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13

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA

15 COUNTY OF LOS ANGELES

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

18 Plaintiff,

19 vs.

20 ACTIVISION BLIZZARD, INC., BLIZZARD
ENTERTAINMENT, INC., and ACTIVISION
21 PUBLISHING, INC., and DOES ONE through
TEN, inclusive,

22 Defendants.
23
24

CASE NO. 21STCV26571

**DEFENDANTS ACTIVISION
BLIZZARD, ET AL.'S EX PARTE
APPLICATION TO STAY THE CASE
FOR THE PURPOSE OF LIMITED
DISCOVERY INTO ALLEGED
ETHICS VIOLATIONS BY COUNSEL
FOR PLAINTIFF AND A POTENTIAL
MOTION TO DISQUALIFY**

Date: October 20, 2021
Time: 8:30 a.m.
Dept.: 73
Judge: Hon. Timothy Patrick Dillon

Action Filed: July 20, 2021
FAC Filed: August 23, 2021
Trial Date: None Set

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1 **TO THE HONORABLE COURT, THE DEPARTMENT OF FAIR EMPLOYMENT AND**
2 **HOUSING, AND ITS ATTORNEYS OF RECORD:**

3 **PLEASE TAKE NOTICE** that on October 20, 2021, or as soon thereafter as the parties
4 may be heard in Department 73 of the above-entitled court, located at 111 North Hill Street, Los
5 Angeles, California 90012, Defendants Activision Blizzard, Inc., Activision Publishing, Inc., and
6 Blizzard Entertainment, Inc. (collectively “Activision Blizzard”), will, and here do, apply *ex parte*
7 to this Court for a stay of the case so that the parties can address newly surfaced allegations that
8 counsel for Plaintiff Department of Fair Employment and Housing (“Plaintiff” or “DFEH”) have
9 violated the California Rules of Professional Conduct, and the impact of such conduct in this
10 matter. Activision Blizzard seeks an order tolling all deadlines, but allowing for (a) limited
11 discovery by Activision Blizzard into the conduct of counsel for the DFEH to determine if facts
12 supporting disqualification or other remedies exist, and (b) briefing to request any such relief with
13 the Court.¹ Activision Blizzard is simultaneously filing an Objection to Non-Complex
14 Designation. If the case is deemed complex (as both Plaintiff and Activision Blizzard have
15 requested) the case will be immediately stayed until an initial case schedule is set.

16 Good cause exists for Activision Blizzard’s *ex parte* application because: (i) the U.S.
17 Equal Employment Opportunity Commission (“EEOC”) only recently raised concerns of ethical
18 violations in pleadings and declarations filed in federal court after the close of business on Friday,
19 October 8, 2021; (ii) if ethical violations did occur, then allowing the attorneys at the center of the
20 violation to continue to prosecute the case against Activision Blizzard would continue to cause
21 irreparable harm, both to Activision Blizzard and to the DFEH’s ability to prosecute this case;
22 (iii) the stay requested would result in no prejudice to the DFEH as the First Amended Complaint
23 was just filed on August 23, 2021, and no trial or other substantive motion dates have been set;
24 and (iv) Activision Blizzard’s response to the First Amended Complaint is due October 22, 2021,
25 necessitating an early decision on this issue.

26
27 _____
28 ¹ Activision Blizzard is prepared to retain separate counsel for the limited purpose of conducting
such discovery and any briefing into these issues, if the Court believes doing so is appropriate
and/or necessary.

1 Pursuant to Rules 3.1203(a) and 3.1204(a) of the California Rules of Court, and without
2 waiver or any future argument that counsel should be disqualified from representing the DFEH in
3 this action, Activision Blizzard, through its counsel, informed Plaintiff of its intention to file this
4 *ex parte* application, as well as the date, time, and place for the presentation of the application.
5 That notice was provided via email to Janette Wipper, Sue Noh, and Rumduol Vuong on
6 October 19, 2021, via email (janette.wipper@dfeh.ca.gov, sue.noh@dfeh.ca.gov, and
7 rumduol.vuong@dfeh.ca.gov) at 8:02 a.m. Pacific Time.² See Declaration of Felicia Davis
8 (“Davis Decl.”), ¶ 2. Activision Blizzard previously filed an *Ex Parte* Application For An Order
9 To Extend Defendants’ Deadline To File Objection To Non-Complex Designation, which was
10 heard on September 1, 2021, in Department 11. That Application was denied without prejudice
11 to the filing of a new complex case questionnaire as to the First Amended Complaint.

12 Pursuant to California Rules of Court, Rule 3.1202(a), Activision Blizzard identifies the
13 address, telephone number, and email for Plaintiff’s counsel in this action:

14 Janette L. Wipper, Chief Counsel
15 Janette.Wipper@dfeh.ca.gov
16 Sue J. Noh, Assistant Chief Counsel
17 Sue.Noh@dfeh.ca.gov
18 Rumduol Vuong, Associate Chief Counsel
19 Rumduol.Vuong@dfeh.ca.gov
20 Department of Fair Employment and Housing
21 320 West 4th Street, Suite # 1000
22 Los Angeles, California 90013
23 (213) 439-6799.

24 This *ex parte* application is based on this Notice, the below memorandum of points and
25 authorities, the supporting Request for Judicial Notice, the Declaration of Felicia Davis, all other
26

27 _____
28 ² Activision Blizzard served DFEH counsel for the limited purpose of permitting them to respond
to this *ex parte* application, and without waiving any ability to continue objecting on conflict
grounds to those attorneys’ participation in this matter.

1 records, documents, and pleadings on file in this case, and upon such further evidence as the
2 Court may consider at the hearing.

3
4 DATED: October 19, 2021

PAUL HASTINGS LLP

5 By: 

6 FELICIA A. DAVIS

7 Attorneys for Defendants
8 ACTIVISION BLIZZARD, INC., BLIZZARD
9 ENTERTAINMENT, INC., and ACTIVISION
10 PUBLISHING, INC.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 Defendants Activision Blizzard, Inc., Activision Publishing, Inc., and Blizzard
4 Entertainment, Inc. (collectively “Activision Blizzard”) hereby respectfully request a stay of
5 proceedings in this case to allow Activision Blizzard time to conduct limited discovery into
6 allegations that recently came to light concerning a potentially disqualifying conflict of interest
7 among the attorneys who brought this case for the Department of Fair Employment and Housing
8 (“DFEH”).

9 Last week, the United States Equal Employment Opportunity Commission (“EEOC”)
10 raised the issue of potential ethical violations by DFEH counsel in a pleading filed in federal
11 court in response to the DFEH’s request to intervene in the federal proceedings and object to the
12 EEOC’s resolution of its claims against Activision Blizzard. The EEOC claims that two of the
13 DFEH attorneys who have appeared in this case (and who currently “play leadership roles within
14 the [DFEH]”) “previously served as EEOC [REDACTED],” during which time they “helped to
15 direct the EEOC’s investigation” against Activision Blizzard. Request for Judicial Notice,
16 concurrently filed (“RJN”) Ex. A, at 4:8-11. According to the EEOC, these attorneys’
17 “representation” of the DFEH in the federal case “is prohibited by California Rule of Professional
18 Conduct 1.11(a)(2),” and “this conflict is imputed to all DFEH attorneys by virtue of California
19 Rule of Professional Conduct 1.11(b) because of DFEH’s failure to screen the individual
20 attorneys.” *Id.* at 4:11-16.³

21 In light of the serious nature of the allegations in the EEOC’s filing, limited discovery into
22 the facts concerning the alleged conflict of interest is appropriate. And, given that the alleged
23 conflict, if substantiated, may be disqualifying under California law, allowing limited discovery
24 now—when the only pleadings the DFEH has filed are a complaint and an amended complaint,
25

26
27 _____
28 ³ The DFEH subsequently retained two sets of separate private counsel, the second of which has
appeared on the DFEH’s behalf in the federal proceeding. But the same conflicted attorneys, as
well as the conflicted DFEH office, continue to represent the DFEH in this case.

1 and Activision Blizzard has filed no substantive motions or other pleadings at all—would save
2 the parties, and the Court, considerable time and resources.

3 **II. BACKGROUND**

4 Activision Blizzard and the EEOC recently entered into a federal Consent Decree to
5 resolve the EEOC’s allegations of gender discrimination and harassment, which are similar to
6 claims alleged in the present case before this Court. On September 27, 2021, the EEOC filed the
7 negotiated Consent Decree in *EEOC v. Activision Blizzard, Inc.*, U.S. District Court, Central
8 District of California, Case No. 2:21-CV-07682-DSF-JEM, pending before the Honorable Dale S.
9 Fischer. *See* RJN, Ex. B.

10 The DFEH opposes the federal Consent Decree and is taking positions directly adverse to
11 the EEOC. The DFEH went so far as to seek to intervene in the federal proceedings, explicitly
12 asking the federal court to reject the EEOC’s legal position in that case and deny employees the
13 ability to decide for themselves whether to seek financial compensation under the Consent
14 Decree. *See* RJN, Ex. G.

15 In response, the EEOC communicated to the DFEH attorneys on October 4, 2021,
16 regarding the latter’s “ethical obligations under the Ethics in Government Act, 18 U.S.C. § 207.”
17 RJN Ex. C, ¶ 4.a. And, later that day, EEOC counsel “sent an email to DFEH Attorneys 1 and 2
18 reminding them of the statutory and regulatory restrictions . . .[,] requesting that they cease their
19 involvement in the matter immediately,” and “ma[king] clear the EEOC’s position that no DFEH
20 counsel may continue to represent DFEH’s purported interests in connection with EEOC’s suit
21 against Defendants.” *Id.*, ¶ 4.b. The EEOC and the DFEH subsequently met and conferred on
22 October 5, 2021, after which the DFEH notified the EEOC of its intent to intervene in the
23 EEOC’s federal proceedings, over the EEOC’s objections. *Id.*, ¶ 5-7; *see* RJN Ex. G.

24 The EEOC filed a response to the DFEH’s intervention motion on October 8, 2021. *See*
25 RJN Ex. A. In that response, the EEOC asks the court to disqualify the DFEH from the federal
26 action based on (heavily redacted) allegations of ethical misconduct by DFEH attorneys, which
27 the EEOC claims violate California Rules of Professional Conduct 1.11(a)-(b). *See* RJN, Ex. A.
28

1 As of the date of this filing, the federal court has not ruled on the DFEH’s motion to intervene or
2 the EEOC’s opposition to the DFEH’s filing.

3 In addition to potential violations of California Rule of Professional Conduct 1.11, the
4 EEOC’s filing also raises a potential issue related to DFEH counsel’s communications with
5 Activision Blizzard employees that could reflect a separate violation of California Rule of
6 Professional Conduct 4.3. Two of the three attorneys representing the DFEH in this matter sent
7 an email to an unknown number of Activision Blizzard employees advising them against
8 retaining private counsel. *See* RJN, Ex. D, at 42. Under Rule 4.3, however, attorneys may not
9 provide advice to an individual whose interest may conflict with the attorney’s client’s interest,
10 except to the extent they “advise the person[s] to secure counsel.” Cal. R. Prof’l Conduct 4.3(a).

11 As discussed further below, Activision Blizzard presently lacks the necessary factual
12 information to assess the full impact of DFEH counsel’s alleged conduct on the pending matter.
13 Given the potential ramifications on this case if the EEOC’s allegations are substantiated—which
14 could include imputing a disqualifying conflict to all DFEH attorneys—and in light of the early
15 posture of this case, an immediate stay to allow for limited discovery into these serious
16 allegations is warranted. In addition, a stay is necessary to forestall Plaintiff from arguing later in
17 this case that Activision Blizzard waived potential conflicts by continuing to engage with counsel
18 for DFEH, which Activision Blizzard will need to do if the case proceeds without a stay.

19 **III. LEGAL ARGUMENT**

20 Activision Blizzard respectfully requests that the case be put on pause to allow it to obtain
21 the facts and information needed to determine whether a motion to disqualify or other remedies
22 are appropriate and present such facts to the Court. A stay of proceedings to permit Activision
23 Blizzard to take limited discovery is both appropriate and necessary in light of the EEOC’s
24 serious allegations regarding DFEH counsel’s potential ethical violations.

25 This Court has the power to stay proceedings in the interest of efficiency. *See, e.g.,*
26 *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (“[T]he power to stay proceedings is incidental to
27 the power inherent in every court to control the disposition of the causes on its docket with
28

1 economy of time and effort for itself, for counsel, and for litigants.”⁴ It is also within the
2 Court’s discretion to “[m]ake [*ex parte*] orders about procedural matters” and “[m]ake orders to
3 help prevent . . . irreparable harm to a party.” Cal. R. Ct. 5.151(b). Activision Blizzard
4 respectfully submits that the exercise of those discretionary powers is warranted here.

5 The EEOC’s October 8, 2021 federal-court filing raises critical threshold questions
6 regarding the conduct of DFEH’s counsel and its impact on this matter. Specifically, if a
7 violation of California Rule of Professional Conduct 1.11 has occurred, as is alleged by the
8 EEOC, then said counsel should not be permitted to represent the DFEH in this matter.
9 Moreover, as the EEOC argues in its filing, violation of these rules could lead to the
10 disqualification not only of the two attorneys at issue, but of the entire group of DFEH attorneys
11 with whom they have worked. It also calls into question the integrity of the underlying
12 investigation itself, where one of the DFEH attorneys in question was heavily involved and
13 personally conducted numerous depositions. Thus, *ex parte* relief is warranted because
14 Activision Blizzard will suffer irreparable harm without a full and fair opportunity to conduct
15 limited discovery to determine whether a motion to disqualify or other remedies are appropriate
16 and present such facts to the Court for determination before this case proceeds further.

17 **A. The DFEH Attorneys’ Alleged Ethical Violations, If True, Disqualify Their**
18 **Participation In This Case, May Disqualify Other DFEH Attorneys, And May**
19 **Have Tainted The DFEH’s Underlying Investigation.**

20 The EEOC has alleged facts that, if substantiated, could require multiple DFEH attorneys
21 to be barred from representing DFEH in connection with this litigation against Activision
22 Blizzard, and could raise serious questions about the DFEH’s underlying investigation pursuant to
23 California Rule of Professional Conduct 1.11. Rule 1.11, titled “Special Conflicts of Interest for
24 Former and Current Government Officials and Employees,” governs situations in which former

25 ⁴ Federal case law is persuasive; the U.S. Court of Appeals for the Ninth Circuit uses a test
26 similar to California state courts. *See Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109-10 (9th Cir.
27 2005) (“A district court has discretionary power to stay proceedings in its own court.” Before
28 granting a stay, a district court must weigh the competing interests, including: “the possible
damage which may result from the granting of a stay, the hardship or inequity which a party may
suffer in being required to go forward, and the orderly course of justice measured in terms of the
simplifying or complicating of issues, proof, and questions of law which could be expected to
result from a stay.” (citations and internal quotation marks omitted)).

1 government employees engage in subsequent representation, as is alleged to be the case here.
2 The Rule expressly applies to cases in which “a lawyer has been employed by one government
3 agency and then moves to a second government agency, . . . as when a lawyer is employed by a
4 city and subsequently is employed by a federal agency” or as in the reverse situation, i.e., when a
5 lawyer who is employed by a federal agency subsequently is employed by the State. Cal. R.
6 Prof’l Conduct 1.11, cmt. 6 (explaining that conflicts of interest in this situation “are governed by
7 paragraphs (a) and (b)” of Rule 1.11). Specifically, the Rule prohibits attorneys who previously
8 worked for one agency (here, the EEOC) from later representing another agency (here, the
9 DFEH) “in connection with a matter in which the lawyer participated personally and substantially
10 as a public official or employee” for the prior agency, “unless the [prior] agency gives its
11 informed written consent to the representation.” *Id.*, R. 1.11(a)(2). For purposes of the Rule,
12 “matter” is defined broadly to include any “claim, controversy, investigation, charge, accusation,
13 arrest, or other deliberation, decision, or action that is focused on the interests of specific persons,
14 or a discrete and identifiable class of persons.” Cal. R. Prof’l Conduct 1.7(e).

15 The EEOC makes clear in its federal-court filing that (a) two of the attorneys currently
16 representing the DFEH in this case previously worked at the EEOC; (b) those attorneys
17 participated personally and substantially in the EEOC’s independent investigation into alleged
18 gender discrimination and harassment by Activision Blizzard; but (c) the EEOC did not provide
19 consent to those attorneys’ current representation on behalf of the DFEH, as is required under
20 Rule 1.11. *See* RJN, Ex. A. Thus, under Rule 1.11, the DFEH attorneys who previously worked
21 at the EEOC and participated “personally and substantially as a public official or employee” in
22 the federal government’s investigation appear to be prohibited from representing the DFEH in
23 connection with the DFEH’s investigation or this litigation.

24 There can be no question that the EEOC’s investigation into Activision Blizzard (and
25 subsequent litigation) overlaps substantially with the “claim, controversy, investigation, charge,
26 accusation . . . or other deliberation, decision, or action that is focused on the interests of specific
27 persons, or a discrete and identifiable class of persons” prosecuted by the DFEH. *See* Cal. R.
28 Prof’l Conduct 1.7(e). The facts alleged in the DFEH’s amended complaint here are the same as

1 the facts alleged in the EEOC’s federal-court complaint.⁵ The claims alleged in the DFEH’s
2 amended complaint here are state-law analogues to claims alleged in the EEOC’s federal-court
3 complaint.⁶ And, the two agencies entered into a worksharing agreement relating to their
4 investigations into alleged gender discrimination and harassment at Activision Blizzard. *See*
5 RJN, Ex. F, ¶ 12-13.

6 Furthermore, if what the EEOC alleges is true, the ethical violation—and potential
7 disqualification—does not end with the two attorneys who previously worked on this matter
8 during their time at the EEOC. On the contrary: If those two attorneys are disqualified under
9 Rule 1.11(a) as set forth above, then Rule 1.11(b) imputes their conflict to the entirety of the
10 DFEH, unless the DFEH: (1) timely screened the disqualified lawyers; and (2) promptly
11 provided written notice to the appropriate government agency. *See* Cal. Rule Prof’l Conduct
12 1.11(b). According to the EEOC, neither occurred here. *See* RJN, Ex. A, at 14:10-21.

13 The critical question, then, is whether the attorneys in question in fact “personally and
14 substantially” participated in the EEOC’s investigation before they moved to the DFEH. Clearly
15 the EEOC believes this to be the case. *See, e.g.,* RJN, Ex. A, at 13:12-13 (“In sum, both attorneys
16 participated directly and through active supervision in actions going to the heart of the merits of
17 this matter.”). But many of the relevant facts contained in the EEOC’s filing are redacted and
18 thus unavailable to Activision Blizzard at this time. In light of the seriousness of the allegations,
19 an opportunity for Activision Blizzard to engage in limited discovery related to this information is

20 ⁵ *Compare, e.g.,* First Amended Complaint, ¶¶ 101-102 (“Defendants’ female workers were
21 routinely subjected to unwelcome sexual advances and other harassing conduct so severe or
22 pervasive that it created a hostile work environment. The harassment was perpetrated by
23 Defendants’ supervisors and/or Defendants knew or should have known of the conduct and failed
24 to take immediate and appropriate corrective action.”), *with, e.g.,* RJN, Ex. E, EEOC Complaint
25 ¶ 22 (“Employees were subjected [to] sexual harassment that was severe or pervasive to alter the
26 conditions of employment. The conduct was unwelcome and adversely affected the employees.
27 The Defendants knew or should have known of the sexual harassment of the adversely affected
28 employees.”).

26 ⁶ *Compare* First Amended Complaint, ¶ 100 (“[California] Government Code section 12940
27 subdivision (j) states that it is an unlawful employment practice for an employer ‘or any other
28 person’ ‘to harass an employee, an applicant, an unpaid intern or volunteer, or a person providing
services pursuant to a contract,’ because of that person’s sex.”), *with* RJN, Ex. E, EEOC
Complaint ¶ 21 (“Defendants have engaged in unlawful employment practices in violation of
§§ 701(k), 703(a) and 704(a) of Title VII, 42 U.S.C. 2000e-2(a) and 2000e-3(a) by subjecting a
class of individuals to sexual harassment, to pregnancy discrimination and/or to retaliation.”).

1 plainly warranted.

2 That is all the more true given the magnitude of the potential ramifications on this case
3 should the facts bear out the allegations. If a violation of Rule 1.11 has occurred, then the
4 integrity of the DFEH’s investigation itself—not just the prosecution of the current action—could
5 be called into question. The EEOC contends that the allegedly conflicted attorneys obtained
6 confidential information about Activision Blizzard during their employment with the EEOC. And
7 at least one of those attorneys had significant involvement in the DFEH’s investigation of
8 Activision Blizzard: the attorney conducted four depositions, signed six sets of discovery, and
9 authored at least three meet and confer letters. Davis Decl., ¶ 3; *see* Cal. R. Prof’l Conduct 1.7
10 (defining “matter” for conflict purposes broadly and specifically prohibiting participation in
11 government “investigation[s]”). If counsel used that information—which they would not have
12 obtained but for their EEOC employment—in the DFEH’s investigation, then the entire
13 investigation upon which this lawsuit is based may be tainted. This is yet another reason this
14 threshold issue must be decided before this case can be allowed to proceed.

15 In sum, a stay of proceedings to permit Activision Blizzard to seek limited discovery into
16 the EEOC’s allegations into potential ethical violations by counsel for the DFEH would offer an
17 ounce of prevention to save the courts a potential pound of cure.

18 **B. The DFEH Attorneys’ Email Discouraging Putative Class Members From**
19 **Consulting With Private Counsel Provides An Independent Reason For**
20 **Disqualification Or Other Remedies.**

21 The potential violation of Rule 1.11 is more than enough to justify a stay of proceedings.
22 But there is more. California law makes clear that individual employees have a right to their own
23 counsel related to governmental antidiscrimination enforcement actions, such as this one. Cal.
24 Gov’t Code § 12965(a) (“In any civil action, the person claiming to be aggrieved shall be the real
25 party in interest and shall have the right to participate as a party *and be represented by that*
26 *person’s own counsel.*”) (emphasis added). California law further prohibits attorneys for a
27 governmental party to provide advice to an unrepresented party whose interests may conflict with
28 the government client’s, *except to the extent they “advise the person[s] to secure counsel.”* Cal.
R. Prof’l Conduct 4.3(a) (emphasis added). Yet, based on the EEOC’s allegations, it appears that

1 counsel for DFEH acted in contravention of these rules by reaching out to potential real parties in
2 interest here and affirmatively advising them *not* to secure counsel.

3 As noted above, attorneys representing the DFEH in this matter sent an email to an
4 unknown number of Activision Blizzard employees.⁷ The email reads, in full:

5 Hi all,

6 We also wanted to follow up and alert you that *you may be*
7 *contacted by private attorneys seeking to become your attorney for*
8 *this case. It is unnecessary and may be misleading or confusing.*

9 A private attorney would have to file suit in your name or get the
10 court's permission for you to intervene as a named plaintiff in this
11 matter. Please let us know if any attorney attempts to solicit your
12 business for this case.

11 Rumie Vuong
12 Associate Chief Counsel
13 CA Dept of Fair Employment & Housing

13 RJN, Ex. D, at 42 (emphasis added).

14 It is generally improper, and a violation of California Rules, for attorneys to advise
15 individuals who are not their clients that they should not retain their own lawyer, particularly
16 when the unrepresented person may have conflicting interests with the attorneys' client. *See* Cal.
17 R. Prof'l Conduct 4.3(a). Government attorneys are not exempt. Yet this email appears to do just
18 that—provide legal advice to unrepresented persons whose interests may not be aligned the
19 interests of the sending attorneys' clients (here, the DFEH). In fact, professional conduct rules
20 assume that individuals with legal claims are better served by having lawyers acting in their
21 interest, rather than by being unrepresented, in light of the reality that private parties typically
22 benefit from having legal advice from a lawyer who is loyal to them. Independent legal advice is
23 particularly valuable in circumstances where a number of different options are available to a
24 private party, as is the case here.

25 Indeed, the value of independent counsel, and the prohibition on attorneys advising
26

27 ⁷ At this time, Activision Blizzard does not know the recipients of this email but assume that it
28 was sent to at least some current and former employees. This is one of the facts on which
discovery is necessary.

1 unrepresented parties, are particularly acute when the interests of the attorneys' client are not
2 entirely aligned with the interests of the unrepresented parties. Here, the parties' interests are not
3 entirely aligned. Whereas the DFEH plainly wishes to proceed against Activision Blizzard on a
4 host of claims, individual former employees of Activision Blizzard may choose not to, either
5 because they have not experienced harassment or discrimination during their employment or
6 because they simply want to put the matter behind them. They also may prefer to resolve claims
7 through the EEOC Consent Decree. These individuals may benefit from independent legal advice
8 regarding the different options available so they can decide for themselves which is most
9 advantageous given their particular circumstances.

10 Furthermore, in the federal-court proceedings initiated by the EEOC against Activision
11 Blizzard, the DFEH has taken efforts to block the EEOC's negotiated Consent Decree and thus
12 prevent individuals from resolving claims that properly belong to them, even if that means that
13 the individuals will not obtain any resolution for years. *See* RJN, Ex. G (DFEH Motion to
14 Intervene); *see also* RJN, Ex. D (DFEH attempting to block settlement discussions between
15 private plaintiffs and Defendant Riot Games in another state court action). The DFEH's
16 opposition to the federal settlement may be a result of politics, or it may be due to the fact that the
17 DFEH now is permitted to seek fees and costs related to its litigation efforts (whereas the EEOC
18 is not). *See* Cal. Gov't Code § 12907(b). But regardless of what is driving the DFEH's
19 maneuvers, it is clear that the agency and individual employees who stand to benefit now from
20 the negotiated resolution of the federal case (which covers many of the same facts and employees
21 as this suit) have different interests.⁸

22 Because the interests of Activision Blizzard employees and the DFEH are not and were
23 not aligned, it appears that Rule 4.3 would have prohibited the DFEH's attorneys from providing

24
25 ⁸ After all, individual employees may wish to settle their alleged claims through established
26 federal processes, may wish to negotiate directly with Activision Blizzard, or even may wish to
27 file their own lawsuit. All of those options are available to them under the federal Consent
28 Decree. And, individual employees would likely benefit from independent legal advice regarding
the different options available to them so they can decide for themselves which is most
advantageous to them. But the DFEH is currently trying to prohibit any individual employee
from availing herself of those options, while apparently advising individual employees not to
retain private counsel in this matter.

1 legal advice on this matter. Indeed, the *only* legal advice California law appears to have
2 permitted the DFEH’s attorneys to provide was to “*advise the person[s] to secure counsel.*” Cal.
3 R. Prof’l Conduct 4.3(a) (emphasis added). But at least with the limited information available to
4 Activision Blizzard at this juncture, it appears that counsel for the DFEH has done exactly the
5 opposite.

6 All that said, Activision Blizzard does not have all of the facts, and recognizes that the
7 DFEH may have further information and explanation for its conduct and email communications.
8 Limited discovery (including, e.g., into the list of recipients of the email and the DFEH’s
9 relationship to those recipients) to determine whether the DFEH may, indeed, have entered into
10 an attorney-client relationship with such individuals is critical to a complete and thorough
11 assessment. At the same time, discovery into whether the DFEH has sent other similarly
12 misleading emails to the putative class is equally critical. (The email begins with, “We also
13 wanted to follow up . . . ,” suggesting that the DFEH may be engaged in other improper
14 communications with these individuals.) A complete understanding of similar communications is
15 necessary before Activision Blizzard can analyze and the Court consider what, if any, curative
16 steps are appropriate.

17 **IV. CONCLUSION**

18 For the foregoing reasons, Activision Blizzard respectfully requests that the Court grant its
19 *ex parte* application for a stay and enter an order staying further proceedings in this case except to
20 the extent necessary to permit Activision Blizzard to conduct limited discovery to determine
21 whether a motion to disqualify or other remedies are appropriate and present such facts to the
22 Court.

23 DATED: October 19, 2021

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