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KAISER FOUNDATION HEALTH PLAN, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

RICHARD BOWIE, an individual,

Plaintiff,

v.

KAISER FOUNDATION HEALTH PLAN, INC.,

Defendant.

Case No. Case 3:23-cv-06546-VC

DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date:	Thursday, June 6, 2024
Time:	10:00 a.m.
Judge:	Hon. Vince Chhabria
Location:	San Francisco Courthouse Courtroom 4 – 17th Floor 450 Golden Gate Avenue San Francisco, CA 94102

TABLE OF CONTENTS

NOTICE OF MOTION AND MOTION 1

MEMORANDUM OF POINTS AND AUTHORITIES 2

I. INTRODUCTION 2

II. STATEMENT OF FACTS AND RELEVANT PROCEDURE 3

A. The Allegations of the Complaint 3

B. Relevant Procedure 6

III. LEGAL STANDARD 6

IV. ARGUMENT 8

A. The Complaint's Second and Fifth Causes of Action Must Be Dismissed Because Plaintiff Has Not and Cannot Establish He Adequately Informed KFHP of a Bona Fide Religious Belief Conflicting with the Policy 8

1. Plaintiff has the obligation to establish that he has a bona fide religious belief conflicting with the Policy and that he adequately informed KFHP of that conflict 8

2. Plaintiff's exemption request and response to KFHP's request for supplemental information do not establish a viable religious belief 9

a. Plaintiff's "body temple" objection to the Policy is not religious 10

b. Plaintiff's objection to the "mandate" of the Policy is not religious 13

3. Plaintiff's exemption request and response to KFHP's supplemental information request do not establish a conflict with the Policy 15

B. Plaintiff's Disparate Treatment Claim Must Be Dismissed Because the Complaint Does Not Allege Facts Establishing Differing Treatment of Similarly Situated Individuals, Discriminatory Intent, or Discriminatory Conduct 17

C. The Third and Fourth Causes of Action for Retaliation Must Be Dismissed Because the Complaint Has Not Alleged Facts Establishing a Causal Link Between Plaintiff's Exemption Request and Any Adverse Employment Action or Retaliatory Conduct by KFHP 20

D. Because the Facts Established by Plaintiff's Exemption Documents Cannot Change, Leave to Amend Should Be Denied as Futile 23

V. CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Africa v. Pennsylvania,
662 F.2d 1025 (3d Cir. 1981).....10, 11, 13, 14

Alvarado v. City of San Jose,
94 F.3d 1223 (9th Cir. 1996) 10

Ashcroft v. Iqbal,
556 U.S. 662 (2009).....6, 7

Beck v. University of Wis. Bd. of Regents,
75 F.3d 1130 (7th Cir. 1996) 16

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....6, 7

Berna v. Bayhealth Med. Ctr., Inc.,
No. 1:23-cv-00945-RGA, 2024 WL 456420 (D. Del. Feb. 5, 2024).....15

Birkes v. Mills,
No. 03:10-cv-00032-HU, 2011 WL 5117859 (D. Or. Sept. 28, 2011).....10

Blackwell v. Lehigh Valley Health Network,
No. 5:22-cv-03360-JMG, 2023 WL 362392 (E.D. Pa. Jan. 23, 2023) 12

Bodett v. CoxCom, Inc.,
366 F.3d 736 (9th Cir. 2004) 18

Brox v. Hole,
590 F. Supp. 3d 363 (D. Mass. 2022),
affirmed in part and vacated in part, 83 F.4th 87 (1st Cir. 2023) 12

Bush v. Mondelez Int'l, Inc.,
No. 16-cv-02460-RS, 2016 WL 5886886 (N.D. Cal. Oct. 7, 2016).....7

Campanelli v. Bockrath,
100 F.3d 1476 (9th Cir. 1996) 7

Chavez v. San Francisco Bay Area Rapid Transit Dist.,
No. 3:22-cv-06119-WHA, 2024 WL 332881 (N.D. Cal. Jan. 28, 2024).....9, 13

United States ex rel. Chunie v. Ringrose,
788 F.2d 638 (9th Cir. 1986) 7

Clark v. Frank,
5 F.3d 535 (9th Cir. 1993) 17

Coates v. Legacy Health,
No. 3:23-cv-00931-JR, 2024 WL 1181827 (D. Or. Jan. 8, 2024),
report and recommendation adopted, 2024 WL 1177124 (D. Or. Mar. 19, 2024) 11

Crawford v. Trader Joe's Co.,
No. 5:21-cv-01519-JGB-SHK, 2023 WL 3559331 (C.D. Cal. May 4, 2023) 8

Day v. Sears Holdings Corp.,
930 F. Supp. 2d 1146 (C.D. Cal. 2013) 20

Detwiler v. Mid-Columbia Med. Ctr.,
No. 3:22-cv-01306-JR, 2022 WL 19977290 (D. Or. Dec. 20, 2022),
report and recommendation adopted, 2023 WL 3687406 (D. Or. May 26, 2023) 12

Doe v. San Diego Unified Sch. Dist.,
19 F.4th 1173 (9th Cir. 2021) 9

Ellison v. Inova Health Care Servs.,
--- F.Supp.3d ----, No. 1:23-cv-00132-MSN-LRV, 2023 WL 6038016
(E.D. Va. Sept. 14, 2023).....10, 11, 24

Fallon v. Mercy Catholic Med. Ctr. of Se. Penn.,
877 F.3d 487 (3d Cir. 2017).....13, 14

Finkbeiner v. Geisinger Clinic,
623 F. Supp. 3d 458 (M.D. Penn. 2022) 11, 12

Freyd v. University of Or.,
990 F.3d 1211 (9th Cir. 2021) 17

Gage v. Mayo Clinic,
No. 2:22-cv-02091-SMM, 2023 WL 3230986 (D. Ariz. May 3, 2023) 19

Geraci v. Moody-Tottrup, Intern., Inc.,
82 F.3d 578 (3d Cir. 1996).....15

Goosby v. City of Los Angeles,
No. 2:21-cv-08234-SVW-DFM, 2021 WL 6496413 (C.D. Cal. Dec. 7, 2021) 24

Griffin v. Massachusetts Dep't of Revenue,
No. 1:22-cv-11991-FDS, 2023 WL 4685942 (D. Mass. July 20, 2023).....16

Heller v. EBB Auto Co.,
8 F.3d 1433 (9th Cir. 1993) 8

Hinton v. Pacific Enters.,
5 F.3d 391 (9th Cir. 1993) 24

Kiel v. Mayo Clinic Health Sys. Se. Minn.,
--- F.Supp.3d ----, No. 0:22-cv-01319-JRT-ECW, 2023 WL 5000255
(D. Minn. Aug. 4, 2023) 11

Klein v. Walt Disney Co.,
No. 2:13-cv-01358-PSG-DTB, 2014 WL 12587046 (C.D. Cal. June 6, 2014).....21

Lazy Y Ranch Ltd. v. Behrens,
546 F.3d 580 (9th Cir. 2008) 7, 22

Lopez v. Smith,
203 F.3d 1122 (9th Cir. 2000) 23

Lyons v. England,
307 F.3d 1092 (9th Cir. 2002) 17

Marder v. Lopez,
450 F.3d 445 (9th Cir. 2006) 7

McAlindin v. County of San Diego,
192 F.3d 1226 (9th Cir. 1999) 22

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973).....17, 18

McDowell v. Bayhealth Med. Ctr., Inc.,
No. 1:22-cv-01392-RGA, 2024 WL 278187 (D. Del. Jan. 25, 2024) 11

Miller v. Port Authority of N.Y & N.J.,
351 F. Supp. 3d 762 (D.N.J. 2018).....15

Moran v. Selig,
447 F.3d 748 (9th Cir. 2006) 18

Moss v. United States Secret Serv.,
572 F.3d 962 (9th Cir. 2009) 7

Mullen v. AstraZeneca Pharms., LP,
No. 2:23-cv-03903-JMY, 2023 WL 8651411 (E.D. Pa. Dec. 14, 2023) 15, 16, 17, 24

Nidds v. Schindler Elevator Corp.,
113 F.3d 912 (9th Cir. 1996) 8

Passarella v. Aspirus, Inc.,
No. 3:22-cv-00342-jdp, 2023 WL 2455681 (W.D. Wis. Mar. 10, 2023).....11

Petermann v. Aspirus, Inc.,
No. 3:22-cv-00332-jdp, 2023 WL 2662899 (W.D. Wis. Mar. 28, 2023) 15

Peterson v. Hewlett-Packard Co.,
358 F.3d 599 (9th Cir. 2004) 8

Prida v. Option Care Enters., Inc.,
No. 5:23-cv-00905-SL, 2023 WL 7003402 (N.D. Ohio Oct. 24, 2023).....14

Quinn v. Legacy Health,
No. 3:23-cv-00331-JR, 2023 WL 10354251 (D. Or. June 16, 2023),
report and recommendation adopted, 2024 WL 620344 (D. Or. Feb. 13, 2024).....11

Ray v. Henderson,
217 F.3d 1234 (9th Cir. 2000) 20, 22

Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.,
768 F.3d 938 (9th Cir. 2014) 7

Ricci v. DeStefano,
557 U.S. 557 (2009).....17

Rutman Wine Co. v. E. & J. Gallo Winery,
829 F.2d 729 (9th Cir. 1987) 23

Sayegh v. John Enright, Inc.,
No. 2:10-cv-04794-JFW-JCG, 2010 WL 11531206 (C.D. Cal. Dec. 8, 2010) 24

Sequeira v. Alameda Cnty.,
No. 3:06-cv-01413-MEJ, 2008 WL 5179108 (N.D. Cal. Dec. 10, 2008).....8

Steffes v. Stepan Co.,
144 F.3d 1070 (7th Cir. 1998) 16

Stone v. Lenovo (United States), Inc.,
No. 6:22-cv-06548-FPG, 2024 WL 356571 (W.D.N.Y. Jan. 31, 2024).....17

Sturgill v. Am. Red Cross,
No. 2:22-cv-11837-PDB-APP, 2023 WL 8701293 (E.D. Mich. Dec. 15, 2023) 11

Templeton v. Neodata Servs., Inc.,
162 F.3d 617 (10th Cir. 1998) 16

Texas Dep't of Cmty. Affairs v. Burdine,
450 U.S. 248 (1981).....17

Ulrich v. Lancaster Gen. Health,
No. 5:22-cv-04945-SWR, 2023 WL 2939585 (E.D. Pa. Apr. 13, 2023).....12, 14

UnifySCC v. Cody,
No. 5:22-cv-01019-BLF, 2022 WL 2357068 (N.D. Cal. June 30, 2022) 13

United States v. Ritchie,
342 F.3d 903 (9th Cir. 2003) 7

University of Texas Sw. Med. Ctr. v. Nassar,
570 U.S. 338 (2013) 21

Varkonyi v. United Launch Alliance, LLC,
No. 2:23-cv-00359-SB-MRW, 2023 WL 4291649 (C.D. Cal. May 12, 2023) 19

Vasquez v. County of Los Angeles,
349 F.3d 634 (9th Cir. 2003) 18

Weiss v. Permanente Med. Grp., Inc.,
No. 3:23-cv-03490-RS, 2023 WL 8420974 (N.D. Cal. Dec. 4, 2023) 18, 19, 22-24

Wood v. City of San Diego,
678 F.3d 1075 (9th Cir. 2012) 17

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No. 2:21-cv-01146-MTL, 2021 WL 5578876 (D. Ariz. Nov. 29, 2021) 19

Federal Statutes

28 U.S.C. § 1407 6

Civil Rights Act of 1964
Title VII, 42 U.S.C. § 2000d, et seq. ..... *passim*

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Cal. Gov. Code, § 12940 ..... *passim*

Rules

Federal Rule of Civil Procedure 12(b)(6) 1, 6, 7

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE THAT, on Thursday, June 6, 2024, at 10:00 a.m.., or as soon thereafter as counsel can be heard, in the above-entitled Court, in Courtroom 4 – 17th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, Defendant KAISER FOUNDATION HEALTH PLAN, INC. ("KFHP"), will and hereby does move pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss all claims asserted against it by Plaintiff RICHARD BOWIE ("Plaintiff") in his Complaint filed on December 20, 2023 (the "Complaint") [CM/ECF #1].

KFH respectfully requests that the Court find Plaintiff fails to plausibly establish any cause of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000d, et seq. ("Title VII") or California's Fair Employment and Housing Act, California Government Code section 12940 ("FEHA"), because the Complaint does not and cannot advance specific facts establishing (1) KFHP discriminated against Plaintiff when denying his request for a religious exemption from the Kaiser Permanente COVID-19 Vaccination Policy (the "Policy") and subsequently terminating his employment for non-compliance with the Policy; (2) Plaintiff had a sincerely-held religious belief that prohibited him from receiving a COVID-19 vaccine; (3) Plaintiff provided sufficient notice to KFHP of any such alleged religious belief and the manner in which it conflicted with the Policy; (4) Plaintiff was treated differently than similarly situated persons outside his protected class; (5) KFHP had discriminatory intent when implementing the Policy; and (5) there is but-for causation between Plaintiff's submission of a request for a religious exemption from the Policy and any adverse employment action by KFHP.

This motion is based on this notice of motion, the below memorandum of points and authorities, the Declaration of Sean T. Strauss and exhibits thereto filed herewith, all pleadings and documents on file in this case, and on such other and further oral and documentary evidence as may be presented at or before the hearing on this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff advances claims under Title VII and FEHA alleging that his former employer, KFHP, religiously discriminated in its application of the Policy against him. Specifically, Plaintiff asserts that he submitted a "a valid religious accommodation request" (Complaint, ¶¶ 88, 101) which KFHP wrongfully denied and that KFHP thereafter discriminated when it "terminated [Plaintiff's] employment" for "requesting religious accommodation from [KFHP]'s vaccine mandate" (*id.*, ¶¶ 87-89). For various reasons, the Complaint cannot state any cause of action, requiring its dismissal.

First, as to the Complaint's Second and Fifth Causes of Action – advancing failure to accommodate theories under Title VII and FEHA – Plaintiff has not and cannot establish he had bona fide religious beliefs preventing him from receiving a COVID vaccine and that he adequately informed KFHP of the conflict between any such beliefs and the Policy. The documents Plaintiff submitted in connection with his accommodation request – which are incorporated by reference in the Complaint – establish Plaintiff's assertion that "my body is the temple of the Holy Spirit, and what I put into my body is between me and my God" (Declaration of Sean T. Strauss in Support of KFHP's Motion to Dismiss Plaintiff's Complaint ["Strauss Decl."], Ex. A at p. 1) does not establish a viable religious belief or a conflict with the Policy, as a matter of law.

Second, the Complaint's First Cause of Action asserting disparate treatment under Title VII must be dismissed because the Complaint does not advance specific facts establishing (1) KFHP discriminated against Plaintiff; (2) Plaintiff was treated differently than similarly situated persons outside his protected class, or (3) discriminatory intent by KFHP. Specifically, Plaintiff exemption request and response to KFHP's request for supplemental information unambiguously demonstrate KFHP's denial of Plaintiff's requested accommodation was justified. Moreover, Plaintiff alleges membership in a protected class because he is Christian (*see* Complaint, ¶ 16), but fails to advance any facts establishing that similarly situated non-Christians were treated differently by the Policy, the exemption request process, or that KFHP intended to discriminate against Christians in general or Plaintiff in particular in its implementation of the Policy.

Finally, the Complaint's Third and Fourth Causes of Action – alleging retaliation under Title VII and FEHA – must be dismissed because Plaintiff fails to establish either discriminatory conduct by KFHP or a but-for causal connection between the protected activity alleged in the Complaint and any adverse employment action. Plaintiff asserts that KFHP retaliated again him for engaging in the protected activity of "requesting religious accommodation from [KFHP]'s vaccine mandate." Complaint, ¶ 87. Factual allegations advanced in the Complaint and documents incorporated by reference therein, however, unambiguously establish Plaintiff was terminated because he "did not comply with [KFHP]'s COVID-19 vaccine mandate" (*id.*, ¶ 58), not because he requested a religious accommodation from the Policy. Furthermore, there are no facts advanced in the Complaint that could establish the requisite but-for causation between Plaintiff's alleged loss of access to KFHP's computer systems for twelve days and his submission of a religious accommodation request. Because Plaintiff has not advanced any facts establishing that engaging in the protected activity alleged in the Complaint was the but-for cause of any adverse employment action, Plaintiff's retaliation claims must be dismissed.

Moreover, because these deficiencies with Plaintiff's claims are established by documents incorporated by reference in the Complaint and thus cannot change, any request to amend the Complaint should be denied as futile.

II. STATEMENT OF FACTS AND RELEVANT PROCEDURE

A. The Allegations of the Complaint

Plaintiff alleges he worked for KFHP from August 2015 until January 2022 as a Senior Manager of Clinical Technology and then as an Executive Director of Clinical Technology. *See* Complaint, ¶¶ 21, 22. Plaintiff alleges he "managed a team of over 300 Kaiser Permanente team members. [Plaintiff's] team was responsible for managing maintenance of an inventory of approximately $4 billion in assets[.]" *Id.*, ¶ 23.

In response to the unprecedented public health emergency presented by the COVID-19 pandemic, and almost contemporaneously with federal and state regulations adopted shortly thereafter requiring COVID-19 vaccination for all employees of healthcare organizations, "In or

around August 2021, [KFHP] announced its COVID-19 vaccine mandate policy, which required that employees obtain a COVID-19 vaccine or an exemption to be completed by September 30, 2021." Complaint, ¶ 27. Plaintiff contends he is "a devout and practicing Christian" who "has sincerely held religious beliefs that prevent him from receiving the mandated COVID-19 vaccines." *Id.*, ¶¶ 16, 28.

Plaintiff alleges that, "On August 19, 2021, [he] submitted a written request for a religious accommodation to be exempted from [KFHP]'s vaccine mandates. In his written request, he explained his religious reasons for conscientiously objecting." Complaint, ¶ 31. Records show that the substantive portion of Plaintiff's exemption request stated in its entirety as follows:

> **My religion is as follows:** I am Christian and a firm believer in the Bible
>
> **The specific religious doctrine or teaching that prevents me from receiving a vaccine is:** I believe my body is the temple of the Holy Spirit, and what I put into my body is between me and my God. 1st Corinthians 6:19-20 states: "Do you not know that your bodies are temples of the Holy Spirit, who is in you, whom you have received from God? You are not your own,; [sic] you were bought at a price"
>
> **I have previously declined to receive other vaccines because of my religious belief, practice or observance?** Yes
>
> **If yes, please identify the other vaccines you have declined. If no, please explain what makes the COVID-19 vaccine different from the other vaccines you have not declined.** flu vaccine

Strauss Decl., Ex. A at p. 1-2. On September 28, 2021, KFHP notified Plaintiff that it provisionally approved his request for an exemption from the Policy. *See id.*, Ex. B at p. 1; Complaint ¶ 33. In that message KFHP specifically explained, "*This approval is provisional -- the decision to approve, and actions taken to accommodate the exemption, are subject to change based on frequently changing conditions, such as COVID-19 infection levels, and changes in public health guidance, legal requirements, and KP policies and practices.*" Strauss Decl., Ex. B at p. 2 (emphasis in original).

On October 8, 2021, KFHP notified Plaintiff that, "After careful review of your request for an exemption under the COVID-19 Vaccination Policy, undertaken to ensure ongoing compliance with our responsibilities under public health requirements and KP policy, it has been determined that additional information is needed from you to further evaluate whether you have a sincerely held

religious belief, practice, or observance that prevents you from receiving any COVID-19 vaccine." Strauss Decl., Ex. C at p. 1-2; *see* Complaint, ¶ 34. In this request for additional information, two additional questions were posed regarding the alleged religious beliefs underlying Plaintiff's exemption request. *See id.*, at p. 4.

Plaintiff responded on October 11, 2021. *See* Strauss Decl., Ex. C at p. 1; Complaint, ¶ 35. Records establish that the entirety of the substantive portions of Plaintiff's response to KFHP's request for additional information is as follows:

> Question:
>
> Have you previously requested any accommodations based on the religious belief that is preventing you from receiving a COVID-19 vaccine?
>
> Answer: Yes. I have filled out the flu declination before, but there has never been a "mandate" that would require me to envoke [sic] a religious exemption.
>
> Question:
>
> What else besides the COVID-19 vaccine do you refuse to put in your body as a result of your religious belief?
>
> Answer: What I chose to put into my body is a sincerely held religious belief that is between me and my God, as my body is a Temple of the Holy Spirit, per my previous answer (I Cor. 6:19-20)
>
> . . .
>
> If you have additional information you would like to submit in support of your request for exemption, please provide it here:
>
> Please see attachment from KPLearn of a list of categories that cannot be discriminated against per CA law, which includes "request to accommodate disability or religious beliefs".
>
> Also, Title VII of the Civil Rights act states that I am requesting an accommodation (not an approval) based on my religious beliefs. It prohibits employers from discriminating against individuals because of their religious beliefs in hiring, firing, or any other terms and conditions of employment (http://www.eeoc.gov)

Strauss Decl., Ex. C at p. 4-5. The attachment submitted by Plaintiff with his supplemental information response contained no information about his alleged religious beliefs; instead, it simply

listed the various statuses protected from discrimination under California law and circled "request to accommodate disability or religious beliefs" in red. *Id.*, at p. 5.

On November 4, 2021, KFHP notified Plaintiff that his request for a religious exemption from the Policy "does not meet the standard necessary for granting an exemption from obtaining any COVID-19 vaccine. Therefore, your request has been **DENIED**." Strauss Decl., Ex. D at p. 2 (emphasis in original); *see* Complaint, ¶ 44. Plaintiff was further informed that his failure to become vaccinated for COVID-19 "**by November 30 or within 30 calendar days of this notice, whichever is later, will result in the termination of your employment on or after December 1.**" Strauss Decl., Ex. D at p. 3 (emphasis in original); *see* Complaint, ¶ 44. Plaintiff nevertheless refused to become vaccinated. *See* Complaint, ¶ 58. On January 10, 2022, Plaintiff was terminated from his employment by KFHP for non-compliance with the Policy. *See id.*, ¶ 60.

B. Relevant Procedure

Plaintiff filed his Complaint on December 20, 2023. *See* CM/ECF #1. On January 10, 2024, KFHP provided the Court with notice that it had filed a Notice of Related Actions in Multidistrict Litigation 3095, informing the Judicial Panel on Multidistrict Litigation ("JPML") that this case was related to other actions included in a pending Motion to Transfer to the Central District of California pursuant to 28 U.S.C. § 1407 for Coordinated or Consolidated Pretrial Proceedings (the "Motion to Transfer"). *See* CM/ECF #10. Pursuant to the Parties' stipulation, on January 11, 2024, the Court stayed this case pending a decision on Multidistrict Litigation. *See* CM/ECF #12.

On February 9, 2024, KFHP provided notice to the Court that the JPML had denied the Motion to Transfer. *See* CM/ECF #13. On March 27, 2024, the Court entered an order lifting the stay and set a deadline for KFHP to respond to the Complaint 28 days after entry of that order. *See* CM/ECF #15.

III. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated in a complaint. *See* Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its

face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. A complaint that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.*; *see also Moss v. United States Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (citing *Iqbal*, 556 U.S. at 678).

When reviewing a Rule 12(b)(6) motion, a court "must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party." *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014). Nevertheless, a court "need not assume the truth of legal conclusions cast in the form of factual allegations." *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 fn. 2 (9th Cir. 1986). That is, to defeat a Rule 12(b)(6) motion, a complaint must provide "more than labels and conclusions, and a formulaic recitation of the elements." *Twombly*, 550 U.S. at 555.

When evaluating a motion to dismiss, a court's review is generally limited to the contents of the complaint. *See Campanelli v. Bockrath*, 100 F.3d 1476, 1479 (9th Cir. 1996). The Court may, however, also consider documents attached to the complaint, documents incorporated by reference in the complaint, or matters subject to judicial notice. *See United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Under the incorporation by reference doctrine, the Court may consider documents "on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion." *Bush v. Mondelez Int'l, Inc.*, No. 16-cv-02460-RS, 2016 WL 5886886, at *1 fn. 1 (N.D. Cal. Oct. 7, 2016) (quoting *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006)). When evaluating the allegations of a complaint, the Court should disregard "allegations contradicting documents that are referenced in the complaint or that are properly subject to judicial notice." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).

IV. ARGUMENT

A. The Complaint's Second and Fifth Causes of Action Must Be Dismissed Because Plaintiff Has Not and Cannot Establish He Adequately Informed KFHP of a Bona Fide Religious Belief Conflicting with the Policy

Plaintiff's Second Cause of Action for Failure to Accommodate pursuant to Title VII and Fifth Cause of Action for Failure to Accommodate pursuant to FEHA each require that Plaintiff establish (1) he has a bona fide religious belief, the practice of which conflicted with an employment duty, and (2) he adequately informed KFHP of the nature of that belief and the conflict. For the reasons discussed below, documents incorporated by reference into the Complaint indisputably demonstrate that Plaintiff has not and cannot satisfy either element. The Complaint's failure to accommodate claims must accordingly be dismissed.

1. Plaintiff has the obligation to establish that he has a bona fide religious belief conflicting with the Policy and that he adequately informed KFHP of that conflict

To establish a claim for religious discrimination under Title VII pursuant to a failure to accommodate theory (the Complaint's Second Cause of Action), Plaintiff must establish, "(1) he had a bona fide religious belief, the practice of which conflicts with an employment duty; (2) he informed his employer of the belief and conflict; and (3) the employer discharged, threatened, or otherwise subjected him to an adverse employment action because of his inability to fulfill the job requirement." *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004) (citing *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993)). The elements of a failure to accommodate claim under FEHA (the Complaint's Fifth Cause of Action) are identical. *See Crawford v. Trader Joe's Co.*, No. 5:21-cv-01519-JGB-SHK, 2023 WL 3559331, at *8 (C.D. Cal. May 4, 2023). "Courts look to federal interpretations of discrimination law when interpreting the provisions of FEHA, and therefore the federal and state discrimination claims should be analyzed together." *Sequeira v. Alameda Cnty.*, No. 3:06-cv-01413-MEJ, 2008 WL 5179108, at *4 (N.D. Cal. Dec. 10, 2008) (citing *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 916 (9th Cir. 1996)).

"[A]lthough Title VII prohibits employment discrimination based on religion, an employee's request for an exemption from a COVID-19 vaccination mandate can be denied on the ground that the employee's belief is not truly religious in nature[.]'" *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1180 (9th Cir. 2021). Objections that "are purely based on social, political, or economic views or personal preferences, or any other nonreligious concerns (including about the possible effects of the vaccine) are not protected by Title VII." Equal Employment Opportunity Commission ("EEOC"), *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at L.2 (Oct. 25, 2021), available at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L; *see also Chavez v. San Francisco Bay Area Rapid Transit Dist.*, No. 3:22-cv-06119-WHA, 2024 WL 332881, at *4 (N.D. Cal. Jan. 28, 2024) (quoting EEOC Guidance).

2. Plaintiff's exemption request and response to KFHP's request for supplemental information do not establish a viable religious belief

In his August 2021 exemption request, which is incorporated by reference in Paragraph 31 of the Complaint, Plaintiff stated that the religious doctrine preventing him from receiving a vaccine is:

> I believe my body is the temple of the Holy Spirit, and what I put into my body is between me and my God. 1st Corinthians 6:19-20 states: "Do you not know that your bodies are temples of the Holy Spirit, who is in you, whom you have received from God? You are not your own,; [sic] you were bought at a price"

Strauss Decl., Ex. A at p. 1; *see* Complaint, ¶ 29. In his response to KFHP's October 2021 supplemental information request asking what else besides the COVID-19 vaccine Plaintiff refuses to put in his body as a result of his religious beliefs, he simply restated his original exemption request when answering, "What I chose to put into my body is a sincerely held religious belief that is between me and my God, as my body is a Temple of the Holy Spirit, per my previous answer (I Cor. 6:19-20)." Strauss Decl., Ex. D at p. 4; *see* Complaint, ¶ 35. Additionally, in response to KFHP's supplemental information request asking whether he had previously requested any accommodations based on the religious belief preventing him from receiving a COVID-19 vaccine, Plaintiff asserted, "Yes. I have filled out the flu declination before, but there has never been a 'mandate' that would

require me to envoke [sic] a religious exemption." Strauss Decl., Ex. C at p. 4. Plaintiff's alleged "body temple" religious belief and his objection to the purported "mandate" of the Policy do not, however, state viable religious beliefs upon which to premise failure to accommodate claims.

a. Plaintiff's "body temple" objection to the Policy is not religious

As a matter of law, the purported "my body is the temple" belief against the COVID-19 vaccine Plaintiff stated as the basis for his exemption request is not religious. *See* Strauss Decl., Ex. A at p. 1; Complaint, ¶ 29. Courts apply "the criteria identified in *Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981), and adopted by the Ninth Circuit in *Alvarado v. City of San Jose*, 94 F.3d 1223, 1229-30 (9th Cir. 1996) . . . in determining whether a set of beliefs is religious." *Birkes v. Mills*, No. 03:10-cv-00032-HU, 2011 WL 5117859, at *3 (D. Or. Sept. 28, 2011). *Africa*'s test focuses on three criteria to assist courts in evaluating whether a set of beliefs is religious:

> First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.

Africa, 662 F.2d at 1032. Courts assessing significantly more detailed "body temple" beliefs stated in requests for religious exemption from vaccine mandates have repeatedly determined that such beliefs are not "religious" for purposes of Title VII discrimination claims.

A leading case on this issue is *Ellison v. Inova Health Care Services*, --- F.Supp.3d ----, No. 1:23-cv-00132-MSN-LRV, 2023 WL 6038016 (E.D. Va. Sept. 14, 2023). In *Ellison*, three plaintiffs submitted requests for exemption from the defendant's COVID-19 vaccination mandate:

> Ellison (a data-analyst) claimed that he could not receive the vaccine because he was required to treat his body as a temple of the Holy Spirit and was not to ingest anything that could potentially harm it.
> . . .
> Jenkins (a staff nurse) also stated that his faith required that he treat his body as a temple of God and that, as a result, he could take the vaccine only if, after prayer, he received approval from God.
> . . .
> Graham (an emergency room nurse) also asserted that her body was a temple, that her healthcare decisions were guided by prayer, and that she had not received authorization from God to take the vaccine.

Id., at *1. The Court dismissed failure to accommodate claims related to each of these body temple requests for exemption from the defendant's COVID-19 vaccination mandate because "they are not rooted in concerns that are religious in nature." *Id.*, at *4.

Specifically, the court explained, "[T]hough couched in religious terms, Ellison refused the vaccine based on concerns of vaccine safety. District courts have routinely rejected similar claims." *Ellison*, 2023 WL 6038016, at *5 (citing *Passarella v. Aspirus, Inc.*, No. 3:22-cv-00342-jdp, 2023 WL 2455681, at *2-7 (W.D. Wis. Mar. 10, 2023)). As to Jenkins, his exemption request amounted "to the type of 'blanket privilege' that undermines our system of ordered liberty [and]. . . if taken to its logical extreme . . .would serve as a 'limitless excuse for avoiding all . . . obligations.'" *Id.* (quoting *Africa*, 662 F.2d at 1031; *Finkbeiner v. Geisinger Clinic*, 623 F. Supp. 3d 458, 465 (M.D. Penn. 2022)). Finally, Graham's claim failed to qualify as religious because it, "like Jenkin's . . . would confer the same sort of blanket privilege that courts must reject." *Id.* (citing *Finkbeiner*, 623 F. Supp. 3d at 465.) Because the beliefs stated by these requests did not qualify as religious, the court dismissed each plaintiff's Title VII failure to accommodate claims. *See id.*, at *5-6.

District courts throughout the country have similarly found that "body temple" requests for exemption from COVID-19 vaccination or testing mandates fail to establish a religious objection for purposes of Title VII discrimination claims. *See, e.g.*, *McDowell v. Bayhealth Med. Ctr., Inc.*, No. 1:22-cv-01392-RGA, 2024 WL 278187, at *3-5 (D. Del. Jan. 25, 2024); *Coates v. Legacy Health*, No. 3:23-cv-00931-JR, 2024 WL 1181827, at *5 (D. Or. Jan. 8, 2024), report and recommendation adopted, 2024 WL 1177124 (D. Or. Mar. 19, 2024); *Sturgill v. Am. Red Cross*, No. 2:22-cv-11837-PDB-APP, 2023 WL 8701293, at *5-9 (E.D. Mich. Dec. 15, 2023); *Kiel v. Mayo Clinic Health Sys. Se. Minn.*, --- F.Supp.3d ----, No. 0:22-cv-01319-JRT-ECW, 2023 WL 5000255, at *7-10 (D. Minn. Aug. 4, 2023); *Quinn v. Legacy Health*, No. 3:23-cv-00331-JR, 2023 WL 10354251, at *5 (D. Or. June 16, 2023), report and recommendation adopted, 2024 WL 620344 (D. Or. Feb. 13, 2024). This is because "citation to a 'religious faith' that [a plaintiff's] body is 'a temple of the Holy Spirit,' and assertion that this gives [the plaintiff] the right to determine which 'medical interventions' 'comport with' this commandment, is, as in *Finkbeiner*, 'fungible enough to cover anything [the plaintiff]

trains it on.'" *Ulrich v. Lancaster Gen. Health*, No. 5:22-cv-04945-SWR, 2023 WL 2939585, at *5 (E.D. Pa. Apr. 13, 2023) (quoting *Finkbeiner*, 623 F. Supp. 3d at 465-66).

In this case, Plaintiff's bare bones assertion in his August 2021 exemption request that he is a Christian who believes "my body is the temple of the Holy Spirit, and what I put into my body is between me and my God" lacks even the additional detail that plaintiffs in the above-cited cases offered to support their legally insufficient exemption requests. Strauss Decl., Ex. A at p. 1. Plaintiff's restated and equally conclusory assertion in his October 2021 response to KFHP's supplemental information request that, "What I choose to put into my body is a sincerely held religious belief that is between me and my God, as my body is a Temple of the Holy Spirit" fares no better.[1] Strauss Decl., Ex. C at p. 4. Because the body-temple objection Plaintiff asserted purports to provide Plaintiff with an unfettered blanket privilege that is a limitless excuse for avoiding any unwanted medical intervention, it does not qualify as religious under *Africa*'s test.[2] *See Blackwell v.*

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[1] In the Complaint, Plaintiff asserts that his body temple objection to the COVID vaccines is based on his belief that "he is to care for his body, not defile his body, and must not introduce something into it that could potentially harm his body." Complaint, ¶ 29. Notably, Plaintiff offered ***no such explanation*** in anything he submitted to KFHP in connection with his exemption request. *See* Strauss Decl., Exs. A, C. Regardless, courts assessing fear of potential harm from the vaccine as a basis for objecting to vaccination requirements have repeatedly found that such objections are medical in nature, not religious, and thus not protected by Title VII. *See, e.g.*, *Detwiler v. Mid-Columbia Med. Ctr.*, No. 3:22-cv-01306-JR, 2022 WL 19977290, at *4 (D. Or. Dec. 20, 2022), report and recommendation adopted, 2023 WL 3687406 (D. Or. May 26, 2023) (finding plaintiff's objection to regular COVID-19 antigen testing to be secular because she believed tests were carcinogenic and would cause more harm than good)*; Brox v. Hole*, 590 F. Supp. 3d 363, 366 (D. Mass. 2022) ("the record suggests that plaintiffs' opposition to receiving the COVID-19 vaccine is based primarily on 'philosophical, medical, or scientific beliefs, or personal fears or anxieties' rather than bona fide religious practices"), affirmed in part and vacated in part, 83 F.4th 87 (1st Cir. 2023); *see also* EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at L.2 (Oct. 25, 2021) (objections to COVID-19 vaccines "purely based on social, political, or economic views or personal preferences . . . (***including about the possible effects of the vaccine***) are not religious beliefs under Title VII."), available at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (emphasis added).

[2] The allegations in the Complaint further support the conclusion that Plaintiff's purported religious belief is actually an unfettered right to object to any employment requirement, as Plaintiff alleges "what he puts into his body ***is a personal decision*** driven by the convictions of the Holy Spirit and the Holy Bible." Complaint, ¶ 30 (emphasis added.) A personal decision, by its nature, is not religious because it does not address "fundamental and ultimate questions having to do with deep and imponderable matters[,]" is not "comprehensive in nature . . consist[ing] of a belief-system as opposed to an isolated teaching[,]" and would essentially provide Plaintiff with a "limitless excuse

Lehigh Valley Health Network, No. 5:22-cv-03360-JMG, 2023 WL 362392, at *5-8 (E.D. Pa. Jan. 23, 2023). The Complaint's failure to accommodate claims must accordingly fail.

b. Plaintiff's objection to the "mandate" of the Policy is not religious

Plaintiff's insinuated objection to the Policy because of its purported "mandate" (*see* Strauss Decl., Ex. C at p. 4) fares no better in establishing a viable religious belief. As noted above, "A plaintiff must show that their request articulated a religious belief, rather than a political objection or other personal non-religious belief." *Chavez*, 2024 WL 332881, at *4 (citing *UnifySCC v. Cody*, No. 5:22-cv-01019-BLF, 2022 WL 2357068, at *2 (N.D. Cal. June 30, 2022)). Because Plaintiff's complaint that "there has never been a 'mandate' that would require me to envoke [sic] a religious exemption" (Strauss Decl., Ex. C at p. 4) at most states a personal or political objection to the Policy, it does not provide a basis for the Complaint's failure to accommodate claims.

First and foremost, Plaintiff's initial August 2021 exemption request fails to advance any objection to the mandate imposed by the Policy. *See* Strauss Decl., Ex. A. Furthermore, while Plaintiff's October 2021 response to KFHP's supplemental information request complains that "there has never been a 'mandate' that would require me to envoke [sic] a religious exemption[,]" Plaintiff does not tie his complaint about the "mandate" to any religious belief or practice. Strauss Decl., Ex. C at p. 4. This alone defeats any argument that any objection Plaintiff might have to the "mandate" of Policy is religious. *Id.*

Furthermore, courts have already thoroughly explained why an objection to the mandatory nature of a vaccination requirement does not qualify as religious. For example, in *Fallon v. Mercy Catholic Medical Center of Southeast Pennsylvania*, 877 F.3d 487 (3d Cir. 2017), the Third Circuit evaluated dismissal of religious discrimination claims arising from plaintiff's termination following refusal to receive the flu vaccine. In that case, Plaintiff's belief was that "'one should not harm their [sic] own body and . . . that the flu vaccine may do more harm than good.' He concludes that if he yielded to coercion and ***consented to the hospital mandatory policy***, he would violate his conscience

for avoiding all . . . obligations" on an ad hoc basis depending on his personal feelings on any given day about any given employment requirement. *Africa*, 662 F.2d at 1031, 1032.

as to what is right and what is wrong." *Id.*, at p. 492 (emphasis added). The Third Circuit held that dismissal of that plaintiff's religious discrimination claim was appropriate because the plaintiff's purported religious belief failed to meet the *Africa* factors.

Specifically, the Third Circuit explained, "It does not appear that these beliefs address fundamental and ultimate questions having to do with deep and imponderable matters, nor are they comprehensive in nature. Generally, [Fallon] simply worries about the health effects of the flu vaccine, disbelieves the scientifically accepted view that it is harmless to most people, and wishes to avoid this vaccine." *Fallon*, 877 F.3d at p. 392. "Fallon's views are [also] not manifested in formal and external signs, such as 'formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations associated with the traditional religions.'" *Id.* "For this reason, because Fallon's beliefs do not satisfy any of the *Africa* factors, Fallon's beliefs do not occupy a place in his life similar to that occupied by a more traditional faith. His objection to vaccination is therefore not religious and not protected by Title VII." *Id.*

Other courts examining objections to vaccination mandates similar to that insinuated in Plaintiff's supplemental information response have also concluded that such concerns are not religious, as a matter of law. In *Ulrich*, the plaintiff objected that requiring her to undergo mandatory COVID testing would place "limitations on my ability to exercise bodily autonomy." *Ulrich*, 2023 WL 2939585, at *2. In *Prida v. Option Care Enterprises, Inc.*, No. 5:23-cv-00905-SL, 2023 WL 7003402, at *2 (N.D. Ohio Oct. 24, 2023), the plaintiff submitted objections to mandatory COVID testing that "pertained primarily to purported natural rights and bodily autonomy." In both cases, the courts dismissed Title VII failure to accommodate claims on the basis that the stated objections were isolated moral teachings incorporating scientific and political factors, not religious beliefs. *See Ulrich*, 2023 WL 2939585, at *4-5; *Prida*, 2023 WL 7003402, at *3-6.

Under the significant and substantive reasoning provided by federal courts around the nation, Plaintiff's complaint regarding the "mandate" imposed by the Policy at most states a personal or political objection, not a religious belief. Because the documents Plaintiff submitted in connection

with his exemption request indisputably demonstrate that Plaintiff failed to establish a bona fide belief that is religious, the Complaint's failure to accommodate claims must be dismissed.

3. Plaintiff's exemption request and response to KFHP's supplemental information request do not establish a conflict with the Policy

Even if the Court were to find that the "my body is the temple" belief advanced by Plaintiff in his exemption submissions establishes a religious belief, the Court must still dismiss the failure to accommodate claims because Plaintiff has not alleged, and cannot allege, he adequately informed KFHP of any conflict between his alleged beliefs and the Policy. "It is the responsibility of the employee to inform their employer of a conflict arising between the employer's policies and the employee's professed religious beliefs." *Mullen v. AstraZeneca Pharms., LP*, No. 2:23-cv-03903-JMY, 2023 WL 8651411, at *3 (E.D. Pa. Dec. 14, 2023) (citing *Geraci v. Moody-Tottrup, Intern., Inc.*, 82 F.3d 578, 581 (3d Cir. 1996)). "This requires that the conflict, not merely the employee's desire for an accommodation, be actually conveyed to the employer[.]" *Id.* (citing *Miller v. Port Authority of N.Y & N.J.*, 351 F. Supp. 3d 762, 778 (D.N.J. 2018)). "A defendant employer is not required to offer an accommodation in the absence of a conflict[.]" *Id.*

In his initial exemption request, plaintiff asserted only that, "I believe my body is the temple of the Holy Spirit, and what I put into my body is between me and my God." Strauss Decl., Ex. A at p. 1. In his supplemental information response, Plaintiff similarly asserted that, "What I choose to put into my body is a sincerely held religious belief that is between me and my God, as my body is a Temple of the Holy Spirit[.]" *Id.*, Ex. C at p. 4. These contentions in no way establish a conflict between Plaintiff's purported religious beliefs and the Policy.

Quite simply, "[A] religious belief that the body is a temple of God is not itself inconsistent with receiving a vaccine . . . Many people hold that belief without also believing that receiving a vaccine defiles the body." *Petermann v. Aspirus, Inc.*, No. 3:22-cv-00332-jdp, 2023 WL 2662899, at *2 (W.D. Wis. Mar. 28, 2023). Despite being provided two separate opportunities, Plaintiff's submissions to KFHP provided absolutely "no information regarding how this 'Body is a Temple' belief prohibits [him] from receiving COVID-19 vaccine." *Berna v. Bayhealth Med. Ctr., Inc.*,

No. 1:23-cv-00945-RGA, 2024 WL 456420, at *6 (D. Del. Feb. 5, 2024). "Plaintiff does not describe [his] religious beliefs or principles in any meaningful way, or how they relate to vaccines generally, or the COVID-19 vaccine specifically. Put another way, [he] does not allege that [his] religion requires [him] to observe certain medical limitations that include a refusal to take vaccines, or certain types of vaccines." *Griffin v. Massachusetts Dep't of Revenue*, No. 1:22-cv-11991-FDS, 2023 WL 4685942, at *7 (D. Mass. July 20, 2023). Because Plaintiff failed to establish in his exemption request or his response to KFHP's request for supplemental information how or why his alleged belief that "my body is the temple of the Holy Spirit" prohibits him from receiving a COVID-19 vaccine (*see* Strauss Decl., Exs. A, C), "It remains that the Plaintiff identified no religious belief to the Defendant that prevented his taking the vaccine and, thus, Defendant did not violate Title VII by not providing an accommodation." *Mullen*, 2023 WL 8651411, at *4.[3]

The same conclusion is true if the Court were to somehow construe Plaintiff's objection to the "mandate" of the Policy as a religious objection. "Plaintiff's broad, generalized beliefs with

[3] It is also important to note that Plaintiff refused to substantively respond to the question at issue. In its request for supplemental information, KFHP asked Plaintiff, "What else beside the COVID-19 vaccine do you refuse to put in your body as a result of your religious belief?" Strauss Decl., Ex. C at p. 4. Plaintiff specifically refused to provide a direct or substantive answer, responding "What I chose to put into my body is a sincerely held religious belief that is between me and my God[.]" *Id.* Plaintiff's explicit and specific refusal to provide a substantive response to KFHP's legitimate request for additional information regarding the scope of his religious beliefs provides a separate and independent ground upon which to dismiss the Complaint's failure to accommodate claims. *See Steffes v. Stepan Co.*, 144 F.3d 1070, 1073 (7th Cir. 1998) (affirming that employer was not liable failure to provide accommodation and noting that when the employee "fail[s] to hold up her end of the interactive process by clarifying the extent of her medical restrictions, [the employer] cannot be held liable for failing to provide reasonable accommodations."); *Templeton v. Neodata Servs., Inc.*, 162 F.3d 617, 619 (10th Cir. 1998) (holding that employee's failure to provide medical information, which was requested by employer and necessary to the interactive process, defeated employee's claim that employer failed to provide reasonable accommodation); *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1135-36 (7th Cir. 1996) (affirming summary judgment in favor of employer and ruling that "[w]here the missing information is of the type that can only be provided by one of the parties, failure to provide the information may be the cause of the breakdown and the party withholding the information may be found to have obstructed the process."); *see also* EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at L.2 (Oct. 25, 2021), available at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws ("An employee who fails to cooperate with an employer's reasonable requests for verification of the sincerity or religious nature of a professed belief, practice, or observance risks losing any subsequent claim that the employer improperly denied an accommodation.").

respect to mandatory vaccination policies do not plausibly conflict with Defendants' vaccination policy because the policy expressly provided alternatives to employees who do not wish to be vaccinated because of a religious objection, and the policy provided a means of raising such objections." *Stone v. Lenovo (United States), Inc.*, No. 6:22-cv-06548-FPG, 2024 WL 356571, at *6 (W.D.N.Y. Jan. 31, 2024). Because the Policy allowed Plaintiff (and any other KFHP employee) to submit a request for exemption, it cannot be said that Plaintiff's alleged objection to mandates establishes a conflict with the Policy. There is absolutely nothing in Plaintiff's initial exemption request or in Plaintiff's response to KFHP's request for supplemental information that actually conveyed to KFHP the nature of any conflict between Plaintiff's alleged beliefs and the Policy. *See* Straus Decl., Exs. A, C. The Complaint's Second and Fifth Causes of Action asserting failure to accommodate theories must accordingly be dismissed. *See Mullen*, 2023 WL 8651411, at *4.

B. Plaintiff's Disparate Treatment Claim Must Be Dismissed Because the Complaint Does Not Allege Facts Establishing Differing Treatment of Similarly Situated Individuals, Discriminatory Intent, or Discriminatory Conduct

"Disparate treatment occurs 'where an employer has treated a particular person less favorably than others because of a protected trait.'" *Wood v. City of San Diego*, 678 F.3d 1075, 1081 (9th Cir. 2012) (citing *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009)). "To establish a prima facie case of disparate treatment under Title VII, a plaintiff must provide evidence that 'give[s] rise to an inference of unlawful discrimination.'" *Lyons v. England*, 307 F.3d 1092, 1112 (9th Cir. 2002) (citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). Disparate treatment claims follow the *McDonnell Douglas* framework in that a plaintiff bears the initial burden of showing: "(1) he is a member of a protected class, (2) he was performing his job in a satisfactory manner, (3) he suffered an adverse employment decision, and (4) he was treated differently than similarly situated persons outside his protected class." *Clark v. Frank*, 5 F.3d 535 (9th Cir. 1993) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). Additionally, when a plaintiff challenges a facially neutral policy, he must allege facts establishing that the defendant had a discriminatory intent for taking the job-related action. *See Wood*, 678 F. 3d at 1081; *Freyd v. University of Or.*, 990 F.3d 1211, 1228 (9th Cir. 2021) ("disparate treatment theory does require

proof of discriminatory intent."); *Weiss v. Permanente Med. Grp., Inc.*, No. 3:23-cv-03490-RS, 2023 WL 8420974, at *3 (N.D. Cal. Dec. 4, 2023). If the plaintiff meets his burden of establishing a prima facie case, then the defendant must offer a legitimate nondiscriminatory reason for taking the adverse employment action. *See Bodett v. CoxCom, Inc.*, 366 F.3d 736, 744 (9th Cir. 2004). Plaintiff must then show that the defendant's given reason for the adverse employment action is a mere pretext. *See McDonnell Douglas Corp.*, 411 U.S. at 804.

The Complaint's First Cause of Action asserting a disparate treatment claim under Title VII must be dismissed because the Complaint fails to allege specific facts plausibly establishing (1) Plaintiff was treated differently than similarly situated persons outside his protected class, (2) discriminatory intent by KFHP; or (3) that KFHP's legitimate and non-discriminatory reason for terminating Plaintiff's employment was a pretext. As to the first issue, Plaintiff alleges only that he "was, and continues to be a devout and practicing Christian" and that "Defendant safely accommodated approximately 2/3 of the 16,000+ religious accommodation requests it received." Complaint, ¶¶ 16, 50. These allegations do not, however, establish differing treatment of similarly situated persons outside Plaintiff's protected class.

To establish individuals are similarly situated, it is not enough for employees to be in similar employment positions; rather, the plaintiff and the comparator employees must be "similarly situated . . . in all material respects." *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006). Employees are thus similarly situated if they have "similar jobs and display similar conduct." *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003). Here, the Complaint advances absolutely no information about any other employee of KFHP that Plaintiff believes was similarly situated to him or how those individuals were allegedly treated. In fact, the Complaint contains absolutely no specific factual information regarding exemption requests submitted by anyone other than Plaintiff. Because the Complaint advances no facts establishing that any individual "similarly situated" to Plaintiff and outside his protected class was treated more favorably than he was, the Complaint's disparate treatment claim necessarily fails. *See Weiss*, 2023 WL 8420974, at *3 (Title VII disparate treatment claim related to the Kaiser Permanente COVID-19 Vaccination Policy failed in part

because the plaintiff did not allege sufficient facts to show that any other individual "shared job responsibilities or engaged in similar conduct in the employment context").[4]

The Complaint also fails to allege specific facts establishing discriminatory intent. As acknowledged in the Complaint, the Policy was facially neutral because it required all KFHP "employees obtain a COVID-19 vaccine or an exemption to be completed by September 30, 2021." Complaint, ¶ 27; *see also Weiss*, 2023 WL 8420974, at *3 (the Kaiser Permanente COVID-19 Vaccination "Policy was facially neutral in that all employees were mandated to take the COVID-19 vaccine by a certain date, regardless of their religious identity, unless an exemption request was granted."). Although the Complaint advances the *legal conclusion* that KFHP's "decision to terminate [Plaintiff's] employment for his religious objections to its COVID-19 vaccine mandate while also accommodating other similarly situated employes constitutes discrimination" (Complaint, ¶ 71), nowhere does Plaintiff allege any *specific facts* establishing that KFHP implemented the facially neutral Kaiser Permanente COVID-19 Vaccination Policy with the intent to discriminate against Christians in general or Plaintiff in particular. The Complaint's failure to allege such facts is fatal to its disparate treatment claim.[5]

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[4] *See also Varkonyi v. United Launch Alliance,, LLC*, No. 2:23-cv-00359-SB-MRW, 2023 WL 4291649, at *3 (C.D. Cal. May 12, 2023) (disparate treatment claim based on denial of religious exemption from COVID-19 vaccine mandate dismissed because "Plaintiff does not provide any allegations that support the existence of direct evidence of discrimination and has not alleged that similarly situated non-Christian or nonreligious individuals were treated more favorably than he was."); *Gage v. Mayo Clinic*, No. 2:22-cv-02091-SMM, 2023 WL 3230986, at *2 (D. Ariz. May 3, 2023) (disparate treatment claim based on denial of a request for religious exemption from COVID-19 vaccine mandate dismissed because complaint did not "allege facts showing that similarly situated individuals outside of her protected class were treated more favorably."); *Zakara v. Flack Global Metals*, No. 2:21-cv-01146-MTL, 2021 WL 5578876, at *4 (D. Ariz. Nov. 29, 2021) (disparate treatment claim dismissed because "Complaint is devoid of facts regarding [other individuals'] job requirements, conduct, or other information that might support a finding that Plaintiff and these employees were similarly situated").

[5] *See, e.g., Weiss*, 2023 WL 8420974, at *3 (the fact that "two thirds of the religious applicants were treated better than [the plaintiff] was similarly does not reflect that [defendant] acted with a discriminatory motive in terminating her employment."); *Varkonyi*, 2023 WL 4291649, at *3 ("without any allegations to support the conclusion that Defendant exhibited religious bias, the FAC fails to state a claim for unlawful termination on the basis of religion. Rather, the allegations in the FAC support the conclusion that Plaintiff's termination was due to Plaintiff's failure to comply with Defendant's uniformly applied vaccination policy.").

Finally, and perhaps most importantly, Plaintiff has not and cannot advance any direct evidence of discrimination or demonstrate that KFHP lacked a legitimate and non-discriminatory reason for terminating his employment. For all of the reasons discussed above, Plaintiff's exemption request and response to KFHP's request for supplemental information unequivocally establish that Plaintiff did not adequately inform KFHP of a bona fide religious belief conflicting with the Policy. *See* Strauss Decl., Exs. A, C. Because Plaintiff's exemption request failed to establish a viable religious basis for objecting to receipt of a COVID-19 vaccine, KFHP appropriately denied Plaintiff's exemption request and informed Plaintiff that his failure to become vaccinated for COVID-19 "**by November 30 or within 30 calendar days of this notice, whichever is later, will result in the termination of your employment on or after December 1.**" *Id.*, Ex. D at p. 3 (emphasis in original). Despite this warning, Plaintiff "did not comply with [KFHP's] COVID-19 vaccine mandate." Complaint, ¶ 58. KFHP thus terminated Plaintiff from his employment on January 10, 2022 for noncompliance with the Policy. *See id.*, ¶ 60. Given these facts, Plaintiff cannot demonstrate KFHP lacked non-discriminatory reason for terminating his employment. The Complaint's First Cause of Action for disparate treatment must accordingly be dismissed.

C. The Third and Fourth Causes of Action for Retaliation Must Be Dismissed Because the Complaint Has Not Alleged Facts Establishing a Causal Link Between Plaintiff's Exemption Request and Any Adverse Employment Action or Retaliatory Conduct by KFHP

Plaintiff's Third and Fourth Causes of Action for retaliation must be dismissed because the Complaint has not and cannot allege facts establishing a causal relationship between the protected activity alleged, namely "requesting religious accommodation from [KFHP's] vaccine mandate" (Complaint, ¶¶ 88, 129), and adverse employment action or that KFHP engaged in retaliatory conduct.

To state a prima facie claim for retaliation under Title VII, Plaintiff must allege facts establishing "(1) he engaged in a protected activity; (2) his employer subjected him to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action." *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000); *see Day v. Sears Holdings Corp.*,

930 F. Supp. 2d 1146, 1176 (C.D. Cal. 2013). "Title VII retaliation claims must be proved according to traditional principles of but-for causation . . . This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *University of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013). Stating a prima facie retaliation claim under FEHA requires allegations establishing the same elements. *See Klein v. Walt Disney Co.*, No. 2:13-cv-01358-PSG-DTB, 2014 WL 12587046, at *5 (C.D. Cal. June 6, 2014).

As Plaintiff's specifically pleads in the Complaint, the alleged "protected activity" at issue in both the Title VII and FEHA retaliation claims is his submission of an allegedly "valid religious accommodation request." Complaint, ¶¶ 88, 101. For all of the reasons stated above, Plaintiff assertion that "I believe my body is the temple of the Holy Spirit, and what I put into my body is between me and my God" (Strauss Decl., Ex. A at p. 1) did not establish a valid religious basis upon which to object to the Policy. KFHP thus properly denied Plaintiff's exemption request and any alleged actions taken in relation to denial of Plaintiff's exemption request were not discriminatory and thus cannot establish the basis for a retaliation claim.

It is also clear from the allegations of the Complaint that there was no allegedly adverse employment action taken by KFHP that can be causally tied to the alleged protected activity. As detailed above, in late August 2021, Plaintiff "submitted a written request for a religious accommodation to be exempted from Defendant's vaccine mandates" and "[o]n November 4, 2021, [KFHP] sent [Plaintiff] an email informing him that it was denying his religious accommodation request[.]" *Id.*, ¶¶ 31, 44; *see* Strauss Decl., Exs. A, E. Plaintiff "did not comply with [KFHP's] COVID-19 vaccine mandate." Complaint, ¶ 58. "On or about January 10, 2022, [KFHP] terminated [Plaintiff] from his position." *Id.*, ¶ 60; *see* Strauss Decl., Ex. D at p. 3 ("**Failure to meet the requirements of the KP vaccination Policy by November 30 or within 30 calendar days of this notice, whichever is later, will result in the termination of your employment on or after December 1.**") (emphasis in original).

As these allegations and documents incorporated by reference in the Complaint establish, Plaintiff's employment by KFHP was not terminated because he submitted "a valid religious

accommodation request" from the Policy. Complaint, ¶¶ 88, 101. Instead, Plaintiff was terminated because he failed to either "provide proof of fully vaccinated status or have an approved exemption" by the specified deadline, in violation of the Policy. See Strauss Decl., Ex. D at pp. 1, 2. Although the Complaint concludes that KFHP allegedly "terminated [Plaintiff's] employment in retaliation for seeking religious accommodation" (Complaint, ¶ 92), this legal conclusion is specifically contradicted by both facts alleged in the Complaint and documents incorporated by reference in the Complaint and, thus, should be disregard. *See Lazy Y Ranch Ltd.*, 546 F.3d at 588. Quite simply, there are no specific facts alleged in the Complaint,

> [E]stablishing that [Plaintiff] was terminated as a result of [his] exemption request and not because [he] failed to comply with the Policy, which clearly mandated all employees be vaccinated unless an exemption is granted, otherwise they would be terminated from employment. Indeed, the facts [Plaintiff] provides in the FAC suggest that [he] was terminated after [his] exemption request was denied, followed by no efforts on [his] part to come into compliance. This is insufficient for a retaliation claim[.]

Weiss, 2023 WL 8420974, at *4. To the extent they rely on Plaintiff's termination from employment by KFHP, the Complaint's retaliation claims must thus be dismissed. *See id.*

The same conclusion is true when evaluating the Complaint's assertion that "revocation of Plaintiff's access to email and company systems [from October 22, 2021 until November 3, 2021] without notice after he submitted a valid religious accommodation request" constitutes retaliation. Complaint, ¶ 88; *see id.* ¶¶ 37, 42, 101. The only fact in the Complaint that ties Plaintiff's alleged loss of access to KFHP's computer systems on October 22, 2021 to his August 20, 2021 submission of "a written request for religious accommodation" is Plaintiff's assertion that he "called the Help Desk for further assistance, and was told that his account had been placed on hold 'due to the Covid stuff.'" Complaint, ¶¶ 27, 37, 41; *see* Strauss Decl., Ex. A.

Setting aside that these allegations do not establish an adverse employment action under the circumstances alleged in the Complaint,[6] considering this alleged call took place sometime in late-

[6] While an adverse employment action need not be severe (*see McAlindin v. County of San Diego*, 192 F.3d 1226, 1239 (9th Cir. 1999)), it must still be "reasonably likely to deter employees from engaging in protected activity" (*Ray*, 217 F.3d at 1243). The Complaint offers no facts plausibly establishing how or why alleged loss of access to KFHP's computer systems for twelve days would

October 2021, near the height of the Delta variant surge in COVID-19 hospitalizations (*see* https://ourworldindata.org/covid-hospitalizations), "due to the Covid stuff" (Complaint, ¶ 41) in connection with the computer systems of a healthcare organization like KFHP could mean anything. This sole fact certainly does not raise beyond the speculative level the contention that Plaintiff would not have lost access to KFHP computer systems for twelve days but-for his submission of a religions exemption request more than two months earlier. Even if Plaintiff did in fact lose access to KFHP's computer systems from October 22, 2021 to November 3, 2021 (*see* Complaint, ¶¶ 37, 42), there are no facts to support the conclusion that this alleged action deterred Plaintiff from engaging in protected activity or otherwise prevented him from complying with the Policy from November 3, 2021 until the time of his termination. To the extent they rely on Plaintiff's alleged loss of access to KFHP's computer systems, the Complaint's retaliation claims must therefore be dismissed.

In sum, Plaintiff cannot establish a basis for his retaliation claim because the Complaint and documents incorporated by reference therein unequivocally establish that Plaintiff did not engage in the alleged protected activity of submitting "a valid religious accommodation request." Complaint, ¶¶ 88, 101. Even if that were not the case, the Complaint has not alleged facts sufficient to plausibly establish the requisite but-for causation between Plaintiff's submission of a religious accommodation request and any adverse employment action. The Complaint's Third and Fourth Causes of Action should accordingly be dismissed. *See Weiss*, 2023 WL 8420974, at *4.

D. Because the Facts Established by Plaintiff's Exemption Documents Cannot Change, Leave to Amend Should Be Denied as Futile

Although the Ninth Circuit has a liberal policy favoring amendment, the Court is not obligated to grant leave to amend if "the pleading could not possibly be cured by the allegation of other facts" or "further amendment would be futile." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987); *see also Hinton*

be likely to deter Plaintiff (or any other KFHP employee) from submitting a request for a religious exemption from the Policy, especially considering that all information collected from Plaintiff in connection with his exemption request had already been received by KFHP by October 22, 2021, when Plaintiff's alleged loss of access to KFHP's computer systems occurred. See Strauss Decl., Exs. A, C.

v. Pacific Enters., 5 F.3d 391, 395 (9th Cir. 1993) ("If the amendments to the complaint will fail to cure fatally defective allegations, refusal to allow leave to file the amended complaint is acceptable."). For this reason, if a plaintiff fails to advance facts in a complaint or an opposition to a motion to dismiss that would establish viable claims, denying leave to amend for futility is justified. *See Goosby v. City of Los Angeles*, No. 2:21-cv-08234-SVW-DFM, 2021 WL 6496413, at *2 (C.D. Cal. Dec. 7, 2021); *Sayegh v. John Enright, Inc.*, No. 2:10-cv-04794-JFW-JCG, 2010 WL 11531206, at *3, fn. 3 (C.D. Cal. Dec. 8, 2010).

The August 2021 exemption request and the October 20221 response to supplemental information Plaintiff submitted to KFHP unequivocally demonstrate that the Complaint has not and cannot establish viable claims. *See* Strauss Decl., Exs. A, C; *Weiss*, 2023 WL 8420974, at *3-4; *Mullen*, 2023 WL 8651411, at *4; *Ellison*, 2023 WL 6038016, at *5-6. Because Plaintiff failed to sufficiently apprise KFHP of his religious beliefs or any conflict between those alleged religious beliefs and the Policy, he cannot establish that KFHP violated Title VII or FEHA when denying his accommodation request and subsequently terminating his employment for non-compliance with the Policy. These facts cannot change, and there is no amendment of the Complaint that can remedy its corresponding failures to state viable claims. Any request by Plaintiff to amend the Complaint should therefore be denied as futile.

V. CONCLUSION

For the foregoing reasons, KFHP respectfully requests that Plaintiff's Complaint be dismissed in its entirety, with prejudice and without leave to amend, and that judgment be entered in its favor.

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