SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: August 6, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

FOR ORAL ARGUMENT: Before 4:00 PM today you must notify the:

(1) Court by calling (408) 808-6856 and

(2) Other side by phone or email that you plan to appear at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

FOR APPEARANCES: The Court strongly prefers in-person appearances. If you must appear virtually, you must use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:

https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR COURT REPORTERS: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:

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FOR YOUR NEXT HEARING DATE: Use Court Schedule to reserve a hearing date for your next motion. Court Schedule is an online scheduling tool that can be found on the court's website here:

https://reservations.scscourt.org/

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	19CV345665	SILVIA NATERA vs HYUNDAI MOTOR AMERICA	Defendant's motion for summary adjudication of the fourth cause of action is DENIED. Scroll to line 1 for complete ruling. Court to prepare formal order.
2	19CV356261	Sherry Chuang vs Shiuh Chuang et al	Off calendar.
3	21CV375332	Chris Wilson vs SoundHound Inc. et al	Defendant's motion for leave to file a cross-complaint is GRANTED. Defendant's proposed crossclaim is plainly compulsory—Defendant's proposed crossclaims and Plaintiff's complaint both relate to Plaintiff's employment with and termination by Defendant. (*Align Technology, Inc. v. Tran* (2009) 179 Cal. App. 4th 949, 962.) And the parties' arguments regarding laches demonstrates the fact intensive analysis necessary to determine whether the proposed claims would be barred by that doctrine. "Laches is an equitable defense. It consists of a failure on the part of a plaintiff to assert his rights in a timely fashion accompanied by a period of delay with consequent results prejudicial to the defendant; in proper circumstances, it constitutes an equitable bar to the maintenance of a plaintiff's alleged cause of action. A mere delay, considered alone, does not usually constitute laches; normally, in order to be an effective bar, the delay must be disadvantageous to a defendant, and constitute a quasi-estoppel. (*Cahill* v. *Superior Court*, 145 Cal. 42 [78 P. 467]; *Swart* v. *Johnson*, 48 Cal.App.2d 829 [120 P.2d 699]; 18 Cal.Jur.2d, Laches, § 36, p. 201.) The existence of laches is a question of fact to be determined by a weighing of all of the applicable circumstances by the trial judge." (*Rouse v. Underwood* (1966) 242 Cal. App. 2d 316, 323.) Even if the Court were to consider the unauthenticated emails Defendants submit, the Court does not have "all of the applicable circumstances" before it to determine the applicability of laches here. Defendant is ordered to file its proposed cross-complaint as a separate document within 10 days of service of the formal order, which formal order the Court will prepare.
4	22CV399482	Chris Smith vs California Waste Solutions et al	Defendants' motion seeks to compel production of records from third party witness San Jose Luxury Imports, DBA Mercedes Benz of Stevens Creek ("MBZ"). The moving papers include a proof of service of the subpoena on MBZ and proof of service of the motion on Plaintiff. However, the Court was unable to locate proof that service of the motion to compel was made on MBZ—the party whom the Court would order to produce the documents. The California Code of Civil Procedure, Rules of Court and Civil Local Rules require that the moving party serve a written notice of motion with the hearing date and time. (Code Civ. Proc. §§1005(a), 1010.) A court lacks jurisdiction to hear a motion that has not been properly served, even if the non-moving party had some type of advanced notice. (*Diaz v. Professional Community Mgmt.* (2017) 16 Cal.App.5th 1190, 1204-1205; *Five-O-Drill Co. v. Superior Court of Los Angeles County* (1930) 105 Cal. App. 232.) If the motion was properly served on MBZ, the moving parties are ordered to bring proof of service to the hearing. Otherwise, this motion is off calendar without prejudice to moving parties reserving a new hearing date and properly serving the motion.
5	22CV402705	KINGDOM OF SWEDEN vs J. Daryaie	At the June 25, 2024 hearing, Defendant agreed to produce certain documents. If such documents were produced, this August 6, 2024 hearing was to come off calendar. There is no evidence in the court file to indicate the promised documents were produced. The parties are accordingly ordered to appear for further debtor's examination.
6-7	22CV403980	Amel Mohamed vs Akamai Technologies, Inc. et al	Defendants' summary judgment motion is GRANTED. Scroll to line 6 for complete ruling. Plaintiff's motion to compel is MOOT. Court to prepare formal order. Defendants ordered to submit form of judgment within 10 days of service of the formal order.

8	23CV417060	Annabella Gonzalez vs CITY OF PALO ALTO	Defendant's demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. A notice of motion with this hearing date and time was served on Plaintiff by electronic mail on June 3, 2024. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) The demurrer is also well taken, as there are insufficient facts alleged to support Plaintiff's asserted causes of action. Indeed, Plaintiff agreed to amend her complaint to allege additional facts but never followed through on that agreement. It is Plaintiff's burden to show in what manner the complaint can be amended to overcome demurrer. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Having failed to respond to this motion, Plaintiff has not made this showing. Accordingly, Defendant's demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. Defendant is ordered to submit a judgment of dismissal within 10 days of service of this formal order. These orders will be reflected in the minutes.
9	23CV425489	TANYA PRATT vs WINGSTOP RESTAURANTS, INC. et al	Motion withdrawn by Defendant's August 1, 2024 filing.
10	24CV432377	Eric Peschke et al vs Arthur Cook et al	Pursuant to the parties' stipulation, this hearing is CONTINUED to August 20, 2024.
11	24CV432506	Leonard Orlean vs MONIQUE CORDEN et al	Defendant's special motion to strike is GRANTED. Please scroll to line 11 for complete ruling. Court to prepare formal order.
12	24CV433307	Citibank N.a. vs Brigit Ananya	Plaintiff's motion for judgment on the pleadings is GRANTED. A notice of motion with this hearing date and time was served on Defendant by U.S. mail on June 7, 2024. Defendant did not oppose the motion. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) There is also good cause to grant this motion. Defendant admits in her May 24, 2024 "First Answer to Amended Complaint" that she owes monetary payments to Plaintiff. Accordingly, Plaintiff's motion is granted. Plaintiff is ordered to submit a form of judgment to the Court for review within 10 days of the hearing. These orders will be reflected in the minutes.
13	24CV439748	Gary King vs Agus Tandiono	Defendants' demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. A notice of motion with this hearing date and time was served on Plaintiff by electronic mail on July 15, 2024. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) The demurrer is also well taken for numerous reasons, including that the property has now been transferred to a third party bona fide purchaser. It is Plaintiff's burden to show in what manner the complaint can be amended to overcome demurrer. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Having failed to respond to this motion, Plaintiff has not made this showing. Accordingly, Defendants' demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. Defendants are ordered to submit a judgment of dismissal within 10 days of service of this formal order. These orders will be reflected in the minutes.
14	2000-7-CV-389807	National Credit Acceptance Inc vs Masik Richard	Parties are ordered to appear for debtor's examination.

Calendar Line 1
Case Name: *Silvia Natera v. Hyundai Motor America*
Case No.: 19CV345665

Before the Court is Defendant Hyundai Motor America's ("Hyundai") motion for summary adjudication of the fourth cause of action in plaintiff Silvia Natera's first amended complaint ("FAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This is a lemon law action. On April 15, 2011, Plaintiff purchased a new 2011 Hyundai Santa Fe (the "Vehicle"). (FAC, ¶ 8.) The sale was accompanied by express warranties by which Hyundai undertook to preserve or maintain the utility or performance of the Vehicle or to provide compensation if there was a failure in such utility or performance. (*Ibid.*) The Vehicle was delivered to Plaintiff with serious defects and nonconformities to the warranty and it developed other serious defects and nonconformities to the warranty, including but not limited to, engine, transmission, electrical, and exterior defects. (FAC, ¶ 9.)

Plaintiff initiated this action on April 3, 2019, asserting (1) breach of express warranty, (2) breach of implied warranty, and (3) violation of Civil Code section 1793.2. On June 17, 2022, the Court (Hon. Rudy) issued its order denying Hyundai's motion for summary judgment. On July 19, 2023, Plaintiff filed her FAC, asserting (1) breach of express warranty; (2) breach of implied warranty; (3) violation of Civil Code section 1793.2; and (4) breach of contract. On July 7, 2023, the Court issued its order denying Plaintiff's motion to enforce settlement but granted Plaintiff leave to amend her complaint to add the fourth cause of action. On November 8, 2023, the Court issued its order overruling Hyundai's demurrer to the fourth cause of action. On May 10, 2024, Hyundai filed the instant motion for summary adjudication, which Plaintiff opposes.

II. Evidentiary Objections

Plaintiff raises objections to portions of defense counsel Brian Takahashi's declaration and Hyundai raises objections to plaintiff counsel Jeffrey Mukai's declaration.

The Court need not rule on Plaintiff's or Hyundai's objections as they do not fully comply with California Rules of Court, rule 3.1354. (*Vineyard Springs Estates v. Superior Court* (2004) 120 Cal.App.4th 633, 642 [trial court has duty to rule on evidentiary objections presented in the proper form];

Hodjat v. State Farm Mutual Automobile Ins. Co. (2012) 211 Cal.App.4th 1, 9 [trial court not required to give party who fails to comply with formatting requirements of California Rules of Court, rule 3.31354 a second chance to file properly formatted objections.].) Objections that are not ruled on are preserved for appellate review. (Code Civ. Proc., § 437c, subd. (q).)

III. Procedural Matters

A. Timeliness of the Motion

Code of Civil Procedure section 437c, subdivision (a), as relevant, "the motion shall be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise. The filing of the motion shall not extend the time within which a party must otherwise file a responsive pleading." (Code Civ. Proc., § 437c, subd. (a)(3).)

Trial is set for August 26, 2024. On July 29, 2024, after finding good cause, the Court granted Hyundai's ex parte application to have the instant motion specially set for hearing within 30 days of the trial date. Thus, the motion is not procedurally improper.

B. Plaintiff's Failure to File a Separate Statement

Code of Civil Procedure section 437c, subdivision (b), provides, in relevant part, "the opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating if the opposing party agrees or disagrees that those facts are disputed. The statement also shall set forth plainly and concisely any other material facts the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion for granting the motion." (Code Civ. Proc., § 437c, subd. (b)(3).)

"The requirement of a separate statement from the moving party and a responding statement from the party opposing summary judgment serves two functions: to give the parties notice of the material facts at issue in the motion and to permit the trial court to focus on whether those facts are truly undisputed." (*Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197, 1210.)

Plaintiff's opposition references "AMFs", however, a separate statement was not filed with the Court, nor was one served to Hyundai with the opposition papers. However, when a case involves simple

issues with minimal evidentiary support, there is no due process impediment to considering the motion even in the absence of an accompanying separate statement. (*Security Pacific Nat. Bank v. Bradley* (1992) 4 Cal.App.4th 89, 93-94.) Here, the motion pertains to one claim, and it does not require substantial evidentiary support. Therefore, the Court will consider the merits of the motion.

IV. Legal Standard

The pleadings limit the issues presented on a motion for summary judgment or adjudication, and such a motion may not be granted or denied based on issues not raised by the pleadings. (*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, 73 ["[T]he pleadings determine the scope of relevant issues on a summary judgment motion."].)

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*).) A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, affirmative defense, or an "issue of duty." (Code Civ. Proc., § 437c, subd. (f)(1).) Summary adjudication of general "issues" or of facts is not permitted. (*Raghavan v. The Boeing Company* (2005) 133 Cal.App.4th 1120, 1136 (*Raghavan*).) Code of Civil Procedure section 437c, subdivision (t), makes clear that the only means by which a party may seek summary adjudication of a part of a cause of action or of an issue other than an "issue of duty" is by submitting a joint stipulation of the parties to the court, specifying the issue(s) to be adjudicated, which the court must then approve before the motion can be filed.

The moving party's declarations and evidence will be strictly construed in determining whether they negate or disprove an essential element of an opponent's claim or defense. While the same standards of admissibility govern both, the opposition declarations are liberally construed while the moving party's evidence is strictly scrutinized. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; see also *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037 [evidence must be liberally construed in support of the opposing party, resolving any doubts in favor of that party].)

The moving party may generally not rely on additional evidence filed with its reply papers. (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38 ["The general rule of motion practice . . . is that new

evidence is not permitted with reply papers. This principle is most prominent in the context of summary judgment motions . . . ."]; see also *Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 252; *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316.)

Hyundai moves for summary adjudication of the fourth cause of action.

V. Analysis

Hyundai's states the following as undisputed facts: On August 6, 2018, Plaintiff emailed Hyundai and requested the Vehicle be repurchased. (Hyundai Separate Statement of Undisputed Material Facts ("Hyundai's UMF"), No. 2.) Hyundai evaluated her request and on October 17, 2018, it offered to repurchase the Vehicle, at the same time requesting further documentation from Plaintiff to provide a more detailed calculation of the amount of the repurchase. (Hyundai's UMF, No. 3.) On January 2, 2019, Hyundai sent its repurchase calculation to Plaintiff including deductions for the negative equity, GAP insurance, and service contract amounts. (Hyundai's UMF, No. 4.)

On April 3, 2019, Plaintiff filed the instant action for breach of express and implied warranty and failure to repair the Vehicle within 30 days. (Hyundai's UMF, No. 5.) On July 10, 2019, the Court sustained Hyundai's demurrer to the second cause of action. (Hyundai's UMF, No. 6.) From 2019 to 2022, Plaintiff served interrogatories, requests for admission, two sets of special interrogatories, and four sets of requests for production. (Hyundai's UMF, No. 7.) On September 11, 2019, Plaintiff was deposed and on December 17, 2019, her husband was deposed. (Hyundai's UMF, No. 8.) On June 25, 2021, Hyundai's witness Joshua Vedder was deposed. (*Ibid*.) On March 1, 2021, the parties conducted a joint inspection of the Vehicle. (Hyundai's UMF, No. 9.)

On October 25, 2021, Hyundai filed a motion for summary judgment as to the two remaining causes of action, and on June 17, 2022, the Court denied the motion. (Hyundai's UMF, Nos. 11-13.) The parties went on to complete preparations for trial on multiple occasions, and, after multiple trial continuances, trial preparations were complete as of April 2023. (Hyundai's UMF, No. 14.)

On May 6, 2019, Hyundai served a Section 998 offer of compromise on Plaintiff offering to pay $55,000.00 to Plaintiff in exchange for a transfer of possession of the Vehicle or if Plaintiff did not agree with that number, an amount could be determined under Civil Code section 1793.2, subdivision (d)(2)(B), less statutory mileage offset calculated using 14,816 miles as the numerators. (Hyundai's UMF, No. 15.)

Plaintiff did not respond to the Section 998 offer before it expired. (Hyundai's UMF, No. 16.) On November 26, 2019, the parties attended private mediation, where the matter was not resolved. (Hyundai's UMF, No. 17.) On February 12, 2021, Plaintiff served her own Section 998 offer, which agreed to dismiss the action if Hyundai paid $115,940.06, to Plaintiff, plus Plaintiff's attorney fees in an amount to be determined by the Court pursuant to statute. (Hyundai's UMF, No. 18.) Plaintiff reiterated that demand by serving identical Section 998 offers on April 21, 2021, and September 8, 2022. (*Ibid*.)

On April 2023, the parties attended a remote mandatory settlement conference ("MSC") with William Bassett as the assigned neutral. (Hyundai's UMF, No. 19.) Hyundai's counsel Michael Foley spoke with Bassett, and Hyundai's in-house counsel, Stephen Cho, was available by phone. (*Ibid*.) Hyundai's initial offer at the MSC was for a waiver of costs; its counsel was not authorized to make any of the purposed offers Plaintiff alleges. (Hyundai's UMF, No. 20.) The alleged purported offer which Plaintiff claims to have accepted has two options: (1) $54,999.00 to be paid to Plaintiff and attorney fees by motion to ("Offer 1") and (2) $55,000.00 to Plaintiff and the attorney fee motion specifically cut off as of June 11, 2019 ("Offer 2"). (Hyundai's UMF, No. 21.) Neither offer indicated who was to take possession of the Vehicle following the payment to Plaintiff. (Hyundai's UMF, No. 22.) Offer 1, which was purportedly accepted by Plaintiff, was silent as to any cutoff for attorney fees. (Hyundai's UMF, No. 23.) Following Basset's report to Hyundai's counsel that the case settled for $54,999.00 and a fee motion, Hyundai's counsel attempted to determine the terms of the purported settlement. (Hyundai's UMF, No. 24.) Bassett relayed to counsel that the parties were "free to negotiate" the remaining terms for the settlement agreement, and that if the parties could not agree on all material terms, then Hyundai would be free to contact the Court and object to the settlement, which counsel did. (*Ibid*.)

According to Defendant, settlements for Song-Beverly lawsuits, generally fall into two main categories: either the parties agree that plaintiff will transfer possession of the vehicle to defendant, with defendant paying any outstanding loan and reimbursing plaintiff for past payments in order to take possession of the vehicle (a "repurchase"); or plaintiff will accept a specified amount, usually less than the purchase price of the vehicle as a compromised claim, but retaining possession of the vehicle and maintaining any outstanding obligation to their lender (a "cash and keep settlement"). (Hyundai's UMF, No. 25.) The options create different obligations for the parties. (Hyundai's UMF, No. 26.)

1. Song-Beverly Warranty Act

"The Song-Beverly Consumer Warranty Act ("Act") was enacted in 1970. [Citation.] The Act regulates warranty terms, imposes service and repair obligations on manufacturers, distributors, and retailers who make express warranties, requires disclosure of specified information in express warranties, and broadens a buyer's remedies to include costs, attorney's fees, and civil penalties. [Citations.] It supplements, rather than supersedes, the provisions of the California Uniform Commercial Code. [Citations.]" (*Krieger v. Nick Alexander Imports, Inc.* (1991) 234 Cal.App.3d 205, 213.)

"The Act is a remedial measure intended for the protection of consumers and should be given a construction consistent with that purpose. [Citations.]" (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1103 (*Oregel*).) "[T]he only affirmative step the Act imposes on consumers is to 'permit[] the manufacturer a reasonable *opportunity* to repair the vehicle.' [Citation.] Whether or not the manufacturer's agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible." (*Id.* at pp. 1103-1104.)

2. Fourth Cause of Action- Breach of Contract

To allege a cause of action for breach of contract, a plaintiff must allege (1) the contract, (2) the plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff. (*Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 921 (*Bushell*).) The elements of a breach of oral contract are the same as those for a breach of a written contract. (*Stockon Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 453.)

Mutual assent or consent is necessary for the formation of a contract. (Civ. Code, §§ 1550, 1565.) For a meeting of the minds to exist, parties must agree on all material contract terms. (*Elyaoudayan v. Hoffman* (2003) 104 Cal.App.4th 1421, 1430 (*Elyaoudayan*).) Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings. (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 119, p. 144.) The parties' outward manifestations must show that the parties all agreed "upon the same thing in the same sense." (Civ. Code, § 1580.) If there is

no evidence establishing a manifestation of assent to the "same thing" by both parties, then there is no mutual consent to contract and no contract formation. (Civ. Code, §§ 1550, 1565 & 1580.)

Plaintiff alleges the parties entered a contract to settle her claims at the April 5, 2023, MSC, when she accepted Hyundai's offer to pay her $54,999.00 plus her attorney's fees and costs in an amount to be decided by the Court in exchange for a dismissal of the case and release of all her claims against Hyundai. (FAC, ¶ 60-62, 66.) She alleges she performed as the contract required or is excused from performance and Hyundai failed to act as required by the contract. (FAC, ¶¶ 67-68.) As a result, she has been harmed by Hyundai's breach. (FAC, ¶ 69.) Plaintiff's evidence also shows the parties agreed on the "same thing" when they agreed that Hyundai would pay Plaintiff $54,999, plus her attorney's fees and costs in an amount to be determined by the Court in exchange for dismissal of the case and release of Plaintiff's claims against Hyundai. (FAC, ¶¶ 60-62; Bassett Decl., p. 2 ["Plaintiff's attorney accepted option number one. I then confirmed with defense counsel, and defense counsel concurred accepting option one"].)

Nevertheless, Hyundai argues the parties did not enter a contract because Offer 1 did not address the disposition of the Vehicle or specify the time period for which Plaintiff is entitled to seek attorney's fees, which terms are material to the alleged contract. (Memorandum of Points and Authorities ("MPA"), p.9:25-10:8.) Plaintiff argues the agreement did not identify a specific time period for attorneys' fees because the parties did not intend to create such a limitation at the time of the agreement, which is illustrated by the parties' prior silence regarding time frame in the Section 998 offers preceding the MSC. (Opp., p.8:6-13.) Plaintiff further argues the parties' intention regarding the disposition was clear as the previous Section 998 offers all contemplated a surrender of the Vehicle and plaintiff's counsel Scot D. Wilson ratified that the Vehicle would be surrendered after the MSC. (Opp., p. 8:14-15; Wilson Decl., ¶ 24.)[1]

"The material terms of a proffered contract must be sufficiently certain to provide a basis for determining what obligations the parties have agreed to." (*Estate of Thottam* (2008) 165 Cal.App.4th 1331, 1340, citing *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811-812 (*Weddington*).) "The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy. Where a contract is so uncertain and

[1] Wilson attended the MSC along with Plaintiff.

indefinite that the intention of the parties in material particular cannot be ascertained, the contract is void and unenforceable." (*Daniels v. Select Portfolio Services, Inc.* (2016) 246 Cal.App.4th 1150, 1174 (*Daniels*).) Whether a contract is sufficiently definite is a question of law. (*Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613, 623; *Alexander, supra,* 104 Cal.App.4th at p. 141.)

"A provision that some matter shall be settled by future agreement, has often caused a promise to be too indefinite for enforcement. [Citation.] If an essential element is reserved for the future agreement of both parties, as a general rule the promise can give rise to no legal obligation until such future agreement. Since either party in such a case may, by the very terms of the promise, refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise. [Citation.]" (*Weddington, supra,* 60 Cal.App.4th at p. 812.)

The parties agreed Hyundai would pay Plaintiff $54,999, plus her attorney's fees and costs in an amount to be determined by the Court in exchange for dismissal of the case and release of Plaintiff's claims against Hyundai. (FAC, ¶¶ 60-62.) For Song-Beverly claims, the buyer has the option of replacement or restitution. (Civ. Code, § 1793.2, subd. (d)(2)(A)-(C).) Throughout this action, Plaintiff has requested restitution and not replacement. The agreement is silent as to the surrender of the Vehicle. While Plaintiff asserts that surrender of the Vehicle is customary in Song-Beverly settlements (Wilson Decl., ¶ 24), Hyundai states that the settlements fall under a "repurchase" or a "cash and keep" settlement. (Takahashi Decl., ¶ 21.) However, there is no evidence the parties ever discussed the second option. To the contrary, the parties only ever discussed repurchase in their Section 998 offers. (Hyundai's Exh. C, ¶ 5 & D, ¶ 3.) The parties' intention about the disposition of the Vehicle can be ascertained, and the silence regarding that term therefore does not render the purported contract so uncertain and indefinite that it would be void and unenforceable. (*Daniels, supra,* 246 Cal.App.4th at p. 1174.)

Regarding attorney's fees, Hyundai contends the cutoff date for fees was a material term because Offer 1 would allow for recovery of additional years of attorney's fees, whereas Offer 2 would cut off fees as of June 11, 2019 for just a difference of 1 dollar, thus, silence as to that term means there was no agreement. However, the very fact that, other than the 1 dollar difference, the only difference between Offers 1 and 2 is the date cutoff for attorneys' fees suggests that no such limitation was contemplated for Offer 1.

Hyundai's reliance on *Weddington, supra*, does not change the Court's conclusion. (*Id*. at p. 798.) There, the parties left open the terms of a licensing agreement, which was listed as a term in their settlement document signed at the end of a mediation. The court of appeal held a meeting of the minds regarding settlement terms had not been reached because the parties were later unable to reach agreement on material aspects of a licensing agreement. Here, the attorney fees term Plaintiff seeks to enforce is clear: the fees were to be determined by the court through motion practice. The term was not, as was the case in *Weddington*, left to future negotiations between the parties. There is also no evidence the parties discussed the disposition of the Vehicle or the cutoff for the attorney's fees at the MSC as was the case in *Weddington*. Hyundai's reliance on *Weddington* is thus unpersuasive.

On this record, the Court cannot conclude, as a matter of law, that these terms were essential to contract formation such that their absence renders the purported contract indefinite and as a result, void and unenforceable. Consequently, Hyundai fails to meet its burden on this motion and the motion for summary adjudication of the fourth cause of action is DENIED.

Calendar Lines 6-7
Case Name: *Mohamed v. Massachusetts Akamai Technologies Inc., et.al.*
Case No.: 22CV403980

Before the Court are Defendants', Massachusetts Akamai Technology Inc., Divya Krishna, Sarma Ayyadevara, motion for summary judgment against Plaintiff's complaint. Pursuant to the California Rule of Court, Rule 3.1308, the Court issues its tentative ruling.

I. Background

This case arises from alleged employment discrimination against Plaintiff. In August 2001, Defendant Akamai hired Plaintiff as a senior quality assurance engineer. Plaintiff alleges she first experienced discrimination when she worked with Pavan Golla, to whom she reported from 2007 to 2011. (Undisputed Material Facts ("UMF") Nos. 46-47, 49.) After Mr. Golla, Plaintiff reported to Mr. Eaton until January 2012, when she switched roles onto another team. Mr. Eaton mistreated her and gave her a "partially meets" rating on her 2011performance review ("2011 Performance Review"). (UMF No. 51.)

After switching to another team, Plaintiff did not experience further discrimination until she transferred to the Enterprise Access Application ("EAA") team in April 2018. (UMF No. 55.) Plaintiff and Ms. Nguyen were both employees on the EAA team, although they did not work together closely. (UMF Nos. 61, 63.) Allegedly, Ms. Nguyen asked Plaintiff to "dress like 'Indians'" in connection with a lunch that Akamai catered on November 8, 2018, in celebration of the Diwali holiday and questioned Plaintiff's ability to perform her job competently.

Plaintiff reported to Khurram Khani from April 2018 to September 9, 2019, when he left Akamai. (UMF Nos. 56-57, 60.) Plaintiff claims Mr. Khani discriminated against her by failing to provide training. (UMF No. 59.)

From September 10, 2019, to June 14, 2020, Plaintiff reported to Mr. Ayyadevara on the EAA team. (UMF No. 14.) Plaintiff alleges Mr. Ayyadevara refused to give Plaintiff a project to work on. Plaintiff's Indian colleagues excluded her from important meetings and excluded her from receiving information she needed to competently perform her job. Plaintiff was also excluded from necessary training.

In 2016, Plaintiff began complaining in writing about the racial imbalance at Akamai. In September 2020, Plaintiff complained she was not being promoted because she was a black, Muslim woman wearing a Hijab.

In May 2021, Plaintiff was placed on a 60-day Performance Improvement Plan. However, Plaintiff took a medical leave of absence until July, which was extended. When Plaintiff returned in late August, her job had been backfilled, and she was told she had 30 days to find a new job. Plaintiff when she did not—despite her efforts—find a job in this timeframe, she was terminated.

Plaintiff filed her complaint on September 1, 2022 alleging (1) racial discrimination, (2) religious discrimination, (3) sex discrimination, (4) disability discrimination, (5) failure to accommodate, (6) failure to engage in interactive process, (7) failure to prevent discrimination, (8) interference in violation of CFRA, (9) retaliation in violation of CFRA, (10) violation of Labor Code section 6409.6, (11) retaliation in violation of FEHA, and (12) wrongful termination in violation of public policy.

On July 24, 2023, Plaintiff dismissed the fourth, fifth, sixth, eighth, ninth, and ten causes of action and her complaint against Stephanie Miller.

II. Legal Standard

The pleadings limit the issues presented on a motion for summary judgment or adjudication, and such a motion may not be granted or denied based on issues not raised by the pleadings. (*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, 73 ["[T]he pleadings determine the scope of relevant issues on a summary judgment motion."].)

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*).) A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, affirmative defense, or an "issue of duty." (Code Civ. Proc., § 437c, subd. (f)(1).) Summary adjudication of general "issues" or of facts is not permitted. (*Raghavan v. The Boeing Company* (2005) 133 Cal.App.4th 1120, 1136 (*Raghavan*).) Code of Civil Procedure section 437c, subdivision (t), makes clear that the only means by which a party may seek summary adjudication of a part of a cause of action or of an issue other than an "issue of duty" is by submitting a joint stipulation of the parties to the court, specifying the issue(s) to be adjudicated, which the court must then approve before the motion can be filed.

The moving party's declarations and evidence will be strictly construed in determining whether they negate or disprove an essential element of an opponent's claim or defense. While the same standards of admissibility govern both, the opposition declarations are liberally construed while the moving party's evidence is strictly scrutinized. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; see also *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037 [evidence must be liberally construed in support of the opposing party, resolving any doubts in favor of that party].)

The moving party may generally not rely on additional evidence filed with its reply papers. (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38 ["The general rule of motion practice . . . is that new evidence is not permitted with reply papers. This principle is most prominent in the context of summary judgment motions . . . ."]; see also *Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 252; *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316.)

Special rules govern the allocation of the burden of proof on motions for summary judgment in wrongful termination and employment discrimination cases. (*Moore v. Regents of Univ. of Calif.* (2016) 248 Cal.App.4th 216, 233.) "California has adopted a three-stage burden-shifting test established by the United States Supreme Court for trying employment discrimination claims that are based on the disparate treatment theory. Under this *'McDonnell Douglas* test,' (1) the plaintiff must establish a prima facie case of discrimination; (2) if the plaintiff is successful, the employer must offer a legitimate nondiscriminatory reason for its actions; and (3) if the employer produces evidence on that point, the plaintiff must show that employer's reason was a pretext for discrimination." (*Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1144 [citations omitted]; see also *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433 (*King*).)

When the employer is the moving party, the initial burden rests with the employer to show that no unlawful discrimination occurred. (Code Civ. Proc., §437c(p)(2); See *Guz, supra* at pp. 354-355; *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 309; *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1523 [employee has no obligation to produce evidence until defendant "has established either the existence of a complete defense or the absence of an essential element of plaintiff's claim."].) The employer may do this by presenting admissible evidence either: negating an essential element of the employee's claim; or showing some legitimate, nondiscriminatory reason for the

action taken against the employee. (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 202-203.) A legitimate, nondiscriminatory reason is one that is unrelated to prohibited bias and that, if true, would preclude a finding of discrimination. The employer's evidence must be sufficient to allow the trier of fact to conclude that it is more likely than not that one or more legitimate, nondiscriminatory reasons were the sole basis for the adverse employment action." (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1158 (*Featherstone*) [citations omitted].)

If the employer meets the initial burden, to avoid summary judgment the employee claiming discrimination must produce substantial responsive evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence that the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination. (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 966.) "Pretext" does not require proof that discrimination was the only reason for the employer's action. It is enough that discrimination was a determinative factor; i.e., that discriminatory intent was a substantial motivating factor in the employer's decision to take the adverse action. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 (*Harris*); *Mendoza v. Western Med. Ctr. Santa Ana* (2014) 222 Cal.App.4th 1334, 1341-1342.)

A plaintiff's subjective beliefs or suspicions of improper motives primarily on conjecture and speculation do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations. (*King, supra,* 152 Cal.App.4th at p. 433;*Doe v. Dept. of Corrections & Rehabilitation* (2019) 43 Cal.App.5th 721, 733, quoting *King*; *Kerr v. Rose* (1990) 216 Cal.App.3d 1551, 1564.)

California's FEHA provides: "It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: [¶] (a) For an employer, because of the race, … sex, … [or] age, … of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 214.)

Before a person may file a civil complaint alleging a violation of this statute, they "must exhaust the administrative remedy provided by the statute by filing a complaint with the" DFEH, "and must obtain

from the [DFEH] a notice of right to sue." (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492 (*Romano*); see also *Williams v. City of Belvedere,* (1999) 72 Cal. App. 4th 84, 90 (*Williams*).) When analyzing how Government Code section 12940 applies to a FEHA claim, California courts look to California precedent and to cases interpreting similar federal employment antidiscrimination laws. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317 (Guz); *Pollock v. Tri-Modal Distribution Services, Inc*. (2021)11 Cal.5th 918 (*Pollock*).)

III. Request for Judicial Notice

Defendant's request for judicial notice of Plaintiff's complaint in this action and Plaintiff's Request for Dismissal filed July 24, 2023, dismissing Defendant Stephanie Miller and Counts 4, 5, 6, 8, 9, and 10 is GRANTED. The Court can take judicial notice of the records in the pending action, or in any other action pending in the same court or any other court of record in the United States. (Evid. Code §452(d).) Judicial notice is limited to the orders and judgments in other court files, as distinguished from the contents of documents filed therein. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113; *Arce v. Kaiser Found. Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482-484.)

IV. Evidentiary Objections

Defendants' evidentiary objections 1 through 66, to Plaintiff's declaration, are SUSTAINED. Code of Civil Procedure section 2015.5 requires a declaration to be signed, dated, and certified as true under penalty of perjury. Section 2015.5 further specifies that a declaration must either reveal a "place of execution" within California or recite that it is made "under the laws of the State of California." Plaintiff's declaration, submitted as Exhibit 23 fails to comply with these requirements. Plaintiff also cannot defeat Defendant's summary judgment motion with a declaration that contradicts her prior sworn testimony. (*Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609, 1613; *Scalf v. D.B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1521.)

Defendants' evidentiary objections 67 through 70 to the declaration of James Dal Bon are SUSTAINED for lack of authentication, personal knowledge, and foundation.

Defendants' evidentiary objections 71 through 88 to the declaration of Mr. Ahmed declaration are SUSTAINED for lack of relevance and lack of probative value in lieu of its prejudicial effect.

V. Analysis

Defendants assert summary judgment or summary adjudication is warranted because (1)

individuals (Ms. Krishna and Mr. Ayyadevara) cannot be held liable for wrongful termination in violation of public policy, retaliation, discrimination, and failure to prevent harassment or discrimination under FEHA; (2) Plaintiff failed to exhaust her administrative remedies; (3) Plaintiff cannot establish a prima facie case of discrimination or pretext based on her subjective belief; (4) Plaintiff cannot establish a prima facie case of discrimination based on Performance Improvement Plans ("PIP") that did not adversely affect her employment; (5) Plaintiff cannot refute that Defendant, Akamai terminated her employment for legitimate business reasons; (6) Defendants cannot be held liable for failure to prevent discrimination where there was no underlying discrimination; (7) wrongful termination in violation of public policy fails when an employer did not violate FEHA; (8) Plaintiff's claims for alleged discriminatory/harassing conducts of Mr. Golla, Mr. Eaton, Ms. Nguyen, and Mr. Khani are time barred; and (9) claims premised on Akamai's failure to promote or transfer Plaintiff internally that took place before January 1, 2020, is time barred. Defendants further assert Plaintiff is not entitled to punitive damages since the record is devoid of any evidence showing managing agents of Akamai engaged in or ratified oppression or malice.

A. Individual Liability

Defendants contend Ms. Krishna and Mr. Ayyadevara cannot be held individually liable for discrimination, retaliation, wrongful termination in violation of public policy, and failure to prevent harassment or discrimination under FEHA. In her opposition, while Plaintiff makes passing remarks about individual defendants' agency and ratification, she expresses her willingness to dismiss the individual Defendants. (Opposition, p. 14, lines 9-10.)

Therefore, there is no need for the Court to further analyze and address this issue.

B. Administrative Remedies

Before suing under FEHA, a plaintiff must exhaust his or her administrative remedies by filing a verified complaint with the DFEH and obtaining a right-to-sue letter. (*Rickards v. United Parcel Service, Inc.* (2012), 206 Cal. App. 4th 1523, 1526-1527; Gov. Code, §§ 12960(b), 12965(b).) Specifically, Government Code section 12960(b) provides: "Any person claiming to be aggrieved by an alleged unlawful practice may file with the department a verified complaint, in writing, that shall state the name and address of the person, employer, labor organization, or employment agency alleged to have committed the unlawful practice complained of, and that shall set forth the particulars thereof and contain other information as may be required by the department." This complaint "must . . . identify[] the conduct

alleged to violate FEHA." (*Wills v. Superior Ct.*, (2011) 195 Cal. App. 4th 143, 153, *as modified on denial of reh'g* (May 12, 2011).) Therefore, "[t]o exhaust his or her administrative remedies as to a particular act made unlawful by the [FEHA], the claimant must specify that act in the administrative complaint, even if the [administrative] complaint does specify other cognizable wrongful acts." (*Kaur v. Foster Poultry Farms LLC*, (2022) 83 Cal. App. 5th 320, 355, *reh'g denied* (Oct. 6, 2022) (quoting *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal. App. 4th 1718, 1724.) The plaintiff bears the burden of pleading and proving timely exhaustion of administrative remedies, such as filing a sufficient administrative charge with DFEH and obtaining a right-to-sue letter. (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal. App. 4th 1336, 1345.) "[I]n the context of the Fair Employment and Housing Act, [] '[t]he failure to exhaust an administrative remedy is a jurisdictional, not a procedural, defect,' and thus that failure to exhaust administrative remedies is a ground for a defense summary judgment. [Citation.]" (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal. App. 4th 1718, 1724.)

Defendants argue Plaintiff's FEHA claims are barred because her CRD complaint contains no specific instances of discrimination or supporting facts that would enable the CRD to investigate her allegations. In support, Defendants submit the following evidence:

- Defendants' counsel's email communications with CRD and request for public records regarding CCRS Case No. 202208-1787661.
- CRD's production of the requested public records on May 10, 2024, which includes a letter from Ms. Bowser, designee of custodian of records, stating "the accompanying records are true and correct copies of records kept in the regular course and scope of CRD's business and constitute the complete investigation record of the case." The produced records consist of: (a) Notice to Complainant's Attorney, right to sue, dated August 10, 2022, (b) Notice of Filing of Discrimination Complaint, dated August 10, 2022, issued to all respondents, (c) Notice of Case Closure & Right to Sue, dated August 10, 2022, issued to Plaintiff, and (d) Complaint, titled In the Matter of the Complaint of Amel Mohamed v. Massachusetts Akamai Technologies, Inc. et.al. DFEH No. 202208-1787661.
- Plaintiff's DFEH complaint and related documents, sent to Defendants by counsel of record for Plaintiff.

This evidence demonstrates insufficiency of the Plaintiff's administrative complaint. The complaint states, "Complainant was discriminated against because of complainant's race, national origin (includes language restrictions), color, religious creed - includes dress and grooming practices, sex/gender, disability (physical or mental), medical condition (cancer or genetic characteristic), age (40 and over), family care or medical leave (cfra) and as a result of the discrimination was terminated, denied hire or promotion, reprimanded, denied any employment benefit or privilege, denied reasonable accommodation for a disability, denied work opportunities or assignments, denied or forced to transfer, denied family care or medical leave (cfra)." This allegation fails to identify the particular discriminatory acts or any facts. While the complaint refers to an attached statement of facts, CRD's produced records did not contain such a statement; neither did the documents Plaintiff's counsel produced for Defendants on October 16, 2023.

To defeat summary judgment on this basis, Plaintiff submits the declaration of his counsel, Mr. Bon, and Exhibits 1 through 4, which include:

- Exhibit 1 – Copy of a document, in edit /draft format, titled "Statement of Fact" with the heading "Department of Fair Employment and Housing, State of California."
- Exhibit 2 – a computer screen image from ccrs.calcivilrights.ca.gov web pages purporting to capture DFEH case list, which includes Plaintiff's case No. 202208-17876611. The second image shows a web page, with no URL, showing uploaded files in Plaintiff's case on August 10, 2022.
- Exhibit 3 – CRD's email communications with Plaintiff's counsel's confirming receipt of his request for public records and CRD's subsequent compliance on July 11, 2024.
- Exhibit 4 – DFEH's August 10, 2022, communications containing, (a) Notice to Complainant's attorney, (b) Notice of Filing of Discrimination Complaint to all Respondent, (c) Notice of Case Closure and Right To Sue, (d) DFEH Complaint, filing date August 10, 2022, (e) Copy of a document, in edit /draft format, titled "Statement of Fact" with the heading "Department of Fair Employment and Housing, State of California."

Mr. Bon attests:

- Exhibit 1 – "The Statement Of Facts Attached To The Original DFEH Complaint August 10, 2022, is a true and correct copy of the statement of Facts I filed on August 10, 2022, with the California Civil Rights Division Department Of Fair Employment Housing to obtain my

right to sue letter for the plaintiff Amel Mohamed."

- Exhibit 2 – "The Screenshot Of My DFEH Account, Showing That I Filed The Statement Of Facts To The Account On August 10, 2022, is a true incorrect copy of a screenshot I took of my account with the DFEH showing that I filed my statement of facts with the DFEH on August 10, 2022."
- Exhibit 3 – "The Public Record Request I Made To The DFEH. To Confirm I Filed The Statement Of Facts is a true and correct copy of the email correspondence I had with the DFEH in order to place a public records request and ask them to copy the defendants with the results."
- Exhibit 4 – "The Complete Right To Sue Letter With The Statement Of Fax Filed With A DFEH On August 10, 2022, is a true incorrect copy of the complete complaint filed with the DFEH on August 10, 2022. That is been on my account with the DFEH since that date."

First, Defendants' objection to Exhibit 1 is sustained for lack of authentication. Documents must be authenticated in some fashion before they are admissible in evidence. (*Thorstrom v. Thorstrom* (2011) 196 Cal. App. 4th 1406, 1418, quoting *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 525.) "Although writings must be authenticated before they are received into evidence or before secondary evidence of their contents may be received ([Evid. Code,] § 1401), a document is authenticated when sufficient evidence has been produced to sustain a finding that the document is what it purports to be ([Evid. Code,] § 1400). The fact that conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility." (*Jazayeri v. Mao* (2009) 174 Cal. App. 4th 301, 321.) Here, Mr. Bon does not testify what the document in Exhibit 1 purports to be. Instead, he testifies that the statement of facts attached to the original DFEH complaint is a true copy of the statement he filed on August 10, 2022.

Second, neither the computer images (Exhibit 2) nor the email communications between Mr. Bon and CRD (Exhibits 3 & 4) show that a statement of facts was filed with the DFEH complaint on August 10, 2022. Mr. Bon's first computer screen image, from the URL ccrs.calcivilrights.ca.gov., merely shows that case number 2002208-17876611, titled Mohamed / Massachusetts Akamai Technologies, Inc. et.al., was filed and closed on August 10, 2022, with a right to sue issued the following date. The second image

is of a web page that merely shows a right to sue package and a complaint was created on August 10, 2022 with no reference to any statement of fact.

The Court finds Plaintiff's DFEH complaint is defective for lack of facts specifying Defendants' alleged discriminatory acts, and Plaintiff therefore failed to exhaust her administrative remedies. While this is sufficient to grant Defendants' summary judgment, the Court will nevertheless consider, in the interest of justice, the merits of Plaintiff's opposition to the remaining issues.

C. Statute of Limitation – FEHA Violations

Before January 1, 2020, individuals had one year from the unlawful practice to file a complaint with the DFEH. (*See* former Gov't Code § 12960(d). Since January 1, 2020, a "complaint alleging a violation of [FEHA] shall not be filed after the expiration of three years from the date upon which the unlawful practice or refusal to cooperate occurred," so long as that claim had not previously lapsed under the one-year statute of limitations. (Gov't Code § 12960(e)(5); 2019 Cal. Legis. Serv. Ch. 709 (A.B. 9) (West) §§ 1, 3 (extending the statute of limitations from one year to three but indicating the amendment does not "revive lapsed claims"); *see also Pollock v. Tri-Modal Distribution Servs., Inc.*, (2021) 11 Cal. 5th 918, 931 (explaining the 2020 amendment to FEHA's statute of limitations "uses virtually identical language" as the previous statute-of-limitations "but allows for a period of three years".)

Defendants contend the applicable statute of limitations bars claims against Mr. Golla, Mr. Eaton, Ms. Nguyen, and Mr. Khani because, (1) by Plaintiff's own account, Mr. Golla and Mr. Eaton could not have discriminated against her after 2012, (2) the alleged wrongful conduct of Ms. Nguyen occurred in 2018, and (3) Plaintiff stopped reporting to Mr. Khani in September 2019, when he left Akamai. (Plaintiff's Separate Statement in Opposition to Defendants' Motion ("PSSOM") 46-55, 60, 63-72.) Defendants additionally contend any claim premised on Akamai's alleged failure to transfer Plaintiff before January 1, 2020, is time-barred.

Here, Mr. Golla's, Mr. Eaton's, Ms. Nguyen's and Mr. Khani's alleged wrongful conduct was subject to the one-year statute of limitation. Therefore, Plaintiff was required to file her claims against Mr. Golla and Mr. Eaton by 2013; against Ms. Nguyen by 2019; and against Mr. Khani by September 2020. However, Plaintiff did not file her claim with DFEH until August 10, 2022. As such, Plaintiff's claims pertaining to the alleged discriminatory conduct of these individuals are time barred. Plaintiff's claim in her responses to Akamai's employment form interrogatories that she experienced an adverse employment

action based on Akamai's failure to transfer her within the past ten years and claims against Akami based on discriminatory conduct Plaintiff alleges occurred prior to January 1, 2020 are also time-barred.

In opposition, Plaintiff argues that she is not claiming damages for any acts that occurred outside the statute of limitations, instead, pursuant to the doctrine of continuing violation doctrine, evidence of these acts is presented to bolster those that fall within the statute of limitations. (Opposition p. 16, lines 4-25.) Under the continuing violation doctrine, "an employer is liable for actions that take place outside the limitations period if these actions are sufficiently linked to unlawful conduct that occurred within the limitations period." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal. 4th 1028, 1056.) A continuing violation occurs where the "employer's unlawful actions are (1) sufficiently similar in kind…; (2) have occurred with reasonable frequency; (3) and have not acquired a degree of permanence." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal. 4th 798, 823.) The issue concerning the applicability of the continuing violations doctrine is "whether the employer's conduct occurring outside the limitations period is sufficiently linked to unlawful conduct within the limitations period that the employer ought to be held liable for all of it." (*Cucuzza v. City of Santa Clara* (2002) 104 Cal. App. 4th 1031, 1042.)

Aside from a cursory argument, Plaintiff not only fails to specify which conduct fits into a pattern of reasonable frequent and similar acts, but also fails to present any evidence demonstrating that Defendants' allegedly discriminatory barred acts are sufficiently linked to unlawful acts that occurred within the limitation period.

The Court finds Plaintiff's claims arising from unlawful discriminatory conduct that occurred prior to January 1, 2020, are time-barred. To the extent Plaintiff's claims stem from post January 1, 2020, unlawful acts, the Court continues with its analysis.

D. FEHA Discrimination Claims

FEHA prohibits various forms of discrimination in employment, including discrimination based on an individual's race, religion, or gender. (Gov. Code § 12940(a).) To state a *prima facie* claim of discrimination in violation of the FEHA, Plaintiff must establish that (1) she is a member of a protected class, (2) she was performing competently in the position she held, (3) she suffered an adverse employment action, and (4) some other circumstance that suggests a discriminatory motive. (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal. App. 4th 1237, 1246.)

Plaintiff's first, second and third causes of action are for racial, religious, and sex discrimination.

Plaintiff claims she experienced adverse employment action because Akamai refused to promote and/or internally transfer her, within the past ten years, and ultimately terminated her due to her status as a black, Muslim woman.

"[T]he proper standard for defining an adverse employment action is the 'materiality' test, a standard that requires an employer's adverse action to materially affect the terms and conditions of employment ... in determining whether an employee has been subjected to treatment that materially affects the terms and conditions of employment, it is appropriate to consider the totality of the circumstances and to apply the 'continuing violation' doctrine." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal. 4th 1028, 1036.) "A mere oral or written criticism of an employee . . . does not meet the definition of an adverse employment action . . ." (*Light v. Department of Parks & Recreation* (2017) 14 Cal. App. 5th 75, 92.) An action that is merely not to an employee's liking is also insufficient to constitute an adverse employment action. (*Id*.)

Defendants contend Plaintiff cannot establish a prima facie case of discrimination, because (1) her discrimination claims are based on her subjective belief and speculation, (2) she does not allege anyone made a comment to her that was discriminatory in nature, and (3) she relies on overgeneralization stereotypes about Africans and women to support her claim. Defendants add that Plaintiff cannot proffer any evidence rebutting Akamai's legitimate business reasons for issuing Performance Improvement Plans ("PIP") to Plaintiff and terminating her employment after her return from an unapproved leave of absence and failed to obtain another position with Akamai within the allotted time.

In support of their position, Defendants submit:

- Exhibit C – excerpts from Plaintiff's deposition
- Exhibit D – Plaintiff's supplemental responses to Akamai's employment form interrogatories
- Exhibit F – copy of Tracey Spruce Investigation Report
- Exhibit S – copy of an email from May 18, 2021, showing Divya Krishna issued a performance improvement plan to Plaintiff.
- Exhibit T – copy of an email from July 13, 2021, showing Divya Krishna issued another performance improvement plan to Plaintiff
- Exhibit Q – copy of Plaintiff's 2011 performance review
- Exhibit I – copy of email correspondence from August 2021, in which Plaintiff indicated her return

from a leave of absence and Divya Krishna informed Plaintiff that she would be placed on a job search and her performance improvement plan was cancelled

- Exhibit J – of Plaintiff's termination letter
- Exhibit K – copy of Plaintiff's offer letter
- Exhibit L – copy of an outline that Akamai prepared explaining the burdens that Plaintiff's leaves of absences were having on its business.

First, Plaintiff claims that being placed on the PIPs constituted adverse employment actions meant to result in termination of her employment 60 days after their issuance. However, Plaintiff provides no evidence to support her interpretation. The PIPs instructed Plaintiff to attend regular weekly meetings with her manager to review her performance and required Plaintiff to provide updates in every meeting. Plaintiff was to receive a midpoint assessment from her manager outlining her overall progress to date. It was also suggested that Plaintiff seek training and support from her colleagues' time or expertise. The Court finds that being instructed to follow the requirements of the PIPs does not constitute an adverse employment action. For an action to be considered an adverse employment action, it must materially and adversely change working conditions, not be a mere inconvenience or an alteration of job responsibilities.

Second, neither Plaintiff's complaint nor her deposition testimony establishes anyone commented about or made derogatory comments about her race, national origin, religion, or wearing a hijab while she was employed at Akamai. Instead, Plaintiff has testified that she believed she was treated differently than her peers because she was a Black, Muslim woman and therefore different from her peers, who she believed were white, Indian, and Asian. (Plaintiff's Depo., 30:16-34:4, 35:7-38:5, 70:2-70:6, 98:2- 99:17, 100:22-101:9, 102:10-104:6, 105:2-106:7, 107:10-107:25, 119:4-119:14, 125:21-126:19, 139:7-139:23, 165:20-166:6, 206:2- 206:14, 212:9-213:2, 216:19-217:4, 223:11-228:15, 228:19-231:18, 233:17-233:24; 331:7-331-10; 358:11-359:13.) "An employee's subjective beliefs in an employment discrimination case do not create a genuine issue of fact…." (*Choochagi v. Barracuda Networks, Inc*. (2020) 60 Cal. App. 5th 444, 456, 274.)

Third, Plaintiff concedes she was on an unapproved and non-job-protected leave of absence from approximately July 22, 2021, to August 26, 2021. (PSSOM No. 43)

The Court finds Defendants have met their burden of negating material elements of Plaintiff's

discrimination claims.

E. Failure to Prevent Discrimination and Harassment

To prevail on a claim that her employer failed to prevent discrimination or retaliation, Plaintiff must prove (1) she was subject to discrimination or retaliation by Akamai, (2) Akamai "failed to take all reasonable steps to prevent discrimination, ... or retaliation," and (3) as a result of the Akamai's failure, Plaintiff "suffer[ed] injury, damage, loss or harm." (*Lelaind v. City and County of San Francisco* (N.D.Cal. 2008) 576 F.Supp.2d 1079, 1103; accord, CACI No. 2527.)

As stated above, Plaintiff is unable to prove a prima facie case of discrimination against Defendants. A defendant cannot be held liable for failure to prevent discrimination if there is no liability for an underlying discrimination claim. (*Trujillo v. North County Transit District* (1998) 63 Cal.App.4th 280, 286 ["[T]here's no logic that says an employee who has not been discriminated against can sue an employer for not preventing discrimination that didn't happen."].)

F. Wrongful Termination in Violation of Public Policy

As a matter of California common law, "when an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atl. Richfield Co.*, (1980) 27 Cal. 3d 167, 170, (1980); *see also Freund v. Nycomed Amersham* (9th Cir. 2003) 347 F.3d 752, 758.) To prevail on a claim for wrongful discharge, a plaintiff must show that: (1) an employer-employee relationship existed; (2) plaintiff's employment was terminated; (3) the violation of public policy was a motivating factor for the termination; and (4) the termination was the cause of plaintiff's damages. (*Haney v. Aramark Unif. Servs., Inc.* (2004) 121 Cal. App. 4th 623, 641.) Here, Plaintiff alleges she was terminated "in violation of the public policy set forth in the [FEHA], California Government Code section 12940, *et seq.*"

As discussed above, Plaintiff cannot establish a prima facie case of discrimination under FEHA. Thus, Plaintiff's derivative claim for wrongful termination in violation of public policy fails as a matter of law.

G. Retaliation Claim In Violation of FEHA

"[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a protected activity, (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the

employer's action." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 [citations and internal quotation marks omitted].)

Defendants contend Akamai legitimately terminated Plaintiff's employment when she failed to find a job, within the company, after her position was backfilled due to her unapproved leaves of absences, which placed an undue burden on her team. Defendants add that Plaintiff remained eligible for re-hire after her termination.

As stated above, Plaintiff cannot establish a prima facie case of discrimination. It is also undisputed that Plaintiff took an unapproved leave of absence from approximately July 22, 2021, to August 26, 2021. As a result of undue burdens created by Plaintiff's last-minute and unauthorized leaves, Akamai hired someone to fill Plaintiff's position. (PSSOM Nos. 24-26.) Therefore, Plaintiff cannot put forth any evidence to support an allegation that her termination was motivated by her discrimination complaints.

Defendants' motion for summary judgment is GRANTED.

Calendar Line 11
Case Name: *Orlean v. Corden, et al.*
Case No.: 24CV4325906

Before the Court is Defendant Monique Corden's[2] special motion to strike portions of Plaintiff Leonard Orlean's Complaint, pursuant to Code of Civil Procedure section 425.16. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises out of a dispute over property located at 382 April Way in Campbell (the "Property"). (Complaint, ¶ 1.) On February 3, 2006, Plaintiff purchased the Property from Arthur Soltan for $630,000. (Complaint, ¶ 10.) Plaintiff executed a "Straight Note" promising to pay Soltan the sum of $357,000 together with interest of $400 per month on or before February 15, 2007. (Complaint, ¶ 11.) Around December 3, 2009, Plaintiff and Soltan modified the original note, agreed to extend the due date to December 1, 2014, and reduce the balance to $317,000 (the "Fist Modification"). (Complaint, ¶ 12.) On August 28, 2013, after a payment of $47,000, Plaintiff and Soltan agreed in writing that the outstanding balance would be $260,000. (Complaint, ¶ 13.) On September 15, 2013, they modified the agreement again, agreed to extend the due date to December 15, 2018, and reduced the balance to $260,000 (the "Second Modification"). (Complaint, ¶ 14.) On August 18, 2016, they entered a third modification which stated the principal was $235,000, Plaintiff had to pay Soltan $25,000 before September 1, 2016, and the remaining principal and interest was due and payable by December 1, 2023. (Complaint, ¶ 15.)

Plaintiff timely made all interest payments as required under the note. (Complaint, ¶ 17.) When Soltan passed away, Corden was appointed the executor. (Complaint, ¶ 18.) On March 29, 2021, Corden recorded a judgment clouding title to the Property. (Complaint, ¶ 20.) The Probate estate failed to provide notice to Plaintiff prior to the note transferring to the Trust. (Complaint, ¶ 21.) On September 5, 2023, Plaintiff received a text message from Corden which reminded him that the remaining balance of $245,000 was due on December 1, 2023, and Plaintiff replied, stating the balance was $235,000, pursuant to the Third Modification. (Complaint, ¶¶ 22-23.) On November 16, 2023, Plaintiff requested First American Title Company ("FATCO") open escrow to facilitate payoff of the Note, which it did.

[2] Corden is sued in her individual capacity and as the successor trustee of the Arthur Marshall Soltan and Nicole Phely Soltan Revocable Trust (the "Trust").

(Complaint, ¶ 24.) Although Plaintiff notified Corden that escrow was opened, on November 28, 2023, Corden informed Plaintiff that he was in default of the Note. (Complaint, ¶¶ 25-26.) Corden failed to provide notice of the Note termination 90 days prior to the original termination date. (Complaint, ¶ 28.) Corden provided Plaintiff with a Civil Code section 2966 notice, stating the principal was $357,000 or alternatively $245,000 assuming all monthly installments were timely paid. (Complaint, ¶ 29.) The amount in the notice was not consistent with the amount agreed on in the Third Modification. (Complaint, ¶ 30.) On December 2, 2023, Plaintiff sent his monthly interest payment and Corden refused to accept it. (Complaint, ¶¶ 32-33.) FATCO emailed the required closing documents to Corden, but it received no response. (Complaint, ¶ 34.) Plaintiff requested payoff instructions and Corden informed him that she would not provide them unless he agreed to her unilateral conditions. (Complaint, ¶¶ 35-36.)

On January 4, 2024, Plaintiff mailed his monthly interest payment and Corden refused to accept it. (Complaint, ¶ 39.) On January 29, 2024, Plaintiff mailed the sum of $245,00 to Corden, she rejected it, and sent the payment back. (Complaint, ¶¶ 41-42.) On February 17, 2024, Plaintiff sent a letter offering to take steps to secure clear title and on February 23, 2024, Corden sent a written counteroffer. (Complaint, ¶¶ 43-44.) On February 26, 2024, Plaintiff accepted the counteroffer and took steps to move forward but Corden failed to provide the payoff request or the conveyance to FATCO by the time the Complaint was filed. (Complaint, ¶¶ 45-50.)

On March 5, 2024, Plaintiff filed his Complaint, asserting (1) negligence, (2) breach of contract, (3) quiet title to real property, (4) fraud, (5) slander of title, (6) breach of implied covenant of good faith and fair dealing, (7) violation of Civil Code § 2954, subdivision (b), (8) violation of Civil Code § 2941, (9) violation of Civil Code § 2943, (10) breach of fiduciary duty, (11) aiding and abetting breach of fiduciary duty, (12) intentional interference with performance of a contract, (13) negligent interference with performance of a contract, and (14) declaratory relief. On May 28, 2024, Corden filed the instant motion, which Plaintiff opposes.

II. Request for Judicial Notice

Corden requests judicial notice of the judgment in the probate matter filed in Riverside County Superior Court: Exhibit A.

Corden's request for judicial notice is GRANTED. Exhibit A is a court record, thus judicial notice of it is proper. (Code Civ. Proc., § 452, subd. (d).) Moreover, because it is a judgment, the Court can consider the truth of the document's contents. (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374-375.)

III. Plaintiff's Evidentiary Objections

Plaintiff submits evidentiary objections to Corden's declaration. The Court did not consider Corden's declaration in ruling on this motion, thus the Court declines to rule on Plaintiff's evidentiary objections.

IV. Legal Standard

Code of Civil Procedure section 425.16 provides for a "special motion to strike" when a plaintiff's claims arise from certain acts constituting the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subds. (a) & (b)(1).)

"Consistent with the statutory scheme, ruling on an anti-SLAPP motion involves a two-step procedure. First, the moving defendant must identify 'all allegations of protected activity' and show that the challenged claim arises from that activity. [Citations.] 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.]" (*Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 934 (*Bel Air Internet*).)

Corden moves to strike the following eight portions of the Complaint and the fifth cause of action in its entirety on the grounds they arise from the valid exercise of her constitutional rights and Plaintiff cannot establish a likelihood of success on the merits:

(1) Paragraph 20: "On March 29, 2021, Corden recorded a judgment clouding title to the Property… in Santa Clara County…";

(2) Paragraph 53(e), "Intentionally obtaining the judgment in probate and then knowingly causing the Santa Clara County Recorder to record the Judgment against the Property thereby creating a cloud on Plaintiff's Property.";

(3) Paragraph 64, "Defendants, and each of them, have conspired to cause false and fraudulent documents to be recorded by the Santa Clara County Recorder, fraudulently clouding title to Plaintiff's Property with the intention of causing Plaintiff pecuniary damages.";

(4) Paragraph 65, "Defendants' claims constitute a cloud on Plaintiff's title and/or an interference with Plaintiff's property rights by recording a judgment obtained in probate and then knowingly caused the Santa Clara County Recorder to record the Judgment against the Property contrary to the Third Modification.";

(5) The entire fifth cause of action;

(6) Paragraph 111(b), "Recording or causing to be recorded false documents or judgments against Plaintiff's Property, thereby adversely affecting Plaintiff's title and financial interests.";

(7) Paragraph 126, "the recording of the judgment.";

(8) Paragraph 131, "recording the judgment contrary to the Third Modification."; and

(9) Paragraph 132, "the recording of the judgment."

A. First Prong: 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)." (*Collier v. Harris* (2015) 240 Cal.App.4th 41, 50-51 (*Collier*).) That section provides that an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue includes: (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).) "These categories define the scope of the anti-SLAPP statute by listing acts which constitute an 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue.'" (*Collier, supra,* at p. 51, citing Code Civ. Proc., § 425.16, subd. (e).)

"A claim arises from protected activity when that activity *underlies or forms the basis for the claim*. [Citations.] Critically, 'the defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech.' [Citations.] '[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.' [Citations.] Instead, the focus is on determining what 'the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.' [Citation.]" (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062-1063 (*Park*) [emphasis added].)

"[A] claim may be struck only if the speech or petitioning activity is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Park, supra,* 2 Cal.5th at p. 1060.) To determine whether the speech constitutes the wrong itself or is merely evidence of a wrong, "in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by defendant supply those elements and consequently form the basis for liability." (*Id.* at p. 1063.)

"In deciding whether the 'arising from' requirement is met, a court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 670.) "[I]f the defendant does not demonstrate this initial prong, the court should deny the anti-SLAPP motion and need not address the second step." (*Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265, 271.)

An anti-SLAPP motion can target a "mixed" cause of action—on that combines allegations of protected and nonprotected activity under one cause of action. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 395 (*Baral*).) When a mixed cause of action contains allegations of protected activity that, on their own, could support a cause of action, those allegations are subject to an anti-SLAPP motion. (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1551.) Such a motion, if

successful, can strike claims arising out of protected activity while allowing other claims to proceed, even if both appear within a single cause of action. (*Baral, supra,* 1 Cal.5th at p. 392.)

Corden argues the identified portions pertain to Corden's procurement of the judgment against real property which stem from her constitutionally protected right of free speech and petition which Plaintiff seeks to punish her for. (Memorandum of Points and Authorities ("MPA"), p. 4:23-25.) She further argues the portions are protected conduct and covered by privilege under Civil Code section 47, subdivision (b). (Memorandum of Points and Authorities ("MPA"), p. 4:26-5:2.)

Corden fails to argue which of the four categories under Section 425.16, subdivision (e) makes the subject allegations protected activity, however, she cites and relies on *Weeden v. Hoffman* (2021) 70 Cal.App.5th 269, 286 (*Weeden*), which states, "the act of obtaining an abstract of judgment as a real property lien is protected activity."[3] *Weeden* further explains:

> Section 425.16, subdivision (e)(2), includes protection for "any written or oral statement or writing 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." The filing of a lawsuit is thus an exercise of a party's constitutional right of petition under the anti-SLAPP law. (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115; *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087.) Further, courts have adopted "a fairly expansive view of what constitutes litigation-related activities within the scope of Section 425.16." (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908 (*Kashian*).) As a result, "protection for petitioning activities applies not only to the filing of lawsuits, but extends to conduct that relates to such litigation, including statements made in connection with or in preparation of litigation. (*Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1537), as well as to actions taken to enforce a judgment. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1062-1065.) Thus, a "defendant's acts of obtaining an abstract of judgment and recording it as a real property lien fall within the categories of Section 425.16, subdivision(e)." (*O'Neil-Rosales v. Citibank (South Dakota) N.A.* (2017) 11 Cal.App.5th Supp. 1, 6.)

[3] *Weeden* stated the activity is protected under Section 425.16, subdivision (e)(2).

(*Weeden, supra,* 70 Cal.App.5th at p. 285, fn. 3.)

For the most part, Plaintiff alleges more than one act as a basis for each claim. To the extent a plaintiff "has alleged various acts as a basis for relief and not merely as background, each act or set of acts must be analyzed separately under the usual two-step anti-SLAPP framework." (*Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995, 1012.) "[A] claim is subject to an anti-SLAPP motion to strike if its elements arise from protected activity. [Citation.] Courts deciding an anti-SLAPP motion thus must consider the claim's elements, the actions alleged to establish those elements, and whether those actions are protected. [Citation.]" (*Id.* at p. 1015.) "Assertions that are 'merely incidental' or 'collateral' are not subject to section 425.16. [Citations.] Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute." (*Baral, supra,* 1 Cal.5th at p. 394.) A cause of action "arises from" protected activity when it is "based on" or "its elements arise from" protected activity—that is, when the protected activity "itself" is the "principal thrust or gravamen" or "core injury-producing conduct" warranting relief. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78; *Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995, 1009; *Park, supra,* 2 Cal.5th at p. 1060; *Colyear v. Rolling Hills Community Assn. of Rancho Palos Verdes* (2017) 9 Cal.App.5th 119, 134.) So long as a "court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached" with respect to those claims. (*Baral, supra,* 1 Cal.5th at p. 396.)

Paragraph 20, provides, "On March 29, 2021, Corden recorded a judgment clouding title to the Property, as document 24896271 in Santa Clara County. ("the Judgment")." (Complaint, ¶ 20.) That allegation is contained in the "Preliminary Allegations" portion, and it is clear this allegation is used to provide context, not to support a claim for recovery. Thus, Paragraph 20 is not subject to anti-SLAPP protections.

Paragraph 53(e) is used to state one of the breaches for the negligence claim. Paragraphs 64-65 are used to state a basis for relief for the quiet title claim. The fifth cause of action is predicated on the protected conduct. (Complaint, ¶¶ 77-83.) Similarly, Paragraph 111(b) is used to state one of the breaches for the breach of fiduciary duty claim. And Paragraphs 126, 133, and

132 are used to support the causes of action for intentional and negligent interference with performance of a contract. The fifth cause of action clearly arises from Corden's act of obtaining judgment and recording it against the Property, thus, it is protected under the statute.

Although Plaintiff contends the activity is part of a broader pattern or conduct by Corden, reading the Complaint shows Plaintiff's allegations regarding the acts of obtaining the judgment and recording it are a basis for liability because they created a cloud on the Property. Thus, with the exception of Paragraph 20, Corden has met her burden on the first prong and the burden shifts to Plaintiff to establish a "probability" that he will prevail on the claims. (Code Civ. Proc., § 425.16, subd. (b)(1).)

B. Second Prong

To meet its burden to defeat a defendant's special motion to strike, a plaintiff "must demonstrate 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 v. Law Offices of Herbert Hafif* (*Soukop*) (2006) 39 Cal.4th 260, 291 (*Soukop*).) This "probability of prevailing" standard is tested by the same 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. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714 (*Taus*).)

A plaintiff must show that there is admissible evidence that, if credited, would be sufficient to sustain a favorable judgment. (*McGarry v. University of San Diego* (2007) 154 Cal.App 4th 97, 108 (*McGarry*).) The court does not weigh credibility or comparative strength of the evidence; the court must consider the defendant's evidence only to determine if it defeats the plaintiff's showing as a matter of law. (*Soukop, supra*, 39 Cal.4th at 291.) "In making this assessment it is the court's responsibility… to accept as true the evidence favoring the plaintiff… The plaintiff need only establish that his or her claim has 'minimal merit' to avoid being stricken as a SLAPP." (*Id*. at 291.) 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 claims, a court considers not only the substantive merits of those claims, but also all defenses available to them. (*Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 398.)

Although the plaintiff bears the burden of resisting a special motion to strike by establishing the second prong that her claim has merit, the defendant bears the burden of proving any affirmative defenses. (*Laker v. Board of Trustees of California State University* (2019) 32 Cal.App.5th 745, 769-770 [defendants in arguing anti-SLAPP motion should be granted, met their burden of establishing that defamation claim was barred by litigation privilege].) Nonetheless, in addressing the second prong of a special motion to strike, "a plaintiff must show that any asserted defenses are inapplicable as a matter of law or make a prima facie showing of facts that, if accepted, would negate such defenses. [Citation.]" (*Weeden, supra,* 70 Cal.App.5th at p. 288; see also *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1263, fn. 7 [if alleged conduct is subject to litigation privilege, plaintiff cannot establish probability of prevailing to defeat an anti-SLAPP motion].)

Corden argues Plaintiff cannot prevail on the merits because each identified portion and the fifth cause of action is barred by the litigation privilege defense.

The litigation privilege, codified in Civil Code section 47, applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057 (*Rusheen*).) "Thus, 'communications with "some relation" to judicial proceedings' are 'absolutely immune from tort liability' by the litigation privilege [citation]. It is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards. [Citation.]" (*Ibid.*)

The principal purpose of the litigation privilege is to afford litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 969.) Although originally enacted with reference to defamation actions, the privilege has been extended to any communication, whether or not it is a publication, and to all torts other than malicious prosecution. (*Id.* at p. 970.) "Any doubt about whether the privilege applies is resolved in favor of applying it. [Citation.]" (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 913.)

Courts have applied the litigation privilege to " 'any publication…that is required [citation] or permitted [citation] by law in the course of a judicial proceeding to achieve the objects of the litigation,

even though the publication is made outside the courtroom and no function of the court or its officers is invoked.' " (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 830-831.) For example, the litigation privilege has applied to " 'the recordation of a notice of lis pendens' [citation], the publication of an assessment lien' [citation], and 'the filing of a claim of mechanic's lien in conjunction with a judicial proceeding to enforce it.' " (*Id*. at p. 830; see *Rusheen, supra,* 37 Cal.4th at p. 1063 ["Extending the litigation privilege to postjudgment enforcement activities that are necessarily related to the allegedly wrongful communicative act is consistent with public policy considerations."].)

1. Fifth Cause of Action: Slander of Title

"Slander or disparagement of title occurs when a person, without a privilege to do so, publishes a false statement that disparages title to property and causes the owner thereof ' "some special pecuniary loss or damage." ' [Citation.] The elements of the tort are (1) a publication, (2) without privilege or justification, (3) falsity, and (4) direct pecuniary loss. [Citations.] If the publication is reasonably understood to cast doubt upon the existence or extent of another's interest in land, it is disparaging to the latter's title. [Citation.] The main thrust of the cause of action is protection from injury to the salability of property [citations], which is ordinarily indicated by the loss of a particular sale, impaired marketability or depreciation in value [citations]." (*Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC* (2012) 205 Cal.App.4th 999, 1030.)

For this claim, Plaintiff alleges:

¶78: Plaintiff asserts ownership of the Property described in this Complaint and maintains that the title to this Property is clear, marketable, and free of any liens or encumbrances that would adversely affect its value or obstruct Plaintiff's ability to convey the Property.

¶ 79: Defendant intentionally obtained a judgment in probate and then knowingly caused the Santa Clara County recorded to record the judgment against the Property thereby creating a cloud on Plaintiff's Property in contravention to the third modification.

¶ 80: Defendants' false claims and the subsequent dissemination of such claims were made maliciously, with the intent to injure Plaintiff's reputation concerning the ownership of the Property, to diminish the perceived value of the Property, and to deter third parties from dealing with the Plaintiff regarding the Property.

¶ 81: Defendants have made and continue to make false statements or representations concerning the title of the Property, which are without any factual or legal basis and are known by the Defendants or should have been known by them to be false at the time they were made.

¶ 82: As a direct and proximate result of Defendants' actions, Plaintiff has suffered actual damages, including by not limited to impairment of the marketability of the Property, decreased property value, lost sale and lease opportunities, and additional legal costs to clear the title.

¶ 83: This conduct constitutes slander of title, and Plaintiff is entitled to recover compensatory damages, punitive damages, and any other relief the Court deems just and proper.

Relying on *Weeden*, Corden contends the slander of title claim is barred by the litigation privilege. There, the Weedens sued Hoffman after he sent them a letter threatening a forced sale of real property the Weedens purchased from Hoffman's ex-wife. (*Weeden, supra,* 70 Cal.App.5th at pp. 275-276, 280.) Hoffman sent the letter based on a judgment lien created when he recorded an abstract of judgment he obtained in divorce proceedings. (*Id*. at p. 280.) In their complaint, the Weedens alleged quiet title, slander of title, and cancellation of an instrument against Hoffman. (*Id*. at pp. 275, 280.) Thereafter, Hoffman filed an anti-SLAPP motion to dismiss the case, arguing the conduct underlying the claims was protected activity and the Weedens were unable to demonstrate a probability of prevailing on the merits. (*Id*. at pp. 276, 280.) The trial court agreed with Hoffman that the conduct underlying the Weedens' claims (his recording of a judgment) constituted protected activity and concluded the Weedens could not demonstrate a probability of prevailing on their claims because the litigation privilege provided Hoffman with absolute immunity from liability. (*Id*. at pp. 276, 280-281.)

The court of appeal agreed the Weedens' claims arose from protected activity but concluded the litigation privilege provided a defense only to the slander of title claim, which sought to hold Hoffman liable in tort damages. (*Weeden, supra,* 70 Cal.App.5th at pp. 286-287, 293.) In doing so, the appellate court noted that "the litigation privilege does not provide a defense to a cause of action that, by its nature, does not seek to impose tort liability for damages on a defendant based on his or her litigation related publications." (*Id*. at p. 289.) Here, Plaintiff's slander of title claim seeks tort damages and thus, it is barred by the litigation privilege.

While Plaintiff contends the claim is based on other tortious conduct, it appears the obtaining and recording of the judgment is the conduct underlying the claim. As a result, Plaintiff fails to overcome the litigation privilege, and the motion to strike the fifth cause of action is GRANTED.

2. Third Cause of Action: Quiet Title

To maintain an action to quiet title, a complaint must be verified and must include (1) a description of the property including both its legal description and its street address or common designation; (2) the title of plaintiff as to which determination is sought and the basis of the title; (3) the adverse claims to the title of the plaintiff against which a determination is sought; (4) the date as of which a determination is sought and, if other than the date the complaint is filed, a statement why the determination is sought as of that date; and (5) a prayer for determination of plaintiff's title against the adverse claims. (Code Civ. Proc., § 761.020.)

Corden argues Paragraphs 64 and 65 are covered by litigation privilege.

"Courts have long recognized that upon service of preliminary notice or upon later recordation of a mechanic's lien, a project owner may seek declaratory or injunctive relief challenging the validity of the lien… We have found no authority to suggest that these types of actions would be barred by the litigation privilege, which generally precludes derivative *tort* liability." (*RGC Gaslamp, LLC v. Ehmcke Sheet Metal Co., Inc.* (2020) 56 Cal.App.5th 413, 437 [emphasis original].) A cause of action to quiet title is clearly not a tort claim, and it does not seek to hold a defendant liable for damages. Rather, "actions to quiet title, like true declaratory relief actions, are generally equitable in nature." (*Caira v. Offner* (2005) 126 Cal.App.4th 12, 25.)

Plaintiff is not seeking to hold Corden liable for damages in the quiet title claim, but rather he "seeks an order declaring that instruments recorded by Defendants be removed from title to the Property according to proof at trial." (Complaint, ¶ 68.) Thus, litigation privilege does not bar the allegations. The Complaint is verified, and it includes the required description of the Property. Plaintiff identifies the title and basis of the title, the adverse claim to the title, the date as of which the determination is sought, and a prayer for determination of his title against adverse claims. (Orlean Decl., ¶¶ 2-6, 10-13, 14.) Thus, the special motion to strike Paragraphs 64 and 65 is DENIED.

3. Remaining Allegations

Paragraphs 53(e) — "intentionally obtaining the judgment in probate and then knowingly causing the Santa Clara County Recorder to record the Judgment against the Property thereby creating a cloud on Plaintiff's Property"; Paragraph 111(b) — "recording or causing to be recorded false documents or judgments against Plaintiff's Property, thereby adversely affecting Plaintiff's title and financial interests"; Paragraphs 126 and 132 — "the recording of the judgment," and Paragraph 131 — "recording the judgment contrary to the third modification" each pertain to tort claims.

As explained above, the litigation privilege therefore applies, and Plaintiff fails to overcome its applicability. Thus, the motion to strike Paragraphs 53(e), 111(b) and portions of Paragraphs 126, 131 and 132 is GRANTED.

4. Attorney's Fees and Costs

Plaintiff requests fees and costs on the basis that the motion is frivolous and meritless.

Code of Civil Procedure section 128.5, subdivision (b)(2), defines "frivolous" as "totally and completely without merit or for the sole purpose of harassing an opposing party." (Code Civ. Proc. § 128.5, subd. (b)(2).) An anti-SLAPP motion is "totally and completely without merit for purposes of a finding of frivolousness under section 425.16, subdivision (c)(1), or section 128.5 only if any reasonable attorney would agree that the motion is totally devoid of merit." (*Moore v. Shaw* (2004) 116 Cal.App.4th 182, 199 (*Moore*).) A frivolous anti-SLAPP motion or appeal "raises no new permissible arguments that change the result." (*City of Alhambra v. D'Ausilio* (2011) 193 Cal.App.4th 1301, 1309.) The court has discretion in determining whether an anti-SLAPP motion was "frivolous," but if it is so determined, an award of attorney's fees is mandatory. (*Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1375, 1388.)

As the motion was partially successful, it does not appear to the Court that the special motion to strike is frivolous or solely intended to cause unnecessary delay. Therefore, the motion was not "totally and completely without merit" and there is no basis to award attorney's fees to Plaintiff. (*Moore, supra,* 116 Cal.App.4th at 199.) Thus, Plaintiff's request for attorney's fees is DENIED.