

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

**Department 3**  
**Honorable William J. Monahan, Presiding**  
Courtroom Clerk  
191 North First Street, San Jose, CA 95113  
Telephone: (408) 882-2130

**DATE: 11/14/2024 TIME: 9:00 A.M.**

**TO CONTEST THE RULING:** Before 4:00 p.m. today (11/13/2024) you must notify the:

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

**TO APPEAR AT THE HEARING:** The Court prefers in-person appearances or by Teams. If you must appear virtually, please use video.

**FOR YOUR NEXT HEARING DATE:** Please reserve your next hearing date using Court Schedule—an online scheduling tool that can be found on the Santa Clara County court website.

**FINAL ORDERS:** The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) **Please Note:** Any proposed orders must be submitted with the Judicial Council Form EFS-020 Proposed Order (Cover Sheet). Please include the date, time, dept., and line number.

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

LINE #	CASE #	CASE TITLE	RULING
<a href="#">LINE 1</a>	24CV441113	BALBOA CAPITAL CORPORATION vs MARTINEZ PALLET SERVICES, INC et al	Hearing: Order of Examination (OEX) Against Francisco J. Mora Martinez (individually and on behalf of Martinez Pallet Services, Inc.  [**continued from 8/22/2024**]  <b>APPEAR.</b>  Note: The proofs of service (POS) filed 10/30/2024 says it was a proof of personal service, but it was delivered to Adela Espinoza, spouse.

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<a href="#">LINE 2</a>	24CV441271	Farm Credit Services of America, PCA vs Elite Transportation, Inc. et al	Hearing: Order of Examination (OEX) of Jaglit Singh Tut or other managing agent of Elite Transportation, Inc. by Plaintiff FARM CREDIT SERVICES OF AMERICA, PCA  <b>APPEAR.</b>  Note: Proof of service (filed 9/19/2024) of personal service on 9/16/2024 on Elite Transportation, Inc., Jagit Singh Tut by personal delivery to Jagit Singh Tut.
<a href="#">LINE 3</a>	2000-7-CV-395433	Unifund Ccr Partners Vs Tran Hung	Hearing: Order of Examination as to Defendant Hung Tran [**reset from 10/24/2024 per courtroom**]  OFF CALENDAR. No proof of service.
<a href="#">LINE 4</a>	2011-1-CV-196465	Cedarcrest Fund, LP vs M. Tran, et al	Hearing: Order of Examination as to Minh-Hang T Tran by Plaintiff Cedarcrest Fund, LP [**reset from 10/24/2024 per courtroom**]  OFF CALENDAR. No proof of service.
<a href="#">LINE 5</a>	24CV441687	SHANDELL FOO vs ANDREW NGO et al	Hearing: Demurrer to Complaint by Defendant COTTON ON USA INC, a Delaware corporation  Unopposed and SUSTAINED WITH 15 DAYS LEAVE TO AMEND. Moving party to prepare order for signature by court.
<a href="#">LINE 6</a>	24CV435415	ALONDRA GONZALEZ vs VOLKSWAGEN GROUP OF AMERICA, INC. et al	Hearing: Motion to deem the truth of matters specified in requests for admission to defendant Volkswagen Group of America, Inc and conclusively established and request for monetary sanctions by plaintiff Alondra Gonzalez  Ctrl Click or scroll down on Line 6 for tentative ruling. The court will prepare the ruling.
<a href="#">LINE 7</a>	24CV435415	ALONDRA GONZALEZ vs VOLKSWAGEN GROUP OF AMERICA, INC. et al	Motion: Compel defendant Volkswagen Group of America, Inc. s responses to plaintiff's first set of requests for production of documents and request for monetary sanctions by plaintiff Alondra Gonzalez  Ctrl Click or scroll down on Line 7 for tentative ruling. The court will prepare the ruling.
<a href="#">LINE 8</a>	21CV383107	Giuliani Construction and Restoration, Inc. vs Rancho Homeowners Association	Motion: Continue Trial Dates [**Advanced from 10/10/2024 Per Ex Parte Order 10/24/24**]  Ctrl Click (or scroll down) on Line 8 for tentative ruling. The court will prepare the order.

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**DATE: 11/14/2024 TIME: 9:00 A.M.**

<a href="#">LINE 9</a>	24CV434189	Jane Doe vs Calvin Ky et al	Hearing: Motion hearings to Proceed Pseudonymously and for Entry of a Protective Order by Plaintiff Jane Doe  Ctrl Click (or scroll down) on Line 9 for tentative ruling. The court will prepare the order.
<a href="#">LINE 10</a>	24CV445615	LONE OAK FUND, LLC vs UPTOWN RESIDENCES, LLC et al	Hearing: Other re Ex Ex Parte Order appointing Receiver and Order to Show Cause and TRO  [**set per 9/24/24 Order**]  <b>APPEAR.</b>  Note: No opposition filed after 9/24/2024 hearing.  Moving party to e-file and bring proposed order to hearing.
<a href="#">LINE 11</a>	23CV426888	Citibank, N.A. vs Amit Sarkar	Hearing: Motion hearings to Quash Service of Summons and Request to Vacate Default by Defendant Amit Sarkar (Pro per)  Ctrl Click (or scroll down on Line 11 or tentative ruling. The court will prepare the order.
<a href="#">LINE 12</a>			

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**Calendar Line 1**

**- 00000 -**

**Calendar Line 2**

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**Calendar Line 3**

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**Calendar line 4**

**- 00000 -**

**Calendar Line 5**

**- 00000 -**



**Calendar Line 6****Case Name:** Alondra Gonzalez vs Volkswagen Group of America Inc., et al**Case No.:** 24CV435415

Plaintiff Alondra Gonzalez (“Plaintiff”)’s motion to deem the truth of matters specified in set one of Plaintiff’s requests for admission (RFAs) to defendant Volkswagen Group of America Inc. (“Defendant”) admitted and conclusively established by Defendant is DENIED AS MOOT.

Plaintiff’s motion is moot as Defendant has already served Plaintiff with its verified responses in substantial compliance with Code of Civil Procedure (“CCP”) section 2033.220. (See CCP § 2033.280(c); *Mary v. Sup. Ct. (Schellenberg)* (2014) 223 Cal.App.4<sup>th</sup> 762, 788.)

The court notes that Plaintiff attached a copy of the Defendant’s verified responses to Plaintiff’s RFA Set One as Exhibit C to the Declaration of [Plaintiff’s Counsel] Phil A Thomas in Support of Plaintiff’s Motion to Compel Further Responses to Plaintiff’s First Set of [RFAs] to Defendant and Request for Sanctions (that Plaintiff filed 1/1/2024).

Plaintiff’s request for monetary sanctions against Defendant and its counsel Squire Patton Boggs (US) LLP is DENIED. Other circumstances make the imposition of sanctions unjust. A timely response was served to an incorrect attorney by mistake. An order imposing sanctions for an administrative error that was made when Plaintiff (and its counsel) believed in good faith, that it had already served its discovery responses would be unjust.

Defendant’s request for monetary sanctions against Plaintiff and her attorneys of record, Phil A. Thomas, Roger Kirnos, and Knight Law Group, LLP is DENIED. Other circumstances make the imposition of sanctions unjust. Defendant’s opposition papers failed to acknowledge that there was no requirement for the moving party (Plaintiff) to meet and confer before filing this motion. (CCP § 2033.280; Weil & Brown, Cal. Practice Guide: Civil Proc. Before Trial (The Rutter Group 2024) ¶ 8:1371; *St. Mary v. Superior Court* (2014) 223 Cal.App.4<sup>th</sup> 762, 777.)

The court exercised its discretion to consider Defendant’s untimely opposition papers filed and served on 11/5/2024 (instead of 10/31/2024). Defendant’s opposition papers were filed and served 9 calendar days before the hearing (instead of 9 court days as required by CCP section 1005(b)). Plaintiff timely filed a reply addressing the merits of the opposition on 11/6/2024. Accordingly, the court exercised its discretion to consider the late filed opposition (and the timely reply) on the merits. (See *Jack v. Ring LLC* (2023) 91 Cal.App.5<sup>th</sup> 1186, 1210 [“a trial court has broad discretion to accept or reject late filed papers.”].)

The court will prepare the order.

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**Calendar Line 7**

**Case Name:** Alondra Gonzalez vs Volkswagen Group of America Inc., et al

**Case No.:** 24CV435415

Plaintiff Alondra Gonzalez (“Plaintiff”)’s motion to compel defendant Volkswagen Group of America, Inc.’s responses to Plaintiff’s first set of requests for production of documents (RPDs) is DENIED AS MOOT.

Plaintiff’s motion is moot as Defendant has already served Plaintiff with its verified responses in substantial compliance. (See *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App. 4<sup>th</sup> 390, 408-412 [whether to proceed with motion when response was untimely is within court’s discretion].)

The court notes that Plaintiff attached a copy of the Defendant’s verified responses to Plaintiff’s RPDs Set One as Exhibit C to the Declaration of Phil A Thomas in Support of Plaintiff’s Motion to Compel Further Responses to Plaintiff’s First Set of [RPDs] to Defendant and Request for Sanctions (that Plaintiff filed 1/1/2024).

Plaintiff’s request for monetary sanctions against Defendant and its counsel Squire Patton Boggs (US) LLP is DENIED. Other circumstances make the imposition of sanctions unjust. A timely response was served to an incorrect attorney by mistake. An order imposing sanctions for an administrative error that was made when Plaintiff and its counsel believed in good faith, that it had already served its discovery responses would be unjust.

The court exercised its discretion to consider Defendant’s untimely opposition papers filed and served on 11/5/2024 (instead of 10/31/2024). Defendant’s opposition papers were filed and served 9 calendar days before the hearing (instead of 9 court days as required by CCP section 1005(b). Plaintiff timely filed a reply addressing the merits of the opposition on 11/6/2024. Accordingly, the court exercised its discretion to consider the late filed opposition (and the timely reply) on the merits. (See *Jack v. Ring LLC* (2023) 91 Cal.App.5<sup>th</sup> 1186, 1210 [“a trial court has broad discretion to accept or reject late filed papers.”].)

The court will prepare the order.

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**Calendar Line 8**

**Case Name:** Giuliani Construction and Restoration, Inc. vs Rancho Homeowners Association, et al.  
**Case No** 21CV383107

Good cause appearing, Plaintiff/Cross Defendant Giuliani Construction and Restoration, Inc (“Giuliani”)’s motion to continue trial (and related dates) for a minimum of 180 days is GRANTED. No opposition was filed. According to the moving papers, Cross-Defendants Graves 6, Inc. and SDI Insulation, Inc. support this motion for a continuance. Defendant and Cross-Complainant Albert Yeong (Yeong”) filed a notice of non-opposition on 10/31/2024.

This is Giuliani’s second motion to continue trial. Giuliani has demonstrated good cause for another trial continuance because Yeong has repeatedly amended his cross-complaint and is currently on his Third Amended Cross-Complaint (“TAXC”). Giuliani has filed a demurrer to the TAXC that is scheduled for hearing on 11/26/2024, so the pleadings have not been settled. The current trial deadline would not provide Giuliani sufficient time to conduct discovery as to the cross-defendant’s subcontractors and would not permit Giuliani’s counsel to attend due to conflicting trials. The interest of justice is best served by continuance of the trial of the matter. Additional time will benefit all parties.

The jury trial date on 1/13/2025 at 8:45 AM is VACATED. The related settlement conference on 1/8/2025 at a time to be determined is VACATED. The related trial assignment/readiness conference on 1/9/2025 at 1:30 PM in Dept. 6 is VACATED.

A trial setting conference is hereby set for 1/14/2025 at 11 AM in Dept. 3.

The court will prepare the order.

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**Calendar line 9**

**Case Name:** Jane Doe vs Calvin Ky, et al.

**Case No.:** 24CV434189

Plaintiff Jane Doe (“Plaintiff”)’s motion to proceed pseudonymously is GRANTED.

Plaintiff’s request for entry of protective order is GRANTED. Plaintiff shall promptly submit the [proposed] protective order for signature by the court.

The court finds that Plaintiff has met her burden under CRC 2.550(d) and (e), showing that good cause exists to seal the documents that were inadvertently filed unredacted.

**Procedural Background**

Plaintiff’s prior motion to proceed pseudonymously and for entry of protective order was DENIED WITHOUT PREJUDICE. (See Order on Submitted Matter filed 8/20/2024.)

On 9/5/2024, Plaintiff filed the present motion to proceed pseudonymously and for entry of protective order. The present motion includes Plaintiff Jane Doe’s declaration setting forth evidence for the court’s consideration.

**Order to Seal Unredacted Documents**

On 10/23/2024, this court temporarily granted Plaintiff’s ex-parte application to seal the unredacted declaration by Jane Doe (with her true name that was inadvertently filed) pending the outcome of this hearing.

Thereafter, on 10/28/2024 the parties submitted a stipulation to seal unredacted documents inadvertently filed pursuant to CRC 2.551.

The court finds that the inadvertently filed declaration with Plaintiff’s true name (that has been sealed pending this hearing) did *not* waive Plaintiff’s right to privacy.

The court finds that Plaintiff has met her burden under CRC 2.550(d) and (e), showing that good cause exists to seal the documents that were inadvertently filed unredacted.

**Plaintiff has a Right to Privacy**

Plaintiff has a right to privacy. The California Constitution provides that all people “have inalienable rights” which include “privacy.” (California Constitution, art. 1, § 1; see also *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 35 [affirming a constitutionally protected interest in precluding the distribution of sensitive and confidential information].)

**Plaintiff’s Complaint**

Plaintiff filed an *unverified* complaint against Defendants for (1) quid pro quo sexual harassment in violation of FEHA (Cal. Gov. Code § 12940(a); (2) hostile work environment sexual harassment in violation of FEHA (Cal. Gov. Code § 12940(j); (3) failure to prevent

discrimination & retaliation (Cal. Gov. Code § 129040(k); (4) gender/sex discrimination in violation of FEHA (Cal. Gov. Code [§] 12940(a); (5) retaliation in violation of FEHA, (Cal. Gov. Code § 12940(h); (6) wrongful termination in violation of public policy; (7) battery (sexual battery); and (8) failure to permit inspection of employee records (Cal. Labor Code § 226.)

Footnote 1 on page 2 of Plaintiff's *unverified* complaint states: "Plaintiff has sued under a pseudonym because this case involves sexual harassment."

### **CCP section 367**

Code of Civil Procedure ("CCP") section 367 provides that an action "must be prosecuted in the name of the real party in interest, except as provided by statute."

### **No Statutory Exception**

The Plaintiff does *not* cite, and the court is unaware of, any statute that would permit her to proceed under a pseudonym. (See Opp. p. 8.)

Even in the absence of a statute, anonymity for parties may be granted when necessary to preserve an important privacy interest. (*Doe v. Lincoln Unified School Dist.* (2010) 188 Cal.App.4th 758, 766; see also *Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436, 1452, fn. 7.)

(*Department of Fair Employment Housing v. Superior Court* (2022) 82 Cal.App.5th 105, at p. 110 (DFEH).)

### **Plaintiff's Identity is Known to Defendants**

Here, both sides agree that the identity of the Plaintiff is known to Defendants.

In determining the appropriate standard, we first note that here the identity of the employee seeking to proceed under a pseudonym is known to the defendant. Significant constitutional concerns would be implicated were it otherwise. (See, e.g., *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1132 [testimony from an anonymous witness unknown to a criminal defendant violates right of confrontation and due process].) *Since the employee's identity is known to the defendant, proceeding anonymously would not similarly intrude on the defendant's rights.*

(DFEH, *supra*, at p. 110 [emphasis added].)

The court does *not* find Defendants argument persuasive that they would not be able to do discovery effectively if this motion is granted. There are many cases that involve parties proceeding anonymously. Furthermore, Plaintiff acknowledges in her papers; her name can be used during depositions because the deposition transcript (and discovery) can be designated confidential under the protective order.

### **The Overriding Interest Test**

When there is no statutory right to prosecute a matter anonymously, the court must apply the standard for such motions articulated in *DFEH*, *supra*, 82 Cal.App.5th 105 at pages 111 to 112:

"Much like closing the courtroom or sealing a court record, allowing a party to litigate anonymously impacts the First Amendment public access right. Before a party to a civil action can be permitted to use a pseudonym, **the trial court must conduct a hearing and apply the overriding interest test:** A party's request for anonymity should be granted only if the court finds that an overriding interest will likely be prejudiced without the use of a pseudonym, and that it is not feasible to protect the interest with less impact on the constitutional right of access. In deciding the issue the court must bear in mind the critical importance of the public's right to access judicial proceedings. Outside of cases where anonymity is expressly permitted by statute, litigating by pseudonym should occur 'only in the rarest of circumstances.' [Citation omitted.]"

(*DFEH*, *supra*, at pp. 111 to 112 [emphasis added].)

The *DFEH* Court then explained that the trial court had "understood the interests it needed to balance[.]" citing to the factors found in *Advanced Textile*. (*Id.* at p. 112, citing *Advanced Textile Corp.*, *supra*, 214 F.3d at pp. 1068-1073.) These factors included: "(1) the severity of the threatened harm; (2) the reasonableness of the anonymous party's fears; and (3) the anonymous party's vulnerability to such retaliation[.]" (See *Advanced Textile Corp.*, *supra*, 214 F.3d at p. 1068 [internal citations omitted].)

Thus, in accordance with the Sixth District's ruling in *DFEH*, and in order to determine if Plaintiff may proceed anonymously, Plaintiff has the burden of showing there is an overriding interest in anonymity, and this Court must look at the relevant evidence in making that determination. (See *DFEH*, *supra*, 82 Cal.App.5th at p. 112.)

The court has reviewed Plaintiff's *unverified* complaint, and the declaration submitted by Plaintiff under the overriding interest test. It is sufficient to justify the order sought.

When there is no statutory right to prosecute a matter anonymously, given the allegations of this *unverified* complaint, the court agrees with Defendants that admissible evidence is required to support a request to proceed under a pseudonym so the court can identify and balance all competing interests and make the necessary findings to support any order granting the request.

In her prior application that was denied without prejudice, Plaintiff relied on the allegations in her *unverified* complaint. However, as Defendants point out in their Opposition, Plaintiff's *unverified* complaint merely contends that that Ky "touched her inappropriately," "tried to kiss" her, "attempted to hold [her] hand," "engaged in physical conduct of a sexual nature," and "inappropriately touched [her] body, including kissing her and attempting to fondle her without her consent." (See, Complaint at ¶¶ 21, 22, 24, 36, 100.) Notably absent are any allegations that reasonably trigger Plaintiff's privacy rights, or which would reasonably

cause embarrassment or stigmatization. Indeed, Plaintiff does *not* even allege [in the complaint] that Defendant Ky attempted to contact with an *intimate part* of her body.<sup>1</sup>

However, Plaintiff's declaration makes clear that defendant Calvin Ky was a supervisor at defendant Intervention Center for Autism Needs, LLC ("ICAN") and that he touched an intimate part of her body, her buttocks without her consent. According to Plaintiff's declaration, Calvin Ky touched her thighs, her buttocks without her consent and felt her up when he tucked her into a blanket while she was crying. Plaintiff Jane Doe's Decl., ¶ 8.) Calvin Ky also touched her inner thigh near her pelvic area without her consent. (Id., ¶ 9.) Calvin Ky also "put his hand underneath my shirt to rub my stomach...kissed my neck and tried to touch my chest." (Id., ¶11.) Plaintiff "removed Calvin [Ky]'s hands from my buttocks". (Id., ¶ 10.) Calvin Ky did all these acts knowing that Plaintiff was "not interested in men in a sexual way" and that Plaintiff "was only interested in women." (Id., ¶5.) What occurred to Plaintiff "was and still is, a very sensitive and highly personal matter that causes me shame, embarrassment and annoyance. [Plaintiff wishes] to proceed pseudonymously to preserve my privacy rights." (Id., ¶ 3.)

Plaintiff's declaration provides sufficient detail to Plaintiff's *unverified* complaint to reasonably trigger Plaintiff's privacy rights and confirms that disclosure of her identity would reasonably cause her embarrassment or stigmatization.

Here, although there is no statutory right to prosecute the matter anonymously, Plaintiff's declaration confirms that defendant touched an intimate part of Plaintiff's body without her consent, and Plaintiff's declaration is persuasive evidence of the type of overriding privacy interest that would fall within the exception in *FEHA, supra*, 82 Cal.App.5th 105, at pp. 111 to 112. Courts generally allow the use of pseudonym where a "legitimate privacy concern" exists and pseudonyms are particularly common in cases involving victims of sexual misconduct, assault or abuse. (*Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4<sup>th</sup> 1436, 1452.)

The motion to allow Plaintiff to proceed pseudonymously is GRANTED. Plaintiff's papers acknowledge that if the case goes to trial, her identity may end up being disclosed, but she has shown good cause to proceed pseudonymously at this time.

### **Plaintiff Seeks a Protective Order to Shield Public Disclosure of her Identity**

CCP section 2017.020(a) provides that discovery can be limited if a court "determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." The CCP also states that a court "may make any order that justice requires to protect any party from unwanted annoyance, embarrassment, oppression, or undue burden and expense." (CCP § 2033.080(b); see also CCP §§ 2025.420(b), 2030.090(b), 2031.060(b).)

Since the motion to allow Plaintiff to proceed pseudonymously is GRANTED, the Plaintiff's request for protective order is GRANTED. Plaintiff shall promptly submit the [proposed] protective order for signature by the court.

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<sup>1</sup> "Intimate part means the sexual organ, anus, groin, or buttocks of any person, or the breast of a female." (Cal. Civ. Code § 1708.5.)

### **Late Filed Opposition**

Defendant served its late opposition papers on Friday 11/1/2024 (and filed them later on 11/4/2024) instead of serving and filing them on 10/31/2024. (See CCP § 1005(b).) The court exercises its discretion to consider Defendant's late filed opposition papers. (See Reply pp.,1, 4-5; Cal Rules of Ct. ("CRC") rule 3.1300(d).) Defendant filed a reply addressing the merits of the arguments raised. The court considered both sides' papers on the merits.

### **Conclusion/Orders**

Plaintiff's motion to allow Plaintiff to proceed pseudonymously is GRANTED.

Plaintiff's request for protective order is GRANTED. Plaintiff shall promptly submit the [proposed] protective order for signature by the court.

The court finds that Plaintiff has met her burden under CRC 2.550(d) and (e), showing that good cause exists to seal the documents that were inadvertently filed unredacted. The court finds as follows, pursuant to CRC 2.550(d):

1. There exists an overriding interest that overcomes the right to public access to the record;
2. The overriding interest supports sealing the record;
3. A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
4. The proposed sealing order is narrowly tailored; and
5. No less restrictive means exist to achieve the overriding interest.

Accordingly, it is ordered that:

1. The **UNREDACTED** Plaintiff Jane Doe's Declaration Filed in Support of Her Motion to Proceed Pseudonymously and for Entry of a Protective Order, filed on September 5, 2024, shall remain under seal.
2. The **REDACTED** Plaintiff Jane Doe's Declaration filed in Support of Her Motion to Proceed Pseudonymously and for Entry of a Protective Order, filed on September 5, 2024, shall *not* be sealed and shall remain in the public record.

The court will prepare the order.

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**Calendar line 10**

**- 00000 -**

**Calendar line 11****Case Name:** *Citibank, N.A. v. Amit Sarkar***Case No.:** 23-CV-426888

Motion to Quash Service of Summons and Request to Vacate Default by Defendant Amit Sarkar

**Factual and Procedural Background**

On November 29, 2023, plaintiff Citibank, N.A. (“Citibank”) filed a Judicial Council Form Complaint alleging common counts against defendant Amit Sarkar (“Sarkar”), a self-represented litigant. The instant action arises from a Citi Mastercard credit card issued by Citibank to defendant Sarkar. Citibank seeks damages in the amount of \$2,586.84.

On July 3, 2024, the clerk of the court entered a default against defendant Sarkar. Thereafter, a default judgment was filed by the court on October 21, 2024.

Currently before the court is a motion by defendant Sarkar to quash service of summons and a request to vacate default. Plaintiff Citibank filed written opposition.

**Motion to Quash Service of Summons**

Defendant Sarkar moves to quash service of summons as he was not personally served with the complaint in this action.

**Legal Standard**

“Service of process is the means by which a court having jurisdiction over the subject matter asserts jurisdiction over the party and brings home to him reasonable notice of the action. [Citation.] It is an indispensable element of due process of law. [Citation.]” (*Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457, 1464.)

“A motion to quash service challenges only the lack of jurisdiction over the person and, when ruling on such a motion, the trial court is not permitted to determine the merits of the complaint.” (*McClatchy v. Coblentz* (2016) 247 Cal.App.4th 368, 375.)

“When a motion to quash is properly brought, the burden of proof is placed upon the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence. [Citation.] This may be done through presentation of declarations, with opposing declarations received in response.” (*Aquila, Inc. v. Super. Ct.* (2007) 148 Cal.App.4th 556, 568.) Where there is a conflict in the declarations, resolution of the conflict by the trial court will not be disturbed on appeal where the ruling is supported by substantial evidence. (*Ibid.*)

**No Legal Basis to Consider Motion to Quash Service of Summons**

As a preliminary matter, the motion to quash service of summons appears to be procedurally improper as the motion was filed *after* the clerk’s entry of default. “A default ‘cuts off the defendant from making any further opposition or objection to the relief which

plaintiff's complaint shows he is entitled to demand.' [Citation.] After a default, a defendant is ' "out of court" ' and cannot take any further steps in the cause affecting the plaintiff's right of action until the default is set aside in a proper proceeding. [Citations.]" (*Rios v. Singh* (2021) 65 Cal.App.5th 871, 887; see *Devlin v. Kearny Mesa Amc/Jeep/Renault* (1984) 155 Cal.App.3d 381, 385 ["The entry of default terminates a defendant's rights to take any further affirmative steps in the litigation until either its default is set aside or a default judgment is entered."].)

As stated above, the clerk entered default on July 3, 2024. Having done so, defendant Sarkar could only seek to set aside the default as opposed to other forms of affirmative relief. As a consequence, the motion to quash service of summons, filed September 10, 2024, is procedurally improper and cannot be addressed the court. The court however may consider the points raised in connection with the alternative request to vacate default which will be examined below.

Accordingly, the motion to quash service of summons is DENIED.

### **Request to Vacate Default**

Defendant Sarkar requests the default be vacated due to plaintiff Citibank's improper service and the court's lack of jurisdiction over the defendant.<sup>2</sup> In support, Sarkar relies on Code of Civil Procedure section 473, subdivision (b).<sup>3</sup>

### **Legal Standard**

Section 473 permits the trial court to relieve a party from a judgment, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise or excusable neglect. (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 232-233 (*Elston*).) "Section 473 is often applied liberally where the party in default moves promptly to seek relief, and the party opposing the motion will not suffer prejudice if relief is granted. [Citations.] In such situations, 'very slight evidence will be required to justify a court in setting aside the default.' [Citations.]" (*Id.* at p. 233.)

"Moreover, because the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default. [Citations.] Therefore, a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits. [Citations.]" (*Elston, supra*, 38 Cal.3d at pp. 233-234.)

"The granting or denial of a motion to set aside an order or judgment under section 473 rests largely in the discretion of the trial court, and its decision will not be disturbed on appeal unless there has been a clear abuse of discretion." (*In re Marriage of Carter* (1971) 19 Cal.App.3d 479, 494.)

### **Valid Personal Service of the Complaint and Summons**

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<sup>2</sup> As default judgment has been entered, the court construes this motion as request to vacate default judgment.

<sup>3</sup> Further unspecified statutory references are to the Code of Civil Procedure.

Defendant Sarkar contends he was never personally served with the summons and complaint in this action.

In opposition, plaintiff Citibank argues it properly effectuated personal service of the complaint on defendant Sarkar. “A summons may be served by personal delivery of a copy of the summons and of the complaint to the person to be served. Service of a summons in this manner is deemed complete at the time of such delivery.” (§ 415.10.)

According to the proof of service, the process server personally served Sarkar with the summons and complaint on December 20, 2023 at 9:05 a.m. at 241 Blossom Hill Road, San Jose, CA 95123. (See Keim Decl. at ¶ 2.) The proof of service includes the name of the defendant along with a physical description. The proof of service also contains the name of the process server, Hector Torres, and his signature signed under penalty of perjury. Thereafter, the proof of service was filed with the court on May 28, 2024. And, “[t]he filing of a proof of service creates a rebuttable presumption that the service was proper.” (*Floveyor Internat., Ltd. v. Super. Ct.* (1997) 59 Cal.App.4th 789, 795 (*Floveyor*).)

Defendant Sarkar disputes the proof of service and asserts he was never personally served with the summons and complaint by plaintiff Citibank. In support, Sarkar submits his declaration, signed under penalty of perjury, stating the following:

- I reside at 241 Blossom Hill Road, Apartment 5, San Jose, CA 95123. The Proof of Service filed by Plaintiff states that I was served at 241 Blossom Hill Road but fails to specify the apartment number. There are more than a dozen apartments in the building, and I was never personally served with any documents at my apartment.
- I became aware of this case and the default entry only upon receiving notice and subsequently by checking the online case status.
- I have not evaded service and as currently unemployed I have always been available at my apartment. The proof of service submitted by plaintiff is inaccurate. (Sarkar Decl. at ¶¶ 2-4.)

The court notes the presumption arises only if the proof of service complies with the applicable statutory requirements. (*Floveyor, supra*, 59 Cal.App.4th at p. 795.) Defendant Sarkar suggests the proof of service is defective as it failed to include an apartment number. But, this is not enough as he does not deny being a resident at this location. In fact, Sarkar argues only that he did not receive the documents *at his apartment*. (Sarkar Decl. at ¶ 2.) This leaves open the possibility that Citibank served Sarkar somewhere else at the location of the apartment complex which is consistent with the proof of service by the process server. Nor is there is any additional evidence that support a finding that service was not properly effectuated. Therefore, the court finds the evidence submitted by Citibank to be more credible and sufficient for establishing valid personal service.

### **No Evidence of Mistake, Inadvertence, or Excusable Neglect**

Defendant Sarkar also seeks relief from default on the grounds of mistake, inadvertence, or excusable neglect.

“While section 473 authorizes a court to relieve a party from default suffered through inadvertence, surprise, excusable neglect or mistake, ‘these words are not meaningless, and the party requesting such relief must *affirmatively show* that the situation is one which clearly falls within such category.’ [Citation.] ‘[A] party who seeks relief under [section 473] must make a showing that due to some mistake, either of fact or of law, of himself or of his counsel, or through some inadvertence, surprise or neglect which may properly be considered excusable, the judgment or order from which he seeks relief should be reversed. In other words, a burden is imposed upon the party seeking relief to show why he is entitled to it, and the assumption of this burden necessarily requires the production of evidence. [Citations.]’ In a motion under section 473 the initial burden is on the moving party to prove excusable neglect by a ‘preponderance of the evidence.’ [Citations.]” (*Kendall v. Barker* (1988) 197 Cal.App.3d 619, 623-624.)

As stated above, defendant Sarkar submitted his declaration as evidence in support of the motion. The declaration however does not affirmatively demonstrate a basis for relief from default based on mistake, inadvertence or excusable neglect. Nor does Sarkar present any additional evidence to support such relief. And, to the extent that mistake, inadvertence, or excusable neglect is grounded on improper service, the court has considered and rejected that argument for reasons explained above.

Consequently, the request to vacate default is DENIED.

#### **Disposition**

The motion to quash service of summons and complaint is DENIED.

The request to vacate default is DENIED.

The court will prepare the Order.

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**Calendar line 12**

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Calendar line 13

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