SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

(Dept 16 is now hearing cases that were formerly in Dept 2)

Judge Eric Geffon will be hearing this calendar for Judge Amber Rosen

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 11-02-23 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. Phone lines are now open for you to call and reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: 408-882-2430 When you can call: Monday to Friday, 8:30 am to 12:30 pm

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV372366 Hearing: Demurrer	California Department Of Fair Employment And Housing et al vs Cisco Systems, Inc. et al	Defendant's Demurrer is OVERRULED. See, tentative decision below.
LINE 2	20CV372366 Motion: Strike	California Department Of Fair Employment And Housing et al vs Cisco Systems, Inc. et al	Defendant's Motion to Strike is GRANTED IN PART. See, tentative decision below.
LINE 3	21CV391302 Motion: Compel	Alex Lowry vs Daniel Carpenter et al	Defendant's Motion to Compel is GRANTED. See, tentative decision below.
LINE 4	21CV391302 Motion: Quash	Alex Lowry vs Daniel Carpenter et al	Plaintiff's Motion to Quash is DENIED. See, tentative decision below.
LINE 5	21CV391302 Motion: Protective Order	Alex Lowry vs Daniel Carpenter et al	Motion for Protective Order is GRANTED IN PART. See, tentative decision, below.

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LINE 6	21CV375659 Motion: Compel	Carol Feterle vs Lan Nguyen et al	Defendant's Motion to Compel is GRANTED. Plaintiff's request to record the examination is GRANTED. See, tentative decision, below.
LINE 7	22CV396254 Motion: Set Aside	Katrina P. Petrini vs Scott Simon et al	Cross-Defendant Katrina Petrini files this motion to set aside Cross-Complainant's Entry of Default and Default Judgment. The request is based on a claim that has been addressed multiple times by the court in this case: that documents are considered "filed" on the date they are submitted to the court for filing, notwithstanding the date that the documents appear in the electronic file available online. In this case, Cross-Defendant did not file an answer to the Cross-Complaint for over a year after it was due. In the interim, a default judgment had been entered. Cross-Defendant provides no reasons justifying the set-aside of the default, other than the claims that have been previously rejected by the court. The request to set aside the default is DENIED.

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 8	23CV411955 Motion: Leave to File	Scott Johnson vs High Noon Pizza, Inc.	Plaintiff Scott Johnson brings this Motion for Leave to File a First Amended Complaint. The Amendment seeks to include the real property owner and DOES 1-50. Defendant has not filed any opposition to this motion. The failure to file an opposition can be considered consent to the granting of the motion. (Cal. Rule of Court, 8.54(c).) Plaintiff's motion for leave to file a first amended complaint is GRANTED. Counsel included a red-lined version of the complaint with the motion, showing the changes being made. Counsel is ordered to file a "clean" copy of the First Amended Complaint.
LINE 9	2010-1-CV-169000 Hearing: Claim of Exemption	Fia Card Services, N.A. vs J. Hussey	This matter is OFF CALENDAR at the request of Plaintiff counsel.
LINE 10			
LINE 11			
LINE 12			

- oo0oo -

Calendar Line 1-2

Case Name: *Department of Fair Employment and Housing v. Cisco Systems, Inc., et al.*
Case No.: 20CV372366

I. Factual Background

On October 16, 2020, the California Department of Fair Employment and Housing ("DFEH")[1] brought this action against Cisco Systems, Inc. ("Cisco"), Sundar Iyer ("Iyer"), and Ramana Kompella ("Kompella") (collectively, "Defendants") to remedy workplace discrimination, harassment, and retaliation violations under the California Fair Employment and Housing Act (Cal. Govt. Code, § 12900, et seq.) ("FEHA") against employee John Doe ("Doe").

Doe is a Dalit Indian, a caste at the bottom of the Indian hierarchy into which he was born. (Compl., ¶ 1.) Doe was recruited and hired at Cisco by Iyer in or around September 2015. (30.) At Cisco, Doe worked with a team of entirely Indian employees who all grew up in India and immigrated to the United States as adults. (Compl., ¶ 3.) Except for Doe, his entire team was from the high castes in India. (*Ibid*.) Specifically, Doe's supervisors and co-workers, defendants Iyer and Kompella, are from India' highest castes and both were aware that Doe is Dalit. (Compl., ¶ 4.)

In or around October 2016, two of Doe's colleagues informed him that Iyer was informing others that he was Dalit. (Compl., ¶ 31.) In or around November 2016, Doe confronted Iyer about disclosing his caste to Cisco employees and Iyer denied making the comment. (Compl., ¶ 32.) That month, Doe filed a discrimination complaint against Iyer with Cisco's HR and Employee Relations department ("HR"). (Compl., ¶ 33.)

On or around December 8, 2016, Doe submitted a written complaint about Iyer's disclosure of Doe's caste, Doe's complaint to Iyer, and Iyer's subsequent retaliatory employment actions, including a sudden change in his job duties. (Compl., ¶ 37.) An internal investigation was conducted revealing Iyer admitted he told Doe's colleagues Doe was not on the main list, effectively revealing his caste. (Compl., ¶ 38.) No further action was taken after the investigation, indicating caste discrimination was not unlawful. (Compl., ¶¶ 38-39.) On or around February 2, 2017, Cisco's employee relations manager closed the investigation finding all of Doe's complaints were unsubstantiated. (Compl., ¶ 39.) When Doe opposed these unlawful practices internally, Defendants retaliated against him. (Compl., ¶ 4.) As a result, Doe received less pay, fewer opportunities, endured a hostile work environment, and other inferior terms and conditions of employment because of his religion, ancestry, national origin/ethnicity, and race/color. (Compl., ¶¶ 4, 40.)

On or around February 26, 2018, Kompella was promoted and became responsible for directing Doe's day-to-day assignments and employment actions, Doe's role was reduced and he was isolated from his colleagues. (Compl., ¶¶ 35, 36, 45.) Doe was later denied a promotion. (Compl., ¶ 47.)

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[1] The Court acknowledges that the DFEH is now referred to as the California Civil Rights Department ("CRD"). However, as the complaint and moving papers refer to "DFEH," for clarity, the Court will refer to CRD as DFEH.

II. Procedural Background

Doe filed a pre-complaint inquiry with the DFEH on or around April 20, 2018. He filed a verified administrative complaint against Cisco on or around July 30, 2018 and an amended administrative complaint, adding Iyer and Kompella, on or around October 9, 2018. The DFEH and Defendants entered into consecutive tolling agreements to toll the statutory deadline for DFEH to file a civil action against Defendants to June 30, 2020.

On or about June 30, 2020, DFEH filed a complaint in the United States District Court for the Northern District of California. On or around October 16, 2020, DFEH voluntarily dismissed the federal action and thereafter filed the operative state court action asserting the following five causes of action:

1) FEHA violation: Discrimination on the basis of religion, ancestry, national origin/ethnicity, and race/color [against Cisco];
2) FEHA violation: Harassment on the basis of religion, ancestry, national origin/ethnicity, and race/color [against all Defendants];
3) FEHA violation: Retaliation [against Cisco];
4) FEHA violation: Failure to take all reasonable steps to prevent discrimination, harassment, and retaliation [against Cisco]; and
5) FEHA violation: Failure to take all reasonable steps to prevent discrimination, harassment, and retaliation [on behalf of DFEH against Cisco].

On November 3, 2020, Cisco filed a demurrer and motion to strike portions of the Complaint. However, on March 1, 2021 (several days before the hearing on the demurrer and motion to strike), Defendants filed a notice of appeal from this Court's order denying a motion to compel arbitration and to stay proceedings. On October 25, 2022, the Sixth District Court of Appeal affirmed the order denying the motion to compel arbitration. The hearing on the demurrer and motion to strike was rescheduled to November 2, 2023. The DFEH opposes both motions.

III. Demurrer

A. Legal Standard

"A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.) The only issue involved in a demurrer is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action. (*Griffith v. Department of Public Works* (1956) 141 Cal.App.2d 376, 381.)

B. Meet and Confer Efforts

Code Civ. Proc. section 430.41 requires a demurring party to meet and confer with the party who filed the challenged pleading to seek informal resolution of the demurring party's objections. (Code Civ. Proc., § 430.41(a).) "As part of the meet and confer process, the

demurring party shall identify all of the specific causes of action that it believes are subject to demurrer and identify with legal support the basis of the deficiencies." (Code Civ. Proc., § 430.41, subd. (a)(1).) "Any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer." (Code Civ. Proc., § 430.41, subd. (a)(4).)

The DFEH contends it made efforts to meet and confer and Cisco's counsel failed to do so and then subsequently filed a demurrer. In its declaration, Cisco asserts it attempted to meet and confer regarding the demurrer and motion to strike on several occasions and that counsel for DFEH requested to reschedule the meet and confer on several occasions. (See Liburt Decl., ¶¶ 5-7.) The emails attached in Exhibit E of the Liburt Declaration confirm that Cisco's counsel attempted to set up times to meet and confer and the parties were unable to find an agreed upon date and time, where DFEH continued to reschedule. While the parties failed to actually meet and confer regarding the motions, Cisco made multiple attempts to meet and confer. Accordingly, the Court does not find that Cisco's meet and confer process was deficient. The Court reminds counsel for DFEH that they should not treat Code of Civil Procedure section 430.41 as a procedural hurdle and should, instead, undertake the obligations set forth therein with sincerity and good faith.

C. Cisco's Request for Judicial Notice

In support of its demurrer and motion to strike, Cisco requests the Court take judicial notice of the following documents:

1) John Doe's original administrative charges filed with the DFEH ("Ex. A");
2) John Doe's amended administrative charges filed with the DFEH ("Ex. B");
3) DFEH's federal complaint, proof of service, and voluntary dismissal ("Exs. C – E").

The DFEH opposes the request for judicial notice of Ex. A and Ex. B, arguing that an administrative charge is not an official act of the legislative, executive, and judicial departments of the United States and is therefore not covered by Evidence code section 452, subdivision (c). (See RJN Opp., p. 1:7-9.) In reply, Cisco does not address this argument but asserts that the administrative complaints are referenced in the Complaint, they are a prerequisite to filing the complaint, and are referenced in the demurrer and motion to strike. (RJN Reply, pp. 1-2.)

The request for judicial notice of Ex. A and Ex. B is GRANTED only as to the document's existence. (See *Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1591 [granting request for judicial notice of DFEH decision].) While the Court understands that Cisco would like judicial notice taken of the boxes that were selected on the DFEH complaint, the Court declines to take judicial notice of the contents of the DFEH complaints, as they likely contain disputed facts, and on demurrer and motion to strike, a court's function is limited to testing the legal sufficiency of the complaint. (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374 [stating also "hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable"].)

The request for judicial notice of Ex. C, Ex. D, and Ex. E is GRANTED as to the documents' existence. (See *Copenbarger v. Morris Cerullo World Evangelism, Inc.* (2018) 29 Cal.App.5th 1, 14 [judicial notice may be taken of court records but the truth of matters asserted in such documents is not subject to judicial notice].)

D. Statute of Limitations

A court may sustain a demurrer on the ground of failure to state sufficient facts if "the complaint shows on its face the statute [of limitations] bars the action." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315.) A demurrer is not sustainable if there is only a possibility the cause of action is time-barred; the statute of limitations defense must be clearly and affirmatively apparent from the allegations in the pleading. (*Id.* at pp. 1315-16.) When evaluating whether a claim is time-barred, a court must determine (1) which statute of limitations applies and (2) when the claim accrued. (*Id.* at p. 1316.) "To determine the statute of limitations which applies to a cause of action it is necessary to identify the nature of the cause of action, i.e., the 'gravamen' of the cause of action." (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22.) "The nature of the cause of action and the primary right involved, not the form or label of the cause of action or the relief demanded, determine which statute of limitations applies." (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 412.)

FEHA claims are governed by two statutory deadlines. (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1411 (*Acuna*).) First, the employee must exhaust statutory administrative remedies by filing a complaint with the DFEH within one year of "the date upon which the alleged unlawful practice or refusal to cooperate occurred[.]" (Gov. Code § 12960, subd. (d); *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492-493; *Acuna*, *supra*, 217 Cal.App.4th at p. 1412.) Second, the civil action based on the claims asserted in the DFEH complaint must be commenced within one year of the date of the DFEH's notice of the right to sue. (Gov. Code, § 12965, subd. (d); *Acuna*, *supra*, 217 Cal.App.4th at p. 1413.)

Cisco argues the entire Complaint is barred by the statute of limitations because it did not file a civil action in state court within one year after Doe filed his administrative complaint. (Demurrer, p. 5:15-16.) Specifically, Cisco asserts that "Doe filed an amended administrative complaint on October 9, 2018 . . . Thus, in the absence of a tolling agreement, DFEH's deadline to file a civil action was October 9, 2019." (Id. at p. 5:16-18.) In this case, it is undisputed that the parties entered into several tolling agreements[2] that extended the DFEH's deadline to June 30, 2020. (Id. at p. 5:19; Compl., ¶ 13.) On June 30, 2020, DFEH filed a federal action, and then on October 16, 2020, DFEH voluntarily dismissed the federal action and subsequently filed the current action in state court. (Id. at p. 5:20-23.)

Cisco agues it is "black-letter law" that when a plaintiff voluntarily dismisses a first lawsuit, the time during which the first lawsuit was pending does not toll the statute of limitations and if a plaintiff files a second action after the statute of limitations has run, the

[2] While both parties agree that they entered into a tolling agreement extending the DFEH's time to file a civil action to June 30, 2020, there are no tolling agreements attached to the Complaint and none are the subject of any request for judicial notice. Thus, with respect to any tolling agreements, the Court is confined to what is stated in the Complaint regarding them.

second action is time-barred. (Demurrer, p. 5:25-28, citing *Thomas v. Gilliland*, 95 Cal.App.4th 427.) In opposition, DFEH argues the parties' tolling agreement, California Emergency Rules of Court, Rule 9 ("Rule 9"), and federal law "more than ensure the timeliness of DFEH's complaint. (Opposition, p. 4:10-12.)

Emergency Rule 9

California Rules of Court, Emergency Rule 9, subdivision (a) states: "Notwithstanding any other law, the statutes of limitations and repose for civil causes of action that exceed 180 days are tolled from April 6, 2020, until October 1, 2020."

The DFEH asserts that at the time Rule 9 took effect, DFEH had 91 days remaining before it was required to file a civil action on June 30, 2020 and therefore, the complaint was due to be filed 91 days after October 1, 2020, or on December 20, 2020. (Opposition, p. 4:17-20.)

The Court first notes that the case law pertaining to Rule 9 is limited, as Rule 9 was adopted by the Judicial Council in response to the COVID-19 pandemic. That said, the Judicial Council Advisory clearly explained: "Emergency rule 9 is intended to apply broadly to toll any statute of limitations on the filing of a pleading in court asserting a civil action." Here, the parties agreed, through a contractual tolling agreement, that DFEH had until June 30, 2020 to file a civil action. At that time, DFEH was unable to file a civil action in state court and Rule 9 had taken effect and tolled the statute of limitations to assert such an action. (*Lerner v. Los Angeles City Board of Education* (1963) 59 Cal.2d 382, 391 ["'the running of the statute of limitations is suspended during any period in which the plaintiff is legally prevented from taking action to protect his rights'"].) When Rule 9 went into effect, DFEH had 85 days remaining before its complaint was due. Thus, DFEH had until 85 days after October 1, 2020 to file in state court. (See *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370 ["the tolled interval, no matter when it look place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred"].) DFEH filed in state court on October 16, 2020. Accordingly, the Complaint was timely filed under Rule 9, and the Court will not sustain the demurrer to the entire Complaint on this basis. The Court need not address DFEH's remaining arguments regarding the statute of limitations.

E. Discrimination

Cisco argues the discrimination claims fail because: 1) caste is not a protected class; 2) Doe did not exhaust his allegations of religion, national origin/ethnicity, and color and so there cannot be discrimination allegations on those bases; 3) DFEH does not state sufficient facts to assert discrimination based on ancestry or race.

1. Caste as a Protected Class

As to the first argument, Cisco directs the Court to arguments made in its motion to strike. (See Demurrer, p. 6:16-17.) As an initial point, the Court notes that directing the Court to a separate motion is insufficient to support arguments made in the current motion. Moreover, Cisco merely asserts that caste and ethnicity-based discrimination are not protected

under FEHA. (See MTS, p. 4:4-5.) In opposition, DFEH argues that FEHA is to be liberally construed and that discrimination based on religion, ancestry, national origin/ethnicity, and race/color are "manifest in caste." (Opposition, p. 7:13-14.)

As an initial matter, the Court notes there is no California case that is directly on point here. However, the Legislature has established that provisions of FEHA "shall be construed liberally for the accomplishment of the purposes of this part." (Gov. Code, § 12993, subd. (a); see also *Kelly v. Methodist Hospital of So. California* (2000) 22 Cal.4th 1108, 1114 ["'Because the FEHA is remedial legislation, . . . the court must construe the FEHA broadly, not restrictively'"]; *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1157 [Legislature intended the FEHA "'to expand'" the rights of persons who are victims of employment discrimination"].) Moreover, although not controlling, the Legislature recently passed Senate Bill 403, which would have added "caste" into the definition of ancestry. While Governor Gavin Newsom vetoed S.B. 403, he stated in that veto that civil rights protections "shall be liberally construed. Because discrimination based on caste is already prohibited under these existing categories, this bill is unnecessary." (See October 7, 2023, S.B. 403 Veto, Office of the Governor.)[3] Taken together, and under the current state of the law, it is clear that it was the intent of the Legislature that "caste" be included under the already existing protected categories.

Based on the foregoing, the Court declines to sustain the demurrer on the ground that caste is not a protected class.

2. Exhaustion of Administrative Remedies

Cisco next asserts that Doe did not exhaust his administrative remedies by indicating he was discriminated against on the basis of religion, national origin/ethnicity, and color animus, and so the DFEH cannot allege discrimination on those bases. Again, Cisco directs the Court to its motion to strike. There, Cisco asserts that Doe's initial and amended administrative complaint alleges only claims based on ancestry and/or race. However, while the Court has taken judicial notice of the amended administrative complaint, it was as to its existence only, and therefore, the Court will not rely on the contents of the document.

"'An employee who wishes to file suit under the FEHA must exhaust the administrative remedy provided by the statute by filing a complaint with the DFEH, and must obtain from the DFEH a notice of right to sue. The timely filing of an administrative complaint before the DFEH is a prerequisite to the brining of a civil action for damages.'" (*Guzman v. NBA Automotive, Inc.* (2021) 68 Cal.App.5th 1109, 1117 (*Guzman*) [internal quotations omitted].)

As DFEH notes in opposition, "[t]he purpose of filing a charge with an administrative agency prior to filing a civil lawsuit is to enable that agency to investigate the charges and attempt to obtain voluntary compliance with the law. When submitting the charge, claimants are not held to specify the charges with literal exactitude." (*Soldinger v. Northwest Airlines* (1996) 51 Cal.App.4th 345, 381.) While "[s]ome authorities state the more specific the original charge filed with the administrative agency, the less likely a civil lawsuit may be expanded into other areas . . . all [authorities] recognize that a DFEH charge 'is not intended as

[3] Cisco is apparently aware of this fact, as it refers to it on p. 1 of its reply to DFEH's opposition to the demurrer. (See Reply, p. 1, fn. 1.)

a limiting device.'" (*Ibid*.; see also *Stearns v. Fair Employment Practice Com* (1971) 6 Cal.3d 205, 213-214.) Further, "[i]ncidents not described in a DFEH charge can be included in the subsequently filed lawsuit if they would necessarily have been discovered by investigation of the charged incidents." (*Ibid*.; see also *Guzman*, *supra*, 68 Cal.App.5th at p. 1117 ["The administrative exhaustion requirement is satisfied if FEHA claims in a judicial complaint are like and reasonably related to those in the DFEH complaint or likely to be uncovered in the course of a DFEH investigation"].)

In this case, Doe filed an administrative complaint with the DFEH indicating he was discriminated against, harassed, and retaliated against by his employer. (Compl., pp. 1:20-2:2.) The DFEH then brought a civil action against Cisco after completing an investigation of Doe's charges alleging Doe was discriminated, retaliated, and harassed on the basis of religion, ancestry, national origin/ethnicity, and race/color. (Compl., ¶¶ 11-12.) Accordingly, Doe has sufficiently exhausted his administrative remedies and the Court declines to sustain the demurrer on this basis.

3. Discrimination Based on Ancestry or Race

The elements of a discrimination claim are: "(1) the employee's membership in a classification protected by the statute; (2) discriminatory animus on the part of the employer toward members of that classification; (3) an action by the employer adverse to the employee's interests; (4) a causal link between the discriminatory animus and the adverse action; (5) damage to the employee; and (6) a causal link between the adverse action and the damage." (*McCaskey v. California State Automobile Assn.* (2010) 189 Cal.App.4th 947, 979.)

Cisco asserts there are no allegations:1) Iyer or Kompella are of a different ancestry or race, 2) that they harbored animus on these bases; or 2) that Doe suffered an adverse employment action within the meaning of FEHA.

i. Race/Ancestry

Cisco contends that race and ancestry are the only exhausted and statutorily protected categories alleged by DFEH. It asserts there are no allegations that Iyer or Kompella or anyone else were of a different ancestry or race than Doe, but rather that they were of different castes than Doe. (Demurrer, p. 6:21-24.) Cisco cites no authority to support the contention that the person doing the discriminating must be of another ancestry or race than the person he is discriminating against. (See *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282 [a point asserted without citation to authority will be disregarded].) DFEH argues that "it is of no consequence that Iyer and Kompella . . . are also from India or may share the same religion or race as Doe. Moreover, persons within the same protected category can still discriminate." (Opposition, p. 10:19-22, citing *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 79 (*Oncale*).)

The Court is persuaded by DFEH's argument, as several cases hold that discrimination by members of the same protected categories can be actionable.[4] (See e.g., *Oncale, supra,* 523 U.S. at p. 76 ["in the related context of racial discrimination in the workplace we have rejected any conclusive presumption that an employer will not discriminate against members of his own race 'Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group'"]; *Castaneda v. Partida* (1977) 430 U.S. 482, 499 [stating same]; *St. Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 609-610 [rejecting argument that discrimination claims by one Caucasian against another are not cognizable]; *Bryant v. Begin Manage Program* (E.D.N.Y. 2003) 281 F.Supp.2d 561, 570 ["the fact that [plaintiff's] supervisor was [also] black does not place [plaintiff's] race discrimination claim outside the scope of Title VII"].) Furthermore, DFEH does allege Doe "has a darker complexion relative to other persons of non-Dalit Indian descent" (Compl., ¶¶ 1, 29) and that Iyer and Kompella are of a higher caste than Dalit (Compl., ¶ 4), creating an inference that there were differences between those within the same protected category. (See *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1111-1112 (*Poseidon*) [in reviewing sufficiency of complaint against general demurrer, court treats as true "not only the complaint's material factual allegations, but also facts that may be implied or inferred from those expressly alleged"].)

ii. Animus

Cisco argues that the Complaint's allegations "do not allow the Court to reasonably infer that (to the extent any of these actually happened) they were caused by an intent to unlawfully discriminate against Doe. . . . This is especially true given that Iyer actively recruited and hired Doe to work with him in a highly coveted position at Cisco earning top compensation[.]" (Demurrer, p. 7:13-19; see also Reply, p. 6:9-12 [stating Cisco is entitled to an inference of nondiscrimination based on the same actor inference].)

In making this "same actor" argument, Cisco relies on *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 273 (*Nazir*), stating that when the same allegedly discriminatory actor previously selected plaintiff for favorable treatment it creates an inference of nondiscrimination. However, Cisco quotes *Nazir* only in part. The First District Court of Appeal explained that same-actor evidence "is a strong inference that a court must take into account on a summary judgment motion." (*Id*. at p. 273 [internal quotations omitted]; see also *Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 937 ["while once commonly relied on by courts affirming summary judgment against a plaintiff alleging discriminatory action, the same-actor inference has lost some of its persuasive appeal in recent years"][internal quotations omitted].) Thus, the same actor inference is not properly considered on a demurrer, where a court is not concerned with a plaintiff's ability to prove its allegations or the possible difficulty in making such proof. (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496.) Furthermore, the Complaint alleges Defendants acted with the intent to discriminate against Doe, which is sufficient for pleading purposes. (See Compl., ¶¶ 49, 58.)

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[4] "We observe initially that while federal authority may be regarded as persuasive, California courts are not bound by decisions of federal . . . courts of appeals." (*People v. Uribe* (2011) 199 Cal.App.4th 836, 875.) In this instance, the Court finds the cited cases to be persuasive and on-point.

iii. Adverse Employment Action

Cisco additionally contends the allegations of isolating Doe from his colleagues, reassigning job duties, denying him a raise, and denying him a promotion are insufficient to state a discrimination claim. (Demurrer, p. 7:1-8, 20.) Specifically, Cisco asserts that there "is no reason to believe that other employees were unaffected by a reorganization, or that Doe was the only employee who did not receive a raise . . . there is no elaboration as to what alleged 'work opportunities' Doe was denied . . . [and] Doe does not allege he was equally qualified for the [promotions]." (Demurrer, p. 7:20-27.) Cisco further asserts there are no allegations that the person who did receive the promotion was outside of the protected classes that Doe pleads. (*Id.* at p. 8:2-3.)

"[A]n adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, [however], the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052.) "The court should consider 'plaintiff's allegations collectively under a totality-of-the-circumstances approach" . . . 'Minor or relatively trivial adverse actions' do not suffice. . . . But an adverse action that 'is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within the reach of' FEHA." (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 423 (*Wysinger*).)

Here, DFEH alleges Doe was informed that Iyer was disclosing his Dalit caste to his coworkers (Compl., ¶ 31); Doe contacted HR to file a discrimination complaint against Iyer (Compl., ¶ 33); six days later, Iyer took away Doe's role leading two technologies (Compl., ¶ 34); Iyer then promoted two of Doe's colleagues, including Kompella who was a higher caste than Doe (Compl., ¶ 35); then Doe's role was reduced and he was isolated from his colleagues (Compl., ¶ 36); Doe then submitted another written complaint to HR (Compl., ¶ 37); Doe was further isolated and Iyer disparaged Doe and misrepresented that he performed his job inadequately (Compl., ¶ 40); Doe was later denied another promotion based on Iyer's retaliatory employment actions (Compl., ¶ 47.) Taken as a whole, the Court finds these allegations are sufficient to allege an adverse employment action for pleading purposes to overcome a demurrer. (See *Poseidon, supra,*152 Cal.App.4th at p. 1111 [the complaint must be liberally construed and given a reasonable interpretation, with a view to substantial justice between the parties]; see also *Wysinger*, *supra*, 157 Cal.App.4th at p. 424 [refusal to promote plaintiff is an adverse employment action under FEHA, especially where there was "also a pattern of conduct, the totality of which constitutes an adverse employment action. This includes underserved negative job reviews [and] reductions in his staff"].)

Based on the foregoing, Cisco's demurrer to the first cause of action for discrimination[5] on the ground DFEH failed to state a claim is OVERRULED.

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[5] Cisco requests that if the Court sustain its demurrer to the discrimination cause of action, the Court should also sustain the derivative failure to prevent discrimination claim. As the demurrer is overruled as to the discrimination cause of action, it is likewise overruled to the derivative fourth and fifth causes of action.

F. Harassment

Cisco demurs to the second cause of action on grounds it fails to state a claim because: 1) Doe did not exhaust his administrative remedies; 2) DFEH fails to allege the first four elements of harassment; and 3) the harassment claims are time-barred.

1. Exhaustion of Administrative Remedies

Cisco asserts that Doe did not exhaust its administrative remedies on religion, national origin/ethnicity, and color claims and therefore cannot allege harassment on those bases. For the same reasons as stated above, the Court finds Doe sufficiently exhausted his administrative remedies and declines to sustain the demurrer to the second cause of action on this basis.

2. Elements of Harassment

To state a prima facie case of harassment, the plaintiff must allege: 1) plaintiff is a member of a protected group; 2) plaintiff was subjected to unwelcome harassment; 3) the harassment complained of was based on membership in the protected group; 4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and 5) respondeat superior. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608.)

Cisco asserts that DFEH fails to plead facts establishing the first four elements of a harassment claim. (Demurrer, p. 8:22-24.)

i. Protected Category

As to the first element, as explained above, caste is included within the already protected categories. Thus, the Court will not sustain the demurrer on this basis.

ii. Unwelcome Harassment

Next, Cisco contends that allegations in the Complaint consist of personal management decisions that cannot be harassment under FEHA. (Demurrer, p. 9:2-3, relying on *Reno v. Baird* (1998)18 Cal.4th 640 (*Reno*) [superseded by statute] and *Janken v. GM Hughes Elecs.* (1996) 46 Cal.App.4th 55 (*Janken*).)

In *Reno*, the Supreme Court, citing to *Janken*, explained that "'harassment consists of a type of conduct outside the scope of necessary job performance of a supervisory job. Instead, harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job.'" (*Reno*, *supra*, 18 Cal.4th at pp. 645-646.)

Cisco argues the following harassment allegations are personnel management decisions that are not actionable under *Reno*: revealing Doe's caste to his colleagues; disparaging him to the team; subjecting him to offensive comments; isolating him from the team; reducing his role; giving him assignments that were impossible to complete; and requiring him to submit

weekly status reports. (Demurrer, p. 9:17-22.) In opposition, DFEH argues courts have held that adverse personnel management decisions can be harassment and the Court should consider a totality of the circumstances. (Opposition, p. 13:14-15, 18-19.) DFEH cites to several cases to support its argument that management decisions may constitute an adverse employment action. However, all of the cases cited by DFEH address discrimination under FEHA and do not specifically state that management acts can be considered harassment.[6]

Cisco next asserts that four of the seven allegations it references "are plainly personnel management" and contends the remaining allegations are conclusory and insufficient. (Demurrer p. 9:23-26.) While DFEH's harassment claims are based in part upon personnel management decisions, such as giving Doe difficult assignments and requiring him to complete status reports (Compl., ¶ 63), DFEH additionally alleges non-personnel management decisions, including revealing Doe's caste to his colleagues (*ibid*.); disparaging him to the team, misrepresenting that he did not perform his job adequately and telling Doe's team members to avoid working with him (Compl., ¶¶ 40, 63); isolating him from the team (Compl., ¶ 63); and criticizing his social skills (Compl., ¶ 47). These allegations fall within the established definition of harassment. (See e.g., *Janken*, *supra*, 46 Cal.App.4th at p. 63 [harassment includes verbal epithets or derogatory comments].) Accordingly, at the pleading stage, the Court finds these allegations to be sufficient to allege harassment.

iii. Causation

Cisco next argues the allegations do not "sufficiently suggest that anything happened based on Doe's caste." (Demurrer, p. 10:10-12.) In opposition, DFEH contends that it alleges the harassment Doe faced was based on his caste. (Opposition, p. 11:16-17, citing Compl., ¶¶ 61-64.) The Complaint contains significant allegations that Doe was subjected to harassment based on his caste, including allegations that other employees had learned of Doe's caste, that he was being treated unfairly, and that "Iyer was setting Doe up to push him out of the Company." (Compl., ¶ 41); and that Defendants subjected Doe to offensive comments and other misconduct based on his caste (Compl., ¶ 63.) The Court finds these allegations are sufficient to survive a demurrer.

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[6] DFEH cites to: *Horsford v. Board of Trustees of California State Univ.* (2005) 132 Cal.App.4th 359, 374 [concluding that, in a racial discrimination action, where management actions were permissible in other contexts, those decisions still resulted in adverse employment action. As such, if the transfer and suspension resulted from racial animus, they are actionable under FEHA"]; *Simers v. Los Angeles Times Communications LLC* (2018) 18 Cal.App.5th 1248, 1279 [in an age and disability discrimination action, "a job reassignment may be an adverse employment action when it entails materially adverse consequences"]; *Wysinger, supra,* 157 Cal.App.4th at p. 424 [in a retaliation action, court held that a refusal to promote plaintiff is an adverse employment action under FEHA given the totality of the circumstances]. However, while these cases provide examples of adverse employment actions, none of the cases specifically address managerial acts as harassment. The Court notes neither party addresses *Roby v. McKesson Corp.*, where the California Supreme Court determined that managerial acts can form the basis for a harassment claim where such acts have the "secondary effect of communicating a hostile message. This occurs when the actions establish a widespread pattern of bias." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 709.)

iv. Sufficiently Pervasive Harassment

Finally, Cisco contends the Complaint's allegations are not actionable as harassment because they are not severe or pervasive because Iyer made a single comment over three years, and it was not made to Doe. (Demurrer, p. 10:21-27.)

"The law prohibiting harassment is violated when the workplace is permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." (*Caldera v. Department of Corrections & Rehabilitation* (2018) 25 Cal.App.5th 31, 38 (*Caldera*) [internal quotations omitted].)

In this case, the Complaint alleges significantly more than a single comment made by Iyer about Doe's caste. However, even if the Complaint alleged only a single act, the Legislature has declared that a single incident of harassing conduct is sufficient if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment. (Gov. Code, § 12923, subd. (b).) In any event, whether harassment is sufficiently severe or pervasive "'is ordinarily one of fact'" and is therefore not properly decided on demurrer. (See *Caldera, supra,* 25 Cal.App.5th at p. 38 [stating also "[a]s to whether the alleged conduct is sufficiently severe or pervasive, a jury is to consider the totality of circumstances"].) Accordingly, the Court declines to sustain the demurrer on this basis.

3. Time-Barred

Cisco additionally asserts the harassment claim must fail because there are no allegations of timely harassment occurring on or after August 1, 2017.[7] Cisco argues that the only events occurring after August 1, 2017 were Kompella's promotion, Doe's lack of promotion, Kompella assigning Doe impossible assignments and requiring him to submit weekly reports, which are all acts of personnel management. (Demurrer, p. 11:23-25.) In opposition, DFEH argues that the continuing violation doctrine applies to Doe's harassment claims.

"A plaintiff suing for violations of FEHA ordinarily cannot recover for acts occurring more than one year before the filing of the DFEH complaint." (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1400 (*Jumaane*).) However, "[t]his one-year period is subject to equitable tolling under various doctrines" including the continuing violation doctrine. (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1412.) "'[W]hen an employer engages in a continuing course of unlawful conduct under the FEHA . . . and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run, not necessarily when the employee first believes that [his] rights may have been violated, but rather, *either* when the course of conduct is brought to an end, . . . *or* when the employee is on notice that further efforts to end the unlawful conduct will be in vain.'" (*Jumaane*, *supra*. [emphasis original].)

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[7] Cisco asserts that Doe filed his DFEH charge on July 30, 2018 and so to be timely, the last instance of harassment must have occurred on or after August 1, 2017. (Demurrer, p. 11:20-22, citing Gov. Code, § 12960.)

"Under this doctrine, a FEHA complaint is timely if discriminatory practices occurring outside the limitations period continued into that period. A continuing violation exists if (1) the conduct occurring within the limitations period is similar in kind to the conduct that falls outside the period; (2) the conduct was reasonably frequent; and (3) it had not yet acquired a degree of permanence." (*Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 721 [internal citations omitted].)

Whether the Complaint's allegations, accepted as true on demurrer, describe acts outside the applicable limitations period that are "reasonably" frequent and similar to those within the limitations period such that the continuing violations doctrine will apply to the alleged events outside the limitations period presents a question of fact that cannot be resolved on demurrer as reasonable minds could certainly disagree on the issue. Moreover, Cisco refers to cases that deal with motions for summary judgment which are not persuasive on demurrer. Accordingly, the Court declines to sustain the demurrer to the second cause of action on this basis.

Therefore, the demurrer to the second cause of action is OVERRULED.

G. Retaliation

"FEHA makes it unlawful for any employer . . . or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under FEHA or because the person has filed a complaint, testified, or assisted in any proceeding under FEHA. In order to establish a prima facie claim of retaliation under this section, a plaintiff must show (1) [he] engaged in a protected activity, (2) [he] was subjected to an adverse employment action, and (3) there is a causal link between the protected activity and the adverse employment action." (*Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1252 [internal citations and quotations omitted].)

Cisco argues the retaliation cause of action fails because DFEH does not allege: 1) protected activity; 2) an adverse action, or 3) a causal link between protected activity and the adverse action.

1. Protected Activity

Cisco first contends that Doe must complain of unlawful conduct and because caste is not protected under FEHA, the allegations do not state a retaliation claim. (Demurrer, p. 12:19-23.) Cisco additionally asserts that it thoroughly investigated Doe's claims and found nothing to substantiate his complaints. (*Id.* at p. 12:22-24.)

Engaging in protected activity includes "engaging in opposition to any practices forbidden under FEHA or the filing of a complaint, testifying, or assisting in any proceeding under FEHA." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 247.)

Here, DFEH alleges Doe contacted Cisco's HR to file a discrimination complaint on two separate occasions, thereby engaging in protected activity. (Compl., ¶¶ 33, 37.) As explained in more detail above, caste is included in the already existing protected categories. Moreover, that Cisco investigated Doe's claims and could not substantiate them does not mean

that Doe did not participate in protected activity. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 474 ["An employee is protected against retaliation if the employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct"].) Therefore, the Court will not sustain the demurrer on this basis.

2. Adverse Action

Cisco contends there are no allegations of adverse action taken against Doe. However, as explained in detail above, DFEH has sufficiently alleged that adverse actions were taken against Doe.

3. Causal Link

Cisco argues the retaliation claim also fails because there is no causal link between the protected activity and the adverse actions. The Complaint contains allegations that as a result of Doe's HR complaints, he was retaliated against by Iyer and Kompella. (See Compl., ¶¶ 34, 74, 75.) These allegations are sufficient to survive a demurrer.

Based on the foregoing, the demurrer to the third cause of action is OVERRULED.

IV. Motion to Strike

A. Legal Standard

A court may strike out any irrelevant, false, or improper matter asserted in a pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436, subd. (a).) The grounds for a motion to strike must appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. (Code Civ. Proc., § 437, subd. (a).) In ruling on a motion to strike, a court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (*Clauson v. Superior Ct.* (1998) 67 Cal.App.4th 1253, 1255.) While a motion to strike can be used to target only a portion of a cause of action or a portion of a pleading's general allegations the Court has "no intention of creating a procedural 'line item veto' for the civil defendant." (*PH II, Inc. v. Superior Ct.* (1995) 33 Cal.App.4th 1680, 1683.)

B. General Allegations

Cisco first moves to strike allegations in the Complaint regarding "caste" and "casteism" on the ground they are immaterial because "caste" is not a protected class listed in FEHA. As the Court explains in detail above, caste is included under the already existing protected categories. Accordingly, the Court will not strike the allegations in the Complaint regarding caste.

Cisco next moves to strike the allegations in the Complaint regarding "ethnicity" on the ground they are immaterial because "ethnicity" is not a protected class listed in the FEHA. While ethnicity is not explicitly stated in Government Code section 12940, subdivision (a), ethnicity is included in the code sections notes to decisions. (See also *Dee v. Vintage*

Petroleum, Inc. (2003) 106 Cal.App.4th 30, 35 [stating FEHA prohibits harassment based on ethnicity].) As such, the Court will not strike allegations in the complaint regarding ethnicity.

Cisco moves to strike "religion," "color," and "national origin" from the Complaint on the ground they are immaterial to the claims because Doe failed to exhaust his administrative remedies with the DFEH. As explained above, the Court does not find that Doe failed to exhaust his administrative remedies. Moreover, "caste" is included within the already existing protected categories. The Court does not find these allegations to be immaterial and declines to strike religion, color, and national origin from the Complaint.

The motion to strike the above allegations is DENIED.

C. Background Information Allegations

Cisco moves to strike the following:

1) **Complaint, p. 2:14-17**: "Unlike Doe, most Indian immigrants in the United States are from upper castes. For example, in 2003, only 1.5 percent of Indian immigrants in the United States were Dalits or members of lower castes. More than 90 percent were from high or dominant castes. Similarly, upon information and belief, the same is true of the Indian employees in Cisco's workforce in San Jose, California."
2) **Complaint, pp. 3:16-4:6**: "For decades, similar to Doe's team, Cisco's technical workforce has been—and continues to be—predominantly South Asian Indian. According to the 2017 EEO-l Establishment Report (EEO-l Report), for example, Cisco has significant overrepresentation of Asian employees compared to other companies in the communications, equipment and manufacturing industry (NAICS 3342) in the same geographic area, which is statistically significant at nearly 30 standard deviations. Such overrepresentation is also present in management and professional job categories. In addition to Cisco's direct workforce, Cisco also employs a significant number of South Asian Indian workers through Indian- owned consulting firms. When combining its direct employees and consultants together, Cisco is among the top five H-lB Visa users in the United States. Over 70 percent of these Hl-B workers come from India. Outside of San Jose, Cisco's second largest workforce is in India. Although Cisco has employed predominantly South Asian Indian workforce for decades"
3) **Complaint, p. 3, fn. 7:** "2017 EEO-l Report for Cisco Systems, Inc. at 170 West Tasman Drive in San Jose, California. Because Cisco is federal contractor and employs 50 or more employees in California and the United States, Cisco is required to file an Employer Information Report EEO-l also known as the EEO—l Report. The EEO-l Report requires employers to report employment data for all employees categorized by sex, race/ethnicity, and job category. EEOC, EEO-l Instruction Booklet, https://www.eeoc.gov/ employers/eeo-l -survey/eeo-1-instruction-booklet (last Visited June 23, 2020)"
4) **Complaint, p. 4, fn. 8**: citation to Joshua Brustein, Cisco, Google benefit from Indian firms' use of H—1B program, The Economic Times (June 6, 2017, 8:31 PM), https://economictimes.indiatimes.com/tech/ites/cisco-google-benefit-from-indian-firms-use-of—h-1b-progranflarticleshow/S9020625.cms.
5) **Complaint, p. 4, fn. 9**: "Laura D. Francis & Jasmine Ye Han, Deloitte Top Participant in H-lB Foreign Worker Program—By Far, Bloomberg Law (Feb. 4, 2020, 2:30 AM),

https://news.bloomberglaw.com/daily-labor-report/ deloitte—topparticipant-in-h-1b-foreign-worker—program-by-far."

6) **Complaint, p. 4, fn. 10**: citation to U.S. Citizenship and Immigration Services, Characteristics of H—lB Specialty Occupation Workers: Fiscal Year 2019 Annual Report to Congress October 1, 2018 September 30, 2019, at (Mar. 5, 2020), https://www.uscis.gov/sites/default/files/reports-studies/ Characteristics_0f_Specialty_Occupation_Workers_H— 1B_Fiscal_Year_2019.pdf.).

In support of its motion to strike the above allegations, Cisco asserts that allegations about non-parties have no rational nexus to plaintiff's claims against it. (See MTS, p. 8:3-7.) In opposition, DFEH argues the information is relevant background information on the Indian Caste System and Dalits and helps link caste with characteristics of race, religion, ancestry, national origin, ethnicity, and color. (MTS Opposition, p. 12:3-6.)

The motion to strike Item Nos. 4 – 6 is GRANTED without leave to amend. The Court does not find these articles regarding tech companies' involvement in H-1B programs to be relevant to DFEH's claims against Cisco. While the Court understands that DFEH alleges that Cisco employs a high number of workers from India, it relies on other information to make the same point, including mandatory EEO-1 reports.

The motion to strike Item No. 2 is GRANTED, in part, without leave to amend, for the same reasons as stated above. The Court strikes the following allegations at p. 4:1-4: "When combining its direct employees and consultants together, Cisco is among the top five H-1B via users in the United States. Over 70 percent of these H1-B workers come from India."

The motion to strike Item Nos. 1 and 3 is DENIED. The Court finds these allegations to be relevant to DFEH's contention that the Indian caste system was prevalent at Cisco due to the number of employees from India.

D. Allegations Regarding Cisco's Conduct

Finally, Cisco moves to strike the following allegations as "class allegations" regarding Cisco's purported failure to "prevent, remedy, or deter" unlawful conduct against lower caste workers because they are immaterial and impertinent:

1) **Complaint, p. 4:6-7**: "Cisco was—and continues to be—wholly unprepared to prevent, remedy, or deter the unlawful conduct against Doe or similarly situated lower caste workers."
2) **Complaint, p. 17:17-20**: "As the agency of the State of California charged with the administration, interpretation, investigation, and enforcement of FEHA, the DFEH brings this claim in the name of the DFEH on behalf of all Indian persons who are or are perceived to be Dalit, of lower castes, or who fall outside the caste system, who are employed by or may seek employment with Cisco in the future."

In opposition, DFEH argues the above allegations are not "class allegations" and that it may independently seek non-monetary preventative remedies for violations of Government Code section 12940, subdivision (k), whether or not it prevails on its underlying claims. (MTS Opposition, p. 15:7-12.)

Pursuant to Cal. Code Regs., tit. 2, section 11023, subdivision (a)(3), "in an exercise of its police powers, the [DFEH] may independently seek non-monetary preventative remedies for a violation of Government Code section 12940(k) whether or not the Department prevails on an underlying claim of discrimination, harassment, or retaliation." As such, the motion to strike Item Nos. 1 – 2 is DENIED.

V. Conclusion and Order

The demurrer is OVERRULED in its entirety. The motion to strike is GRANTED, in part and DENIED, in part.

The Court will prepare the final Order.

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Calendar Line 3-5
Case Name: *Alex Lowry v. Daniel Carpenter, et al.*
Case No.: 21CV391302

I. Background

This matter arises from the procurement of life insurance policies for plaintiff Alex Lowry ("Plaintiff") by defendants Daniel Carpenter ("Carpenter") and Natorae Wettstein ("Wettstein") (collectively, "Defendants"). According to allegations of the first amended complaint ("FAC"), in March 2018, insurance broker Carpenter sold Plaintiff a $11,750,000 life insurance policy through John Hancock (the "John Hancock Policy"). (FAC, ¶ 10.) In August 2019, Carpenter began the process of obtaining for Plaintiff, through Lincoln Financial Group ("Lincoln"), two additional life insurance policies for $7,500,000 each (the "Lincoln Policies"). (*Id*. at ¶ 11.) Carpenter told Plaintiff he would do a "1035 exchange" from the John Hancock Policy to the Lincoln Polices for an estimated total of $162,000. (*Id.* at ¶ 12.)

The FAC further alleges Carpenter allowed the John Hancock Policy to lapse despite Plaintiff notifying Carpenter he received notices warning of the lapse. (FAC, ¶ 14.) In 2019 and 2020, because Carpenter did not have the authority to write insurance policies for Lincoln, Carpenter enlisted the assistance of insurance broker Wettstein to obtain the Lincoln Policies. (*Id.* at ¶¶ 15-16.) Plaintiff alleges Carpenter, with Wettstein's assistance, forged Plaintiff's signature on the Lincoln forms. (*Id.* at ¶ 15.) Plaintiff alleges, among other things, moving defendant Wettstein was negligent for failing to ensure that Plaintiff signed the Lincoln forms. (*Id.* at ¶¶ 17, 26-27.) Plaintiff suffered damages because of Defendants' negligent conduct, including "lost income/opportunity in rectifying the fraudulent policies" and "lost tax benefits." (*Id*. at ¶ 29.)

On June 13, 2022, Plaintiff filed the FAC against Defendants, asserting causes of action for:

1) negligence (against both Defendants);

2) breach of fiduciary duty (against Carpenter);

3) intentional misrepresentation (against Carpenter);

4) negligent misrepresentation (against Carpenter); and

5) unfair business practices (against both Defendants)[8].

On May 4, 2022, the court granted Wettstein's unopposed motions against Plaintiff to compel further discovery responses.

On June 20, 2023, Wettstein issued a Deposition Subpoena for the Production of Business Records (the "Subpoena") to Chahal & Associates ("Chahal"), an accounting firm retained by Plaintiff to prepare his personal tax returns and those for his company, ANM Sales, Inc. ("ANM"). (Declaration of Kimberly Harvey in support of Plaintiff's Motion to Quash

[8] On October 11, 2022, the court sustained Wettstein's demurrer to the fifth cause of action of the FAC without leave to amend.

("Harvey Decl."), ¶ 3.) The Subpoena is the subject of the three motions now before the court and seeks the following:

DOCUMENTS TO BE PRODUCED

1. LOWRY's tax return from 2016 through 2021.
2. ANM's tax returns from 2016 through 2021.
3. YOUR COMMUNICATIONS with LOWRY RELATED TO LOWRY's life insurance policies.

(Harvey Decl., Ex. A, Attachment "3.")

On July 21, 2023, Plaintiff filed two of the three motions now before the court: a motion to quash or limit the Subpoena, and an alternative motion for a protective order in relation to the Subpoena.

On August 9, 2023, Wettstein filed the third motion now before the court: a motion to compel compliance with the Subpoena.

II. Plaintiff's Motion to Quash

Plaintiff moves the court for an order quashing or limiting the Subpoena and related sanctions. Wettstein opposes and requests sanctions.

A. Legal Standard

Pursuant to Code of Civil Procedure section 1985.3, subdivision (g), "Any consumer whose personal records are sought by a subpoena duces tecum and who is a party to the civil action in which this subpoena duces tecum is served may, prior to the date for production, bring a motion under Section 1987.1 to quash or modify the subpoena duces tecum." [9]

Under Section 1987.1, subdivisions (a) and (b)(1), the court may "upon motion reasonably made by a [party] … make an order quashing [a] subpoena entirely, modifying it, or directing compliance with it upon those terms or conditions as the court shall declare, including protective orders." In addition, the court may make "any other order as may be appropriate to protect the [moving party] from unreasonable or oppressive demands," including unreasonable violations of his or her right to privacy. (§ 1987.1, subd. (a).)

B. Procedural Issues

i. *Service*

Plaintiff contends there are procedural defects with service of the Subpoena. Specifically, Plaintiff says he was never personally served with the Subpoena, that he was served with the "Notice to Consumer or Employee and Objection" (Judicial Council form SUBP-025) on the same day the Subpoena was served on Chalal, and that ANM was never given notice or opportunity to object. (Mot., pp. 3:4-9, 6:5-14; Harvey Decl., ¶¶ 5.)

As Wettstein persuasively argues in opposition, Plaintiff's contentions regarding service of the Subpoena are without merit. First, Section 1985.3 states that service of a subpoena duces tecum "shall be made as follows: [¶] To the consumer personally, at his or her last known address, or … ***if he or she is a party, to his or her attorney of record.***" (Section

[9] All further undesignated statutory references are to the Code of Civil Procedure.

1985.3, subdivision (b)(1).) Here, Plaintiff is a party to this action, and there is no dispute that his attorney of record was served. (Harvey Decl., ¶ 5 ["On June 30, 2023, Wettstein electronically served the Subpoena on Sellar Hazard & Lucia, law firm of record for Lowry"].)

As to the contention that Chalal was served with the Subpoena the same day that Plaintiff was served with it, Wettstein objects to this statement in attorney Harvey's declaration on the grounds, among others, that the claim lacks foundation, lacks personal knowledge, and is hearsay. The objection is SUSTAINED. (Evid. Code, §§ 400, 702(a), 800, and 1200, et seq.) Moreover, Wettstein proffers the proof of service showing Chalal was served with the Subpoena seven days after Plaintiff's attorney was served. (Declaration of Wendy Thomas ("Thomas Decl."), ¶ 12, Ex. 11.)

Finally, Wettstein was under no obligation under Section 1985.3 to serve ANM with a "Notice to Consumer or Employee and Objection" (Judicial Council form SUBP-025) because according to the statute, " 'Consumer' means any individual, partnership of five or fewer persons, association, or trust which has transacted business with, or has used the services of, the witness or for whom the witness has acted as agent or fiduciary." (Section 1985.3, subd. (a)(2).) Here, ANM is a corporation and does not meet the statutory definition of a consumer who must be provided with notice and opportunity to object.

Accordingly, Plaintiff's contentions that the Subpoena was defectively served are without merit.

ii. ***Separate Statement***

Wettstein asks the court to exercise its discretion to deny the motion to quash on the basis that Plaintiff failed to submit a separate statement as a separate document. (Opp., pp. 14-15.) Generally, a motion to quash must be accompanied by a separate statement, defined as a "separate document" filed and served with the motion. (Cal. Rules of Court, rule 3.1345, subds. (a)(5), (c).) A trial court has discretion to deny a motion for failure to comply with the separate statement requirements. (See, *e.g.*, *Mills v. U.S. Bank* (2008) 166 Cal.App. 871, 893 ["trial court was well within its discretion to deny" a motion to compel discovery where the separate statement was "extremely confusing because it did not indicate which of the specific discovery requests the various factual and legal reasons related to"].)

Here, Plaintiff includes his "separate statement" in the body of his supporting memorandum rather than as a separate document. (Mot., pp. 6-7.) However, because there are only three categories requested by the Subpoena, there is minimal confusion caused by the failure to file the separate statement as a separate document. Wettstein's robust opposition further suggests that there was little prejudice to her as a result of the procedural defect.

Thus, the court declines to deny the motion to quash based on the non-compliant separate statement.

iii. ***Amended Notice***

Wettstein further argues the motion to quash should be taken off-calendar because Plaintiff failed to serve her with an amended notice after the hearing was scheduled. (Opp., p. 13—citing Santa Clara County Superior Court Local Rules, Civil Rule 8(c), Scheduling Hearings, p. 7.) Here, for the same reasons discussed above, the court finds there to be minimal prejudice to Wettstein.

Thus, the court declines to deny the motion to quash for failure to serve an amended notice. Plaintiff is admonished to comply with the Code of Civil Procedure, the California Rules of Court, and the local rules with respect to his filings going forward, as the court may decline to consider future filings that are non-compliant.

C. Merits of the Motion to Quash

As to the merits, Plaintiff contends the taxpayer privilege and the right of privacy support his motion to quash the Subpoena.

i. Taxpayer Privilege

Plaintiff argues the taxpayer privilege applies to the first two requests for his personal tax returns and those of his company, ANM. (Mot., pp. 3-4.) In opposition, Wettstein contends Plaintiff has waived his right to the privilege by placing his and ANM's finances at issue. (Opp., pp. 10-12.)

"There is no recognized federal or state constitutional right to maintain the privacy of tax returns. [Citations.]" (*Weingarten v. Superior Court* (2002) 102 Cal.App.4th 268, 274 (*Weingarten*).) "California courts, however, have interpreted state taxation statutes as creating a statutory privilege against disclosing tax returns. [Citations]." (*Ibid.*) "The purpose of the privilege is to encourage voluntary filing of tax returns and truthful reporting of income, and thus to facilitate tax collection. [Citation.]" (*Ibid*.)

"But this statutory tax return privilege is not absolute. The privilege will not be upheld when (1) the circumstances indicate an intentional waiver of the privilege; (2) the gravamen of the lawsuit is inconsistent with the privilege; or (3) a public policy greater than that of the confidentiality of tax returns is involved. [Citation.]" (*Weingarten*, *supra*, 102 Cal.App.4th at p. 274.) "This latter exception is narrow and applies only 'when warranted by a legislatively declared public policy.' [Citation.]" (*Ibid.*) A trial court has broad discretion in determining the applicability of a statutory privilege. [Citation]." (*Ibid*.) An implied waiver of the taxpayer privilege occurs where the "gravamen of [the] lawsuit is so inconsistent with the continued assertion of the taxpayer's privilege as to compel the conclusion that the privilege has in fact been waived." (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 721 (*Schnabel*).)

Here, Wettstein persuasively argues Plaintiff has impliedly waived the taxpayer privilege by placing his income, tax savings, and financial condition at issue. First, in filing this lawsuit, Plaintiff alleges that he suffered monetary damages, including "lost income/opportunity" and "lost tax benefits." (FAC, ¶ 29.) Further, Plaintiff's discovery responses and deposition testimony demonstrate the gravamen of Plaintiff's claims against Wettstein is inconsistent with the continued assertion of the taxpayer's privilege. As discussed below, an examination of the discovery preceding the Subpoena casts doubt upon Plaintiff's claim of monetary damages, and Plaintiff himself has indicated his claim of lost tax benefits requires reference to the specifics of the tax returns requested by the Subpoena.

Wettstein's opposition describes her discovery efforts preceding the issuance of the Subpoena. (Opp., pp. 2-7.) In his responses to Wettstein's form interrogatories and special interrogatories, Plaintiff states that he attributes loss of income, loss of earning capacity, lost opportunity, lost investment income, lost tax benefits, and attorney's fees and costs to the incident giving rise to his claims. (Thomas Decl., ¶¶ 5-6, Exs. 4-5.) In his supplemental response to the form interrogatories, Plaintiff states he lost at least $42,000 in income due to the incident. (*Id*. at ¶ 7, Ex. 6.)

Wettstein took Plaintiff's deposition over the course of two days. (Thomas Decl., ¶¶ 9-10, Exs. 8-9.) Plaintiff testified that he is 100% owner of ANM and that it is a corporation. (*Id.* at ¶ 9, Ex 8., pp. 9-10.) Plaintiff confirmed that ANM paid for all of the monthly premiums for both the John Hancock Policies and Lincoln Policies. (*Id*. at ¶ 10., Ex. 9., pp. 29, 56.) Plaintiff entered into respective settlement agreements with John Hancock and Lincoln which included the rescission of the policies and the return of the full amount of the premiums that had been paid on the policies. (*Id.* at ¶ 10., Ex. 9., pp. 49-51.)

Plaintiff further testified that the settlement payments ($126,000 for the John Hancock settlement and $190,000 for the Lincoln settlement) were made to Plaintiff personally, even though ANM had paid all the premium payments for the policies. (Thomas Decl., ¶ 10., Ex. 9., pp. 52-53.) Thus, Plaintiff deposited the proceeds of the settlements into his personal bank account. (*Id.* at ¶ 10., Ex. 9., pp. 53, 56.) When asked whether the policy premiums were recognized as a loss or tax-deductible expense, and why the settlement payments were made to him and not to ANM, Plaintiff repeatedly answered, **"I don't know. I'm not a CPA."** (*Id.* at ¶ 10., Ex. 9., pp. 52-57.) Plaintiff said he does not know whether he ever transferred the settlement money from his personal bank account to the bank account for ANM. (*Id.* at ¶ 10., Ex. 9., p 53.)

When asked whether the payments on the policies appeared on his personal tax returns or on ANM's tax returns, Plaintiff said: **"I would assume that they're at this point in time probably in some way, shape, or form commingled."** (Thomas Decl. at ¶ 10., Ex. 9., p. 64.) Plaintiff also testified that he has lost "probably more" than $14,000 in W-2 income and that his income varies between $10,000 per month and $20,000 per month based on how well the business is doing. (*Id.* at ¶ 10, Ex. 9, pp. 84-85.)

This evidence proffered by Wettstein is sufficient to establish Plaintiff has impliedly waived the taxpayer privilege on behalf of himself and the corporation he owns completely, ANM. As Wettstein argues in opposition, the tax records requested by the Subpoena are relevant to Plaintiff's claim for monetary damages, lost tax benefits, and lost income. Further, Plaintiff's testimony effectively concedes that the only way to determine the veracity of his claims of lost tax benefits and lost income is to ask his CPA and obtain the relevant tax records. Thus, the gravamen of this lawsuit "is so inconsistent with the continued assertion of the taxpayer's privilege as to compel the conclusion that the privilege has in fact been waived." (*Schnabel*, *supra*, 5 Cal.4th at p. 721.)

Accordingly, the court finds that to the extent the taxpayer privilege would bar production of the tax records requested by the Subpoena, the privilege has been waived.

ii. <u>Right to Privacy</u>

Plaintiff also contends the Subpoena seeks information protected by the right to privacy without showing a compelling need. (Mot., pp. 4-6.) Wettstein asserts her interests outweigh the privacy interests of Plaintiff and ANM. (Opp., pp. 12-13.)

The right to privacy under the California Constitution protects an individual's "reasonable expectation of privacy against a serious invasion." (*Pioneer Electronics, Inc. v. Superior Court* (2007) 40 Cal.4th 360, 370.) The law is well established that the right to privacy extends to a person's financial affairs. (*Thomas B. v. Superior Court* (1985) 175 Cal.App.3d 255, 261 ["Personal financial information comes within the zone of privacy protected by article I, section 1 of the California Constitution"]; *Fortunato v. Superior Court* (2003) 114 Cal.App.4th 475, 481 ["there is a right to privacy in confidential customer

information *whatever* form it takes, whether that form be tax returns, checks, statements, or other account information"].)

Where the right to privacy is asserted in the discovery context, the items sought must be "directly relevant" and "essential to the fair resolution" of the lawsuit. (*Alch. v. Superior Court* (2008) 165 Cal.App.4th 1412, 1425.) To establish direct relevance, "[i]t is not enough that the information might lead to relevant evidence," which could be sufficient to establish general relevance for discovery purposes absent a privacy objection. (*Binder v. Superior Court* (1987) 196 Cal.App.3d 893, 901.) "Mere speculation as to the possibility that some portion of the records might be relevant to some substantive issue does not suffice." (*Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1017.)

In *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1 (*Hill*), the California Supreme Court announced a test for evaluating privacy concerns. "The party asserting a privacy right must establish a legally protected privacy interest, an objectively reasonable expectation of privacy in the given circumstances, and a threatened intrusion that is serious. [Citation.] The party seeking information may raise in response whatever legitimate and important countervailing interests disclosure serves, while the party seeking protection may identify feasible alternatives that serve the same interests or protective measures that would diminish the loss of privacy. A court must then balance these competing considerations. [Citation.]" (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 552 (*Williams*).)

Here, Plaintiff asserts that his "personal financial information comes within the zone of privacy protected by Article I, Section 1 of the California Constitution," but acknowledges a corporations right to privacy is not constitutionally protected. (Mot., pp. 4-5, citing *SCC Acquisitions, Inc. v. Superior Court* (2015) 243 Cal.App.4th 741, 756.) This establishes a legally protected privacy interest and expectation of privacy. But Plaintiff does not explain why the disclosures requested by the Subpoena represent a serious privacy intrusion. Thus, Plaintiff fails to address the third prong under the *Hill* test.

Even if Plaintiff had met his initial burden in asserting a privacy right, Wettstein has "raised legitimate and important countervailing interests disclosure serves." (*Williams*, *supra*, 3 Cal.5th at p. 552.) As detailed above, the information requested is directly relevant in this case because Plaintiff has put his income and his tax benefits in issue. The information sought may show Plaintiff has already been fully reimbursed for any damages caused by the Defendants' conduct, and that any additional recovery would be a windfall.

For these reasons, Wettstein has a compelling interest in obtaining the information because the material sought is "directly relevant" to the litigation. (*Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379, 1387 [compelling interest demonstrated where the material sought is directly relevant to the litigation].) In this motion, Plaintiff has not identified feasible alternatives or protective measures that would diminish the loss of Privacy. Thus, carefully weighing the competing considerations under the *Hill* test, the court finds that the need for the requested discovery outweighs the right to privacy. (*Williams*, *supra*, 3 Cal.5th at p. 552.)

Plaintiff's arguments do not convince the court otherwise. Plaintiff asserts he has not given up his right to privacy by the mere "happenstance" of his involvement in this litigation. (Opp., p. 5.) He further contends it is unclear why Wettstein believes she should have access to the materials requested, stating "[p]lenty of other documents likely exist to substantiate Plaintiff's damages." (*Id.*, p. 5:26-27.)

Plaintiff's arguments appear disingenuous for several reasons. First, Plaintiff chose to file this lawsuit, with its specific damage claims, and thus did not find himself in it by

"happenstance." Second, the meet and confer communications show counsel for Wettstein clearly stated why she believed she should have access to the materials in question. (Thomas Decl., ¶ 14, Ex. 13.) For example, in an email dated July 12, 2023, Ms. Thomas stated, "In order to evaluate a lost income claim, one would have to see what the income was for Mr. Lowry and his business in the years preceding the events in question." (*Ibid.*) Lastly, if plenty of other documents exist to substantiate Plaintiff's damages claims, it begs the question: why has Plaintiff not identified or produced these documents? When asked on the form interrogatories whether any documents support the existence or amount of any item of damages, Plaintiff answered, "No." (Thomas Decl., ¶ 5, Ex. 4, pp. 8-9.) In sum, the court is not persuaded by the right-to-privacy argument set forth by Plaintiff.

Accordingly, as Plaintiff's arguments in support of his motion to quash are without merit, the motion is DENIED.

D. Sanctions

In making an order on a motion to quash under Section 1987.1, "the court may in its discretion award the amount of the reasonable expenses incurred in making or opposing the motion, including reasonable attorney's fees, if the court finds the motion was made or opposed in bad faith or without substantial justification or that one or more of the requirements of the subpoena was oppressive." (Section 1987.2, subd. (a).)

Here, the court does not award sanctions to Plaintiff because he did not prevail on the motion to quash. Similarly, the court finds an award of sanctions to Wettstein is not warranted. Accordingly, the parties' respective requests for sanctions are DENIED.

E. Conclusion—Motion to Quash

Plaintiff's motion to quash Wettstein's Subpoena to Chahal & Associates is DENIED. Plaintiff and Wettstein's respective requests for sanctions are DENIED.

III. Plaintiff's Motion for Protective Order

As an alternative to his motion to quash, Plaintiff moves for a protective order. Wettstein opposes and request sanctions.

A. Legal Standard

Under Section 2017.020, the court is authorized to limit discovery through protective orders.

> The court shall limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence. The court may make this determination pursuant to a motion for protective order by a party or other affected person. This motion shall be accompanied by a meet and confer declaration under Section 2016.040.

(Section 2017.202, subd. (a); see also *John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1206.) The court is further authorized to "limit the frequency or extent of use of a discovery method" if it determines either of the following:

(1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.

(2) The selected method of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation.

(Section 2019.030, subd. (a).)

Procedurally, a formal noticed motion is required to obtain a protective order. (*St. Paul Fire & Marine Ins. Co. v. Superior Court* (1984) 156 Cal.App.3d 82, 85-86.) The motion must be accompanied by a declaration stating *facts* showing a "reasonable and good faith attempt" to resolve the matter outside of court. (Section 2025.420, subd. (a).) The burden is on the moving party to establish good cause for whatever relief is requested. (*Emerson Elec. Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1110 ["Generally, a deponent seeking a protective order will be required to show that the burden, expense, or intrusiveness involved … clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence"]; *Nativi v. Deutsche Bank Nat'l Trust Co.* (2014) 223 Cal.App.4th 261, 318 [burden not met by "entirely conclusory" declaration that "lacked any factual specificity"].)

The granting or denial of a protective order lies within the sound discretion of the law and motion judge, and is reviewable for abuse of discretion. (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 379-381.)

B. <u>Discussion</u>

Plaintiff's motion for a protective order includes a meet and confer declaration signed by Plaintiff's counsel. (Declaration of Kimberly Hazard ("Hazard Decl.").) Plaintiff's arguments in support largely mirror his motion to quash, discussed above. With respect to the tax returns, Plaintiff does not appear to seek any particular limitation on the production of the tax returns, and is instead asking the court to completely prohibit production of the tax returns. (Mot., pp. 4-5.) To the extent Plaintiff's motion for a protective order is simply a reframed version of his motion to quash, the court denies the request for the reasons discussed above. While not specifically addressed by Plaintiff in his motion, the meet and confer emails produced reference Plaintiff's request that the tax returns be redacted, and Wettstein agreed that redacting information such as dates of birth and full social security numbers would be reasonable.

Regarding the third request of the Subpoena concerning communications between Plaintiff and Chahal, Plaintiff requests the court "enter a protective order ensuring that any communications pertaining to life insurance or other financial information by the Subpoena be treated as confidential and not disclosed to anyone outside of this litigation." (*Id.* at p. 4:18-20—quoting and citing *Martin v. Superior Court* (1980) 110 Cal.App.3d 391, 395 ["where a party is compelled in civil discovery to reveal financial information because the information is relevant … that party is … presumptively entitled to a protective order that the information need be revealed only to counsel for the discovering party or to counsel's representative, and that once revealed, the information may be used only for the purposes of the lawsuit"].)

In opposition, Wettstein contends Plaintiff has failed to demonstrate good cause for a protective order. (Opp., pp. 9-11.) Wettstein argues the time frame of the records sought (2016 to 2021) is reasonable because Plaintiff obtained the life insurance policies at issue in 2018 and

2019 and because Plaintiff is claiming damages for lost income, tax benefits, and opportunities from 2019 to present. (*Id.* at p. 10:25-27.) Wettstein asserts she requires information from before the alleged conduct to evaluate Plaintiff's claim of lost income. The court finds this argument has merit and the timeframe requested is reasonable in light of Plaintiff's claims in the pleadings. For the same reasons, the court finds the 2016 to 2021 timeframe shall apply to the third request for production of communications with Chahal.

Wettstein further argues Plaintiff's request for a confidentiality provision concerning the requested communications should be denied because the declaration in support of Plaintiff's motion is conclusory and because court records are presumed to be open. (Opp., pp. 13-14.) Wettstein also asserts that Plaintiff failed to meet and confer regarding this request, and that if he had, the parties could have discussed the terms of a stipulated protective order. (*Id.* at p. 14.)

Here, the court finds Plaintiff's request for a confidentiality provision to be reasonable. Further, Wettstein counsel already expressed willingness to agree to redaction of certain information from the documents, as discussed above. Accordingly, in these respects, Plaintiff's motion for a protective order is GRANTED, and in all other respects, the motion is DENIED. (See *Raymon Handling Concepts Corp. v. Superior Court* (1995) 39 Cal.App.4th 584, 588—the issuance and formulation of protective orders are largely discretionary.)

C. Sanctions

Both sides acted with substantial justification in making or opposing the motion to for a protective order, and their respective requests for sanctions are DENIED.

D. Conclusion—Protective Order

Plaintiff's request for a protective order is GRANTED in part. Any materials produced in response to the Subpoena shall be produced only to counsel for defendant Natorae Wettstein or counsel's representative, and once produced, shall be used only for purposes of this litigation. All responses shall be limited to the timeframe from 2016 through 2021, and all dates of birth and the first five numbers of individual's social security numbers shall be redacted. In all other respects, Plaintiff's motion for a protective order is DENIED.

IV. Wettstein's Motion to Compel

Wettstein moves the court for an order compelling nonparty Chahal's compliance with the Subpoena and requests related sanctions. Plaintiff opposes and requests sanctions.

A. Legal Standard

"In California, discovery may be obtained from a nonparty through an oral deposition, a written deposition, or a deposition for the production of business records and things. (Section 2020.010, subd. (a).) To pursue the deposition of a nonparty, a party must generally serve a deposition subpoena. (Section 2020.010, subd. (b).)" (*Board of Registered Nursing v. Superior Court* (2021) 59 Cal.App.5th 1011, 1030 (*Board of Registered Nursing*).)

If a nonparty disobeys a deposition subpoena, the subpoenaing party may seek a court order compelling the nonparty to comply with the subpoena under either Code of Civil Procedure section 1987.1 or section 2025.480. (Sections 1987.1, 2025.480; see, generally *Unzipped Apparel, LLC v. Bader* (2007) 156 Cal.App.4th 123 [applying section 2025.480 to a business records subpoena directed to a nonparty]; *Board of Registered Nursing*, *supra*, 59 Cal.App.5th 1031 [same].) Section 1987.1 authorizes a party to bring a motion to direct compliance with a subpoena. A court may then make an order directing compliance with the subpoena "upon those terms and conditions as the court shall declare." (Section 1987.1, subd. (a).)

Section 2025.480, subdivision (a) provides, "If a deponent fails to answer any question or to produce any document, electronically stored information, or tangible thing under the deponent's control that is specified in the deposition notice or a deposition subpoena, the party seeking discovery may move the court for an order compelling that answer or production." Section 2025.480, subdivision (i) provides, "If the court determines that the answer or production sought is subject to discovery, it shall order that the answer be given or the production be made on the resumption of the deposition."

B. Timeliness

Wettstein relies on section 2025.480, which contains a timeliness provision. A motion made under that section "shall be made no later than 60 days after the completion of the record of the deposition, and shall be accompanied by a meet and confer declaration under Section 2016.040." (Section 2025.480, subd. (b).) Here, the Subpoena was served on Chahal on June 27, 2023, and responses were due on July 21, 2023. The motion was filed on August 9, 2023. Accordingly, the motion is timely. Additionally, it is accompanied by a declaration evidencing significant meet and confer efforts.

C. Merits of the Motion to Compel

Turning to the merits, Chahal served objections to the Subpoena, as set forth below. (Wettstein's Separate Statement in Support of Motion to Compel, ("Separate Statement"), pp. 2-8.)

Request No. 1 seeks: "LOWRY's tax returns from 2018 through 2021." (*Id*. at p. 2.)

Request No. 2 seeks: "ANM's tax returns from 2016 through 2021." (*Id.* at p. 7.)

Request No. 3 seeks: "YOUR COMMUNICATIONS with LOWRY RELATED TO LOWRY's life insurance policies. (*Id*. at p. 8.)

In response to each of these requests, Chahal objected as follows: "My client does not consent to the production of these records, which are protected by confidentiality and my client's right to privacy. The documents and information requests are unreasonable, oppressive, and outside the scope of discovery. Moreover, the subpoena failed to include witness fees and I was not served personally." (*Id.* at pp. 2, 7, 8.)

Wettstein persuasively argues that Chahal's objections lack merit. As discussed above in relation to Plaintiff's motion to quash, the right to privacy is not absolute, and Plaintiff has failed to demonstrate that the right to privacy prevents production of the documents requested by the Subpoena. Likewise, Plaintiff has impliedly waived the taxpayer privilege because the gravamen of this litigation is inconsistent with continued assertion of the privilege. The court does not find the requests to be unreasonable, oppressive, or outside the scope of discovery

because the Subpoena is limited to three categories of documents and Wettstein has sufficiently established the relevance of the requested materials, as discussed previously. Moreover, the court has limited the scope of the responses as set forth in protective order described above.

Chahal's objections on the basis that the Subpoena was not accompanied by witness fees is without merit. A party producing documents in response to a subpoena can recover "reasonable costs" incurred, which includes ten cents per page for standard reproduction of documents and reasonable clerical costs incurred at a maximum rate of $24 per hour per person. (Evid. Code, §1563, subd. (b)(1).) Here, there is no indication that Chahal has produced any documents or provided an invoice for the same. Moreover, the proof of service shows the process server paid $15 in witness fees when serving the Subpoena. (Thomas Decl., Ex. 11.) Plaintiff effectively concedes the objection based on witness fees lack merit by failing to address it in his opposition.

Wettstein further asserts that Chahal is required to produce an affidavit along with its responses. The court agrees because as the face of the Subpoena states, "The records shall be accompanied by an affidavit of the custodian or other qualified witness pursuant to Evidence Code section 1561."[10] (Harvey Decl., Ex. A.)

The court is not persuaded by Plaintiff's arguments in opposition, which are essentially the same arguments he sets forth in support of his motion to quash and motion for protective order, addressed previously. Thus, the court finds there is good cause to grant the motion to compel.

D. <u>Sanctions</u>

Plaintiff's request for sanctions is DENIED.

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[10] **Evidence Code, Section 1561:** (a) The records shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following:

(1) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records.

(2) The copy is a true copy of all the records described in the subpoena duces tecum or search warrant, or pursuant to subdivision (e) of Section 1560, the records were delivered to the attorney, the attorney's representative, or deposition officer for copying at the custodian's or witness' place of business, as the case may be.

(3) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event.

(4) The identity of the records.

(5) A description of the mode of preparation of the records.

(b) If the business has none of the records described, or only part thereof, the custodian or other qualified witness shall so state in the affidavit, and deliver the affidavit and those records that are available in one of the manners provided in Section 1560.

(c) If the records described in the subpoena were delivered to the attorney or his or her representative or deposition officer for copying at the custodian's or witness' place of business, in addition to the affidavit required by subdivision (a), the records shall be accompanied by an affidavit by the attorney or his or her representative or deposition officer stating that the copy is a true copy of all the records delivered to the attorney or his or her representative or deposition officer for copying.

E. Conclusion—Motion to Compel

Wettstein's motion to compel Chahal's compliance with the Subpoena is GRANTED. Within 20 days of the entry of this order, Chahal shall serve responses that in are in compliance with the Code of Civil Procedure and in accordance with the protective order described herein. The responses shall be accompanied by an affidavit in compliance with Evidence Code section 1561.

V. Conclusion

Plaintiff Alex Lowry's motion to quash defendant Natorae Wettstein's Deposition Subpoena for the Production of Business Records to Chahal & Associates is DENIED.

Plaintiff Alex Lowry's request for a protective order is GRANTED IN PART. Any materials produced by non-party Chahal & Associates in response to Deposition Subpoena for Production of Business Records, shall be produced only to counsel for defendant Natorae Wettstein or counsel's representative, and once produced, shall be used only for purposes of this litigation. All responses shall be limited to the timeframe from 2016 through 2021, and all dates of birth and the first five numbers of individual's social security numbers shall be redacted. In all other respects, Plaintiff's motion for a protective order is DENIED.

Defendant Natorae Wettstein's motion to compel compliance by non-party Chahal & Associates with the deposition subpoena for production of business records is GRANTED. Within 20 days of the entry of this order, Chahal & Associates shall produce responses in compliance with the Code of Civil Procedure and in accordance with the protective order described herein. The responses shall be accompanied by an affidavit in compliance with Evidence Code section 1561.

The requests for sanctions are DENIED in their entirety.

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Calendar Line 6

Case Name: *Carol Feterle v. Lan Nguyen, et. al.*
Case No.: 21CV375659

I. Introduction

This personal injury case arises out of injuries allegedly related to the bleaching and coloring of Plaintiff's hair by Defendant. Plaintiff alleges both physical and emotional injuries, and has disclosed that the incident has led to a diagnosis of post-traumatic stress disorder (PTSD).

The parties agreed to a mental examination by a defense retained expert, Dr. John Greene, but they disagree about the scope of that examination. Plaintiff objects to performing the personality index testing that Dr. Greene wishes to conduct as part of the examination. The tests include the MMPI-3, the MCMI-IV and the Rotter Incomplete Sentences Blank ("Personality Index Testing"). The parties were unable to come to agreement through the meet and confer process, and this motion to compel was filed by Plaintiff as a result.

II. Legal Analysis

There is no dispute that Plaintiff has put her mental distress "at issue" in this action by seeking damages for ongoing mental stress. Plaintiff's claim is that there is not good cause for the Personality Index Testing because this is a "trauma induced stress response" and is not related to a cognitive or neurological condition. Plaintiff indicates they intend to call Plaintiff's psychotherapist, Sarita Ledet, MFT, who has diagnosed Plaintiff with PTSD and was deposed about the method she used in making that diagnosis.

Plaintiff takes the position that Defendant has not met their burden of showing how the Personality Index Testing is "directly related" to Plaintiff's PTSD. The court disagrees. Defendant has provided a declaration from Dr. Greene, in which he states that using these tests is "the most accurate and generally accepted procedure to arrive at reliable and valid inferences regarding diagnosis, functional impairment and subjective distress." (Declaration of Dr. Greene, page 2, lines 22-24.) Notably, Plaintiff does not include in their opposition any declaration from Ms. Ledet, or any mental health professional, indicating that the requested testing is not necessary or appropriate in making an evaluation of Plaintiff's mental health claims.

For the foregoing reasons, Defendant's request to compel the examination, including the Personality Index Testing, is GRANTED.

Plaintiff requests to audio record the entirety of the examination, as allowed under CCP 2032.530. That section specifically allows either the examiner or the examinee to record the mental examination. Counsel is ordered to meet and confer concerning a protective

order for the recording. Should a protective order be agreed upon, and if Plaintiff chooses to do so, the request to record the examination is GRANTED.

Plaintiff also requests the raw data from the examination. Recognizing that there are copyright concerns about the data, Plaintiff indicates a willingness to enter into a protective order. Counsel is ordered to meet and confer concerning a protective order for the raw data. Once the protective order is executed, the request for the raw data from the interview is GRANTED.

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