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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, an agency of the State of California, Plaintiffs, v. ACTIVISION BLIZZARD, INC., BLIZZARD ENTERTAINMENT, INC., and ACTIVISION PUBLISHING, INC., and Does One through Ten, inclusive, Defendants.	Case No. 21STCV26571 **PLAINTIFF'S OPPOSITION TO DEFENDANTS' EX PARTE APPLICATION TO STAY** Assigned for All Purposes to: Judge: Honorable Timothy Patrick Dillon Dept: 73 Hearing Date: Oct. 20, 2021 Hearing Time: 8:30 am *Complaint Filed: July 20, 2021*

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INTRODUCTION

Defendants Activision Blizzard, Inc., Blizzard Entertainment, Inc., and Activision Publishing, Inc.'s ("Activision's") ex parte application to stay creates an unnecessary fire drill through an improper procedural vehicle based on a substantive nonissue. The Court should deny the motion without prejudice to Activision's option to file a properly noticed motion.

The substance of Activision's assertion is that two public servants once represented the American people at the EEOC, while the EEOC was investigating Activision's violations of federal laws protecting against sex-based discrimination, harassment, and retaliation, and that those two public servants then left the EEOC and now work at the DFEH, where they have participated in litigating claims on behalf of the people of California challenging Activision's violations of state laws protecting against sex-based discrimination, harassment, and retaliation. Activision hopes to conjure a scandal from these mundane facts, based on an aggressive misreading of California Rules of Professional Conduct 1.11 and 4.3. As to Rule 1.11, even accepting that it applies here, the two public servants at issue do not fit within its purview because they had minimal involvement with the EEOC's investigation (as they both worked in a different department) (precluding application of Rule 1.11(a)), and, they are now screened from this matter (precluding application of Rule 1.11(b)), in an abundance of caution. And Rule 4.3 is irrelevant to this motion. The DFEH is eager for the Court to rule (on a properly noticed motion) on the substance of Activision's assertions, so that these scattershot ethics complaints can cease to be an excuse for distraction.

Denial of Activision's inappropriate ex parte motion as to Rule 1.11 is required for three reasons.

First, there is no emergency meriting ex parte treatment: there is no possibility of ongoing harm or change in circumstances because the relevant facts occurred years ago and Attorneys 1 and 2 are no longer working on the DFEH case. In addition, this is no emergency because Activision has known of the relevant facts for a long time. The issue has been discussed by the parties over the past 15 days, resulting in Activision submitting a carefully written 13-page motion with approximately 200 pages of supporting material. In essence, Activision suggests that

there is an emergency meriting extreme ex parte relief even though all the relevant facts are in the past, and the core relief it proposes has been accomplished through the DFEH's cautionary screen.

Second, this is not an issue appropriate for a stay, given that the core remedy Activision seeks – the opportunity to engage in discovery – is available in the normal course of litigation.

Third, the underlying ethical question is readily resolved in either of two ways: (a) the two lawyers at issue have sworn, as officers of the Court, that they did not fall within the purview of the rule because they were not personally and substantially involved in the EEOC investigation; (b) the Outten & Golden law firm has appeared on behalf of DFEH, and none of the Rule 1.11 arguments Activision advances could apply to that firm.

Lastly, Activision's purported violation of Rule 4.3 could not form the basis for ex parte relief or a stay even if it were plausible, which it is not.

Activision's effort to escape the normal process of litigation via an ex parte stay should be rejected.

FACTUAL BACKGROUND

The DFEH attorneys Activision targets ("Attorneys 1 and 2"), and the DFEH more generally, have all conducted themselves properly. Attorney 1 worked for the EEOC in the legal unit until approximately mid-2019, and then Attorney 1 began work for the DFEH in approximately September 2020. Attorney 2 worked for the EEOC in the legal unit until approximately early 2020, and then Attorney 2 began work for the DFEH in approximately July 2020.

The EEOC has two relevant divisions, the legal unit and the enforcement unit Attorneys 1 and 2 worked as lawyers in the legal unit. Throughout their tenure at the EEOC, the EEOC Activision investigation was handled by the enforcement unit. In fact, the EEOC confirmed as late as summer 2021 (long after Attorneys 1 and 2 had left the EEOC) that even then, the EEOC Activision matter was still in the enforcement unit. Declaration of Janette Wipper in Support of DFEH's Opposition to Defendants' Ex Parte Application to Stay (Wipper Decl.), ¶ 14. This division of labor within the EEOC helps explain why Attorneys 1 and 2 had so little contact with

the EEOC Activision matter while they worked there 1-2 years ago.

When Attorneys 1 and 2 began work for the DFEH in 2020, DFEH chief counsel Janette Wipper discussed with them their involvement in EEOC matters. *Id.*, ¶ 15. Those discussions confirmed that neither Attorney 1 nor Attorney 2 had worked "personally and substantially" on the EEOC Activision matter. *Id.* Attorneys 1 and 2 have signed declarations confirming this reality. *See Id.*, Exh. A.

In July 2021, the DFEH filed this action against Activision, alleging rampant sex discrimination, sexual harassment, and retaliation in violation of California law. Then, in September 2021, the EEOC filed a complaint and proposed settlement on the same day, proposing a mechanism by which Activision could be released from all federal *and state* claims, even though the EEOC provided no evidence that it had investigated, evaluated, or achieved reasonable value for the state law claims, and even though the EEOC has no authority to prosecute or release state law claims. Wipper Decl., ¶ 12. The DFEH promptly gave notice of its intent to intervene in the EEOC action to reinitiate its efforts to engage in collaborative dialog with the EEOC and to ensure that no improperly overbroad or weak settlement be approved. *Id.*, ¶ 24. The EEOC responded by accusing the DFEH of violating Rule 1.11, an accusation that Activision recycles here. *Id.*, ¶¶ 13-15. The DFEH immediately screened Attorneys 1 and 2 from the matter. *Id.*, ¶ 16.

In response to the order of the court in the federal case ordering the parties to meet and confer regarding a briefing schedule, the DFEH and the EEOC agreed that the DFEH's motion to intervene would be due this Monday, October 25. Now, Activision brings this ex parte motion, to be heard days before the DFEH's motion to intervene is due, and days before Activision's deadline to respond to the complaint on Friday, October 22.

ARGUMENT

A. An Ex Parte Application is Not Appropriate in this Non-Emergency Situation.

Ex parte motions are an exceptional vehicle intended only to address matters that cannot be heard on the court's regular hearing calendar. "In our adversary system, ex parte motions are disfavored," and a party seeking ex parte relief must show why it should be allowed to bypass

other litigants by skipping to the head of the line for special treatment. *Ayestas v. Davis*, 138 S. Ct. 1080, 1091 (2018). Therefore, it has long been the rule that full "notice of motion must be given whenever the order sought may affect the rights of an adverse party." *McDonald v. Severy*, 6 Cal. 2d 629, 631 (1936); *see also* Rutter Group, Cal. Prac. Guide Civ. Pro. Before Trial, Ch. 9:349 ("[C]ourts may not grant ex parte relief that would affect the opposing party's rights."). "Fundamental due process demands" that such notice be provided. *Miller v. Foremost Motors, Inc*., 16 Cal. App. 4th 1271, 1276 (1993).

Here, Activision has long known that the two attorneys at issue ("Attorneys 1 and 2") once worked for the EEOC. In fact, Activision has been aware of these attorneys' involvement in the DFEH's lawsuit since well before the complaint was filed bearing their names on July 20, 2021. Wipper Decl. ¶¶ 20-23. Over the past four months, there have been no changes in the status of these individuals to justify Activision's ex parte motion. And Activision has known for over two weeks (since October 4), or longer, that the EEOC was alleging that two individuals prior work at the EEOC created a conflict. *Id*., ¶ 18, Exh. B. But only yesterday did Activision file this detailed motion, comprising approximately 200 pages of detailed briefing and supporting papers.

Conversely, granting a stay would dramatically injure the rights of the DFEH and the hundreds of Activision employees it seeks to help in this litigation. Through this action, the DFEH seeks to secure remedies for the hundreds of individuals who were harassed, discriminated against, and retaliated against on the basis of sex by Activision in recent years. A stay of any kind would simply derail the State's important efforts to collect evidence and pursue claims to make these individuals whole. Therefore, Activision's attempt to fabricate an emergency through its ex parte application must be rejected. If Activision wishes to get enough information to determine whether a motion is truly worth the Court's time, it can do so through the normal discovery process. If it then chooses to assert these arguments based on actual evidence, it can do so on a normal, noticed motion, with all parties and the Court getting the benefit of full briefing.

B. <u>Activision Has Not Demonstrated that a Stay Is Warranted.</u>

Activision argues that the Court should adopt the federal standard for determining whether

to take the extreme measure of staying litigation, by weighing the competing interests including the "[1] damage which may result from the granting of a stay, [2] the hardship or inequity which a party may suffer in being required to go forward, and [3] 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." *See Lockyer v. Mirant Corp*., 398 F.3d 1098, 1109-10 (9th Cir. 2005). However, Activision does not provide any analysis regarding these factors and therefore does not meet its burden in demonstrating that a stay is warranted.

Rule 1.11 does not apply, because it is limited to individuals who worked "personally and substantially" on the matter at the first agency, yet neither Attorney 1 nor 2 worked "personally and substantially" on the Activision investigation while at the EEOC. Rule 1.11(a). Wipper Decl. ¶16, Exh. A. That ends the matter. If Activision chooses to disbelieve the sworn testimony of officers of the Court, it can pursue any appropriate relief.

Separately, even if 1.11(a) were to apply, the DFEH's compliance with the requisites of Rule 1.11(b) eliminates any potential problem. Specifically, the DFEH, in an abundance of caution, promptly screened Attorneys 1 and 2 from the Activision matter immediately after the first assertion of Rule 1.11's possible application was raised, consistent with Rule 1.11(b).

Furthermore, Activision can point to no actual or even hypothetical harm because the EEOC and the DFEH have a Worksharing Agreement that facilitates cooperation and *requires them to share information*. The alleged harm (that the DFEH lawyers "obtained confidential information about Activision Blizzard during their employment with the EEOC") is simply the typical "harm" of being a litigation defendant. In other words, Activision has suffered no actual harm establishing that a stay is warranted. This is because the EEOC-DFEH Worksharing Agreement provides that what the EEOC knows, the DFEH knows. Specifically, under Title VII and the Worksharing Agreement, the EEOC is required to provide the DFEH with any information that the EEOC obtained from Activision Blizzard "upon request" and "without cost," including confidential information in an investigation. 42 U.S.C. 2000e-8(c)-(d). Given that the EEOC is statutorily obligated to share even confidential information with the DFEH, any possible information that Attorneys 1 and 2 might bring from the EEOC to DFEH would be redundant to

the normal flow of information between these two law enforcement agencies tasked with protecting the rights of Activision's employees. In light of these unique facts, Rule 1.11 should not bar Attorneys 1 and 2 from any activity at the DFEH.

Aside from all of these reasons why Activision's argument lacks merit, the fact that the DFEH is now represented by the Outten & Golden law firm puts all concerns to bed. Activision has not made, and could not make, any argument for why Outten & Golden cannot litigate this matter on the DFEH's behalf. That is because Rule 1.11 addresses representation by an individual lawyer of a "client" (here, the DFEH) and representation by other lawyers in that lawyer's "firm" (here, the DFEH). The Rule suggests no possible restriction on lawyers in other firms, which makes perfect sense, since the Rule is not designed to strip a party of the right to legal representation, as Activision hints is its goal.

C. Activision's Invocation of Rule 4.3 Is Irrelevant.

Lastly, Activision's attempt to apply Rule 4.3 to this matter is misplaced. Rule 4.3 prohibits a lawyer, in communications with unrepresented individuals on behalf of the lawyer's client, from: (1) stating or implying that a lawyer is disinterested, (2) giving legal advice if the interests of the unrepresented person are in conflict with their client, and (3) seeking to obtain privileged or confidential information. Here, the referenced email from Attorney 1 does none of these things. First, the email's author makes no claims to disinterest, as the email explicitly lists the attorney's title and affiliation with the DFEH, and the email comes in the context of well-publicized litigation by the DFEH seeking to hold Activision accountable for violations of their employees' rights to be free from discrimination, harassment, and retaliation. Second, the email contains no legal advice. Third, the email seeks to obtain no privileged or confidential information. Activision's hand-waving regarding the email points to no actual impropriety.

CONCLUSION

Because Activision's ex parte motion is procedurally improper, is substantively meritless, and seeks relief that it can pursue in the normal course of the litigation, the DFEH respectfully submits that the motion must be denied.

Dated: October 20, 2021

Respectfully submitted,

By: 
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PROOF OF SERVICE

I am a citizen of the United States and employed in San Francisco, CA at Outten & Golden LLP, whose business address is One California Street, 12th Floor, San Francisco, CA 94111. I am over the age of eighteen years and not a party to the within action.

On October 20, 2021, I served a true and correct copy of the following document(s) on the parties listed below:

PLAINTIFF'S OPPOSITION TO DEFENDANTS' EX PARTE APPLICATION TO STAY

☑ **BY ELECTRONIC SERVICE:** By electronically filing and serving a true and correct copy via to the email addresses set forth below

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 20, 2021 in San Francisco, California.

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