Department of Fair Employment and Housing v. Activision Blizzard, Inc., et al.
21STCV26571

The court issues its rulings regarding Defendants' motion for summary adjudication (1242).

I. Introduction

By their motion, Defendants ask this court to dismiss with prejudice the bulk of the Department of Fair Employment and Housing's (DFEH) case (first through eighth causes of action). Defendants argue that this court lacks jurisdiction to adjudicate these causes of action because the DFEH's over two-year investigation "stopped short" of a full investigation and the DFEH did not expend enough efforts at conciliation and mediation. For several fundamental reasons, Defendants have not carried their initial burden on summary adjudication and the motion must be denied.

There is no authority supporting the extraordinary relief Defendants seek by this motion. No California court has dismissed a DFEH filed action based on an alleged failure to fully investigate or expend sufficient pre-suit efforts on voluntary resolution. Defendants rely on inapplicable cases in which courts have dismissed individual employee actions because the employee failed to comply with the Government Code by obtaining the statutorily-required right-to-sue letter from the DFEH. However, different laws apply when the DFEH commences an action against an employer as a "public prosecutor testing a public right." The Legislature vested the DFEH with authority and discretion when exercising the state's police power to enforce the statutes within its jurisdiction. For example, Government Code section 12965, subdivision (a)(1), grants the DFEH "discretion" to "bring a

civil action" without conciliation or mediation "if circumstances warrant."[1] In any event, Defendants' evidence establishes that the DFEH did all that was required before filing this action.

The motion is therefore denied because it lacks legal or factual support.

II. Background

A. Complaint

On August 23, 2021, Plaintiff DFEH filed the operative First Amended Complaint ("FAC") against Defendants Activision Blizzard, Inc., ("Activision Blizzard"), Blizzard Entertainment, Inc. ("Blizzard"), and Activision Publishing, Inc. ("Activision Publishing") (collectively, "Defendants").

The FAC initially asserted eleven (11) causes of action. However, on February 15, 2022, the court held a hearing on Defendants' demurrer and motion to strike. The court sustained the Defendants' demurrer as to the third cause of action for employment discrimination because of sex-termination, with leave to amend, and overruled the rest of the demurrer. The DFEH did not exercise its right to amend the FAC. On May 9, 2022, the Defendants filed their Answer to the FAC. Therefore, the third cause of action is no longer at issue.

Accordingly, the following causes of action in the FAC remain at issue.

a) Employment discrimination because of sex – compensation (1st Cause of Action).

b) Employment discrimination because of sex – promotion (2nd Cause of Action).

c) Employment discrimination because of sex – constructive discharge

---

[1] (See *Department of Fair Employment and Housing v. Cisco Systems, Inc.* (Aug. 5, 2022) ___ Cal.App.5th ___ [2022 WL 3136003], *5 ["We note '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, religious creed, color, national origin, ancestry,' or other protected characteristics. (§ 12920.) To implement that policy, the Legislature created the Department and gave it broad powers to investigate employment discrimination complaints and bring civil actions against violators when necessary."].)

(4th Cause of Action).

d) Employment discrimination because of sex – harassment (5th Cause of Action).

e) Retaliation (6th Cause of Action).

f) Failure to prevent discrimination and harassment (on behalf of Group) (7th Cause of Action).

g) Failure to prevent discrimination and harassment (on behalf of DFEH) (8th Cause of Action).

h) Unequal pay (9th Cause of Action).

i) Waiver of rights, forums, or procedures and release of claims (10th Cause of Action).

j) Failure to maintain and produce records (on behalf of DFEH only) (11th Cause of Action).

The FAC alleges the following: DFEH is a state agency tasked with investigating and prosecuting civil rights actions. (FAC, ¶ 9.) Defendant Activision Blizzard is one of the largest American video game developers and distributors, with approximately 9,500 employees and over 100 million players worldwide. (FAC, ¶ 2.) Activision Blizzard conducts business through its subsidiaries, including defendants Blizzard and Activision Publishing. (FAC, ¶ 2.)

Unlike its customer base of increasingly diverse players, Defendants' workforce is only about 20 percent women. (FAC, ¶ 9.) Very few women ever reach top roles at the company, and those who reach higher positions, earn less salary, incentive pay, and total compensation than their male peers. (FAC, ¶ 3.) In addition, the Defendants promote women more slowly and terminate them more quickly than their male counterparts. (FAC, ¶ 4.) Faced with such adverse terms and conditions of employment, many women have been forced to leave the company. (FAC, ¶ 4.) Female employees and contingent or temporary workers were also subjected to constant sexual harassment, including having to continually fend off unwanted sexual comments and advances by their male co-workers and superiors. (FAC, ¶ 6.) Employees were further discouraged from complaining as human resources personnel were known to be close to alleged harassers and treated complaints dismissively. (FAC, ¶ 7.) Female employees and contingent or temporary workers were subjected to retaliation after complaining, including but not limited to being deprived of work on projects, unwillingly being transferred to different units, and selected for layoffs. (FAC, ¶ 7.)

III. Defendants' Motion

A. Moving

On May 6, 2022, Defendants filed this motion for summary adjudication, arguing:

- The Fair Employment and Housing Act ("FEHA") does not permit the DFEH to bring or maintain this FEHA litigation until it follows the following steps: (1) fully investigates the claims identified in its complaint; (2) meaningfully endeavors to negotiate a resolution of any claim it believes is supported by that investigation; and then (3) works in good faith to mediate a resolution to any unresolved claim.
- Here, the DFEH failed to follow those three steps.
- First, the DFEH failed to complete its investigation because it did not obtain the substantial amounts of evidence that it had deemed necessary before announcing that it had completed its investigation.
- Second, the DFEH did not endeavor (make a serious attempt) to eliminate the alleged unlawful practices through informal means.
    - Instead, in its rush to move ahead of the United States Equal Employment Opportunity Commission (EEOC), the DFEH set aside a planned mediation and demanded a "sham mediation" on a few days' notice.
    - California courts often look to federal cases interpreting Title VII for guidance in interpreting the FEHA.
        - In one case, *Mach Mining v. E.E.O.C.* (2015) 575 U.S. 480 (*Mach Mining*), the United States Supreme Court held that the EEOC must try to engage the employer in some kind of discussion (whether written or oral) to allow the employer to remedy the allegedly discriminatory practice.
        - Here, conciliation could not begin without the DFEH notifying Defendants of the claims at issue, the basis for those claims, and the group or class affected.
        - However, the DFEH failed to provide such information when Defendants requested it and, in its June 24, 2021, letter announcing that it had completed its investigation.
        - Accordingly, by failing to inform Defendants of the specific allegations against it, the DFEH violated its duty to attempt an informal resolution of this matter.

- The DFEH cannot justify its conduct by pointing to its approaching deadline because Defendants repeatedly offered to toll the limitations period.

- Third, the harassment and retaliation claims were expressly excluded from the scope of the DFEH's investigation.
  - The DFEH and the EEOC entered into an agreement in December 2018 (the "Interagency Agreement"), under which the DFEH would investigate pay and promotion claims while the EEOC would investigate harassment and related retaliation claims.
  - Having agreed in writing that it would not investigate any harassment-related claims, the DFEH cannot now claim that it conducted the required investigation or gathered enough evidence to decide whether harassment or retaliation occurred.
  - Accordingly, the court should dismiss the DFEH's harassment and retaliation claims.
- The court cannot stay the action and allow the DFEH to complete its investigation because the FEHA requires the DFEH to satisfy its pre-filing requirements *and then* file suit within two years after filing its administrative complaint.
- For those reasons, the court should dismiss the challenged causes of action.

B. Opposition

In opposition, the DFEH contends:

- The FEHA requires the DFEH to follow the following procedure to investigate complaints:
  - First, any person claiming to be aggrieved by an alleged unlawful practice can file a verified complaint with the DFEH. However, if the alleged unlawful practice adversely affects a group or class of persons, the aggrieved person *or DFEH's director may file the complaint* on behalf of and as a representative of such a group or class.
  - Second, upon receiving any complaint alleging facts sufficient to constitute a violation of any of the provisions of this part, the DFEH must make a prompt investigation.
  - Third, if the DFEH determines that the complaint is valid, the FEHA requires DFEH to "immediately endeavor to eliminate the . . . unlawful practice complained of by conference, conciliation, and

persuasion."

- Fourth, before filing a civil action, the 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."

- Here, the DFEH complied with the pre-suit requirements above.
  - The DFEH first issued a Director's complaint against Defendants alerting the latter of their "discriminatory practices" against its employees and job applicants based on sex-gender, including failing to hire, select, or employ persons because of their sex.
  - The DFEH then promptly launched an investigation into those allegations.
    - DFEH investigated this dispute for more than two years. Indeed, Defendants' evidence reveals that during that period, the DFEH served 40 requests for production of documents, deposed seven PMK witnesses, and reviewed over 17,000 pages of documents before commencing this civil action.
    - Defendants' argument that the DFEH should have investigated *more* runs afoul of the legislative framework empowering the DFEH to use its discretion when investigating matters.
    - Moreover, state and federal law have repeatedly rejected arguments challenging the sufficiency of administrative agencies' investigations.
      - For example, in *EEOC v. Keco Indus., Inc.* (6th Cir. 1984) 748 F.2d 1097, 1100, a federal appellate court noted that when employers have challenged the sufficiency of an EEOC investigation, courts have precluded the use of that objection as a basis for dismissing the case.
      - As this court also noted in its ruling on the DFEH's motion for protective order, the federal appellate court in *EEOC v. Sterling Jewelers, Inc.* (2d Cir. 2015) 801 F.3d 96 (*Sterling Jewelers*) refused to engage in judicial review of the sufficiency of the EEOC's investigation.
      - The *Sterling Jewelers* court found that doing so impermissibly would make Title VII actions a two-step procedure whereby the parties would first litigate whether the EEOC had a reasonable basis for its initial findings and only then proceed to litigate the merits.

        - Like in *Sterling Jewelers*, the sufficiency of DFEH's investigation should not be subject to judicial review.
        - The only question should be whether an investigation occurred. Here, the fact that DFEH investigated the matter was enough to satisfy its investigation obligation under the FEHA.
    - After finding reasonable cause to believe that Defendants had violated the FEHA's provisions, the DFEH invited Defendants to a mediation with the DFEH's dispute resolution division.
        - However, the DFEH failed to eliminate Defendants' unlawful practices through informal means because Defendants refused to participate in the multiple conciliation and mediation opportunities the DFEH offered on July 1, July 2, and July 15 (with the second day of mediation on July 20, 2021).
        - In *Mach Mining*, the case that Defendants rely on, the United States Supreme Court held that all that the EEOC was required to do was to afford the employer a "chance" to discuss and rectify a specified discriminatory practice.
        - Assuming that *Mach Mining* even applies to the DFEH, it is undisputed that the DFEH offered Defendants "a chance" to discuss and rectify its discriminatory practices by providing opportunities to mediate and discuss those practices. However, Defendants chose not to participate.
- Defendants' argument that DFEH relinquished its jurisdiction over the harassment and retaliation claims because the EEOC, not the DFEH, took the lead in investigating those claims is meritless.
    - As part of the Interagency Agreement, the DFEH and the EEOC agreed to share confidential information and personnel related to the investigations.
    - However, during the investigations, the DFEH did not cede to the EEOC the Director's complaint or its authority to prosecute and resolve its claims under state law. Indeed, because the EEOC cannot prosecute FEHA claims, the DFEH could never relinquish its authority over those claims to the EEOC. In other words, although the EEOC and DFEH agreed to cooperate in investigating their claims against Defendants, their division of labor had no impact on the litigation authority.
    - Moreover, contrary to Defendants' arguments, DFEH's investigation included harassment and retaliation claims. First, in February

2021, Defendants inquired about the status of DFEH's investigation of harassment and retaliation claims. Second, on April 2, 2021, the DFEH subpoenaed records relating to harassment and retaliation. Defendants did not object to the subpoena, but instead responded that it would gather the responsive documents, although it may take time to do so.

- Notwithstanding the above, there is no reason for the court to stay or dismiss this action because the informal conciliation process that Defendants argue failed to occur is moot since the parties attended a private mediation with Mark Rudy on June 30, 2022. Moreover, additional mediation sessions are scheduled for October 11 and 13, 2022.

C. Reply

In reply, Defendants argue:

- The DFEH had no legal authority to file this case.
  - Seeking to jump ahead of the EEOC and grab the media spotlight, the DFEH commenced this action without (1) investigating whether it had valid claims, (2) attempting to reach a voluntary resolution of the dispute, and (3) participating in mediation.
  - DFEH's opposition shows no evidence to the contrary.
- Failure to investigate:
  - The case that the DFEH relies on *Sterling Jewelers* requires the DFEH to produce evidence showing that it investigated whether each of the claims asserted had a basis and to explain, at a minimum, the steps it took to do so.
  - Here, the DFEH's declarations do not state that the agency investigated each claim asserted in this suit, let alone describe the steps it took to investigate such claims.
  - Moreover, as outlined in the moving papers, the DFEH did not investigate the harassment and retaliation claims because the agency agreed that EEOC would investigate those claims.
    - The DFEH points to investigative demands it served in April 2021 to support its argument that its investigation encompassed harassment and retaliation claims.
    - However, those demands were made in April 2021, two and a half years into the investigation and three months before the

statutory deadline. Thus, the DFEH not only did not attempt to obtain any information about harassment or retaliation earlier but (the unrebutted evidence shows) terminated its investigation before Defendants could produce the documents DFEH stated it needed in response to those and other demands.

- Further, although DFEH implies it met its harassment/retaliation investigation obligation through the EEOC's work, it provides no evidence that the EEOC shared any information with it.

- The DFEH cites a laundry list of cases that stand for the proposition that the nature and extent of its investigation are within its discretion. However, summary adjudication does not require second-guessing DFEH's judgment because (1) the DFEH identified the evidence it required to determine whether its complaints were valid, but (2) abruptly ended its investigation without obtaining such evidence.

- Failure to conciliate:
  - The undisputed evidence shows that the DFEH did not endeavor to conciliate with Defendants.
  - The DFEH asserts that its findings were outlined in a cause letter. However, the only information DFEH disclosed in the letter was that the agency intended to file a lawsuit. Moreover, the letter says nothing about what Defendants had done wrong, which employees were affected, or what the DFEH proposed Defendants do to fix it.
  - DFEH also points to a second letter it wrote in response to Defendants' request for information about the agency's findings. However, that letter does not disclose those findings or whether they were related to any particular employer, alleged unlawful practice, or group of employees or applicants.
- Failure to mediate:
  - Separate from the conciliation requirement, the FEHA also requires the parties to engage in mandatory mediation to resolve the dispute to avoid litigation.
  - The DFEH cannot argue that it attempted to mediate with Defendants on July 1, July 2, July 16, and July 20, 2021, because the "undisputed evidence" shows that the DFEH knew that three of those dates were unworkable for Defendants and that the parties could not meaningfully mediate on the remaining date.
- The DFEH cannot cure its jurisdictional defects through post-suit

mediation and offers no legal authority to support that argument.

D. Request for Judicial Notice

The court grants Defendants' unopposed request for judicial notice, filed May 6, 2022, as to all requests. (Evid. Code, § 452, subds. (c),(d), and (h).)

E. Evidentiary Objections

1. Court's Rulings on the Objections

The court rules on the DFEH's objections (filed July 7, 2022) to Defendants' evidence (filed May 6, 2022) as follows:

a. Objections to the Declaration of Elena Baca and Exhibits Thereto

Regarding the Baca Declaration, the court overrules Objections Nos. 1-3, 4-12, 15, 16, 18-21, 22, 24, 26-31, 33, 34-36, 42 (second sentence) 43, 45-46, 47, 48-55. (Defendants Appendix of Evidence, filed May 6, 2022 ("DAE"), Exhibit A – Declaration of Elena Baca ("Baca Decl.").

The court sustains Objections Nos. 37 and 38 on hearsay grounds.

The court sustains Objection No. 39 on relevance grounds. Because the court has sustained the DFEH's objection to the contents of the email on hearsay grounds, it follows that the exhibit showing a copy of the email is not relevant. (See DAE, Baca Decl., Exh. 13.) The court sustains Objection Nos. 61 and 62 on relevance grounds.

The court sustains Objection Nos. 13, 14, 17, 20, 23, 25, 32, 35, 40, 41, 42 (first sentence), 44, 56, 57, 58, 59, 60 on foundation and secondary evidence rule grounds.[2] (Evid. Code, § 1521, subd. (b) ["Nothing in this section makes admissible oral testimony to prove the content of a writing if the testimony is inadmissible under Section 1523 (oral testimony of the content of a writing)."]; Evid. Code, § 1523, subd. (a) ["Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a

---

2 Evidence Code sections 1520, 1521, 1522, and 1523 "replace the Best Evidence Rule and its exceptions." (Evid. Code, § 1521 Comments.)

writing."]; see *Copenbarger v. Morris Cerullo World Evangelism, Inc.* (2018) 29 Cal.App.5th 1, 14 ["Here, the invoices for attorney fees were not lost or destroyed. Lloyd Copenbarger testified he had the invoices, and his attorneys would have copies of them too, but he chose not to bring the invoices with him to trial. Thus, under Evidence Code section 1523, Lloyd Copenbarger's testimony was inadmissible to prove the content of the invoices."]; *Dart Industries, Inc. v. Commercial Union Insurance Co.* (2002) 28 Cal.4th 1059, 1068 ["These statutes are codifications of the venerable common law rule that lost documents may be proved by secondary evidence."]; see generally *Simons California Evidence Manual* (2022 Ed.) § 8:21, p. 661 ["Section 1523(a), does not bar the admissibility of oral testimony concerning the contents of a writing if the proponent does not have possession or control of the original or a copy of the writing and neither the writing nor a copy was reasonably procurable by the proponent by use of the court's process or by other available means."].) Here, there is no suggestion that any documents were unavailable.

b. Objections to the Declaration of Rosa Viramontes

Defendants' attaches the Declaration of District Director Rosa Viramontes that the EEOC filed in Support of Opposition to the DFEH's Motion to Intervene in the United States District Court Case *U.S. Equal Employment Opportunity Commission v. Activision Blizzard, Inc., Blizzard Entertainment, Inc.*, Case No.: 2:21-CV-07682-DSF-JEM. The Viramontes Declaration, however, was not signed under penalty of perjury. (See DAE, Baca Decl., Exhibit 12 – Declaration of District Director Rosa Viramontes, p. 11 [providing the last page of the declaration but only a signature is provided but not under oath]; RJN, p. 355–last page of the Declaration of Rosa Viramontes.) Therefore, the declaration is not evidence and is excluded, along with its attachments, from this motion. (See Code Civ. Proc., § 2015.5 ["in writing of such person which recites that it is certified or declared by him or her to be true under penalty of perjury"].) Accordingly, the court declines to consider the Viramontes declaration and its attachments as evidence.

Even if the Viramontes Declaration had been properly signed under oath, the court points out that the court could not rely on the truth of the matters asserted in the declaration. The general rule is that "while courts are free to take judicial notice of the existence of each document in a court file, including the truth of results reached, they may not take judicial notice of the truth of hearsay statements in decisions and court files." (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882 [italics removed].) Indeed, "[t]he hearsay rule applies to statements contained in judicially noticed documents, and precludes consideration of

those statements for their truth unless an independent hearsay exception exists." (*North Beverly Park Homeowners Assn. v. Bisno* (2007) 147 Cal.App.4th 762, 778.)

However, "[t]here is a hearsay exception for the use of declarations in motion practice, but that exception applies to declarations filed in support of motions in the present action, not those filed in other actions." (*North Beverly Park Homeowners Assn. v. Bisno, supra*, 147 Cal.App.4th at p. 778.) Code of Civil Procedure "[s]ection 2009 provides that '[a]n affidavit may be used . . . upon a motion.' Under section 2015.5, *declarations under penalty of perjury* may be used in lieu of affidavits. ([CCP] § 2015.5.)" (*Ibid.* [emphasis added].) "Thus, under section 2009, affidavits and declarations may be used in support of a motion, even though they are hearsay. [Citation.] However, the '"motion"' referred to in section 2009 is a motion filed in the case at hand—[CCP] section 1004 provides that 'motions must be made in the court in which the action is pending.'" (*Ibid.*) "Thus, the limited hearsay exception of section 2009 for affidavits and declarations in support of a motion applies to motions filed in the present case, not those filed in support of motions in unrelated cases." (*Id.* at pp. 778-779.)

Here, the section 2009 hearsay exception would not apply to the Viramontes Declaration because the declaration was filed in a federal district court, not in this court. Accordingly, even if the declaration was signed under penalty of perjury, the declaration is inadmissible hearsay.[3]

F. Objections to the Declaration of Richard T. Johnson and Exhibits Thereto

The court overrules Objections Nos. 74-76.

IV. Discussion

A. Legal Standard for Motion for Summary Adjudication

The purpose of a motion for summary judgment or summary adjudication "is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) "Code of Civil Procedure section

---

[3] Given these rulings, the court does not reach DFEH Objection Nos. 63-73.

437c, subdivision (c), requires the trial judge to grant summary judgment if all the evidence submitted, and 'all inferences reasonably deducible from the evidence' and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal.App.4th 1110, 1119.)

"On a motion for summary judgment, the initial burden is always on the moving party to make a prima facie showing that there are no triable issues of material fact." (*Scalf v. D.B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1519.) A defendant or cross-defendant moving for summary judgment or summary adjudication "has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to the cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) "Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(2).) "If the plaintiff cannot do so, summary judgment should be granted." (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 467.)

A defendant moving for summary adjudication ""bears the burden of showing the court that the plaintiff "has not established, and cannot reasonably expect to establish,'" the elements of his or her cause of action."" (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 705; accord, *Mattei v. Corporate Management Solutions, Inc.* (2020) 52 Cal.App.5th 116, 122.) When a defendant moves for summary adjudication on a cause of action for which the plaintiff has the burden of proof at trial, the defendant "must present evidence that either 'conclusively negate[s] an element of the plaintiff's cause of action' or 'show[s] that the plaintiff does not possess, and cannot reasonably obtain,' evidence necessary to establish at least one element of the cause of action. [Citation.] Only after the defendant carries that initial burden does the burden shift to the plaintiff 'to show that a triable issue of one or more material facts exists as to the cause of action . . .'" (*Luebke v. Automobile Club of Southern California* (2020) 59 Cal.App.5th 694, 702-703; accord, *Mattei*, at p. 122; see Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at pp. 853-854.)

In *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th 826, the California Supreme Court held: "Summary judgment law in this state, however, continues to require a defendant moving for summary judgment to

present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. In this particular at least, it still diverges from federal law. For the defendant *must* 'support[ ]' the 'motion' with evidence including 'affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice' must or may 'be taken.' (Code Civ. Proc., § 437c, subd. (b).) The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence—as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing. But, as *Fairbank v. Wunderman Cato Johnson* (9th Cir. 2000) 212 F.3d 528 concludes, the defendant *must* indeed present 'evidence': Whereas, under federal law, 'pointing out through argument' (*id.* at p. 532) may be sufficient (see generally *Schwarzer*, et al., Cal. Practice Guide: Federal Civil Procedure Before Trial (The Rutter Group 2001) ¶¶ 14:137 to 14:137.6, pp. 14-32 to 14-33 [setting out the 'disagree[ment]' of the '[c]ourts' on the issue]), under state law, it is not." (*Id.* at pp. 854-855, footnotes omitted.)[4]

"When deciding whether to grant summary judgment, the court must consider all of the evidence set forth in the papers (except evidence to which the court has sustained an objection), as well as all reasonable inferences that may be drawn from that evidence, in the light most favorable to the party opposing summary judgment." (*Id.* at p. 467; Code Civ. Proc., § 437c, subd. (c); see generally *Sharufa v. Festival Fun Parks, LLC* (2020) 49 Cal.App.5th 493, 497 [to determine whether a defendant is entitled to summary judgment, "we review the entire record and ask whether a reasonable trier of fact could find in plaintiff's favor"]; *McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 299 ["All reasonable inferences

---

4 (Cf. *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 592-593 ["Applying the foregoing to the present case, we conclude defendant is entitled to summary judgment. Defendant's separate statement cites facts which prove that the repossession of the scanner took place in accord with the terms of the lending documents; plaintiff's interrogatory responses demonstrate they have no evidence defendant made any fraudulent representations; plaintiffs' interrogatory responses indicate they have no evidence defendant was a member of a fraudulent conspiracy; and plaintiffs admitted defendant had done nothing wrong in connection with the actual lending of the money and repossession of the scanner. This was sufficient to shift the burden of proof to plaintiffs pursuant to section 437c, subdivision (o)(2)."].)

must be drawn in favor of the plaintiff and conflicting evidence is to be disregarded."]; *Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1474 ["if any evidence or inference therefrom shows or implies the existence of the required element(s) of a cause of action, the court must deny a defendant's motion for summary judgment . . . because a reasonable trier of fact could find for the plaintiff"].)

B. DFEH's Pre-Suit Obligations Under the FEHA

The DFEH is a state agency that derives its enforcement authority from the FEHA, Government Code section 12900 et seq., including the powers to "receive, investigate, conciliate, mediate, and prosecute complaints alleging practices made unlawful" under the Act. (Gov. Code, § 12930, subd. (f)(1).) "Any person claiming to be aggrieved by an alleged unlawful practice may file with the department [DFEH] a verified complaint, in writing, that shall . . . [among other things] set forth the particulars thereof and contain other information as may be required by the [DFEH]." (Gov. Code, § 12960, subd. (c).)

"If an unlawful practice alleged in a verified complaint adversely affects, in a similar manner, a group or class of persons of which the aggrieved person filing the complaint is a member, or if the unlawful practice raises questions of law or fact which are common to such a group or class, the aggrieved person *or the director* may file the complaint on behalf and as representative of such a group or class." (Gov. Code, § 12961, subd. (a) [emphasis added].) "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.' Cal. Gov't. Code § 12920. '[S]ince 1959 the DFEH has been actively investigating, prosecuting and conciliating' complaints of discrimination falling within those areas under its jurisdiction. *State Pers. Bd. v. Fair Employment & Hous. Com.*, 39 Cal.3d 422, 431, 217 Cal.Rptr. 16, 703 P.2d 354 (1985). FEHA, the California statute that created DFEH, 'was meant to supplement, not supplant or be supplanted by, existing antidiscrimination remedies, in order to give [Californians] the maximum opportunity to vindicate their civil rights against discrimination.' " (*Department of Fair Employment and Housing v. Law School Admission Council, Inc.* (N.D. Cal. 2013) 941 F.Supp.2d 1159, 1167.)

In *Department of Fair Employment and Housing v. Law School Admission Council, Inc., supra,* 941 F.Supp.2d 1159, the court further held:

"The California Supreme Court has recognized that 'DFEH is a public prosecutor testing a public right,' when it pursues civil litigation to enforce statutes within its jurisdiction." (*Id.* at pp. 1167-1168.) The court continued: "Like Title VII, FEHA empowers DFEH to 'prevent any person from engaging in any unlawful practice as set forth in the [statute],' *id.* at 323, 100 S.Ct. 1698, and 'specifically authorizes [DFEH] to bring a civil action,' *id.* at 324, 100 S.Ct. 1698, in the role of a 'public prosecutor testing a public right,' *State Pers. Bd. v. Fair Employment & Hous. Com.*, 39 Cal.3d at 444, 217 Cal.Rptr. 16, 703 P.2d 354. In bringing enforcement actions, DFEH acts 'not merely [as] a proxy for the victims of discrimination,' but also 'to vindicate the public interest in preventing [certain forms of] discrimination.' " (941 F.Supp.2d at p. 1169.)[5]

Here, the DFEH filed this enforcement action allegedly seeking to remedy, prevent, and deter unlawful discriminatory practices and other violations that Defendants engaged in against their aggrieved female employees, contingent workers, and temporary workers. (FAC, ¶ 28.) Defendants move for summary adjudication, arguing that the DFEH cannot maintain or bring this action because the agency failed to satisfy three pre-suit obligations under the FEHA before filing this action; investigate, conciliate, and mediate.

C. Investigation of Alleged Unlawful Practices

Under the FEHA, "[a]fter the filing of any complaint alleging facts sufficient to constitute a violation of any of the provisions of [the FEHA]," the DFEH is required to "make *prompt investigation* in connection therewith."

---

5 In *Department of Fair Employment and Housing v. Cisco Systems, Inc., supra,* ___ Cal.App.5th ___ [2022 WL 3136003], the court held: "[T]he Legislature amended FEHA to clarify the Department's role in pursuing litigation on behalf of the public. (See Assem. Bill No. 2662, effective June 21, 2022, adding Gov. Code, § 12930, subd. (o) ['By performing the functions and duties and exercising the powers set forth in this part, the department represents the interests of the state and effectuates the declared public policy of the state to protect and safeguard the rights and opportunities of all persons from unlawful discrimination and other violations of this part. This subdivision is declarative of existing law as stated in *Department of Fair Employment and Housing v. Cathy's Creations, Inc.* (2020) 54 Cal.App.5th 404, 410, 269 Cal.Rptr.3d 1.']; and amending § 12965, subd. (a) and § 12981, subd. (a) to add language indicating that when the Department brings a civil action it is 'acting in the public interest.')." (*Id.* at *5, footnote 1.)

(Gov. Code, § 12963 [emphasis added].)

Defendants argue that the DFEH failed to complete its investigation because it did not obtain the substantial amounts of evidence that it had deemed necessary before announcing that it had completed its investigation. They present their counsel's declaration as evidence. Defendants do not argue that the DFEH failed to investigate, only that the DFEH's investigation "stopped short." However, in support of their motion, Defendants fail to set forth the extent of the DFEH's investigation. After stating that DFEH filed the "Director's Complaint" in October 2018, Defendants argue: "For more than two years, Activision Blizzard cooperated with both investigations, which were proceeding in seemingly routine fashion." Defendants then describe a May 2020 "tolling agreement extending the original deadline . . . allowing DFEH until July 7, 2021" to file an action against Defendants. Defendants, however, do not set forth what occurred during those "more than two years." In their factual summary, Defendants' discussion of the DFEH's investigation focuses on events in May to June 2021 to make their point that "DFEH did not complete its investigation . . . ."[6]

It is well-established that a party moving for summary judgment or summary adjudication must set forth all admissible relevant evidence on the issues to be decided. When discharging its initial burden on summary adjudication, the moving party cannot cherry pick what evidence it presents on the issue in question. (See *Rio Linda Unified School District v. Superior Court* (1997) 52 Cal.App.4th 732, 740 ["If a party contends some particular issue of fact has no support in the record, it must set forth *all* the material evidence on the point and not merely the evidence favorable to it."]; Weil & Brown et al., *Cal. Prac. Guide: Civ. Pro. Before Trial* (The Rutter Group 2022), ¶10:245.16 ["the moving party must set forth *all* material evidence on point, not just the evidence favorable to it."]; see also *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 855, fn. 23 ["Language in certain decisions purportedly allowing a defendant moving for summary judgment

---

[6] In her declaration, Defendants' counsel does state: "In addition to written discovery, DFEH previously served a notice of PMK depositions on February 19, 2020, seeking depositions on ten different topics and 52 sub-topics. In the ensuing months, Activision Blizzard produced seven witnesses for deposition and sought to meet and confer with DFEH as to the remainder—six of which were still pending when DFEH indicated it had closed its investigation in June 2021." (Baca Decl., ¶ 12.) There is no other discussion or evidence about the substance of the DFEH's investigation prior to 2021.

simply to 'point[ ]' out 'an absence of evidence to support' an element of the plaintiff's cause of action (e.g., *Hunter v. Pacific Mechanical Corp., supra,* 37 Cal.App.4th at p. 1288, 44 Cal.Rptr.2d 335, italics in original) does not reflect summary judgment law as it has ever stood, and is accordingly disapproved."].) Defendants did not set forth all admissible evidence regarding the DFEH's "more than" two-year investigation. Therefore, because Defendants did not set forth all the DFEH did to investigate the charges against Defendants, Defendants did not carry their initial burden on this motion. For this reason alone, Defendants' motion is denied as to the DFEH's investigation.

Overlooking this defect in Defendants' motion and proceeding to evaluate the evidence that Defendants did submit, Defendants' counsel submits a declaration to which the court has sustained certain of the DFEH's evidentiary objections. The court has sustained objections to the references to the DFEH June 15, 2021 letter (DAE, Baca Decl., ¶ 39) and Defendants' June 23, 2021 letter (DAE, Baca Decl., ¶ 42), and paragraph 42 of the Baca Declaration. (Evid. Code §§ 1521, 1523; see DFEH Objection Nos. 40, 41, 42.) (See *Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 945 ["And section 437c has always required the evidence relied on in supporting or opposing papers to be *admissible*."].) Nonetheless, the court describes Defendants' argument.[7]

On June 24, 2022, the DFEH closed its investigation and issued a Notice of Cause Finding and Mandatory Dispute Resolution ("Notice of Cause Letter") letter stating that the DFEH had reason to file a civil complaint against Defendants in a Superior Court. (DAE, Baca Decl., ¶ 43; Exhibit 15 – a copy of the Notice of Cause Letter, p. 2, first paragraph ["The Department of Fair Employment and Housing (hereinafter 'DFEH') has completed its investigation of the above referenced complaint. Based on the evidence DFEH has collected during its investigation, DFEH has reason to file a civil complaint in superior court against Blizzard Entertainment, Inc., Activision

---

[7] The Baca Declaration attaches much correspondence with the DFEH, but fails to place these key written communications in evidence. (See DAE, Baca Decl., ¶¶ 39, 42.) As stated, the court has sustained DFEH's objections to paragraphs 39 and 42 in the Baca Declaration, among other paragraphs. Although Defendants' counsel quotes from her June 28, 2021 letter to the DFEH, counsel does not attach her June 28, 2021 letter. (See DAE, Baca Decl., ¶ 46.) Nor does Defendants' counsel attach or even mention the DFEH's June 29, 2021 letter sent in response to the June 28 letter. (See Lawson Decl., Exh. 2.)

Blizzard, Inc., and Activision Publishing, Inc."].)

Defendants argue that because the DFEH did not obtain the evidence that it had deemed necessary for its investigation before announcing that it had completed the investigation, the DFEH failed to satisfy its investigation requirement. It is true that "[w]hen a complaint has been filed with the DFEH alleging facts sufficient to state a violation of [e.g., FEHA], the DFEH is required to 'make prompt investigation' (§ 12963), and *to gather all relevant evidence necessary* to determine whether an unlawful practice has occurred (Cal. Code Regs., tit. 2, § 10026, subd. (d))." (*Department of Fair Employment and Housing v. Superior Court of Kern County* (2020) 54 Cal.App.5th 356, 372 [emphasis added].) Therefore, to the extent that the DFEH failed to gather all relevant evidence it stated was necessary to determine the validity of its administrative complaint, such failure could imply that the agency failed to investigate the alleged unlawful conduct thoroughly.

However, just because the DFEH initially stated that it needed certain evidence, the conclusion does not follow that the evidence was in fact necessary. The agency could have determined later that evidence was not required. Significantly, as stated, Defendants have not submitted the alleged June 15, 2021 letter from DFEH to Defendants or the June 23, 2021 letter from Defendants' counsel to the DFEH. (See DAE, Baca Decl., ¶¶ 39, 42.) Therefore, given the absence of these letters and the objections sustained to the Baca Declaration, there is no evidence that as late as June 23, 2021, the day before the DFEH announced it had completed its investigation, the DFEH was still seeking the production of documents. Again, there is an incomplete record in support of this motion. Defendants' motion fails for this additional reason.

In any event, the court further finds that the Defendants have failed to meet their initial burden of establishing that the DFEH did not "investigate" within the meaning of the FEHA for the following additional reasons.

First, "[w]hen the Department receives a verified complaint, it is empowered to conduct an investigation of the allegations contained in the complaint. (§§ 12980, subd. (c) & 12963.) Investigation *may* include compelling testimony and production of documents. (§§ 12963.1 & 12963.3.) These administrative investigations are similar to grand jury proceedings, and can therefore be initiated '"'"merely on suspicion that the law is being violated, or even just because it [the department] wants assurance that it [the law] is not [being violated].'"'" [Citations.]" (*Department of Fair*

Employment and Housing v. Superior Court (2002) 99 Cal.App.4th 896, 901 [emphasis added]; see also Cal. Code Regs., tit. 2, § 10026 [emphasis added] ["During the course of its investigation the department may, *but is not required*, to issue and serve investigative subpoenas, written interrogatories, and requests for production of books, records and documents"]; Gov. Code, §§ 12963.1 [subpoenas], 12963.2 [interrogatories], 12963.3 [depositions], 12963.4 [request for production of documents].)

Here, Defendants' evidence establishes that the DFEH served subpoenas and requests for the production of documents. (DAE, Baca Decl., ¶¶ 10, 11 [stating that DFEH served at least 52 requests for production of documents; Exhibit 7 ["Subpoena (Gov. Code, § 12963.1)"], pp. 1-2 [stating that Defendants were not required to appear in person if Defendants produced the records described in the subpoena].) *"In addition to written discovery, DFEH . . . served a notice of PMK depositions* on February 19, 2020, seeking depositions on ten different topics and 52 sub-topics. In the ensuing months, Defendants *produced seven witnesses for depositions* and sought to meet and confer with DFEH as to the remainder – six of which were still pending when the DFEH indicated it had closed its investigation in June 2021." (Baca Decl., ¶ 12 [emphasis added]; see footnote 4, *supra*.) Therefore, the DFEH "investigated" the dispute by compelling testimony and production of documents.

Second, to the extent that Plaintiff argues that the DFEH did not investigate the dispute *sufficiently* or *completely*, the nature and scope of the investigation are within the agency's discretion. (See generally *Sterling Jewelers, supra,* 801 F.3d at p. 101 ["The sole question for judicial review is whether the EEOC conducted an investigation. As the district and magistrate judges in this case recognized, courts may not review the *sufficiency* of an investigation—only whether an investigation occurred."]; *E.E.O.C. v. CRST Van Expedited, Inc.* (8th Cir. 2012) 679 F.3d 657, 674 ["as a general rule, 'the nature and extent of an EEOC investigation into a discrimination claim is a matter within the discretion of that agency' "]; *Martin v. E.E.O.C.* (D.D.C. 2014) 19 F. Supp. 3d 291, 303 ["Title VII does not provide—and the Court is not aware of—any specific parameters for how the EEOC must conduct an investigation"].)

Indeed, in rejecting an argument based on a failure "to make a 'genuine' investigation," the court in *Mahdavi v. Fair Employment Practice Com.* (1977) 67 Cal.App.3d 326 ("*Mahdavi*") held: "The nature and scope of an employment discrimination investigation lies with the discretion of the FEPC." (*Id.* at p. 338, footnote omitted.) In *Mahdavi*, the appellant did "not

contend that the [Fair Employment Practice Commission ("FEPC")] refused to investigate, but rather that it failed to make a 'genuine' investigation." (*Id.* at p. 337.) The appellant argued, "that the FEPC investigation, . . . [was] inadequate in light of extensive discovery powers granted to the commission under Labor Code section 1419, subdivision (g)." (*Ibid.*) The (now repealed) statute provided that the FEPC had the power to "'hold hearings, subpoena witnesses, compel their attendance, administer oaths, examine any person under oath and, in connection therewith, to require the production of any books or papers relating to any matter under investigation or in question before the commission.'" (*Ibid.*) "Appellant therefore conclude[d] that a writ of mandate under Code of Civil Procedure section 1085 should issue to compel a genuine investigation of appellant's case." (*Ibid.*) The court disagreed because "[t]he nature and scope of an employment discrimination investigation lies within the discretion of the FEPC, and "[i]t is the general rule that mandamus does not lie to compel a public administrative agency possessing discretionary power to act in a particular manner."[8] (*Ibid.*)

Mahdavi's holding is relevant here because, although *Mahdavi* predated the FEHA, it is based on FEHA's predecessor. "The California Fair Employment Practice Act ["FEPA"], enacted in 1959 (Lab. Code, ss 1410—1433), [was] a comprehensive police power measure prohibiting discrimination in employment. The act provide[d] essentially for investigation by the [Fair Employment Practice Commission ("FEPC")] on its own motion or in response to a complaint." (*Mahdavi, supra*, 67 Cal.App.3d at p. 333.) FEPA "was . . . recodified in 1980 in conjunction with the Rumford Fair Housing Act (former Health & Saf. Code, § 35700 et seq.) to form the FEHA. (Stats.1980, ch. 992, § 4, p. 3140 et seq.)" (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 72 (*Rojo*).) The FEHA "create[d] two administrative bodies: the . . . [DFEH] (§ 12901), whose function is to investigate, conciliate, and seek redress of claimed discrimination (§ 12930), and the Fair Employment and

---

[8] In *Mahdavi, supra,* 67 Cal.App.3d 326, Mahdavi filed a discrimination complaint against the University of California at Irvine after he was not hired for two positions he sought. The Fair Employment Practices Commission (precursor agency to DFEH) closed the case for lack of evidence of discrimination based on the recommendation of its investigator, who met with representatives of the university. Mahdavi filed a petition for writ of mandate charging the investigation was so perfunctory as to constitute an abuse of discretion. (*Id.* at pp. 331-332.) Noting that the investigation of Mahdavi's claims could have been more complete, the court nevertheless found the investigation was sufficient to support the decision to close the case. (*Id.* at p. 338.)

Housing Commission [FEHC] (§ 12903), which performs adjudicatory and rulemaking functions (§ 12935)." (*Rojo*, *supra*, 52 Cal.3d at p. 72.) Under FEPA, the Fair Employment Practice Commission ("FEPC") was the predecessor to the FEHC. (*Kelly v. Methodist Hospital of Southern Cal.* (2000) 22 Cal.4th 1108, 1113; Stats.2012, c. 46 (S.B.1038), in subd. (b) [substituting "Fair Employment and Housing Council" for "Fair Employment and Housing Commission"].)

In 2013, California Senate Bill 1038 eliminated the FEHC and transferred its duties to the DEFH. (2012 Cal. Legis. Serv. Ch. 46 (S.B. 1038) (WEST) ["This bill would eliminate the Fair Employment and Housing Commission and would transfer the duties of the commission to the Department of Fair Employment and Housing. The bill would create within the department a Fair Employment and Housing Council that would succeed to the powers and duties of the former commission"]; *Rubio v. CIA Wheel Group* (2021) 63 Cal.App.5th 82, 96 ["In 2013, the California Legislature eliminated the Fair Employment and Housing Commission . . ."].)

When FEPA was recodified, the powers that were enumerated in the now repealed Labor Code section 1419, subdivision (g) (see *Mahdavi* discussion above) were recodified in Government Code section 12930, subdivision (g). (Gov. Code, § 12930 ["In connection with any matter under investigation or in question before the department pursuant to a complaint filed under Section 12960, 12961, or 12980: ¶ (1) To issue subpoenas . . . . ¶ (2) To administer oaths, examine witnesses under oath and take evidence, and take depositions and affidavits. ¶ (3) To issue written interrogatories. ¶ (4) To request the production for inspection and copying of books, records, documents, and physical materials"].)

Therefore, because the same powers that the FEPC had under FEPA are the same powers that the DFEH has under the FEHA, the court's holding in *Mahdavi* applies in this instance, and the court finds that the nature and scope of DFEH's investigation lied within the discretion of the agency. Therefore, if the DFEH found that it had completed its investigation before obtaining discovery it may have previously thought necessary, the agency satisfied any investigation obligation under the FEHA.

As stated, in any event, there is no legal support for the court to dismiss the causes of action in question. The cases on which Defendants rely are inapposite. For example, Defendants' principal citation, *Rojo, supra,* 52 Cal.3d 65, although not described in Defendants' memorandum as an individual-employee-plaintiff case, involved an individual employee's well

known requirement to obtain a right-to-sue letter under section 12965, subdivision (b) before filing a lawsuit. In *Rojo*, the California Supreme Court held: "[A]lthough an employee must exhaust the FEHA administrative remedy before bringing suit on a cause of action under the act or seeking the relief provided therein, exhaustion is not required before filing a civil action for damages alleging nonstatutory causes of action." (*Id.* at p. 88, footnote omitted.) Government Code section 12965, subdivision (c)(1)(C), provides: "The [right-to-sue] notices specified in subparagraphs (A) and (B) shall indicate that the person claiming to be aggrieved may bring a civil action under this part against the person, employer, labor organization, or employment agency named in the verified complaint within one year from the date of that notice." *Rojo* does not support Defendants here because the DFEH is the plaintiff.[9]

Under these circumstances, the court finds that Defendants have failed to meet their initial burden of establishing that the challenged causes of action in the FAC have no merit because they failed to show that the DFEH

---

[9] Similarly, Defendants' other citations regarding "require[ed] pre-filing exhaustion of administrative remedies" involved individual employees. (See *Willis v. Superior Court* (2011) 195 Cal.App.4th 143, 153 ["Before filing a civil action alleging FEHA violations, an employee must exhaust his or her administrative remedies with DFEH. Specifically, the employee must file an administrative complaint with DFEH identifying the conduct alleged to violate FEHA. At the conclusion of the administrative process, which may or may not include an investigation or administrative remedies, DFEH generally issues the employee a right-to-sue notice."]; *Cole v. Antelope Valley Union High School Dist.* (1996) 47 Cal.App.4th 1505, 1511 ["We conclude plaintiff is barred from suing those individual defendants for failure to name them in the DFEH charge."]; *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1729-1730 ["If Martin wished to avail herself of state judicial remedies for her additional claims, it was essential that she undertake by reasonable means to make the additional claims known to the DFEH. In our view she did not do so, and therefore she did not exhaust her state administrative remedies."]; *Foroudi v. Aerospace Corp.* (2020) 57 Cal.App.5th 992, 1002-1003 ["'Exhaustion of these procedures is mandatory; an employee may not proceed in court with a FEHA claim without first obtaining a right-to-sue letter.'"]; see generally *Kim v. Konad USA Distributions Inc.* (2014) 226 Cal.App.4th 1336, 1345 ["Moreover, it is 'plaintiff's burden to plead and prove timely exhaustion of administrative remedies, such as filing a sufficient complaint with [DFEH] and obtaining a right-to-sue letter.'"].)

did not investigate the claims. (Code Civ. Proc., § 437c, subd. (p)(2).) Therefore, the burden does not shift to the DFEH to show one or more material facts in dispute as to those causes of action. (Code Civ. Proc., § 437c, subd. (p)(2).)

Accordingly, the court denies Defendants' motion for summary adjudication on the ground that the DFEH failed to satisfy its investigation requirement under the FEHA.

D. Investigation of Harassment and Retaliation Causes of Action

Defendants argue that the court should dismiss the fifth cause of action for employment discrimination because of sex – harassment and the sixth cause of action for retaliation because by agreeing that EEOC would investigate harassment and retaliation claims, the DFEH failed to satisfy its pre-suit obligation of investigating those claims.

To support that argument, Defendants rely on the matters asserted in and documents attached to the Viramontes Declaration. However, the court has excluded the Viramontes Declaration from consideration on this motion. For this reason alone, Defendants' motion as to these causes is therefore denied. Defendants did not carry their initial burden.

Notwithstanding the above, the court denies Defendants' motion for additional reasons. The court can take judicial notice of the legal effect of legally operative documents such as the Worksharing Agreement. "Where, as here, judicial notice is requested of a legally operative document—like a contract—the court may take notice not only of the fact of the document and its recording or publication, but also facts that clearly derive from its legal effect." (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 754.) "Moreover, whether the fact derives from the legal effect of a document or from a statement within the document, the fact may be judicially noticed where, as here, the fact is not reasonably subject to dispute." (*Ibid.*)

According to the Worksharing Agreement, the DFEH and EEOC agreed:

> In order to facilitate the assertion of employment rights, the EEOC and the FEPA [the document referred to the DFEH as FEPA] each designate the other as its agent for the purpose of receiving and drafting charges, including those that are not jurisdictional with the agency that initially receives the charges. The EEOC's receipt of charges on the FEPA's behalf will

> automatically initiate the proceedings of both the EEOC and the FEPA for the purposes of Section 706 (c) and (e) (1) of Title VII. This delegation of authority to receive charges does not include the right of one Agency to determine the jurisdiction of the other Agency over a charge. Charges can be transferred from one agency to another in accordance with the terms of this agreement or by other mutual agreement.

(RJN, Exhibit 13 – FY 2019 EEOC/FEPA Model Worksharing Agreement, p. 2, Section II.A [emphasis added].)

> Both the FEPA and the EEOC shall make available for inspection and copying to appropriate officials from the other Agency any information that may assist each Agency in carrying out its responsibilities. Such information shall include, but not necessarily be limited to, investigative files, conciliation agreements, staffing information, case management printouts, charge processing documentation, and any other material and data as may be related to the processing of dual-filed charges or administration of the contract. The Agency accepting information agrees to comply with any confidentiality requirement imposed on the agency providing the information. With respect to all information obtained from the EEOC, the FEPA agrees to observe the confidentiality provisions of Title VII, the ADEA, the ADA and GINA.

(RJN, Exhibit 13 – FY 2019 EEOC/FEPA Model Worksharing Agreement, p. 5, Section IV.A [emphasis added].)

Therefore, pursuant to the Worksharing Agreement, the EEOC and DFEH agreed (1) to designate each other as agents of each other for the purposes of receiving and drafting charges, (2) that the delegation of authority did not include the right of one agency to determine the jurisdiction of the other over a charge, but (3) each agency shall make available for inspection and copying to the other agency information that may assist the other agency in carrying out its responsibilities, including investigative files.

To the extent that Defendants argue that under the Worksharing Agreement, the DFEH ceded its authority to the EEOC to investigate the harassment and retaliation claims, the argument is negated based on the terms of the Worksharing Agreement. For this further reason, Defendants have not carried their initial burden on summary adjudication.

In addition, as stated, the nature and scope of DFEH's investigation of a complaint are within the agency's discretion. Here, just because the DFEH issued its Notice of Cause letter a day after the EEOC completed its investigation (DAE, Baca Decl., ¶ 43), it does not follow that the DFEH failed to investigate these charges. To discharge their initial burden on this motion, Defendants have not established that the DFEH did not investigate the harassment and retaliation claims. The Baca Declaration is silent on this point. Defendants' evidence supports the reasonable inference that the DFEH did conduct such an investigation. For example, the DFEH on February 8, 2021 confirmed Defendants' counsel "asked if DFEH had identified issues related to pay, discrimination, harassment and which units/teams are affected by those issues." (DAE, Baca Decl., Exh. 6, p.1.) The DFEH's second amended complaint alleged that Defendants "have failed to take all reasonable steps necessary to prevent discrimination and harassment from occurring." (DAE, Baca Decl., Exh. 4., ¶ 4.)

Further, under the Worksharing Agreement, it is plausible that the DFEH obtained information from the EEOC to investigate the harassment and retaliation claims.[10] Indeed, "when Title VII and FEHA claims overlap, under [a] worksharing agreement, the EEOC and DFEH are each the agent of the other for purposes of receiving charges, and thus a filing with one agency is considered to be constructively filed with the other. See, e.g., *EEOC v. Dinuba Med. Clinic, 222 F.3d 580, 585* (9th Cir.2000) ('Constructive filing is made possible by "worksharing agreements," which designate the EEOC and the state agency each other's agents for the purpose of receiving charges.'); *Paige v. State of Cal.*, 102 F.3d 1035, 1041 (9th Cir.1996) ('[T]he filing of a charge with one agency is deemed to be a filing with both.')" (*Dornell v. City of San Mateo* (N.D. Cal. 2013) 19 F.Supp.3d 900, 905.) Therefore, to the extent that any harassment or retaliation claims complaints were filed with the EEOC, such charges also may be deemed filed with the DFEH.

The court finds that Defendants have failed to meet their initial burden of establishing that the fifth cause of action for employment discrimination because of sex – harassment and sixth cause of action for retaliation in the

---

10 The discussion here regards Defendants' initial burden on summary adjudication. As stated, Defendants' burden is to conclusively negate an element of a cause of action. The analysis never progresses to what the DFEH has placed in evidence given Defendants' failure to carry their initial burden.

FAC have no merit because the DFEH allegedly "disavowed" those causes of action. (Code Civ. Proc., § 437c, subd. (p)(2).) Therefore, the burden does not shift to the DFEH to show one or more material facts in dispute as to those causes of action. (Code Civ. Proc., § 437c, subd. (p)(2).)

Accordingly, the court denies Defendants' motion for summary adjudication as to the fifth cause of action for employment discrimination because of sex – harassment and sixth cause of action for retaliation.

E. Conference, Conciliation, and Persuasion

"If the department determines after investigation that the complaint is valid, the department shall immediately endeavor to eliminate the unlawful employment practice complained of by conference, conciliation, and persuasion." (Gov. Code, § 12963.7, subd. (a).) The statute does not provide what kind of "conference, conciliation, and persuasion" must occur or what must be communicated to the target employer in connection with these matters. The statute also does not provide for a forfeiture of DFEH's right to pursue an action in court. To the contrary, as stated, section 12965 gives DFEH "discretion" to "bring a civil action" without conciliation or mediation "if circumstances warrant."

Defendants contend that the DFEH failed to conciliate. Without supporting California authority, Plaintiffs argue that California courts often look to federal cases interpreting Title VII for guidance in interpreting the FEHA. They point to *Mach Mining, supra,* 575 U.S. 480, in which they state that the United States Supreme Court held that the EEOC must try to engage the employer in some kind of discussion (whether written or oral) to allow the employer to remedy the allegedly discriminatory practice. Defendants then argue that conciliation could not begin without the DFEH notifying Defendants of the claims at issue, the basis for those claims, and the group or class affected. However, according to Defendants, the DFEH failed to provide such information when Defendants requested it and, in its June 24, 2021 Notice of Cause letter announcing that it had completed its investigation.[11]

---

[11] In *Mach Mining, supra*, 575 U.S. 480, Defendants' authority on the conciliation issue, after pointing that "a court looks only to whether the EEOC attempted to confer about a charge, and not to what happened (*i.e.*, statements made or positions taken) during those discussions," the Supreme Court held: "Should the court find in favor of the employer, the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance. See § 2000e–5(f)(1) (authorizing a stay of a Title VII

Accordingly, although there is no requirement in the statutes or regulations, Defendants conclude that by failing to inform Defendants of the specific allegations against it, the DFEH violated its duty to attempt an informal resolution of this matter. However, to the extent required, the court finds that the Defendants' evidence reveals that the DFEH gave Defendants adequate notice of the claims at issue and the group or class affected and that further information could have been obtained through the process.

Defendants' counsel states that on October 12, 2018, the DFEH issued a Director's Complaint and amended that Complaint on October 29 and December 7, 2018, to add some of the named defendants. (DAE, Baca Decl. ¶¶ 3-5; Exhs. 2, 3, and 4.) The most recent amended Director's Complaint notified the Defendants that the DFEH has obtained information that the Defendants "have discriminated in compensation or in terms, conditions or privileges of employment on the basis of sex," and if those allegations are proven, they "would constitute a violation of Government Code section 12940." (DAE, Baca Decl., Exhibit 4 – Second Amended Notice of Group or Systemic Investigation and Director's Complaint for Group/Class Relief signed December 7, 2018, ¶ 2.) "The Department further alleges that Respondents have failed to hire, select, or employ women based on their sex." (DAE, Baca Decl., Exh. 4, ¶ 3.) "The Department further alleges that Respondents have failed to take all reasonable steps necessary to prevent discrimination and harassment from occurring." (DAE, Baca Decl., Exh. 4, ¶ 4.) "These unlawful practices, if proven, adversely affect, in a similar manner, female employees and applicants for employment." (DAE, Baca Decl., Exh. 4, ¶ 5.) The administrative complaint further stated: "The DFEH's investigation shall include, but not limited to, the foregoing allegations. This investigation is ongoing and will further determine the scope and merits of these allegations." (DAE, Baca Decl., Exh. 4, ¶ 8.)

Therefore, Defendants have not shown that the DFEH failed to notify Defendants of the claims at issue and the group or class affected.

---

action for that purpose)." (575 U.S. at pp. 494-495.) Thus, under the federal statutes at issue in *Mach Mining*, in the event there is a total failure of any attempt to conciliate, the remedy is not to dismiss the agency's case with prejudice. Rather, the remedy is for the court to order the agency "to undertake . . . efforts to obtain voluntary compliance." Here, the parties mediated on June 30, 2022 and have further mediation sessions scheduled for October 11 and 13, 2022.

The United States Supreme Court held in *Mach Mining* that the EEOC "must tell the employer about the claim—essentially, what practice has harmed which person or class—and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance." (*Mach Mining*, *supra*, 575 U.S. at p. 488.) Here, it is evident that the DFEH gave Defendants what practices (e.g., failing to hire, select, or employ women based on their sex) have harmed which class (females). The DFEH gave Defendants the opportunity to discuss these matters at issue. For example, in the Notice of Cause letter, DFEH gave Defendants the option of attending an internal DFEH mediation on July 1 and 2, 2021. (DAE, Baca Decl., ¶ 45, Exh. 15.) Defendants' counsel states that she had indicated that she was out of office, including those two dates, and that DFEH should have been aware of that out-of-office message. (DAE, Baca Decl., ¶ 45.) Therefore, Defendants did not attend mediation on those dates.

On June 30, 2021, DFEH's counsel emailed Defendants' counsel proposing a further tolling agreement so that the parties could address the mediation conditions. (DAE, Baca Decl., ¶ 47, Exh. 16.) On July 1, 2021, Defendants' counsel sent DFEH's counsel an email agreeing to toll DFEH's deadline to July 21. (DAE, Baca Decl., ¶ 49.) In that email sent on July 1, Defendants' counsel told the DFEH: "We agree that extending the statute of limitations to July 21, 2021, to facilitate discussion and a resolution of the matters raised in our letter yesterday over the next two weeks, makes sense so that we can thereafter achieve our shared goal of mediating any disagreed issues." (DAE, Baca Decl., Exh. 17.) Although counsel for the parties further discussed the tolling issue (DAE, Baca Decl., ¶¶ 50-51), Defendants would not agree to DFEH's language in the proposed tolling agreement requiring that Defendants waive issue and claim preclusion arguments. (DAE, Baca Decl., ¶ 52 ["Specifically, DFEH's revisions to the tolling agreement required: 'Any conciliation, settlement, litigation, other enforcement processes or resolution related to the EEOC shall not prevent, impede, interfere or serve as a right or defense to any DFEH claim'"].) On the other hand, on July 12, 2021, DFEH refused to sign the tolling agreement "without assurance that sexual harassment claims against [Defendants] would remain available for DFEH to pursue after mediation, regardless of the result of the EEOC proceedings." (DAE, Baca Decl., Exhibit 4, ¶ 53.) Then on July 13, 2021, during a telephone conference call, the DFEH stated that it would not sign the draft tolling agreement without the inclusion of language ensuring that Defendants would not settle any claims with the EEOC before mediation on December 9, 2021. (DAE, Baca Decl., ¶ 54.)

During that telephone conference call on July 13, 2021, DFEH invited

Defendants to attend an internal mediation through DFEH's mediation program on July 15, 2021. (DAE, Baca Decl., ¶ 54.) However, despite expending much energy negotiating a tolling agreement, Defendants' counsel sent an email on July 14, 2021, stating that Defendants could not mediate the next day without knowing what the parties were supposed to be mediating. (DAE, Baca Decl., ¶ 58.)

The court finds Defendants' argument–that they did not know what they would be mediating on July 15, 2021–unpersuasive. The Directors' Complaints, the parties' counsels' discussions, discovery the DFEH propounded, and the alleged battle between the EEOC and the DFEH gave Defendants enough information to begin the mediation process. Defendants' refusal to agree to waive issue and claim preclusion arguments (during the tolling discussions) suggests they knew what claims were at issue. Moreover, any charge filed with the EEOC was deemed filed with the DFEH. (RJN, Exhibit 13 – FY 2019 EEOC/FEPA Model Worksharing Agreement, p. 2, Section II.A ["The EEOC's receipt of charges on the FEPA's behalf will automatically initiate the proceedings of both the EEOC and the FEPA for the purposes of Section 705 (c) and (e) (1) of Title VII"].) To the extent required, the DFEH expended efforts at conciliation. When counsel could not agree on an extension of the tolling agreement, the DFEH filed this action the day before the deadline in the existing tolling agreement expired. (DAE, Baca Decl., ¶ 49, Exh. 17.)

In any event, Defendants also have failed to demonstrate that conciliation is mandatory under the FEHA.

"In 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 *in the director's discretion* may bring a civil action in the name of the department, acting in the public interest, on behalf of the person claiming to be aggrieved." (Gov. Code, § 12965, subd. (a)(1) [emphasis added].) Therefore, if circumstances warrant, the DFEH director has the discretion to bring a civil action before engaging in any conference, conciliation, mediation, or persuasion.

In rejecting a failure to engage in good faith conciliation argument, the federal court in Northern California held that sections 12963.7 and 12965, subdivision (a) did not require conciliation. "LSAC's final challenge to DFEH's ability to bring the specific ADA causes of action advanced in its complaint flows from FEHA's 'conciliation' provision. Cal. Gov't Code § 12963.7 provides that where DFEH determines that a 'complaint is valid, the

department shall immediately endeavor to eliminate the unlawful . . . practice complained of by conference, conciliation, and persuasion.'" (*Department of Fair Employment and Housing v. Law School Admission Council Inc.* (N.D. Cal. 2012) 896 F.Supp.2d 849, 864.)

"LSAC's motion argues that DFEH failed engage in good faith conciliation as required by statute, and as a consequence cannot issue a written accusation without first exhausting that requirement. [Citation.] This argument is unsupported by the language of FEHA, the cases interpreting it, and the facts of this case." (*Ibid.*) "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 to issuing a written accusation. Cal. Gov't Code § 12965(a), which states that '[i]n the case of failure to eliminate an unlawful practice under this part through conference, conciliation, or persuasion, *or in advance thereof if circumstances warrant*, the director in his or her discretion may cause to be issued in the name of the department a written accusation,' also indicates that conciliation is not required in every case. [Citation.]" (*Ibid.* [italics in original].) "Further, in both *Motors Ins. Corp. v. Div. of Fair Employment Practices*, and *DFEH v. Hoag Memorial Hospital Presbyterian*, the California Court of Appeal and the Fair Employment and Housing Commission have confirmed that conciliation under FEHA is not a condition precedent to filing suit. See [*Motors Ins. Corp. v. Div. of Fair Employment Practices* (1981) 118 Cal.App.3d 209, 224] (DFEH is able 'to file an accusation within the statutorily prescribed time even if it has not obtained optimum results from its investigation or its efforts at conciliation'); *In the Matter of the Accusation of the Department of Fair Employment and Housing v. Hoag Memorial Hospital Presbyterian*, Case No. FEP82–83 K9–011 se L–3046985–10, 1985 WL 62889 at *8 (Aug. 1, 1985) ('Neither is there any jurisdictional requirement that the Department, in each instance, engage in conciliation efforts, formally or informally, before issuing an accusation.')." (896 F.Supp.2d at p. 864.) Again, here, the parties could not agree on an extension of the tolling agreement, and the DFEH filed this action.

For all these reasons, the court finds that Defendants have failed to meet their initial burden of establishing that the causes of action in the FAC have no merit because the DFEH did not endeavor to conciliate the matter before filing this action. (Code Civ. Proc., § 437c, subd. (p)(2).) Therefore, the burden does not shift to the DFEH to show one or more material facts in dispute as to those causes of action. (Code Civ. Proc., § 437c, subd. (p)(2).)

Accordingly, the court denies Defendants' motion for summary

adjudication on the ground that the DFEH failed to conciliate.

F. Mandatory Dispute Resolution Requirement

Defendants also move for summary adjudication on the ground that the DFEH failed to satisfy the FEHA's mandatory dispute resolution requirement before filing this action.

As stated, "[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 in the director's discretion may bring a civil action in the name of the department, acting in the public interest, on behalf of the person claiming to be aggrieved." (Gov. Code, § 12965.)

However, "[p]rior to filing a civil action, the department *shall 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) [emphasis added].)

As discussed above, the DFEH required the parties to participate in mandatory dispute resolution on July 15, 2021. Defendants refused because they claimed they did not know what the parties would be mediating. However, to the extent required, the court has found evidence that the Defendants knew what the dispute was about. Defendants also could have engaged in the process to gain more information. More importantly, the statutes do not give the target employer the ability to seek dismissal of the DFEH's causes of action because the employer questions the extent of DFEH's mediation efforts.

For the reasons set forth, the court finds that the Defendants have failed to establish that the challenged causes of action in the FAC have no merit because the DFEH failed to require the parties to participate in a mandatory dispute resolution before filing this action. (Code Civ. Proc., § 437c, subd. (p)(2) [emphasis added].) Therefore, the burden does not shift to the DFEH to show one or more material facts in dispute as to those causes of action. (Code Civ. Proc., § 437c, subd. (p)(2).)

Accordingly, the court denies Defendants' motion for summary adjudication on the ground that the DFEH failed to require the parties to participate in a mandatory dispute resolution.

V. Disposition

Defendants' motion for summary adjudication is denied.

IT IS SO ORDERED.

Dated: August 10, 2022

Timothy Patrick Dillon
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA COUNTY OF LOS ANGELES	Reserved for Clerk's File Stamp **FILED** Superior Court of California County of Los Angeles 08/10/2022 Sherri R. Carter, Executive Officer / Clerk of Court By M. Carino Deputy
COURTHOUSE ADDRESS: Stanley Mosk Courthouse 111 North Hill Street, Los Angeles, CA 90012	
PLAINTIFF/PETITIONER: Department of Fair Employment and Housing	
DEFENDANT/RESPONDENT: Activision Blizzard, Inc. et al	
CERTIFICATE OF MAILING	CASE NUMBER: 21STCV26571

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the Order Ruling Re: Motion for Summary Adjudication (Res ID: 1242) upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Los Angeles, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Adam L. Koshkin*
One California Street, 12th Floor
San Francisco, CA 94111

Amy L. Maurer*
685 Third Avenue, 25th Floor
New York, NY 10017

Antonio Micheal Lawson*
California Department of Fair Employment
320 W. 4th Street, Suite #1000
Los Angeles, CA 90013

David H. Fry*
Munger, Tolles & Olson LLP
350 South Grand Avenue
50th Floor
Los Angeles, CA 90071-3426

Elena R. Baca*
Paul Hastings et al LLP
515 S Flower Street
Twenty-Fifth Floor
Los Angeles, CA 90071

Jahan C. Sagafi*
Outten & Golden LLP
One California Street
12th Floor
San Francisco, CA 94111

Kevin P. Muck*
Wilmer Cutler Pickering Hale & Dorr LLP
One Front Street
Suite 3500
San Francisco, CA 94111

Richard T. Johnson
560 Mission Street, 27th Floor
San Francisco, CA 94105

Sherri R. Carter, Executive Officer / Clerk of Court

Dated: 08/10/2022

By: M. Carino
Deputy Clerk

CERTIFICATE OF MAILING

SHORT TITLE: DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING vs ACTIVISION BLIZZARD, INC., et al.	CASE NUMBER: 21STCV26571

ADDITIONAL PAGE – CERTIFICATE OF MAILING