SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: October 10, 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 go to https://reservations.scscourt.org or 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	19CV340899	Lisamarie Chatham v. CSAA Insurance Services, Inc. et al.	Order of examination: parties to appear.
LINE 2	24CV431277	Briana Burrows et al. v. Pushpa Bisht et al.	Click on LINE 2 or scroll down for ruling.
LINE 3	24CV434451	Jane Doe v. Naeem Ul Islam Hashmi et al.	Click on LINE 3 or scroll down for ruling in lines 3-4.
LINE 4	24CV434451	Jane Doe v. Naeem Ul Islam Hashmi et al.	Click on LINE 3 or scroll down for ruling in lines 3-4.
LINE 5	21CV377892	Cheryl Rouse v. Stanford Health Care et al.	Click on LINE 5 or scroll down for ruling.
LINE 6	22CV409237	Dana Lyn Banks v. A Tool Shed, Inc. et al.	Click on LINE 6 or scroll down for ruling.
LINE 7	23CV421811	Robert Rome v. Cupertino Health-care & Wellness Center, LLC et al.	Parties to appear. Click on LINE 7 or scroll down for the court's tentative ruling in lines 7-10 and 16, which the court wishes to discuss with the parties.
LINE 8	23CV421811	Robert Rome v. Cupertino Health-care & Wellness Center, LLC et al.	Parties to appear. Click on LINE 7 or scroll down for the court's tentative ruling in lines 7-10 and 16, which the court wishes to discuss with the parties.
LINE 9	23CV421811	Robert Rome v. Cupertino Health-care & Wellness Center, LLC et al.	Parties to appear. Click on LINE 7 or scroll down for the court's tentative ruling in lines 7-10 and 16, which the court wishes to discuss with the parties.
LINE 10	23CV421811	Robert Rome v. Cupertino Health-care & Wellness Center, LLC et al.	Parties to appear. Click on LINE 7 or scroll down for the court's tentative ruling in lines 7-10 and 16, which the court wishes to discuss with the parties.

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LINE #	CASE #	CASE TITLE	RULING
LINE 11	24CV430233	Citibank N.A. v. Jesus Angel Diaz Salazar	Motion for RFAs to be deemed admitted: notice is proper, and the motion is unopposed. Good cause appearing, the court GRANTS the motion. Moving party shall prepare the proposed order.
LINE 12	22CV408336	JPMorgan Chase Bank, N.A. v. Andrew H. Ko	Motion to amend judgment: notice is proper, and the motion is unopposed. The basis for this motion is a "clerical mistake" that resulted in the amount of the proposed judgment being submitted as $9,727.43 instead of $9,727.93. The court finds good cause to GRANT the motion and amend the amount of judgment by 50 cents to the higher sum. Plaintiff shall submit an amended judgment for the court's signature.
LINE 13	23CV418836	Frank Vasquez v. Jose Montes et al.	Motion to be relieved as counsel: parties to appear.

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LINE #	CASE #	CASE TITLE	RULING
LINE 14	24CV440481	Salah Noureddine v. SVG Contractors, Inc.	Motion to file complaint under seal: the mere fact that the complaint alleges a breach of a "confidential" agreement does not mean that the entire agreement, and all references to it, must necessarily remain under seal. Here, the entire focus of the present lawsuit is on the terms of the "confidential" agreement and their alleged breach. Granting the motion would be tantamount to keeping the entire substance of this case concealed from public view. The court has reviewed the parties' agreement and finds that there is no overriding privacy interest in the terms of the agreement that overcomes the right of public access to the documents at issue. In addition, the court notes that the proposed sealing is not narrowly tailored at all—the entire contract has been redacted in plaintiff's filing, as well as substantial portions of the complaint referring to the terms of the agreement. Finally, the court finds that plaintiff's motion and conclusory declaration of counsel are woefully insufficient on their face. The motion is DENIED. (See Cal. Rules of Court, rule 2.550.)
LINE 15	21CV390649	Gerardo Ivan Delgado Hernandez v. Gemma Guzman et al.	Petition for approval of compromise of minor's claim. Parties to appear in accordance with CRC 7.952.
LINE 16	23CV421811	Robert Rome v. Cupertino Health-care & Wellness Center, LLC et al.	Parties to appear. Click on LINE 7 or scroll down for the court's tentative ruling in lines 7-10 and 16, which the court wishes to discuss with the parties.

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Calendar Line 2
Case Name: *Briana Burrows et al. v. Pushpa Bisht et al.*
Case No.: 24CV431277

Plaintiffs Briana Burrows and Jonathan Kerwin (together, "Plaintiffs") filed this quiet title action against defendants Pushpa Bisht, Bank of America, N.A., and "All Other Persons Unknown, Claiming any Legal or Equitable Right, Title, Estate, Lien, or Interest in the Property Described in the Complaint" (collectively, "Defendants"), based on a boundary dispute involving the placement of a fence between two properties. Bisht now demurs to the complaint in its entirety on the ground that it fails to join a necessary defendant: her husband, Ravdeep Bhasin.

I. BACKGROUND

According to the allegations of the complaint, Plaintiffs purchased real property at 15447 Stratford Drive, San Jose, CA, 95124 (a.k.a., "Lot 10") in June 2021. (Complaint, ¶ 8.) Bisht purchased real property next door at 15437 Stratford Drive, San Jose, California 95124 ("Lot 11") nearly two years earlier, in August 2019. (*Id.* at ¶ 9.) The prior owner of Lot 11 constructed a cyclone fence between the lots. (*Id.* at ¶¶ 10-12.) After Bisht purchased Lot 11, she extended the cyclone fence by constructing a wooden fence to the nearby street. (*Id.* at ¶ 13.) As constructed, the fence now allegedly includes approximately 857 square feet of Lot 10 on the Lot 11 side of the fence. (*Ibid*.)

Plaintiffs filed their complaint against Defendants on February 16, 2024, asserting causes of action for: (1) quiet title; (2) slander of title; (3) ejectment; (4) permanent injunction to remove encroachments; (5) nuisance; and (6) declaratory relief. On July 15, 2024, Bisht filed the present demurrer, and Plaintiffs filed an opposition on September 26, 2024. Bisht has not filed a timely reply.

II. REQUESTS FOR JUDICIAL NOTICE

Both sides have submitted requests for judicial notice. As a general matter, "[j]udicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code, § 450.) A precondition to judicial notice in either its permissive or mandatory forms is that the matter to be noticed be relevant to the issues before the court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, fn. 18 (*Silverado*), citing *People v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2.) It is the court, and not the parties, that determines relevance. Evidence Code section 453, subdivision (b), requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter." (Evid. Code, § 453, subd. (b).) Also, "[a] party requesting judicial notice of material under Evidence Code sections 452 or 453 must provide the court and each party with a copy of the material." (Cal. Rules of Court, rule 3.1306(c).)

A. Bisht's Request for Judicial Notice

Bisht requests that the court judicially notice emails between Bisht and Plaintiffs' counsel. (Defendant Pushpa Bisht's Request for Judicial Notice ("Bisht RJN"), p. 1:19-22.) Plaintiffs oppose the request on the ground that the documents do not fall within the requirements of Evidence Code section 452, subdivisions (c), (d), or (h). (Plaintiffs'

Objections to Defendant's Request for Judicial Notice, p. 3:11-12.) Plaintiffs also argue that the emails are irrelevant to the issues before the court. (*Id.* at p. 3:13-14.)

The court agrees that the emails are irrelevant and denies Bisht's request. (See *Silverado, supra,* 197 Cal.App.4th at p. 307, fn. 18 [denying judicial notice on relevance grounds].) In the emails, the parties appear to discuss the legal merits of Bisht's demurrer (including whether Bhasin should be named a party), proper procedures for filing documents with the court, and extensions of time to Bisht to file a response to the complaint. (See Bisht RJN, pp. 2-13.) None of this has any bearing on the court's decision. The court also notes that emails between the parties are generally not judicially noticeable, as they do not fall under subdivisions (c), (d), or (h) of section 452.

B. Plaintiffs' Request for Judicial Notice

Plaintiffs request that the court judicially notice five exhibits in support of their opposition to Bisht's demurrer. (Plaintiffs' Request for Judicial Notice, p. 3:1-21.) Exhibit 1 is Plaintiffs' verified complaint in the present matter. Exhibit 2 is Bisht's first amended answer. Exhibit 3 is a "Grant Deed" for real property located at 15447 Stratford Drive, San Jose, CA 95124. Exhibit 4 is a "Grant Deed" for real property located at 15437 Stratford Drive, San Jose, California 95124. Exhibit 5 is a document titled "Interspousal Transfer Deed." Plaintiffs cite Evidence Code section 452, subdivisions (c), (d), and (h) in support of their request. (*Id.* at p. 2:9-26.)

The court denies judicial notice of Exhibit 1 as unnecessary because it is the pleading under review. (See *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1091, fn. 1 [denying as unnecessary a request for judicial notice of the pleading under review on demurrer].)

The court grants judicial notice of Exhibit 2 under Evidence Code 452, subdivision (d), as it is a court record. The court also grants judicial notice of Exhibits 3-5 under Evidence Code 452, subdivision (c). Under subdivision (c), a court may take judicial notice of "official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." (See also *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 194 *(Ragland*) ["a recorded deed is an official act of the executive branch, of which this court may take judicial notice. [Citations.]".) At the same time, the court does not judicially notice the truth of any disputed factual matters contained in Exhibits 3-5. (See *Ragland, supra,* 209 Cal.App.4th at p. 194 ["'While courts may notice official acts and public records, "we do not take judicial notice of the truth of all matters stated therein." [Citations.] "[T]he taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom, since in many instances what is being noticed, and thereby established, is no more than the existence of such acts and not, without supporting evidence, what might factually be associated with or flow therefrom." ' [Citation.]"].)

III. DEMURRER

A. General Legal Standards

As relevant to this case, "[t]he party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on

any one or more of the following grounds: . . . [t]here is a defect or misjoinder of parties." (Code Civ. Proc., § 430.10, subd. (d).) A demurrer may be brought by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court, in ruling on a demurrer, treats it "as admitting all properly pleaded material facts, 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.) "A demurrer tests only the legal sufficiency of the pleading. [Citation.] 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.' [Citation.]" (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214, superseded by statute on other grounds as stated in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227.)

B. Discussion

Bisht demurs to the entire complaint on the ground that the complaint is defective for failing to join Bhasin. (Memorandum of Points and Authorities in Support of Defendant's Demurrer ("MPA"), p. 3:5-10.) She argues that a party "shall" be joined as a party in the action if "he claims an interest relating to the subject of the action (in this case, the subject real property) and is so situated that the disposition of the action in his absence may (1) as a practical matter impair or impede his ability to protect that interest . . . ." (*Id.* at p. 4:1-5, citing Code Civ. Proc., § 389, subd. (a).) According to Bisht, she married Bhasin on May 19, 2019, no premarital agreement exists between them, and Bhasin has an equal ownership in the property, which "is community property to the marriage." (*Id.* at p. 3:22-25.) Bisht claims that if Bhasin "is not added as a defending party, his ability to protect his community interest in the subject property will be impaired or impeded." (*Id.* at p. 4: 6-8.) She states that "she attempted, in numerous communications[,] to request Plaintiffs to add Mr. Bhasin as a defending party" but for "unknown reasons, Plaintiffs refuse to do so." (*Id.* at p. 4:12-15.)

Plaintiffs respond that Bisht "has filed an unverified answer and included or identified in her unverified answer to the complaint an individual – Ravdeep Bhasin – as a party defendant," and that this is inadequate. (Opposition, p. 7:25-26.) In addition, Bisht "misconstrues the purpose" of Civil Procedure section 389, because Bhasin "is not a necessary or proper defendant with any vested interest in the property . . . , plaintiffs are not required to name him as a defendant in the complaint . . . , complete relief can and should be afforded without him[,] and there is no adequate legal basis that compels plaintiffs to add him as a defendant." (*Id.* at p. 8:10-15.) According to Plaintiffs, Bhasin "is not a vested owner and has no identifiable recorded interest in the real property[,] and his absence will not affect the outcome . . . [i]f the plaintiffs prevail, the true boundary line will be confirmed . . . [i]f defendant prevails, nothing will change. As Mr. Bhasin is not a vested owner and has no established interest in the real property, he will not be affected in either event . . . ." (*Id.* at p. 10:13-17.)

Code of Civil Procedure section 389 governs the joinder of parties and provides: "A person who is subject to service of process and whose joinder will not deprive the court of

jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party." (Code Civ. Proc., § 389, subd. (a).) An owner of the property has been held to be an indispensable party within the meaning of section 389. (See *Majd v. Bank of America, N.A.* (2015) 243 Cal.App.4th 1293, 1308-1309 [record owner of the property is an indispensable party to any action seeking to cancel the deed by which it acquired the property]; see also *Washington Mutual Bank v. Blechman* (2007) 157 Cal.App.4th 662, 668 ["When a party seeks to set aside and vacate a trustee's sale in a foreclosure proceeding, there can be no doubt that the parties to the sale transaction are indispensable parties."].)

Neither party has directed the court to particularly relevant supporting authority. Bisht cites nothing beyond Code of Civil Procedure sections 389 and 430.10. Plaintiffs cite two cases, neither of which is factually on point. (See Opposition, pp. 8:15-25, 9:11-17, citing *Countrywide Home Loans, Inc. v. Superior Court* (1999) 69 Cal.App.4th 785 (*Countrywide*); *Friendly Village Community Assn., Inc. v. Silva & Hill Constr. Co.* (1973) 31 Cal.App.3d 220 (*Friendly Village*).) Plaintiffs rely on *Friendly Village* for the requirements that a *plaintiff* must meet for a cause of action, which is of little utility here. (See Opposition, p. 9:11-17, citing *Friendly Village, supra*, 31 Cal.App.3d at p. 224 ["An element of a cause of action for injury to real property is the plaintiff's ownership, lawful possession, or right to possession, of the property."].) *Countrywide* discusses joinder in the context of multiple purported tortfeasors involved in an alleged fraud scheme, which has little to do with whether a third party's purported community property interest in real property necessitates a joinder, when that third party is not on the title to the real property. (See, e.g., *Countrywide, supra*, 69 Cal.App.4th at p. 789 ["This case presents the question of whether, under the rules governing the joinder of parties, a trial court can require a plaintiff to sue all of the participants in an alleged scheme to defraud even though the plaintiff wants to sue only some of them. Plaintiff contends that it can choose which tortfeasors to sue. We agree."].)

Nevertheless, the court ultimately finds Bisht's argument to be unpersuasive, based on its own research. First, "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." (Code Civ. Proc., § 367.) In addition, Code of Civil Procedure section 370 makes it clear that "[a] married person may be sued without his or her spouse being joined as a party . . . ." (Code Civ. Proc., § 370; *see also Yearout v. American Pipe & Steel Co.* (1946) 74 Cal.App.2d 139, 143-144 (*Yearout*) [unnamed spouse was not a necessary party to earlier materialman's lien foreclosure action because of privity with named spouse]; *Cutting v. Bryan* (1929) 206 Cal. 254, 258 (*Cutting*) [unnamed spouse was not a necessary party to earlier quiet title action because of privity with named spouse].) In *Yearout*, the court stated that a spouse "was not a necessary party to the action to foreclose the materialman's lien on the community property as she was represented there by her husband." (*Yearout, supra*, 74 Cal.App.2d at p. 144.) Notably in *Yearout*, the "deed of conveyance named 'F. A. Yearout, a married man' as grantee," and did not list the spouse's name. (*Id.* at p. 140.)

Plaintiffs contend that the grant deed for Lot 11 lists only Bisht as the owner of Lot 11, and Bisht does not appear to dispute this fact. (Opposition, p. 6:10-13.) Instead, Bisht's sole basis for the demurrer appears to be Bhasin alleged community property interest as her spouse. (MPA, p. 3:21-25.) While an owner of a property has been held to be an indispensable party within the meaning of Code of Civil Procedure section 389, Bisht identifies no authority for the proposition that any spouse with a potential community property interest must always be named as a party in a real property dispute. Furthermore, the court finds that Bisht cannot establish that Bhasin has a community property interest in the property without resort to extrinsic evidence, given that the deed to Lot 11 (of which the court has taken judicial notice) lists only Bisht. Because it is purely extrinsic evidence, the court *cannot* consider the Bhasin declaration, submitted with Bisht's opposition, on demurrer. (See *Nealy v. County of Orange* (2020) 54 Cal.App.5th 594, 597, fn. 1 [on demurrer, court's focus is limited to the facts alleged on the face of the pleading and its exhibits, and any facts subject to judicial notice].) Moreover, as a general matter, Bisht fails to demonstrate that a failure to name Bhasin as a defendant would "impair or impede his ability to protect [his community property] interest," because she does not show that he "is so situated" that his ability to protect his interests is any different from her own. (Code Civ. Proc., § 389, subd. (a).)

Accordingly, the court OVERRULES Bisht's demurrer to the entire complaint.

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Calendar Lines 3-4
Case Name: *Jane Doe v. Naeem Ul Islam Hashmi et al.*
Case No.: 24CV434451

I. BACKGROUND

In this lawsuit, plaintiff Jane Doe alleges she was sexually battered by defendant Dr. Naeem Hashmi during medical examinations performed in December 2020 and May 2021. Both examinations took place at Crescent Medical Center ("Crescent") in San Jose. Crescent is also named as a defendant.

Doe filed her original complaint on April 4, 2024. She filed the operative first amended complaint ("FAC') on April 25, 2024. The FAC states two causes of action against Hashmi, Crescent, and Doe defendants: (1) sexual battery in violation of Civil Code section 1708.5 and (2) gender violence in violation of Civil Code section 52.4. The FAC alleges on information and belief that Hashmi "was the business owner and employed by" Crescent. (FAC, ¶ 7.) There are no exhibits attached to the FAC.

Currently before the court is a demurrer to and motion to strike portions of the FAC, filed by defendants on July 2, 2024 and June 27, 2024, respectively. Doe filed oppositions on September 26, 2024.

II. REQUEST FOR JUDICIAL NOTICE

In opposition to the motion to strike, Doe has submitted a request for judicial notice. "Judicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code, § 450.) A precondition to judicial notice in either its permissive or mandatory forms is that the matter to be noticed be relevant to the material issue before the court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307 [citing *People v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422, fn. 2].) It is the court, and not the parties, that determines relevance. Evidence Code section 453, subdivision (b), requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter."

Doe submits three online articles, attached as Exhibits B-D to the declaration of counsel Jonathan Melmed, arguing that these exhibits are judicially noticeable under Evidence Code section 452, subdivision (h).

The court denies the request. These news articles are not relevant to the issues before the court, and news articles are not properly noticeable under section 452, subdivision (h), in any event. (See *Gould v. Md. Sound Indus*. (1995) 31 Cal.App.4th 1137, 1145 ["Judicial notice under Evidence Code section 452, subdivision (h), is intended to cover facts which are not reasonably subject to dispute and are easily verified. These include, for example, facts which are widely accepted as established by experts and specialists in the natural, physical, and social sciences which can be verified by reference to treatises, encyclopedias, almanacs and the like or by persons learned in the subject matter."]; see also *Jolley v. Chase Home Finance LLC* (2013) 213 Cal.App.4th 872, 889 ["[W]e know of no 'official web site' provision for judicial notice in California."]; *Huitt v. Southern California Gas Co*. (2010) 188 Cal.App.4th 1586, 1605, fn. 10 ["Simply because information is on the Internet does not mean that it is not

reasonably subject to dispute."].) These articles do not come close to meeting the standard set forth in *Gould*.

III. DEMURRER TO THE FAC

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.) "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.)

Where a demurrer is to an amended complaint, the court "may consider the factual allegations of prior complaints, which a plaintiff may not discard or avoid by making contradictory averments in a superseding, amended pleading." (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034, internal quotations omitted; see also *Larson v. UHS of Rancho Springs, Inc*. (2014) 230 Cal.App.4th 336, 343 [noting "well-established precedent" allowing "courts to consider omitted and inconsistent allegations from earlier pleadings when ruling on a demurrer"]; *Doe v. United States Youth Soccer Assoc.* (2017) 8 Cal.App.5th 1118, 1122 [citing *Berg & Berg*].)

In ruling on a demurrer, the court considers only the pleading under attack, any attached exhibits, and any facts or documents of which judicial notice may be granted. The court cannot consider extrinsic evidence in ruling on a demurrer or motion to strike. This includes declarations. The court has considered the declaration of Faith Wolinsky only to the extent it discusses the meet-and-confer efforts required by statute.

Code of Civil Procedure section 430.60 states: "A demurrer shall distinctly specify the grounds upon which any of the objections to the complaint, cross-complaint, or answer are taken. Unless it does so, it may be disregarded." The rules of court also require that the demurrer itself (distinct from a supporting memorandum) specify the target of any objection and the grounds. (See Cal. Rules of Court, rules 3.1103(c), 3.1112(a), 3.1320(a) ["Each ground of demurrer must be in a separate paragraph and must state whether it applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."]; see also 5 Witkin, *Cal. Procedure* (5th ed., 2019) Pleading, § 953 ["Each ground of demurrer must be in a separate paragraph and must state whether the demurrer applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."].)

Finally, "points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before." (*Proctor v. Vishay Intertechnology, Inc*. (2013) 213 Cal.App.4th 1258, 1273; see also *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500 ["This court will not consider points raised for the first time in a reply brief for the obvious reason that opposing counsel has not been given the opportunity to address those points."].)

B. Basis for the Demurrer

Defendants challenge the causes of action on the ground that they fail to state sufficient facts against Crescent, "based on vicarious liability or respondent superior." (See Notice of Demurrer and Demurrer, p. 2:8-11.)

C. Discussion

The court SUSTAINS Crescent's demurrer to the first and second causes of action, for the reasons that follow.

The FAC's boilerplate allegations in paragraphs 10, 11, and 13 of the FAC are contentions, deductions, and conclusions of fact or law that the court does not accept as true on demurrer. The allegations in paragraphs 24-27 (in the first cause of action) are similarly conclusory and insufficient to allege that Crescent is vicariously liable for any sexual battery of Doe by Hashmi.

"An employer will not be held vicariously liable for an employee's malicious or tortious conduct if the employee substantially deviates from the employment duties for personal purposes. Thus, if the employee inflicts an injury out of personal malice, not engendered by the employment, or acts out of personal malice unconnected with the employment, or if the misconduct is not an outgrowth of the employment, the employee is not acting within the scope of employment. If an employee's tort is personal in nature, mere presence at the place of employment and attendance to occupational duties prior or subsequent to the offense will not give rise to a cause of action against the employer under the doctrine of respondeat superior. In such cases, the losses do not foreseeably result from the conduct of the employer's enterprise and so are not fairly attributable to the employer as a cost of doing business." (*Delfino v. Agilent Technologies, Inc*. (2006) 145 Cal.App.4th 790, 812-813 (*Delfino*), internal citations and quotations omitted.)

This principle applies in cases involving assaults and sexual assaults by medical care providers. (See *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 301-302 [ultrasound technician's sexual misconduct not within scope of employment, as "a sexual tort will not be considered engendered by the employment unless its motivating emotions were fairly attributable to work-related events or conditions"].) "To hold medical care providers strictly liable for deliberate sexual assaults by every employee whose duties include examining or touching patients' otherwise private areas would be virtually to remove scope of employment as a limitation on providers' vicarious liability." (*Id*. at 302; see also *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1005 [county not vicariously liable for deputy sheriff's unwanted touching and sexual propositioning of his female coworkers during work hours, with the Court reasoning that "[i]f an employee's tort is personal in nature [as the deputy's was found to have been], mere presence at the place of employment and attendance to occupational duties prior to or subsequent to the offense will not give rise to a cause of action against the employer under the doctrine of respondeat superior"]; *Myers v. Trendwest Resorts, Inc*. (2007) 148 Cal.App.4th 1403, 1432 [no vicarious liability against employer for claims of sexual battery, false imprisonment, and intentional infliction of emotional distress]; *John Y. v. Chaparral Treatment Center, Inc.* (2002) 101 Cal.App.4th 565, 575-577 [treatment center operator not liable for employee's sexual molestation of resident minor]; *Maria D. Westec Residential Security, Inc*. (2000) 85

Cal.App.4th 125, 128-129 [employer not liable for alleged sexual assault by on-duty security guard].)

"Although the question of whether a tort was committed within the scope of employment is ordinarily one of fact, it becomes one of law where the undisputed facts would not support an inference that the employee was acting within the scope of employment." (*Perry v. County of Fresno* (2013) 215 Cal App.4th 94, 101-102 [county corrections officer writing racially inflammatory letters to inmates was acting outside the scope of his employment, as "[a]n employee who abuses job-created authority over others for purely personal reasons is not acting with the scope of employment"].) Here, there are no factual allegations to support the notion that Hashmi's alleged sexual batteries of Doe on the two occasions he examined her were within the scope of his employment or agency—*apart from Doe's boilerplate and conclusory allegation that they were*—and this is a determination the court can make on demurrer.

The second cause of action for gender violence similarly fails to state sufficient facts against Crescent. As Crescent points out, Civil Code section 52.4, subdivision (d), states: "Notwithstanding any other laws that may establish the liability of an employer for the acts of an employee, this section does not establish any civil liability of a person because of his or her status as an employer, unless the employer personally committed an act of gender violence."

The general rule is that statutory causes of action must be alleged with particularity. Here, the boilerplate allegations in paragraph 7 of the FAC (made on information and belief), as well as the allegations in paragraphs 35-38, are insufficient to state that Crescent, as a legal entity separate from Hashmi, committed gender violence in violation of Civil Code section 52.4.

Again, contrary to the opposition's suggestion, the generic allegations in paragraphs 10 and 13 of the FAC do not support either cause of action against Crescent. (See Opposition, p. 5:9-27.) These allegations are not only boilerplate; they are also made solely on information and belief.

In general, a party cannot, "by placing the incantation 'information and belief' in a pleading, [ ] insulate herself or himself" from the requirements of Code of Civil Procedure section 128.7, irrespective of whether the pleading is verified or unverified. (*Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 596, fn. 9.) Additionally, even when it is permissible to allege an ultimate fact on the basis of information and belief, a party cannot simply include the phrase "information and belief," without more. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1158-59.) To plead an allegation on the basis of information and belief properly, a plaintiff must allege the facts or information that led him or her to infer or believe the truth of the ultimate factual allegation. (*Gomes*, *supra*, 192 Cal.App.4th at pp. 1158-59; see also *Brown v. USA Taekwondo* (2019) 40 Cal.App.5th 100, 1106 ["where factual allegations are based on information and belief, the plaintiff must allege 'information that "lead[s] [the plaintiff] to believe that the allegations are true."'"].) Allegations made on "information and belief" that lack supporting information are not accepted as true on demurrer.

For these reasons, the demurrer must be sustained.

As for leave to amend, a plaintiff bears the burden of demonstrating that an amendment would cure the defect identified on demurrer. (See *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145 ["The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case. [Citation.]'"].) Doe has not met this burden, as the opposition simply argues that the "[d]emurrer as to Plaintiff's first, third, and seventh cause of action must be overruled as a matter of law," and that leave to amend should be granted "if the court sustains any portion of the demurrer." (See Opposition, p. 9:5-21.)

While Doe has failed to articulate how the FAC's allegations could be amended to state proper causes of action against Crescent, the court GRANTS 20 days' leave to amend, as this is the first pleading challenge in this case to be heard by the court.

Doe is reminded that when a demurrer is sustained with leave to amend, the leave must be construed as permission to the pleader to amend the causes of action to which the demurrer has been sustained, not to add entirely new causes of action. (*Patrick v. Alacer Corp*. (2008) 167 Cal.App.4th 995, 1015.) Raising claims entirely unrelated to those originally alleged requires either a new lawsuit or a noticed motion for leave to amend. "Following an order sustaining a demurrer or a motion for judgment on the pleadings with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order. The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend." (*Zakk v. Diesel* (2019) 33 Cal.App.5th 431, 456, citing *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023.)

IV. MOTION TO STRIKE PORTIONS OF THE FAC

A. General Standards

Under 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. Irrelevant matter includes (1) an allegation that is not essential to the statement of a claim or defense, (2) an allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense, and (3) a demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint. (See Code Civ. Proc., § 431.10, subds. (b), (c).) 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. (Code Civ. Proc., § 437, subd. (a); see 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 complaint 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].)

A motion to strike may be brought against a portion of a cause of action that is purportedly defective—*e.g.*, because it seeks an improper remedy. (See *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680.) At the same time, as Courts of Appeal have emphasized,

"[W]e have no intention of creating a procedural 'line item veto' for the civil defendant." (*Id.* at p. 1683.) California Rule of Court 3.1322(a) requires that "[a] notice of motion to strike a portion of a pleading must quote in full the portions sought to be stricken except where the motion is to strike an entire paragraph, cause of action, count, or defense. Specifications in a notice must be numbered consecutively."

As with a demurrer, extrinsic evidence cannot be considered, and additional arguments cannot be raised for the first time in a reply brief. Again, the court has considered the declaration of Faith Wolinsky in support of the motion only to the extent it discusses the required meet and confer efforts.

B. Basis for the Motion to Strike

Defendants move to strike paragraphs 24-27 and 35-39 in their entirety, as well as the portion of paragraph 30 that alleges that Hashmi was arrested. (See Notice of Motion and Motion at p. 2:6-19.)[1]

C. Discussion

Defendants' motion to strike paragraphs 24-27 (part of the first cause of action) and paragraphs 35-39 (part of the second cause of action) in their entirety is DENIED as MOOT, in light of the court's ruling on the demurrer to the FAC. The court also notes that the motion boils down to an argument that these paragraphs should be stricken because the first and second causes of action fail to state sufficient facts as alleged against Crescent. (See Memorandum, pp. 4:18-6:2.) Grounds for demurrer are not a basis for a motion to strike. A failure to allege sufficient acts to state a cause of action does not itself demonstrate that any allegations are irrelevant, false, improper, or not filed in conformity with law under Code of Civil Procedure section 436.

The court also notes that it would deny Defendants' motion to strike a portion of paragraph 30 (alleging that Hashmi was arrested) even if the motion were not moot. The claim that a factual allegation is untrue is not a basis for a motion to strike, as the allegations must be accepted as true at the pleading stage. Similarly, Defendants have presented no basis for the court to find that the allegation is "irrelevant." Defendants' assertion that the allegation would be inadmissible at trial is, even if assumed to be true, not a basis for striking it from a pleading.

V. CONCLUSION

The demurrer to the FAC's first and second causes of action as alleged against defendant Crescent is SUSTAINED with 20 days' leave to amend. The motion to strike portions of the FAC is DENIED as MOOT.

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[1] Paragraph 36 is listed twice. The court assumes this is typographical error and that defendants meant to list paragraph 39.

Calendar Line 5
Case Name: *Cheryl Rouse v. Stanford Health Care et al.*
Case No.: 21CV377892

Plaintiff Cheryl Rouse filed this action for medical malpractice against defendants Stanford Health Care (sued as "Stanford Hospital") and Dr. Benjamin Chung, based on injuries Rouse allegedly suffered while being treated for a non-functional kidney. Defendants now bring a motion for summary judgment, or in the alternative summary adjudication, as to Rouse's cause of action for negligence, the only cause of action in her complaint.

I. BACKGROUND

According to the allegations of the complaint, Chung and Stanford Hospital treated Rouse for a non-functional kidney from December 12, 2019 to December 26, 2019. (Complaint, ¶ 1.) Rouse alleges that Stanford Hospital initially admitted her on December 12, 2019 for a right robotic simple nephrectomy (*i.e.*, removal of the right kidney), but Defendants improperly conducted the surgery, negligently perforated her gallbladder, and failed to respond to Rouse's complaints of abdominal pain and to diagnose appendicitis. (*Id.* at ¶¶ 1, 3.) Consequently, Rouse suffered a ruptured gallbladder and other injuries and damages, including "retention of the problem kidney." (*Ibid*.)

On February 18, 2021, Rouse filed a complaint against Defendants, asserting a cause of action for negligence. On July 12, 2024, Defendants moved for summary judgment, or in the alternative summary adjudication, to the sole cause of action for negligence. On September 26, 2024, Rouse filed an opposition to Defendants' motion. Defendants filed a reply on October 4, 2024 (one day late).

II. MOTION FOR SUMMARY JUDGMENT/SUMMARY ADJUDICATION

A. Legal Standard

On summary judgment or summary adjudication, the moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) The motion shall be granted only if it completely disposes of an entire cause of action, an affirmative defense, a claim for damages, or an "issue of duty." (See Code Civ. Proc., § 437c, subd. (f)(1); *McClasky v. California State Auto. Ass'n* (2010) 189 Cal.App.4th 947, 975 ["If a cause of action is not shown to be barred in its entirety, no order for summary judgment–or adjudication–can be entered."].)

"A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action . . . . The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72, internal citations omitted.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable finder of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra,* 25 Cal.4th at p. 850.) "A party cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact." (*Christina C. v. County of Orange* (2013) 220 Cal.App.4th

1371, 1378, internal citations and quotation marks omitted; see also *McHenry v. Asylum Entertainment Delaware, LLC* (2020) 46 Cal.App.5th 469, 479 [because speculation is not evidence, speculation cannot create a triable issue of material fact].)

The pleadings limit the issues presented for summary judgment or summary adjudication, and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins.* (2010) 181 Cal.App.4th 60, 74 ["[T]he pleadings determine the scope of relevant issues on a summary judgment motion. [Citations.]"].) "A moving party seeking summary judgment or adjudication is not required to go beyond the allegations of the pleading, with respect to new theories that could have been pled, but for which no motion to amend or supplement the pleading was brought, prior to the hearing on the dispositive motion. [Citations.]" (*Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 444, quoting *Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 421.)

The moving party's declarations and evidence will be strictly construed in determining whether they negate or disprove an essential element of a plaintiff's claim "in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64.) The evidence must be liberally construed in support of the opposing party, resolving any doubts in favor of that party. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.)

B. Grounds for Defendants' Motion

The elements of a negligence cause of action are: "'(a) a legal duty to use due care; (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the resulting injury.'" (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917-918, quoting *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 834.) Here, Defendants argue that Rouse has no evidence that they breached the requisite standard of care and that Defendants' negligence caused the alleged injury. (Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment ("MPA"), pp. 7:12-9:22.)

Defendants support their motion with a separate statement of undisputed material facts, a declaration from counsel attaching five exhibits, and a declaration from Dr. Jaime Landman ("Landman Declaration" or "Landman Decl.").[2] Rouse responds with objections to Defendants' evidence, opposing evidence consisting of two exhibits, a separate statement in response to Defendants' undisputed facts, and a declaration from Dr. Gabriel Akopian ("Akopian Declaration" or "Akopian Decl.").

C. Discussion

As Defendants note, the "standard of care or duty of a health care provider is to use that reasonable degree of skill, knowledge and care exercised by reputable health care providers practicing under similar circumstances." (MPA, p. 7:9-12, citing *Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 215 (*Alef*).) "Expert testimony is required to establish the elements

[2] It appears that Landman spells his first name "Jaime" on his CV and in the signature on his declaration, but Defendants repeatedly misspell his first name as "Jamie."

of the plaintiff's prima facie case, including breach of the standard of care." (MPA, p. 8:6-7, citing *Sinz v. Owens* (1949) 33 Cal.2d 749, 753; *Landeros v. Flood* (1976) 17 Cal.3d 399, 410.) As emphasized by Defendants, it "has also long been the law in California that liability for medical malpractice must be predic[a]ted upon a substantial causal connection between the alleged negligent conduct and the resulting injury." (MPA, p. 8:20-22, *Budd v. Nixen* (1971) 6 Cal.3d 195, 200.)

Defendants argue that the Landman Declaration establishes that "Defendants did not breach the standard of care nor did a breach of the standard of care cause Plaintiff's injuries." According to Defendants, "Plaintiff not only received appropriate informed consent for the December 12, 2019 robotic right nephrectomy and was informed of the risks associated with said procedure, but the standard of care was also complied with in all respects in the performance of the surgery and that a breach of the standard of care was not the cause of any of Plaintiff's injuries or damages." (MPA, p. 9:12-20, citing Defendants' Separate Statement of Undisputed Material Facts in Support of Summary Judgement, or in the Alternative Summary Adjudication ("SSUMF"), Nos. 17-31.)

SSUMF numbers 17 through 31 rely on paragraphs 1 through 7 of the Landman Declaration. In these paragraphs, Landman states that he is a "physician duly licensed to practice medicine in California," he is board-certified in urology, and he reviewed Plaintiff's medical records from Stanford Health Care and transcripts of the depositions of Rouse and Chung, with accompanying exhibits. (Landman Decl., ¶¶ 1, 2, 4.) Landman declares that Chung and other Stanford Hospital staff discussed with Rouse the risks of removing her kidney, that Rouse understood any risks associated with the procedure, that she chose to proceed with the operation, that she signed a written consent form, that she "began having problems with ventilation and hypotension" when the procedure began, that Stanford Hospital ended the procedure, and that Rouse thereafter underwent a procedure to remove her gallbladder, with Stanford Hospital surgically repairing an umbilical hernia. (See *id.* at ¶ 5.) According to Landman, the procedure "fully complied with the standard of care," given Rouse's informed consent and her physical condition at the time of the procedure. Landman opines that "to a reasonable degree of medical probability, a breach of the standard of care did not cause Plaintiff's injuries." (See *id.* at ¶¶ 6-7.)

This satisfies Defendants' initial burden of showing that at least one element of the plaintiff's cause of action may not be established: *i.e.*, either (1) the lack of compliance with the standard of care, or (2) the causation of Rouse's injuries as a result of the lack of compliance with the standard of care. First, "[t]he standard of care in a medical malpractice case requires that medical service providers exercise that reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of their profession under similar circumstances. The standard of care against which the acts of a medical practitioner are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of laymen. [Citation.]" (*Alef, supra,* 5 Cal.App.4th at p. 215.) The Landman Declaration establishes Landman's medical credentials, states that Landman reviewed Defendants' care and treatment of Rouse, and discusses why Landman believes Defendants' actions did not violate any applicable standard of care. (See Landman Decl., ¶¶ 1-7.)

Second, in "a medical malpractice action, a plaintiff must prove the defendant's negligence was a cause-in-fact of injury." (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1118, citing *Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1502.) "[T]here exists an obvious distinction between a reasonable medical probability and a medical possibility. [Citation.] There can be many, even an infinite number of, possible circumstances which can produce an injury. But a 'possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury. [Citation.]' [Citation.]" (*Simmons v. W. Covina Medical Clinic* (1989) 212 Cal.App.3d 696, 702, citing *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396.) Landman concludes, supported by his "review of the medical records," "to a reasonable degree of medical probability, a breach of the standard of care did not cause Plaintiff's injuries." (Landman Decl., ¶¶ 6, 7.)

In opposition, Rouse relies on the opposing Akopian Declaration. In it, Akopian states that he is the "Director of the Huntington Hospital general surgency residency training program" and a "staff surgeon for Cedar Sinai Medical Center, with a clinical practice focused on minimally invasive and robotic surgery." (Akopian Decl., ¶¶ 1-2.) Akopian reviewed Rouse's medical records, the Landman Declaration, and Rouse and Chung's deposition transcripts. (*Id.* at ¶¶ 3-4.) According to Akopian, the "placement of the Veress needle in the right upper quadrant, despite Ms. Rouse's complex surgical history, and high body mass index (BMI) was inappropriate" for several reasons, including that the "puncture of the gallbladder during the insertion indicates that the location was poorly chosen" and "the only way for the needle to have entered the gallbladder is if the needle was placed too deep into the abdominal cavity." (*Id.* at ¶¶ 5-9.) Furthermore, Akopian states that Landman "downplays the significance" of an issue Rouse experienced during the procedure, claims Chung erred in how he inserted a needle into Rouse, failed to consider alternatives to the procedure after she experienced an issue, and should have supervised and "guided the placement" of a needle into Rouse, as "it is unclear from the deposition [of Chung] who in fact performed the first [] needle placement and who attempted the second placement." (*Id.* at ¶¶ 10-15.) It is Akopian's "opinion to a reasonable degree of medical probability, that Defendant's performance fell below the standard of care," and to a "reasonable degree of medical probability, a breach of the standard of care caused Plaintiff's injuries." (*Id.* at ¶¶ 17, 18.)

Defendants argue that this declaration fails to create a triable issue of fact, because Akopian has failed to "attest to having expertise in the same or a similar circumstance" and therefore lacks familiarity with the standard of care at issue. (Reply to Plaintiff's Opposition to Motion for Summary Judgment, or in the Alternative Summary Adjudication ("Reply"), pp. 2:1-4:27.) According to Defendants, "'the Supreme Court has formulated the standard of care as that of physicians in similar *circumstances* rather than similar *locations*.'" (*Id.* at pp. 2:28-3:1, quoting *Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 468 (*Avivi*), emphasis original.) Further, "the appropriate test for expert qualification in ordinary medical malpractice actions is whether the expert is familiar with circumstances similar to those of the respondents; familiarity with the standard of care in the particular community where the alleged malpractice occurred, while relevant, is generally not requisite . . . ." (*Id.* at p. 3:9-12, citing *Avivi, supra,* 159 Cal.App.4th at p. 465.) Defendants argue that Akopian has "failed to attest that he is familiar with the standard of care for physicians in similar circumstances as Dr. Chung in this case. Nor does Dr. Akopian attest to ever having practiced medicine in and around the Bay Area . . . . More importantly, Dr. Akopian fails to attest to how

he is familiar with the standard of care for a robotic nephrectomy performed in the Bay Area." (*Id.* at p. 3:25-27.) This, according to Defendants, contrasts with Landman's declaration, wherein Landman attests that he "is familiar with the standard of care in the same or similar location as Defendants for consenting a patient for robotic nephrectomy" and he attests that he has performed "hundreds of robotic nephrectomies." (*Id.* at p. 4:3-5.) Defendants note that a urologist, like Landman, "specializes in diagnosing and treating diseases of the urinary system, such as the kidneys" whereas a "general surgeon," like Akopian, "would not be called upon to perform a robotic nephrectomy." (*Id.* at p. 4:7-10.)

The Court of Appeal's decision in *Avivi* is instructive. In *Avivi*, the Court reversed and remanded the trial court's decision granting summary judgment in a medical malpractice case involving a bone fracture, holding that the trial court had improperly excluded a declaration from a doctor—the only expert declaration submitted by plaintiff to show a triable issue of fact—based solely on the fact that the doctor practiced in a different geographical location (Israel) from the medical care at issue (Southern California). (*Avivi, supra,* 159 Cal.App.4th at p. 473.) According to the Court of Appeal, the doctor had declared that: "he had practiced orthopedics for 27 years, had treated thousands of patients with injuries similar to appellant's, had numerous contacts with doctors from the United States regarding treatment of injuries similar to appellant's, had reviewed many publications on treatment of fractures in the United States, and that treating a fracture would be handled similarly in Israel as in the United States. Read in the light most favorable to appellant, [the doctor's] statements demonstrate that he was generally familiar with the standard of care for treating fractures in the United States, and with treating fractures in circumstances similar to appellant's. It was not necessary that he also state familiarity with the standard of care in Southern California." (*Id.* at p. 471; see also *Borrayo v. Avery* (2016) 2 Cal.App.5th 304, 312 ["Regardless, with the locality issue placed in its proper perspective, Pineda's declaration does not suggest to us that he is unqualified to render an opinion in this case. His declaration and attached curriculum vitae reveal that he has practiced as an orthopedic surgeon for more than 30 years, and is licensed as a specialist in orthopedic surgery. He has also performed over 500 orthopedic surgeries, including approximately 10 to 12 TOS surgeries, and approximately six to eight surgeries to repair dislocated or subluxated sternoclavicular joints. Pineda stated that through his training and experience he was familiar with the standard of care for TOS surgeries, as well as with how sternoclavicular joints can be dislocated or subluxated. Additionally, he had personally performed orthopedic examinations of plaintiff both before and well after her surgery . . ."].)

Here, Akopian states that he "is a general surgeon duly licensed to practice medicine in the state of California . . . [he] completed residency training in general surgery at Huntington Memorial Hospital in 2006 and subsequently a fellowship in minimally invasive surgery at LAC-USC Medical Center." (Akopian Decl., ¶ 1.) He "has been board certified in surgery by the American Board of Surgery since 2007." (*Ibid*.) He is "the Director of the Huntington Hospital general surgery residency training program" and "a staff surgeon for Cedars Sinai Medical Center, with a clinical practice focused on minimally invasive and robotic surgery." (*Id.* at ¶ 2.) While the court recognizes Akopian statement that he has a practice focused on "minimally invasive and robotic surgery" (see Akopian, Decl. ¶ 2), at no point does Akopian state that he is familiar with any standard of care related to any aspect of the treatment received by Rouse, let alone a standard of care for treating injuries similar to Rouse's or using procedures similar to the one Chung used on Rouse. Nor does Akopian state how any of his previous or current medical experience relates to the standard of care Rouse received. "General surgery" and even general "robotic surgery" are not the same as kidney surgery, and

there is nothing in the Akopian Declaration to indicate that he has any familiarity with this type of surgery—*i.e.*, nephrectomies—or indeed, *any familiarity with surgeries or diseases of the urinary system*, at all. Urology is a distinct medical specialty, and Akopian is apparently not a urologist (or nephrologist). This reflects a lack of familiarity with the standard of care in "similar circumstances."[3]

The court also finds issues with the evidentiary foundation for Akopian's opinion disagreeing with Landman's "conclusions that the standard of care was met." (Akopian Decl., ¶ 16.) Akopian states that he has "reviewed the medical records related to the case of Cheryl Rouse, as well as the Declaration submitted by Dr. Jamie [sic] Landman, dated June 25, 2024." (*Id.* at ¶ 3.) "After reviewing the medical records from Stanford Health Care, deposition transcripts of Ms. Rouse, Dr. Benjamin Chung, and other relevant exhibits, I have formed an independent opinion regarding the care provided to Ms. Rouse during her robotic right nephrectomy performed on December 12, 2019." (*Id.* at ¶ 4.) Akopian attaches no exhibits to his declaration, and he cites no specific records or page numbers from the materials that he claims to have reviewed. Rouse submits Akopian's resume and excerpts from the deposition transcripts of Chung in support of her opposition, but no other evidence is submitted. (See Declaration of Tiega-Noel Varlack in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment, or in the Alternative Summary Adjudication, Exs. A, B.) The court agrees with Defendants that Akopian's opinions in his declaration are entirely conclusory. It is not clear what medical records Akopian is relying on. Indeed, almost all of Akopian's perfunctory declaration appears to consist of brief, generic, conclusory statements that could have been written by a lawyer or layperson rather than a medical expert—with the possible exception of a single sentence in paragraph 15, where he describes "an alternative entry method such as a 'cut down' technique or optical trocar entry technique." But even here, the opinion is bald and conclusory, with no explanation as to what these alternative "techniques" even mean. The court finds that Akopian's opinions lack any proper evidentiary foundation. (See *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 742-743 ["Dr. Frumovitz attempted to testify in his declaration to the facts of the medical procedure without personal knowledge of those facts. Relying on medical records that were not before the court, pursuant to the business records exception to the hearsay rule[] . . . Without those hospital records, and without testimony providing for authentication of such records, Dr. Frumovitz's declaration had no evidentiary basis. Consequently his expert medical opinion on whether defendant Hemmat met the standard of care had no evidentiary value. . . . Dr. Frumovitz had no personal knowledge of the underlying facts of the case, and attempted to testify to facts derived from medical and hospital records which were not properly before the court. Therefore, his declaration of alleged facts had no evidentiary foundation."].)

For the reasons stated above, the court finds that Rouse has not raised a triable issue of fact as to whether Defendants breached the standard of care or whether that breach caused the alleged injuries to Rouse. The court GRANTS Defendants' motion for summary judgment.

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[3] This is not to say that an opinion from a physician in exactly the same area of specialization (urology or nephrology) is always necessary as a matter of law, but Akopian must then explain how he has expertise involving "similar circumstances" given his more generic qualifications, and his conclusory declaration completely fails to do so.

D. Rouse's Evidentiary Objections

With the opposition to the motion, Rouse has submitted objections to the evidence submitted by Defendants. (See Objections to Evidence in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment or, in the Alternative, Summary Adjudication ("Plaintiff's Evidentiary Objections").)

The court overrules Rouse's first objection to the submission of her own medical records, based on hearsay, foundation, and authentication. The court finds these objections to be unpersuasive, as these medical records include a statement from "the duly authorized custodian of the records of Stanford Health Care" who "has the authority to certify copies of these records," and the "records . . . were prepared by Stanford Health Care personnel of the above named business in the ordinary course of business at or near the time of the act, condition, or event." (See Plaintiff's Evidentiary Objections, pp. 2:1-26; Landman Decl., Ex. D, p. 1.) The court finds that the medical records meet the business records exception to hearsay and have been properly authenticated. (*Wicks v. Antelope Valley Healthcare Dist.* (2020) 49 Cal.App.5th 866, 876 ["[T]he medical records were properly authenticated as the hospital's business records, and as such, they are not hearsay. They are the type of records on which medical experts may and do rely in order to give expert testimony in a medical malpractice case. [Citation.] . . . Here, defense counsel's declaration stated that the copies of Mr. Wick's medical records provided to Dr. Holland for review 'were true and exact copies of the records provided directly to my office by the hospital's Health Information Management supervisor' . . . ."].)

The court also overrules Rouse's best evidence rule objection. The California Legislature repealed Evidence Code sections 1500 and 1501, which formerly contained the best evidence rule, in favor of the "secondary evidence rule." (See Plaintiff's Evidentiary Objections, p. 3:10-13; *People v. Goldsmith* (2014) 59 Cal.4th 258, 269 ["Sections 1552 and 1553 were added to the Evidence Code as part of the 1998 legislation that repealed the best evidence rule (former § 1500) and adopted the secondary evidence rule (§§ 1520-1523; Stats. 1998, ch. 100, §§ 4, 5, pp. 634-635.) Under the secondary evidence rule, the content of a writing may now be proved either 'by an otherwise admissible original' (§ 1520) or by 'otherwise admissible secondary evidence' (§ 1521, subd. (a))[.]"].)

Nor does the court find Rouse's completeness argument persuasive. (See Plaintiff's Evidentiary Objections, p. 3:14-18.) Evidence Code section 356 permits a court to admit relevant evidence to "avoid creating a misleading impression." (See Evid. Code, § 356 ["Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."]; *People v. Samuels* (2005) 36 Cal.4th 96, 130 ["The purpose of Evidence Code section 356 is to avoid creating a misleading impression. [Citation.] It applies only to statements that have some bearing upon, or connection with, the portion of the conversation originally introduced. [Citation.] Statements pertaining to other matters may be excluded. [Citation.]"].)

As for Rouse's privacy objection to the introduction of her medical records, a party who tenders a medical condition as an issue in a case waives the physician-patient privilege

and thus her privacy interest in her medical records, to the extent they are relevant to that condition. (Evid. Code, § 996; see also *In re R.R.* (2010) 187 Cal.App.4th 1264, 1278 ["The patient-litigant exception, as the statute is known, is justified for two different reasons. First, since the patient has put into issue the medical condition, [s]he 'may no longer justifiably seek protection from the humiliation of its exposure.' [Citation.] Second, in all fairness, a patient ought not to be allowed to establish a condition without a full inquiry into the circumstances. [Citation.]"].)

The court overrules Rouse's objections to paragraphs 34, 36, 38-41, 42, 45, 53, 60, and 62 of the Landman Declaration.[4] (Plaintiff's Evidentiary Objections, pp. 3:19-5:10.) Rouse provides no legal support for any of these objections. (See *ibid.*) Nor does the court find any of these paragraphs to be irrelevant, misleading, speculative, or lacking in foundation: Landman declares that he has reviewed Rouse's medical records and deposition transcripts, that he is a physician specializing in urology, that he is "familiar with the standard of care in the same or similar location as the Defendants with respect to consenting a patient for a robotic nephrectomy as well as the performance of [the relevant] procedure," that he has "performed hundreds of robotic nephrectomies," and that he offers his opinion as to the medical procedures Chung performed on Rouse. (See Landman Decl., ¶¶ 1-7.) These statements are admissible.

As for Rouse's hearsay objection, she argues that Landman "references the content of Dr. Chung's and Ms. Rouse's depositions, including what they allegedly told the plaintiff about the risks of surgery. These portions of the declaration are hearsay and inadmissible for the truth of the matter asserted." (Plaintiff's Evidentiary Objections, p. 4:13-17.) The court finds that these statements are not being offered for the truth of the matter asserted—instead, they are being offered to establish that these statements were actually made. Moreover, "[a] motion for summary judgment and its opposition may rely on hearsay presented through affidavits and deposition testimony." (*Forest Lawn Memorial-Park Assn. v. Superior Court* (2021) 70 Cal.App.5th 1, 8, citing Code Civ. Proc., § 437c, subds. (b)(1), (b)(2).) Such affidavits or declarations "shall be made by a person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations." (*Ibid.*, citing Code Civ. Proc., § 437c, subd. (d).) Counsel for Defendants "personally reviewed" excerpts from the two deposition transcripts and "attested" under "penalty of perjury" that they are "true and correct cop[ies] of pertinent excerpts from the deposition transcription[s]." (Declaration of Adam M. Stoddard in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication, ¶¶ 4, 6.) In any event, the court finds that these statements are not hearsay.

Finally, the court declines to consider Rouse's third and fourth objections, which are not material to the outcome of the motion.[5] (Code Civ. Proc., § 437c, subdivision (q) ["In granting or denying a motion for summary judgment or summary adjudication, the court need

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[4] The court notes that the parties use different numbering to refer to the paragraphs in Landman's declaration. The numbering system used by Rouse does not correspond to the numbering of paragraphs used by Defendants and Landman – Rouse's objections refer to paragraphs 34, 36, 38 through 42, 45, 53, and 60. The Landman Declaration has a total of 25 paragraphs. Putting aside this discrepancy, the court will refer to Landman and Defendants' numbering scheme. It appears Rouse's objections are focused on paragraphs 5.3 through 7.

[5] Indeed, it is not clear to the court what the third objection is even directed to, as it does not identify the evidence at issue.

rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review."].)

E. Defendants' Evidentiary Objections

Given the court's conclusion above that the Akopian Declaration lacks a sufficient evidentiary foundation, the court SUSTAINS Defendants' objection to the Akopian Declaration on that ground. The court declines to rule on Defendants' other objections, as the foundation objection is dispositive.

III. CONCLUSION

Defendants' motion for summary judgment is GRANTED.

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Calendar Line 6
Case Name: *Dana Lyn Banks v. A Tool Shed, Inc. et al.*
Case No.: 22CV409237

Defendants A Tool Shed, Inc., Robert H. Pedersen, and Rob W. Pedersen (collectively, "Defendants") bring this motion to compel against plaintiff Dana Lyn Banks. They originally filed and noticed this as a motion to compel initial responses to form interrogatories under Code of Civil Procedure section 2030.290, but then after Banks apparently served belated responses, they "amended" the motion to seek further responses to the form interrogatories under Code of Civil Procedure section 2030.300. This was improper. In fact, the amended notice of motion fails to cite section 2030.300 and still refers only to section 2030.290. Rather than filing an unauthorized "amendment" of the motion under section 2030.290, Defendants should have withdrawn the original motion and filed a new motion under section 2030.300.[6]

At the same time, the amendment was made more than two months ago, it was accompanied by a separate statement as required by rule 3.1345(a)(2) of the California Rules of Court, and Banks has had more than a sufficient opportunity to respond. In fact, Banks has filed an improper 51-page opposition to the amended motion, which is grossly over the 15-page limit. She is therefore not prejudiced by the unauthorized amendment.

Notwithstanding these procedural irregularities, the court has considered the form interrogatories at issue, including Banks's responses, and will address the merits. In the future, however, the parties should expect the court to enforce the rules strictly on both sides.[7]

Form Interrogatories Nos. 2.1–2.10: As noted in the footnote above, there are still no answers provided by Banks to these interrogatories. Accordingly, the court GRANTS the motion and orders Banks to supplement her responses with substantive answers within 30 days of notice of entry of this order.

Form Interrogatories Nos. 2.11–2.13, 4.1–4.2, 6.1–6.7, 7.1–7.3, 8.1–9.2, 10.1–10.3, 11.2, 12.1–13.2, and 14.1–14.2: The court finds Banks's response that she is "unaware of an Incident" to be evasive and improper. The term "Incident" has been appropriately defined by Defendants, and Banks must provide substantive answers to each of these form interrogatories using that definition. Banks shall supplement her answers within 30 days of notice of entry of this order.

Form Interrogatories Nos. 11.1, 15.1, and 50.1–50.6: "N/A" is not a proper response to an interrogatory. Similarly, Banks's statements that she is "unaware of any material allegations" in the case or "is unaware of a Contract" are evasive on their face. Banks must provide substantive answers within 30 days of notice of entry of this order.

In her overlong opposition, Banks raises a number of disparate issues—including extensive arguments that go to the merits of the case as a whole, as well as arguments that Defendants (and their counsel) have "lied" and asserted "false claims" against her—but these

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[6] Or, at a minimum, it should have been brought as a "hybrid" motion under both code sections, given that there were several interrogatories as to which Banks still did not provide an answer (*e.g.*, Nos. 2.1-2.10).
[7] That would include disregarding or striking any unauthorized filings, which, in this case, have been submitted by both sides.

points have no bearing on the sufficiency of her form interrogatory responses. They are irrelevant to this motion.

The court therefore GRANTS the amended motion. Although the court finds that Banks's supplemental responses after the original motion was filed were inadequate and not provided in good faith, the court DENIES Defendants' request for monetary sanctions, given the fundamental procedural irregularity identified above in their motion.

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Calendar Lines 7-10 & 16
Case Name: *Robert Rome v. Cupertino Healthcare & Wellness Center, LLC et al.*
Case No.: 23CV421811

1. Background

The complaint of Robert Rome, "by and through his Guardian Ad Litem, Lafaye Maxey," alleges elder and dependent abuse, negligence, and violation of Health and Safety Code section 1430(b) against defendants Cupertino Healthcare & Wellness Center, LLC ("Cupertino Healthcare") and Sol Healthcare, LLC ("Sol Healthcare"). On July 9, 2024, this court granted Rome's motion for a preferential trial setting under Code of Civil Procedure section 36, subdivision (a), setting the trial for November 4, 2024. Because of the shortened time to trial, the court specially set the hearing on Sol Healthcare's four discovery motions for October 10, 2024, and it also found good cause to hear defendants' summary judgment motion less than 30 days before the trial, on October 24, 2024.

In addition to the four discovery motions presently before the court (Sol Healthcare's motions to compel Rome to provide further responses to form interrogatories, special interrogatories, and document requests, as well as a motion for RFAs to be deemed admitted), defendants have now also brought a motion to "abate" the action, based on their allegation that Rome has passed away, and no successor in interest has been identified. Again, because of the compressed timeframe of this case, the court granted defendants' ex parte application (filed Thursday, September 26, 2024, with September 27 being a state holiday) to hear the motion to abate on October 10, 2024, at the same time as the discovery motions. The court indicated in its order, dated Monday, September 30, 2024, that if plaintiff wished to file a response to the motion to abate, that it should do so by Friday, October 4, 2024. The court has received no response on behalf of plaintiff.

Instead, the court has now received, on October 7, 2024, a stipulation from the parties to vacate the trial date, and on October 8, 2024, a separate stipulation to continue the hearing on the motion for summary judgment. No explanation has been provided as to whether this renders moot the motion to abate, or what impact this has, if any, on the discovery motions. There has been no request to withdraw the motion to abate.

2. Discovery Motions

In any event, it appears that the discovery motions are now largely moot, because overdue responses to the discovery at issue were finally served on Rome's behalf on September 26, 2024, more than two months after they were due. September 26 is also the date on which plaintiff's counsel filed an opposition to the discovery motions, arguing that the failure to respond earlier was "inadvertent" and that Sol Healthcare has not been prejudiced by the late responses. In reply, defendants argue that they have indeed been prejudiced by the late responses, given that it was the plaintiff's side that requested a preferential trial setting, and it is now only a month before the current trial date. Defendants argue that Sol Healthcare is still entitled to monetary sanctions for plaintiff's discovery misconduct.

The court ultimately finds that the plaintiff's side did not act with substantial justification in delaying its discovery responses for more than *two months*, especially after having sought an accelerated trial date within *four months*. The court also finds the claim that

the failure to respond was "inadvertent" to be lacking in credibility. Finally, the purpose of discovery sanctions is compensatory, not punitive, and Sol Healthcare is entitled to the costs of having had to bring these motions. The fact that plaintiff did not provide responses until the very due date of the opposition to the motions raises a strong inference that responses would not have been provided but for the filing of the motions.

At the same time, while the court finds that the amounts sought for the interrogatory motions are not unreasonable ($605.00 each), the court does not understand why Sol Healthcare has requested $1,402.50 for the RFA motion and $1,155.00 for the inspection demand motion, given that the text of these motions and briefs is essentially the same boilerplate text in each instance. The court also does not see why Sol Healthcare felt the need to file four separate motions, four separate opening briefs, and four separate reply briefs, when all of the issues could easily have been presented in a single document that still would have been well within the 15-page limit. Each opening memorandum was barely three pages long.

Accordingly, the court orders a total monetary sanction in the amount of **$1,650.00** against the plaintiff's side (including plaintiff's counsel, jointly and severally), to be paid to Sol Healthcare within 30 days of notice of entry of this order. This represents six hours at counsel's hourly rate of $275 per hour, for all four motions.

3. Motion to Abate

As for the motion to abate, as noted above, no explanation has been given as to whether a ruling is still sought on the motion, given the two stipulations filed on October 7, 2024 and October 8, 2024. The court is inclined to sign the stipulations, vacating the current trial date and continuing the summary judgment hearing date, given that there is no longer a basis for a preferential trial setting. But the court has received minimal information from the parties as to the status of the case, and so they are therefore ordered to appear to update the court.

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