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: September 19, 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	22CV405048	Jane Doe v. County of Santa Clara et al.	Click on LINE 1 or scroll down for ruling.
LINE 2	24CV431433	Sharmin Qureshi v. USA West Province, Society of Jesus et al.	Click on LINE 2 or scroll down for ruling
LINE 3	23CV417184	Thomas Vo v. Technology Credit Union	Click on LINE 3 or scroll down for ruling in lines 3-4.
LINE 4	23CV417184	Thomas Vo v. Technology Credit Union	Click on LINE 3 or scroll down for ruling in lines 3-4.
LINE 5	23CV409585	Michael Achter v. Hyundai Motor America	Click on LINE 5 or scroll down for ruling.
LINE 6	23CV425445	Fortune Vieyra v. San Jose Day Nursery et al.	Motion to dismiss cause of action for race and gender discrimination, or in the alternative, to file a third amended complaint: as defendants correctly point out, this motion is MOOT, given the court's September 5, 2024 order sustaining the demurrer to the second amended complaint (which addressed the cause of action for race and gender discrimination). The motion is therefore DENIED.
LINE 7	24CV429748	Alberto Guadalupe Aguilar v. Joseph J. Albanese, Inc. et al.	Motion to be relieved as counsel: parties to appear.

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Calendar Line 1
Case Name: *Jane Doe v. County of Santa Clara et al.*
Case No.: 22CV405048

I. BACKGROUND

This is a lawsuit arising from the alleged sexual assault of plaintiff Jane Doe by defendant Mohammadreza Rohaninejad, M.D. The County of Santa Clara (the "County"), originally sued as O'Connor Hospital, is also a defendant.

The original complaint, filed on October 3, 2022, stated 13 causes of action against O'Connor Hospital, O'Connor Hospital Foundation, and Rohaninejad. After the court granted Doe relief from the government claim filing requirements, Doe filed a first amended complaint ("FAC") on July 21, 2023, stating eight causes of action: (1) Gender Violence (against Rohaninejad and Does); (2) Sexual Harassment (against all defendants); (3) Sexual Assault (against all defendants); (4) Sexual Battery (against all defendants); (5) Intentional Infliction of Emotional Distress (against all defendants); (6) Negligence (against all defendants); (7) Fraudulent Concealment (against the County and Does); and (8) Breach of Mandatory Duty (against the County).

The County demurred to the second through eighth causes of action in the FAC, and on February 13, 2024, the court sustained the demurrer with leave to amend.[1] Doe then filed the operative second amended complaint ("SAC") on March 11, 2024, which also states eight causes of action but now only two against the County: (1) Gender Violence (against Rohaninejad and Does); (2) Sexual Harassment (against Rohaninejad and Does); (3) Sexual Assault (against Rohaninejad and Does); (4) Sexual Battery (against Rohaninejad and Does); (5) Intentional Infliction of Emotional Distress (against Rohaninejad and Does); (6) Negligence (against Rohaninejad and Does); (7) "Vicarious Liability for Negligence by Government Employee" (against the County and Does); and (8) "Vicarious Liability for Negligence by Independent Contractor" (against the County and Does). There are no exhibits attached to the SAC.

The complaint and FAC alleged that Rohaninejad sexually assaulted Doe while she was a patient at O'Connor Hospital from July 13 to July 14, 2021, after she was admitted for emergency gallbladder surgery. The County was named as a defendant because it owns and operates O'Connor Hospital. The SAC makes the same or similar allegations but now adds the "alternative" theory that Rohaninejad "negligently treated" Doe in a non-sexual manner, causing physical and psychological harm.

The County filed a demurrer to the SAC on April 30, 2024, which Doe opposes.

II. REQUEST FOR JUDICIAL NOTICE

The County has submitted a request for judicial notice with its reply. "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

[1] The court takes judicial notice of the February 13, 2024 order on its own motion pursuant to Evidence Code section 452, subdivision (d).

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."

The County seeks judicial notice of five documents, attached as Exhibits A-E to the request: the original complaint, Doe's petition and reply in support of her request for relief from government claim filing requirements, and the FAC and Doe's opposition to the demurrer to the FAC. The Court GRANTS the request under Evidence Code section 452, subdivision (d). Court records cannot be judicially noticed as to the truth of their contents (see *Oh v. Teachers Ins. & Annuity Assn. of America* (2020) 53 Cal.App.5th 71, 79-81), but the court can take notice of, and compare, the allegations and arguments in these documents with the currently operative pleading.

III. DEMURRER TO THE SAC

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 the court may take judicial notice. 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 Bonnie Phan in support of the demurrer only to the extent that it discusses the meet-and-confer efforts required by statute. The court has not considered the attached exhibits.

"Where a pleading includes a general allegation, such as an allegation of an ultimate fact, as well as specific allegations that add details or explanatory facts, it is possible that a conflict or inconsistency will exist between the more general allegation and the specific allegations." (*Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1235.) "To

handle these contradictions, California courts have adopted the principle that specific allegations in a complaint control over an inconsistent general allegation." (*Id*. at pp. 1235–1236.) "Under this principle, it is possible that specific allegations will render a complaint defective when the general allegations, standing alone, might have been sufficient." (*Id*. at p. 1236.) "It is well established that in the context of a demurrer, specific allegations control over more general ones." (*Chen v. PayPal, Inc*. (2021) 61 Cal.App.5th 559, 571-572 [citing *Perez* among others].)

Code of Civil Procedure section 430.60 states that "[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."].) While the County's "sham pleading" argument is made for the first time in its reply brief, the court already considered the contradictions between the allegations of intentional conduct in the complaint and FAC and the attempt to recast this conduct as negligent, as they were apparent from the SAC itself and the arguments in Doe's opposition.

B. Basis for the Demurrer

The County demurs to the SAC's seventh and eighth causes of action on the ground that they fail to state sufficient facts because they are based on a theory of vicarious liability, and the County cannot be vicariously liable for Rohaninejad's actions outside the scope of his employment or his work as an independent contractor. (See Notice of Demurrer and Demurrer at pp. 1:25-2:12.) The County also contends that the "peculiar risk" doctrine does not apply to intentional torts such as sexual assault.

C. Discussion

The court sustains the County's demurrer to the SAC's seventh and eighth causes of action, for the reasons that follow.

1. Allegations of Sexual Assault

The SAC contains essentially the same allegations regarding sexual assault by Rohaninejad as in the original complaint and FAC. For the same reasons that the court previously found these allegations to be an insufficient basis for vicarious liability under Government Code sections 815.2 and 815.4, so the court finds these allegations to be insufficient to support the seventh and eighth causes of action in the SAC. (See February 13,

2024 Order, pp. 7:20-10:22.) First, the SAC's allegations that the intentional actions of Rohaninejad toward Doe were either within the scope of his employment or part of his status as an alleged independent contractor for the County are examples of the types of "contentions, deductions or conclusions of fact of law" that the court is not required to accept as true on demurrer. (See e.g., SAC at ¶ 5, 6, 10, 50, 66 and 86.) Second, "[a]n 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." (*Delfino v. Agilent Technologies, Inc*. (2006) 145 Cal.App.4th 790, 812-813 (*Delfino*).) This principle has been held to apply in cases involving sexual assaults. (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.)[2]

"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."].) As this court previously determined, Rohaninejad's alleged sexual assault of Doe was not within the scope of his employment as a matter of law, and this determination applies to both pre- and post-operative physical examinations of Doe by Rohaninejad.

Finally, as the court noted in its February 13, 2024 order, "the vicarious liability standard for independent contractors is exactly the same as the vicarious liability standard for employees. . . . [Rohaninejad's] alleged status as an independent contractor adds nothing to the viability of the causes of action." (Feb. 13, 2024 Order at p. 10:18-22.) Both the seventh and eighth causes of action fail to state sufficient facts to support claims against the County because the County cannot be vicariously liable for Rohaninejad's alleged acts of intentional sexual assault.

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[2](See also *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1005 [county held not vicariously liable for deputy sheriff's unwanted touching and sexual propositioning of his female coworkers during work hours; "[i]f an employee's tort is personal in nature [as the deputy's was held 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].)

2. Allegations of "Negligent" Treatment Through "Aggressive Conduct and Physical Touching"

To the extent that the SAC now contains a new, "alternative" theory that Rohaninejad's actions were "negligent" because he engaged in "inappropriate and aggressive conduct and physical touching during examination," the court concludes that these allegations must be disregarded. As noted above, the court may consider inconsistent allegations from earlier pleadings when ruling on a demurrer. In this case, the court finds that the allegations in the complaint and FAC that Rohaninejad's actions were "sexual assault" and "sexual battery" to mean that his alleged actions were both intentional and sexual in nature. (See Complaint, ¶¶ 3.a, 6, 32, 43, 49, 52, 61, 63, 69, 78, 81, 104, 112, 131, 143; see also FAC, ¶¶ 2.a, 5, 33, 39, 44, 50, 53, 64, 66, 67, 68, 76, 90, 105 and 107.) The new allegations in the SAC asserting that Rohaninejad's actions were somehow "negligent" (yet still "aggressive" and involving physical contact) (e.g., SAC, ¶¶ 2.a, 5, 11, 12, 34, 53, 71, 87- 88, 90) are directly inconsistent with the prior allegations. "While inconsistent theories of recovery are permitted, a pleader cannot blow hot and cold as to the facts positively stated." (*Manti v. Gunari* (1970) 5 Cal.App.3d 442, 449, internal citation omitted.) Further, the arguments contained in Doe's opposition to the prior demurrer confirmed that the causes of action in the earlier pleadings were based on Rohaninejad's intentional conduct; they contradict allegations in the SAC that his actions of abuse and assault were somehow merely negligent. A court may treat a party's admissions in a brief as contradicting allegations in a complaint. (See, e.g., *Artal v. Allen* (2003) 111 Cal.App.4th 273, 274, fn. 2 ["'While briefs and argument are outside the record, they are reliable indications of a party's position on the facts as well as the law, and a reviewing court may make use of statements therein as admissions against the party. [Citations.]'"]; *Mangini v. Aerojet-General Corp*. (1996) 12 Cal.4th 1087, 1097–1098 [concessions in party's brief may be taken as admissions against the party].)

"A negligent person has no desire to cause the harm that results from his carelessness . . . and he must be distinguished from a person guilty of willful misconduct, such as assault and battery, who intends to cause harm." (*Mahoney v. Corralejo* (1974) 36 Cal.App.3d 966, 972 ("*Mahoney*").) "Willfulness and negligence are contradictory terms." (*Id*.) "If conduct is negligent, it is not willful; if it is willful, it is not negligent." (*Id*.) "'No amount of descriptive adjectives or epithets may turn a negligence action into an action for intentional or willful misconduct.'" (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 413, quoting *Mahoney* at p. 973.) The reverse is also true. Doe cannot now assert that Rohaninejad's actions were not intentional because they were "negligent." Pursuant to the sham pleading doctrine, the court "may disregard amendments that omit harmful allegations in the original complaint or add allegations inconsistent with it. [Citations]." (*Falcon v. Long Beach Genetics, Inc.* (2014) 224 Cal.App.4th 1263, 1281.) The court does so here, disregarding amendments to the SAC that are inconsistent with the original complaint and FAC.

3. The "Peculiar Risk" Doctrine

The SAC contains allegations regarding "peculiar risk" in the eighth cause of action, but the court ultimately finds that these allegations are also insufficient to support liability on the part of the County. (See SAC, ¶¶ 93, 96 & 98.) "Under the peculiar risk doctrine, a person who hires an independent contractor to perform work that is inherently dangerous can be held liable for tort damages when the contractor's negligent performance of the work causes injuries

to others. By imposing such liability without fault on the person who hires the independent contractor, the doctrine seeks to ensure that injuries caused by inherently dangerous work will be compensated, that the person for whose benefit the contracted work is done bears responsibility for any risks of injury to others, and that adequate safeguards are taken to prevent such injuries." (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 691.) In this case, the work Rohaninejad was to perform—a physical examination of Doe before and after emergency gallbladder surgery—cannot reasonably be construed as "inherently dangerous" work.

"The peculiar risk doctrine can best be explained by examples of the types of risks which have been found to come within its scope. Such risks include being struck by an automobile while eradicating traffic lines on a busy street, being run over by dump trucks backing up during construction work, explosions while painting the inside of a tank with volatile paint, falling while working on a 10-foot high wall or on a 20-foot high bridge, electrocution while operating a crane near high voltage wires during bridge construction work, and a cave-in while working in a 14-foot deep trench." (*Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1183 [internal citation omitted].) "[Plaintiffs] have provided no authority that this doctrine, which originated to hold landowners responsible for the negligence of contractors engaged to perform work on their property, has ever been applied in the context of a corporation contracting with a doctor to provide 'medical care' to a third party, nor have they made any argument as to why the doctrine should be applied in this type of situation." (*Id*.)

4. 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 does not explain how the seventh and eighth causes of action could be further amended, but only includes a generic request for leave to amend. (See Opposition, p. 9:17-18.)

As there is no potentially effective amendment apparent to the court that would be consistent with Doe's theory of the case, further leave to amend the seventh and eighth causes of action is denied.

In short, the court SUSTAINS the demurrer to the seventh and eighth causes of action without leave to amend.

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Calendar Line 2
Case Name: *Sharmin Qureshi v. USA West Province, Society of Jesus et al.*
Case No.: 24CV431433

Plaintiff Sharmin Qureshi filed this action against defendants Sacred Heart Jesuit Center ("SHJC"), USA West Province, Society of Jesus ("West Province"), George Wagner, Joseph O'Keefe, and Lisa Bishop Smith, based on defendants' alleged harassment and discrimination against Qureshi. Qureshi has since dismissed all of the harassment and discrimination causes of action, as well as defendant SHJC, leaving only a single cause of action for defamation against the remaining defendants: West Province, Wagner, O'Keefe, and Smith (collectively, "Defendants"). Defendants now bring a special motion to strike the defamation cause of action (paragraphs 24 and 74-85) in the first amended complaint ("FAC"). For the reasons that follow, the court grants the motion.

I. BACKGROUND

According to the allegations of the FAC, in July 2019, Qureshi accepted a position as Medical Director for SHJC. (FAC, ¶ 14.) Wagner served as the Superior Father at SHJC, O'Keefe served as interim administrator, and Smith served as the provincial assistant of healthcare. (*Id.* at ¶ 15.) Qureshi alleges that in 2021, Wagner, O'Keefe, and Smith began harassing and discriminating against her because of her Muslim religion. (*Id.* at ¶ 16.) On July 17, 2022, Defendants hired Dr. Charles Brugh as an administrator at SHJC. (*Id.* at ¶ 17.) Qureshi allegedly reported the discrimination and harassment she experienced to Brugh, who consulted with staff at SHJC, substantiating Qureshi's claims. (*Id.* at ¶¶ 18-19.) On January 17, 2023, Brugh prepared a complaint reporting the harassment and discrimination and sent it to Defendants, who allegedly failed to follow up and investigate. (*Id.* at ¶ 20.) On February 1, 2023, Defendants placed Brugh on administrative leave for raising Qureshi's complaint to "a higher level." (*Id.* at ¶ 21.) On May 3, 2023, Defendants gave Qureshi 60 days' notice of termination of her employment contract. (*Id.* at ¶ 22.) Following her termination, Qureshi learned that Defendants "spread rumors to Jesuits and other potential patients not to use Plaintiff's services in the future because Plaintiff is not a competent doctor and that Defendants fired her." (*Id.* at ¶ 24.)

Qureshi filed her original complaint on February 6, 2024 and then the FAC on February 26, 2024, alleging causes of action for: (1) willful misclassification in violation of Labor Code section 226.8; (2) discrimination in violation of Government Code section 12940 et seq.; (3) harassment in violation of Government Code section 12940 et seq.; (4) retaliation in violation of Government Code section 12940 et seq.; (5) failure to prevent in violation of Government Code section 12940 et seq.; (6) wrongful termination in violation of public policy; (7) defamation; (8) failure to provide employment records in violation of Labor Code section 226; and (9) failure to provide personnel records in violation of Labor Code section 1198.5.

As noted above, only the seventh cause of action for defamation remains in this case. On June 3, 2024, Defendants filed the present motion to strike that cause of action. Qureshi opposes.

II. REQUESTS FOR JUDICIAL NOTICE

Both sides have submitted requests 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 issues before the court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, fn. 18, 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, § 450, 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. Defendants' Requests

Defendants' request cites Evidence Code section 452, subdivisions (c) and (h), and request that the court judicially notice six documents. (See Defendants' Request for Judicial Notice, pp. 1-3.) Exhibit 1 is an accusation and complaint filed by the Attorney General of California with the California Department of Consumer Affairs on January 27, 2023. Exhibit 2 is a letter from the California Department of Consumer Affairs dated March 25, 2021. Exhibit 3 is a screenshot of the California Department of Consumer Affairs "medical license lookup" for Qureshi's medical license as it appeared on or around February 1, 2023. Exhibit 4 is a screenshot of the California Department of Consumer Affairs' website "license lookup search details for TOBIIT, Inc." Exhibit 5 is a statement of information on file with the California Secretary of State for TOBIIT, Inc. Exhibit 8 is a screenshot of Qureshi's medical practice website.[3]

The court GRANTS judicial notice of Exhibits 1-5. Evidence Code section 452, subdivision (c), permits a court to 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." (Evid. Code, § 452, subd. (c).) Evidence Code section 452, subdivision (h), permits a court to take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subd. (h).) Exhibits 1 and 2 are official acts of the executive branch. (See *Nativi v. Deutsche Bank National Trust Co.* (2014) 223 Cal.App.4th 261, 281, fn. 3 [court took judicial notice of a letter from the Federal Deposit Insurance Corporation].) Exhibits 3-5 are official records of government agencies. (See *In re Israel O.*, 233 Cal.App.4th 279, 289 fn. 8 [taking judicial notice of materials "posted as reference sources on the official websites of the responsible federal agencies"].) At the same time, the court does not take judicial notice of the truth of disputed factual matters contained in Exhibits 1-5. (See *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 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

[3] Defendants' request seeks judicial notice of Exhibits 1-5 and 8. Exhibits 6 and 7 are part of a separate declaration.

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.]"].)

The court DENIES judicial notice of Exhibit 8. Defendants provide no legal support for their statement that "the existence of a public website (Exhibit 8) is capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Defendants' Request, p. 3:7-9; see *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 889 ["While there may be federal cases that adopt this approach, frequently without analysis [citation], we know of no 'official Web site' provision for judicial notice in California. [Citation.] 'Simply because information is on the Internet does not mean that it is not reasonably subject to dispute.' [Citation.]"].)

B. Qureshi's Requests

Qureshi requests the court judicially notice four documents "because they are records of this court." (Plaintiff's Request, p. 2:6.) Exhibit 1 is the original complaint in this matter, filed on February 6, 2024. Exhibit 2 is the FAC in this matter, filed on February 26, 2024. Exhibit 3 is a Request for Dismissal filed on May 24, 2024. Exhibit 4 is a Request for Dismissal filed on July 12, 2024.

The court DENIES judicial notice of Exhibit 2 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 pleading under review on demurrer].) The court GRANTS judicial notice of Exhibits 1, 3, and 4 under Evidence Code 452, subdivision (d). Evidence Code 452, subdivision (d) permits a court to take judicial notice of records of any court of this state. (Evid. Code, § 452, subd. (d).)

III. SPECIAL MOTION TO STRIKE

A. General Legal Standards

Code of Civil Procedure section 425.16 authorizes a person to bring a special motion to strike allegations "arising from any act . . . in furtherance of [his or her] right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (Code Civ. Proc., § 425.16, subd. (b)(1).) This is commonly referred to as an "anti-SLAPP" motion.

Courts evaluate anti-SLAPP motions using a two-step analysis. (*Country Side Villas Homeowners Assn. v. Ivie* (2011) 193 Cal.App.4th 1110, 1116.) "First, the moving defendant must identify 'all allegations of protected activity' and show that the challenged claim arises from that activity. [Citations.]" (*Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 934.) "Second, if the defendant makes such a showing, the 'burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated.' [Citation.] Without resolving evidentiary conflicts, the court determines 'whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment.' [Citation.]" (*Ibid*.)

1. First Step: Protected Activity

"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 [Code of Civil Procedure] section 425.16, subdivision (e). [Citations.]" (*Collier v. Harris* (2015) 240 Cal.App.4th 41, 50-51.) Examples of protected speech include:

> (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).)

"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.' [Citations.]" (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 670.)

2. Second Step: Probability of Prevailing

The plaintiff meets its burden of showing a probability of prevailing by demonstrating "'that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [Citations.]" (*Soukop v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291 (*Soukop*), quoting *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548].) This "probability of prevailing" standard is similar to the standard governing a motion for summary judgment in that it is the plaintiff's burden to make a prima facie showing of facts that would support a judgment in the plaintiff's favor. (See *Taus v. Loftus* (2007) 40 Cal.4th 683, 714.) Stated differently, the "plaintiff need only establish that his or her claim has 'minimal merit' [citation] to avoid being stricken as a SLAPP. [Citation.]" (*Soukup, supra*, 39 Cal.4th at p. 291.)

A plaintiff must show that there is admissible evidence that, if credited, would be sufficient to sustain a favorable judgment. (See *McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 108.) While the burden on the second prong belongs to the plaintiff, in determining whether a party has established a probability of prevailing on the merits of his or her causes of action, a court considers not only the substantive merits of those causes of action, but also all defenses available to them. (See *Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 398.) Affidavits or declarations not based on personal knowledge, or that contain hearsay or impermissible opinions, or that are argumentative, speculative or conclusory, are insufficient to show a "probability" that the plaintiff will prevail. (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26.)

B. Discussion

1. Protected Activity

Defendants focus on three of the four categories set forth in Code of Civil Procedure section 425.16, subdivision (e): "(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." (Memorandum of Points and Authorities in Support of Defendants' Special Motion to Strike ("MPA"), pp. 10:9-13:27.)

First, Defendants contend that SHJC terminated Qureshi's contract because of "the State's Accusation of gross negligence in her care of a Jesuit," and that this public Accusation "was a matter of public concern and public information." (*Id.* at p. 6:25-26.) Defendants note that the Department of Consumer Affairs publicly listed the status of Qureshi's medical license upon commencing the investigation into the Accusation. (*Id.* at p. 12:7-10.) Given this, Defendants argue that the "alleged statements to their patients and employees" notifying their patients and employees of the status of Qureshi's medical license and her quality of care—statements that form the basis of Qureshi's cause of action for defamation—"are all protected conduct" under subdivisions (e)(3) and (e)(4) (*Id.* at p. 10:9-11; p. 12:19.)

Second, Defendants argue that the alleged statements were 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 under Code of Civil Procedure section 425.16, subdivision (e)(2). (*Id.* at p. 13:1-27.) In her opposition brief, Qureshi addresses Defendants' arguments under subdivision (e)(2), but she does not address subdivisions (e)(3) and (e)(4) at all.

a) Issue of Public Interest

The court agrees with Defendants that California Courts "have held that statements . . . made to warn consumers about the use of a doctor's services are a matter of public concern." (MPA, p. 10:27-28; see *Yang v. Tenet Healthcare Inc.* (2020) 48 Cal.App.5th 939, 948-949 (*Yang*) ["[T]he hospital's directive that doctors should no longer refer patients to Yang is similar to a statement made by a third party to aid and protect consumers, the latter of which has consistently been held to constitute protected activity under the anti-SLAPP statute. [Citations.] Defendants telling doctors to not refer patients to Yang is akin to consumer protection information in that defendants ostensibly seek to protect the patients' interests . . . . Stating that a doctor should not have patients referred to her because she is unqualified and unethical is not a 'slight reference to the broader public issue' of physicians' qualifications [citation]; rather, it directly contributes to the discourse by contending a physician lacks those qualifications."]; *Healthsmart Pacific, Inc. v. Kabateck* (2016) 7 Cal.App.5th 416, 429 ["members of the public, as consumers of medical services, have an interest in being informed of issues concerning particular doctors and health care facilities [citations]"]; *Carver v. Bond* (2005) 135 Cal.App.4th 328, 344 ["The article warned readers not to rely on doctors' ostensible experience treating professional athletes, and told what it described as 'a cautionary

tale' of plaintiff exaggerating that experience to market his practice. Since the statements at issue served as a warning against plaintiff's method of self-promotion, and were provided along with other information to assist patients in choosing doctors, the statements involved a matter of public concern."].)

The circumstances here closely resemble those in *Yang*, where plaintiff Yang was a doctor who sued a hospital, its medical staff, and individual doctors for falsely stating to "healthcare providers," "medical practices," Yang's "patients," and "members of the general public" that Yang did not have privileges for certain procedures. (*Yang, supra,* 48 Cal.App.5th at p. 943.) Defendants in *Yang* also allegedly told these people that she "rendered care below applicable standards of practice," that "[h]er behavior and medical ethics were below applicable standards," that she was not "qualified or competent to practice her specialties," that she was "dangerous to [her] patients and to employees and members" of the hospital's medical staff, and that she was "'under investigation.'" (*Ibid*.) The defendants in *Yang* argued that these statements "were made in furtherance of the exercise of the right of free speech in connection with a public issue or an issue of public interest," citing Code of Civil Procedure section 425.16, subdivision (e)(4). (*Id.* at p. 944.) The Court of Appeal agreed and held that subdivision (e)(4) did apply. (*Yang, supra,* 48 Cal.App.5th at p. 949.) The allegations that defendants informed Yang's patients and the general public that "she was generally unqualified, as well as [a defendant's] statement that the hospital had directed several doctors to 'no longer refer patients' to Yang," contributed to a public issue because these statements "were communicated to the public, not just to discrete doctors or hospital staff members" and the "hospital's directive that doctors should no longer refer patients to Yang is similar to a statement made by a third party to aid and protect consumers." (*Id.* at p. 948.) Statements "aimed at protecting members of the public who might see a doctor are sufficiently broadly applicable." (*Id.* at p. 949.)

Here, the court finds that Code of Civil Procedure section 425.16, subdivision (e)(4), similarly applies to the statements about Qureshi. The FAC alleges that Defendants "spread rumors to Jesuits and other potential patients not to use Plaintiff's services in the future because Plaintiff is not a competent doctor and that Defendants fired her." (FAC, ¶ 24.) "These false and defamatory statements included express and implied statements by Defendant's employees to employees of Defendant and to the public that 'Plaintiff was not a good doctor and no one shall use her professional services.'" (*Id.* at ¶ 75.) These allegedly false statements are the same types of allegedly false statements that were at issue in *Yang*.

Qureshi's opposition brief and supporting declarations add details regarding more allegedly defamatory statements. Yet, as noted in Defendants' reply brief, many of these statements appear to have occurred while SHJC still employed Qureshi and Brugh, which is a different timeframe from what is alleged in the FAC. (See, e.g., Declaration of Sharmin Qureshi in Support of Plaintiff's Opposition ("Qureshi Decl."); Declaration of Charles Brugh in Support of Plaintiff's Opposition ("Brugh Decl.").) According to the allegations in the FAC, SHJC placed Brugh on administrative leave on February 1, 2023 and terminated Qureshi's employment on July 7, 2023. (*Id.* at ¶¶ 21, 23.) The allegations of the FAC are directed to defamatory statements that "occurred in or around July through September of 2023," after Qureshi was terminated, and that focus on whether Defendants "fired" Qureshi, whether Qureshi "was not a good doctor," and whether "no one should use [Qureshi's] services." (FAC, ¶¶ 24, 75.) As such, these new allegations in the opposition fall outside the scope of this special motion to strike, which are limited to the statements alleged in the FAC.

Again, the court finds that the statements made to Jesuit patients about Qureshi, as alleged in the FAC, are similar to those made in *Yang*, where the court held that the statements regarding Yang's lack of privileges to perform certain procedures and competence as a doctor, and directing other doctors not to refer patients Yang, "directly contribut[ed] to the [public] discourse" and was akin to "consumer protection information" by questioning Yang's competence and ethicality. (*Yang, supra,* 48 Cal.App.5th at pp. 943, 948-949.) Here, Defendants allegedly stated to potential patients and priests at SHJC that Qureshi lacked competence as a doctor. (FAC, ¶ 24.) Again, as noted above, Qureshi's opposition does not even address Defendants' arguments under Code of Civil Procedure section 425.16, subdivisions (e)(3) and (e)(4), which could be interpreted as an admission that these arguments have merit.

b) Statements "In Connection With" an Issue Under Consideration or Review in an Official Proceeding

Because the court finds that Defendants' statements are protected speech under Code Civ. Proc., § 425.16, subdivision (e)(4), the court declines to address the closer question of whether these statements also fall under Code of Civil Procedure section 425.16, subdivision (e)(2).

2. Probability of Prevailing

As for whether Qureshi has a probability of prevailing in her defamation case (the second step in an anti-SLAPP analysis), the court finds that Qureshi has not met her burden of demonstrating such a probability. "The elements of a defamation cause of action are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage." (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1369.) Qureshi has not shown "'that the [challenged claims are] both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" (*Soukop, supra,* 39 Cal.4th at p. 291.)

"[I]n order to satisfy [their] burden under the second prong of the anti-SLAPP statute, it is not sufficient that plaintiffs' complaint survive a demurrer. Plaintiffs must also substantiate the legal sufficiency of their claim. It would defeat the obvious purposes of the anti-SLAPP statute if mere allegations in an unverified complaint would be sufficient to avoid an order to strike the complaint. Substantiation requires something more than that. Once the court determines the first prong of the statute has been met, a plaintiff must provide the court with sufficient evidence to permit the court to determine whether 'there is a probability that the plaintiff will prevail on the claim.' [Citation.]" (*Dupont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568.)

To meet her burden, a plaintiff must " 'demonstrate the complaint is legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [Citation.]" (*Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 809.) The FAC is the operative complaint in this matter. (See *JKC3H8 v. Colton* (2013) 221 Cal.App.4th 468, 477-478 ["A plaintiff or cross-complainant may not seek to subvert or avoid a ruling on an anti-SLAPP motion by amending the challenged complaint or cross-complaint in response to the motion. [Citations.]"].) The FAC alleges that unspecified "Defendants" defamed Qureshi to unspecified third persons by stating

"Plaintiff was not a good doctor and no one shall use her professional services," along with other unspecified but "similar" statements. (FAC, ¶ 75.) According to the FAC, the publications specifically occurred in or around "July through September of 2023." (*Id.* at ¶ 75.) The declarations submitted by Qureshi and Brugh, however, make no mention of any specific statements made by Defendants in the period from July to September 2023.

In fact, as Defendants note, many of the allegedly defamatory statements in Qureshi and Brugh's declarations appear to have been made when SHJC employed Brugh, whom SHJC allegedly placed on administrative leave in February 2023, five months prior to July 2023. (See FAC ¶ 21; Brugh Decl., ¶ 11 ["Ms. Bishop-Smith had previously made those same statements about Plaintiff's care of Father D.C. to me in my office. . . ."], ¶ 12 ["I received reports directly from nursing staff members . . ."], ¶ 13 ["Ms. Guevarra, Mr. Alvarez, and another floor nurse (whose name I do not recall) informed me that Ms. Bishop-Smith made false accusations . . ."], ¶ 14 ["As the administrator, I was involved in . . . [n]ursing staff informed me . . ."], ¶ 15 ["During my initial interview in consideration for the Administration position . . ."], ¶ 16 ["Additionally, Father George and Ms. Bishop-Smith made false statements to me . . ."].) These statements are not relevant to the allegations of the FAC, which focus on a later timeframe.

Even if these allegedly defamatory statements could form the basis of Qureshi's defamation cause of action, many of the statements constitute inadmissible hearsay, including multiple levels of hearsay. (See *People v. Flinner* (2020) 10 Cal.5th 686, 735 ["Hearsay is an out-of-court statement offered for the truth of the matter asserted and is generally inadmissible."].) For example, the Brugh Declaration contains the following allegation: "Ms. Guevarra, Mr. Alvarez, and another floor nurse (whose name I do not recall) informed me that Ms. Bishop-Smith made false accusations . . ." (Brugh Decl., ¶ 13; see also *id.* at ¶ 10 ["Father D.C. told me that Ms. Bishop-Smith had said to him . . . Father D.C. also told me that Bishop-Smith convinced him (Father D.C.) to disregard Plaintiff's recommended medication plan and told him that he should not allow Plaintiff to treat him again."], ¶ 12 ["I received reports directly from staff members . . ."]; Qureshi Decl., ¶ 7 ["Dr. Brugh informed me that a patient, Father D.C., told him that Ms. Bishop-Smith had told Father D.C. . . ."], ¶ 8 ["Ms. Guevarra informed me . . ."], ¶ 9 ["[N]ursing staff informed me . . ."], ¶ 10 ["Further, Ms. Guevarra informed me that Ms. Bishop-Smith falsely . . ."], ¶ 11 ["Moreover, Ms. Guevarra and Mr. Alvarez informed me that Ms. Bishop-Smith made false accusations . . ."], ¶ 12 ["Ms. Guevarra also told me that Ms. Bishop-Smith told her . . ."], ¶ 13 ["Ms. Guevarra, Mr. Alvarez, the Staff Development Coordinator, Lourdes (last name unknown), and a nurse Jessica (last name unknown) informed me . . ."], ¶ 14 ["Additionally, Father G. and Father J. informed me that Father Joe had told them that they could refuse the medications . . ."], ¶ 15 ["Ms. Guevarra, Mr. Alvarez, and Dr. Brugh informed me that Father George and Ms. Bishop-Smith made false statements . . ."], ¶ 16 ["Additionally, Dr. Brugh told me that Father George and Ms. Bishop-Smith . . ."].)

While Qureshi correctly notes that courts typically accept as true all evidence favorable to a plaintiff and do not weigh credibility or generally evaluate the weight of the evidence in the second step of an anti-SLAPP analysis, a plaintiff must still meet her burden of demonstrating the merit of a claim through admissible evidence. (See *Kreeger v. Wanland* (2006) 141 Cal.App.4th 826, 831 ["If the defendant makes such a showing, the burden shifts to the plaintiff to establish, with admissible evidence, a reasonable probability of prevailing on the merits. [Citation.]"].) The statements above, along with many others in both Qureshi and

Brugh's declarations, constitute inadmissible hearsay and cannot support Qureshi's defamation cause of action for the purposes of an anti-SLAPP motion.[4] (See *Sanchez v. Bezos* (2022) 80 Cal.App.5th 750, 764-766 (*Sanchez*) ["Plaintiff is correct that a witness who personally hears a slanderous remark does not run afoul of the hearsay rule by testifying to the content of the remark and its speaker. Although the slanderous remark is an out-of-court statement, it is not being offered for its truth, but simply for the fact that it was uttered. Plaintiff, however, has not offered a declaration from anyone who personally heard defendants make any defamatory comments. Instead, he offered his own declaration describing what reporters purportedly told him defendants said. . . . [P]laintiff necessarily offers the reporters' out-of-court statements for their truth, because those statements are the only evidence linking the purportedly slanderous comments to defendants."].)

Qureshi's declaration does contain a subset of allegedly defamatory statements that she seems to imply (but does not explicitly state) occurred after SHJC terminated her employment, which is the relevant timeframe for purposes of the FAC. Qureshi states: "Father O. and Bishop S. told me that Father George had said that he and Ms. Bishop-Smith wanted to remove me from the Medical Director position and that I was not competent to diagnose and treat the Jesuits. Additionally, they told me that Father George stated that I was responsible for the death of Patient A. Similarly, Father L. and Father R. told me that Father George had said that he wanted me removed from the facility." (Qureshi Decl., ¶ 27.) These allegedly defamatory statements constitute hearsay, because Qureshi has not submitted a declaration "from anyone who personally heard defendants make any defamatory statements. Instead [she] has offered [her] own declaration describing what reporters purported told [her] defendants [Father George and Bishop-Smith] said." (*Sanchez, supra*, 80 Cal.App.5th at p. 765.)

The court finds that Qureshi has not met her burden of showing a probability of prevailing on her defamation cause of action. All she has submitted to the court are a series of undated, allegedly defamatory statements that either constitute hearsay or appear to be irrelevant given the post-termination timeframe alleged in the FAC. (See FAC, ¶¶ 75, 76; *Collins v. Hertz Corp.* (2006) 144 Cal.App.4th 64, 75 [it is a party's duty "to direct the court to evidence that supports their claims. It is not the court's duty to rummage through the papers to construct or resuscitate their case."].) Given this, the court need not address Defendants' other arguments regarding the application of the common interest privilege or the public disclosure of private facts. (See MPA, pp. 15:10-18:18.)

C. Attorney's Fees

The "prevailing defendant" on the motion to strike "shall be entitled" to recover his or her attorney fees and costs. (Code Civ. Proc., § 425.16, subd. (c).) "[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.) Here, the motion and reply are not accompanied by any declaration stating the fees and costs incurred in bringing the special motion to strike. Therefore, Defendants will have to bring a separate motion for attorneys' fees in order to recover any monetary award.

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[4] Defendants have filed evidentiary objections to the two declarations Qureshi submitted in support of her opposition. The court does not need to rule on these objections, except to sustain the objections based on hearsay, as the declarations are otherwise insufficient on their face.

IV. CONCLUSION

The court GRANTS Defendants' special motion to strike.

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Calendar Lines 3-4
Case Name: *Thomas Vo v. Technology Credit Union*
Case No.: 23CV417184

Plaintiff Thomas Vo moves to compel further responses to special interrogatories and requests for admissions from defendant Technology Credit Union ("TCU"). TCU filed a tardy opposition to these motions on September 9, 2024, three days after it was due.

The court GRANTS the motion and orders TCU to provide supplemental responses within 20 days of notice of entry of this order.

As with a similar motion that was heard on September 12, 2024 regarding Vo's document requests, the sole basis for TCU's opposition to this discovery is that this case is purportedly automatically stayed under Code of Civil Procedure section 916, because TCU has now appealed the court's order denying its petition to compel arbitration. The court now adopts the same reasoning as in its September 12, 2024 order to reject this argument:

> Although section 916 does provide that "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby" (Code Civ. Proc., § 916, subd. (a)), on May 18, 2023, the California Legislature passed Senate Bill 365, which contains an express exception to section 916 for appeals of an order denying a petition to compel arbitration: "Notwithstanding Section 916, the perfecting of such an appeal shall not automatically stay any proceedings in the trial court during the pendency of the appeal." (Code Civ. Proc., § 1294, subd. (a).) This new language in section 1294, subdivision (a), went into effect on January 1, 2024.
>
> Here, the court's order denying TCU's petition to compel arbitration was issued on November 9, 2023, and TCU filed its notice of appeal on November 28, 2023. Thus, this case ***was*** automatically stayed on November 28, under the prior statutory scheme. The question that remains is what happened on January 1, 2024, when the new law went into effect? Did the case remain automatically stayed, or does SB 365 mean that the case is no longer stayed pending the appeal? TCU argues that the perfecting of its appeal on November 28, 2023 "divested" the trial court of jurisdiction under the prior law and that applying the new law to the present case now would be a "retroactive" application. The court finds this argument to be unpersuasive. The question here is not whether the case was stayed from November 28, 2023 to January 1, 2024: answering this question in the negative would indeed be a retroactive application; the court answers the question in the affirmative. Instead, the critical question here is what happens to this case under the present law ***going forward***? The court concludes that allowing this case to remain automatically stayed would be directly contrary to the legislative purpose underlying SB 365. The court orders the parties to proceed with the litigation.
>
> Although the court finds TCU's argument that it is entitled to an indefinite stay to be unconvincing, the court also finds that the argument was not totally unreasonable. Accordingly, Vo's request for monetary sanctions is denied.

The court expects TCU to comply with this order and provide supplemental discovery responses within 20 days of notice of entry of this order.

It is so ordered.

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Calendar Line 5
Case Name: *Michael Achter v. Hyundai Motor America*
Case No.: 23CV409585

This is a motion for attorney's fees, costs, and expenses by plaintiff Michael Achter against defendant Hyundai Motor America ("Hyundai"). The court GRANTS the motion in part and DENIES it in part, as follows.

The parties settled this Song-Beverly Consumer Warranty Act case after a little over a year of litigation. As Hyundai notes, there were no discovery motions, depositions, or vehicle inspections in this case. There was, however, a contested motion to compel arbitration by Hyundai that this court (Judge Alloggiamento) ultimately denied. Apart from this motion, it appears that the bulk of the parties' work consisted of serving and responding to written discovery and trying to resolve this case. The terms of the parties' settlement includes an award of attorney's fees, costs, and expenses to Achter as the prevailing party, but the parties disagree on the appropriate amount of fees.

In his opening papers, Achter seeks a total of $56,293.51 in fees, costs, and expenses, consisting of a lodestar baseline of $50,240.00 for 99.7 hours of work, a 1.1x lodestar multiplier ($5,024.00), and $1,029.51 in costs and expenses. In his reply, Achter requests an additional $2,640.00 for three more hours to prepare the reply brief and one more hour to prepare for and attend the hearing on this motion, for a grand total of $58,933.51.

Having reviewed the parties' papers, the court makes the following findings and orders:

- As an initial matter, the court notes that both sides are in clear violation of rule 3.1113(d) of the California Rules of Court, which sets forth a 15-page limit for briefs. Achter's opening brief is nearly 19 pages long; Hyundai's opposition is 16 pages. No excuse is offered, and no application to file a longer brief was made by either side under rule 3.1113(e). This violation is particularly bothersome in light of the unnecessarily wordy briefs that were submitted—they are filled with grandiloquent verbiage and argumentation.

- Contrary to Hyundai's argument, the billing rates set forth in the declaration of plaintiff's counsel of $600/hour for Adam McNeile and $500/hour for Malachi Haswell are reasonable, even if they are somewhat on the high side for Song-Beverly counsel.

- At the same time, the court finds a 1.1x lodestar multiplier to be unsupported. Although the court has awarded a lodestar multiplier in a small percentage of Song-Beverly Act cases in the past, those cases were far more complicated and risky than this one; they went on for longer periods of time and had a significantly larger number of disputed (and close) issues. By contrast, nothing about this case appears to have been particularly novel, complex, or challenging. The court finds that this case involved a relatively low level of risk.

- The court disagrees with Hyundai that "pre-Complaint activities" (such as meeting with the client and preparing the complaint) are not reimbursable, even if the work may have involved the use and revision of commonly used templates. The same

goes for written discovery, which may also have relied on some templates. The court rejects Hyundai's contention that various time entries relating to settlement activities and what it calls "administrative tasks" should be disallowed. (Those "administrative tasks" that Hyundai contends "should have been done by a secretary" included drafting a case management statement and conducting legal research, which is work that the court would normally expect to be done by a lawyer.)

- The court finds Hyundai's suggestion to reduce the fees award to $12,500 to be arbitrary. Hyundai provides no explanation or calculation as to how it arrived at this amount.

- The court firmly agrees with Hyundai that 10.8 hours at $600/hour for the preparation of this motion, including the overlong and unnecessarily loquacious opening memorandum, is excessive. The court reduces this to 5.8 hours. The court also disallows the time spent (or anticipated to be spent) by Achter's counsel on a reply brief and oral argument. The reply brief consists almost entirely of a rehash of the opening brief. Thus, the court subtracts $5,640.

In summary, the court awards the following amounts in fees, costs, and expenses:

- $50,240 (fees incurred prior to the reply brief) - $3,000 = $47,240 in fees.

- $1,029.51 in costs and expenses.

The total amount awarded is **$48,269.51**.

IT IS SO ORDERED.

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