FILED
San Francisco County Superior Court
DEC 22 2017
CLERK OF THE COURT
BY: Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

JOHN DOE, ET AL, Plaintiffs, vs. GOOGLE, INC., et al., Defendants.	Case No. CGC – 16-556034 ORDER (1) DENYING GOOGLE AND ALPHABET'S MOTION FOR JUDGMENT ON THE PLEADINGS AND (2) GRANTING DOE'S MOTION TO COMPEL FURTHER RESPONSE AND PRODUCTION OF DOCUMENTS (A) IN RESPONSE TO DOCUMENT REQUEST NO. 56 AND (B) REGARDING "CATALYST" FEES

The fifth amended complaint (5AC) alleges defendants used illegal agreements to restrict their current and former employees' freedom of speech and to restrain trade. *Id.* ¶¶ 38–51. Among those alleged illegal agreements is an "Employee and Temporary Workers Adult Content Liability Release" (Release). ¶¶ 94. The Release requires employees to agree that during the course of their employment they may be exposed to sensitive adult content, releases Google from "any and all liability" associated with having such material in the work environment, including claims of harassment, hostile work environment, and discrimination. *Id.* ¶¶ 96–97. Plaintiffs contend the Release requires employees to release non-waivable rights, including rights under Title VII, the Fair Employment and Housing Act (FEHA), and California workers' compensation laws. *Id.* ¶ 214.

The Release issue is the topic of the only remaining claim (others having been previously disposed of), i.e., cause of action 23. Defendants move for judgment on the pleadings on this claim.

In the second part of this order I address two discovery disputes raised by separate motions.

I heard argument today.

1. Motion For Judgment On The Pleadings

Request for Judicial Notice

Doe requests judicial notice of a letter sent from Google's counsel to the LWDA on March 17, 2017. RFJN Ex. 1. Doe says the purpose of the letter is to demonstrate that Google knew its Release was illegal, and to show the breadth of the release. RFJN at 1. The request is not opposed. But Google's purpose or intent is not relevant to the present motion. The language of the Release, which is attached as an exhibit to the letter, is relevant to the determination of the motion for judgment on the pleadings, but it is already included as an attachment to the 5AC. Nothing from the letter itself is helpful. The request is denied.

Timing of Motion

Plaintiffs contend the motion is not timely. It can be made only if the defendant has already filed his answer, and the time to demur has expired. C.C.P. § 438(f)(2). The 5AC was filed and served on November 21, 2017. The time to demur would have expired on December 26. This motion was filed on November 30. But the cause of action at issue now was not first raised in the 5AC; it came up first in the third amended complaint, filed April 28, 2017. TAC ¶¶ 90, 92–94. The time to demur to it has expired. The present motion is timely.

Google Release

The Release is incorporated into the complaint:

> During my employment or assignment at Google, I may be exposed to sensitive "adult content", such as text, descriptions, graphics, pictures, and/or other files commonly referred to as being "adult" content. [¶] I acknowledge that exposure to this material may be part of my essential job function and hereby release Google Inc. and its subsidiaries and affiliates from any and all liability associated with having this material present in the work environment, including but not limited to claims of harassment, hostile work environment and discrimination. This agreement does not change or impact the at-will status of my employment or my assignment at Google.

5AC Ex. 1 ex. 1.

Defendants offer reasons why the Release is necessary (MPA at 6–8), but this irrelevant now. *Cloud v. Northrop Grumman Corp.*, 67 Cal. App. 4th 995, 999 (1998) ("Presentation of extrinsic evidence is . . . not proper on a motion for judgment on the pleadings.").

The parties disagree on the interpretation of the Release, specifically, the language "any and all liability associated with having [adult content] present in the work environment." Plaintiffs argue that this would necessarily require employees to release any and all claims of harassment or discrimination, including in situations where explicit or derogatory material is unrelated to the work. Opposition at 6–7. Plaintiffs contend that the Release would necessarily protect defendants from liability if, for example, a supervisor sent lewd photos to a subordinate, or there were company-wide emails communicating derogatory jokes. *Id.* at 7. Therefore, as a matter of law, the Release unlawfully restrains employees from pursuing Title VII and FEHA claims, which are non-waivable. Opposition at 10–11. Defendants argue that the language is limited by the qualifier that exposure to the adult content is limited to that which is "part of [the employee's] essential job function," and that the Release operates as an assumption of risk. MPA at 8.

1 The basic, patent fact is the Release releases "claims of harassment, hostile work
2 environment and discrimination."
3 The Release generally releases "any and all liability." While the California Supreme
4 Court has found that a general release of "any and all claims" does not render a release unlawful,
5 null, or void, such a release "does *not* encompass nonwaivable statutory protections." *Edwards*
6 *v. Arthur Andersen LLP*, 44 Cal. 4th 937, 954 (2008) (emphasis added).[1] The Release
7 specifically releases harassment and discrimination claims. These are non-waivable statutory
8 rights, and release of such rights is contrary to public policy. *Armendariz v. Foundation Health*
9 *Psychcare Services, Inc.*, 24 Cal. 4th 83, 100–01 (2000), *abrogated on other grounds by AT&T*
10 *Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (employment contract that requires employees
11 to waive their rights to redress sexual harassment or discrimination is contrary to public policy).
12 This is precisely what plaintiffs allege in the 5AC—that the Release is unlawful because
13 it releases claims for violation of non-waivable statutory rights under Title VII, FEHA, and
14 workers' compensation laws. 5AC ¶ 214.
15 The motion for judgment on the pleadings is denied.
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20 **2. Motions To Compel (addressed to Google only)**
21 **A. Document Request No. 56**
22 Request No. 56 seeks "[a]ll documents or ESI evidencing communications among those
23 involved in the drafting or approval of any version of Google's "Employee and Temporary
24 Workers Adult Content Liability Release" from January 1, 2011 to the present. Google
25 responded with several boilerplate objections, including that the request is vague and ambiguous,
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[1] *See also Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 101 (2000), *abrogated on other grounds by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (holding that an agreement cannot serve to waive statutory rights).

overly broad, not relevant to determining whether the Release is lawful, not reasonably calculated to lead to discovery of admissible evidence, seeks privileged or protected information, and is unduly burdensome and oppressive. Boilerplate is not useful, and on occasions it may be sanctionable. Cf., e.g., Weil & Brown, et al., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 8:1498.5, 8:904, 8:1071, 8:1076.1 (Rutter: 2017).

Google argues that the request covered too long period, as it seeks documents from the last seven years. But plaintiffs has its reasons for this period: the Release apparently was effective in 2013, perhaps earlier, and the considerations that led to it would have dated to even earlier.

Google has no evidence of burden.

The materials should be produced.

B. Documents Regarding "Catalyst" Fees and Costs

Plaintiffs allege that their PAGA claims were the "catalyst" that caused Google to make material changes to its employment practices, to bring them into compliance with the law.

Request for judicial notice

Plaintiffs request judicial notice of several documents including the NLRB's Orders consolidating cases and rescheduling or postponing hearings, an Order regarding Adecco's demurrer in the related *Moniz* matter in San Mateo Superior Court, and reporter's transcripts from the Adecco demurrer hearing in *Moniz* and a case management conference in this matter. RFJN ISO Reply ISO "Catalyst" Compel at 1–2. None of these is relevant to determining the motion to compel, and the requests are denied.

Special Interrogatories Nos. 11–28; Doe's Requests for Admissions Nos. 4–25; Doe's Form Interrogatory No. 17.1; Doe's Requests for Production Nos. 58–75

Google objected to all of these requests on the same various grounds, including lack of relevance, overbreadth, and burden. With respect to burden, Google only offers a conclusory statement that the requests are burdensome, because they would require parsing through privileged information. This is not admissible evidence and I reject the argument.

Google contends plaintiffs cannot recover catalyst fees as a matter of law, as the claims are preempted by the NLRA, and C.C.P. § 1021.5 is inapplicable to claims governed by federal law. As plaintiffs note, proof of claims or defenses is not necessary as a condition of discovery. *Williams v. Super. Ct.*, 3 Cal. 5th 531, 551 (2017). Further, preemption of their claims does not bar them from pursuing discovery on PAGA fees and costs based on Google modifying its policies to be in compliance with *California* law.

At argument Google pressed the position, which it contends I can decide now, that plaintiffs will never be able to collect catalyst fees because none of their complaints asked for the relief –the change in policies—they now contend they ushered into existence.

> "The 'catalyst theory' permits an award of attorney fees even when the litigation does not result in a judicial resolution if the defendant changes its behavior substantially because of, and in the manner sought by, the litigation. [Citation.] To obtain attorney fees under this theory, a plaintiff must establish that (1) the lawsuit was a catalyst motivating the defendants to provide the primary relief sought; (2) the lawsuit had merit and achieved its catalytic effect by threat of victory, not be dint of nuisance and threat of expense; and (3) the plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit." (*Coalition, supra,* 238 Cal.App.4th at p. 521, 189 Cal.Rptr.3d 306.)

California Pub. Records Research, Inc. v. Cty. of Yolo, 4 Cal. App. 5th 150, 191 (2016).[2] Under analogous provisions of the Public Records Act, the issue is just whether the action caused, as matter of fact, the agency to act. *Sukumar v. City of San Diego,* 14 Cal. App. 5th 451, 464 (2017). If so, the plaintiff is sufficiently "prevailing". 14 Cal. App. 5th at 467.

[2] See also, e.g., *Coal. for a Sustainable Future in Yucaipa v. City of Yucaipa*, 238 Cal. App. 4th 513, 521 (2015).

The causation issue, such as perhaps whether the action was a "substantial factor contributing to defendant's action," *Cates v. Chiang*, 213 Cal. App. 4th 791, 807 (2013), is not the point Google makes now.

Rather, Google says the relief, in effect injunctive relief, must have been sought specifically *as such* by a complaint in this case. It's true that the complaint (or petition) is a good source to figure out the goals of the litigation, that is, the "primary relief" sought, *California Pub. Records Research, Inc.*, 4 Cal. App. 5th at 192, but to some extent the issue is a practical one too,[3] suggesting that a reading of only the complaint—especially in the context of a discovery dispute—is not a wise way to decide that ultimate issue of catalyst fee entitlement.[4] Discovery relevance is broadly construed, and if fees entitlement is presented by the complaint, it is probably entitled to discovery. *Williams v. Superior Court*, 3 Cal. 5th 531, 549 (2017) (complaint as guide to discoverability).

Conclusion

The motion for judgment on the pleadings is denied. The discovery motions are granted, and (to allow for the holiday period), Google should respond to the discovery demands by January 16, 2018.

Dated: December 22, 2017

Curtis E.A. Karnow
Judge of The Superior Court

[3] *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 566 (2004, 2005) ("practical impact of the public interest litigation in order to determine whether the party was successful").

[4] Compare e.g. *Marine Forests Soc'y v. California Coastal Comm'n*, 160 Cal. App. 4th 867, 879 (2008) (detailed examination of "primary relief" sought).

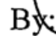
CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, DANIAL LEMIRE, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On DEC 2 6 2017, I electronically served THE ATTACHED DOCUMENT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: DEC 2 6 2017

T. Michael Yuen, Clerk



By: ______________________
DANIAL LEMIRE, Deputy Clerk