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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, **Plaintiff,** **v.** **LEXUS OF SERRAMONTE, SONIC AUTOMOTIVE, INC., AND FIRST AMERICA AUTOMOTIVE,** **Defendants.**	Case No. C-05-0962 SBA **NOTICE OF MOTION, MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES FOR PARTIAL SUMMARY JUDGMENT** **DATE: SEPTEMBER 19 2006** **TIME: 1:00 P.M.** **COURTROOM: 6** **JUDGE ARMSTRONG**

TO EACH PARTY AND TO EACH ATTORNEY OF RECORD IN THIS ACTION:

PLEASE TAKE NOTICE that on September 19, 2006, or as soon thereafter as counsel can be heard in the United States District Court for the Northern District of California, the Equal Employment Opportunity Commission (EEOC) will and hereby does move for Partial Summary Judgment as to four of Defendant's Affirmative Defenses.

These four defenses fail as a matter of law because they lack legal foundation or because there is an absence of facts to support these defenses as explained in detail in the attached Memorandum of Points and Authorities. As there is no basis for Defendants' assertion of these defenses, the EEOC is entitled to partial summary judgment in its favor as to these purported defenses.

I. INTRODUCTION

The Equal Employment Opportunity Commission ("EEOC") filed this public enforcement lawsuit against Lexus of Serramonte, Sonic Automotive, Inc., and First America Automotive (collectively referred to as "Lexus") for violations of Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. §2000e, *et. seq*. The EEOC alleges that Lexus discriminated against Charging Party Annie Wei ("Wei" or "Charging Party") and similarly situated female employees by subjecting them to sexual harassment. Ms. Wei's harassment ultimately resulted in her constructive discharge

By this motion, the EEOC seeks partial summary judgment on four (4) affirmative defenses. The four defenses fail as a matter of law because they lack legal foundation or because there is an absence of facts to support the defense. As such, the EEOC is entitled to partial summary judgment in its favor as to these purported defenses.

II. MEET AND CONFER REQUIREMENT MET

In compliance with this Court's Order For Pretrial Preparation, the EEOC engaged in "meet and confer" discussions with Defendant prior to the filing of the instant motion. [Ordonio-Dixon Decl. ¶¶3-5.]

III. APPLICABLE STANDARD FOR SUMMARY JUDGMENT

Under Fed.R.Civ.P. 56(c), summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). The Supreme Court has held that summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and to which the party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). According to the Court, "[o]ne of the principal purposes of the summary judgment rule is to isolate and [d]ispose of factually unsupported claims or defenses." 106 S.Ct. at 2553.

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IV. ARGUMENT

A. Defendant's Affirmative Defense of Unclean Hands Fails as a Matter of Law – Sixth Affirmative Defense

In its Answer, Defendants raised the following defense:

Sixth Affirmative Defense

Plaintiffs had unclean hands with respect to the matters raised in the Complaint, and on that ground, are barred from recovering any relief on the Complaint, or any purported cause of action alleged therein.[1]

Generally, the unclean hands defense closes the doors of a court of equity to a party tainted with inequity or bad faith relative to the matter in which relief is sought, and derives from the equitable maxim that one " 'who comes into equity must come with clean hands.' " *United States v. Philip Morris Inc.*, 300 F.Supp.2d 61, 74 (D.D.C.2004) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945)). However, when "the Government acts in the public interest the unclean hands doctrine is unavailable as a matter of law." *Philipp Morris* at 75.

Plaintiff EEOC is the federal agency charged with the administration, interpretation, and enforcement of Title VII, and is expressly authorized to bring this action by sections 706(f)(1) and (3) of Title VII, 42 U.S.C. §§2000e-5(f)(1) and (3). The instant case is a public enforcement action filed by the EEOC to enforce violations of federal anti-discrimination law. As such, Defendants may not raise this defense in response to any claim made by the EEOC.

Even if the defense of unclean hands were available in this case, Defendant has failed to articulate any factual basis for the defense despite discovery and "meet and confer" requests. [Esparza-Cervantes Decl. ¶2, Ordonio-Dixon Decl. ¶5.] Absent such facts to support the defense, it must fail.

In sum, Defendants' defense of "unclean hands" has no basis in law or fact. Defendant can not raise this defense against the EEOC, and even if it could, Defendant has failed to articulate any facts to support such a defense.

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[1] Though Defendants use the word "Plaintiffs" indicating multiple plaintiffs, there is but one plaintiff in this lawsuit.

B. There Is No Affirmative Defense Based On The EEOC's Failure To Exhaust Administrative Remedies – Tenth Affirmative Defense

In its Answer, Defendant raised the following defense:

Tenth Affirmative Defense

Plaintiffs' claims are barred due to their failure to timely exhaust administrative remedies.

There is no statutory legal requirement as to an administrative remedy that governs a Title VII action initiated by the EEOC. The only plaintiff in this action is the EEOC. Thus, the only prerequisite to the filing of the instant public enforcement lawsuit is the filing of the underlying charge more than thirty days before the institution of the lawsuit. 42 U.S.C. §2000e-5(f)(1) and (3). "Defendants admit that more than 30 days prior to the institution of this lawsuit, Anne Wei filed a charge of discrimination." [Defendant's Answer at page 2, paragraph 6.] Based on this admission of fact, Defendant's affirmative defense has no application here and must fail as a matter of law.

C. **The EEOC May Seek Relief For Claimants Who Did Not File An EEOC Charge – Thirteenth Affirmative Defense.**

In its Answer, Defendant raised the following defense:

Thirteenth Affirmative Defense

The Court lacks jurisdiction over any claims under Title VII against Defendants as to any Plaintiff who failed to file any timely charge or allegations against Defendants, or any of them, with the EEOC.

As noted above, the EEOC is the only Plaintiff in this action. Thus, whether a timely charge has been filed by claimants on whose behalf the EEOC seeks relief is irrelevant to the present suit. As Magistrate Judge Larson, has already observed in this case, "the EEOC has statutory authority to file lawsuits seeking classwide relief, and is exempt from the certifications of FRCP 23." *Order Granting Motion To Compel Production of Employee Lists* dated August 9, 2006, page 3, lines 1-3 *citing General Telephone Co. of the Northwest, Inc. v. EEOC,* 446 U.S. 318 (1980). This statutory authority "specifically grants the EEOC the power to enforce the anti-discrimination laws by seeking injunctive remedies in the public interest as well as monetary remedies on behalf of individual

claimants." *Id*. at page 2 lines 25-27. In addition, "timely filing of an EEOC charge is not a necessary condition to the obtaining of relief by one as a member of a class in whose behalf suit has been brought." *Inda v. United Air Lines, Inc.*, 565 F.2d 554 (9th Cir. 1977). Simply stated, the EEOC may seek such relief for claimants regardless of whether the individual has filed her own charge. As such, Defendant's Thirteenth Affirmative Defense fails as a matter of law.

D. All Jurisdiction Prerequisites to the Filing of the Instant Lawsuit Have Been Met – Fourteenth Affirmative Defense

In its Answer, Defendant raised the following defense:

Fourteenth Affirmative Defense

All claims under Title VII which were not the subject of a timely charge filed with the EEOC pursuant to 42 U.S.C. Section 2000e-5(e); with respect to which no investigation or conciliation has been made by the EEOC; or, which were not made the subject of a timely civil action pursuant to 42 U.S.C. Section 2000e-5(f)(1) are barred.

This defense lumps three separate issues together. Taken together or separate, Defendant's Fourteenth Affirmative Defense fails. Two of these issues raised are discussed above. First, as addressed above in Section C, the EEOC may properly assert claims for individuals who did not file a charge. Second, by Defendant's own admission, the EEOC's lawsuit was filed according to the time constraints set out by 42 U.S.C. Section 2000e-5(f)(1); See Section B. Finally, the purported absence of an "investigation or conciliation" defense lacks a factual basis.

Courts are uniform in holding that the only jurisdictional steps required of the EEOC as a condition precedent to filing a public action under Section 706 of Title VII, 42 U.S.C. §2000e-5, are the filing of a charge, an investigation, a reasonable cause determination, and conciliation. *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 607 (9th Cir. 1982) (*citing §*42 U.S.C.2000e-5(b)). There are no other conditions precedent or exhaustion requirements in the statue. *Miller v. Bank of America*, 600 F.2d 211, 214 (9th Cir. 1979) (declining to read an exhaustion of employment remedies requirement into Title VII).

During "meet and confer" discussions regarding the instant motion, Defense counsel admitted that the four jurisdictional steps had been met as to defendants Lexus of Serramonte and Sonic

Automotive, Inc. Defendants noted that defendant First America Automotive, Inc. (FAA) was not specifically named in Ms. Wei's Charge of Discrimination. As such, Defendant argues that FAA received no notice of the charge, investigation and conciliation and because of this, the jurisdictional requirements set out above are not met as to FAA.[2] [Ordonio-Dixon Decl. ¶4.]

Generally, Title VII claimants "may only sue [parties] named in the EEOC charge because only those [parties] named had an opportunity to respond to the charges during the administrative proceedings." *Sosa v. Hiraoka*, 920 F.2d 1451, 1458 (9th Cir. 1990). However, there are numerous exceptions to this rule. For example, "if the [party] named in the EEOC charge is a principal or agent of the unnamed party, or if they are 'substantially identical parties,' suit may proceed against the unnamed party." *Id* at 1460. In addition, where "defendants themselves 'should have anticipated' that the claimant would name those defendants in a Title VII suit, the court has jurisdiction over those defendants even though they were not named in the EEOC charge." *Sosa* at 1459 *citing Chung v. Pomona Valley Community Hosp.*, 667 F.2d 788, 792 (9th Cir. 1982). Suit may also proceed "if the unnamed party had notice of the EEOC conciliation efforts and participated in the EEOC proceedings." *Id.* FAA is properly a Defendant in this lawsuit based on all of these exceptions.

1. Substantially Identical Parties

All three Defendants are "substantially identical parties." Indeed, all three companies share a common ownership. In answers to interrogatories regarding the relationship between the Defendants, Defendants responded as follows:

> Lexus of Serramonte is a d/b/a for FAA Serramonte L, Inc., which is wholly owned by FirstAmerica Automotive, Inc. First America Automotive, Inc. is wholly owned by Sonic Automotive, Inc., which owns a number of dealerships in California and throughout the United States. Sonic Automotive, Inc. purchased FirstAmerica Automotive Inc. on or about December 1, 1999.

[Esparza-Cervantes Decl. ¶4.]

[2] The EEOC notes that FAA's co-Defendants failed to appear at two mutually scheduled conciliation conferences and rejected EEOC's offers to propose monetary relief to conciliate Ms Wei's charge. [Esparza-Cervantes Decl. ¶12.] Thus, it is difficult to imagine FAA could have suffered any prejudice from any alleged exclusion from the conciliation process.

The three Defendants also share identical corporate officers occupying identical positions: According to documents filed with the California Secretary of State, Dept. of Corporations, O. Bruton Smith is CEO of all three defendants. In addition, B. Scott Smith is Vice-President for all three companies. Identical identity of top corporate officers supports a finding that two entities should be treated as a single employer for Title VII purposes. *See, e.g., McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 933 (11th Cir. 1987) (noting that one man served as president of both defendants and a second served as a secretary for both defendants). The similarity does not stop with the Smiths. The eleven corporate officers listed for FAA hold the same positions in Lexus of Serramonte's corporate filings.[3] [Esparza-Cervantes Decl. ¶5.]

The central management of the companies is evident by their integrated operations. All three companies share the same employee health benefit programs and employee orientation/handbooks. Indeed, Defendants contend that an arbitration agreement included in the employee handbook governs any state claims which Ms. Wei may pursue against the companies. Company employees testified to the interrelated nature of Defendants' operations and management. [Esparza-Cervantes Decl. ¶¶6-9.] Indeed, all three companies are jointly represented in this lawsuit by the same law firm. This firm also represented the companies during the EEOC's investigation. [Esparza-Cervantes Decl. ¶10.]

Based on the foregoing, it is clear that Defendants are all "substantially identical parties."

2. FAA should have anticipated being named in the lawsuit.

The interrelatedness of the companies as detailed above makes it clear that FAA "should have anticipated" being a Defendant in the instant lawsuit. FAA shares the same officers and operations as the other Defendants. Moreover, FAA is Ms. Wei's direct employer, having identified itself as such Ms. Wei's employer in W-2 forms submitted to the Internal Revenue Service during the time of the harassment. [Esparza-Cervantes Decl. ¶11.] FAA clearly should have anticipated being named in the instant lawsuit.

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[3] Lexus of Serramonte is a d/b/a for the corporate entity FAA Serramonte L, Inc.

3. FAA had notice of Ms. Wei's EEOC Charge.

Based on the foregoing, FAA undoubtedly received notice of Ms. Wei's charge through Lexus of Serramonte and Sonic Automotive Inc. due to the highly intertwined, interdependent nature of their business relationships.

In sum, FAA is properly a Defendant in this lawsuit. Defendants' Fourteenth Affirmative Defense fails.

V. CONCLUSION

As explained above, Defendants' four affirmative defenses fail as a matter of law because they lack legal foundation or because there is an absence of facts to support the defense. As such, this Court should grant partial summary judgment on these purported defenses as set out in the attached order.

Dated August 14, 2006

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

BY: _____//s//_____
LINDA ORDONIO-DIXON