ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:
Daniel Horowitz SBN 92400
3650 Mt. Diablo Blvd, Ste 225
Lafayette, CA 94549

TELEPHONE NO.: 925-283-1863 FAX NO. *(Optional)*:
E-MAIL ADDRESS *(Optional)*: horowitz@physiciandefense.lawyer
ATTORNEY FOR *(Name)*: Dr. Alicia Kalamas

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BRANCH NAME: Wakefield Taylor Courthouse

PLAINTIFF/PETITIONER: Dr. Alicia Kalamas
DEFENDANT/RESPONDENT: John Muir Health, Calvin Knight, Taejoon Ahn, et al.

NOTICE OF ENTRY OF JUDGMENT OR ORDER

CASE NUMBER: C22-00088

(Check one): [X] **UNLIMITED CASE** (Amount demanded exceeded $25,000) [ ] **LIMITED CASE** (Amount demanded was $25,000 or less)

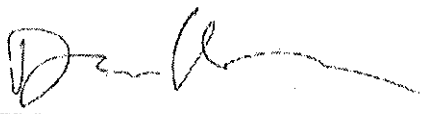
TO ALL PARTIES :

1. A judgment, decree, or order was entered in this action on *(date)*: 11/09/2022

2. A copy of the judgment, decree, or order is attached to this notice.

Date: November 14, 2022

Daniel Horowitz
(TYPE OR PRINT NAME OF [X] ATTORNEY [ ] PARTY WITHOUT ATTORNEY)



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San Francisco, CA 94111
Telephone: (415) 982-5267
Fax: (415) 982-5287

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

ALICIA KALAMAS, **Plaintiff,** **v.** **JOHN MUIR HEALTH, CALVIN KNIGHT, TAEJOON AHN, and JOHN MUIR MEDICAL GROUP,** **Defendants.**	**CASE NO. C22-00088** **ORDER RE: DEFENDANTS SPECIAL MOTION TO STRIKE UNDER C.C.P. §425.16**

I. BACKGROUND

A. Facts

This case arises out Plaintiff Alicia Kalamas' ("Plaintiff") work as a Medical Director of the preoperative clinic at Defendant John Muir Health ("JMH") hospital. In July of 2011, JMH opened a preoperative clinic, but the clinic lacked direct physician oversight. In 2013, Plaintiff was hired to provide that oversight. Because hospitals cannot directly employ physicians, Plaintiff contracted with MAC/Envision, which then contracted Plaintiff to JMH. (Complaint for Damages ("Compl.") ¶74.) Plaintiff commenced work in October of 2013 as the Medical Director of the Perioperative

Medicine Program. (*Id*. ¶36.) Her initial focus was to improve access to the preoperative clinic. (*Id*. ¶38.) After addressing workflow issues and increasing clinic volume and productivity, Plaintiff began to focus on quality improvement projects. (*Id*. ¶¶41, 43-51.)

On May 10, 2018, MAC/Envision renewed its contract with JMH that provided for Plaintiff's work at JMH. (Compl. Ex. 3, p. 15.) The contract was effective May 15, 2018 through May 31, 2021. (*Id*., Ex. 3, §6.1.) Plaintiff's responsibilities included: "[o]versee the preoperative clinic," provide "direct supervision of the nurse practitioners and other clinic staff," "communicate with physicians regarding patient care recommendations for optimal outcome," "[p]rovide strategic direction for the Program," "[f]acilitate and assist in the development of perioperative order sets," "[p]articipate in chart review of surgery patients," "[p]rovide support for and/or attend multidisciplinary rounds on surgical patients as it relates to improving evaluations of patients and operations in the clinic," and "[m]eet regularly with executive leadership from both John Muir Health hospitals and John Muir Physicians Network to discuss Program updates." (Compl. ¶75, Ex. 3, Ex. 1.)

Plaintiff alleges that she performed her job without complaint until she began to focus on improving "glycemic (blood glucose) management and the astonishingly high (and hidden) rate of surgical site infections" occurring at JHM. (Compl. ¶112.) To reduce surgical site infections, Plaintiff led an initiative to modify glycemic control in surgical patients. (*Id*. ¶114.) Plaintiff alleges that JMH lacked a protocol for checking the blood glucose levels of diabetic patients upon arrival at the hospital prior to surgery and

throughout the patient's stay at JMH. (*Id.* ¶70.) Changes to the hospital's protocol regarding glycemic control would require modifications to nursing protocols, hospitalists' practice guidelines, and day-to-day procedures at the hospital. (*Id.* ¶114.) Plaintiff alleges that she encountered staff resistance to her proposed changes, particularly from Defendant Taejoon Ahn ("Ahn"), a Family Medicine practitioner who was the President and CEO of Defendant John Muir Medical Group ("JMMG") and who supervised JMH hospitalists. (*Id.* ¶105.)

In June of 2018, Plaintiff submitted a request to the Medical Directors of Endocrinology to change the insulin order set for post-surgical patients. (Compl. ¶153.) The request was denied. (*Id*.) In July of 2016, Plaintiff met with the Endocrinology Medical Directors to discuss implementing glucose testing and insulin therapy for surgical patients. (*Id*. ¶166.) Plaintiff also circulated articles on the relationship of blood glucose levels and surgical site infections. (*Id.* ¶168.) Plaintiff alleges that her suggestions were "tabled and ignored" and that JMH never adopted her suggested protocols. (*Id.* ¶¶173, 175.)

Ahn was opposed to Plaintiff's suggested protocols and circulated an email critiquing an article Plaintiff had distributed that supported her position. (Compl. ¶244, Ex. 38.) Plaintiff alleges her suggested changes to glucose management protocols would have had significant impact on the work of JMH hospitalists, who treat the patients of other physicians while the patients are in the hospital. (Compl. ¶¶176-77.) According to Plaintiff, the hospitalists had no systemic protocols to improve surgical outcomes and

when Plaintiff attempted to implement changes, the hospitalists were extremely resistant. (*Id.* 178.) Because Ahn supervised the hospitalists, Plaintiff alleges that he was particularly sensitive to any criticisms of the work performed by hospitalists.

Plaintiff alleges that she continued to advocate for a glucose management protocol and, in January of 2019, Plaintiff met with several Executive Directors to discuss the issue. Although Plaintiff's contract required her to work with hospitalists, Plaintiff alleges that Ahn directed the hospitalists to refuse to attend any meeting at which Plaintiff was present. (Compl. ¶¶262, 309.) Furthermore, Plaintiff alleges that Ahn "manipulated and politicked against her both covertly and openly," and attempted to discredit Plaintiff by labeling her a "disruptive physician." (*Id.* ¶¶239, 244, 263). Ahn purportedly used "gender based stereotyping and other tools to encourage false reporting and false characterization of her patient advocacy as 'disruptive.'" (*Id.* ¶272.) Plaintiff alleges that JMH and JMMG sanctioned and ratified Ahn's actions and "sided" with staff who "resisted patient centered improvements." (*Id.* ¶¶92, 191.)

Anna Chang, a physician specializing in endocrinology, served on a JMH committed that oversaw policy decisions for in-house treatment of surgical patients. (Compl. ¶22.) Dr. Chang characterized Plaintiff's emails regarding the proposed protocols as "bullying," and expressed concern that the protocols would reduce blood glucose levels too low. (*Id* ¶¶ 279, 283.) In response, Plaintiff submitted to the committee her correspondence with two experts in glycemic control that addressed Dr. Chang's

concern regarding insulin dosing frequency, but not a single committee member responded. (*Id.* ¶¶ 286, 288.)

Since her suggestion to implement protocols was in limbo, Plaintiff began to review the individual charts of patients treated at JMH. When Plaintiff noted what she believed to be failures to adequately treat a patient's blood glucose level, Plaintiff would report the deficiencies. In January of 2019, Plaintiff emailed the Executive Directors of Hospital Medicine and requested that they adhere to guidelines for managing hyperglycemia in hospital patients. (Compl. ¶300.) Plaintiff also pointed out adverse patient events, such as patients who had highly elevated blood glucose levels for several hours without receiving treatment. (*Id.* ¶¶303, 307, 310, 311, 312, 313; Exs. 45, 46, 47, 49.) Plaintiff alleges that she was "not informed of any action taken" on her series of complaints but that a meeting was held, without Plaintiff, on February 19, 2019. (Id. ¶314.) Plaintiff alleges that the purpose of the meeting was "not about implementing changes to patient care" but "was about silencing and punishing [Plaintiff] for her work supporting patient care." (*Id*., ¶ 315)

Plaintiff continued to send email complaints whenever she believed patients were receiving inadequate care. (Compl. ¶¶316, 346, Ex. 50.) Plaintiff also shared with a JMMG Chairperson her concern that hospitalists were not adequately documenting patients' co-morbidities; the Chairperson agreed that the documentation was inadequate but did not make any systematic changes to address the issue. (*Id.* ¶354.) Plaintiff continued to request that the hospital implement protocols so that Plaintiff would not

have to review individual patient charts to address the deficiencies. (*Id.* ¶¶340, 344, 347, Exs. 59, 62, 63.)

Plaintiff alleges that the hospitalists' reacted with hostility to Plaintiff's complaints. (Compl. ¶320, Ex. 53) Hospitalists objected when Plaintiff wrote orders for patients or suggested additional treatment she believed was required, and they refused to take Plaintiff's direction. (*Id.* ¶322) Plaintiff requested assistance from JMH senior management to resolve her problems with hospitalists, but her requests were ignored. (*Id.* ¶¶326-327, 330, 333, 350.)

In June of 2019, Plaintiff met with JMH management and was told that she had an abrasive personality and required professional coaching. (Compl. ¶358) JMH issued a letter stating that Plaintiff had a history of implementing several successful clinical initiatives at JMH, and that in late 2018, Plaintiff identified "poor patient management" in the post-surgical phase. (*Id*., Ex. 71.) The letter acknowledged that Ahn failed to respond to Plaintiff's "email, text, [and] phone" complaints of inadequate care, which led to "multiple conversations regarding appropriate channels to communicate patient management concerns." (*Id*.) The letter further stated that some of the conversations "were construed by the Hospitalist leadership as inflammatory and disruptive" and that Ahn had instructed hospitalists to "not engage with [Plaintiff] in meetings." (*Id*.) As a result, JMH determined that Plaintiff required coaching to "develop strategies for tailoring her communication style to her audience . . .." (*Id*.) Plaintiff objected to the implication that she was solely responsible for the contentious interactions between

Plaintiff and Ahn, and JMH management acknowledged that the "embargo" that Ahn had placed on hospitalists' meetings with Plaintiff was "inappropriate." (*Id.* ¶¶366-368, Ex. 73.)

When hospital staff suggested adopting an alternative glucose protocol that Plaintiff contends is 20% higher than the recommended level, Plaintiff objected. (Compl. ¶386, Exs. 83, 84.) Plaintiff learned that the alternative protocol was being implemented without her input and participation and complained to JMH management. (*Id.* ¶397., Ex. 88.) Although JMH staff acknowledged the clinic's issues with hyperglycemia and suggested a meeting with Plaintiff, they did not follow through. (*Id.* ¶468, Ex. 123.)

Plaintiff continued to send alerts whenever she noticed patient care that she believed was inadequate. (*See, e.g.*, Compl. ¶¶400, 403, 404, 405-407, 438, 439, 449, 461, 488-89, Exs. 89, 92, 93-96, 112, 134). Plaintiff states that she was frustrated because she had to be a "safety net" for patients as "every night there seems to be some error that leaves our patients vulnerable vis a vis glycemic management." (*Id.* ¶456.)

In February of 2021, JMH demanded that Plaintiff refrain from sending emails alerting staff of treatment issues. (Compl. ¶491, Ex. 135). JMH management also told Plaintiff that she had "sharp elbows." (*Id.* ¶¶471, 497.) Plaintiff contends that Defendants did not want to address the substandard treatment provided by JMH and discredited her complaints by labeling them "communication issues with hospitalists" and accusing her of having a personality issue. (*Id.* ¶¶527, 535.) Although JMH objected to Plaintiff's attempt to resolve problems by writing insulin orders for post-surgical patients, JMH

never indicated that Plaintiff's orders were improper or that the treatment she suggested was incorrect. (*Id.* ¶538)

Plaintiff alleges that the surgeons who utilized JMH agreed with Plaintiff's protocols and appreciated Plaintiff's advocacy. (Compl. ¶545, Ex. 164.) When a group of surgeons complained about clinic care, JMH and JMMG offered to meet with the surgeons, but did not include Plaintiff in the meeting. (*Id.* ¶¶542, 543.) When one of the surgeons objected and Plaintiff emailed JMH's CEO that she expected to attend the meeting, JMH's CEO refused to intervene and stated that Ahn could "decide who will attend." (*Id.* ¶¶546, 547, 551.) When the surgeons objected to Plaintiff's absence, Ahn stated that the meeting would go forward as planned, and if the surgeons refused to attend without Plaintiff, the meeting would be cancelled. (*Id.* ¶552, Ex. 167.)

In April of 2021, Plaintiff was notified that JMH was holding a meeting to determine whether to renew Plaintiff's contract and by late April, Plaintiff learned that her contract would not be renewed. (Compl. ¶¶548, 556, 564, 573, Exs. 166, 178.) Additionally, JMH "eliminated" Plaintiff's position and created a new job position to ensure that Plaintiff lacked the qualifications to reapply. (*Id.* ¶¶557, 567, 575, Ex. 180.) When a surgeon asked why JMH was "firing" Plaintiff, JMH management responded that Plaintiff was "threatening lawsuits." (*Id*., ¶548.)

Plaintiff emailed JMH management, stating that the "reorganization" of her position was a pretext and objecting to the "ongoing abuse of power, retaliation, and character assassination she faced at the hands of" Ahn. (Compl. ¶558.) She complained

that Ahn and the hospitalists "undermined her authority" and "prevented her Perioperative Glycemic Management Order Set from advancing through the established process." (*Id*.) In May of 2021, Plaintiff emailed JMH's Corporate Compliance officer to request information on protection of whistleblowers, noting that the proximity between her non-renewal and her complaints regarding patient safety issues indicated that JMH had retaliated against Plaintiff. (*Id.* ¶¶574, 576, Ex. 180.)

In late May of 2021, the CEO of JMH met with a group of surgeons to discuss quality issues at the hospital. (Compl. ¶599). However, he informed the group that Plaintiff's contract with JMH was "off topic" because Plaintiff was "litigious," and he would never consider re-hiring her. (*Id*.)

Plaintiff filed her Complaint for Damages on January 12, 2022 in the Contra Costa County Superior Court. On March 22, 2022, the parties stipulated to submit the matter to Judicial Reference under California Code of Civil Procedure §638(a) and agreed to the appointment of the Honorable Elizabeth D. Laporte (Ret.) as Referee.

B. Plaintiff's Request for Judicial Notice and Objection to Evidence

Plaintiff seeks judicial notice of the complaint filed in TOM JONG, TRUC-CO JONG v. JOHN MUIR HEALTH, JEFF POAGE, JAY MICHAEL S. BALAGTAS, THOMAS HUI, WAYNE K. LEE, ROMERSON J. DIMLA and DOES 1-100 (Case No. C22-00633) Contra Costa County Superior Court. Defendants did not object to Plaintiff's request. The document was filed in a "court of this state" and is subject to judicial notice under California Evidence Code §452(d).

Plaintiff objects to the Declaration of Nick Mickas MD, filed by Defendants in support of their motion, on the basis that ¶11 of the declaration contains statements that are not based on Dr. Mickas' personal knowledge and are hearsay. Plaintiff's objections are denied as Dr. Mickas' statements in ¶11 of his declaration were not relied upon to determine this motion.

II. DISCUSSION

California Code of Civil Procedure ("CCP") 425.16 was enacted "to encourage continued participation in matters of public significance" by preventing attempts to chill that participation through the abuse of the judicial process. (*Kibler v. N. Inyo Cnty. Local Hosp. Dist*, 39 Cal.4th 192, 197 (2006).) A defendant may bring a special motion to strike under CCP 425.16 (the "anti-SLAPP statute") to obtain early dismissal of a lawsuit that is "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (*Id*.)

CCP 425.16(b)(1) states that:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

In evaluating anti-SLAPP motions, courts apply a two-prong test. First, the court determines whether a defendant has made a *prima facie* showing that the lawsuit arises from an act in furtherance of the defendant's right of petition or free speech. (*Laker v. Bd. of Trustees*, 32 Cal.App.5th 745, 762 (2019).) To prevail on the first step, Defendants

must identify all allegations of protected activity and all claims for relief supported by those allegations. (*Baral v. Schnitt*, 1 Cal.5th 376, 396 (2016).) If a claim is supported by both protected and unprotected activities, the court disregards the unprotected activity at this stage. (*Id*.) Defendants must then show that the challenged claim arises out of the allegations of protected activity and that the allegations of protected conduct are not merely incidental or included to provide context or background. (*Id*.; *see also, Bonni v. St. Joseph Health System*, 11 Cal.5th 995, 1012 (2021).

"A claim arises from a protected activity when that activity underlies or forms the basis for the claim." (*Park v. Board of Trustees of California State University*, 2 Cal.5th 1057, 1062 (2017).) Courts must "consider the elements of the challenged claims and what actions by defendant supply those elements and . . . form the basis for liability." (*Laker*, 32 Cal.App.5th at 771.) The protected activity must "supply elements of the challenged claim" such that "but for" the defendant's "alleged actions taken in connection with" the protected activity, the plaintiff's claim would have no basis. (*Park*, 2 Cal.5th at 1063-64.) The "mere fact that an action was filed after protected activity took place does not mean the action arose from that activity . . .." (*Id*. at 1063.) If the protected activity supplies only "evidence of the parties' disagreement," merely leads to the liability creating activity, or provides only evidentiary support for the plaintiff's claim, the allegation is not subject to attack under CCP §425.16. (*Id*. at 1064.)

Section 425.16(e) defines whether an act is "in furtherance of the person's right of petition or free speech." Defendants contend that Plaintiff's' claims arise out of the types

of protected activity described in subsections (2) and (4), which state, respectively, that the following constitute acts "in furtherance:"

> . . . 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 . . .
>
> [or]
>
> . . . 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.

If a defendant meets its burden on the first step, the court then examines, under the second prong, whether the plaintiff has shown a probability of success on the merits. (*Baral*, 1 Cal.5th at 396.) This step is a "summary-judgment" like process under which the court does not weigh evidence or resolve conflicts but accepts the plaintiff's evidence as true and determines whether the plaintiff stated a "legally sufficient claim" and a *prima facie* factual showing. (*Id*. at 384-385.) A defendant may attack a plaintiff's showing on prong two by demonstrating that the plaintiff's claim fails as a matter of law. (*Id*. at 385.) If the plaintiff cannot meet its burden, allegations of protected activity supporting the targeted claim are stricken from the complaint. (*Id*. at 396.) However, if the plaintiff meets its burden on prong two, allegations arising out of protected activity may remain in a complaint.

Plaintiff is pursuing four[1] causes of action: (1) violation of Health & Safety Code §1278.5; (2) negligent infliction of emotional distress[2]; (3) breach of contract; and (4) violation of Labor Code §1102.5. Defendants argue that although Plaintiff has not pled a claim for defamation, Plaintiff has made "Character Assassination" allegations that resemble the type of allegations that are pled in support of a defamation claim. (Def. Moving Papers, p. 12.) Thus, Defendants argue that case law applying the anti-SLAPP statute to defamation claims should apply to this case even though Plaintiff has not pled a claim for defamation and the word "defamation" is entirely absent from Plaintiff's Complaint.

Defendants cite *Total Call Int'l v. Peerless Ins. Cop*., 181 Cal.App.4th 161 (2010), a case in which the court examined whether an insured adequately pled a claim that would trigger an insurer's duty to defend a lawsuit involving advertising injury or defamation. (*Id*. at 165.) The insurer's duty to defend is broader than the duty to indemnify and arises from the mere possibility of liability, a different standard than here. (*Id*. at 166.) After noting that a claim that alleges "an injurious false statement" would trigger the insurance policy even if not labeled "defamation" or "advertising injury," the Court concluded that the insured's complaint did not allege a claim for an injurious false statement and thus did not trigger the scope of the policy's coverage for advertising injury. (*Id*. at 170 or 171.) *Total Call* did not involve the application of the anti-SLAPP

[1] Plaintiff's Complaint alleges one count for intentional infliction of emotional distress. At oral argument on this motion, Plaintiff conceded that she lacked sufficient evidence to support that claim and Plaintiff withdrew that cause of action.

[2] Although labeled "Negligence" in her Complaint, Plaintiff explained at the hearing that she intended to allege one count for negligent infliction of emotional distress.

statute and does not support Defendants' assertion that Plaintiff's complaint must be examined *as if* Plaintiff had alleged a claim for defamation.

Plaintiff's claims shall be analyzed as pled.

A. Retaliation Claims: Health & Safety Code §1278.5 and Labor Code §1102.5

Plaintiff's first and last causes of action arise out of Plaintiff's allegations that she complained about treatment provided at JMH and that in response, Defendants retaliated against her. California Health & Safety Code § 1278.5(b)(1) states that "[n]o ***health facility*** shall discriminate or retaliate, in any manner, against any patient, employee, member of the medical staff, or any other health care worker of the health facility because that person has . . . [p]resented a grievance, complaint, or report to the facility, to an entity or agency responsible for accrediting or evaluating the facility, or the medical staff of the facility, or to any other governmental entity." (*Emphasis added*.)

California Labor Code §1102.5 states that:

> An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

An "adverse employment action" is one that "materially affects the terms, conditions or privileges of employment." (*Yanowitz v. L'Oreal USA, Inc*., 36 Cal.4th 1028, 1051 (2005).) The California Supreme Court has stated that:

> Retaliation claims are inherently fact specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim.

(*Id*. at 1052.)

The same factual allegations support Plaintiff's Health & Safety Code §1278.5 claim and Plaintiff's Labor Code §1102.5 claim and thus the two claims will be addressed in conjunction.

1. Plaintiff's Factual Allegations

Plaintiff alleges that she suffered "discriminatory treatment" because of her repeated attempts to report adverse patient events, as defined under Health & Safety Code §§1279.1 and 1279.6(c), that occurred at JMH. Specifically, Plaintiff alleges that she suffered "discharge, demotion, suspension, or any unfavorable changes in, or breach of, the terms or conditions of [Plaintiff's] contract, employment, or privileges . …" (Compl., p. 117.) In her supplemental briefing, Plaintiff clarified that Defendants retaliated by "restricting her privileges, modifying the terms of her contract through conduct, and by ultimately not renewing her contract" and Plaintiff cited to specific portions of her

Complaint that support her retaliation claims. (*See*, Plaintiff's Supplemental Brief of 9/26/2022, 5:6-7.)

Plaintiff alleges that she informed Defendants that she had concerns regarding JMH's glycemic management of pre-op patients, JMH's intake of a pediatric surgery patient, the scope of authority delegated to nurses, and patient care errors committed by both nurses and hospitalists. (*See*, Compl. ¶¶ 143-145, 412, 487-489, 504-505, 511, 523, 531-532, 537, 559, 615.) As a result of her reporting, Plaintiff alleges that "inappropriate restrictions were placed on her ability to perform her duties at JMH" and she was excluded from discussions regarding glucose management and other patient care issues. (*Id*. ¶¶397, 403-404, 414, 417, 505.) Plaintiff further alleges that she was effectively demoted by Ahn because he required Plaintiff to obtain permission from a hospitalist before writing orders for surgical patients. (*Id*. ¶¶417-419.) Although JHM was aware of Ahn's interference and indicated to Plaintiff that Ahn's "embargo" on hospitalists' interactions with Plaintiff was "inappropriate," Plaintiff states that JHM nonetheless sanctified, endorsed, ratified and directed Ahn's behavior because JHM did nothing to correct it. (*Id*. ¶¶92, 191, 354, 368).

Plaintiff further alleges that JMH forbade Plaintiff from writing orders in patient charts, prohibiting her from making notes in the JMH records system, and blocking her from implementing orders. (Compl. ¶¶491-92.) Defendants also allegedly prevented Plaintiff from being directly involved with patient care and from modifying patient charts. (*Id*., ¶¶320-323, 413-419, 491-492, 513-514, 538)

Plaintiff was also banned from attending meetings regarding patient care. Ahn instructed his Medical Directors to not attend any meeting at which Plaintiff was present. (*Id*. ¶262.) Additionally, the CEO of JMMG scheduled a meeting between hospitalists and orthopedic surgeons to discuss surgeons' concerns regarding patient care, but the CEO intentionally excluded Plaintiff. (Compl. ¶¶551-552.) When Plaintiff complained, the CEO responded that Ahn "and other leaders of the hospitalist team . . . can decide who will attend." (*Id*. ¶547.) When a surgeon complained that he would not attend if Plaintiff were not at the meeting, the CEO stated that the meeting would go forward without Plaintiff and, if the surgeons refused to attend without Plaintiff, the meeting would be cancelled. (*Id*. ¶¶551-552.)

Ultimately, JMH did not renew Plaintiff's contract. (Compl. ¶¶556, 564.) Plaintiff alleges that Defendants "reorganized" the position to avoid Plaintiff's complaints about patient care and as a "pretext to not renew her contract." (Compl. ¶¶548, 557, 567.) JMH's Senior Vice President and Chief Medical Officer allegedly stated that Plaintiff's contract was not renewed "because she is threatening lawsuits." (*Id*., ¶548.) Furthermore, the CEO informed the surgeons that he would not rehire Plaintiff because she was "litigious." (*Id*. ¶599.) Plaintiff complained to Defendants that "given the proximity to the time she raised concerns about several safety issues within JHM . . . retaliation appears to be the motive." (*Id*. ¶576.)

2. Protected Activity

Defendants contend that Plaintiff's retaliation claims infringe upon the following protected activity: (1) statements to medical staff regarding Plaintiff's' professional competency; (2) statements made in the debate over hospital protocols; (3) discussions critiquing the medical journal articles that Plaintiff cited in support of her suggested protocols; and (4) the peer review process.

Statements regarding Plaintiff's "qualifications, competence, and professional ethics" are "conduct in furtherance of . . . the exercise of the constitutional right [of]. . . free speech in connection with a public issue or an issue of public interest" because "whether or not a licensed physician is deficient in such characteristics is . . . a public issue." (*Yang v. Tenet Healthcare Inc*., 48 Cal.App.5th 939, 947 (2020).) Debating hospital protocols and criticizing medical journal articles are also free speech in connection with a public issue or an issue of public interest. "[E]xpressions of opinion about an issue of genuine scientific debate" are "noncommercial speech fully protected under the First Amendment." (*Bernardo v. Planned Parenthood Federation of America*, 115 Cal.App.4th 322, 342 (2004).) Discussions regarding the appropriate glucose medication protocol for a public hospital relate to a "public issue or an issue of public interest."

Defendants also argue that Plaintiff's claims arise out of statements and conduct in furtherance of Defendants' peer review process. "Peer review is the process by which a committee comprised of licensed medical personnel at a hospital 'evaluate[s] physicians

applying for staff privileges, establish[es] standards and procedures for patient care, assess[es] the performance of physicians currently on staff,' and reviews other matters critical to the hospital's functioning." (*Kibler*, 39 Cal.4th at 199, *citing Arnett v. Dal Cielo,* 14 Cal.4th 4, 10 (1996).) "[P]eer review of physicians . . . serves an important public interest. Hospital peer review, in the words of the Legislature, 'is essential to preserving the highest standards of medical practice' throughout California." (*Id*., *citing* Cal. Bus. & Prof. Code, § 809(a)(3).)

Defendants note that California Business & Professions Code §2282 (which states that "medical staff shall meet periodically and review and analyze at regular intervals their clinical experience") requires hospitals to implement a peer review process. Thus, the peer review process is an "official proceeding authorized by law," such that "any written or oral statement or writing made in connection with" the peer review process is protected under CCP 425.16(e)(2). The California Supreme Court has determined that "a hospital's peer review may qualify as "any other official proceeding authorized by law" under CCP 425.16(e)(2) and that a lawsuit arising out of a peer review proceeding may be subject to an anti-SLAPP motion. (*Kibler*, 39 Cal.4th at 198.)

Plaintiff argues that Defendants never commenced a formal peer review investigation of Plaintiff and thus there was no "peer review" process. However, a formal investigation is not required for communications to be protected. "A peer review committee may informally investigate a complaint or an incident involving a staff physician." (*Arnet v. Dal Cielo*, 14 Cal.4th 4,10 (1996).) Complaints made regarding a

physician in the SPARK system may lead to a peer review investigation, because reports that staff experienced difficult or counterproductive communications with a medical director relate to the "clinical experience" of the institution. (*See, e.g., Kibler*, 39 Cal.4th at 197 ("hostile encounters between Kibler and other staff members" formed the basis for the peer review investigation.) Further, peer review also encompasses establishing procedures for patient care. (*Id*. at 199.) Thus, Defendants' communications in support of the peer review process are protected activity under CCP 435.16(e)(2) even if a peer review investigation against Plaintiff was not instigated.

Additionally, CCP 435.16(e)(4) protects "any other conduct in furtherance of the exercise of the constitutional right" of free speech in connection with an issue of public interest. Statements regarding Plaintiff's' professional competency, debates over hospital protocols, and criticism of medical journal articles constitute conduct in furtherance of free speech regarding patient care in a community hospital, which is an issue of public interest.

Therefore, Plaintiff's allegations include conduct by Defendants that constitutes protected activity.

3. Arising from Protected Activity

Anti-SLAPP motions may only target claims "arising from any act" of the defendant "in furtherance of the" defendant's right of free speech:

> An unduly broad reading of the anti-SLAPP statute would subject most, if not all, harassment, discrimination, and retaliation cases to motions to strike. Any employer that initiates an investigation of an employee, whether for lawful or unlawful motives, would be at liberty to claim that its conduct was protected and

> thereby shift the burden of proof to the employee, who, without the benefit of discovery and with the threat of attorney fees looming, would be obligated to demonstrate the likelihood of prevailing on the merits.

(*Laker*, 32 Cal.App.5th at 766-767, *citing Nam*, 1 Cal.App.5th at 1189.) Defendants must demonstrate that Plaintiff's retaliation claims arise from Defendant's protected activities. If "the particular manifestations" of the retaliation suffered by a plaintiff do not constitute protected speech or petitioning activity, the retaliation claim does not implicate the anti-SLAPP statute. (*See, Wilson v. Cable News Network*, 7 Cal.5th 871, 886 (2019).)

To prove retaliation, Plaintiff must show by a preponderance of the evidence that her whistleblowing was a "contributing factor" to an adverse employment action. (*Lawson v. PPG Architectural Finishes, Inc., 12 Cal.5th 703*, 712 (2022).) If she meets that burden, Defendants must demonstrate by clear and convincing evidence that they would have taken the same action for legitimate, independent reasons even if Plaintiff had not engaged in the whistleblowing activities. (*Id*.)

Defendants argue that Plaintiff's retaliation claims arise out of Plaintiff's allegations that Defendants critiqued Plaintiff's suggested glucose protocols and the scientific articles Plaintiff circulated in support of those protocols. (Def's Special Motion to Strike, 17:1-19, *citing* Compl. ¶¶171, 194, 244.) Defendants point to Plaintiff's allegations that Ahn's critiques were "bombastic," and that Dr. Chang's opposition was based on "unreasonable fear and lack of understanding of the basic science." (Id. ¶¶194, 244, 247.)

While her Complaint criticizes JMH staff and JMMG members' opinions regarding appropriate glucose management, Plaintiff does not allege that Defendants' contrary opinions constitute retaliation or an adverse employment action against Plaintiff. Plaintiff alleges that Defendants' acts of retaliation occurred after Plaintiff and Defendants disagreed over the proper protocols for glucose management. In her supplemental briefing, Plaintiff clarified that she subsequently suffered retaliation in the form of restricted privileges, modification of the terms of her contract, and the non-renewal of her contract. (Pl's Supp. Brief Setting Forth and Specifying Allegations ISO Count 1, 5:5-7.) Thus, Plaintiff's allegations regarding Defendants' "scholarly criticism" of Plaintiff's suggested protocols and the scientific journals Plaintiff cited in supported of her protocols are included in the Complaint as background information.

At oral argument on this motion and in their supplemental briefing, Defendants argued that Plaintiff's allegations that she was in effect subjected to silent treatment, *i.e.*, that Defendants had a "policy and practice" of ignoring all areas of Plaintiff's advice and communications (*see, e.g.*, Compl. ¶¶238, 448), target Defendants' constitutional right to *refrain* from speaking. Defendants also argued that Plaintiff's allegations that Defendants excluded her from meetings target Defendants' exercise of their right to free association.

Freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all," as well as the "right to eschew association for expressive purposes. ..." (*Janus v. Am. Fed. of State, Cnty. & Mun. Emps.,* 138 S.Ct. 2448 2463 (2018).) "Whenever the Federal Government or a State prevents individuals from saying what

they think on important matters or compels them to voice ideas with which they disagree," free speech rights are undermined. (*Id.* at 2464, *citations omitted*.) Defendants maintain that their choice to respond to Plaintiff's advocacy with "silence" is constitutionally protected speech.

Plaintiff argues persuasively that the constitutional right to "refrain from speaking" protects only the right to be free from laws that compel a person to deliver a particular message. (*See, National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2371 (2018).) JMH's failure to respond to Plaintiff's complaints regarding inadequate hospital care does not implicate JMH's right to be free from laws that compel individuals to speak a message with which they do not agree. JMH was under no obligation to agree with Plaintiff.

Defendants' argument that decisions to exclude Plaintiff from meetings are protected speech is also unavailing. Conduct is protected as speech only if the conduct itself is intended to convey an expressive idea. The United States Supreme Court has "rejected 'the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.'" (*Texas v. Johnson*, 491 U.S. 397, 404 (1989), *citing United States v. O'Brien*, 391 U.S. 367, 376 (1968).) Instead, "the nature of [the speaker's] activity, combined with the factual context and environment in which it was undertaken, [must] lead to the conclusion that [the speaker] engaged in a form of protected expression." (*Spence v. State of Washington*, 418 U.S. 405, 409 (1974).) Hence, the burning of a United States flag is conduct that

constitutes expressive speech. (*Id*.) However, Defendants' silence in response to Plaintiff's complaints of unsafe treatment of patients in the context of the workplace is not "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." (*See*, *Texas,* 491 U.S. at 404*, citing Spence v. Washington,* 418 U.S. 405, 409–411 (1974).)

As for Defendants' argument that the decision to exclude Plaintiff from meetings regarding patient safety protocols was protected by the First Amendment's expressive associational right, Defendants failed to demonstrate that the workplace meetings constituted expressive associations. In any case, to be entitled to protection, Defendants must show that they were "engage[d] in expressive activity that could be impaired." (*Villegas v. City of Gilroy*, 484 F.3d 1136, 1143 (9th Cir. 2007).) The only "threat" entailed by including Plaintiff in the meetings was the threat of "more speech." (*See, Hamilton County Educ. Assoc. v. Hamilton County Bd. of Educ*., 112 F.Supp.3d 716, 724 (2015).) When a group's expressive association is not burdened, it does not matter whether the group is, in fact, an expressive association. (*Id*.)

None of the cases relied upon by Defendants in support of these arguments involve anti-SLAPP motions, which is significant because the "scope of protection afforded by the anti-SLAPP statute may not precisely track the lines drawn under the First Amendment . . .." (*Bonni*, 11 Cal.5th at 1021.) It is also significant that none of the cases involve employees or independent contractors engaged in work-related meetings. *Healy v. James*, 408 U.S. 169 (1972) and *Marca v. Capella Univ*., 2007 WL 9705859,

involved student participation in colleges. *Janus v. Am. Fed. of State, Cnty. & Mun. Emps*., 138 S.Ct. 2448 (2018) involved a governor's challenge to legislation regarding the use of public-sector union dues. *Minn. State Bd. for Comm. Colleges v. Knight*, 465 U.S. 271 (1984) involved faculty members challenging the constitutionality of a state statute limiting public employees' ability to engage in official exchanges of views. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) involved a homosexual scout leader who was expelled from the Boy Scouts. And *Dem Party of U.S. v. Wisc*., 450 U.S. 107 (1981) involved Democratic Party delegates.

Conversely, in the employment context, the California Supreme Court has instructed that there is an important distinction between communications made during the peer review process and an employer's communications that implement management decisions. In *Park*, a professor of Korean national origin sued for discrimination after he was denied tenure by his university employer. (*Park*, 2 Cal.5th at 1061.) The university argued that the professor's lawsuit violated CCP §425.16 because the university's grievance process, which included the university's communication to the professor that he was denied tenure, was protected speech. The Court noted that:

> . . . the tenure decision may have been communicated orally or in writing, but that communication does not convert Park's suit to one arising out of speech. The dean's alleged comments may supply evidence of animus, but that does not convert the statements themselves into the basis for liability. As the trial court correctly observed, Park's complaint is based on the act of denying plaintiff tenure based on national origin. Plaintiff could have omitted allegations regarding communicative acts or filing a grievance and still state the same claims.

(*Id*. at 1068.)

Furthermore, *Park* reviewed the holding in *Kibler* that the peer review process was a protected activity under §425.16 and clarified that the California Supreme Court disapproved of subsequent Court of Appeal cases that "overread" *Kibler* as concluding that every part of the peer review process was automatically protected activity. (*Id*. at 1069.) *Park* held that *Kibler* did not consider "whether every aspect of a hospital peer review proceeding involves protected activity, but only whether statements in connection with but outside the course of such a proceeding ***can*** qualify as 'statement[s] . . . in connection with an issue under consideration' in an 'official proceeding'" under §425.16(e)(2). (*Id*. at 1070, *emphasis added*.) "Kibler does not stand for the proposition that disciplinary ***decisions*** reached in a peer review process, as opposed to statements in connection with that process, are protected." (*Id*., *emphasis added*.) In fact, *Park* cautioned that:

> Failing to distinguish between the challenged decisions and the speech that leads to them or thereafter expresses them "would chill the resort to legitimate judicial oversight over potential abuses of legislative and administrative power."

(*Id*. at 1067, *citing San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Association*, 125 Cal.App.4th 343, 358 (2004).)

Similarly, in *Bonni*, the California Supreme Court considered whether a physician's retaliation claims against a hospital violated the anti-SLAPP statute. The Court noted that a claim is not "subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity." (*Bonni*, 11 Cal.5th

at 1014, *citing Park*, 2 Cal.5th at 1060.) Instead, "a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Id., emphasis in original*.) Thus, the Court determined that although speech conducted during the peer review process was protected, the adverse actions that the hospitals took based on their view that the plaintiff's "competence was suspect" were not protected because the anti-SLAPP statute "does not extend so far." (*Id*. at 1021.)

Defendants' decisions to limit Plaintiff's organizational authority, ban Plaintiff from meetings, prohibit Plaintiff from writing patient prescriptions or notes in charts without hospitalists' consent, and to curtail Plaintiff's ability to report patient care errors are employment activities regardless of how they were communicated. To the degree that Defendants' liability under Plaintiff's retaliation claims is based upon the decisions themselves and not Defendants' communication of those decisions, Plaintiff's claims do not target protected speech or conduct.

Defendants further claim that even if their exclusion of Plaintiff from meetings was not protected conduct, allegations that supervisors or coworkers refused to speak to an employee are insufficient to plead an "adverse employment action." But the authority cited by Defendants does not support their contention. In *Fisher v. San Pedro Peninsula Hospital*, 214 Cal.App.3d 590 (1989), the Second Circuit Court of Appeal stated that "[o]stracism, of course, does not amount to a hostile environment, and no cause of action can be pled on that basis *alone*." (*Id*. at 615, *emphasis added*.) Thus, *Fisher* held only that

ostracism by itself was insufficient to support a hostile environment claim. Furthermore, twenty years later the Second Circuit Court of Appeal refused to extend its holding in *Fisher* beyond the facts of the case, noting that "our opinion in *Fisher v. San Pedro Peninsula Hospital* . . . only addressed whether the allegations were sufficient to support the plaintiff's sexual harassment claim, not a discrimination claim." (*Williams v. Ralphs Grocery Store*, 2019 WL 4950258 *22.) Plaintiff has not alleged a claim for hostile work environment and thus *Fisher* is inapposite.

However, Defendants also challenge allegations in the Complaint that target Defendants' peer review process. Plaintiff alleges that Ahn and JMH undermined Plaintiff and discredited her work by labeling her a "disruptive physician." (Compl. ¶117, 210-216.) Plaintiff also alleges that Defendants encouraged staff to make false reports about Plaintiff's personal behavior and demeanor to "focus attention away" from the science and "actual factual issues" supporting Plaintiff's complaints, and to silence Plaintiff's criticism of the care provided at JMH. (Compl. ¶213, 261-264.) Furthermore, Plaintiff claims that Defendants used "false allegations" against her with the goal of initiating "a sham peer review process" to justify terminating Plaintiff. (Id.¶¶273, 358, 379, 538-39.) According to Plaintiff, if Defendants were successful at labeling Plaintiff a disruptive physician and if Plaintiff were sanctioned or disciplined for her behaviors, "her career would be irreparably damaged." (Id. ¶265.) Thus, Plaintiff alleges that Defendants' peer review actions were performed as retaliation against Plaintiff for her advocacy regarding patient blood glucose level management.

As discussed above, the peer review process is protected under §425.16(e)(2) of the anti-SLAPP statute. Thus, Plaintiff's retaliation claims are "mixed" causes of action that arise from both protected and unprotected activity. (*See, Baral v. Schnitt*, 1 Cal.5th 376, 395 (2016).) When a case involves "mixed causes of action," allegations of unprotected activity that support a claim are disregarded at the first step of the §435.16 analysis. (*Id.* at 396.) Defendants have met their burden on Prong 1 by demonstrating that Plaintiff's retaliation claims arise, in part, out of Defendants' peer review process.

4. Probability of Success on the Merits

Because Defendants met their burden on prong one with regard to Plaintiff's retaliation claims, Plaintiff bears the burden to show a probability of success on the merits by demonstrating a "legally sufficient claim" and a *prima facie* factual showing. (*See, Baral*, 1 Cal.5th at 384-385.)

On the second prong of the §425.16 analysis, the court does not "weigh evidence or resolve conflicting factual claims," but rather the court determines whether the plaintiff has stated a "legally sufficient claim and made a *prima facie* factual showing sufficient to sustain a favorable judgment." (*Yang*, 48 Cal.App.5th at 949.) A plaintiff's proffered evidence is accepted as true, and the defendant's showing is evaluated only to "determine if it defeats the plaintiff's claim as a matter of law." (*Id.*)

Defendants argue that Plaintiff's retaliation claims fail as a matter of law because the claims rely entirely on statements that are absolutely privileged under California Civil

Code §47(b) or conditionally privileged under §47(c). [3] Section 47 of the Civil Code provides, in part, that "[a] privileged publication or broadcast is one made:

> (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable [in a mandate action] .... [¶] ... [¶]
>
> (c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information…."

(*Kashian*, 98 Cal.App.4th at 914, *citing* Cal. Civil Code §47.) The "litigation privilege" under §47(b) is absolute and does not depend on the speaker's "motives, morals, ethics or intent." (*Silberg v. Anderson*, 50 Cal.3d at p. 220.) The "common interest privilege" under §47(c) requires evidence that the speaker acted without malice. "[I]f malice is shown, the [common interest] privilege is not merely overcome; it never arises in the first instance." (*Id*. at 915.)

Defendants argue that Plaintiff is a limited purpose public figure and as such, to overcome Defendants' §47(c) privilege, Plaintiff must prove that Defendants acted with "actual malice." When an "an individual voluntarily injects himself or is drawn into a particular public controversy" that individual "becomes a public figure for a limited range of issues." (*Copp v. Paxton*, 45 Cal.App.4th 829, 845 (2004).) To be a "limited purpose public figure," a person must undertake "some voluntary act through which [the person]

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[3] Although §47 "originally applied only to defamation actions, the privilege has been extended to any communication, not just a publication, having 'some relation' to a judicial proceeding, and to all torts other than malicious prosecution." (*Kashian v. Harriman*, 98 Cal.App.4th 892, 913 (2002).) It has also been interpreted to preclude statutory causes of action. (*Komarova v. National Credit Acceptance, Inc.,* 175 Cal.App.4th 324, 336–337 (2009).)

seeks to influence the resolution of" a public controversy. (*Id*.) If an issue is "being debated publicly and if it ha[s] foreseeable and substantial ramifications for nonparticipants, it [is] a public controversy." (*Id.*, *citing Waldbaum v. Fairchild Publications, Inc*., 627 F.2d 1287, 1297 (D.C. Cir. 1980).)

Plaintiff does not contest that she is a limited purpose public figure regarding the debate over treatment standards at JMH. Plaintiff's own allegations establish that she injected herself into the controversy over appropriate protocols for JMH patient care, which is an issue that has substantial ramifications for the community that utilizes the hospital. However, while Plaintiff's status as a limited purpose public figure may limit the facts that Plaintiff may rely upon to prove her claims, it does not demonstrate that Plaintiff's retaliation claims fail as a matter of law. As detailed above, Plaintiff's retaliation claims arise out of a variety of actions, including Defendants' acts of curtailing Plaintiff's authority, banning Plaintiff from meetings, and refusing to renew Plaintiff's contract. These actions are not privileged under either §47(b) or §47(c).

Defendants also argue that Plaintiff's retaliation claims are based solely on JMH's decision not to renew her contract, and that neither JMMG nor the individual defendants were involved in that decision. But, as discussed above, Plaintiff's retaliation claims are not based solely on the non-renewal of her contract. Plaintiff's claims are also supported by her allegations that Defendants interfered with her authority at JMH, in effect demoting her, instructed staff to ignore her directions and refuse to attend meetings if Plaintiff was present, excluded Plaintiff from meetings regarding patient care standards,

refused surgeons' requests to include Plaintiff in meetings, refused to renew her contract and then rewrote the contract description to preclude Plaintiff from re-applying. None of these actions trigger anti-SLAPP protection.

Regarding Plaintiffs' Health & Safety Code § 1278.5 claim, Defendants contend that Plaintiff cannot demonstrate a probability of success against defendants Knight, Ahn, and JMMG because only a health care facility can violate Health & Safety Code § 1278.5 and these defendants are individuals and a medical group. Health & Safety Code §1278.5(b)(1) states that "[n]o ***health facility*** shall discriminate or retaliate, in any manner, against any patient, employee, member of the medical staff, or any other health care worker of the health facility because that person has . . . [p]resented a grievance, complaint, or report to the facility, to an entity or agency responsible for accrediting or evaluating the facility, or the medical staff of the facility, or to any other governmental entity." (*Emphasis added*.)

Defendants cite *Armin v. Riverside Community Hospital*, 5 Cal. App.5th 810, 832 (2016), which held that a plaintiff can sue only a health facility, and not individual doctors, for a violation of §1278.5. Plaintiff acknowledges that *Armin* determined that an individual doctor could not be sued for a violation of §1278.5, but Plaintiff argues that the case does not indicate whether "medical staff" can be liable under the statute. Plaintiff also argues that *Armin* was wrongly decided and should be disregarded as precedent. Lastly, Plaintiff objects that Defendants must attack the scope of Plaintiff's §1278.5 claim under a demurrer and not an anti-SLAPP motion.

In *Armin*, an individual doctor claimed that four other doctors at his health care facility retaliated against him in violation of §1278.5. (*Armin,* 5 Cal. App.5th at 816-19.) The court noted that in each subsection of §1278.5, only a "facility" was prohibited from engaging in certain acts. (*Id*. at 832.) The plaintiff in *Armin* noted that under §1278.5(i), the term "health facility" was defined as "any facility defined under this chapter, including, but not limited to, the facility's administrative personnel, employees, boards, and committees of the board, and medical staff." (*Id*. at 833.) Thus, the plaintiff in *Armin* argued that "medical staff," which would include individual doctors, were subject to §1278.5 liability. (*Id*.)

The *Armin* court rejected that argument. The court acknowledged that the term "medical staff" can "only include doctors and like professions, since subdivision (b) of Business and Professions Code section 2282 restricts membership in medical staffs to 'physicians and surgeons and other licensed practitioners competent in their respective fields and worthy in professional ethics.'" (*Armin*, 5 Cal. App.5th at 833.) However, the court concluded that by using the phrase "medical staff" in defining "health facility," "the Legislature was referring to the uniplural corporate body that brings peer review proceedings against individual members of 'medical staff' rather than individual staff members." (*Id.* at 834.) The court pointed out that each entity set forth in the definition of "facility" under subdivision (i) was an agent with which "a hospital acting as its own legal person might retaliate against a complaining doctor, nurse or patient." (*Id*.) The

"medical staff," in its corporate and "uniplural sense," brings peer review proceedings under §§805 through 809.7 of the California Business and Professions Code.

The court also noted that the legislative history of Assembly Bill No. 632 (2007-2008 Reg. Sess.), which resulted in the enactment of §1278.5, referred to self-governing "medical staffs" that, acting through peer review committees, are required to adopt rules governing appropriate standards for patient care. (*Id*. at 835, *citing Arnett v. Dal Cielo* 14 Cal.4th 4, 10 (1996).) Thus, "medical staff" is equated with official hospital action. (*Id*.)

Lastly, the court in *Armin* pointed out that §1278.5 was intended to protect individual members of the "medical staff" who spot and report problems with hospital patient care or conditions, and that applying §1278.5 liability to individual doctors would contradict that policy.

Armin is controlling precedent and the reasoning set forth in *Armin* is detailed and persuasive. The rational for confining liability under §1278.5 to a hospital facility applies equally to physician and non-physician staff, and to medical groups comprised of hospital clinicians. *Armin* precludes Plaintiff from suing individual doctors or the JMMG under §1278.5.

Therefore, Plaintiff failed to meet her burden to prove probability of success on the merits for her retaliation claims against Defendants Knight, Ahn, and JMMG. However, Plaintiff succeeded on proving probability of success on the merits for her retaliation claim against JMH.

B. Negligent Infliction of Emotional Distress

The elements of a claim for negligent infliction of emotional distress are: (1) defendant was negligent; (2) plaintiff suffered serious emotional distress; and (3) defendant's negligence was a substantial factor in causing plaintiff's serious emotional distress. (CACI No. 1620.) "Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame." (*Id*.) "[S]erious mental distress may be found where a reasonable" and "normally constituted" person "would be unable to adequately cope with the mental stress" endured under the circumstances of the case. (*See*, *Molien v. Kaiser Foundation Hospitals*, 27 Cal.3d 916, 928 (1980) (*discussing and citing with approval, Rodrigues v. State,* 472 P.2d 509, 519 (1970).)

1. Plaintiff's Factual Allegations

Plaintiff does not indicate which allegations specifically support her claim for negligent infliction of emotion distress, but in pleading that cause of action, Plaintiff realleges and incorporates every allegation pled in paragraphs 1-623 of the Complaint.

Plaintiff alleges that Defendants demeaned Plaintiff's complaints about patient safety reforms (¶26), interfered with Plaintiff's work by engaging in "vicious personal attacks, nasty interchanges" and "direct attacks" on Plaintiff's professional reputation and career (¶¶92, 179, 208, 238, 256, 276, 277, 356), undermined and attempted to silence Plaintiff by labeling her a "disruptive physician" with "sharp elbows" (¶¶210, 213, 263, 278, 280, 315), engaged in "hostile communications" (¶117), used gender stereotypes to

"belittle" Plaintiff, (¶¶117, 335, 358, 359, 471-472, 476), subjected Plaintiff to "ridicule" and the "silent treatment" (¶238), directed personnel to ignore Plaintiff and "not attend any meeting where [Plaintiff] was present" (¶¶262, 308, 367, 368, 372), put a "target on [Plaintiff's] back" and announced to staff that it was "open season" to attack and discredit Plaintiff by filing false complaints against her (¶¶214, 242, 243, 272, 289). Plaintiff further alleges that her valid complaints about patient care were dismissed, and that Defendants claimed the problems were due to Plaintiff's personality. (¶¶499, 527.) Plaintiff states that she was "ostracized and prevented from doing her work" and that the "hostility inherent in being ignored in the workplace" was "increasingly oppressive on a personal level." (¶¶292, 298, 320, 362). Plaintiff alleges that she received hostile and insulting emails from hospitalists who refused to accept Plaintiff's role as Medical Director of the Perioperative Medicine Program and that their hostility was "ratified by JMH" because JMH refused to "discipline, correct or even mediate a solution." (¶¶320-323, 326, 334.)

Plaintiff alleges that she suffered "severe and continued emotional injury due to conduct" described in the Complaint because of the "hostile workplace, professional and personal attacks, . . . [and] the traumas of watching patient after patient suffer adverse health consequences due to the misconduct of defendants." (¶622.)

2. Protected Activity

Defendants argue that, except for Defendants' decision not to renew Plaintiff's contract, all allegations pled in support of Plaintiff's negligent infliction of emotional

distress claim target protected conduct. Defendants contend that allegations that Defendants personally attacked Plaintiff arise out of speech made in connection with the medical peer review process and speech made in connection with an issue of public interest (*i.e.*, the treatment protocols at JMH.) As such, all allegations pled in support of Plaintiff's negligent infliction of emotional distress claim fall under §425.16(e)(2) and (4).

As discussed above, statements made in connection with but outside the course of a hospital's peer review process may qualify as "statements . . . in connection with an issue under consideration" in an "official proceeding." (*Kibler*, 39 Cal.4th at 198.) Furthermore, communications regarding a doctor's qualifications or the appropriate treatment protocols are speech that furthers public discourse on a public issue. (*Yang*, 48 Cal.App.5th at 948.) Thus, Plaintiff's allegations that she suffered emotional distress because of Defendants' "demeaning," "gender stereotyped," and "hostile" communications" target protected speech because these communications occurred while staff debated hospital protocols, procedures and treatment plans.

3. Arising from Protected Activity

Plaintiff's allegations that Defendants "personally attacked" Plaintiff such that she suffered emotional distress are not merely background evidence for Plaintiff's claim for negligent infliction of emotional distress. These allegations, which target Defendants' protected conduct, are the crux of Plaintiff's claim. Plaintiff also supports her claim with allegations that Defendants impeded her ability to implement adequate patient care,

curtailed her authority over hospital procedures, and excluded her from meetings. None of these allegations target protected activities because they describe decisions Defendants made in response to Plaintiff's reports of inadequate patient care. Thus, Plaintiff's negligent infliction of emotional distress claim is a "mixed" cause of action in that it arises from allegations of both protected and unprotected activity. (*See, Baral*, 1 Cal.5th at 395.)

As set forth above, in cases involving "mixed causes of action," allegations of unprotected activity that support a claim are disregarded on the first step of the §435.16 analysis. (*Baral*, 1 Cal.5th at 396.) Thus, Defendants demonstrated that Plaintiff's negligent infliction of emotional distress claim arises out of protected conduct and Defendants satisfied the first prong of their anti-SLAPP motion regarding this claim. The burden shifts to Plaintiff to demonstrate that her negligent infliction of emotional distress claim is legally sufficient and factually substantiated.

4. Probability of Success on the Merits

Defendants argue that Plaintiff's allegations target speech that is absolutely protected under §47(b). Defendants assert that all peer review related speech is privileged under §47(b) because those communications were made in connection with an official proceeding authorized by law. Defendants argue that communications regarding hospital protocols and appropriate treatment plans for individual patients are protected under §47(c) because those communications were "made in good faith on a subject in which the speaker and hearer share[] an interest or duty." (*Kashian*, 98 Cal.App.4th at 914.) Because

Plaintiff is a limited purpose public figure, Plaintiff cannot overcome Defendants' right to claim a privilege over these communications under §47(c) unless she demonstrates that Defendants made the statements with "actual malice." (*Id*. at 915.) Plaintiff has offered no evidence that Defendants were motived by "actual malice" when they engaged in these communications.

Defendants contend that Plaintiff's negligent infliction of emotional distress claim is unlikely to succeed because, with the sole exception of Plaintiff's allegation that her contract was not renewed, §47 eliminates all allegations Plaintiff pled in support of this claim. Defendants contend that their decision not to renew Plaintiff's contract does not establish probability of success on the merits because the mere termination of employment is insufficient, as a matter of law, to establish emotional distress damages.

Plaintiff's Complaint suggests three sources as the cause of Plaintiff's emotional distress. First, Plaintiff alleges that she experienced "personal attacks," demeaning and hostile communications, and "gender-based stereotypes." Most, if not all, of these communications occurred during Defendants' informal peer review process or during the staff's debates over hospital protocols and patient treatment plans. Thus, these communications are largely privileged under either §47(b) or (c).

Second, Plaintiff states that her attempts to communicate with staff were ignored, she was excluded or affirmatively banned from attending meetings, and her authority was marginalized. As detailed above, these allegations describe actions or employment decisions and are not privileged speech under §47.

Lastly, Plaintiff states that she suffered emotional distress from witnessing the administration of inadequate care that placed patients at risk, but which Plaintiff had no ability to remediate. These allegations do not implicate speech protected under §47.

Thus, contrary to Defendants' contention, §47 does not exempt all of Plaintiff's allegations supporting her claim for emotional distress damages except for Defendants' failure to renew her contract. Nonetheless, the allegations pled and the evidence presented by Plaintiff are insufficient to demonstrate the type of "severe emotional distress" required to support a claim for negligent infliction of emotional distress.

"[E]motional distress may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry,'" but to support an emotional distress cause of action, a plaintiff "must prove that [the] emotional distress was severe and not trivial or transient." (*Wong,* 189 Cal.App.4th at 1376 (*citations omitted*).) "With respect to the requirement that the plaintiff show severe emotional distress," the California Supreme Court "has set a high bar." (*Hughes v. Pair*, 46 Cal.4th 1035, 1051 (2009).) Emotional distress is not evidenced by "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." (*Id*.) "Severe emotional distress means 'emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.'" (*Id*.)

Thus, emotional distress was demonstrated by a plaintiff who was "a nervous wreck," "felt 'dragged out,'" "unable to do anything or go anywhere," and depressed.

(*See*, *Saari v. Jongordon Corp*., 5 Cal.App.4th 797, 806 (1992).) Similarly, emotional distress was demonstrated by a plaintiff who "suffered from panic attacks consisting of anxiety, tightness in the chest and heart palpitations," "was depressed and unable to sleep," and "began drinking and developed a serious drinking problem." (*See*, *Kelly–Zurian v. Wohl Shoe Co*., 22 Cal.App.4th 397, 410 (1994).) However, a plaintiff who alleged that the defendant's actions were "very emotionally upsetting to me, and . . . caused me to lose sleep, have stomach upset and generalized anxiety," failed to adequately support her claim for "severe emotional damage." (*Wong,* 189 Cal.App.4th at 1376.)

Plaintiff alleges that the "hostility inherent in being ignored in the workplace" was "oppressive on a personal level," and that to ensure that patients were provided with adequate care, Plaintiff spent time "[o]n vacation, at home at night, [and] on weekends" reviewing in-patient "files to see who was being mismanaged." (Compl. ¶¶292, 295.) She alleges that this "exhausting work prevented countless complications and negative results," but that the "physical and emotional toll . . . was massive." (*Id*. ¶296.) Nonetheless, Plaintiff alleges that when forced to decide between "get[ting] along and go[ing] along" or continuing to "report the harms to patients and escalate the information to the highest levels of management," Plaintiff chose the latter and "never stopped her advocacy." (*Id*. ¶¶292, 298.)

While Plaintiff's allegations indicate that she suffered stress and exhaustion from working long hours and from persisting in advocating for patient care despite hostile

resistance from Defendants, Plaintiff has not alleged severe emotional distress of the substantial or enduring quality that is required to support a claim for negligent infliction of emotional distress. Further, at the hearing on this motion, Plaintiff conceded that her Complaint did not support a claim for intentional infliction of emotional distress. Although Plaintiff did not withdraw her claim for negligent infliction of emotional distress, the level of emotional distress required to prove negligent infliction is the same as the level of emotional distress required to prove intentional infliction. (*Wong v. Jing*, 189 Cal.App.4th 1354, 1378 (2010).) Thus, Plaintiff has failed to demonstrate that her claim for her negligent infliction of emotional distress claim is legally sufficient and factually substantiated.

Plaintiff requests leave to amend her claim, but a plaintiff whose claim is stricken by a successful anti-SLAPP motion cannot "try again with an amended complaint." (*Dickinson v. Cosby,* 17 Cal.App.5th 655, 676 (2017).) Allowing an amendment after a court finds the anti-SLAPP statute has been met would "completely undermine the statute by providing the pleader a ready escape from section 425.16's quick dismissal remedy." (*Simmons v. Allstate Ins. Co.,* 92 Cal.App.4th 1068, 1073 (2001).) Thus, "[t]here is no such thing as granting an anti-SLAPP motion with leave to amend." (*Dickinson*, 17 Cal.App.5th at 676.)

C. Breach of Implied Covenant of Good Faith and Fair Dealing

Although labeled "breach of contract," Plaintiff clarified at the hearing that her final cause of action states a claim for breach of the implied covenant of good faith and

fair dealing. To prove her claim, Plaintiff must show that: (1) Plaintiff and Defendant executed a contract; (2) Plaintiff performed, or substantially performed, all obligations required of Plaintiff under the contract, or Plaintiff's performance was excused; (3) Defendants prevented Plaintiff from receiving benefits under the contract; (4) Defendants did not act fairly and in good faith; and (5) Plaintiff was harmed by Defendant's conduct. (*CACI* 325.)

1. Plaintiff's Factual Allegations

Plaintiff alleges that the contract between JMH and Plaintiff had an "implied by law covenant of good faith and fair dealing" and that her "role in developing a successful program was integral to her career development opportunities and her ability to continue to work . . . at JMH." (Compl. ¶119:18-22.) Plaintiff's opposition to Defendants' anti-SLAPP motion explains that JMH's interference with Plaintiff's job performance and ultimate decision not to renew her contract breached the covenant of good faith and fair dealing. By "breaching the covenant of good faith and fair dealing," Defendants limited Plaintiff's career options and "her ability to move to a related career opportunity in her chosen area of specialization." (*Id*. at 119:25-27.)

Plaintiff does not indicate which allegations specifically support her claim for breach of the covenant, but in pleading the count, Plaintiff realleges and incorporates all allegations set forth in paragraphs 1-632 of the Complaint. (Compl. ¶119:16.)

2. Protected Activity

Plaintiff alleges that Defendants disagreed with Plaintiff's suggested glucose protocols and blocked their implementation, submitted SPARK alerts stating that plaintiff was "disruptive," criticized Plaintiff's performance as a physician, and refused to respond to Plaintiff's reports of inadequate treatment. As discussed above, some of these actions are protected speech under §425.16(e)(2) and (4).

3. Arising from Protected Activity

Plaintiff's breach of covenant claim arises out of allegations of both protected and unprotected activity. Plaintiff's breach of covenant claim is based upon Plaintiff's allegations that she could not perform her job adequately because Defendants criticized Plaintiff's professional capabilities and rejected her suggested protocols. These allegations are not merely incidental to Plaintiff's claim that her performance was frustrated but directly support Plaintiff's claim.

Plaintiffs' breach of covenant claim is also supported by allegations that Defendants failed to acknowledge Plaintiff's complaints about patient treatment, excluded Plaintiff from meetings regarding patient care, limited Plaintiff's authority, and refused to renew Plaintiff's contract because Defendants did not want to resolve the problems Plaintiff highlighted. These allegations do not target protected conduct.

Thus, Plaintiff's breach of the covenant claim is a "mixed cause of action." Allegations of non-protected conduct that support Plaintiff's claim must be ignored at this stage. (*See, Baral v. Schnitt*, 1 Cal.5th 376, 395 (2016). Defendants have met their burden

of demonstrating that Plaintiff's breach of the covenant claim arises out of allegations that target Defendant's protected right to free speech.

4. Probability of Success on the Merits

Defendants argue that Plaintiff cannot demonstrate probability of success on the merits because when a party has the option not to renew a contract with a limited duration, the exercise of that discretion is not a breach. (Defs' Motion, 23:23-25, *citing A.B.C. Dist. Co. v. Distillers Dist. Corp*., 154 Cal. App. 175, 183 (1957).) Furthermore, Defendants argue that the implied covenant cannot be invoked to impose a duty to employ "objective standards" when exercising an absolute right under the contract because the covenant cannot contradict express terms of the agreement. (*See*, *Tollefson v. Roman Catholic Bishop*, 219 Cal.App.3d 843, 853-54 (1990).)

In their supplemental briefing, Defendants argue that Plaintiff's claim also fails because there was no contract between Defendants and Plaintiff. Plaintiff acknowledges that hospitals cannot 'employ' physicians and thus Plaintiff was employed by MAC/Envision, and via a contract between MAC/Envision and JMH, Plaintiff was contracted to work at JMH. (Compl. ¶564.) Defendants contend that they cannot be liable for breach of Plaintiff's employment contract because they were not a party to that contract. (*See, Barnhart v. Points Dev. US Ltd*, 2016 WL 3041036 at *3 ("a plaintiff cannot maintain a breach of contract claim against an entity who is not a party to the contract.")

Plaintiff notes that California Civil Code §1559 states that "[a] contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Plaintiff argues that she is a third-party beneficiary to the contract between MAC/Envision and JMH and can enforce its terms under Civil Code §1559.

In determining whether a third party is a beneficiary to a contract, courts consider: "(1) whether the third party would in fact benefit from the contract, . . . (2) whether a motivating purpose of the contracting parties was to provide a benefit to the third party, and (3) whether permitting a third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties." (*Goonewardene v. ADP, LLC*, 6 Cal.5th 817, 829-830 (2019).) "All three elements must be satisfied to permit the third-party action to go forward." (*Id*. at 830.)

Plaintiff is specifically named in the contract between JMH and MAC/Envision and the terms of that agreement relate to Plaintiff's work at JMH. (Compl., Ex. 3, pp. 1-2.) Thus, Plaintiff has demonstrated an issue of fact as to whether she is a third-party beneficiary to JMH's contract with MAC/Envision who has a right to sue to enforce that contract.

Defendants argue that even if Plaintiff can plead a breach of the covenant claim as a third-party beneficiary, Plaintiff's claim fails as a matter of law because Plaintiff cannot impose a duty under the implied covenant that conflicts with the terms of the contract.

Furthermore, Defendants argue that laws that prohibit employers from terminating "at will" employees for improper motives do not apply to independent contractors, such as Plaintiff.

The contract between JMH and MAC/Envision states that the term of the agreement was May 15, 2018 through May 31, 2021. (Compl., Ex. 3, p. 7.) Either party was entitled to terminate the agreement without cause, effective thirty days after written notice of termination was provided to the other party. (*Id*. at p. 8.) Defendants argue that these terms create a contract of limited duration, and that Plaintiff cannot utilize the implied covenant to transmute a contract under which "neither party is required to renew" into "an implied contract for an indefinite term terminable only upon objective and justifiable cause." (*See, Tollefson*, 219 Cal.App.3d at 853.)

Plaintiff argues that Defendants' non-renewal was nonetheless improper because Defendants' only reasons for not renewing the contract was that Plaintiff was engaged in the protected conduct of complaining regarding inadequate patient care and that Defendants were concerned that Plaintiff was "litigious." Plaintiff argues that while Defendants had the right to not renew her contract "without cause," Defendants did not have the right to fail to renew her contract for an improper purpose.

While the "discharge of an at-will employee . . . might constitute a breach of the covenant of good faith and fair dealing," such as when an employee is discharged for reasons that violate public policy, laws regarding "wrongful discharge and breach of the covenant arising out of the employment relationship are not on point" if the worker is an

independent contractor. (*Abrahamson v. NME Hosp., Inc*., 195 Cal.App.3d 1325, 1329 (1987).) A hospital may be liable for a breach of the covenant if it asserts, in bad faith, that good cause exists for the termination of an independent contractor. (*Id*.) However, if both the hospital and the independent contractor agree that "good cause was not the reason for the termination," the covenant cannot be utilized to impose "a requirement that the right of either party to terminate without cause" is conditioned upon the proviso that "the termination must be free of any suggestion of violation of fundamental public policy or of law." (*Id*.) If termination "without cause" could only be accomplished with lawful cause, the phrase "'without cause' is effectively deleted from the agreement" and the contract becomes "terminable only for cause." (*Id*.) "Such interpretation of the clear, unambiguous 'without cause' term in the agreement rewrites the contract." (*Id*., *citing Seaman's Direct Buying Service, Inc. v. Standard Oil Co*., 36 Cal.3d 752, 769 (1984).)

Plaintiff's allegations that Defendants interfered with her performance under the contract because they limited her authority and prevented her from setting treatment protocols or from overseeing patient care also fail to establish probability of success on her claim. Plaintiff alleges that her "role in developing a successful program was integral to her career development opportunities and her ability to continue to work either at JMH or elsewhere . . .." (Compl. ¶119:20-22.) In other words, Plaintiff contends that Defendants' interference with her job performance impeded Plaintiff's ability to renew her contract and continue working with JMH or elsewhere. However, Defendants had the discretion not to renew Plaintiff's contract, and Defendants did not claim, in bad faith,

that Plaintiff's contract was terminated "for cause." Additionally, Plaintiff has alleged no facts and presented no evidence that Defendants' interference with Plaintiff's responsibilities at JMH interfered with Plaintiff's ability to work "elsewhere."

Therefore, Plaintiff has failed to allege facts that support her claim for breach of the covenant of good faith and fair dealing. As detailed above, Plaintiff's request for leave to amend must be denied.

II. Conclusion

Defendants' Special Motion to Strike Portions of Plaintiff's Complaint as a Strategic Lawsuit Against Public Participation is GRANTED, in part, and DENIED, in part.

As to Plaintiff's Health & Safety Code §1278.5 cause of action, Defendants' motion is GRANTED with regard to Defendants Knight, Ahn, and JMM, and DENIED as to JMH.

As to Plaintiff's Labor Code §1102.5 cause of action, Defendants' motion is DENIED.

As to Plaintiff's causes of action for negligent infliction of emotional distress and breach of the implied of good faith and fair dealing, Defendants' motion is GRANTED. Plaintiff's request for leave to amend these claims is DENIED.

Defendants' request to strike the following paragraphs of Plaintiff's Complaint is DENIED because these allegations constitute background facts or support claims that survive Defendants' anti-SLAPP motion: ¶¶ 26-28; 92-96; 105-108; 110-112; 116-117;

119; 162-165; 178; 179; 194-198; 208-215; 220-224; 237-248; 246-253; 255-256; 261-284; 289; 292; 297; 308; 314-315; 320- 323; 326-327; 334-337; 356-363; 365-369; 379; 414-415, 417-426; 471-477; 497-501; 506; 508; 513-515; 527; 535; 538- 545; 550; 558-559; 622-623. Although Plaintiff may not rely upon statements that are privileged under Civil Code §47 to prove liability, allegations reciting statements that may be privileged under §47 can remain in the Complaint as background facts for the claims that survive Defendants' anti-SLAPP challenge.

The parties are ordered to meet and confer to select a date and time for a follow-up case management conference call with the Referee, and to contact the Referee's Case Manager, Scott Schreiber, regarding scheduling.

IT IS SO ORDERED:

Dated: November 9, 2022

Hon. Elizabeth D. Laporte (Ret.)
Judicial Referee