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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, an agency of the State of California,

Plaintiff,

vs.

TESLA, INC., doing business in California as TESLA MOTORS, INC., and **DOES ONE through FIFTY**, inclusive,

Defendant**s**.

Case No. 22CV006830

PLAINTIFF CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING'S OPPOSITION TO DEFENDANT TESLA, INC.'S MOTION TO STAY

Date: May 17, 2022
Time: 3:00 PM
Department: 23
Judge:
Reservation ID: 952536509641

Action Filed: February 9, 2022
FAC Filed: March 11, 2022
Trial Date: TBD

[Filed concurrently with Pl. DFEH's Objections to Def. Tesla's Request for Judicial Notice; Pl. DFEH's Request for Judicial Notice; Declaration of Siri Thanasombat ISO Opposition to Motion to Stay]

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I. INTRODUCTION

For years, Tesla, Inc. (Tesla) subjected Black and/or African American workers to harassment and discrimination on the basis of race, and after these workers opposed such unlawful practices, Tesla retaliated against them. Tesla repeatedly failed to take all reasonable steps to prevent such unlawful practices in its workplace, as required under the California Fair Employment and Housing Act (FEHA). In addition to paying Black and/ or African American workers less than non-Black counterparts for substantially similar work, Tesla required them to waive rights as a condition of employment or continued employment, in violation of FEHA and the California Labor Code. The California Department of Fair Employment and Housing (DFEH) brought this government enforcement action to redress Tesla's unlawful employment practices under the FEHA and other state laws.

Tesla now seeks to stay the government enforcement action on the dubious grounds that it "may" seek an opinion from the Office of Administrative Law (OAL) that DFEH overstepped its authority and allegedly failed to meet its statutory obligations before filing suit. These arguments are baseless. It would be this court, not OAL, that would rule on these arguments. Through its motion to stay, Tesla seeks to avoid addressing racism at its California locations. Instead, it attacks DFEH in an attempt to delay and distract from the substantive allegations, even when the state agency has fulfilled its statutory obligations prior to filing this government enforcement action. These groundless attacks demonstrate that Tesla wants to play only by its own rules, even going so far as attempting to create rules and regulations to govern a state agency. For these reasons, Tesla's motion to stay should be denied.

II. FACTS AND PROCEDURAL HISTORY

Founded in 2003, Tesla produced its first premium all-electric sedan (Model S) in 2012 in the State of California. (FAC ¶¶ 1,3.) The Fremont factory accommodates over 15,000 Tesla workers alone, and Defendants employ thousands more workers throughout the state. (*Id.*, ¶¶ 1, 8.) Black and/or African American workers are segregated to the lowest levels, making up 0% of the executives but about 20% of the factory operatives. (*Id.*, ¶ 8.) Black and/or African American workers are also overrepresented in Tesla's contract workforce, but severely under-represented as officials and managers, executives/senior officials and managers, first/mid-officials and managers, and professionals. (*Ibid.*)

Indifference and segregation at Tesla's workplaces have left many complaints of rampant racism

unchecked for years. Black and/or African American workers have complained that Tesla co-workers, production leads, supervisors, and managers constantly use the n-word and other racial slurs to refer to Black workers. (*Id.*, ¶¶ 9, 35.) They have complained that racist writings are etched onto walls of restrooms, restroom stalls, lunch tables, and even factory machinery. (*Id.*, ¶¶ 9, 39.) They have complained that Black and/or African American workers are assigned to more physically demanding posts and the lowest-level contract roles, paid less, and more often terminated from employment than other workers. (*Id.*, ¶ 9.) They also have complained that Black and/or African American workers are often denied advancement opportunities, and more often and more severely disciplined than non-Black workers. (*Ibid*.) Black and/or African American workers also have reported retaliation for making these complaints. (*Id.*, ¶ 50.)

Even after years of complaints about racial harassment, racial discrimination, and retaliation, Tesla has continued to deflect and evade responsibility, like it does with this motion to stay. (*Id.*, ¶¶ 11, 49.) While Tesla claims to not tolerate racial harassment or discrimination at its workplaces, Defendants failed to take effective remedial measures in response to complaints of discrimination and harassment. (*Id.*, ¶ 12.) Tesla only conducted investigations into workers' complaints if direct Tesla employees were involved. (*Id.*, ¶ 54.) Workers were discouraged from complaining, and Black and/or African American workers were warned that complaints led to retaliatory harassment, undesirable assignments, and/or termination. (*Id.*, ¶ 12.) Focused more on bottom-line profits rather than workers, Defendants also failed to maintain and provide employment records, especially of discrimination and harassment complaints and related files. (*Id.*, ¶¶ 13, 57.)

Prompted by workers' complaints against Tesla, in June 2019, DFEH filed and served on Tesla a Notice of Group or Systemic Investigation and Director's Complaint for Group/Class Relief ("Notice of Director's Complaint") and the Complaint of Employment Discrimination Before the State of California Department of Fair Employment and Housing ("Director's Complaint"). (*Id.*, ¶ 21; Declaration of Siri Thanasombat ISO Pl. DFEH's Opposition to Mtn. to Stay ("Thanasombat Decl."), Exhs. 1, 2 [Notice of Director's Complaint; Director's Complaint].) After approximately three years of investigation, DFEH determined there was merit to the Director's Complaint and issued a cause finding on January 3, 2022. (*Id.*, ¶ 22.) The parties participated in an unsuccessful mediation pursuant to Government Code section

12965 on February 8, 2022. (*Id.*, ¶ 23.) On February 9, 2022, DFEH filed this government enforcement action under Government Code section 12965. On March 11, 2022, DFEH filed its First Amended Complaint (FAC) pursuant to Code of Civil Procedure section 472. Tesla now moves to stay these proceedings.

III. LEGAL STANDARD

In considering a motion to stay, the court must determine whether a stay will "promote the ends of justice," in light of an imminent proceeding that may materially affect the current action, and whether a final judgment in that proceeding would have a preclusive effect on this action. (Cal. Rules of Court, rule 3.515 (f)).

Under the California Administrative Procedures Act (APA), interested parties may petition the Office of Administrative Law (OAL) to review whether a state agency has created "underground regulations" outside the normal process for APA-promulgated regulations. (Gov. Code § 11340.5.) However, OAL's review, and even its ultimate determination, of an agency's action would not invalidate the agency's action. (Gov. Code § 11340.5; see also *People v. Medina* (2009) 171 Cal.App.4th 805, 814 ["An OAL determination that a particular guideline constitutes an underground regulation is not binding on the courts, but it is entitled to deference."].) In fact, courts have held that even if OAL determined that an agency's application of a law was indeed an underground regulation, the underlying actions in question would still stand. In one of the controlling cases on this issue, also cited by Tesla, the Supreme Court of California in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557 (*"Tidewater"*) held that even when it found the Division of Labor Standards Enforcement (DLSE) to have adopted a non-APA compliant policy, the underlying agency actions (the wage orders) were not void:

> "If, when we agreed with an agency's application of a controlling law, we nevertheless rejected that application simply because the agency failed to comply with the APA, then we would undermine the legal force of the controlling law**. Under such a rule, an agency could effectively repeal a controlling law simply by reiterating all its substantive provisions in improperly adopted regulations.** Here, for example, if Tidewater and Zapata violate applicable IWC wage orders, they should not be immune from suit simply because the DLSE adopted an invalid policy. The DLSE's policy may be void, but the underlying wage orders are not void. Courts must enforce those wage orders just as they would if the DLSE had never adopted its policy."

Tidewater, supra, 14 Cal.4th at p. 577.

Moreover, California courts have demonstrated a strong preference for a policy that favors proceeding to trial or other resolution on the merits. (See, e.g., *People v. Superior Court (Salter)* (2011) 192 Cal.App.4th 1352, 1359 (*"Salter"*) [court could see "no reason in logic or law to allow either party to deprive the other of the right to a jury trial that is allowed in the … legislation."].) For state courts, the policy to see a case through to trial on the merits is strongly preferred over policies based on technical or administrative ambiguities or objections. (See, e.g., *Baccus v. Superior Court* (1989) 207 Cal.App.3d 1526, 1532 ["policy favoring trial or other resolution on the merits is generally to be preferred over the policy requiring dismissal for failure to prosecute with reasonable diligence."]; *Dowling v. Farmers Ins. Exch.* (2012) 208 Cal.App.4th 685, 694 ["the policy favoring trial on the merits must be considered by the court in resolving any ambiguity in a written stipulation extending the time to bring an action to trial pursuant to Code of Civil Procedure section 583.310."].)

Citing to directive from the Legislature, courts have enforced this preference. The U.S. Supreme Court noted: "A stay is an 'intrusion into the ordinary processes of administration and judicial review,' … and accordingly 'is not a matter of right, even if irreparable injury might otherwise result to the appellant….'" (*Nken v. Holder* (2009) 556 U.S. 418, 427 [citations omitted]; see also *Fid. Nat'l Home Warranty Co. Cases* (2020) 46 Cal.App.5th 812, 837 ["The Legislature has expressly provided that 'the policy favoring trial ... of an action on the merits [is] generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action....' (Code Civ. Proc., § 583.130.)."]; *Bruns v. E-Com. Exch., Inc.* (2011) 51 Cal.4th 717, 728 ["The bill also makes a number of modest substantive changes to improve the operation of the statutes. **The effect of the changes is to encourage ... disposition of civil actions on the merits rather than dismissal on procedural technicalities**."] [emphasis added].) Even the district court in the case that Tesla cites to support its position denied the motion for a stay, holding that the issuance of a stay would substantially harm prisoners, and the public interest favored denying a stay. (*Coleman v. Brown* (E.D. Cal. 2013) 960 F.Supp.2d 1057.)

IV. ARGUMENT

A. TESLA SEEKS TO AVOID ADDRESSING RACISM AT ITS CALIFORNIA WORKPLACES

DFEH brought this government enforcement action pursuant to express statutory authority from the Legislature. (Gov. Code § 12900 et seq.; Cal. Const., art. III, § 3.) DFEH has the statutory function, power, and duty to "receive, investigate, conciliate, mediate, and prosecute complaints" alleging violations of the FEHA. (Gov. Code, § 12930, subd. (f)(1).) DFEH's authority to seek relief on behalf of the state in the public interest and on behalf of impacted workers and applicants is a delegation of power by the Legislature. (See, e.g., Gov. Code, §§ 12920, 12920.5, 12930, 12960, 12961, and 12965.) Section 12961 expressly authorizes the DFEH Director to file a complaint on behalf of the department seeking relief for a group of persons adversely affected, in a similar manner, by an alleged unlawful practice.[1] "Any complaint so filed may be investigated as a group *or* class complaint, and, if in the judgment of the director circumstances warrant, *shall* be treated as such for purposes of conciliation, dispute resolution, and *civil action.*" (Gov. Code, §§ 12961 and 12965, subd. (a) [emphasis added].) Since the FEHA's enactment in 1959 – more than five years before its federal counterpart, Title VII of the Civil Rights Act of 1964 – and with successive legislative changes to strengthen and broaden its protections, the FEHA is arguably the strongest state employment civil rights law in the nation and is significantly broader than federal law in terms of scope of protections, available remedies, and covered entities.[2] (FAC ¶ 2; Gov. Code, §12900 et seq.; 42 U.S.C. 2000e et seq.)

Founded in California, Tesla has benefited for years from the state and its diverse, dynamic workforce; however, instead of addressing the rampant racism in its California workplaces, Tesla engaged in its usual playbook strategies to delay, distract, and obscure. Tesla has endeavored at all costs to avoid letting a jury decide the merits of each lawsuit filed against it. In numerous suits alleging racism, Tesla has sought frivolous stays of the proceedings, attacked the pleadings rather than the merits of the case, and/or compelled arbitration. (See e.g., Plaintiff DFEH's Request for Judicial Notice

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[1] *McCracken, et al., v. Riot Games, Inc.* (Dec. 27, 2021) Case No. 18STCV03957 (Los Angeles Superior Court), cited by Tesla in its motion, is one example of a government enforcement action where DFEH sought relief for a group of persons, pursuant to Gov. Code, §§ 12961 and 12965. DFEH settled the suit for $100 million, ten times the settlement offer before DFEH intervened in the lawsuit.

[2] *See, e.g.*, J. Oversight Hearing of the Sen. and Assem. Judiciary Coms., *Fair Employment and Housing 50 years after the FEHA: Where do we go from here?* (February 23, 2010) ["In addition to its initial protections, the FEHA now prohibits discrimination in employment on the basis of sex, age, disability, medical condition, sexual orientation, and marital status, making it significantly broader than federal law both in terms of scope of protections and covered employers."] https://ajud.assembly.ca.gov/sites/ajud.assembly.ca.gov/files/reports/2010%20FEHA%20background%20paper.pdf [as of May 1, 2022].

("RJN"), Exhs. A,B [Court dockets in *Vaughn v. Tesla, Inc*., Case No. RG17882082 (Alameda Superior Court) (*"Vaughn"*); *Di-az v. Tesla, Inc.*, Case No. 3:17-cv-06748-WHO (U.S. District Court, Northern District of California) (*"Di-az"*)].)

This is because Tesla fears going to trial on the merits. When a jury has reviewed evidence of Tesla's treatment of Black and/or African American workers, the jury found significant violations of the law leading to substantial and unprecedented verdicts against Tesla. (See RJN, Exh. B [Court docket in *Di-az* [jury verdict of $137 million[3]]].) Since DFEH is not subject to arbitration, Tesla instead hurls attacks on DFEH in Tesla's attempt to avoid a jury and a determination on the merits.

These misstatements and attacks[4] are Tesla's desperate attempt to delay and distract[5] from the substantive allegations included in this government enforcement action. Tesla, for example, threatens to file a petition with the OAL about alleged underground regulations. (Tesla's Mem. Points & Auths. in Support of Motion to Stay ("Mtn. to Stay"), pp. 9-16.) Although Tesla cites to California Government Code section 11340.5, it conveniently failed to include the provision that prohibits parties from using OAL's review process and determination in earlier-filed litigation. (Gov. Code 11340.5, subd. (e).) California Government Code section 11340.5(e) prohibits a court from considering an OAL determination if: 1) the court action involves the party that requested the OAL determination, as Tesla states it will; 2) the court action was filed prior to the party's request for determination, such as this government enforcement action was; and 3) at issue in the lawsuit is whether the agency action is a

[3] Even though the federal judge in *Di-az v. Tesla, Inc.* had to reduce the $137 million jury award, the court pointed to jury findings of misconduct. The court held: "Even though a single utterance can be devastating, Diaz and other employees testified that the word was used repeatedly and frequently around the Tesla factory, including by supervisors…. And even though the many, many utterances of that word alone would also be devasting, it was far from the only racial slur that was used or hurled at Diaz. ….But it was not just that co-workers and supervisors slung around these slurs, it was what little Diaz's employers did to stop them. Diaz testified that he made verbal complaints that were never addressed….And even when his written complaints were 'addressed,' the jury could readily have concluded that the responses were thin and lackluster at best and intentionally unresponsive to the conduct at worst." (*Di-az v. Tesla, Inc.* (N.D. Cal. Apr. 13, 2022) Case No. 3:17-cv-06748-WHO, Order on Post-Trial Motions, Dkt. No. 317.)

[4] Tesla also accuses DFEH of impropriety, but DFEH has a statutory duty to investigate complaints that are filed with the Department, including those who have retained private counsel.

[5] Tesla requests judicial notice of three DFEH cases that are irrelevant to the merits of this case. DFEH files its objections in Plaintiff DFEH's Objection to Defendant Tesla's Request for Judicial Notice. As part of its plan to distract, Tesla also incorrectly claims that DFEH "took millions of dollars for 'its fees'" in *McCracken et al. v. Riot Games, Inc.*, Case No. 18STCV03957, Los Angeles Superior Court. In fact, DFEH has not even filed a motion for fees yet.

regulation, which, however, is not the case here.[6] (*Ibid.*) At issue in this lawsuit are Tesla's violations of the FEHA and other laws. (FAC ¶¶ 34-192.) Tesla attempts to pull the wool over the court's (and the public's) eyes by redirecting the focus on the Department's actions instead of confronting the substantive allegations of rampant racism at its workplaces. The purpose of subdivision (e) is to proscribe gamesmanship in litigation that Tesla now tries to employ. Moreover, *assuming arguendo* Tesla files with OAL (since it only states that it "intends to file a petition" and OAL may choose not to consider Tesla's petition[7]), and even if OAL found against DFEH, this lawsuit would still continue.[8] (Mtn. to Stay, p. 15; Gov. Code 11340.5, subd. (e); see also *Salter, supra,* 192 Cal.App.4th, at p. 1359.) Therefore, a stay would not "promote the ends of justice" as there is no imminent proceeding that would materially affect the current action, and an OAL determination would not have any preclusive effect on this lawsuit. (Cal. Rules of Court, rule 3.515, subd. (f).) For these reasons, the motion to stay fails.

B. DFEH HAS COMPLIED WITH ITS PRE-SUIT OBLIGATIONS

DFEH derives its enforcement authority from the FEHA. (Gov. Code, § 12900 et seq.) The FEHA empowers DFEH to "receive, investigate, and conciliate complaints" that allege violations of law within the broad scope of its jurisdiction. (Gov. Code § 12930, subd. (f).) The FEHA provides a procedure for DFEH to use in investigating a complaint. For example, the FEHA allows "any person

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[6] In its Motion, Tesla lists five DFEH actions it claims to be underground regulations: "(i) either not requiring or not disclosing a factual basis to support initiating an investigation; (ii) providing "cause" letters with no information, thereby denying an employer information to respond or allow for a meaningful mediation; (iii) failing to engage in good faith conciliation and pre-filing mediation; (iv) initiating litigation beyond statutory authority by filing suit on claims not previously included in the notice or investigated, at all; and (v) demanding employers waive statutory rights and protections as a condition precedent for DFEH performing statutorily required acts, including mediation." (Mtn to Stay, pp. 14-16.) The question of whether these agency actions are "regulations" pursuant to Gov. Code § 11342.600 is **not** at issue in this pending enforcement action. Tesla desires to put these agency actions at issue, and thus, confirms that its strategy is to distract from the substantive allegations of racism at its workplaces.

[7] California Code of Regulations, title 1, section 270, subdivision (b) [OAL Review of Petitions Regarding Underground Regulations] provides: "No later than 60 days after receipt of a complete petition filed pursuant to this chapter, the office shall determine whether or not to consider the petition on its merits, in its entirety or in part, unless, prior to the end of the 60-day period, the agency submits to OAL a certification pursuant to section 280."

[8] The Office of Administrative Law's (OAL) website clearly states that it may not be the right forum for this dispute: "OAL cannot …. [r]esolve disputes between the public and an agency …. These issues must be resolved… by the courts." OAL also frowns upon using the OAL review process to gain advantage in litigation: "Finally, it is important to note Government Code section 11340.5(e): If you have already begun litigation challenging an underground regulation, a determination issued by OAL may not be considered by the court in that pending litigation." (Office of Administrative Law, *OAL's Role Concerning Underground Regulation Petitions,* https://oal.ca.gov/underground_regulations/role-in-underground-regulations/ [as of May 1, 2022].)

claiming to be aggrieved by an alleged unlawful practice" to file with DFEH a verified complaint setting "forth the particulars" of "the unlawful practice complained thereof." (Gov. Code § 12960, subd. (c).) In situations where "an unlawful practice alleged in a verified complaint adversely affects, in a similar manner, a group or class of persons ... the aggrieved person or the director may file the complaint on behalf and as representative of such a group or class." (Gov. Code § 12961.) Upon receiving "any complaint alleging facts sufficient to constitute a violation of any of the provisions of this part," DFEH is directed to "make [a] prompt investigation." (Gov. Code § 12963.) If DFEH determines that the "complaint is valid, the department shall immediately endeavor to eliminate the unlawful ... practice complained of by conference, conciliation, and persuasion." (Gov. Code § 12963.7.) Prior to filing a civil action, DFEH must "require all parties to participate in mandatory dispute resolution in the department's internal dispute resolution division free of charge to the parties in an effort to resolve the dispute without litigation." (Gov. Code § 12965, subd. (a)(2).) As with all aspects of the FEHA, the investigatory and adjudicatory procedure is to be "construed liberally for the accomplishment of the purposes of [the Act]." (Gov. Code § 12993, subd. (a); see also *Dept. Fair Empl. & Hous. v. Law Schl. Admission Council, Inc.* (N.D. Cal. 2012) 896 F.Supp.2d 849 (*"LSAC"*).)

Contrary to Tesla's claims, DFEH has met each of these pre-suit obligations.[9] Tesla's Black and/or African American workers filed individual complaints with DFEH alleging race discrimination, harassment, and retaliation at Tesla's various locations in California. (FAC ¶ 22; Gov. Code § 12960.) The Director of DFEH also issued a Director's Complaint on behalf and as representative of a group of Black and/or African American workers. (Thanasombat Decl., Exhs. A, B [Notice of Director's Complaint; Director's Complaint]; Gov. Code § 12961.) Upon receiving these complaints, DFEH

[9] Defendant's cited cases are distinguishable and inapplicable. The appellate court in *Diamond v. Superior Court* (2013) 217 Cal.App.4th 1172 held that a foreclosure on a lien was precluded because incorrect and late notice about alternative dispute resolution rights was provided to the homeowner, and the homeowners' association failed to record its vote to foreclose on the lien. As discussed in Section IV.B., sufficient notice of the allegations was provided. Additionally, *Chrysler Credit Corp. v. Ostly* (1974) 42 Cal. App. 3d 663 is about a private individual's inability to recover tax payments because they failed to file a claim. This did not happen here. In *City of San Jose v. Monsanto Co.* (N.D. Cal. Aug. 4, 2017) No. 5:15-CV-03178-EJD, 2017 WL 3335735, the court granted Monsanto's motion to stay because plaintiffs were seeking the same relief before the court and before the California Commission on State Mandates. DFEH is only seeking relief against Tesla in this government enforcement action. Lastly, the court in *Lane v. Francis Cap. Mgmt. LLC* (2014) 224 Cal. App. 4th 676, 693, was bound by Code of Civil Procedure section 1281.4 to stay proceedings pending arbitration. Here, DFEH is not subject to arbitration.

promptly launched an investigation. (FAC ¶ 22; Thanasombat Decl., ¶ 5; Gov. Code § 12963.) Determining that there was reasonable cause to believe that Tesla had violated provisions of the FEHA, DFEH invited Tesla to a mediation with DFEH's dispute resolution division. (Thanasombat Decl., ¶¶ 6, 7; Gov. Code §§ 12965, subd. (a)(2); 12963.7, sub. (a).) DFEH therefore satisfied each of the statutory obligations before filing this government enforcement action.

Tesla's accusations[10] about DFEH's "neutrality obligations" is another attempt to distract from the substantive allegations. (Mtn. to Stay, pp. 1-5.) The California Supreme Court has repeatedly emphasized that a prosecutor's duty "to seek justice and develop a full and fair record" does not mean they "share in the neutrality expected of the judge and jury." (*People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 741, 746; *People v. Vasquez* (2006) 39 Cal.4th 47, 55.) "[Z]ealous advocacy" is an "essential part of the prosecutor's proper duties" and public prosecutors can prioritize their cases and even "feel unusually strongly about a particular prosecution." (*People v. Bryant, Smith, and Wheeler* (2014) 60 Cal.4th 335, 375-376 [internal quotations and citations omitted]; *id*. at pp. 373-374 [confirming that the "rigid requirements of adjudicative neutrality . . . do not apply to prosecutors"].) Moreover, the FEHA does not describe DFEH as "neutral." To the contrary, it directs DFEH to eliminate and remedy discrimination. (Gov. Code § 12920.) Tesla's complaints regarding DFEH's neutrality is an attempt to divert the court's attention and sling another attack on DFEH.

DFEH engaged in conciliation, despite Tesla's disingenuous claims.[11] DFEH offered three dates for the mediation to defense attorneys from Holland & Knight, an international law firm. (Thanasombat

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[10] Tesla's cited cases support DFEH's position. DFEH agrees with the court in *People ex rel. Clancy v. Superior Ct.* (1985) 39 Cal. 3d 740, 746 that "[a] government lawyer in a civil action or administrative proceeding has the responsibility to seek justice …." Tesla's requested stay will stymie this process. In another criminal case, *People v. Eubanks* (1996) 14 Cal. 4th 580, 927 P.2d 310, the court found recusal of the prosecutor to be appropriate when the company that had accused defendants of stealing had contributed $13,000 to the district attorney's office. There is no such claim against the DFEH. Finally, the Second Circuit in *Wright v. United States* (2d Cir. 1984) 732 F.2d 1048 held that the petitioner's claim that he was deprived of the right to a disinterested prosecutor did not amount to error, after a jury had found him guilty beyond a reasonable doubt on ample evidence.

[11] Tesla's cited cases are unavailing, as they are about an employer's ability to guarantee the silence of witnesses in government investigations through a private legally enforceable agreement. (*D'Arrigo Bros. of California v. United Farmworkers of Am.* (2014) 224 Cal. App. 4th 790, 803–804 [pursuant to Labor Relations Act of 1975]; *Cariveau v. Halferty* (2000) 83 Cal. App. 4th 126 [Securities Exchange Act]; *E.E.O.C. v. Astra U.S.A., Inc.* (1st Cir. 1996) 94 F.3d 738 [Title VII]; *E.E.O.C. v. Cosmair, Inc., L'Oreal Hair Care Div.* (5th Cir. 1987) 821 F.2d 1085, 1089–90 [ADEA]. DFEH has never prohibited Tesla from speaking with a government agency, much less "coerce" an industrial titan such as Tesla to enter into a private legally enforceable agreement to not do so.

Decl., ¶ 6.) In its communications with Tesla, DFEH never once purported to prohibit Tesla from speaking with the U.S. Equal Employment Opportunity Commission (EEOC). (Declaration of Deborarh Rzepela-Auch ISO Mtn. to Stay ("Rzepela-Auch Decl."), Exh. 5.) Tesla requested a postponement of the mediation for one month. (*Ibid.*) As a condition of postponing the mediation by another month, DFEH requested assurance that Tesla would not settle the state-law claims with a federal agency that has no jurisdiction over them. Specifically, DFEH attorney wrote: "DFEH is willing to agree to mediate on the latter of your two available dates (February 8) on the condition that Tesla confirms that ***no other settlement related to the allegations*** in the DFEH Director's Complaint (DFEH Case No. 201906-06540918) will be reached before this date." (*Ibid.*) In fact, it was Tesla, not DFEH, who drafted and offered the language about not communicating with the EEOC.[12] (*Ibid.*) Tesla sought a continuance of the mediation to which DFEH asked for assurance that state claims would not be negotiated away in the meantime. This was not a "requirement" for mediation at all, as DFEH is bound by statute to endeavor to conciliate, but a response to a request for a month-long continuance during which time Tesla might have sought to improperly settle state claims with another entity. More importantly, DFEH scheduled a mediation with DFEH's dispute resolution division and in fact engaged in conciliation with Tesla on February 8, 2022, the date requested by Tesla. (*Ibid.*)

Furthermore, California courts have held that Government Code section 12963.7 does not impose conciliation as a necessary prerequisite to filing a civil action. (See, e.g., *LSAC, supra*, 896 F.Supp.2d at p. 864; *Motors Ins. Corp. v. Div. of Fair Employment Practices* (1981) 118 Cal.App.3d 209, 224 (*"Motors Ins."*).) Government Code section 12963.7 provides that if DFEH finds reasonable cause of a violation, "the department shall immediately *endeavor* to eliminate the unlawful employment practice complained of by conference, conciliation, and persuasion." (Gov. Code § 12963.7 [emphasis added].) "The use of the permissive word endeavor in § 12963.7, on its face, undercuts any reading of this section that would impose conciliation as a necessary prerequisite…." (*LSAC, supra*, 896 F.Supp.2d

[12] Defense counsel first offered the following assurance: "That neither Tesla nor its counsel will discuss, negotiate or move with intent to settle any of the allegations that may be related to the DFEH Director's Complaint." When DFEH asked Defendant to confirm whether this statement applied to the EEOC, it was defense counsel who offered not to communicate with the EEOC: "That neither Tesla nor its counsel will discuss, negotiate or move with intent to settle any of the allegations that may be related to the DFEH Director's Complaint, **including any communications with the EEOC**, up to and including the date of mediation." (emphasis in original) (Rzepela-Auch Decl., Exh. 5.)

at p. 864.) In cases where conciliation was at issue, the California Court of Appeal and the Fair Employment and Housing Commission have confirmed that conciliation under the FEHA is not a condition precedent to filing suit. (See *Motors Ins., supra,* 118 Cal.App.3d at p. 224 [DFEH is able to file a written accusation "even if it has not obtained optimum results from … its efforts at conciliation"]; *In the Matter of the Accusation of the Dept. Fair Empl. & Hous. v. Hoag Memorial Hospital Presbyterian* (Aug. 1, 1985) Case No. FEP82-83 K9-011se L-30469 85-10, FEHC No. 85-10, 1985 WL 62889 at *8 ["Neither is there any jurisdictional requirement that the Department, in each instance, engage in conciliation efforts, formally or informally, before issuing an accusation."].) Even though conciliation is not a prerequisite to DFEH filing a government enforcement action, DFEH in fact engaged in conciliation with Tesla.

Moreover, the FEHA provides that "[i]n the case of failure to eliminate an unlawful practice under this part through conference, conciliation, mediation, or persuasion, ***or in advance thereof if circumstances warrant***," the Director may file a civil action. (Gov. Code 12965, subd. (a)(1).) Here circumstances warranted filing a civil action. In addition to the hundreds of complaints DFEH received from Defendants' workers pre-suit, DFEH still continues to receive ongoing complaints from Defendants' workers alleging racism and retaliation, among other claims. (See e.g., Mtn. to Stay, p. 9; Rzepela-Auch Decl., Exhs. 6,7.) Tesla's desire to bring a petition with OAL must be balanced against the harms that continue to accrue to workers, taxpayers, the general public, the state legislature, and civil rights in California. The FEHA explicitly outlines the legislative intent in prioritizing employment rights:

> "It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race …. It is the purpose of this part to provide effective remedies that will eliminate these discriminatory practices. This part shall be deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state."

(Gov. Code §12920.) Tesla's ongoing unlawful conduct is causing grave and irreparable harm to workers, employers, taxpayers, and the public at large. (Gov. Code §12920.) Since circumstances warranted the filing of the government enforcement action, Tesla's motion to stay should be denied. (Gov. Code §§12920, 12930, subd. (h), 12961, 12965, subd. (a).)

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C. TESLA SEEKS TO IMPOSE ITS OWN RULES TO REGULATE THE STATE AGENCY

Through this motion to stay and other actions, Tesla demonstrates that it seeks to play only by its own rules, going so far as trying to regulate a state agency. (See, e.g., FAC §§ 7-14; RJN [Court dockets in *Vaughn* and *Di-az*].)

First, Tesla wants to dictate the pre-suit requirements for a state agency. As detailed in Section IV.B., prior to filing a civil action, DFEH only must "require all parties to participate in mandatory dispute resolution in the department's internal dispute resolution division … in an effort to resolve the dispute without litigation." (Gov. Code § 12965, subd. (a)(2).) In other words, DFEH statutorily only has to endeavor to conciliate the dispute before it files a government enforcement action. (Gov. Code §§12963.7, 12965, subd. (a).) Tesla now wants to impose additional requirements, extrapolated from a federal decision related to a federal agency. (Mtn. to Stay, pp. 10-12.) *Mach Mining, LLC v. EEOC* (2015) 575 U.S. 480 (*"Mach Mining"*) outlines the requirements to satisfy Title VII's conciliation provision, a condition precedent to a civil action for the EEOC, not this state agency. Although both agencies are mandated to enforce civil rights laws and courts have correctly relied on federal Title VII cases in interpreting the FEHA, Tesla ignores the fact that each agency has its own governing statutory framework. (Gov. Code § 12900 et seq.; 42 U.S.C. § 2000e *et seq.*; see *Mach Mining, supra,* 575 U.S., at p. 481 ["Title VII of the Civil Rights Act of 1964 … sets out a detailed, multi-step procedure through which the ***Commission*** enforces the statute's prohibition on employment discrimination."] [emphasis added].) With regard to statutory language, the federal prerequisites to filing a lawsuit are more rigid than the state pre-suit obligations. (Gov. Code §§12963.7, § 12965(a); 42 U.S.C. § 2000e *et seq.*) California state law is stronger than federal law in this area, and thus, preferred.[13] (FAC ¶ 2.) Moreover, even under *Mach Mining*, the remedy for not satisfying the conciliation provision is to return to conciliation, not stay the court proceeding for months. (*Mach Mining, supra,* 575 U.S. at p. 482.)

[13] The legislative history of Title VII explains this deference to the states. Senator Joseph Clark of Pennsylvania gave a detailed explanation of the Senate's revisions of the House Bill and noted: "The Federal law will apply in all the States, but it will not override any State law or municipal ordinance which is not inconsistent. However, the Federal authorities will stay out of any State or locality which has an adequate law and is effectively enforcing it. This provision has two beneficial effects: (1) it will induce the States to enact good laws and enforce them, so as to have the field to themselves; and (2) it will permit the Federal [fair employment practices commission] to concentrate its efforts in the States which do not cooperate...."' 110 CONG. REC. 7216 (1964) (remarks of Senator Clark).

Second, Tesla wants to dictate what is entailed in DFEH's administrative investigation process. It argues that DFEH is required to interview certain people, seek certain documents, and inspect certain locations before an investigation is deemed sufficient.[14] Notably, Tesla failed to include any authority to support these assertions. (Mtn. to Stay, p. 2). Under the FEHA, however, there are no statutory or regulatory requirements that determine the sufficiency of DFEH's investigative process. Tesla now wants to impose such administrative requirements. Tesla fails to recognize the "wide investigative latitude afforded DFEH under California law." (*LSAC, supra,* 896 F.Supp.2d at p. 862; Gov. Code § 12900 et seq.) DFEH has broad authority to investigate and enforce California's civil rights laws (Gov. Code §12920; *Dept. Fair Empl. & Hous. v. Law School Admission Council, Inc.* (N.D. Cal. 2013) 941 F.Supp.2d 1159, 1167 ["The legislature of the State of California has vested DFEH with the authority to enforce the civil rights of California citizens as 'an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state.'"]; see also *Dept. Fair Empl. and Hous. v. Superior Court of Kern County* (2020) 54 Cal.App.5th 356, 371.)

Third, Tesla wants to dictate how detailed an administrative complaint must be. It complains of the alleged insufficiency of the notice provided in the Director's Complaint and the cause determination letter, arguing that DFEH was required to provide the factual bases for initiating an investigation, finding cause, and filing a government enforcement action. (Mtn. to Stay, p. 2). Tesla again fails to cite to any applicable statutory authority requiring DFEH to provide more details than it did. Tesla's citation to Government Code section 12960, subdivision (c) as requiring DFEH to "provide notice with particularity"[15] is misplaced as the provision governs how an individual can file an administrative complaint with DFEH (Mtn. to Stay, p. 2; Gov. Code § 12960, subd. (c).) Similarly, Tesla's citation to Government Code sections 12962 and 12963 are also unavailing, since the former provision lays out how a DFEH complaint should be served on an employer, and the latter provision simply requires

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[14] In its motion to stay, Tesla also demands that DFEH issue a "detailed cause finding" such that the parties can participate in a "valid mediation" that "thoroughly" addresses the results of the administrative investigation. (Mtn. to Stay, pp. 11-12.) Defendant does not answer who would determine whether these conditions are met; the motion seems to suggest that Defendant would.

[15] Logically, the "notice with particularity" that Defendant claims is required in a Director's Complaint (Mtn. to Stay, p. 2.) is not possible when an investigation is first initiated or launched.

DFEH to investigate a complaint filed with the Department. (Mtn. to Stay, p. 2; Gov. Code §§ 12962, 12963.). Tesla's reference to Government Code section 12965, subdivision (a)(1) to support its position is also incorrect. That section authorizes the DFEH Director to file a civil action "[i]n the case of failure to eliminate an unlawful practice under this part through conference, conciliation, mediation, or persuasion, or in advance thereof if circumstances warrant…" (Gov. Code § 12965, subd. (a)(1).) None of these cited statutory provisions mandate the level of detail DFEH must provide an employer in launching an investigation. (Gov. Code §§ 12960, subd. (c), 12962, 12963, 12965, subd. (a)(1).)

Despite Tesla's protestations,[16] DFEH is not limited to filing claims that were expressly raised in verified complaints or the Director's Complaint. (Gov. Code §§ 12960, 12961; *LSAC, supra,* 896 F.Supp.2d, at pp. 861-862.) Tesla fails to recognize that DFEH's investigative powers are broad.[17] (Gov. Code §§ 12900 et seq.; *LSAC, supra,* 896 F.Supp.2d, at pp. 861-862.) Like grand jury proceedings, investigations may be initiated merely on suspicion that the law is being violated, or even just because DFEH wants assurance that the law is not being violated. (*Dept. Fair Empl. & Hous. v. Super. Ct. (Keller)* (2002) 99 Cal.App.4th 896, 901.) Tesla also ignores that DFEH in fact provided to Tesla notice of the allegations during its three-year investigation. (Thanasombat Decl., Exhs. 1, 2; Gov. Code § 12963; *LSAC, supra,* 896 F.Supp.2d, at pp. 861-862.)

Construing DFEH's statutory scheme broadly, the Ninth Circuit has held that claims not originally brought in verified complaints may nonetheless be brought in subsequently when they are "like or reasonably related to" the initial allegations. (*LSAC, supra,* 896 F.Supp.2d, at p. 862 [citing *Rodriguez v. Airborne Express* (9th Cir. 2001) 265 F.3d 890, 897 (*"Rodriguez"*)].) Adopting a "relation-back" theory as articulated by the Fifth Circuit in *Sanchez v. Standard Brands, Inc.* (5th Cir.1970) 431 F.2d 455, the Ninth Circuit in *Rodriguez* held that new accusations of wrongdoing could be added later

[16] Tesla also argues that some of the claims are time-barred. Courts have applied the continuing violation theory when ongoing systematic discrimination or harassment against a protected class is alleged, like it is here. (*See, e.g.*, *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823-824; *Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1402 [194 Cal.Rptr.3d 689]; *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115, fn. 6 (finding events more than 10 years old could be viewed as part of single hostile work environment claim).)

[17] DFEH can initiate an investigation merely on suspicion that the law is being violated, or even just because the Department wants assurance that the law is not being violated. (*Dep't of Fair Employment & Hous. v. Superior Court* (2002) 99 Cal.App.4th 896, 901 [121 Cal.Rptr.2d 615], *as modified* (June 26, 2002).) During the investigation, DFEH may seek any information "reasonably relevant" to the investigation. (*Id.* at pp. 901-902 [emphasis added].)

to a DFEH complaint "on the principle that the proper scope of the charge is determined by facts alleged in the original complaint, not the legal theory originally attached to those facts." (*Rodriguez*, *supra,* 265 F.3d at p. 899.)

Here, the causes of action asserted by DFEH in the FAC are "like or reasonably related to" the allegations set forth in the Notice of Group or Systemic Investigation and Director's Complaint for Group/Class Relief and thus, are permissible under *Rodriguez.* (Thanasombat Decl., Exhs. 1, 2 [Notice of Director's Complaint, Director's Complaint]; *Rodriguez, supra*, 265 F.3d 890.) The Notice of Director's Complaint and the Director's Complaint clearly enumerated that the agency was investigating claims that Tesla subjected African American employees to discrimination, harassment, and retaliation, based on race. (Thanasombat Decl., Exhs. 1, 2 [Notice of Director's Complaint, Director's Complaint].) They also stated that DFEH was investigating claims that Tesla failed to take reasonable steps to prevent harassment from occurring. (*Ibid.*) Not mentioned in Tesla's motion to stay, the Notice of Director's Complaint also provided explicit notice that other allegations may arise during the investigation: "The DFEH's investigation shall include, but not be limited to, the foregoing allegations. The investigation is ongoing and will further determine the scope and merits of these allegations." (*Ibid.*) Therefore, Tesla's argument that it did not receive adequate notice of the scope of allegations that ultimately made their way into the FAC is disingenuous. The motion to stay should be denied.

V. CONCLUSION

For the reasons stated above, Tesla's motion to stay fails. Tesla attempts to avoid liability by delaying and distracting from the substantive allegations of rampant racism at its statewide workplaces. Despite Tesla's claims, DFEH satisfied its statutory obligations before filing this government enforcement action. By attacking DFEH, Tesla confirms that it wants to only play by its own rules, and now attempts to "rule-make" for a state agency. The motion to stay should be denied.

Dated: 5/3/22

CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING

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