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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF ALAMEDA**
11

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

13 Plaintiff,

14 v.

15 TESLA, INC., doing business in California as
16 TESLA MOTORS, INC., and DOES ONE through
FIFTY, inclusive,

17 Defendants.
18

Case No.: 22CV006830

Assigned to The Honorable Evelio Grillo

**VERIFIED CROSS-COMPLAINT FOR
DECLARATORY RELIEF AND WRIT
OF MANDATE**

Compl. Filed: Feb. 9, 2022
FAC Filed: March 11, 2022

19 TESLA, INC., a Delaware Corporation doing
business in California as TESLA MOTORS, INC.,

20 Petitioner and Cross-Complainant,

21 v.

22 CALIFORNIA CIVIL RIGHTS DEPARTMENT,
23 formerly known as DEPARTMENT OF FAIR
EMPLOYMENT AND HOUSING,

24 Respondent and Cross-Defendant.
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INTRODUCTION

1
2 1. Pursuant to Sections 428.10(b), 1060 and 1094.5 of the California Code of Civil
3 Procedure (“CCP”), Petitioner and Cross-Complainant Tesla, Inc. (“Tesla”) brings this Verified
4 Cross-Complaint for Declaratory Relief and Writ of Mandate (the “Cross-Complaint”) against
5 Respondent and Cross-Defendant the California Civil Rights Department (“CRD,” formerly known
6 as the Department of Fair Employment and Housing, or “DFEH”). The claims asserted in the Cross-
7 Complaint arise in relevant part out of the same transaction, occurrence, or series of transactions and
8 occurrences as those alleged in the First Amended Civil Rights Complaint for Injunctive and
9 Monetary Relief (“FAC”) brought by CRD against Tesla. Through the Cross-Complaint, Tesla
10 seeks a writ of mandate and declaratory relief from the invalid rulemaking of CRD, which has
11 improperly adopted and is generally applying rules, regulations and/or procedural standards in
12 violation of the California Administrative Procedure Act (“APA”). Cal. Gov’t Code § 11340.5(a),
13 11342.600, 11349.1. These rules, regulations and/or standards constitute invalid underground
14 regulations under the APA, and have been and will continue to be unlawfully applied by CRD to
15 Tesla and other California employers absent the relief requested herein.

16 2. CRD has subverted and continues to subvert the statutory and regulatory framework
17 of the California Fair Employment and Housing Act (“FEHA”), Cal. Gov’t Code § 12940, *et seq.*,
18 with its own *ultra vires* rules of procedure. CRD’s underground regulations unlawfully permit it to
19 (a) initiate employer investigations without disclosing the factual bases for such investigations, (b)
20 issue “cause” determinations against employers without providing any information in support of
21 those determinations, (c) file civil suits against employers without first engaging in good faith
22 conciliation and mediation, (d) file civil suits against employers on claims not previously
23 investigated and/or concerning which the employers were provided no pre-suit notice, and (e)
24 demand that employers waive their legal rights and protections as a condition precedent for CRD’s
25 performing its statutorily required acts, including conciliation and mediation.

26 **PARTIES**

27 3. Tesla is an electric vehicle and clean energy company founded in California. Tesla
28 employs over 20,000 workers at its facility in Fremont, California—the last remaining auto

1 manufacturing plant in the state. While other manufacturers have left California for less expensive
2 and less restrictive locales, Tesla is proud to provide high-paying jobs that equip Californians with
3 valuable skills and training, as well as an opportunity to share in the ownership of the company
4 through stock incentives at all levels.

5 4. Tesla values and has invested in the Fremont community, its Fremont facility, and its
6 workforce. Those investments include substantial commitments to diversity, inclusion, and
7 community outreach, which may account for the Fremont facility’s majority-minority workforce
8 (*i.e.*, the majority of employees are from historically underrepresented backgrounds). Providing
9 these opportunities and investing in Fremont benefits not only Tesla’s workers but also Tesla and,
10 more broadly, the state.

11 5. CRD is the state agency charged with protecting Californians from employment
12 discrimination, including through its administration and enforcement of the FEHA. Cal. Gov’t Code
13 § 12940, *et seq.*; *see also About CRD*, <https://calcivilrights.ca.gov/aboutdfeh/>. Historically, CRD
14 assisted workers and employers alike by serving as a neutral agency responsible for investigating
15 and resolving complaints—reserving litigation for only the most severe situations of employer
16 malfeasance. Indeed, the legislative history of Assembly Bill 738, which first assigned the Division
17 of Fair Employment Practices (a predecessor agency to CRD) with responsibility for investigating
18 and conciliating employment complaints, described the goal of the Legislature “to build as much due
19 process as possible so that all parties to a complaint are protected from capricious or arbitrary
20 action.”¹ Unfortunately, CRD (or a segment thereof) has abandoned these founding principles in
21 recent years, as evidenced by the unlawful underground rulemaking described herein.

22 **JURISDICTION AND VENUE**

23 6. Tesla has performed all conditions precedent to the filing of the Cross-Complaint, to
24 the extent any such conditions exist. The Court’s jurisdiction is invoked pursuant to Sections 1060
25 (Declaratory Relief) and 1094.5 (Writ of Mandate) of the CCP. Venue in Alameda County is proper
26 under Sections 395 and 401 of the CCP.

27 _____
28 ¹ *See* Request for Judicial Notice in Support of Defendant Tesla Inc.’s Motion to Stay, Exhibit A (excerpts from legislative history of AB 738).

GOVERNING LAW

1
2 7. The APA broadly defines a “regulation” as “every rule, regulation, order, or standard
3 of general application...adopted by any state agency to implement, interpret, or make specific the
4 law enforced or administered by it or to govern its procedure.” Cal. Gov’t Code § 11342.600.
5 Under this expansive definition, any general rule or guideline intended to govern how an agency
6 carries out its statutory obligations qualifies as a regulation subject to the APA. *See Malaga Cnty.*
7 *Water Dist. v. Cent. Valley Reg’l Water Quality Control Bd.*, 58 Cal. App. 5th 418, 436 (2020) (“[A]
8 regulation under the APA is any order or standard of general application by any state agency to
9 govern its procedure.”). A regulation need not be in writing in order to be subject to the APA. *See*
10 *Morning Star Co. v. State Bd. of Equalization*, 38 Cal. 4th 324, 336 (2006) (“We decline to endorse
11 an approach that would allow an agency to avoid APA requirements simply by driving its
12 regulations further underground [by failing to put them in writing].”).

13 8. In order for a regulation to be promulgated in compliance with the APA, the proposed
14 regulation must be published along with the state agency’s statement of reasons for the regulation.
15 Cal. Gov’t Code § 11346.2(a)–(b), 11346.4. In addition, the agency must solicit and provide the
16 opportunity for public comment on the proposed regulation. *Id.* § 11346.8. The agency must
17 respond in writing to any public comment and also hold a public hearing on the proposed regulation.
18 *Id.* The agency must transmit the rulemaking record (*i.e.*, its record of compliance with the APA) to
19 the California Office of Administrative Law (“OAL”), file a copy of the regulation with the
20 California Secretary of State, and post the regulation on its website. Cal. Gov’t Code § 11343(a),
21 (c)(1), 11347.3(c). Any failure by the agency to comply with the requirements of the APA in
22 promulgating a regulation renders the regulation invalid and unenforceable. *See Vasquez v. Dep’t of*
23 *Pesticide Regul.*, 68 Cal. App. 5th 672, 684 (2021) (“[A]ny regulation not properly adopted under
24 the APA is considered invalid.” (quoting *Reilly v. Superior Ct.*, 57 Cal. 4th 641, 649 (2013))).

25 9. Although CRD has statutory authority “[t]o adopt, promulgate, amend, and rescind
26 suitable procedural rules and regulations to carry out [its] investigation, prosecution, and dispute
27 resolution duties,” it must do so in compliance with the APA, and no exemption from that
28 requirement exists under California law. Cal. Gov’t Code §§ 11340.5, 12930(e).

1 10. CRD is invested with certain administrative, investigative, conciliatory and
2 prosecutorial powers under the FEHA. Cal. Gov't Code § 12930(f)(1). The FEHA, however, sets
3 limits and imposes obligations on CRD regarding the use and timing of those powers. This statutory
4 framework is intended to serve the “vital policy interests [of the] FEHA, i.e., the resolution of
5 disputes and elimination of unlawful employment practices by conciliation.” *Yurick v. Superior Ct.*,
6 209 Cal. App. 3d 1116, 1123 (1989).

7 11. For example, the FEHA grants CRD the administrative authority to receive or prepare
8 administrative complaints of unlawful discrimination against employers, but requires such
9 complaints to “set forth the particulars” of the alleged unlawful conduct and be “served” on the
10 employers alleged to have engaged in that conduct. Cal. Gov't Code §§ 12960, 12961, 12962. The
11 FEHA’s requirement that CRD provide employers written notice of the “particulars” of their alleged
12 discriminatory conduct is intended to give employers a meaningful opportunity to respond to the
13 allegations, establish the relevant parameters of any CRD investigation, ensure due process, and
14 ultimately facilitate the statutory conciliation process intended to resolve issues without the need for
15 litigation.

16 12. The FEHA also requires CRD to “make prompt investigation in connection []with”
17 the “particulars” identified in the administrative complaint of discrimination. Cal. Gov't Code §
18 12963. CRD’s investigative powers are thus broad but not unlimited. Those powers are constrained
19 in terms of timing (investigations must be “prompt”) and subject matter (investigations must be
20 conducted “in connection []with” the allegations set forth in the administrative complaint).

21 13. If upon concluding an investigation CRD determines that there is merit to one or
22 more of the allegations of discrimination made against an employer in an administrative complaint,
23 CRD’s well established practice is to issue what is known as a “Cause Finding.” A Cause Finding
24 consists of written notice to the employer of CRD’s post-investigative determination regarding the
25 merits of the complaint. The purpose of the Cause Finding is to ensure due process and inform and
26 facilitate CRD’s statutory obligation to “immediately endeavor to eliminate the unlawful
27 employment practice complained of by conference, conciliation, and persuasion.” Cal. Gov't Code
28 § 12963.7; *see also* Cal. Code Regs., tit. 2, § 10057(d) (“After an investigation finds reason to

1 believe that discrimination has occurred or is about to occur, and prior to filing a civil action, [CRD]
2 shall require the parties to participate in mandatory dispute resolution in an effort to resolve the
3 dispute without litigation.”).

4 14. Although the FEHA grants CRD authority to initiate civil litigation against employers
5 for alleged discriminatory conduct, CRD may file suit only after it has complied with all of the
6 statutory pre-suit obligations imposed on it by the FEHA and engaged in a “mandatory dispute
7 resolution process” through the DFEH’s internal mediation division. Cal. Code Regs., tit. 2, §
8 10057(d); *see also Okoli v. Lockheed Tech. Operations Co.*, 36 Cal. App. 4th 1607, 1617 (1995)
9 (exhaustion of administrative remedies under the FEHA is a jurisdictional prerequisite to bringing a
10 civil lawsuit under the Act).

11 **RELEVANT FACTS**

12 15. CRD has adopted rules of legal interpretation and procedure to govern its conduct in
13 carrying out its statutory pre-suit obligations under the FEHA, and done so in violation of the APA.
14 These illegal rules make a mockery of the FEHA’s statutory requirements and render those
15 requirements an administrative piffle—a bureaucratic nuisance to be brushed aside by CRD with
16 formulaic labels and the illusion of compliance. The result is entirely inconsistent with the
17 principles of fair notice, neutral investigations, good faith conciliation, and mandatory pre-suit
18 mediation embedded in the FEHA.

19 16. CRD’s underground regulations in violation of the APA include the following:

- 20 (a) CRD initiates investigations of alleged employer misconduct under the FEHA
21 without providing notice to employers of the “particulars” for those investigations;
22 (b) CRD issues Cause Findings against employers without first providing any
23 information to support those determinations;
24 (c) CRD files civil suits against employers without first engaging in good faith
25 conciliation and mediation;
26 (d) CRD files suits against employers on claims not previously investigated to
27 completion or at all, and/or concerning which the employers were not provided pre-
28 suit notice; and

1 (e) CRD demands that employers waive their legal rights and protections as a
2 condition precedent for CRD’s performing its statutorily-required acts, including
3 mediation.

4 17. On June 21, 2019, CRD served the following documents on Tesla: (a) “Notice of
5 Filing of Discrimination Complaint”; (b) “Complaint of Employment Discrimination”
6 (“Administrative Complaint”); and (c) “Notice of Group or Systemic Investigation and Director’s
7 Complaint for Group/Class Relief” (“Director’s Complaint”). In support of the Administrative
8 Complaint, CRD alleges as the “PARTICULARS” that Tesla “engaged in discrimination,
9 harassment and retaliation against its employees due to...race,” “failed to provide a workplace free
10 of unlawful discrimination or harassment,” and “failed to take all reasonable steps to prevent
11 unlawful discrimination or harassment.” The Director’s Complaint similarly alleges in conclusory
12 fashion that Tesla engaged in “discriminatory practices against African American employees on the
13 basis of race,” and “[s]pecifically,” that Tesla subjected such employees to “harassment on the basis
14 of race,” “failed to take all reasonable steps necessary to prevent harassment from occurring,” and
15 “retaliated against employees who have reported or opposed harassment on the basis of race.”

16 18. The Administrative and Director’s Complaints both fail to name a single Tesla
17 employee who purportedly experienced or engaged in racial harassment or retaliation. Neither
18 complaint provides a date, location, or factual context for any alleged harassment or retaliation. This
19 same lack of factual specificity applies to the “failure to prevent” discrimination or harassment
20 allegations in the Complaints.

21 19. After serving Tesla with the Administrative and Director’s Complaints, CRD
22 commenced a multi-year investigation of Tesla. During that investigation, CRD requested, and
23 Tesla provided, a range of documents, including organization charts; employee handbooks; policies
24 and training materials on harassment, discrimination and retaliation; documents regarding the
25 employment of certain identified individuals; documents regarding internal complaints of race
26 discrimination; Tesla’s agreements with staffing agencies; and a map of Tesla’s factory in Fremont.
27 CRD did not request any employee compensation data or information about employee work
28 assignments.

1 20. Tesla is informed and believes and thereon alleges that during its pre-suit
2 investigation of Tesla, CRD did not interview any members of Tesla’s management (some of whom
3 were accused of race discrimination), or any members of Tesla’s HR or Employee Relations teams
4 (the units responsible for investigating employee concerns and complaints). CRD also never
5 physically inspected Tesla’s Fremont facility to observe working conditions in real time, to
6 understand how work schedules and job rotations operated in the facility, or to view where
7 employees are stationed. For almost three years while CRD conducted its investigation, CRD never
8 communicated to Tesla any concerns about ongoing race harassment or discrimination at the
9 Fremont plant.

10 21. On January 3, 2022, CRD served Tesla with a one-page Cause Finding, advising that
11 “[b]ased on the evidence CRD has collected during its investigation, DFEH has reason to file a civil
12 complaint in this matter against Tesla, Inc.” The Cause Finding provides no additional information
13 regarding CRD’s charges of misconduct against Tesla, and fails to provide any facts or describe any
14 “evidence” to justify CRD’s finding or to support CRD’s conclusion that it has “reason” to sue
15 Tesla.

16 22. On February 9, 2022, CRD filed the civil complaint that commenced this lawsuit. On
17 March 11, 2022, CRD filed the FAC. The FAC asserts 13 causes of action based on “claims for
18 unlawful race harassment; race discrimination in terms and condition [sic] of employment (including
19 assignment, compensation, discipline, promotion, termination, constructive discharge); retaliation;
20 failure to prevent discrimination, harassment and retaliation; unequal pay; waiver of rights, forums,
21 or procedures and release of claims; and recordkeeping violations.” (FAC ¶ 14.)

22 23. A comparison of the allegations of unlawful conduct set forth in the Administrative
23 and Director’s Complaints with the allegations and 13 causes of action asserted in the FAC makes
24 clear that the unlawful conduct in the FAC far exceeds the “PARTICULARS” identified by CRD in
25 the Administrative and Director’s Complaints. Neither of those Complaints contain any allegations
26 or otherwise mention Tesla’s purported discriminatory “assignment,” “compensation,” “discipline,”
27 “promotion,” “termination,” “constructive discharge,” “unequal pay,” and/or imposition of a “waiver
28 or rights” with respect to African American employees, or Tesla’s failure to maintain or produce any

1 “records.” These allegations appear for the first time in the FAC in connection with the Second,
2 Third, Fourth, Fifth, Sixth, Seventh, Eleventh, Twelfth, and Thirteenth Causes of Action. CRD thus
3 failed to provide Tesla any pre-suit notice of these claims and theories of recovery, and did so
4 consistent with the underground regulation CRD has adopted that no such notice is required.

5 24. The same is true with respect to the First (Harassment), Eighth (Retaliation), and
6 Ninth and Tenth (Failure to Prevent Discrimination/Harassment) Causes of Action. Although the
7 labels of “harassment,” “retaliation” and “failure to prevent” do appear in the Administrative and
8 Director’s Complaints, there are no supporting factual allegations in those Complaints giving Tesla
9 fair notice of the “particulars” of its alleged unlawful conduct. Once more, a comparison of the
10 allegations of the FAC with the sparse and conclusory labels used in the Administrative and
11 Director’s Complaints shows that CRD did not provide Tesla with proper notice, again consistent
12 with CRD’s underground regulation that no such notice is required.

13 25. Within one day of receiving CRD’s Cause Finding, and in an effort to ensure that its
14 statutorily-mandated mediation with CRD was meaningful, Tesla submitted a written request to
15 CRD asking for the “evidentiary support and reasoning for the Department’s probable cause
16 finding.” CRD refused, stating: “DFEH will discuss the evidentiary support and reasoning for its
17 cause finding at the mediation.”

18 26. On January 11, 2022, Tesla again wrote to CRD, stating that due to “Tesla’s sincere
19 commitment to a meaningful opportunity to work cooperatively with DFEH to explore a sensible
20 and durable resolution of the identified issues, I would ask that you further consider the two vital
21 requests in my January 4, 2022 letter – a request for time and information.” CRD responded:
22 “DFEH is willing to agree to mediate on the latter of your two available dates (February 8) on the
23 condition that Tesla confirms that no other settlement related to the allegations in DFEH Director’s
24 Complaint (DFEH Case No. 201906-06540918) will be reached before this date.” DFEH also again
25 refused to provide any information about its Cause Finding prior to the mediation.

26 27. On January 14, 2022, CRD advised Tesla that because Tesla had not “agreed to
27 DFEH’s condition regarding an extension to mediate on February 8,” “a mediation will be scheduled
28 for January 20, 2022.” In short, to secure a mediation on the previously agreed February 8 date,

1 DFEH required that Tesla not even “contemplate[]” or “discuss” settlement of similar claims with
2 the United States Equal Employment Opportunity Commission (“EEOC”). Forced to choose
3 between its statutory right to a pre-suit mediation, and its state and federal constitutional rights to
4 engage in free speech and petition the federal EEOC, Tesla capitulated to the unlawful speech
5 restraint.

6 28. CRD and Tesla attended the mediation on February 8, 2022. Although CRD had
7 represented to Tesla that it would provide Tesla factual support for the Cause Finding at the
8 mediation, CRD failed to do so. Instead, a session that was supposed to address a multi-year
9 investigation of allegations of race discrimination ended just 2.5 hours after it started. The truth is
10 that CRD did not engage in meaningful conciliation efforts or good faith mediation with Tesla,
11 consistent with its underground regulation that no such pre-suit obligations apply to it under the
12 FEHA.

13 29. In sum, the entire course of pre-suit conduct by CRD toward Tesla was entirely
14 inimical to the statutory constraints and obligations imposed on CRD by the FEHA. CRD did not
15 provide Tesla adequate notice of the “particulars” of its alleged discriminatory conduct in the
16 Administrative or Director’s Complaints. CRD did not conduct a fair and neutral investigation of
17 Tesla’s conduct, despite taking almost three years to complete that investigation. In fact, Tesla is
18 informed and believes and thereon alleges that CRD failed to investigate fully or at all certain claims
19 and theories of recovery alleged in the FAC during the pre-suit administrative proceedings. CRD
20 provided Tesla with a Cause Finding completely devoid of facts or reasoning to support its
21 conclusion, thus preventing CRD and Tesla from engaging in meaningful conciliation and/or
22 mediation. CRD imposed improper conditions precedent to scheduling the mediation it was required
23 by statute to hold, and then engaged in that mediation in a perfunctory, “check-the-box” manner.

24 30. Tesla’s experience with CRD is not unique. To the contrary, this type of misconduct
25 by CRD has become commonplace as documented in detail by the investigative news media, court
26 filings in other civil cases filed by CRD, and CRD’s judicial admissions in this case. *See, e.g.,* Matt
27 Taibbi, *The Lawyers Who Ate California: Part I*, TK NEWS (May 14, 2019),
28 <https://taibbi.substack.com/p/the-lawyers-who-ate-california-part>; Matt Taibbi, *The Lawyers Who*

1 *Ate California: Part II*, TK NEWS (May 14, 2019), [https://taibbi.substack.com/p/the-lawyers-who-](https://taibbi.substack.com/p/the-lawyers-who-ate-california-part-1a8)
2 [ate-california-part-1a8](https://taibbi.substack.com/p/the-lawyers-who-ate-california-part-1a8); Matt Taibbi, *The Lawyers Who Ate California: Epilogue*, TK NEWS (May
3 19, 2019), <https://taibbi.substack.com/p/the-lawyers-who-ate-california-epilogue>. In violation of the
4 APA, CRD is using rules, regulations and/or standards of conduct of general application to interpret
5 and make specific certain provisions of the FEHA, including those provisions governing CRD’s pre-
6 suit obligations. The pattern of CRD behavior experienced by Tesla reflects standards of conduct
7 that Tesla is informed and believes and thereon alleges are and have been applied generally by CRD
8 to other California employers. Such conduct constitutes invalid underground rulemaking under the
9 APA. Cal. Gov’t Code § 11342.600; *see also Tidewater Marine W. Inc. v. Bradshaw*, 14 Cal. 4th
10 557, 568 (1996); *Morning Star Co.*, 38 Cal. 4th at 336.

11 31. Recent court filings in a civil suit brought by CRD against another employer confirm
12 that the CRD rules and standards of procedure that Tesla experienced and now challenges through
13 this Cross-Complaint are generally applied by CRD against other California employers. *See Dep’t*
14 *of Fair Emp. & Housing v. Activision, Inc., et al.*, Los Angeles County Superior Court Case No.
15 21STCV26571 (“Activision Case”). A dispositive motion filed in the Activision Case on May 6,
16 2022, details how CRD applied rules and procedural standards identical to those challenged herein to
17 Activision in a completely separate and unrelated proceeding. Specifically, CRD (1) failed to
18 investigate or complete its investigation of administrative claims of discrimination against Activision
19 prior to filing suit on those claims; (2) issued a Cause Finding against Activision that did not provide
20 any supportive information, thus making conciliation and mediation a sham process; (3) imposed
21 improper conditions precedent to mediation on Activision, including the waiver of certain legal
22 rights; (4) failed to engage in good faith conciliation and mediation as required by statute and public
23 policy, but rather treated those pre-suit obligations as “check-the-box” nuisances; and (5) filed a civil
24 suit against Activision on claims not identified or otherwise asserted during the pre-suit
25 administrative process. Similar examples of CRD’s applying rules and procedural standards in
26 violation of the APA and at odds with the FEHA have been documented in detail by the news media.
27 *See Taibbi Article, supra.*

28

1 32. The identical experiences and treatment of Tesla and Activision by CRD reflect
2 CRD’s interpretation of its powers under the FEHA, and the agency’s general application of those
3 procedural practices to employers in California. CRD concedes as much in defending its pre-suit
4 conduct in this case and the Activision Case, by asserting what can only be described as an
5 unfettered power to conduct itself as it alone sees fit. Specifically, CRD has sought to justify in
6 court filings in this case and the Activision Case its right to issue factually-barren Cause Findings,
7 impose whatever limits on the conciliation process it deems appropriate, engage in hasty and
8 perfunctory mediations, and file civil suits on claims and based on allegations that far exceed the
9 “particulars” of discrimination identified during the pre-suit administrative process. In thus
10 attempting to justify its misconduct toward Tesla and Activision, CRD has implicitly acknowledged
11 that this misconduct reflects CRD’s interpretation of its power and authority as applied generally to
12 employers, and will continue to govern its procedures in administering and enforcing the FEHA.

13 33. CRD has promulgated and is generally applying the rules, regulations and/or
14 procedural standards described herein without publishing the text of those rules, regulations and/or
15 standards and filing that text with the Secretary of State as required by the APA. Cal. Gov’t Code §§
16 11340.5(a), 11346.2(a).

17 34. CRD has promulgated and is generally applying the rules, regulations and/or
18 procedural standards described herein without first issuing a notice of proposed rulemaking as
19 required by the APA. Cal. Gov’t Code §§ 11346.2(a), 11346.4.

20 35. CRD has promulgated and is generally applying the rules, regulations and/or
21 procedural standards described herein without first publishing an initial and/or final statement of
22 CRD’s reasons for the rules, regulations and/or standards as required by the APA. Cal. Gov’t Code
23 §§ 11346.2(b), 11346.9.

24 36. CRD has promulgated and is generally applying the rules, regulations and/or
25 procedural standards described herein without first soliciting, receiving, considering and/or
26 responding to public comment and/or holding a public hearing on those rules, regulations and/or
27 standards as required by the APA. Cal. Gov’t Code § 11346.8.

28

1 37. CRD has promulgated and is generally applying the rules, regulations and/or
2 procedural standards described herein without first transmitting the rulemaking record to the
3 California Office of Administrative Law for review as required by the APA. Cal. Gov't Code §
4 11347.3(c).

5 38. CRD has promulgated and is generally applying the rules, regulations and/or
6 procedural standards described herein without first advising the Secretary of State of the authority by
7 which CRD has adopted such rules, regulations and standards as required by the APA. Cal. Gov't
8 Code § 11343(d).

9 39. CRD has promulgated and is generally applying the rules, regulations and/or
10 procedural standards described herein without first posting a copies of those rules, regulations and/or
11 standards on its website as required by the APA. Cal. Gov't Code § 113439(c)(1).

12 40. The relief sought herein is necessary to remedy CRD's ongoing application of the
13 invalid underground rules, regulations and/or procedural standards described herein which violate
14 the APA, and Tesla has no other adequate remedy at law for the harm alleged herein.

15 41. The relief sought herein will also result in the enforcement of important public rights
16 and confer a benefit on all California employers subject to the FEHA and the regulatory and
17 prosecutorial authority of CRD. No state agency created, enabled, and limited by statute may act
18 with impunity. No state agency may function outside the law. As described herein and reflected in
19 public filings and the experiences of Tesla, Activision and other California employers, CRD
20 comports itself as if the statutory and regulatory requirements it must satisfy before initiating civil
21 litigation are of little import, a mere bureaucratic nuisance requiring only sham compliance. But
22 those pre-suit requirements reflect vital policy interests embedded in the FEHA, and they must be
23 honored as a matter of statutory obligation and fundamental public policy. The public interest
24 demands that CRD be held accountable for its underground rulemaking in violation of the APA.

FIRST CAUSE OF ACTION

VIOLATIONS OF THE ADMINISTRATIVE PROCEDURE ACT

[Cal. Gov't Code §§ 11340, *et seq.*]

42. Tesla incorporates by reference all prior paragraphs of the Cross-Complaint as if set forth fully herein.

43. CRD was at all times relevant hereto required to comply with the requirements of the APA prior to adopting and generally applying rules, regulations and/or procedural standards covered by the APA. Those requirements include, but are not limited to, ensuring that the adoption and application of any rules, regulations and/or standards be preceded by public notice, an opportunity for public comment, a response in writing by CRD to public comments, and the forwarding of all materials on which CRD relies to OAL for review. Cal. Gov't Code §§ 11346(a), 11346.4, 11346.5, 11346.8, 11346.9, 11347.3(b). Any rule, regulation and/or standard covered by the APA but not promulgated in accordance with the requirements of the APA is and may be declared to be an invalid underground regulation. Cal. Gov't Code § 11350; Cal. Code Regs., tit. 1, § 250.

44. CRD abused its discretion, acted in excess of its statutory power and authority, and failed to proceed in the manner required by law by promulgating and generally applying the rules, regulations and/or procedural standards described herein without first complying with one or more of the requirements of the APA.

45. Tesla has no plain, speedy, or adequate remedy in the ordinary course of law unless the Court grants the writ of mandate and declaratory relief requested herein.

SECOND CAUSE OF ACTION

[Declaratory Relief – CCP § 1060]

46. Tesla incorporates by reference all prior paragraphs of the Cross-Complaint as if set forth fully herein.

47. There is an actual controversy between Tesla and CRD in that (a) Tesla asserts that CRD has adopted and is generally applying rules, regulations and/or procedural standards as described herein that implement, interpret, or make specific the law (*i.e.*, FEHA) administered and enforced by CRD, and that these rules, regulations and/or standards constitute “regulation[s]” as

1 defined by the APA, whereas CRD asserts to the contrary; and (b) Tesla asserts that CRD failed to
2 adopt said rules, regulations and/or standards in compliance with the APA for the reasons set forth
3 herein, and CRD asserts to the contrary.

4 48. A judicial declaration is necessary and appropriate at this time to clarify whether
5 CRD's adoption and general application of the rules, regulations and/or procedural standards
6 described herein are lawful, or whether such rules, regulations and/or procedural standards are
7 invalid underground regulations promulgated by CRD in violations of the APA, such that the parties,
8 the public and the courts can be informed as to the legality or illegality of CRD's conduct and
9 ongoing practices.

10 **CONCLUSION**

11 **WHEREFORE, TESLA prays:**

12 1. For a declaratory judgment, stating that the rules, regulations and/or standards of
13 conduct described herein constitute invalid and unlawful underground regulations adopted and
14 generally applied by CRD in violation of the APA, and that said rules, regulations and/or standards
15 are null and void.

16 2. That the Court issue a peremptory writ of mandate directing CRD to cease applying
17 the aforesaid invalid and unlawful underground regulations until such time as CRD has promulgated
18 the subject rules, regulations and/or procedural standards in compliance with the APA.

19 3. That Tesla be awarded attorneys' fees pursuant to CCP § 1021.5 on the substantial
20 benefit theory, as well as costs incurred in this proceeding; and

21 4. That Tesla be awarded such other and further relief as the Court deems just and
22 proper.

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DATED: September 22, 2022

HOLLAND & KNIGHT LLP

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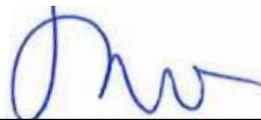
VERIFICATION

I, Nicole White, declare as follows:

I am the Director, People Operations at Tesla, Inc., the Defendant in this action, and I am authorized to execute this verification on its behalf. I declare that I have read the foregoing VERIFIED CROSS-COMPLAINT FOR DECLARATORY RELIEF AND WRIT OF MANDATE and know the contents thereof. I declare that the matters stated therein are either true of my own knowledge or that I am informed and believe the matters stated therein are true and on that ground allege that they are true.

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

Executed this 22nd day of September 2022, at Austin, Texas.



Nicole White

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PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES) ss.

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 400 S. Hope Street, 8th Floor, Los Angeles, California 90071.

On **September 22, 2022**, I caused the foregoing document described as **VERIFIED CROSS-COMPLAINT FOR DECLARATORY RELIEF AND WRIT OF MANDATE** to be served on the interested parties in this action as follows:

Alexis McKenna
Sirithon Thanasombat
California Department of Fair Employment and Housing
2218 Kausen Drive, Suite 100
Elk Grove, CA 95758-7178
Email: alexis.mckenna@dfeh.ca.gov

[X] (BY E-MAIL) I e-mailed above-listed document(s) to the e-mail addressee(s) on the attached Service List. A true and correct copy of the e-mail transmittal will be attached to the above-listed document(s) and produced if requested by any interested party.

[X] (BY ELECTRONIC SERVICE) Pursuant to California Rule of Court rule 8.212(c) and the Court’s order authorizing electronic service, an electronic copy of such document was served through CASEANYWHERE.

[X] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **September 22, 2022**, at Los Angeles, California.



Yvonne Ceballos

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Tel:

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