

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA**

Rene C. Davidson Courthouse

Department of Fair Employment and Housing, an agency of the State of California	No. 22CV006830
Plaintiff/Petitioner(s)	Date: 01/11/2023
VS.	Time: 10:00 AM
Tesla, Inc.	Dept: 21
Defendant/Respondent(s)	Judge: Evelio Grillo
	ORDER re: Hearing on Motion - Other PLAINTIFF CIVIL RIGHTS DEPARTMENT'S MOTION TO STRIKE TESLA, INC.'S AMENDED CROSS- COMPLAINT OF DEFENDANT TESLA, INC.

The Demurrer filed by California Civil Rights Department, Formerly Known as Department of Fair Employment and Housing on 11/21/2022 is Sustained with Leave to Amend.

The Demurrer of the CRD to Tesla's 1AXC is SUSTAINED WITH LEAVE TO AMEND. The motion of the CRD to strike portions of the Tesla's 1AXC is GRANTED IN PART WITH LEAVE TO AMEND.

**OVERVIEW**

The CRD filed this case alleging that Tesla has engaged in pattern or practice of race discrimination and harassment. Tesla immediately asserted that the case was premature and procedurally improper. (Orders dated 6/8/22 [motion to stay pending completion of pre-filing process] and 8/24/22 [demurrer to CRD complaint for failure to allege completion of pre-filing process].)

Tesla's answer filed 9/22/22 asserts as affirmative defense #2 that the CRD failed to comply with the statutory prerequisites to filing the civil case against Tesla and asserts as affirmative defense #3 that the CRD brings this action base on invalid underground regulations in violation of the Administrative Procedure Act ("APA"). (Govt Code 11340.5(a), 11342.600.)

On 10/18/22, Tesla file the 1AXC, alleging that the CRD has improperly adopted and is generally applying rules, regulations and/or procedural standards in violation of the APA. Tesla assets "CRD's underground regulations unlawfully permit it to (a) initiate employer

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investigations without disclosing the factual bases for such investigations, (b) issue “cause” determinations against employers without providing any information in support of those determinations, (c) file civil suits against employers without first engaging in good faith conciliation and mediation, (d) file civil suits against employers on claims not previously investigated and/or concerning which the employers were provided no pre-suit notice, and (e) demand that employers waive their legal rights and protections as a condition precedent for CRD’s performing its statutorily required acts, including conciliation and mediation.” (1AXC, para 2) (See also para 16, 29-32.)

Th 1AXC asserts claims for (1) violation of the APA; and (2) declaratory relief that CRD has violated the APA. The 1AXC at para 1 and 6 makes passing references to CCP 1085 (traditional writ of mandate) but does not assert a claim for a traditional writ of mandate.

## NATURE OF AFFIRMATIVE DEFENSES AND CROSS-COMPLAINT

Tesla asserts affirmative defenses to the claims in the CRD’s complaint. An affirmative defense is a defense to the claims asserted, resulting in a finding of no liability, mitigation of damages, or offset of damages. If a party wants affirmative relief, then that party needs to file a cross-complaint seeking affirmative relief. (CCP 431.30(c); *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730 fn 12; *Morris Cerullo World Evangelism v. Newport Harbor Offices & Marina, LLC* (2021) 67 Cal.App.5th 1149, 1159.)

Tesla’s 1AXC asserts claims for affirmative relief against the CRD. Those claims are under CCP 428.10. Tesla’s claims that could have been asserted in a separate action and are not defenses or affirmative defenses to the claims in the CRD’s complaint.

Tesla’s assertions that the CRD applied the underground regulations against Tesla is relevant for two purposes. First, they demonstrate that Tesla has standing. (*California Department of Consumer Affairs v. Superior Court* (2016) 245 Cal.App.4th 256.) Second, they provide a factual basis for Tesla’s assertion that the CRD has taken certain actions.

The court recalls that in earlier briefing on another motion the CRD cited to a case holding that a party cannot as an affirmative defense assert that a state agency has failed to comply with the APA. That case would appear to explain why Tesla recast its APA violation affirmative defense as an APA violation cross complaint. That case, if the court recalls it correctly, also suggests that the outcome of Tesla’s 1AXC would affect the CRD’s future enforcement efforts but might have no effect on the CRD’s prosecution of this particular case.

## DEMURRER TO 1AXC

The demurrer to the first cause of action for violation of the APA is SUSTAINED WITH LEAVE TO AMEND.

The court reviewed the relevant statutes regarding the CRD’s pre-filing process and regulations

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in the orders of 6/8/22 and 8/24/22. The CRD has adopted regulations about filing, investigating, conciliating, and otherwise processing administrative complaints. (2 CCR 10002 et seq) The CRD's regulations include 2 CCR 10012, regarding Director's Complaints, 2 CCR 10013, regarding Class or Group Complaints, 2 CCR 10026 regarding complaint investigations, and so forth.

The court is somewhat frustrated with both parties because both briefed the issue of whether the CRD has underground regulations without addressing that the CRD has express regulations that cover the same topics as the alleged underground regulations. The lapse is particularly stunning because the CRD is presumably aware of its own regulations and Tesla referenced the regulations in the 1AXC at para 13.

Tesla's claim in large part appears to have no merit.

Tesla asserts "CRD's underground regulations unlawfully permit it to (a) initiate employer investigations without disclosing the factual bases for such investigations. There is an express regulation. 2 CCR 10012 states that a Director's complaint must include the information in Govt Code 12960(c). A Director's complaint would presumably need to have all the information in an individual complaint under 2 CCR 10002 and the referenced CRD form.

Tesla asserts "CRD's underground regulations unlawfully permit it to (b) issue "cause" determinations against employers without providing any information in support of those determinations. The court has not located any statute or regulation that states the CRD must prepare or issue "cause" determinations. There is no need for the CRD to develop a regulation on something it is not required to do and that it might not actually do.

Tesla asserts "CRD's underground regulations unlawfully permit it to (c) file civil suits against employers without first engaging in good faith conciliation and mediation. There is an express regulation. The order of 6/3/22 states: "The DFEH then has a conciliation process. (2 CCR 10024) The DFEH also has a "mandatory dispute resolution" process that involves mediation. (2 CCR 10025(d)) "After mediation is declined or is unsuccessful, the department shall commence, resume, or complete the investigation as necessary." (2 CCR 10025(f).) (Govt Code 12963.7.)"

Tesla asserts "CRD's underground regulations unlawfully permit it to (d) file civil suits against employers on claims not previously investigated and/or concerning which the employers were provided no pre-suit notice. There is an express regulation. 2 CCR 10003 states "The department shall liberally construe all complaints" and that complaints are to include related claims "regardless of whether such other claims are expressly stated." The order of 8/24/22 addressed this stating: "If the court considered both the Director's Complaint and the Director's Complaint did not identify each of the claims ultimately asserted in this civil action, then the court would consider whether the claims in this case are "like and reasonably related to" those in the Director's Complaint. (Guzman v. NBA Automotive (2021) 68 Cal.App.5th 1109, 1118.) (See also Department of Fair Employment and Housing v. Law School Admission Council Inc. (N.D. Cal. 2012) 896 F.Supp.2d 849, 861-864.) Any claims in a civil action must "be reasonably expected to grow out of" the charges or "reasonably have been uncovered in an investigation of

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the charges that were made.” (Okoli, supra.)”

Tesla asserts “CRD’s underground regulations unlawfully permit it to (e) demand that employers waive their legal rights and protections as a condition precedent for CRD’s performing its statutorily required acts, including conciliation and mediation.” The court has not located any regulation on this issue, but the relevant issue appears to be whether the CRD can control the scheduling of the conciliation process and require that employers agree to certain matters as a condition of the employer’s desired schedule.

There is probably no need for the CRD to develop a regulation on how it schedules conciliation and mediation and whether it can ask for agreements as a condition to a specific schedule.

Tesla may amend, if possible, to identify policies or practices of the CRD that are rules of general application that are underground regulations. Policies or practices that are the subject of express regulations are not underground regulations almost by definition.

Tesla’s concern appears to be that in this particular case the CRD did not comply with its express regulations, not that the CRD has underground regulations of general application that it applies generally.

The demurrer to the second cause of action for declaratory relief (CCP 1060, 1061) is SUSTAINED WITH LEAVE TO AMEND.

First, as discussed above, the cross-complaint is directed at the prospective validity of the CRD’s alleged underground regulations. In contrast, Tesla’s affirmative defenses are directed at whether the CRD complied with the pre-filing procedural requirements on the facts of this case. The CRD’s argument that the declaratory relief claim is moot has no merit because Tesla’s claim regarding the existence of underground regulations is prospective and is not limited to the application of those underground regulations to Tesla.

Second, a claim for declaratory relief is an appropriate procedural vehicle for asserting that a policy or procedure is an unlawful underground regulation. (Morning Star Co. v. State Bd. of Equalization (2006) 38 Cal.4th 324, 328.)

The “procedural” claim for declaratory relief is derivative of the “substantive” claim that the CRD has unlawful underground regulations. The fact that declaratory relief is an appropriate procedural vehicle for relief does not suggest that the claim has any substantive merit.

## MOTION TO STRIKE PORTIONS OF 1AXC

The motion of the CRD to strike the allegations about what happened before and in the conciliation/mediation is GRANTED IN PART. The motion is DENIED regarding 1AXC paras 26 and 27 because they describe logistical and procedural events that happened before the conciliation/mediation on 2/8/22. The motion is GRANTED IN PART regarding 1AXC para 28 to the extent it alleges what the CRD did or not do at the conciliation/mediation on 2/8/22. Tesla must limit itself to an allegation that the conciliation/mediation on 2/8/22 was not successful

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without alleging why it was not successful.

The motion of the CRD to strike the prayer seeking declaratory relief is DENIED. As discussed above, the cross-complaint is directed at the prospective validity of the CRD's alleged underground regulations. In contrast, Tesla's affirmative defenses are directed at whether the CRD complied with the pre-filing procedural requirements on the facts of this case.

**FURTHER PROCEEDINGS**

On or before 2/3/23, Tesla may file a Second Amended Cross Complaint on the APA undergrounds regulation issues.

The Court orders counsel to obtain a copy of this order from the eCourt portal.

Dated: 01/11/2023



**Evelio Grillo / Judge**