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13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

15
16 U.S. EQUAL EMPLOYMENT
17 OPPORTUNITY COMMISSION,

18 Plaintiff,

19 vs.

20 ACTIVISION BLIZZARD, INC.,
21 BLIZZARD ENTERTAINMENT,
22 INC., ACTIVISION PUBLISHING,
23 INC., and KING.COM, INC., and
DOES ONE through TEN, inclusive,

24 Defendants.
25

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

} **MEMORANDUM OF POINTS AND**
} **AUTHORITIES IN SUPPORT OF**
} **PLAINTIFF EEOC’S OPPOSITION**
} **TO PROPOSED INTERVENOR**
} **DFEH’S *EX PARTE* APPLICATION**
} **TO SHORTEN TIME TO FILE**
} **MOTION TO INTERVENE;**
} **EXHIBITS**

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1 **INTRODUCTION**

2 Plaintiff EEOC files this opposition in response to Proposed Intervenor Department
3 of Fair Employment and Housing (DFEH)’s *Ex Parte* Application to Shorten Time.
4 While the EEOC opposes DFEH’s motion to intervene on the merits, *see* Ex. A to the
5 Notice of Opposition by the EEOC to DFEH’s Ex Parte Application to Shorten Time, the
6 present intervention motion should also be disallowed because, as explained below, it
7 arises from representation prohibited by the California Rules of Professional Conduct.
8 Specifically, two DFEH attorneys¹—who play leadership roles within the organization—
9 previously served as EEOC [REDACTED] who helped to direct the EEOC’s
10 investigation into Commissioner’s Charge No. 480-2018-05212 against Activision
11 Blizzard, Inc. (“Activision”). These same attorneys then proceeded to represent DFEH in
12 connection with these intervention proceedings, which seek to oppose the consent decree
13 that arose out of the very investigation they helped to direct while at the EEOC. Such
14 representation is prohibited by California Rule of Professional Conduct 1.11(a)(2), and
15 this conflict is imputed to all DFEH attorneys by virtue of California Rule of Professional
16 Conduct 1.11(b) because of DFEH’s failure to screen the individual attorneys.

17 After being informed of this conflict, DFEH retained new counsel but appears to
18 have filed the present intervention motion just hours after this counsel was retained,
19 strongly suggesting that the motion is a product of the prohibited representation. For this
20 reason, the intervention motion should be disallowed and DFEH attorneys should be
21 barred from providing work product to, or advising, new counsel in connection with these
22 intervention proceedings.

23
24
25
26
27 ¹ Because of the sensitive nature of this issue, this Memorandum uses the terms “DFEH
28 Attorney 1” and “DFEH Attorney 2” to refer to these attorneys.

FACTUAL AND PROCEDURAL BACKGROUND

I. DFEH ATTORNEYS 1 AND 2 ARE FORMER [REDACTED] WITH THE EEOC WHO HELPED LEAD THE EEOC'S INVESTIGATION OF ACTIVISION.

DFEH Attorneys 1 and 2 are former [REDACTED] with the EEOC. DFEH Attorney 1 was employed with the EEOC [REDACTED], and DFEH Attorney 2 was employed [REDACTED]. After leaving the EEOC, DFEH Attorney 1 began serving as [REDACTED], and DFEH Attorney 2 began serving as [REDACTED]. *Id.*

While employed with the EEOC, both attorneys were assigned to work on Commissioner's Charge No. 480-2018-05212, against Activision. [REDACTED]

A. Guidance and Advice Provided by DFEH Attorneys 1 and 2

In their capacity as [REDACTED], DFEH Attorneys 1 and 2 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 DFEH Attorney 2 similarly provided [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 **B. Supervision and Approval Authority**

14 DFEH Attorneys 1 and 2 engaged in active supervision of subordinate trial
15 attorneys and had authority to direct and approve their work. [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 DFEH Attorney 2 was also delegated key authority with respect to the Activision
23 investigation in her role as a [REDACTED]. For example, [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 **C. Coordination with External Stakeholders Like DFEH**

27 DFEH Attorneys 1 and 2 were also closely involved in coordination with external

28 [REDACTED]

1 stakeholders like DFEH. [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]

10 **II. INVOLVEMENT OF DFEH ATTORNEYS IN REPRESENTING DFEH**
11 **WITH RESPECT TO THESE INTERVENTION PROCEEDINGS**

12 While DFEH is now represented by Olivier Schreiber & Chao LLP, it is clear that,
13 until at least October 5, 2021, DFEH’s own attorneys, including DFEH Attorneys 1 and 2,
14 represented DFEH with respect to these intervention proceedings. This is evidenced by
15 several communications with EEOC counsel and Defendants’ counsel regarding DFEH’s
16 plans to intervene and regarding objections to the proposed consent decree in question.
17 On September 29, 2021, Janette Wipper, Chief Counsel of DFEH, notified counsel of
18 DFEH’s plan to file a motion to intervene. Markey Decl. ¶ 3a, Ex. 2. On September 30,
19 2021, DFEH Attorney 1 emailed EEOC counsel and Defendant’s counsel, asking to meet
20 and confer on DFEH’s motion to intervene. *Id.* ¶ 3b, Ex. 3. On October 1, 2021, DFEH
21 Attorney 2 sent two emails to EEOC counsel and Defendants’ counsel articulating
22 DFEH’s objections to the proposed consent decree. *Id.*

23 On October 4, 2021, EEOC’s Office of Legal Counsel provided written notice to
24 DFEH Attorneys 1 and 2 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED] Later that day, Ms. Park emailed DFEH Attorneys
28

1 1 and 2, referencing this communication and requesting that [REDACTED]

2 [REDACTED]
3 [REDACTED]
4 [REDACTED] *Id.* Ex. 5. Ms. Park stated that EEOC would not “meet and confer
5 with DFEH counsel regarding the substance of the EEOC’s lawsuit or consent decree.”

6 *Id.* Ms. Wipper responded later that day, contending that “[n]either [DFEH Attorneys 1 or
7 2] participated personally and substantially as an EEOC employee in the [Activision]
8 investigation,” requesting that “EEOC agree not to oppose DFEH’s motion to intervene,”
9 and stating that she “look[ed] forward to the meet and confer conference” scheduled for
10 the next day. *Id.*

11 During the meet and confer on October 5, 2021, DFEH Attorneys 1 and 2 and Ms.
12 Wipper appeared on DFEH’s behalf. *Id.* ¶ 5. DFEH Attorney 2 began to speak regarding
13 the merits of the intervention motion, but Ms. Park reiterated EEOC’s objections
14 regarding the conflict-of-interest rules. *Id.* DFEH Attorney 2 [REDACTED]

15 [REDACTED]
16 [REDACTED]
17 [REDACTED] *Id.* After EEOC counsel continued to voice
18 objections to discussing the merits of the case with DFEH attorneys, Ms. Wipper and
19 DFEH Attorneys 1 and 2 disconnected from the call. *Id.* ¶ 6. Mr. Patrick Patterson, an
20 attorney who introduced himself as a consultant for DFEH and stated that he was
21 authorized to do the meet and confer, engaged in discussion regarding the merits of the
22 intervention motion. *Id.*

23 On October 6, 2021, Ms. Park emailed Mr. Patterson to inquire whether he would
24 be representing DFEH for limited purposes of the meet and confer or instead for all
25 purposes. Markey Decl. Ex. 6. Mr. Patterson responded at 8:51 a.m. Pacific Standard
26 Time that day to indicate that he had “been authorized to represent DFEH only for the
27 purpose of the meet-and-confer” and that he did not “know who will be representing the
28

1 Department going forward” but would “let [counsel] know if and when I find out.” *Id.* At
2 4:55 p.m. that same day, Mr. Patterson indicated that, “going forward, the attorneys listed
3 immediately below,” namely, Olivier Schreiber & Chao LLP, “will be representing
4 [DFEH] in this matter.” *Id.* At 7:52 p.m. that same day, DFEH’s intervention motion was
5 filed under Mr. Schreiber’s signature. *Id.* ¶ 8.

6 LEGAL DISCUSSION

7 **I. CALIFORNIA RULES OF PROFESSIONAL CONDUCT BARRED AND** 8 **CONTINUE TO BAR DFEH ATTORNEYS 1 AND 2, AND ANY DFEH** 9 **ATTORNEY, FROM REPRESENTING DFEH IN CONNECTION WITH** 10 **THESE INTERVENTION PROCEEDINGS.**

11 **A. DFEH Attorneys, Including DFEH Attorneys 1 and 2, Previously** 12 **Represented DFEH With Respect to This Intervention Motion.**

13 Although DFEH is currently represented by Olivier Schreiber & Chao LLP in
14 connection with this motion to intervene, it is clear that DFEH’s own attorneys—
15 including DFEH Attorneys 1 and 2—represented DFEH in connection with these
16 intervention proceedings until at least October 5, 2021. As discussed above, these
17 attorneys authored a series of emails between September 29, 2021 and October 1, 2021,
18 regarding DFEH’s intent to intervene. Markey Decl. ¶ 3. In addition, these attorneys
19 appeared for the meet and confer on October 5, 2021, after being notified of EEOC’s
20 objections, and DFEH Attorney 2 attempted to discuss the merits of the intervention
21 motion. *Id.* ¶¶ 4-5. These actions confirm that DFEH attorneys—including DFEH
22 Attorneys 1 and 2—represented DFEH in connection with these intervention proceedings
23 through at least October 5, 2021.

24 **B. This Representation Was and Remains Barred By California Rules of** 25 **Professional Conduct 1.11(a) and (b).**

1 **1. California Rule of Professional Conduct 1.11(a)(2) Barred and**
2 **Continues to Bar DFEH Attorneys 1 and 2 from Representing**
3 **DFEH In Connection With This Matter.**

4 California Rule of Professional Conduct 1.11, enacted on November 1, 2018, is
5 entitled “Special Conflicts of Interest for Former and Current Government Officials and
6 Employees.” Rules 1.11(a) and 1.11(b) govern situations where former government
7 employees engage in subsequent representation, including cases where “a lawyer has been
8 employed by one government agency and then moves to a second government agency, . . .
9 as when a lawyer is employed by a city and subsequently is employed by a federal
10 agency,” or vice versa. Cal. Rule Professional Conduct 1.11, Comment 6 (explaining that
11 conflicts of interest in this situation “are governed by paragraphs (a) and (b)” of Rule
12 1.11).

13 Rule 1.11(a) provides:

14 (a) Except as law may otherwise expressly permit, a lawyer who has
15 formerly served as a public official or employee of the government:

16 (1) is subject to rule 1.9(c); and

17 (2) shall not otherwise represent a client in connection with a matter
18 in which the lawyer participated personally and substantially as a
19 public official or employee, unless the appropriate government
20 agency gives its informed written consent to the representation.

21

22 Under Rule 1.11(a)(2), then, DFEH Attorneys 1 and 2 are prohibited from representing
23 DFEH in connection with this matter if they participated in the matter “personally and
24 substantially as a public official or employee.”²

25 _____
26 ² Rule 1.11(a)(2) provides an exception where the appropriate government agency gave
27 informed written consent to the representation, but it is undisputed that there has been no
28 such consent by the EEOC here.

1 Comment 3 to Rule 1.11 states that the term “personal participation” includes “both
2 direct participation and the supervision of a subordinate’s participation.” Cal. Rule
3 Professional Conduct 1.11, Comment 3. Comment 3 also specifies that: “Substantial
4 participation requires that the lawyer’s involvement be of significance to the matter.
5 Participation may be substantial even though it is not determinative of the outcome of a
6 particular matter.” *Id.*

7 Here, it is clear that DFEH Attorneys 1 and 2 participated personally and
8 substantially in [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]

1 Rule 1.11 indicates that this sort of direct advice and guidance regarding the
2 substantive merits and strategy of a case constitutes personal and substantial participation.
3 Cal. Rule Prof. Conduct 1.11, Comment 3 (“Personal and substantial participation may
4 occur when, for example, a lawyer participates through . . . recommendation, investigation
5 or the rendering of advice in a particular matter.”). Indeed, interpretations of identical
6 “participated personally and substantially” language in the context of government statutes
7 and regulations—language from which the drafters of Rule 1.11 borrowed, *see* Cal. Rule
8 Professional Conduct 1.11, Executive Summary, at 4 (expressing intent to “provide
9 uniformity . . . with government statutes and regulations that use the . . . phrase
10 [‘participated personally and substantially’]”)—provide further support for this position.
11 *See* 5 C.F.R. § 2641.201(i), Examples 2 and 3 to Paragraph (I) (Office of Government
12 Ethics regulation interpreting “participated personally and substantially” language in 18
13 U.S.C. § 207(a)(1)) (attorney who “provides advice concerning strategy during the
14 discovery stage of the litigation” has participated personally and substantially, even with
15 no further involvement beyond a single conversation); *United States v. Clark*, 333 F.
16 Supp. 2d 789, 794-95 (E.D. Wis. 2004) (interpreting same provision) (AUSA’s receipt of
17 investigative reports and discussion of case with law enforcement agent constituted
18 personal and substantial participation).

19 Second, both attorneys also engaged in active supervision of subordinate trial
20 attorneys and had authority to direct and approve their work. [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

1 [REDACTED] *Id.* ¶ 12. This sort of authority to supervise and
2 approve subordinates’ work plainly constitutes personal and substantial participation. *See*
3 Cal. R. Professional Conduct, Comment 3 (“Personal and substantial participation may
4 occur when, for example, a lawyer participates through decision, approval, [or]
5 disapproval . . . in a particular matter.”); 5 C.F.R. § 2641.201(i), Example 5 to Paragraph I
6 (interpreting 18 U.S.C. § 207(a)(1)) (General Counsel who forwards subordinate’s
7 evaluation of particular issue to Director with note indicating concurrence has participated
8 substantially); *Clark*, 333 F. Supp 2d at 794-95 (interpreting same provision) (former
9 AUSA’s approval of prosecution memorandum alone constituted personal and substantial
10 participation, explaining that “the single act of approving or participation in a critical step”
11 qualifies as substantial).

12 In sum, both attorneys participated directly and through active supervision in
13 actions going to the heart of the merits of this matter. Thus, Rule 1.11(a)(2) barred and
14 continues to bar them from representing DFEH in connection with this matter.

15 **2. California Rule of Professional Conduct 1.11(b) Barred and**
16 **Continues to Bar Any DFEH Lawyer From Representing DFEH**
17 **in this Matter.**

18 California Rule of Professional Conduct 1.11(b) provides:

19 (b) When a lawyer is prohibited from representation under paragraph (a),
20 no lawyer in a firm with which that lawyer is associated may knowingly
21 undertake or continue representation in such a matter unless:

22 (1) the personally prohibited lawyer is timely screened from any
23 participation in the matter and is apportioned no part of the fee
therefrom; and

24 (2) written notice is promptly given to the appropriate government
25 agency to enable it to ascertain compliance with the provisions of
26 this rule.

1 Rule 1.11(b) thus imputes a disqualified lawyer’s conflict to the entirety of a firm³
2 unless the firm: (1) timely screened the disqualified lawyer; and (2) promptly provided
3 written notice to the appropriate government agency. The screening and notice
4 obligations apply where “a lawyer has been employed by one government agency and
5 then moves to a second government agency, . . . as when a lawyer is employed by a city
6 and subsequently is employed by a federal agency.” Cal. R. Professional Conduct 1.11,
7 Comment 6. “Because conflicts of interest [in these situations] are governed by
8 paragraphs (a) and (b) [of Rule 1.11], the latter agency is required to screen the lawyer.”
9 *Id.*

10 Here, DFEH met neither the screening nor notice obligations. First, there is no
11 claim that DFEH promptly provided written notice to the EEOC as required by Rule
12 1.11(b)(2). Second, it is clear that DFEH failed to timely screen DFEH Attorneys 1 and 2
13 from participation in these intervention proceedings. As discussed above, DFEH
14 Attorneys 1 and 2 [REDACTED]

15 [REDACTED]
16 [REDACTED] Markey Decl. ¶¶ 3-
17 5. There can be no claim that there was timely “isolation of [these] lawyer[s] from any
18 participation” in representing DFEH in connection with the intervention proceedings, as
19 would be necessary to show that timely screening took place. Cal. R. Professional
20 Conduct 1.01(k). Thus, all DFEH attorneys were and should remain barred from
21 representing DFEH in this matter.

22 **II. THIS COURT SHOULD DISALLOW DFEH’S INTERVENTION MOTION**
23 **BECAUSE IT IS A PRODUCT OF PROHIBITED REPRESENTATION AND**
24

25 ³ DFEH qualifies as a “firm” within the meaning of Rule 1.11(b). *See* Cal. R. Professional
26 Conduct Rule 1.01(c) (defining “firm” broadly to include “lawyers employed in . . . the
27 legal department, division or office . . . of a government organization, or of another
28 organization”).

1 **SHOULD BAR DFEH ATTORNEYS FROM PROVIDING WORK**
2 **PRODUCT OR ADVICE TO CURRENT COUNSEL RELATED TO THESE**
3 **PROCEEDINGS.**

4 Federal courts have “inherent powers to manage their own proceedings,” including
5 the ability to craft appropriate remedies for violations of ethical rules. *Erickson v.*
6 *Newmark Corp.*, 87 F.3d 298, 303 (9th Cir. 1996). A district court’s power to manage
7 these proceedings continues “even after [a] lawyer is no longer representing a party in the
8 proceedings.” *SPV-LS, LLC v. Transamerica Life Ins. Co.*, No. 14-CIV-4092, 2017 U.S.
9 Dist. Lexis 134971, at *4 (D.S.D. Aug. 23, 2017), *aff’d in relevant part, rev’d in part on*
10 *separate issue*, 912 F.3d 1106 (8th Cir. 2019). In framing an order regarding attorney
11 conduct, the court has “wide discretion . . . so as to be just and fair to all parties involved.”
12 *Int’l Bus. Machines Corp. v. Levin*, 579 F.2d 271, 279 (3d Cir. 1978). “Ultimately, . . . a
13 court must maintain ethical standards of professional responsibility.” *Hitachi, Ltd. v.*
14 *Tatung Co.*, 419 F. Supp. 2d 1158, 1161 (N.D. Cal. 2006) (citation omitted). Thus, this
15 Court has broad powers to ensure that DFEH is not permitted to gain any unfair advantage
16 from any ethical violations that have already occurred in this case.

17 **A. DFEH’s Intervention Motion Is the Product of Prohibited**
18 **Representation.**

19 It is clear that, up until October 5, 2021, DFEH attorneys represented DFEH for
20 purposes of these intervention proceedings. *See supra* at 9. It is also clear that DFEH did
21 not retain present counsel until, at the earliest, the morning of October 6, 2021. Markey
22 Decl. Ex. 6 (emails from Mr. Patterson at 8:51 a.m. indicating that he did not “know who
23 will be representing [DFEH] going forward” and at 4:55 p.m. that same day indicating
24 that, “going forward,” Olivier Schreiber & Chao LLP would “be representing [DFEH] in
25 this matter”). Less than 3 hours later at 7:52 p.m. that same evening, DFEH’s intervention
26 motion was filed under Mr. Schreiber’s signature. *Id.* ¶ 8. Even assuming that DFEH
27 retained present counsel at 8:52 a.m. on October 6, 2021, it beggars belief to conclude that
28

1 present counsel could have authored the intervention motion in the 11 hours that elapsed
2 before filing without relying on the work product of DFEH attorneys. It would elevate
3 form over substance to allow DFEH attorneys to engage in apparent shadow
4 representation where California Rule of Professional Conduct 1.11 prohibits their direct
5 representation.⁴

6 **B. DFEH Attorneys Should Be Barred From Providing Work Product to or**
7 **Advising Present Counsel Regarding these Intervention Proceedings.**

8 When attorneys withdraw or are disqualified from representation based on a
9 violation of conflict-of-interest rules, case law recognizes the propriety of barring these
10 attorneys from providing work product to or engaging in further consultation with
11 successor counsel in certain circumstances. In *First Wisconsin Mortgage Trust v. First*
12 *Wisconsin Corp.*, 584 F.2d 201 (7th Cir. 1978) (en banc), the Seventh Circuit, sitting en
13 banc, rejected a per se rule that the work product of a disqualified law firm is
14 automatically “tainted,” instead adopting a case-by-case inquiry into whether “the work
15 performed during the period subject to disqualification [has] aspects of confidentiality or
16 other unfair detriment to the former client arising from the very fact of the knowledge and
17 acquaintanceship acquired during the period of the prior representation.” *Id.* at 205, 208.

18 In applying this test, courts have looked to the extent to which the prior and
19 subsequent representation were factually related and the “relevance of the general and
20 specific knowledge” gained through prior representation to the subsequent representation.
21 *See, e.g., Behunin v. Dow Chem. Co.*, 642 F. Supp. 870, 873 (D. Colo. 1986) (finding that
22 a bar on disclosure of work product was not warranted where the “specific allegations are
23

24 ⁴ If current counsel for DFEH disputes that the intervention motion constitutes the work
25 product of DFEH attorneys, EEOC is amenable to counsel filing a declaration detailing
26 the steps they took to prepare the motion and the extent to which they did or did not
27 consult with or rely on work prepared by DFEH attorneys. *See, e.g., State Ex. Rel.*
28 *FirsTier Bank v. Mullen*, 534 N.W.2d 575, 580 (1995) (allowing discovery into conduct
of successor counsel to determine relationship with disqualified firm).

1 completely unrelated and only a wild imagination could see this information harming
2 [defendant] in the present case”); *Quark, Inc. v. Power Up Software Corp.*, 812 F. Supp.
3 178 (D. Colo. 1992) (barring disclosure of work product where the two actions had “a
4 related factual context”). Here, the “general and specific knowledge” that DFEH
5 Attorneys 1 and 2 gained in their prior representation of the EEOC is highly relevant and
6 closely factually related to their subsequent representation of DFEH: indeed, they are
7 seeking to oppose the very consent decree that arose from the investigation they helped to
8 direct while at the EEOC.

9 Courts have also assessed the likelihood that the disqualified attorneys obtained
10 important information in their prior representation. *See EZ Paintr Corp. v. Padco, Inc.*,
11 746 F.2d 1459, 1461-62 (Fed. Cir. 1984) (affirming a ruling that limited turnover of work
12 product by disqualified attorneys because there was evidence that they had acquired
13 information about the merits of the opposing party’s legal theories and other confidential
14 information in their prior representation). Here as in *EZ Paintr Corp.*, DFEH Attorneys 1
15 and 2 gained information about the merits of the EEOC’s legal theories and other
16 confidential information about the Activision investigation during their prior
17 representation. [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]

8 These circumstances plainly demonstrate at least “a reasonable possibility of
9 confidential information being used in the formation of, or being passed to substitute
10 counsel through” the work product of DFEH attorneys. *First Wisconsin*, 584 F.2d at 209;
11 *see also Quark*, 812 F. Supp. at 180 (barring disclosure of work product where prior client
12 submitted affidavits showing they “revealed information . . . relating to . . . marketing,
13 development, and planning” that was “relevant to [subsequent] action and could be used
14 against” client). Because of this risk of disclosure of confidential information, this is not a
15 case where the mere withdrawal of DFEH Attorney 1, DFEH Attorney 2, and other DFEH
16 attorneys would “eliminate the harm . . . that led to disqualification—the protection of
17 client confidences.” *Id.* (barring disclosure of work product to successor counsel because
18 “[m]erely disqualifying the individual . . . attorneys would not prevent any confidential
19 information that found its way into their work product from being used against plaintiff by
20 successor counsel”); *see also Levin*, 579 F.2d at 283 (looking to whether the disclosure of
21 work product would serve only as “vindication of the integrity of the bar” or instead serve
22 to remedy “specific injury to the moving party”).

23 The need for a robust protective remedy is especially great given the unique
24 circumstances of this case, where two former EEOC attorneys intimately involved in
25 investigating charges against Activision while at the EEOC now seek to oppose the
26 consent decree that is the culmination of that very investigation. While Rule 1.11(a)’s
27 prohibition on representation applies regardless of whether the lawyer in question is
28

1 “adverse to a former client,” Cal. R. Professional Conduct 1.11, Comment 3, the concerns
2 animating the rule are at their zenith where the interests are directly opposed. *See Ross v.*
3 *Am. Red Cross*, No. 09-cv-905, 2012 U.S. Dist. Lexis 82798, at *8 (S.D. Ohio Jan. 11,
4 2012) (noting heightened concerns where attorney “was at the forefront of devising and
5 implementing the Red Cross’ legal strategy” and then sought to testify against Red
6 Cross’s interest with respect to consent decree he helped negotiate).

7 Moreover, courts have articulated special concerns in the context of potential
8 violations by government attorneys for the following reasons:

9 First, because government attorneys may have had access to more kinds of
10 information in connection with the prior representation than private attorneys
11 typically do, there is a greater potential for misuse of information—including
12 information that is not necessarily confidential in nature—. . . . Second, the
13 public is generally more concerned about government improprieties than
14 about private improprieties. Thus, the appearance problem is more severe
because the public is likely to be more critical of this potential misuse of
information.

15 *Brown*, 486 A.2d at 49 (discussing rule of professional conduct similar to California Rule
16 of Professional Conduct 1.11).

17 CONCLUSION

18 For all these reasons, the appropriate remedy to address the violation of Rule 1.11
19 in this case is to disallow DFEH’s intervention motion and bar DFEH counsel from
20 providing further work product or advice to current counsel. If the Court is inclined to
21 accept the Motion for Intervention, then EEOC respectfully submits its Opposition to the
22 Motion to Intervene which is attached as Exhibit A to the Notice of Opposition by the
23 EEOC to DFEH’s Ex Parte Application to Shorten Time. Either way, DFEH’s Motion to
24 Intervene should be denied due to violation of Rule 1.11 and on the merits.

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Respectfully submitted,

Dated: October 8, 2021

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

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