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26 **UNITED STATES DISTRICT COURT**
27 **CENTRAL DISTRICT OF CALIFORNIA**

28 U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

v.

ACTIVISION BLIZZARD INC.,
BLIZZARD ENTERTAINMENT, INC.,
ACTIVISION PUBLISHING, INC.
KING.COM, INC., and DOES ONE
through TEN, inclusive,

Defendants.

Case No. 2:21-CV-07682 DSF-JEM

**CALIFORNIA DEPARTMENT
OF FAIR EMPLOYMENT AND
HOUSING’S OBJECTIONS TO
APPROVAL OF PROPOSED
AMENDED CONSENT DECREE**

Date: February 7, 2022

Time: 1:30 pm

Dept: 7D

Judge: Hon. Dale S. Fischer

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1 **INTRODUCTION**

2 In July 2021, the California Department of Fair Employment and Housing
3 (“DFEH”) filed a state court government enforcement action to address egregious
4 unlawful conduct by Activision Blizzard (“Activision”) and its related entities
5 under California state law. In its 35-page amended complaint filed one month later,
6 DFEH outlined Activision’s culture of horrific sexual harassment and assault, as
7 well as pay and other inequities between men and women. Two months after DFEH
8 initiated its litigation, the Equal Employment Opportunity Commission’s (“EEOC”)
9 filed a sparse complaint in this Court asserting only federal Title VII claims,
10 accompanied by a proposed consent decree filed the same day, with Activision,
11 supported by no analysis or formal discovery.¹

12 DFEH sought to intervene in this federal action to protect the interests of
13 California and its workers.² From any vantage point, EEOC and Activision’s
14 announced resolution is not only unfair, inadequate, and unreasonable, it is
15 designed to undermine DFEH’s state government enforcement action, ignore the
16 protections of stronger state laws, enable Activision to escape accountability, and
17
18

19 _____
20 ¹ In contrast to DFEH’s detailed state-court complaint (and ongoing discovery
21 in an adversarial process under court-supervision), EEOC’s bare-bones complaint
22 was filed with no discovery and contains a paucity of information: no factual
23 allegations or even causes of action. Its jurisdiction section is limited to federal
24 question, and this Court is so limited. Dkt. 1; *see* Fed. R. Civ. P. 8; *Ashcroft v.*
25 *Iqbal*, 556 U.S. 662, 681 (2009). DFEH requests the Court to take judicial notice of
26 DFEH’s amended state court complaint (Sagafi Decl., Ex. A), as well as Exhibits
27 B-F and H. Fed. R. Evid. 201. Each document was either submitted to a court or
28 obtained from a government website. Accordingly, the existence of these
documents is not reasonably in dispute. *Goldstein v. Exxon Mobil Corp.*, 2019 WL
4575569, *1 (C.D. Cal. Mar. 19, 2019) (Fischer, J.).

² DFEH has appealed the Court’s denial of intervention and intends to seek a
stay of this action pending appeal. Others also objected to the proposed consent
decree. Dkt. 20.

1 abrogate principles of federalism.³ The amended decree makes that abundantly
 2 clear. Instead of respecting this Court’s statement in the ruling that the proposed
 3 consent decree “will not, and could not affect DFEH’s ongoing [state court]
 4 litigation” (Dkt. 46, p. 2), EEOC and Activision collude to do exactly that. Their
 5 proposed agreement requires Activision employees to sign a release covering
 6 “federal, state, and local law . . .” and specifically waiving “any right I may have to
 7 recover any monetary damages or other relief the DFEH may recover in the DFEH
 8 Lawsuit” speaks volumes. Dkt. 50-4, p. 2.

9 Since DFEH sought to intervene, the federal litigants have doubled down on
 10 the flaws of the original consent decree. Rather than heed this Court or properly
 11 tailor the decree to federal claims consistent with EEOC’s pleadings and litigation
 12 authority – and this Court’s subject-matter jurisdiction – EEOC and Activision only
 13 calcified the offending provisions. The amended decree now requires over 13,000
 14 claimants (who are witnesses in DFEH’s state case) across the country to complete
 15 a 17-page claim form (and share it with Activision (Dkt. 50-1 IX.B.4.i)), approve
 16 the destruction of evidence relevant to the DFEH state case, and then release *all*
 17 state law claims they might have (including claims under the California Fair
 18 Employment and Housing Act (“FEHA”) that were not – and could not be – alleged
 19 in EEOC’s complaint nor bargained for by EEOC). In return, claimants may receive
 20 as little as a few hundred dollars.

21 This is an unfair, collusive, and illegal deal. The EEOC itself has opposed
 22 similar terms – and in fact called them “antithetical to deep-rooted Commission
 23 goals.” Sagafi Decl., Ex. D (EEOC submission in *EEOC v. Grays Harbor Comm.*
 24 _____

25 ³ The U.S. Supreme Court has long recognized a legislative “intent to accord
 26 parallel or overlapping remedies against discrimination. . . . Title VII provides for
 27 consideration of employment-discrimination claims *in several forums*. . . . [T]he
 28 legislative history of Title VII manifests a congressional intent to allow an
 individual to pursue independently his rights under both Title VII and other
 applicable state and federal statutes.” *Alexander v. Gardner-Denver Co.*, 415 U.S.
 36, 47–49 (1974) (“*Alexander*”) (citations omitted, emphasis added).

1 *Hosp.*, 791 F. Supp. 2d 1004 (W.D. Wash. 2011) (“*Grays Harbor*”) at 8. There,
2 the EEOC declared that “conditioning an individual’s relief in a Commission
3 lawsuit upon the release of separate state law claims would diminish, not enhance,
4 his or her private rights... The Commission asserted only federal claims in its
5 complaint and at the bargaining table with the [Defendant]; thus, the claimants had
6 no legal advocate seeking greater relief for additional state and local claims during
7 settlement discussions. The need for a bargaining partner on state law claims is
8 particularly acute given that damages are un-capped in Washington... A private
9 attorney’s post hoc review of the settlement agreement will not cure this defect.”
10 Sagafi Decl., Ex. D, p. 8 (emphasis added). The district court agreed. *Grays*
11 *Harbor*, 791 F. Supp. 2d at 1009-10. These are exactly the terms EEOC now asks
12 this Court to bless.

13 The decree is also unlawful under this Circuit’s precedent. Decades ago, the
14 Ninth Circuit made clear that “EEOC has no power to extinguish state claims or
15 state statutory rights.” *E.E.O.C. v. Pan Am. World Airways, Inc.*, 897 F.2d 1499,
16 1507 (9th Cir. 1990) (“*Pan Am.*”). California courts agree. *Victa v. Merle Norman*
17 *Cosms., Inc.*, 19 Cal. App. 4th 454, 463 (1993) (“the inability to assert the broader
18 remedies of California law in the EEOC case derived not from limitations on the
19 courts but from limitations of the EEOC’s power.”). EEOC ignores this
20 precedent. *Horne v. Flores*, 557 U.S. 433, 449 (2009) (noting “public officials
21 sometimes consent to ... decrees that go well beyond what is required by federal
22 law” to improperly deprive state powers; such decrees exceed appropriate limits).

23 EEOC lacks standing to allege, let alone extinguish, FEHA and other state
24 claims or statutory rights, and the Court lacks subject matter jurisdiction over state
25 claims in this action. See *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019) (“*Frank*”)
26 (“A court is powerless to approve a proposed class settlement if it lacks jurisdiction
27 over the dispute, and federal courts lack jurisdiction if no named plaintiff has
28 standing.”). A consent decree like this one – designed to frustrate Congress’ intent

1 to “accord parallel or overlapping remedies against discrimination ... in several
2 forums,” *Alexander*, 415 U.S. at 47-49, as DFEH’s pending state action does – is
3 neither “fair, adequate and reasonable” nor consistent with “the public interest.”
4 Finally, the facts surrounding the settlement suggest collusion between EEOC and
5 Activision to suppress evidence in the DFEH action and secure a waiver of state
6 and federal claims for pennies on the dollar, undermining governmental
7 enforcement principles. For all these reasons, the Court should decline to approve
8 an agreement that is not only unfair, but “illegal, a product of collusion, and against
9 the public interest.” *United States v. State of Colo.*, 937 F.2d 505, 509 (10th Cir.
10 1991) (“*Colorado*”).

11 **BACKGROUND**

12 In previous filings, DFEH provided the Court with summaries of Activision’s
13 unlawful conduct, as well as background regarding DFEH’s authority and the
14 EEOC’s more limited enforcement authority. (Dkts. 24-1 – 24-15.) DFEH
15 incorporates those statements by reference.

16 **ARGUMENT**

17 **A. The Court Lacks Jurisdiction Over FEHA Claims.**

18 Federal courts have an obligation to assure themselves of litigants’
19 standing under Article III. *See Frank*, 139 S. Ct. at 1046. As the Supreme
20 Court has noted, “[t]hat obligation extends to court approval of proposed class
21 action settlements.” *Ibid.*; *see* Fed. R. Civ. P. 41(a)(1)(A). A court is
22 powerless to approve a proposed class settlement if it lacks jurisdiction over
23 the dispute, and federal courts lack jurisdiction if no named plaintiff has
24 standing. *Frank*, 139 S. Ct. at 1046; *Simon v. Eastern Ky. Welfare Rights*
25 *Organization*, 426 U.S. 26, 40, n.20 (1976). The same is true of government
26 settlements; although the EEOC is not subject to class certification
27 requirements, the Court cannot approve a proposed consent decree that
28

1 purports to release claims not before the Court. *Rufo v. Inmates of Suffolk*
2 *County Jail*, 502 U.S. 367, 378 (1992) (noting consent decrees are subject to
3 the rules generally applicable to other judgments and decrees). Here, the Court
4 lacks jurisdiction to approve the consent decree because it includes a release
5 of FEHA claims. As noted above, the consent decree conditions all claimants’
6 relief on their agreement to release claims known or unknown, including
7 claims arising under state law.

8 The consent decree conditions all claimants’ relief on their agreement to
9 release:

10 any claims . . . currently known or unknown to me, that were asserted or
11 could have been asserted . . . arising under . . . the Fair Employment and
12 Housing Act (“FEHA”), or under any other applicable federal, state, or
13 local law By signing this Release, *I waive any right I may have to*
14 *recover any monetary damages or other relief the DFEH may recover in*
15 *the DFEH Lawsuit* for sexual harassment, pregnancy discrimination or
16 related retaliation.... I hereby expressly waive and relinquish all rights
17 and benefits under that section and any law of any jurisdiction of similar
18 effect with respect to the release of any unknown or unsuspected claims I
19 may have against the Released Parties.

20 Dkt. 50-4, p. 2 (emphasis added).

21 This release seeks to circumvent the fact that EEOC lacks standing to litigate
22 the claims described in the release. *See* 42 U.S.C. § 2000e-5 (granting EEOC
23 authority over only Title VII claims brought against private employers); *EEOC v.*
24 *Federal Express Corp.*, 268 F. Supp. 2d 192, 203 (E.D.N.Y. 2003) (“[O]ur system
25 of federalism, which is not based upon a monolithic view of the public interest, but
26 rather embraces the notion that states, in the exercise of their police power, may
27 define the public interest with reference to the aspirations of their own citizenry.”);
28 *Victa v. Merle Norman Cosms., Inc.*, 19 Cal. App. 4th 454, 463 (1993) (observing

1 that the EEOC does not have standing to litigate FEHA claims). EEOC is the only
2 Plaintiff here; it has alleged no state law claims in its complaint. Dkt. 1.

3 EEOC is a creature of statute and has only the authority granted to it by
4 Congress. 42 U.S.C. § 2000e-5. And Congress has chosen not to authorize EEOC to
5 pursue state-law claims. EEOC has recognized this in its own arguments to courts,
6 and courts have agreed. *See Grays Harbor*, 791 F. Supp. 2d 1004. There, EEOC
7 *expressly rejected* a defendant’s request to release state law claims. *Id.* at 1005-06.
8 *Grays Harbor* then moved the court to facilitate an overbroad release to class
9 members, arguing it should not be exposed to separate actions. *Id.* In opposition,
10 EEOC declared that it followed “its longstanding policy that individual relief
11 cannot be conditioned upon a waiver of State law claims not asserted in the
12 Commission’s complaint.” Sagafi Decl., Ex. B. Congress has made clear that
13 EEOC “is to supplement, not replace, the private right of action.” *General Tel. Co.*
14 *v. EEOC*, 446 U.S. 318, 326 (1980) (“*General Telephone*”). Thus, EEOC argued in
15 *Grays Harbor* that “conditioning an individual’s relief in a Commission lawsuit
16 upon the release of separate state law claims would diminish, not enhance, his or
17 her private rights.” Sagafi Decl., Ex. D; *id.*, Ex. B, ¶ 5.

18 Here, EEOC and Activision have presented an amended decree that would
19 ostensibly resolve unlitigated allegations, issues, and claims raised by EEOC
20 against Defendants made in the Action, including Charge Number 480-2018-05212
21 and unlitigated claims under the Fair Employment and Housing Act (“FEHA”), or
22 under any other applicable federal, state, or local law that may exist. Dkt. 50-1.
23 These claims are outside of EEOC’s litigation authority under Title VII and outside
24 the federal question jurisdiction cited in EEOC’s complaint and the proposed
25 decree. Dkts. 1, 50-1, p. 8.

26 “A consent decree must spring from and serve to resolve a dispute within the
27 court’s subject-matter jurisdiction.” *Local Number 93, Int'l Ass'n of Firefighters v.*
28 *City of Cleveland*, 478 U.S. 501, 525 (1986). Moreover, “the consent decree must

1 ‘com[e] within the general scope of the case made in the pleadings,’ [citation], and
2 must further the objectives of the law upon which the complaint was based.” *Id.*
3 (quoting *Pacific R. Co. v. Ketchum*, 101 U.S. 289 (1880), and citing *EEOC v.*
4 *Safeway Stores, Inc.*, 611 F.2d 795, 799 (10th Cir. 1979)).

5 As previously noted, this proposed decree does not further the objectives of
6 Title VII. As the Supreme Court has ruled for decades, Congress intended Title VII
7 to “accord parallel or overlapping remedies against discrimination ... in several
8 forums... [T]he legislative history of Title VII manifests a congressional intent to
9 allow an individual to pursue *independently* his rights under *both* Title VII and
10 other applicable *state* and federal statutes. The clear inference is that Title VII was
11 designed to supplement rather than supplant, existing laws and institutions relating
12 to employment discrimination.” *Alexander*, 415 U.S. at 47–49. EEOC and
13 Activision’s decree undermines these objectives.

14 This Court should therefore reject the amended consent decree.

15 **B. The Decree Requires Participants To Release Unlitigated Claims.**

16 The amended consent decree cannot be found “fair, adequate, and
17 reasonable” because it requires a release of FEHA claims that EEOC has no
18 standing to litigate. As set forth above, EEOC’s jurisdiction is narrowly
19 circumscribed by statute. 42 U.S.C. § 2000e-5. Yet – despite the parties’ claims to
20 the contrary – the amended consent decree requires claimants to release all rights to
21 FEHA claims to recover a tiny share of Title VII damages. Dkt. 50-4 (requiring
22 release of claims not alleged in EEOC’s complaint, including FEHA claims).

23 Thus, even absent EEOC’s lack of standing, the amended consent decree’s
24 prerequisite release of FEHA claims is overbroad. A consent decree that is
25 “overreaching” is not “fair, adequate or reasonable.” *See Officers for Justice v. Civil*
26 *Service Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982). EEOC’s attempt to release
27 FEHA claims is an overreach for lack of jurisdiction, as discussed above.

28 Additionally, the release is fatally flawed because it contradicts EEOC’s own

1 regulations and is not tethered to the allegations of the complaint. EEOC’s
2 longstanding policy that relief cannot be conditioned upon a waiver of state-law
3 claims is detailed in the EEOC Settlement Standards and Procedures Manual, which
4 provides that “[i]ndividual relief in Commission actions cannot be conditioned
5 upon a waiver of legal claims other than those asserted in the Commission’s
6 complaint.” Sagafi Decl., Ex. E; see *Grays Harbor*, 791 F. Supp. 2d at 1006.

7 Here, EEOC seeks to violate that policy and force waivers of FEHA claims
8 (and other state-law claims) in exchange for participation in the Title VII
9 settlement. Activision’s proposal, to provide up to one hour of legal consultation to
10 covered individuals waiving FEHA claims, mimics the request made by Grays
11 Harbor, which sought to compel EEOC to provide advice to claimants regarding
12 their state law rights. EEOC’s response was diametrically opposite to its new
13 position here. The broader relief afforded claimants under FEHA and the lack of a
14 legal advocate for the state claims at the bargaining table during negotiations
15 renders the post-hoc one-hour consultation meaningless. See Sagafi Decl., Ex. D
16 (EEOC submission in *Grays Harbor*) (“a private attorney’s post hoc review of the
17 settlement agreement will not cure this defect.”).

18 EEOC’s proposed decree effectively extinguishes Activision employees’
19 FEHA claims, assigning an aggregate value of \$0 because EEOC cannot recover for
20 FEHA claims. Sagafi Decl., Ex. E, at pp. 9-10 (“because the Commission could not
21 have recovered on these separate claims if it prevailed at trial, the relief in a
22 Commission settlement cannot constitute consideration for a release of the
23 claims.”). Beyond EEOC’s own policy, the proposed release is contrary to Title VII
24 and binding legal precedent. See *Alexander*, 415 U.S. at 47-49. As the Supreme
25 Court noted, “legislative enactments in this area have long evinced a general intent
26 to accord parallel or overlapping remedies against discrimination.” *Id.* at 47.

27 Here, the proposed release extends far beyond the claims set forth in EEOC’s
28 complaint. It requires claimants to expressly waive FEHA and all other state or

1 local claims. Second, the release includes a general Section 1542 California Civil
 2 Code statement waiving all “Released Claims.” Additionally, the release is not
 3 tethered to any factual allegations in EEOC’s complaint.⁴ Instead, it broadly refers
 4 to “all allegations, issues, and claims raised by the EEOC against Defendants made
 5 in the Action, including Charge Number 480-2018-05212” and in the attachment,
 6 any claims of sexual harassment, pregnancy discrimination, or related retaliation,
 7 whether currently known or unknown under all laws. However, Charge Number
 8 480-2018-05212 is not limited to sexual harassment, pregnancy discrimination, or
 9 related retaliation claims alleged in EEOC’s complaint.⁵

10 The proposed decree is also impermissibly overbroad in covering
 11 Activision’s *male* employees, unlike the complaint. Dkt 1. In its Statement of
 12 Claims, the EEOC complaint refers to Charge Number 480-2018-05212, which
 13 initiated “the EEOC’s investigation into allegations regarding sex discrimination
 14 and retaliation against females, and paying females less than males.” Nowhere does
 15 EEOC refer to, or explain how, the favored sex in its investigation – male
 16 employees – became a part of the class and subject to the proposed decree’s release.

17 The release must be tied to the *factual allegations* in the complaint. *See*
 18 *Hesse v. Sprint Corp.*, 598 F.3d 581, 590-591 (9th Cir. 2010). The parties’ proposed
 19 release seeks to “capture claims that go beyond the scope of the allegations in the
 20 operative complaint, which the Ninth Circuit has held is inappropriate.” *See Willner*
 21 *v. Manpower, Inc.*, 2014 WL 4370694, at *7 (N.D. Cal. Sept. 3, 2014) (citing

22
 23
 24 ⁴ As noted above, the EEOC’s complaint is devoid of factual allegations related to
 25 Activision’s unlawful conduct. Dkt. 1.

26 ⁵ Dkt. 1. In EEOC’s complaint, it states that: “Charge Number 480-2018-05212,
 27 initiat[ed] the EEOC’s investigation into the following allegations, including but
 28 not limited to: “1. Subjecting *female* employees to sex-based discrimination,
 including harassment, based on their gender. 2. Retaliating against *female*
 employees for complaining about sex-based discrimination, based on their gender.
 3. Paying *female* employees less than male employees, based on their gender.”

1 *Hesse*, 598 F.3d at 590); *Marshall v. Northrop Grumman Corp.*, 469 F. Supp. 3d
2 942, 949 (C.D. Cal. 2020).

3 These defects cannot be cured by an amended complaint because, as noted
4 above, EEOC lacks standing to assert FEHA claims. *Pan Am.*, 897 F.2d at 1507 n.
5 8, citing *Dunlop v. Pan Am. World Airways, Inc.* 672 F.2d 1044, 1049 n.7 (2d Cir.
6 1982) (“Had paragraph 17 barred all claims against Pan Am, including those arising
7 under state law, our analysis would be very different. The EEOC has no power to
8 extinguish state claims or state statutory rights.”) Accordingly, the overbroad
9 release is fatal to the proposed consent decree, and the Court should reject it.

10 **C. The Proposed Monetary Relief Is Inadequate.**

11 Although the EEOC’s complaint is devoid of factual allegations, the public
12 record is not. *See Activision Blizzard sued for mistreatment of women in the*
13 *workplace, employees stage walkout*, the Northern Light, Aug. 10, 2021, available
14 at [https://www.thenorthernlight.org/stories/activision-blizzard-sued-for-](https://www.thenorthernlight.org/stories/activision-blizzard-sued-for-mistreatment-of-women-in-the-workplace-employees-stage-walkout)
15 [mistreatment-of-women-in-the-workplace-employees-stage-walkout](https://www.thenorthernlight.org/stories/activision-blizzard-sued-for-mistreatment-of-women-in-the-workplace-employees-stage-walkout) (last visited
16 Jan. 18, 2022); *The Investors Trying to Fix the Most Toxic Company in Video*
17 *Games*, Slate Magazine, Aug. 30, 2021, available at [https://slate.com/business](https://slate.com/business/2021/08/activision-blizzard-sexual-harassment-lawsuit-strategic-organizing-center.html)
18 [/2021/08/activision-blizzard-sexual-harassment-lawsuit-strategic-organizing-](https://slate.com/business/2021/08/activision-blizzard-sexual-harassment-lawsuit-strategic-organizing-center.html)
19 [center.html](https://slate.com/business/2021/08/activision-blizzard-sexual-harassment-lawsuit-strategic-organizing-center.html) (last visited Jan. 18, 2022); ‘Cube Crawls’ and ‘Frat Bro’ Culture:
20 California’s Huge Activision Blizzard Lawsuit Alleges Yet Another Toxic
21 Workplace in the Video Game Industry, Time Magazine, July 30, 2021, updated
22 Aug. 4, 2021, available at [https://time.com/6086010/activision-blizzard-california-](https://time.com/6086010/activision-blizzard-california-lawsuit-sexual-harassment/)
23 [lawsuit-sexual-harassment/](https://time.com/6086010/activision-blizzard-california-lawsuit-sexual-harassment/) (last visited Jan 18, 2022).

24 The proposed Consent Decree provides inadequate compensation for these
25 widespread Title VII claims, let alone state-law claims. As a comparison, DFEH
26 recently submitted for court approval a consent decree settling sexual harassment
27 and discrimination claims against one of Activision’s main competitors for \$100
28 million on behalf of 2,365 potential female participants. Sagafi Decl., Ex. F. Here,

1 the EEOC agreed to less than a fifth of that amount for a much larger group.

2 Notably absent from the proposed consent decree is any justification for the
3 hugely discounted settlement.⁶ Thus, there is no information to support a finding
4 that the proposed consent decree is fair, adequate, and reasonable.

5 **D. The Proposed Amended Decree Is Against the Public Interest.**

6 “Because the issuance of a consent decree places the power of the court
7 behind the compromise struck by the parties, the district court must ensure that the
8 agreement is not illegal, a product of collusion, or against the public interest.”
9 *Colorado*, 937 F.2d at 509. “A consent decree may disserve the public interest if it
10 bar[s] private litigants from pursuing their own claims independent of the relief
11 obtained under the consent decree.” *U.S.S.E.C. v. Citigroup Glob. Markets, Inc.*,
12 752 F.3d 285, 297 (2d Cir. 2014). This is exactly what EEOC and Activision want
13 to do here.

14 As previously noted, EEOC and Activision propose a decree designed to
15 harm DFEH’s state government enforcement action, undercut stronger state laws
16 and principles of federalism, suppress evidence, and evade accountability. The
17 decree has the classic hallmarks of a reverse auction. “A reverse auction is said to
18 occur when ‘the defendant in a series of class actions picks the most ineffectual
19 class lawyers to negotiate a settlement with the hope that the district court will
20 approve a weak settlement that will preclude other claims against the defendant.’
21 [Citation.] It has an odor of mendacity about it.” *Negrete v. Allianz Life Ins. Co. of*
22 *North America*, 523 F.3d 1091, 1099 (9th Cir. 2008). There are significant indicia
23 of collusion between Activision and the EEOC in this case.

24 First and foremost, EEOC has agreed to release FEHA claims it can neither
25 prosecute nor extinguish; i.e., claims that are worth \$0 in EEOC’s hands. *Pan Am.*,

26 _____
27 ⁶ The parties submitted some documents to the Court under seal, depriving DFEH,
28 the victims, and the public of an opportunity to understand EEOC’s basis for
accepting the low settlement. (Dkts. 52, 55.) Such secrecy disservices the public
interest and undermines public faith in the civil justice system.

1 897 F.2d at 1507 n.8. This “cooperation” with Activision is particularly startling
2 when EEOC policy explicitly prohibits such a release. Sagafi Decl., Ex. E. It raises
3 a significant red flag that EEOC here seeks to concede ground it has historically
4 vigorously protected, as reflected in *Grays Harbor*.

5 Second, the monetary relief is paltry given the potential liability and strength
6 of the case. Sagafi Decl., Ex. A. EEOC’s willingness to settle a significant case for
7 a fraction of the potential value, without litigation, also signals collusion. Finally,
8 EEOC and Activision have united in attacking DFEH, asserting unsupported
9 allegations of ethical misconduct. When DFEH’s ethics counsel asked EEOC to
10 provide evidence to support its baseless ethics allegations, EEOC did not respond.
11 Sagafi Decl., Ex. G. In the meantime, Activision filed EEOC’s baseless allegations
12 in DFEH’s state action in an effort to stay the action. Sagafi Decl., Exh. H.

13 **E. Additional Inadequate Settlement Terms Counsel Against Approval.**

14 **Destruction of evidence.** The proposed decree provides a highly unusual
15 provision blessing Activision’s rewriting of its business records to erase evidence
16 of discrimination, harassment, and retaliation – even though this evidence is
17 relevant to DFEH’s ongoing state action. Dkt. 50-1 at 21:10-19. By asking
18 claimants to approve the destruction of evidence and this Court to approve the term
19 in the decree, EEOC gives Activision cover for spoliation. The proposed decree
20 further tampers with retaliatory termination evidence by requiring Activision to
21 “[r]eclassify the terminations of any Eligible Claimant to voluntary resignations.”
22 Dkt. 51-1 at 21:25-28. This rewriting of history eliminates evidence crucial to
23 DFEH’s retaliation claims and potentially prevents claims for wrongful termination.

24 **Missing claimant scope information.** The proposed decree provides no
25 information as to the number of actual Covered Individuals.

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1 **Missing information about value of the claims.** The EEOC has provided no
2 public information regarding its analysis of the maximum value of the federal
3 claims of the Covered Individuals.⁷

4 **CONCLUSION**

5 For the foregoing reasons, the Court should deny approval of the decree.

6
7 Dated: January 18, 2022

Respectfully submitted,

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⁷ The Court posed questions to the parties regarding the proposed decree. The parties' answers to several are incomplete or misleading. Dkt. 51. DFEH provides additional information in the appendix.

APPENDIX

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25 *California Department of Fair Employment and Housing*

26 **UNITED STATES DISTRICT COURT**
27 **CENTRAL DISTRICT OF CALIFORNIA**

28 U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

v.

ACTIVISION BLIZZARD INC.,
BLIZZARD ENTERTAINMENT, INC.,
ACTIVISION PUBLISHING, INC.
KING.COM, INC., and DOES ONE
through TEN, inclusive,

Defendants.

Case No. 2:21-CV-07682 DSF-JEM

**CALIFORNIA DEPARTMENT
OF FAIR EMPLOYMENT AND
HOUSING’S RESPONSES TO
THE COURT’S QUESTIONS**

Date: February 7, 2022
Time: 1:30 pm
Dept.: 7D
Judge: Dale S. Fischer

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Court’s Question/Requested Clarification	Parties’ Response	DFEH’s Response
<p>Clarify whether equal pay claims other than pregnancy claims were alleged in the Complaint and would be resolved by this Decree. Tr. 22:17-19; 27:12-15; 28:8-10.</p>	<p>The Complaint makes no allegations regarding equal pay. (Dkt. 1). An equal pay claim is referenced in the Complaint because the EEOC’s Commissioner’s Charge made an allegation of pay discrimination. Pursuant to its agreement with DFEH not to investigate pay claims, EEOC did not make findings regarding equal pay or pursue that claim. The EEOC is required to investigate a claim before conciliating and/or litigating that claim. 42 U.S.C.A. § 2000e-5(b); <i>Mach Mining, LLC v. E.E.O.C.</i>, 575 U.S. 480, 483-484 (2015) (EEOC required to investigate and make findings on particular claims before pursuing conciliation or litigation on those claims). Thus, the Complaint does not assert an equal pay claim.</p>	<p>The Parties’ response does not answer the Court’s question regarding whether the Consent Decree would “resolve” equal pay claims other than pregnancy claims. The Parties clarify that the Complaint does not and cannot mention pay equity claims because of EEOC requirements to investigate before litigating a claim.</p> <p><i>However, the language of the Consent Decree is clear that the Parties intend to resolve equal pay claims.</i></p> <p>Section IV.A “Release of Claims” provides that claims arising out of Charge Number 480-2018-05212, which specifically included allegations of pay equity, would be completely and finally resolved by the Decree.</p> <p>Also, the general releases to be signed by claimants broadly require claimants to release and waive their claims under FEHA, or any other applicable law.</p> <p>The release that claimants are required to sign to participate in the settlement expressly waives claims in the DFEH state action against Defendants, FEHA claims and all claims under state and local law. The release also includes a general release under section 1542 that releases all</p>

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		claims against defendants known or unknown.
<p>Clarify the scope of the Consent Decree in Paragraph 1 of Section II (entitled “Purpose and Scope”) and Section IV.A (entitled “Release”). Tr. 27:4-10.</p>	<p>The language of this Section was edited to clarify the scope of the proposed Consent Decree, which is limited to the claims brought by the EEOC in the Action.</p> <p>To clarify, it now states: “In the interest of resolving this matter, the Parties have agreed that this Action should be finally settled by entry of this Decree, and all claims brought by the EEOC, including those arising out of any of the same factual predicates as those implicated by in the Action, will be fully and completely resolved by this Decree.”</p> <p>To the extent the Court inquired as to the use of the phrase “same factual predicate,” this language is permitted by Ninth Circuit case law. <i>Class Plaintiffs v. City of Seattle</i>, 955 F.2d 1268, 1287 (9th Cir. 1992); <i>Reyn’s Pasta Bella, LLC v. Visa USA, Inc.</i>, 442 F.3d 741, 748 (9th Cir. 2006).</p> <p>The language in Section IV.A is the EEOC’s standard release language for its own potential claims against an employer. Markey Decl., Exh. D.</p>	<p>The release that claimants are required to sign to participate in the settlement expressly waives claims in the DFEH state action against Defendants, FEHA claims and all claims under state and local law. The release also includes a general release under section 1542 that releases all claims against defendants, known or unknown.</p> <p>The Amended Proposed Consent Decree would reach claims to which the EEOC is not a party because the amended language still allows for claims “arising out of the same factual predicates” as those in the complaint to be fully resolved. The EEOC lacks the authority to litigate, settle or extinguish state law claims or state statutory rights under Title VII and Ninth Circuit precedent. The EEOC’s procedures require that a consent decree “be limited to the factual claims in the Commission’s complaint” and must “refer to the statute(s) under which the claims were brought.” (EEOC Policy). In <i>EEOC v. Grays Harbor Comm. Hosp.</i>, (W.D. Wash. 2011) (“<i>Grays Harbor</i>”), EEOC argued – and a district court agreed – that “conditioning an individual’s relief in a Commission lawsuit upon</p>

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		<p><i>the release of separate state law claims would diminish, not enhance, his or her private rights...” and is “antithetical to deep-rooted Commission goals.” Declaration of Jahan C. Sagafi, Ex. D. A review of consent decrees publicized on the EEOC’s website support that the EEOC limits its consent decrees to the claims in the instant action. All consent decrees the EEOC entered into between 2019 and 2021, except one, clearly specified that the consent decree resolved the claims in the instant action and did not suggest the resolution of any action other than the action at hand.</i></p>
<p>Clarify scope of EEOC’s release to Activision Blizzard and Eligible Claimants’ releases to Activision Blizzard. Tr. 27:2-10.</p>	<p>The scope of the EEOC’s release is described in Section IV.A of the Decree.</p> <p>The scope of Eligible Claimants’ release is set forth in the Release of Claims (Attachment C to Decree)</p> <p>Those Eligible Claimants who agree to release their sexual harassment, pregnancy discrimination, and related retaliation claims will release their right to proceed or otherwise recover any monetary relief under Title VII, FEHA, or other state or local law for such claims and for any other claims they could have brought in any court based on those same facts (<i>e.g.</i>, other tort or contract claims). For any claim</p>	<p>Section IV.A A “Release of Claims” is much broader than the Parties represent because it resolves all allegations, “issues,” and claims and does not specify what is meant by “issues.” Also, the language is clear that the release applies to EEOC Charge Number 480-2018-05212, which includes pay equity claims, and “the Action,” which is a vague complaint that does not satisfy jurisdictional standards.</p> <p>The Amended Proposed Consent Decree specifically allows for the general release of California state law claims that the EEOC does not have authority to pursue.</p> <p>The release that claimants are required to</p>

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	<p>nevertheless asserted, by (or on behalf of) an Eligible Claimant, that is covered by an Eligible Claimant’s release, the court before whom such a claim is asserted would address the preclusive effect of the release in that action. <i>See In re Robbs</i>, 67 F.3d 308 (9th Cir. 1995) (the preclusive effect of any release on other claims will be determined by the Court where those claims sit); <i>see also Ruiz v. Snohomish Cty. Pub. Util. Dist. No. 1</i>, 824 F.3d 1161, 1168 (9th Cir. 2016) (“[T]o the extent that Defendants argue that the district court may predetermine the res judicata effect of its judgment, they are mistaken as a matter of law.”); <i>Medellin v. Texas</i>, 552 U.S. 491, 513 n.9 (2008) (“A court adjudicating a dispute may not be able to predetermine the res judicata effect of its own judgment.”) (quotations omitted); <i>MK Hillside Partners v. Comm’r of Internal Revenue</i>, 826 F.3d 1200, 1207 (9th Cir. 2016) (“The first court does not get to dictate to other courts the preclusion consequences of its own judgment”) (quoting 18 Federal Practice § 4405); <i>see also Matsushita Elec. Indus. Co. v. Epstein</i>, 516 U.S. 367, 396 (1996) (Ginsburg, J., concurring in part and dissenting in part) (“A court conducting an action cannot predetermine the <i>res judicata</i> effect of the</p>	<p>sign to participate in the settlement expressly waives all claims in the DFEH state action against Defendants, FEHA claims and all claims under state and local law. The release also includes a general release under section 1542 that releases all claims against defendants, known or unknown.</p> <p>This Court’s obligation to ensure a consent decree is fair and consistent with the public interest certainly includes consideration of EEOC and Activision’s attempt to bar the DFEH action and state law claims through this decree. <i>U.S.S.E.C. v. Citigroup Glob. Markets, Inc.</i>, 752 F.3d 285, 297 (2d Cir. 2014). (“A consent decree may disserve the public interest if it barred private litigants from pursuing their own claims independent of the relief obtained under the consent decree.”)</p>
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	<p>judgment; that effect can be tested only in a subsequent action.”).</p>	
<p>Identify size and gender makeup of Defendants’ workforce. Tr. 27:21-28:15.</p>	<p>Defendants’ United States workforce has 13,143 employees as of August 2021. Potential Claimants include individuals of all genders, but the vast majority of Eligible Claimants are expected to be female based on the EEOC’s investigation. Female employees make up 21 percent of Defendants’ United States workforce.</p>	<p>The Parties’ response only provides information regarding the size and gender makeup of Defendants’ current workforce based on numbers from August 2021, not the number Potential Claimants. The Consent Decree defines “Potential Claimant” as “an individual who was an employee at any of Defendants at any time since September 1, 2016.”</p> <p>There is still no information as to the number of individuals covered under the proposed Consent Decree.</p>
<p>Describe process for determining which Potential Claimants are eligible, scoring claims, and whether scoring will occur on a rolling basis. Tr. 40:3-12; 41:6-14; 44:2-13; 46:21-47:6.</p>	<p>Scoring will occur on a rolling basis. <i>See</i> Claim Form (Attachment B to Decree) for detail on scoring process with the EEOC making the final determination on eligibility and allocation.</p>	<p>The Amended Proposed Consent Decree provides no information regarding the EEOC’s metrics for determining the value of each person’s claims, and EEOC cannot evaluate state law claims.</p>
<p>Review language in Section X.A. Tr. 51:9-12.</p>	<p>Language revised and clarified. <i>See</i> Section X.A.</p>	<p>Sections X.A. and X.C of the Proposed Amended Consent Decree still contemplate the tampering and/or destruction of critical evidence in DFEH’s case – personnel file documents that reference allegations of sexual harassment, pregnancy discrimination, or related retaliation.</p> <p>Section X.A. references Section X.J., but there is no subsection J in the Proposed Amended</p>

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		<p>Consent Decree.</p> <p>The Proposed Amended Consent Decree also requires claimants to complete a 17-page claim form and provides Activision access to the completed claim forms.</p>
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Dated: January 18, 2022

Respectfully submitted,

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