**SUPERIOR COURT, STATE OF CALIFORNIA**
**COUNTY OF SANTA CLARA**

**Department 10**
**Honorable Frederick S. Chung**

Farris Bryant, Courtroom Clerk (covering for Rachel Tien)
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

**DATE: April 9, 2024 TIME: 9:00 A.M.**

**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 courthouse is open:** Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

**Scheduling motion hearings**: Please call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion *before* you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

**CourtCall is no longer available**: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

**Recording is prohibited**: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

**Court reporters**: Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See https://www.scscourt.org/general_info/court_reporters.shtml.

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| LINE # | CASE # | CASE TITLE | RULING |
|---|---|---|---|
| LINE 1 | 2005-1-CV-048590 | National Credit Acceptance, Inc. v. Dennis Amundson | Order of examination: parties to appear. |
| LINE 2 | 23CV418782 | Chandrakant Singla v. Flawless Photonics, Inc. et al. | Click on LINE 2 or scroll down for ruling. |
| LINE 3 | 23CV421639 | William Perera v. Financial Industry Regulatory Authority, Inc. | Click on LINE 3 or scroll down for ruling in lines 3-5. |
| LINE 4 | 23CV421639 | William Perera v. Financial Industry Regulatory Authority, Inc. | Click on LINE 3 or scroll down for ruling in lines 3-5. |
| LINE 5 | 23CV421639 | William Perera v. Financial Industry Regulatory Authority, Inc. | Click on LINE 3 or scroll down for ruling in lines 3-5. |
| LINE 6 | 23CV418284 | Wells Fargo Bank, N.A. v. Lydia T. Nguyen | Motion for summary judgment: notice is proper, and the motion is unopposed. The court finds that plaintiff has met its initial burden of showing that there is no triable issue of material fact regarding the amounts owed on the credit card issued to defendant, and that there is no defense to the causes of action. (Code Civ. Proc., § 437c, subd. (p).) The motion is GRANTED. Moving party to prepare order. |
| LINE 7 | 19CV341058 | Michael Jadali et al. v. Cigna Health and Life Insurance Company et al. | Click on LINE 7 or scroll down for ruling in lines 7-9. |
| LINE 8 | 19CV341058 | Michael Jadali et al. v. Cigna Health and Life Insurance Company et al. | Click on LINE 7 or scroll down for ruling in lines 7-9. |
| LINE 9 | 19CV341058 | Michael Jadali et al. v. Cigna Health and Life Insurance Company et al. | Click on LINE 7 or scroll down for ruling in lines 7-9. |

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| | | | |
|---|---|---|---|
| LINE 10 | 23CV413608 | Gabriel Garcia et al. v. Steve Schlegel | Motion to compel discovery responses from plaintiff Gabriel Garcia: notice is proper, and the motion is unopposed. The court finds good cause to GRANT the motion, given the failure to provide responses to the requests. The court also GRANTS IN PART the request for monetary sanctions, in light of the extreme simplicity of the motions against each plaintiff. The court orders the plaintiffs, *collectively*, to pay $709.94 (2 hours at $354.97/hour) within 30 days of notice of entry of this order. |
| LINE 11 | 23CV413608 | Gabriel Garcia et al. v. Steve Schlegel | Motion to compel discovery responses from plaintiff Maribel Garcia: notice is proper, and the motion is unopposed. The court finds good cause to GRANT the motion, given the failure to provide responses to the requests. The court also GRANTS IN PART the request for monetary sanctions, in light of the extreme simplicity of the motions against each plaintiff. The court orders the plaintiffs, *collectively*, to pay $709.94 (two hours at $354.97/hour) within 30 days of notice of entry of this order. |
| LINE 12 | 22CV406751 | Enrique Flores Maravilla v. Steven Justo Supetran et al. | Motion to set aside dismissal: notice is not proper, as the motion was filed without a hearing date, and there is no amended notice of hearing on file. Parties to appear to address the apparent notice defect. |

**SUPERIOR COURT, STATE OF CALIFORNIA**
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**DATE: April 9, 2024 TIME: 9:00 A.M.**

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| | | | |
|---|---|---|---|
| LINE 13 | 23CV423336 | Online Brands LLC v. SJS Group LLC | Motion to set aside entry of default: the court exercises its discretion to GRANT the motion under Code of Civil Procedure section 473, subdivision (b), finding that the default was the product of defendant's "mistake, inadvertence, surprise, or neglect." Plaintiff's opposition fails to address discretionary relief under section 473(b), addressing only mandatory relief under section 473(b), as well as relief under section 473.5. California courts have a clear policy favoring the disposition of cases on the merits (see *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806), to which the plaintiff's opposition pays lip service and then fully ignores. |

**- oo0oo -**

**Calendar Line 2**
**Case Name:** *Chandrakant Singla v. Flawless Photonics, Inc. et al.*
**Case No.:** 23CV418782

## I. BACKGROUND

This action arises from an employment dispute between plaintiff Chandrakant Singla and defendant Flawless Photonics, Inc. ("Flawless"), Singla's former employer, as well as defendants Robert Loughan (the Chair of Flawless's Board) and Flawless Photonics S.A.R.L. (a Luxembourg subsidiary of Flawless) ("Flawless S.A.R.L.").

Singla filed the original and still-operative complaint on July 5, 2023. It states four causes of action: (1) Nonpayment of Wages (against Flawless); (2) Breach of Contract (against Flawless and Flawless S.A.R.L.); (3) Violation of Business and Professions Code Section 17200 *et seq*. (against Flawless); and (4) Defamation (against Flawless and Loughan). There are no exhibits attached to the complaint.

Flawless filed an answer to the complaint on October 30, 2023. Currently before the court is a special motion to strike the complaint's fourth cause of action for defamation under Code of Civil Procedure section 425.16, also known as an "anti-SLAPP" motion.

## II. SPECIAL MOTION TO STRIKE

### A. General Standards

Courts evaluate special motions strike using a two-step analysis. (*Country Side Villas Homeowners Assn. v. Ivie* (2011) 193 Cal.App.4th 1110, 1116.) The initial burden rests with the moving party to demonstrate that the challenged pleading arises from protected activity: *i.e.*, an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue." (Code Civ. Proc., § 425.16, subds. (b)(1) & (e); *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) "A defendant meets his or her burden on the first step of the anti-SLAPP analysis by demonstrating the acts underlying the plaintiff's cause of action fall within one of the four categories spelled out in . . . section 425.16, subdivision (e)." (*Collier v. Harris* (2015) 240 Cal.App.4th 41, 50-51 (*Collier*).) These four categories are: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e).)

As the California Supreme Court has stressed, "the critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78; see also *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 670 (*Peregrine Funding*).) "In deciding whether the 'arising from' requirement is met, a

court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*Peregrine Funding, supra*, 133 Cal.App.4th at p. 670.) "[H]owever, it is not enough to establish that the action was filed in response to or in retaliation for a party's exercise of the right to petition. [Citations.] Rather, the claim must be based on the protected petitioning activity." (*Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 804 [citing *Navellier v. Sletten* (2003) 29 Cal.4th 82, 89].) "[I]f the defendant does not demonstrate this initial prong, the court should deny the anti-SLAPP motion and need not address the second step." (*Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265, 271 (*Baharian-Mehr*).)

"[A] claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060 (*Park*) [emphasis in original].) "A claim arises from protected activity when that activity underlies or forms the basis for the claim. Critically, 'the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech.' '[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the Anti-SLAPP statute.' . . . In short, in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by defendants supply those elements and consequently form the basis for liability." (*Id.* at 1062-1063 [internal citations omitted].) "The anti-SLAPP statute does not apply simply because an employer protests that its personnel decisions followed, or were communicated through, speech or petitioning activity. A claim may be struck under the anti-SLAPP statute 'only if the speech or petitioning activity itself is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted.'" (*Wilson v. Cable News Network, Inc*. (2019) 7 Cal.5th 871, 890, quoting *Park, supra*, at 1060.)

**B. The Complaint's Fourth Cause of Action**

The fourth cause of action for defamation alleges that "Mr. Loughan—in a letter on February 28, 2023, and an email on April 4, 2023—told Flawless Photonics' shareholders that Plaintiff ran at least three other companies while working for Flawless Photonics, that he failed to respond to various people, and that he failed to bring in additional money to the company. The people to whom these statements were made reasonably understood that these statements were about Plaintiff." (Complaint, ¶¶ 33-34.) Plaintiff Singla alleges that Flawless is vicariously liable for Loughan's statements. (Complaint, ¶ 37.)

The complaint alleges more specifically in its introductory paragraphs:

> . . . In a letter to Flawless Photonics' shareholders on February 28, Mr. Loughan advocated for Mr. Singla's immediate removal from the board and termination as CEO. Mr. Loughan's letter to shareholders contained several untrue and damaging statements about Mr. Singla. The letter claimed, for example, that Mr. Singla neglected his work because he was purportedly running three other companies, which was untrue . . . . The letter also included untrue and defamatory statements that Mr. Singla purportedly refused to provide financial information, failed to follow up with potential investors, refused to provide a corporate slide

> deck, and failed to bring in additional funding to the company, leaving it in dire financial straits, all of which was untrue . . . .
>
> * * *
>
> Mr. Loughan also claimed that Mr. Singla had failed to respond to several government letters, which was untrue . . . .
>
> * * *
>
> On April 5, 2023, Mr. Loughan sent another email to Flawless Photonics' shareholders with more untrue and damaging statements about Mr. Singla, including repeating the falsehood that Mr. Singla purportedly failed to bring additional funding to the company . . . .
>
> * * *
>
> Mr. Loughan never asked Mr. Singla about these accusations and had no reasonable grounds for believing them true. Moreover, he made them with malice in order to harm Mr. Singla's reputation, allowing him to take over Flawless Photonics at [a] time when the company he managed was failing and he was going through an expensive divorce, and in order to eliminate a perceived threat to his equity holdings. As a result of Mr. Loughan's untrue and defamatory statements, a majority of Flawless Photonics' shareholders voted to remove Mr. Singla from the board and terminated his position as President and CEO . . . .

(Complaint, ¶¶ 12-15.)

**C. Analysis**

Flawless contends that the fourth cause of action should be stricken because it "arises from a 'written or oral statement or writing made in connection with an issue under consideration or review by . . . [an] official proceeding authorized by law.' Civ. Proc. Code § 425.16(e)(2), and that such statement or statements is or are true." (Notice of Motion and Motion at p. 2:7-10.) More specifically, Flawless contends that the February 28, 2023 letter and April 4, 2023 email at issue were part of a request for action by written consent of the shareholders of Flawless, authorized by Delaware General Corporations Law section 228, and that they therefore constitute statements made "in connection with an issue" being considered by an "official proceeding authorized by law." This is the heart of Flawless's argument under the first prong of the anti-SLAPP analysis, and the court finds it to be singularly unpersuasive. The fact that a communication is "authorized" by Delaware law does not mean it is made in connection with an "official proceeding" for purposes of Code of Civil Procedure section 425.16, subdivision (e)(2). Flawless does not cite any authority for the proposition that a request for action by written consent under General Corporations Law section 228 constitutes an official proceeding for purposes of section 425.16.[1] Instead, Flawless argues that because Singla *could* have challenged his removal through a separate legal action in Delaware under

[1] This statute generally states that any action required to be taken at a meeting of stockholders of a corporation may instead be taken through a written request for approval by the stockholders.

General Corporations Law section 225, Flawless's actions should be considered as having been made as part of an "official proceeding," analogous to the circumstances that were found to satisfy the first prong of the anti-SLAPP analysis in *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192 (*Kibler*). (See Memorandum at pp. 1:3-14 and pp. 12:16-13:21.) This argument is based on a plain misreading of *Kibler*.

The question presented in *Kibler* was whether a hospital's peer review disciplinary proceedings were "'official proceeding[s]'" under section 425.16(e)(2). (*Kibler*, *supra*, 39 Cal.4th at p. 197.) In that case, the plaintiff was a doctor who sued his hospital for defamation for statements that were made during his peer review disciplinary proceedings. (*Id*. at pp. 196–197.) In finding that the disciplinary proceedings were "official proceedings," the court relied on three considerations. First, peer review proceedings were required of hospitals and were heavily regulated. (*Id*. at pp. 199–200.) Second, because hospitals were required to report the results of peer review proceedings to the Medical Board of California, those proceedings played a "significant role" in "'aid[ing] the appropriate state licensing boards in their responsibility to regulate and discipline errant healing arts practitioners.'" (*Id*. at p. 200.) Third, "[a] hospital's decisions resulting from peer review proceedings are subject to judicial review by administrative mandate. [Citation.] Thus, the Legislature has accorded a hospital's peer review decisions a status comparable to that of quasi-judicial public agencies whose decisions likewise are reviewable by administrative mandate." (*Ibid*., citing Bus. & Prof. Code, § 809.8; see also *Talega Maintenance Corp. v. Standard Pacific Corp.* (2014) 225 Cal.App.4th 722, 730-732 (*Talega*) [discussing *Kibler* and holding that homeowner's association board meetings are *not* "official proceedings"].) Flawless's termination of Singla after a request for written action of shareholders does not present anything like these considerations and is not even remotely analogous to the situation in *Kibler*. There is nothing "quasi-judicial" about a corporation's request for action by written consent of its shareholders. Indeed, the request for action at issue here is much more analogous to the circumstances of the HOA board meetings in *Talega*, which were also *not* quasi-judicial.

Other decisions in this area further support the conclusion that Flawless's communications with shareholders discussing Singla were not related to an "official proceeding." In *Fontani v. Wells Fargo Investments, LLC* (2005) 129 Cal.App.4th 719 (*Fontani*) [disapproved on other grounds in *Kibler*, *supra*, 39 Cal.4th at p. 203, fn. 5], the Court of Appeal held that the employer's allegedly defamatory statements that were contained on an official form it was required to send to the National Association of Securities Dealers ("NASD") was protected activity. This was because the NASD was an official body exercising governmental power that had been delegated to it. (*Fontani*, supra, 129 Cal.App.4th at 729-730.) By contrast, the present circumstances do not involve any official body exercising delegated governmental authority.

The case of *Donovan v. Dan Murphy Foundation* (2012) 204 Cal.App.4th 1500 (*Donovan*), cited but not discussed by Flawless, presents perhaps the closest analogue to the termination of Singla, and it, too, undercuts Flawless's "official proceeding" argument. In *Donovan*, a member of the board of directors of a nonprofit charitable organization sued the organization for wrongful removal. The organization brought an anti-SLAPP motion, arguing that the board meeting at which the plaintiff was removed was an "official proceeding," because "board of directors meetings and majority voting are authorized under the Corporations Code, and the issue whether to retain [the plaintiff] was an issue of consideration before the [board of directors]." (*Donovan*, *supra*, at p. 1508.) The Court of Appeal rejected

that argument, distinguishing *Kibler* on the ground that corporate board decisions are not subject to review by administrative mandate. In addition, the Court noted that while meetings of the board of directors were authorized by statute, "the actual procedures are left to the private organizations." (*Id*. at p. 1508; see also *Century 21 Chamberlain & Associates v. Haberman* (2009) 173 Cal.App.4th 1, 9 (*Century 21*) [private arbitrations are not "official proceedings" because they are "not part of a comprehensive statutory licensing scheme," "not reviewable by administrative mandate," and "not required by statute"]; *Olaes v. Nationwide Mutual Ins. Co*. (2006) 135 Cal.App.4th 1501, 1508 [private company's sexual harassment grievance protocol not an official proceeding].)

The termination of Singla by Flawless is more analogous to the facts of *Donovan*, *Century 21*, and *Talega* than to the facts of *Kibler*. The key consideration in all of these cases, including *Kibler*, is whether the actions of the defendants were subject to review by administrative mandate, not simply capable of being challenged in a lawsuit: "[A]dministrative mandate pursuant to Code of Civil Procedure section 1094.5 is available only if the decision resulted from a proceeding in which by law: 1) a hearing is required to be given, 2) evidence is required to be taken, and 3) discretion in the determination of facts is vested in the agency. The legal right to an evidentiary hearing may be granted by statute, regulation or rule, or by due process if a liberty or property interest is implicated." (*Excelsior College v. Board of Registered Nursing* (2006) 136 Cal.App.4th 1218, 1237–1238.) There was no hearing before Singla's termination, much less one in which evidence was required to be taken.

Because Flawless has failed to show that the activity at issue—the February 28, 2023 letter and April 4, 2023 email to shareholders sent by Loughan—were statements made in connection with an "other official proceeding authorized by law" under Code of Civil Procedure section 425.16, subdivision (e)(2), it has failed to meet its initial burden of demonstrating that Singla's fourth cause of action for defamation arises from protected activity. The court DENIES Flawless's special motion to strike.

The court declines to address the second step of the anti-SLAPP analysis. (See *Baharian-Mehr, supra*, 189 Cal App.4th at 271.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 [emphasis in original].)

**D. Attorney's Fees**

The "prevailing defendant" on a special motion to strike "shall be entitled" to recover his or her attorney's fees and costs related to the motion. (Code Civ. Proc., § 425.16(c)(1).) The purpose of this fee-shifting provision is both to discourage meritless lawsuits and to provide financial relief to the SLAPP lawsuit victim. "[A]ny SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131.) As Flawless's motion has been denied, its request for attorneys' fees is also DENIED.

A prevailing plaintiff may only recover attorney's fees and costs if the court makes a finding that a denied special motion to strike "is frivolous or is solely intended to cause unnecessary delay." (Code Civ. Proc., § 425.16(c)(1).) The court does not find that Flawless's motion was "frivolous" or "solely" intended to cause delay, and therefore DENIES Singla's

request for attorneys' fees. (See Opposition, pp. 13:27-15:16 & Declaration of Sean McHenry.)

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**Calendar Lines 3-5**
**Case Name:** *William Perera v. Financial Industry Regulatory Authority, Inc.*
**Case No.:** 23CV421639

## I. BACKGROUND

This is an action for declaratory relief brought by plaintiff William Perera against defendant Financial Industry Regulatory Authority, Inc. ("FINRA"). The original and still-operative complaint, filed on August 25, 2023, alleges that FINRA is administering an arbitration between Perera and his employer in a manner that conflicts with the California Supreme Court's decision in *Armendariz v. Foundation Health Psychcare Services* (2000) 24 Cal.4th 83 (*Armendariz*). Perera alleges that FINRA has not complied with the holding in *Armendariz* that an employment arbitration must involve a neutral arbitrator and must not require the employee to pay any type of expense that he or she would not have to pay if the dispute had been brought in court rather than in arbitration. Perera alleges that FINRA has charged him thousands of dollars in fees not permitted under *Armendariz*.

The complaint's sole cause of action for declaratory relief seeks, among other things, a declaration that "*Armendariz* and Cal. Code Civ. Proc. § 1284.3 are applicable to the underlying arbitration matter, that pursuant thereto I am entitled to a full waiver of fees, that I am entitled to all of my rights as afforded by *Armendariz* and Cal. Code Civ. Proc. § 1284.3, and that neither FINRA nor FINRA's arbitrators have discretion over whether or not to honor my rights as afforded by *Armendariz* and Cal. Code Civ. Proc. § 1284.3." (Complaint, ¶ 65.)

Perera is self-represented, which is sometimes referred to as appearing "in propria persona." "[W]hen a litigant is appearing in propria persona, he is entitled to the same, but no greater, consideration than other litigants and attorneys. Further, the in propria persona litigant is held to the same restrictive rules of procedure as an attorney." (*Burnete v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1267 [internal citations omitted]; see also *Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543 [self-represented litigants "are held to the same standards as attorneys" and must comply with the rules of civil procedure].)

Currently before the court are three law-and-motion matters: (1) FINRA's motion to strike Perera's request for entry of default; (2) FINRA's demurrer to the complaint; and (3) Perera's motion to strike FINRA's demurrer. The court first addresses the motions to strike.

## II. MOTION TO STRIKE THE REQUEST FOR ENTRY OF DEFAULT

### A. General Standards

Pursuant to Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any 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. The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice.[2] (Code Civ. Proc., § 437, subd. (a); see

[2] The request for judicial notice in footnote 1 of FINRA's motion is improper and has not been considered. (See Cal. Rules of Court, rule 3.1113(*l*).)

also *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913.) In ruling on a motion to strike, the court reads the challenged pleading as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc*. (2010) 191 Cal.App.4th 53, 63, [citing *Clauson v. Super. Ct*. (1998) 67 Cal.App.4th 1253, 1255].)

The court cannot consider extrinsic evidence in ruling on a demurrer or motion to strike. Extrinsic evidence includes declarations. The court has only considered the declaration from counsel Lori Werderitch to the extent that it discusses the parties' meet-and-confer efforts, as required by statute. The court has not considered the contents of any exhibits attached to this declaration.

The court has not considered the unauthorized opposing declaration from Perera (which constitutes the bulk of his opposition) or any attached exhibits. As noted above, self-represented parties are held to the same standards as attorneys. While Code of Civil Procedure section 435.5 (applicable to motions to strike) and section 430.41 (applicable to demurrers) require the moving party to submit a declaration for the narrow purpose of discussing compliance with their meet-and-confer requirements, neither statute provides any authorization for the submission of declarations from an opposing party. Declarations are extrinsic evidence that cannot be considered by the court.

**B. Analysis**

As an initial matter, the court notes that FINRA has apparently failed to comply with Code of Civil Procedure section 435.5, because the Werderitch declaration makes no mention of any meet-and-confer efforts in connection with the motion to strike the request for entry of default. Nevertheless, because section 435.5, subdivision (a)(4), expressly states that insufficient meet-and-confer efforts "shall not be grounds to grant or deny the motion to strike," the court will consider the motion on the merits.

The court DENIES FINRA's motion to strike, which has purportedly been brought under Code of Civil Procedure sections 436 and "430.31(a)(2)." (See Notice of Motion at p.1:27-28.)[3]

Under Code of Civil Procedure section 435, subdivision (b)(1), a party "within the time to respond to a pleading, may serve and file a notice of motion to strike the whole or any part thereof." Under section 435, subdivision (a): "As used in this section: (1) The term 'complaint' includes a cross-complaint. (2) The term 'pleading' means a demurrer, answer, complaint or cross-complaint." Section 436 then states: "The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms that it deems proper: (a) Strike out any irrelevant, false, or improper matter inserted in any pleading. (b) Strike out all or any 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."

[3] There is no section 430.31. Assuming that FINRA meant to refer to section 430.41, subdivision (a)(2), that provision provides no support for a motion to strike.

A request for entry of default is not a "demurrer, answer, complaint, or cross-complaint" and is therefore not a "pleading" under the foregoing code sections. A party cannot bring a motion to strike a non-pleading under sections 435 and 436. Even a cursory glance at these code provisions should have revealed to FINRA the impropriety of this motion.

The court notes that on April 2, 2024, FINRA apparently filed a last-minute notice of withdrawal of the motion to strike, asserting that the motion is now "moot." This is incorrect. The motion was not properly brought in the first place, and so it cannot be "mooted." The court therefore provides a ruling on the motion.

## III. MOTION TO STRIKE THE DEMURRER

Perera's motion to strike the demurrer is brought pursuant to Code of Civil Procedure section 435 on the ground that the demurrer was not filed in conformity with law. (See Notice of Motion at p. 1:24-26.) The court DENIES Perera's motion, as follows.

As an initial matter, this motion was filed on March 18, 2024 without sufficient notice. Motions to strike must comply with Code of Civil Procedure section 1005, subdivision (b), and rule 3.1300(a) of the California Rules of Court, which require all moving and supporting papers to be served at least 16 court days prior to the hearing, plus additional calendar days depending on the method of service. Perera filed his motion only 15 court days before the April 9, 2024 hearing date, despite his having been in possession of FINRA's demurrer for more than four months by that point. Apparently, the clerk's office allowed his motion to be calendared for the same date as the demurrer itself, but this was incorrect. The motion should be denied for this reason alone.

In addition, the court denies the motion on the merits. The only substantive argument that Perera advances in support of the motion is that the FINRA's demurrer was allegedly untimely. This argument, in turn, depends entirely upon Perera's claim that the September 27, 2023 declaration from FINRA counsel Lori Werderitch "was perjured and was made to cause unnecessary delay." (Memorandum, p. 3:23-24.) Contrary to the assumptions underlying this argument, a motion to strike or a demurrer cannot be used to inquire into or verify the truthfulness of a previously filed declaration. As already explained above, the court cannot consider extrinsic evidence in ruling on a demurrer or motion to strike. For purposes of the present demurrer and motion to strike the demurrer, the September 27, 2023 Werderitch declaration must be accepted as true. On its face, it was sufficient to give FINRA a 30-day extension to respond to the complaint under Code of Civil Procedure section 430.41, subdivision (a)(2). This means that FINRA's demurrer, filed on October 27, 2023, is deemed timely and must be considered by the court.

To the extent that Perera contends that there was an insufficient meet-and-confer effort by FINRA regarding its demurrer, that is also not a basis for granting his motion to strike. As already noted above, the California Legislature has expressly provided (in section 435.5 subdivision (a)(4) (applicable to motions to strike) and in section 430.41 subdivision (a)(4) (applicable to demurrers)) that a determination by the court that the meet-and-confer process was insufficient "shall not" be a basis for granting or denying a motion to strike or sustaining or overruling a demurrer.

## IV. FINRA'S DEMURRER TO THE COMPLAINT

### A. General Standards

The court, in ruling on a demurrer, treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, [citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318]; see also *Valero v. Spread Your Wings, LLC* (2023) 88 Cal.App.5th 243, 253.) "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.) Facts appearing in exhibits attached to the complaint (which are considered part of the "face of the pleading") are given precedence over inconsistent allegations in the complaint. (See *Barnett v. Fireman's Fund Ins. Co*. (2001) 90 Cal.App.4th 500, 505 ["[T]o the extent the factual allegations conflict with the content of the exhibits to the complaint, we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits."].)

"[A] general demurrer may not be sustained, nor a motion for judgment on the pleadings granted, as to a portion of a cause of action." (*Daniels v. Select Portfolio Servicing, Inc*. (2016) 246 Cal.App.4th 1150, 1167 [overruled in part on other grounds in *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905]; see also *Fire Ins. Exchange v. Superior Court* (2004) 116 Cal.App.4th 446, 452; *Kong v. City of Hawaiian Gardens Redevelop. Agency* (2003) 108 Cal App 4th 1028, 1046; *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682 ["A demurrer does not lie to a portion of a cause of action."].)

As already noted multiple times above, the court *cannot* consider extrinsic evidence in ruling on a demurrer. The court has therefore only considered the Werderitch declaration to the extent that it addresses meet-and-confer efforts. The court has not considered the contents of any attached exhibits. Similarly, the court has not considered any portion of the declaration included in the body of Perera's opposition to the demurrer, or any of its attached exhibits.[4] Finally, the court has not considered any portion of Perera's unauthorized "supplemental" declaration, which was filed on March 25, 2024 without prior leave of court.

The court notes that Perera's apparent practice of making legal arguments in the form of a sworn declaration is improper. (See *In re Marriage of Heggie* (2002) 99 Cal.App.4th 28, 30 ["The proper place for argument is in points and authorities, not declarations."].) The inclusion of argument in declarations "is a sloppy practice which should stop." (*Ibid*.) "Even at its most benign, it is a practice that forces the trial and appellate courts, and opposing counsel, to sort out the facts that are actually supported by oath from material that is nothing more than the statement of an opinion ostensibly under oath. More fundamentally, however, it makes a mockery of the requirement that declarations be supported by statements made under penalty of perjury." (*Id*.) The court advises Perera to avoid this practice in the future.

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[4] Requests for judicial notice made in the body of Perera's opposition have also not been considered. Again, this violates rule 3.1113 (*l*) of the California Rules of Court.

**B. Analysis**

As noted above, the complaint states a single cause of action for declaratory relief, which is a statutory cause of action created by Code of Civil Procedure section 1060. That section states, in pertinent part:

> Any person . . . who desires a declaration of his or her rights or duties with respect to another . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties . . . including a determination of any question of construction or validity arising under the instrument or contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding determination of these rights or duties, whether or not further relief is or could be claimed at the time . . . . The declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought.

(Code Civ. Proc., § 1060.)

To qualify for declaratory relief under section 1060, a plaintiff's action must present two essential elements: (1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to the rights or obligations of a party. (*Lee v. Silveira* (2016) 6 Cal.App.5th 527, 546.) "'The fundamental basis of declaratory relief is the existence of an actual, present controversy over a proper subject.'" (*Linda Vista Village San Diego Homeowners Assn., Inc. v. Tecolote Investors, LLC* (2015) 234 Cal.App.4th 166, 181 [internal citation omitted].) For a party to pursue an action for declaratory relief, the actual, present controversy must be pleaded specifically. Thus, a claim must provide specific facts, as opposed to conclusions of law, which show a controversy of concrete actuality. (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal App 4th 497, 513-514, [disapproved on another ground in *Yvanova v. New Century Mortg. Corp*. (2016) 62 Cal.4th 919, 934, 939, fn. 13].)

A general demurrer is usually not an appropriate method for testing the merits of a declaratory relief action because the plaintiff is entitled to a declaration of rights even if it is adverse to the plaintiff's interest. (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 752.) When a complaint sets forth facts showing the existence of an actual controversy between the parties relating to their respective legal rights and duties and requests that these rights and duties be adjudged, the plaintiff has stated a legally sufficient complaint for declaratory relief. It is an abuse of discretion for a judge to sustain a demurrer to such a complaint and to dismiss the action, even if the judge concludes that the plaintiff is not entitled to a favorable declaration. (*Id*. at p. 756; see also *Nede Mgmt. Inc. v. Aspen American Ins. Co.* (2021) 68 Cal.App.5th 1121, 1130-1132; *Childhelp, Inc. v. City of Los Angeles* (2023) 91 Cal.App.5th 224, 235-236 [discussing cases].)

FINRA contends that Perea's cause of action for declaratory relief fails to state sufficient facts in four ways. (See Demurrer at p. 3:5-21.)

FINRA's first argument, that the complaint is "not yet ripe" and fails to state an actual controversy because damages are not yet settled, is unpersuasive. Again, a demurrer does not lie to only a part of a cause of action. While it is certainly not a model of clarity, the complaint

alleges an actual, present controversy over whether Perera is being improperly assessed fees to participate in what is allegedly a mandatory arbitration, and as to whether FINRA has imposed procedures in arbitrations involving California residents that do not comply with the *Armendariz* decision.

In this respect, Perera's cause of action is distinguishable from those that were asserted in *Monterrey Coastkeeper v. California Regional Water Control Board, Central Coast Region* (2022) 76 Cal.App.5th 1, 13 (*Monterrey Coastkeeper*) and *Zolly v. City of Oakland* (2020) 47 Cal.App.5th 73, 90 (*Zolly*), the cases cited by FINRA. The reason the claim in *Monterrey Coastkeeper* was found inadequate was that "[d]eclaratory relief generally is not available to use the courts to tell an administrative agency how to do its job. An action for declaratory relief 'does not confer upon the court the authority to make pronouncements in a field reserved to other branches of government. [Citation.]'" (*Monterrey Coastkeeper, supra*, 76 Cal.App.5th at p. 18. FINRA is not comparable to an administrative agency or branch of government. The reason the claim in *Zolly* was found not to present an actual controversy was because it challenged a potential fee increase that had not yet occurred and might never occur. (See *Zolly, supra*, 47 Cal.App.5th at p. 91.) By contrast, Perera's arbitration has commenced, and he alleges that he has been assessed fees, even if they may have been deferred for the time being.

FINRA's second argument, that Perera's claim is barred by arbitral immunity, is also unpersuasive. Strictly speaking, this argument does not establish a failure to state facts sufficient to support a declaratory relief claim; rather, it asserts an affirmative defense to the claim. "'[A] demurrer based on an affirmative defense will be sustained only where the face of the complaint discloses that the action is necessarily barred by the defense.'" (*Stella v. Asset Management Consultants, Inc*. (2017) 8 Cal.App.5th 181, 191.) Moreover, Perera's declaratory relief claim alleges controversies involving fees and procedures that do not necessarily involve the "quasi-judicial" role of any arbitrator or arbitral panel in their "decisionmaking role." Arbitral immunity exists to protect arbitrators "from civil liability for conduct in their quasi-judicial capacity, including the exhibition of bias or prejudice in the rendering of their decisions." (*Morgan Phillips, Inc. v. JAMS/Endispute LLC* (2006) 140 Cal.App.4th 795, 800.) "The purpose of arbitral immunity is to encourage fair and independent decisionmaking by immunizing arbitrators from lawsuits arising from conduct in their decisionmaking role." (*Id*., citing *Thiele v. RML Realty Partners* (1993) 14 Call.App.4th 1526, 1531.) To the extent that arbitral immunity might even apply as an affirmative defense here, it does not necessarily address the entirety of the cause of action as a matter of law. As a result, adjudicating this potential defense *at the pleading stage* is singularly inappropriate.

FINRA's third argument—that it is not a party to the underlying arbitration and has not taken "enforcement action" against Perera—does not describe any failure to state sufficient facts under Code of Civil Procedure section 430.10. Whether FINRA itself is a party to the underlying arbitration has nothing to do with whether Perera may bring a claim against it under section 1060. The complaint alleges several actions by FINRA that have already taken place and that Perera asserts are improper. FINRA is trying to adjudicate the merits of isolated portions of the declaratory relief claim. Once again, this is not possible on a demurrer.

FINRA's fourth and final basis for the demurrer, that Perera fails "to establish he has any right to pursue a private right of action against FINRA," is also completely unpersuasive. Indeed, it appears to miss the entire point of Code of Civil Procedure section 1060. Section

1060 permits Perera to bring an action seeking "a declaration of his or her rights or duties with respect to another," provided that he adequately alleges an actual present controversy over a proper subject. The decision in *Weintraub v. Glen Rauch Securities, Inc.* (S.D.N.Y. 2005) 399 F.Supp.2d. 454, relied upon by FINRA, is inapposite. That case held that a plaintiff cannot state a cause of action against the National Association of Securities Dealers (NASD) based on a violation of NASD's own rules and guidelines (or the New York Stock Exchange's rules and guidelines), because those rules "confer no private right of action." (*Id.* at p. 462.) That holding has no application here, where Perera is not complaining about FINRA's violation of its own rules. To the extent that FINRA's memorandum of points and authorities attempts to articulate additional arguments that were not raised in the notice of demurrer and demurrer (such as arguing that Perera is not entitled to any injunctive relief), these arguments do not support sustaining the demurrer on the ground of failure to state sufficient facts.

Finally, the court declines to consider the additional argument, made for the first time in FINRA's reply, that the entire declaratory relief claim is now moot because the arbitration has ended and Perera's fees have supposedly now been waived.[5] Once again, this is *extrinsic evidence* that falls outside the scope of the pleadings. Moreover, it is unfair for the court to rely on this without giving Perera an adequate opportunity to respond. (See *Tellez v. Rich Voss Trucking Inc*. (2015) 240 Cal.App.4th 1052, 1066 [courts do not consider points raised for the first time in a reply brief]; see also *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [points raised for the first time in a reply brief will ordinarily be disregarded because the other party is deprived of the opportunity to counter the argument].) These arguments are for another time and a different procedural context.[6]

The demurrer is OVERRULED, and FINRA must answer the complaint within 10 days of notice of entry of this order.

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[5] The court has also not considered the request for judicial notice made in the body of the reply brief. (See Cal. Rules of Court, rules 3.1113(*l*) and 3.1306(c).)

[6] The court has not considered the evidentiary objections to Perera's supplemental declaration that were submitted with FINRA's reply. There is no authority for the submission of evidentiary objections in the context of demurrers and motions to strike. Moreover, the objections are unnecessary, as the court has already determined that the supplemental declaration of Perera is extrinsic evidence that cannot be considered by the court for any purpose.

**Calendar Lines 7-9**
**Case Name:** *Michael Jadali et al. v. Cigna Health and Life Insurance Company et al.*
**Case No.:** 19CV341058

## I. BACKGROUND

This case is more than five years old and is set to go to trial in 13 days. Defendants Cigna Health and Life Insurance Company and Cigna Healthcare of California, Inc. (collectively, "Cigna") have now filed three discovery-related motions: (1) a motion for terminating or evidentiary sanctions against plaintiffs Michael Jadali, Center for Pain & Rehabilitation Medicine, and Pacific Coast Medical Clinic (collectively, "Plaintiffs"), based on alleged spoliation of evidence, (2) a motion to compel compliance with Cigna's third set of requests for production of documents (Nos. 33, 35-37, and 39), and (3) a motion to seal certain exhibits submitted with the motion to compel compliance. Plaintiffs oppose the first two motions but do not oppose the third.

This case was originally set for trial more than 10 months ago, on May 30, 2023. Upon receipt of the parties' stipulation, the court continued that date to August 28, 2023, as Cigna's summary judgment motion, calendered for June 2023, needed to be heard first. On August 18, 2023, the court reluctantly continued the trial date again after multiple requests from the parties, based on Plaintiffs' claim that they were still suffering the adverse consequences of a ransomware attack that occurred in early November 2022. The court then set the current trial date of April 22, 2024.

## II. MOTION FOR SANCTIONS

The November 2022 ransomware attack is the basis for Cigna's motion for sanctions. Cigna argues that Plaintiffs committed to producing additional documents in October 2022, failed to do so after the November 1, 2022 ransomware attack, and then strung Cigna along for the better part of a year with promises that they were "fixing the issue," without producing anything more. (Memorandum, p. 2:13-16.) According to Cigna, Plaintiffs breached their duty to preserve these documents, which include: (1) "patient files"; (2) "proof of payments of deductibles, co-pays, and other non-covered items"; (3) the personnel file for "A.G.," a former employee of Plaintiffs who complained about Plaintiffs' billing practices; and (4) agreements with or relating to "MultiPlan," a third-party entity that was apparently involved in setting reimbursement rates. (*Id.* at p. 2:17-27 & p. 4:10-18.)

Plaintiffs respond that they should not be blamed for the ransomware attack on their systems, which was a "catastrophic" loss for them, as to which even their reasonable and good-faith efforts to preserve and back up their data were ineffective. They note that they had "firewalls" and "back up" systems in place, but "the hackers encrypted both the server and the backup." (Opposition at pp. 3:4-4:4.) Thus, they argue, there was no spoliation. In addition, Plaintiffs argue that they already produced "patient records covering the vast majority of claims in issue in the case," that the issue of payment of deductibles and co-pays does not impact the damages calculations in this case, and that they already produced their "Multiplan Agreement" in their original document production. (Opposition at pp. 6:16-7:9.)

The court ultimately concludes that Cigna has not made a sufficient showing to justify terminating or evidentiary sanctions. But because the record is not fully developed in these

papers, and because this is an issue as to which the judge who tries the case is far better equipped to make a final determination, the undersigned defers to the trial judge who is ultimately assigned to try this case on the question of whether a jury instruction such as CACI 204 ("Willful Suppression of Evidence"), or some other adverse inference, is appropriate.

First, the court sees no basis for a terminating sanction. Indeed, Cigna barely spends any time in its moving papers discussing such a drastic outcome. Cigna has not shown that the ransomware attack on Plaintiffs' systems was a deliberate effort by Plaintiffs to destroy relevant evidence in this case. At most, Cigna has suggested that Plaintiffs may have been negligent in preserving their data, but even there, Cigna's showing falls short and relies more on innuendo rather than hard facts. Even more critically, Cigna does not demonstrate that an issue sanction or evidentiary sanction would be insufficient to remedy any prejudice arising from the alleged loss of relevant evidence, which is a necessary predicate for the imposition of a terminating sanction.

Second, with respect to an evidentiary sanction, the court again notes that Cigna's showing of negligence is conjectural at best, and its showing of intentional misconduct is even weaker. Cigna makes no effort to prove that Plaintiffs' "firewalls" or "back up" systems somehow fell below an applicable standard of care in the industry. Cigna simply argues that Plaintiffs had a duty to preserve evidence, and they were unable to do so because of the ransomware attack. This is plainly not enough.

Third, the alleged prejudice to Cigna from the loss of relevant patient files is inadequately explained. Cigna contends that the unproduced patient files are relevant to Plaintiffs' "supplemental spreadsheet" of additional patient claims for which recovery is sought—in the amount of an "excess of $600,000." (Memorandum at p. 4:5-9.) But if Plaintiffs no longer have these patient files, then it appears that they are even more prejudiced by this loss than Cigna would be, given that it is Plaintiffs' burden to prove the amounts and propriety of these "supplemental" claims at trial. It may well be that the issue of supplemental patient claims is something as to which the absence of patient files *could* hamper Cigna's defenses at trial, but the exact manner in which it might do so is entirely unclear from the present record. That is precisely why this issue should be directed to the trial department that actually tries this case. If, for example, the "supplemental spreadsheet" comes up during the presentation of evidence in a way that makes it apparent that Plaintiffs are using the absence of supplemental patient files as both a sword and a shield, then the trial judge is in the best position to determine whether a remedy is appropriate, and if so, what that remedy should be.

The same goes for the evidence regarding payments of deductibles/co-pays, the personnel file of A.G., and agreements with or correspondence relating to MultiPlan. Cigna has failed to demonstrate any present, concrete prejudice on these points. For example, it remains to be seen whether Plaintiffs will make "unsubstantiated attack[s] on A.G.'s character" at trial that render her personnel file an important piece of missing evidence. (Reply at pp. 8:25-9:2.) If so, the trial judge can address that issue. Indeed, this point may be something that can be addressed in a motion in limine (*e.g.*, a motion to exclude evidence that can only be rebutted with A.G.'s personnel file) rather than via a jury instruction.

In sum, the court DENIES the motion for terminating or evidentiary sanctions, without prejudice. The present order is fully modifiable by the trial judge who is ultimately assigned to try this case.

## III. MOTION TO COMPEL COMPLIANCE

Cigna argues that Plaintiffs agreed to produce documents in response to Requests Nos. 33, 35-37, and 39, but that they have failed to do so. In addition, Cigna points out that the primary document produced by Plaintiffs in response to these requests—an "investigation log" from the Santa Clara County District Attorney's Office, Bates-stamped JADALI00013883-JADALI00014053—has been improperly redacted for reasons other than privilege. The court agrees.

First, Plaintiffs admit that the investigation log has been redacted for relevance rather than for privilege. Plaintiffs contend that the redacted materials are "highly sensitive materials obtained during [a] criminal investigation that was ultimately abandoned." (Opposition at p. 4:18-23.) This is not a proper basis for redaction. There is a protective order in this case, and in any event, Plaintiffs do not appear to contend—even though they imply it—that these redactions have been accomplished to protect any third-party privacy interests. Moreover, the court is not convinced by Plaintiffs' contention that the redacted portions have nothing to do with the case simply because they involve third-party payors rather than Cigna. As Cigna notes, "the other insurance companies may be witnesses with knowledge of discoverable matter related to the allegations of fraud perpetrated by Plaintiffs. The identity of such witnesses must be disclosed and may not be properly withheld through redactions." (Memorandum at p. 11:6-8.)

Second, the court rejects Plaintiffs' argument that this motion is untimely because it should have been brought as a motion to compel further responses under Code of Civil Procedure section 2031.310, rather than a motion to compel compliance under section 2031.320. A motion to compel further responses under section 2031.310 would have been called for if Plaintiffs' written responses to the requests for production had clearly indicated that this information would be withheld, but the court finds instead that Plaintiffs' written responses were ambiguous at best, and inscrutable at worst. They stated: "Plaintiff will produce nonprivileged documents in its possession, custody or control responsive to this Request to the extent they relate to an investigation of the Plaintiff that involved or implicated services provided to Cigna insureds and/or charges Plaintiffs submitted to Cigna for reimbursement." (E.g., Cigna's Separate Statement at p. 5:7-13 [Response to Request for Production No. 35].) There is nothing in this circumlocutory response to put Cigna on notice that Plaintiffs would be producing an investigation log *but also redacting significant portions* of that same log based on relevance. Accordingly, the court finds that a motion to compel compliance under section 2031.320 is the correct vehicle by which to obtain an unredacted version of this log, and this motion is not untimely.

As for any other documents that may be responsive to Requests Nos. 33, 35-37, and 39, the court is uncertain, based on the parties' briefing, whether there are any such documents that still have not been produced. Plaintiffs' opposition seems to suggest—though somewhat unclearly—that there are no other responsive documents in its possession, custody, or control.

The court GRANTS the motion to compel compliance. Given the impending trial date, and given that Plaintiffs have already produced a redacted version of the investigation log, the court orders Plaintiffs to produce an unredacted version of the log by no later than the close of business on **April 11, 2024**. As for Cigna's request for monetary sanctions, the court finds that Plaintiffs did not act with substantial justification in opposing this motion to compel and

therefore GRANTS Cigna's request IN PART. Rather than the $5,000 sum requested—which appears to be an estimate rather than an exact amount—the court orders Plaintiffs to pay Cigna **$3,680** (representing four hours of work at $920/hour) within 30 days of notice of entry of this order.

## IV. MOTION TO SEAL

Finally, Cigna moves to seal portions of Exhibits A, B, C, and D, attached to the Declaration of Melvin Wu and submitted in support of the motion to compel compliance. These portions contain confidential information belonging to third-party patients, including confidential health information protected by the Health Insurance Portability and Accountability Act of 1996. Having reviewed the moving papers, the court GRANTS the motion, finding: that there exists an overriding privacy interest of third-party patients in their medical records that overcomes the right of public access to the records; the overriding interest supports sealing the records; a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; the proposed sealing is narrowly tailored; and no less restrictive means exist to achieve the overriding interest. The court clerk is directed to maintain the unredacted version of the Declaration of Melvin Wu (filed December 8, 2023) under seal. Public access to the unredacted documents will remain restricted absent a further order from the court.

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