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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

JOHN M HEINEKE,  
Plaintiff,  
v.  
SANTA CLARA UNIVERSITY, et al.,  
Defendants.

Case No. 17-CV-05285-LHK

**ORDER GRANTING IN PART AND  
DENYING IN PART SPECIAL MOTION  
TO STRIKE AND GRANTING MOTION  
TO DISMISS**

Re: Dkt. Nos. 27, 45

Before the Court are Defendants Santa Clara University and Jane Doe’s motion to dismiss the complaint and special motion to strike the complaint under California’s statute barring strategic lawsuits against public participation (the “anti-SLAPP statute”). ECF Nos. 27, 45. Having considered the submissions of the parties, the relevant law, and the record in this case, the Court GRANTS IN PART and DENIES IN PART Defendants’ special motion to strike. The Court GRANTS Defendants’ motion to dismiss the complaint in its entirety. In this Order, the Court also details its reasoning for previously granting Defendants’ motion to allow Jane Doe to proceed under pseudonym. *See* ECF No. 54.

1 **I. BACKGROUND**

2 **A. Factual Background<sup>1</sup>**

3 Plaintiff John Heineke (“Plaintiff”) is a 79-year-old tenured professor of economics at  
4 Santa Clara University (“SCU”). ECF No. 74 (“Compl.”) ¶¶ 1, 9. In 2015, Jane Doe (“Doe”),  
5 then a student of his, accused Plaintiff of sexual harassment and filed a complaint with SCU’s  
6 Office of EEO & Title IX. Compl. ¶¶ 28, 32. Doe chose not to pursue the complaint at that time.  
7 Compl. ¶ 33. Plaintiff denies the allegations and asserts that Doe made the allegations as a face-  
8 saving way to withdraw from her commitment to serve as Plaintiff’s teaching assistant. Compl.  
9 ¶ 34.

10 At some unspecified time, another student (“Student A”) of Plaintiff’s filed a complaint  
11 accusing him of sexual harassment. Compl. ¶ 36. SCU hired a third-party investigator to  
12 investigate the charges. The investigator found that a preponderance of the evidence did not  
13 support Student A’s allegations of sexual harassment. Compl. ¶ 37. In the course of the  
14 investigation into Student A’s claims, however, the investigator learned of Doe’s complaint and  
15 interviewed her. Compl. ¶¶ 37-38. The investigator then opened a formal investigation into Doe’s  
16 complaint. Compl. ¶¶ 38-39. Plaintiff asserts that Student A made her allegations because she  
17 was upset about a low grade she received in Plaintiff’s class. Plaintiff asserts that Doe agreed to  
18 resurrect her allegations to help Student A, with whom Plaintiff says Doe is friends. Compl. ¶ 36;  
19 Heineke Decl. ¶¶ 7-8.

20 Following an investigation that included interviewing Doe and a number of witnesses, the  
21 investigator issued a report finding that Plaintiff had violated SCU’s Gender-Based Discrimination  
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23 <sup>1</sup> Given the already voluminous filings and rulings in this case, the Court is familiar with the facts  
24 of this case at a much greater level of detail than the facts recounted in this Section suggest.  
25 However, in considering a motion to dismiss, the Court is confined to the allegations in the  
26 complaint and judicially noticeable facts. *See Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir.  
27 1995); *Bagley v. City of Sunnyvale*, No. 16-CV-02250-LHK, 2017 WL 344998, at \*18 n.4 (N.D.  
Cal. Jan. 24, 2017). Because more factual detail is not required to decide the instant motion to  
dismiss, the Court confines its factual summary to those facts alleged in the Complaint. Where  
necessary and appropriate, additional facts are included in the Court’s analysis of the anti-SLAPP  
special motion to strike.

1 and Sexual Misconduct Policy as well as Policy 311 of the Staff Policy Manual. Compl. ¶ 40.  
2 Plaintiff contends that the investigation was biased against him. *See, e.g.*, Compl. ¶¶ 39-40.

3 On August 20, 2017, SCU threatened to terminate Plaintiff based on Provost Dennis  
4 Jacobs's acceptance of the investigation's findings. Compl. ¶ 45. Plaintiff contends that these  
5 decisions were influenced by SCU's general counsel's bias against Plaintiff, as well as SCU  
6 Business School's desire to save money. Heineke Decl. ¶¶ 30-31.

7 SCU suspended Plaintiff pending the resolution of Plaintiff's internal appeal of Jacobs's  
8 decision to SCU's president. Compl. ¶ 46. Plaintiff contends that news of his suspension quickly  
9 spread around campus. Compl. ¶ 46. Upon information and belief, Plaintiff alleges that SCU  
10 employees and students have publicly disclosed Doe's allegations of sexual harassment or the fact  
11 that Plaintiff was suspended for sexual harassment. Compl. ¶ 48.

12 Plaintiff contends that as a result of Defendants' actions, he has suffered mental anguish,  
13 loss of sleep, loss of appetite, headaches, loss of companionship, loss of reputation, and loss of  
14 career, as well as a range of monetary damages. Compl. ¶¶ 63-64.

15 **B. Procedural History**

16 On September 12, 2017, Plaintiff filed a complaint against Defendants SCU and a named  
17 former student alleging age discrimination, due process violations, wrongful termination,  
18 intentional infliction of emotional distress, negligent infliction of emotional distress, breach of  
19 contract, breach of the covenant of good faith and fair dealing, and defamation. Compl.

20 **1. First Emergency Motion for Temporary Restraining Order or Preliminary**  
21 **Injunction**

22 On September 13, 2017, while Plaintiff was suspended with pay pending resolution of his  
23 appeal to the SCU President of the Provost's decision to terminate Plaintiff, ECF No. 22 at 3,  
24 Plaintiff filed an emergency motion for a temporary restraining order or preliminary injunction,  
25 ECF No. 97. Also on September 13, 2017, the Court ordered SCU to respond to the emergency  
26 motion. ECF No. 16. SCU responded on September 14, 2017. ECF No. 68. On September 15,  
27 2017, the Court denied Plaintiff's emergency motion because the Court found that Plaintiff's

1 alleged harms—reputational injury, loss of job, and emotional distress—were not irreparable  
2 under United States Supreme Court and Ninth Circuit precedent. *Id.*

3 On September 16, 2017, Plaintiff filed a notice of appeal to the Ninth Circuit Court of  
4 Appeals. ECF No. 23. Plaintiff sought a temporary restraining order from the Ninth Circuit,  
5 which the Ninth Circuit denied in a summary order. ECF No. 25. Briefing for the appeal  
6 concluded on December 4, 2017. *See* Docket No. 26 for Case No. 17-16876.

7 **2. Defendants’ Motion to Dismiss**

8 On October 3, 2017, Defendants filed a motion to dismiss the Complaint in this Court.  
9 ECF No. 69 (“MTD”). On October 23, 2017, Defendants filed an administrative motion to allow  
10 the named defendant to proceed under pseudonym. ECF No. 71. On October 27, 2017, Plaintiff  
11 filed an opposition to the administrative motion to proceed under pseudonym. ECF No. 86. Also  
12 on October 27, 2017, Plaintiff filed an opposition to the motion to dismiss. ECF No. 34 (“MTD  
13 Opp.”). On November 8, 2017, Plaintiff filed a reply in support of the motion to dismiss. ECF  
14 No. 70 (“MTD Reply”).

15 **3. Plaintiff’s Second Motion for a Preliminary Injunction**

16 On November 9, 2017, Plaintiff filed a second emergency motion for a preliminary  
17 injunction. ECF No. 37. The Court struck Plaintiff’s motion for failure to comply with the Civil  
18 Local Rules governing page limits. ECF No. 38. On November 13, 2017, Plaintiff refiled the  
19 emergency motion for preliminary injunction based on his alleged imminent firing. Plaintiff’s  
20 motion included a request for an evidentiary hearing. ECF No. 39. The Court directed SCU to  
21 file a response by November 15, 2017. ECF No. 40. The Court also set a hearing for the  
22 preliminary injunction motion for November 17, 2017 and ordered the parties to file statements  
23 related to Plaintiff’s request for an evidentiary hearing. ECF No. 46.

24 SCU filed an opposition to the emergency motion for a preliminary injunction on  
25 November 15, 2017, ECF No. 75, and both parties filed statements outlining their positions on  
26 Plaintiff’s requested evidentiary hearing, ECF Nos. 76, 90. Notably, Plaintiff envisioned calling at  
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1 least 18 witnesses and taking at least 12 hours of testimony. ECF No. 90.

2 On November 16, 2017, the Court filed an order granting Plaintiff's request for an  
3 evidentiary hearing but limiting each side to two hours of witness testimony. ECF No. 50. The  
4 Court also granted Defendants' request for the named student-defendant to proceed under the  
5 pseudonym of "Jane Doe." ECF No. 54.

6 Also on November 16, 2017, the Court ordered Plaintiff to file a declaration under penalty  
7 of perjury stating whether Plaintiff would file an appeal to the Faculty Judicial Board, as such an  
8 appeal would render Plaintiff's second request for a preliminary injunction premature. ECF No.  
9 51. Plaintiff filed a declaration stating that he had decided to file an appeal to the Faculty Judicial  
10 Board. ECF No. 92. Accordingly, the Court denied Plaintiff's motion for a preliminary injunction  
11 because Plaintiff's status had not materially changed since his first motion for a restraining order  
12 or preliminary injunction. ECF No. 55. Specifically, Plaintiff remained on paid suspension  
13 pending exhaustion of his administrative remedies at SCU. *Id.* at 2. As such, the Court's  
14 reasoning in its Order denying the first motion for a temporary restraining order or preliminary  
15 injunction still applied. *Id.* The Court vacated the associated hearing. *Id.*

16 **4. Defendants' Anti-SLAPP Special Motion to Strike**

17 On November 13, 2017, Defendants filed a special motion to strike the complaint. ECF  
18 Nos. 72 ("anti-SLAPP Mot."). The Court set a hearing for the special motion to strike on  
19 November 30, 2017. On November 17, 2017, Plaintiff filed an opposition to the special motion to  
20 strike. ECF No. 56 ("anti-SLAPP Opp."). On November 22, 2017, Defendants filed a reply. ECF  
21 No. 62 ("anti-SLAPP Reply"). On November 28, 2017, the Clerk issued a notice taking the  
22 motions under submission without oral argument pursuant to Civil Local Rule 7-1(b). ECF No.  
23 63. Also on November 28, 2017, Plaintiff filed an administrative motion for permission to file a  
24 sur-reply on the anti-SLAPP special motion to strike. ECF No. 64. The Court denied the  
25 administrative motion on November 29, 2017. ECF No. 65. On November 30, 2017, Plaintiff  
26 filed a second notice of appeal, this time challenging the Court's second order denying a  
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1 preliminary injunction, as well as the Court’s order allowing Doe to proceed under pseudonym.  
2 ECF No. 67.

3 **II. LEGAL STANDARD**

4 **A. Anti-SLAPP Motion to Strike Pursuant to Cal. Code Civ. Proc. § 425.16(b)(1)**

5 California’s anti-SLAPP statute states:

6 A cause of action against a person arising from any act of that person in  
7 furtherance of the person’s right of petition or free speech under the United States  
8 Constitution or the California Constitution in connection with a public issue shall  
9 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.

10 Cal. Code Civ. Proc. § 425.16(b)(1). “To prevail on an anti-SLAPP motion to strike, the  
11 defendant must first make a prima facie showing that the plaintiff’s suit arises from an act in  
12 furtherance of the defendant’s rights of petition or free speech.” *Jordan-Benel v. Universal City*  
13 *Studios, Inc.*, 859 F.3d 1184, 1188 (9th Cir. 2017); *see also Park v. Board of Trustees of Cal. State*  
14 *Univ.*, 393 P.3d 905, 907 (Cal. 2017) (“Initially, the moving defendant bears the burden of  
15 establishing that the challenged allegations or claims ‘aris[e] from’ protected activity in which the  
16 defendant has engaged.”). “An ‘act in furtherance’ includes, among other things, ‘conduct in  
17 furtherance of the exercise of the constitutional right of petition or the constitutional right of free  
18 speech in connection with a public issue or an issue of public interest.’” *Jordan-Benel*, 859 F.3d  
19 at 1188 (quoting Cal. Code Civ. Proc. § 425.16(e)(4)).

20 If the defendant establishes a prima facie case, the burden shifts to the plaintiff to show “a  
21 probability of prevailing on the challenged claim.” *Id.*; *see also Park*, 393 P.3d at 907 (“If the  
22 defendant carries its burden, the plaintiff must then demonstrate its claims have at least minimal  
23 merit.” (internal quotation marks omitted)). The plaintiff’s burden at step two, however, is a  
24 relatively low one. *See Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1163 (9th Cir. 2011) (“In the anti-  
25 SLAPP context, ‘probability’ is a low bar.”); *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 598  
26 (9th Cir. 2010) (“[T]he second step of the anti-SLAPP inquiry is often called the ‘minimal merit’  
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1 prong.”). If the plaintiff cannot make this showing, the claim is stricken. *Jordan-Benel*, 859 F.3d  
2 at 1188. California’s anti-SLAPP statute cannot be used to strike federal law claims. *Hilton v.*  
3 *Hallmark Cards*, 599 F.3d 894, 901 (9th Cir. 2010).

4 **B. Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6)**

5 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss an  
6 action for failure to allege “enough facts to state a claim to relief that is plausible on its face.” *Bell*  
7 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the  
8 plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
9 defendant is liable for the misconduct alleged. The plausibility standard is not akin to a  
10 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted  
11 unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted). For  
12 purposes of ruling on a Rule 12(b)(6) motion, the Court “accept[s] factual allegations in the  
13 complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving  
14 party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

15 However, a court need not accept as true allegations contradicted by judicially noticeable  
16 facts, *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and the “[C]ourt may look  
17 beyond the plaintiff’s complaint to matters of public record” without converting the Rule 12(b)(6)  
18 motion into one for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995).  
19 Nor is the Court required to “assume the truth of legal conclusions merely because they are cast in  
20 the form of factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per  
21 curiam) (quoting *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)). Mere  
22 “conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to  
23 dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); accord *Iqbal*, 556 U.S. at 678.  
24 Furthermore, “a plaintiff may plead [him]self out of court” if he “plead[s] facts which establish  
25 that he cannot prevail on his . . . claim.” *Weisbuch v. County of Los Angeles*, 119 F.3d 778, 783  
26 n.1 (9th Cir. 1997) (quoting *Warzon v. Drew*, 60 F.3d 1234, 1239 (7th Cir. 1995)).

1           **C.     Leave to Amend**

2           Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend “shall be freely  
3 granted when justice so requires,” bearing in mind “the underlying purpose of Rule 15 to facilitate  
4 decision on the merits, rather than on the pleadings or technicalities.” *Lopez v. Smith*, 203 F.3d  
5 1122, 1127 (9th Cir. 2000) (en banc) (ellipses omitted). However, a court “may exercise its  
6 discretion to deny leave to amend due to ‘undue delay, bad faith or dilatory motive on part of the  
7 movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice  
8 to the opposing party . . . , [and] futility of amendment.’” *Carvalho v. Equifax Info. Servs., LLC*,  
9 629 F.3d 876, 892-93 (9th Cir. 2010) (alterations in original) (quoting *Foman v. Davis*, 371 U.S.  
10 178, 182 (1962)).

11           **D.     Standard for Allowing Party to Proceed Under Pseudonym**

12           “The normal presumption in litigation is that parties must use their real names.” *Doe v.*  
13 *Kamehameha Sch./Bernice Pauahi Bishop Estate*, 596 F.3d 1036, 1042 (9th Cir. 2010). However,  
14 Ninth Circuit precedent “allow[s] parties to use pseudonyms in the ‘unusual case’ when  
15 nondisclosure of the party’s identity ‘is necessary . . . to protect a person from harassment, injury,  
16 ridicule or personal embarrassment.’” *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d  
17 1058, 1067-68 (9th Cir. 2000) (quoting *United States v. Doe*, 655 F.2d 920, 922 n.1 (9th Cir.  
18 1981)). Courts balance “the need for anonymity against the general presumption that parties’  
19 identities are public information and the risk of unfairness to the opposing party.” *Id.* at 1068  
20 (citations omitted). Courts applying this balancing test have recognized three situations allowing a  
21 plaintiff to proceed anonymously:

- 22           (1) when identification creates a risk of retaliatory physical or mental harm; (2)  
23           when anonymity is necessary to preserve privacy in a matter of sensitive and  
24           highly personal nature; and (3) when the anonymous party is compelled to admit  
25           his or her intention to engage in illegal conduct, thereby risking criminal  
26           prosecution.

27           *Id.* (internal quotation marks and citations omitted).

28           **III.   DISCUSSION**

          The Court first addresses the instant special motion to strike and the instant motion to

1 dismiss. Then, the Court provides its reasoning for previously ruling that Jane Doe may proceed  
2 under pseudonym.

3 **A. Anti-SLAPP Special Motion to Strike**

4 As an initial matter, Defendants first argued that all of Plaintiff’s claims are subject to an  
5 anti-SLAPP special motion to strike, but Defendants conceded in their anti-SLAPP Reply that “a  
6 motion to strike under the anti-SLAPP statute may only be used to strike state law claims.” Anti-  
7 SLAPP Reply at 7. As such, Plaintiff’s § 1983 claim for due process violations and his ADEA  
8 claim, to the extent he has pled one,<sup>2</sup> are not subject to strike pursuant to the anti-SLAPP motion.  
9 Defendants’ motion to strike is therefore DENIED as to the § 1983 claim and any ADEA claim.

10 With regard to the state law claims, Defendants bear the burden of establishing a prima  
11 facie case that the claims arise from protected speech. Defendants contend that speech relating to  
12 sexual harassment complaints and investigations are protected by section (e)(2) of the anti-SLAPP  
13 statute, which protects “any written or oral statement or writing made in connection with an issue  
14 under consideration or review by a legislative, executive, or judicial body, or any other official  
15 proceeding authorized by law.” Anti-SLAPP Mot. at 9-10 (quoting § 425.16(e)(2)).  
16 Alternatively, Defendants argue that Doe’s complaint and SCU’s investigation are protected by  
17 section (e)(4), which protects “any conduct in furtherance of the exercise of the constitutional right  
18 of petition or the constitutional right of free speech in connection with a public issue or an issue of  
19 public interest.” *Id.* at 10 (quoting § 425.16(e)(4)).

20 The California Supreme Court recently clarified when a claim “arises from protected  
21 activity” for the purpose of the anti-SLAPP statute. *See Park*, 393 P.3d at 908. In short, the  
22 California Supreme Court held that “a claim is not subject to a motion to strike simply because it  
23 contests an action or decision that was arrived at following speech or petitioning activity, or that  
24 was thereafter communicated by means of speech or petitioning activity.” *Id.* at 907. “Rather, a  
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26 <sup>2</sup> As explained in more detail in Section III.B.2.b., below, it is not clear that Plaintiff’s Complaint  
27 even properly attempts to plead an ADEA claim.

1 claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of,  
2 and not just evidence of liability or a step leading to some different act for which liability is  
3 asserted.” *Id.* Because *Park* is dispositive for many of the claims at issue in the anti-SLAPP  
4 motion, *Park* bears examining in some detail.

5 The plaintiff in *Park* was a tenure-track assistant professor and was of Korean national  
6 origin. *Id.* at 907. Park’s application for tenure was denied, and he then brought several  
7 discrimination claims against the university. The university responded with an anti-SLAPP  
8 motion to strike. *Id.* The university argued that the suit arose from the university’s decision to  
9 deny Park tenure and the numerous communications leading up to and following that decision,  
10 which the university argued were protected speech. The state trial court reasoned that the  
11 complaint was based on the university’s decision to deny tenure as opposed to any protected  
12 communications, and so the trial court denied the anti-SLAPP motion to strike. *Id.*

13 The state Court of Appeal reversed. “The majority reasoned that although the gravamen of  
14 Park’s complaint was the University’s decision to deny him tenure, that decision necessarily rested  
15 on communications the University made in the course of arriving at that decision.” *Id.* Because  
16 the tenure decisionmaking process was an official proceeding, the majority concluded that it was  
17 protected activity. The dissent argued “that all government action inevitably involves some form  
18 of communication, and courts must distinguish between instances when a claim challenges only  
19 the action itself and instances when a claim challenges the process that led to the action.” *Id.*

20 The California Supreme Court granted review and reversed. The California Supreme  
21 Court instructed that “the defendant’s act underlying the plaintiff’s cause of action must *itself* have  
22 been an act in furtherance of the right of petition or free speech. [T]he mere fact that an action  
23 was filed after protected activity took place does not mean the action arose from that activity for  
24 the purposes of the anti-SLAPP statute.” *Id.* at 908 (internal quotation marks and citations  
25 omitted). Rather, “in ruling on an anti-SLAPP motion, courts should consider the elements of the  
26 challenged claim and what actions by defendant supply those elements and consequently form the  
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1 basis for liability.” *Id.*

2 The California Supreme Court also approvingly discussed a recent California Court of  
3 Appeal case, *Nam v. Regents of University of California*, 205 Cal. Rptr. 3d 687 (Ct. App. 2016).  
4 In *Nam*, a medical resident sued her university for sexual harassment, discrimination, and  
5 wrongful termination. The defendant’s anti-SLAPP motion “contended the suit arose from  
6 communicated complaints about the plaintiff’s performance, written warnings it issued her, an  
7 investigation it conducted, and the written notice to plaintiff of her termination.” *Park*, 393 P.3d  
8 at 911. The California Court of Appeal held that the basis for the plaintiff’s claims was not speech  
9 itself, but rather the university’s alleged conduct. As the California Supreme Court noted, “[w]hat  
10 gives rise to liability is not that the defendant spoke, but that the defendant denied the plaintiff a  
11 benefit . . . on account of a discriminatory or retaliatory consideration.” *Id.*

12 Indeed, as the California Supreme Court explained, interpreting the statute otherwise  
13 “would chill the resort to legitimate judicial oversight over potential abuses of legislative and  
14 administrative power.” *Id.* (quoting *San Ramon Valley Fire Protection Dist. v. Contra Costa*  
15 *County Employees’ Retirement Ass’n*, 22 Cal. Rptr. 3d 724 (Ct. App. 2004)). Specifically, “[a]ny  
16 employer who initiates an investigation of an employee, whether for lawful or unlawful motives,  
17 would be at liberty to claim that its conduct was protected and thereby shift the burden of proof to  
18 the employee who, without the benefit of discovery and with the threat of attorney fees looming,  
19 would be obligated to demonstrate the likelihood of prevailing on the merits.” *Id.* (quoting *Nam*,  
20 205 Cal. Rptr. 3d at 696).

21 The California Court of Appeal applied *Park* to a case with facts that are somewhat similar  
22 to the instant case in *Ku v. Dibaji*, 2017 WL 3205809 (Cal. Ct. App. July 28, 2017) (unpublished).  
23 In *Ku*, a professor was demoted after an investigation found that he violated the university’s  
24 sexual harassment policies. The professor sued the university and the student for defamation,  
25 wrongful termination, breach of good faith and fair dealing, and intentional infliction of emotional  
26 distress. *Id.* at \*1-2. The trial court granted defendants’ anti-SLAPP motion after concluding that  
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1 all of the professor’s claims were based on the complaint of sexual harassment and the alleged  
2 inadequate investigation of those claims. *Id.* at \*2. The professor waived any objection to the trial  
3 court’s ruling as to defamation, but the California Court of Appeal reversed as to the other causes  
4 of action. *Id.* at \*4-5. Citing *Park* and *Nam*, the California Court of Appeal held that the thrust of  
5 the wrongful termination, breach of good faith and fair dealing, and intentional infliction of  
6 emotional distress causes of action were “based not on speech but on the university defendants’  
7 actions.” *Id.* at \*4.

8 Under *Park*, *Nam*, and *Ku*, it is clear that Defendants’ anti-SLAPP motion to strike fails as  
9 to the wrongful discharge, breach of contract, and breach of the implied covenant of good faith  
10 and fair dealing causes of action. In each of these causes of action, the Defendants’ alleged action  
11 that underpins Plaintiff’s claim is the decision to suspend or discharge Plaintiff, not any protected  
12 speech. *See Park*, 393 P.3d at 907-11; *Nam*, 205 Cal. Rptr. 3d at 695-96; *Ku*, 2017 WL 3205809  
13 at \*4; Compl. ¶ 58 (wrongful discharge claim), ¶¶ 84, 86 (breach of contract claim), ¶ 91 (breach  
14 of covenant of good faith and fair dealing claim). Defendants’ citations to caselaw for the  
15 proposition that all communications relating to and decisions arising out of an internal sexual  
16 harassment investigation are protected under the anti-SLAPP statute either predate *Park* or are  
17 distinguishable. Specifically, Defendants’ citation to *Okorie v. Los Angeles Unified School*  
18 *District*, 222 Cal. Rptr. 3d 475 (Ct. App. 2017), is unavailing, as the Court of Appeal in that case  
19 specifically found that “in contrast to *Park*, the protected activity here *itself* is the wrong  
20 complained of.” *Id.* at 490. For example, the *Okorie* plaintiff claimed that the school’s  
21 communications with students’ parents after his removal constituted harassment. *Id.* at 490. The  
22 same cannot be said of Plaintiff’s wrongful discharge, breach of contract, or breach of the implied  
23 covenant of good faith and fair dealing causes of action. Accordingly, Defendant’s special motion  
24 to strike is DENIED as to these claims.

25 However, Plaintiff’s intentional infliction of emotional distress (IIED), negligent infliction  
26 of emotional distress (NIED), and defamation claims do arise out of protected speech because

1 these claims are explicitly based on Defendants’ allegedly false accusations of sexual assault,  
 2 rather than the subsequent employment decision. *See* Compl. ¶ 74 (IIED claim alleging that  
 3 Defendants’ “treatment of Plaintiff Heineke by falsely accusing him of sexual harassment was  
 4 extreme, outrageous and unreasonable”); ¶¶ 78-79 (NIED claim alleging that Defendants breached  
 5 their duty to exercise ordinary care in dealing with Plaintiff, presumably based on same statements  
 6 as IIED claim); ¶ 98 (defamation claim alleging that Defendants published to students and faculty  
 7 the allegedly false accusations of sexual harassment). As a result, the burden shifts to Plaintiff to  
 8 “demonstrate [his] claims have at least ‘minimal merit.’” *Park*, 393 P.3d at 907 (quoting  
 9 *Navellier v. Sletten*, 52 P.3d 703, 708 (Cal. 2002)).

10 Because an anti-SLAPP motion is brought so early in the proceedings, “the plaintiff’s  
 11 burden of establishing a probability of prevailing is not high.” *Overstock.com, Inc. v. Gradient*  
 12 *Analytics, Inc.*, 61 Cal. Rptr. 3d 29, 38 (Ct. App. 2007). “To withstand a special motion to strike,  
 13 the plaintiff need only show a ‘minimum level of legal sufficiency and triability,’ or ‘minimal  
 14 merit.’” *Art of Living Found. v. Does 1-10*, 2012 WL 1565281, at \*15 (N.D. Cal. May 1, 2012)  
 15 (quoting *Mindys Cosmetics*, 611 F.3d at 598). “Put another way, the plaintiff must demonstrate  
 16 that the complaint is both legally sufficient and supported by a sufficient prima facie showing of  
 17 facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.”  
 18 *Navellier*, 52 P.3d at 708 (quoting *Wilson v. Parker, Covert & Chidester*, 50 P.3d 733 (Cal.  
 19 2002)). “The court does not weigh evidence or resolve conflicting factual claims. . . . It accepts  
 20 the plaintiff’s evidence as true, and evaluates the defendant’s showing only to determine if it  
 21 defeats the plaintiff’s claim as a matter of law.” *Baral v. Schnitt*, 376 P.3d 604, 608 (Cal. 2016).

22 However, “averments on information and belief are insufficient.” *Church of Scientology v.*  
 23 *Wollersheim*, 49 Cal. Rptr. 2d 620, 636 (Ct. App. 1996), *overruled on other grounds by Equilon*  
 24 *Enterprises v. Consumer Cause, Inc.*, 52 P.3d 685 (Cal. 2002). Rather, Plaintiff must support his  
 25 claims with “competent admissible evidence within the personal knowledge of the declarant.” *Id.*  
 26 at 635; *see also Macias v. Hartwell*, 64 Cal. Rptr. 2d 222, 226 (Ct. App. 1997) (“Appellant had to  
 27

1 show, by competent and admissible evidence, that she would probably prevail on the defamation  
2 action.”). If Plaintiff does not meet his burden, the Court must grant the special motion to strike.  
3 “In addition, since the statutory intent is to provide a quick, inexpensive method of dismissing  
4 SLAPP suits, leave to amend is improper.” *Browne v. McCain*, 611 F. Supp. 2d 1062, 1068 (C.D.  
5 Cal. 2009) (citing *Simmons v. Allstate Ins. Co.*, 112 Cal. Rptr. 2d 397 (Ct. App. 2001)).

6 The Court first addresses Plaintiff’s IIED and NIED causes of action against SCU, and  
7 then the Court addresses Plaintiff’s IIED and NIED causes of action against Doe. Then, the Court  
8 addresses Plaintiff’s defamation cause of action against both Defendants.

9 **1. IIED and NIED Claims Against SCU**

10 “California’s Workers’ Compensation Act provides an employee’s exclusive remedy  
11 against his or her employer for injuries arising out of and in the course of employment.” *Erhart v.*  
12 *BofI Holding, Inc.*, --- F.3d ---, 2017 WL 4005434, at \*14 (S.D. Cal. Sept. 11, 2017) (quoting  
13 *Wright v. State*, 183 Cal. Rptr. 3d 135 (Ct. App. 2015)). Specifically, § 3600 of the California  
14 Labor Code states that “[l]iability for the compensation provided by this division, in lieu of any  
15 other liability whatsoever to any person . . . shall, without regard to negligence, exist against an  
16 employer for any injury sustained by his or her employees arising out of and in the course of the  
17 employment.” The California Supreme Court has determined that this workers’ compensation  
18 exclusivity rule applies “notwithstanding that the injury resulted from the intentional conduct of  
19 the employer, and even though the employer’s conduct might be characterized as egregious.”  
20 *Shoemaker v. Myers*, 801 P.2d 1054, 1062 (Cal. 1990). Moreover, the exclusivity rule applies  
21 even where the plaintiff does not allege that his emotional distress is disabling. *Livitsanos v.*  
22 *Superior Court*, 828 P.2d 1195, 1203 (Cal. 1992).

23 There are several exceptions to the exclusivity rule. First, the exclusivity rule does not  
24 apply where the employer’s conduct “contravenes fundamental public policy.” *Miklosy v. Regents*  
25 *of Univ. of Cal.*, 188 P.3d 629 (Cal. 2008). “Although this exception appears broad, the California  
26 Supreme Court has clarified that it ‘is aimed at permitting a *Tameny* action to proceed despite the  
27

1 workers' compensation exclusive remedy rule.” *Erhart*, 2017 WL 4005434 at \*15 (quoting  
2 *Miklosy*, 188 P.3d at 711). “A *Tameny* action is a common law tort claim for wrongful discharge  
3 in violation of public policy recognized in *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330  
4 (1980).” *Erhart*, 2017 WL 4005434 at \*15. “Thus, the ‘public policy’ exception to the exclusive  
5 remedy rule allows the employee to allege a *Tameny* action, but it does not allow the employee to  
6 also assert a distinct claim for intentional infliction of emotional distress.” *Id.*; *see also Yau v.*  
7 *Santa Margarita Ford, Inc.*, 176 Cal. Rptr. 3d 824, 837 (Ct. App. 2014) (distinguishing cases that  
8 allowed IIED claims under the violation of public policy exception as predating *Miklosy*).

9         Second, the exclusivity rule does not apply if the employer’s conduct “exceeds the risks  
10 inherent in the employment relationship.” *Id.* (quoting *Miklosy*, 188 P.3d at 711). However, the  
11 California Supreme Court has held that workplace discipline, including termination, is inherent in  
12 the employment relationship, even when the employer’s actions are intentional or egregious. *See*  
13 *Miklosy*, 188 P.3d at 645 (holding that whistleblower retaliation “occurred at the worksite, in the  
14 normal course of the employer-employee relationship, and therefore workers’ compensation is  
15 plaintiffs’ exclusive remedy for any injury that may have resulted”); *Cole v. Fair Oaks Fire*  
16 *Protection Dist.*, 729 P.2d 743, 751 (Cal. 1987) (holding that exclusivity rule applied where  
17 employer falsely accused employee of misconduct, subjected employee to a “kangaroo”  
18 disciplinary proceeding, publicly demoted him, gave him burdensome and menial duties, and filed  
19 an application to force him to retire involuntarily).

20         Here, Plaintiff’s IIED and NIED claims are barred by the workers’ compensation  
21 exclusivity rule. In the IIED cause of action, Plaintiff alleges that “SCU’s treatment of Plaintiff  
22 Heineke by falsely accusing him of sexual harassment was extreme, outrageous and  
23 unreasonable.” Compl. ¶ 74. However, SCU’s investigation of Doe’s sexual harassment  
24 allegation, SCU’s adoption of the investigation’s findings, and SCU’s subsequent decision to  
25 suspend Plaintiff are precisely the sort of workplace discipline and employment decisions that the  
26 California Supreme Court has held are barred by the workers’ compensation exclusivity rule. *See*,

1 e.g., *Shoemaker*, 801 P.2d at 1061-65. Plaintiff's efforts to invoke the public policy exception to  
2 the exclusivity rule fail because, as explained above, the California Supreme Court has interpreted  
3 that exception narrowly to only encompass *Tameny* wrongful discharge actions. *Miklosy*, 188  
4 P.3d at 711. Plaintiff's citation to cases that predate *Miklosy* do not compel a different result. *See*  
5 *Yau*, 176 Cal. Rptr. 3d at 837 (distinguishing cases that allowed IIED claims under the violation of  
6 public policy exception as predating *Miklosy*). Finally, Plaintiff's argument that the exclusivity  
7 rule does not apply because SCU's actions "infringe on a fundamental right such as freedom of  
8 speech (academic freedom), equal protection, freedom from age discrimination, [or] § 1983 due  
9 process" is unavailing. Nowhere does the Complaint assert violations of freedom of speech or  
10 equal protection. In addition, as explained below, Plaintiff fails to state a claim for age  
11 discrimination or a due process violation. As such, Plaintiff's IIED and NIED claims against SCU  
12 are barred by the workers' compensation exclusivity rule. As a result, Plaintiff has failed to carry  
13 his "burden of establishing a probability of prevailing" on his IIED and NIED claims against SCU.  
14 *Overstock.com, Inc.*, 61 Cal. Rptr. 3d at 38; *see Comstock v. Aber*, 151 Cal. Rptr. 3d 589, 607 (Ct.  
15 App. 2012) ("[T]o defeat a SLAPP motion, [a plaintiff] must overcome substantive defenses.").  
16 Defendants' special motion to strike is thus GRANTED with prejudice as to Plaintiff's IIED and  
17 NIED claims against SCU.

18 Although workers' compensation is the employee's exclusive remedy against the  
19 employer, workers' compensation "does not preclude suit by the employee against a negligent  
20 third party." *O'Dell v. Freightliner Corp.*, 12 Cal. Rptr. 2d 774, 778 (Ct. App. 1992); *see also*  
21 *Kropp v. Cal. Highway Patrol*, 2011 WL 529669, at \*6 (Cal. Ct. App. Feb. 14, 2011) ("There is  
22 nothing in the statutory scheme that allows a third party . . . to claim the workers' compensation  
23 exclusivity rule as a defense to a lawsuit."). As a result, the Court must also analyze whether  
24 Plaintiff has carried his burden on his IIED and NIED claims against Defendant Doe.

1                   **2. IIED and NIED Claims Against Doe**

2                   **a. IIED Claim Against Doe**

3                   “A cause of action for intentional infliction of emotional distress exists where there is (1)  
4 extreme and outrageous conduct by the defendant with the intention of causing, or reckless  
5 disregard for the probability of causing, emotional distress; (2) the plaintiff’s suffering severe or  
6 extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the  
7 defendant’s outrageous conduct.” *Hughes v. Pair*, 209 P.3d 963, 976 (Cal. 2009) (internal  
8 quotation marks omitted). “A defendant’s conduct is ‘outrageous’ when it is so extreme as to  
9 exceed all bounds of that usually tolerated in a civilized community. And the defendant’s conduct  
10 must be intended to inflict injury or engaged in with the realization that injury will result.” *Id.*  
11 (internal quotation marks and citations omitted). “It is for the court to determine, in the first  
12 instance, whether the defendant’s conduct may reasonably be regarded as so extreme and  
13 outrageous as to permit recovery.” *Fowler v. Varian Assocs., Inc.*, 241 Cal. Rptr. 539, 545 (Ct.  
14 App. 1987).

15                   “Severe emotional distress means emotional distress of such substantial quality or enduring  
16 quality that no reasonable [person] in civilized society should be expected to endure it,” which the  
17 California Supreme Court has characterized as “a high bar.” *Id.* (internal quotation marks omitted)  
18 (alteration in original). “Although emotional distress may consist of any highly unpleasant mental  
19 reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment,  
20 or worry, to make out a claim, the plaintiff must prove that emotional distress was *severe* and not  
21 trivial or transient.” *Wong v. Tai Jing*, 117 Cal. Rptr. 3d 747, 766 (Ct. App. 2010). In *Wong*, for  
22 example, the California Court of Appeal held that the plaintiff’s declaration that she had suffered  
23 from lost sleep, upset stomach, and generalized anxiety was not severe enough to prevail on an  
24 IIED claim. 117 Cal. Rptr. 3d at 767. Similarly, in *Hughes*, the California Supreme Court held  
25 that a plaintiff’s allegation that she had “suffered discomfort, worry, anxiety, upset stomach,  
26 concern, and agitation” did not establish the type of severe emotional distress required to state an

1 IIED claim. 209 P.3d at 976-77. By contrast, in *Kelly-Zurian v. Wohl Shoe Co.*, 27 Cal. Rptr. 2d  
 2 457 (1994), the California Court of Appeal held that evidence of depression, insomnia, alcohol  
 3 abuse, a diagnosis of post-traumatic stress disorder, and panic attacks consisting of anxiety,  
 4 tightness in the chest, and heart palpitations, was sufficient. *Id.* at 463. In *Saari v. Jongordon*  
 5 *Corp.*, 7 Cal. Rptr. 2d 82, 88 (Ct. App. 1992), which involved emotional distress claims based on  
 6 the mishandling of the plaintiff’s son’s remains, the California Court of Appeal found that a  
 7 plaintiff’s testimony that she lay awake at night wondering what had happened to her son’s  
 8 remains and medical evidence that the plaintiff became depressed were enough to support a  
 9 damages award for emotional distress.

10 In the instant case, accepting Plaintiff’s evidence as true and without weighing competing  
 11 evidence, as the Court must in an anti-SLAPP motion, Plaintiff has met his low burden to make a  
 12 “prima facie showing of facts” to support his IIED claim as to Defendant Doe. First, Plaintiff  
 13 alleges that Doe knowingly made false accusations of sexual harassment. Compl. ¶¶ 28, 32, 34,  
 14 36, 43, 48, 73-74. In his declarations, Plaintiff vigorously disputes Doe’s allegations of sexual  
 15 harassment and maintains that Doe falsely accused him. Heineke Decl. at ¶¶ 14, 15, 17, 19, 21,  
 16 22, 28; ECF No. 39-1 at 23 ¶¶ 3-4, 27 ¶ 14, 28 ¶ 15, 32 ¶ 19, 33 ¶¶ 20-21, 37 ¶ 25.

17 The California Court of Appeal has held that knowingly making false accusations of sexual  
 18 harassment can satisfy the first element of an IIED claim, which requires extreme and outrageous  
 19 conduct. For example, in *Moreno v. Ostly*, 2012 WL 3095344 (Cal. Ct. App. July 31, 2012), the  
 20 California Court of Appeal held that a defendant’s telling numerous people about an alleged  
 21 sexual assault when the defendant knew the claims were false when she made them “was  
 22 sufficiently egregious to satisfy the extreme and outrageous standard.” *Id.* at \*11. Similarly, in  
 23 *Bozin v. AT&T Wireless Services, Inc.*, 2002 WL 1764166 (Cal. Ct. App. July 31, 2002), the  
 24 California Court of Appeal observed that it was “reasonably possible” that “allegations that [a  
 25 coworker] made false accusations of sexual misconduct against [the plaintiff] that were designed  
 26 and intended to, and did, cause him humiliation, mental anguish and emotional and physical  
 27

1 distress” would state a claim for intentional infliction of emotional distress. *Id.* at \*4. *Moreno* and  
 2 *Bozin* are also consistent with California courts’ holdings in other contexts that false accusations  
 3 of child abuse or false reports to the police can constitute outrageous conduct for the purpose of an  
 4 IIED claim. *See Siam v. Kizilbash*, 31 Cal. Rptr. 3d 368, 383-84 (Ct. App. 2005) (finding that  
 5 knowingly making false reports of child abuse was sufficient to satisfy a plaintiff’s anti-SLAPP  
 6 burden on an IIED claim); *Jones v. Hirschberger*, 2002 WL 853858, at \*6 (Cal. Ct. App. May 6,  
 7 2002) (“The threat to falsely report Mr. Jones to the police and the identification of Jones as a  
 8 suspect when Mr. Hirschberger vandalized his own car could be found to be outrageous by a trier  
 9 of fact.”); *Begier v. Strom*, 54 Cal. Rptr. 2d 158, 161-63 (Ct. App. 1996) (reversing trial court’s  
 10 order granting demurrer of plaintiff’s IIED claim based on false accusation of child abuse). Thus,  
 11 accepting Plaintiff’s evidence as true and without weighing competing evidence, Plaintiff has met  
 12 his low burden to allege the first element of an IIED claim against Doe.

13 Next, as to Plaintiff’s alleged severe emotional distress, Plaintiff alleges in the Complaint  
 14 that he “has suffered from mental anguish, loss of sleep, loss of appetite, headaches, and a loss of  
 15 companionship, society, and comfort.” Compl. ¶¶ 71, 77, 82, 88. Plaintiff also alleges in the  
 16 Complaint that he “suffered and continues to suffer severe emotional distress, mental anguish,  
 17 indignation, wounded pride, shame, humiliation, loss of confidence and despair.” *Id.* ¶ 76.  
 18 Plaintiff’s declaration accompanying the Complaint does not mention any emotional distress. *See*  
 19 Heineke Decl. However, in a signed declaration filed in support of Plaintiff’s second emergency  
 20 motion for a preliminary injunction,<sup>3</sup> Plaintiff states that his suspension has caused him “great  
 21 anxiety and loss of sleep.” ECF No. 39-1 at 42. Plaintiff states that he “wake[s] up almost every  
 22 night worrying about [his] students and [him]self” and worrying about “the shame and humiliation  
 23 of being falsely charged and then suspended for something that didn’t happen and that [he] didn’t  
 24 do.” *Id.* at 42-43. Plaintiff states that he is “depressed” and that his depression is “deepening  
 25

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26 <sup>3</sup> The declaration was originally submitted in support of Plaintiff’s appeal to the Ninth Circuit of  
 27 this Court’s order denying Plaintiff’s first emergency motion for a preliminary injunction.

1 every day.” *Id.* at 43. Finally, Plaintiff states that being prevented from teaching is causing him  
2 “tremendous psychological and physical pain.” *Id.* Whether Plaintiff’s alleged emotional distress  
3 is sufficiently severe to state a claim for IIED is a close question. Given the level of emotional  
4 distress that the California Court of Appeal found sufficient in *Saari*, 7 Cal. Rptr. 2d at 88,  
5 however, the Court concludes that Plaintiff has carried his low burden of showing sufficient  
6 emotional distress to support his IIED claim at this stage.

7 Plaintiff has also sufficiently alleged that his emotional distress is proximately caused by  
8 Doe’s allegedly false accusation of sexual harassment. Finally, although Plaintiff has not put  
9 forward any facts to support his claim that Doe intended to inflict emotional distress, his  
10 declarations reasonably support that Doe acted with reckless disregard for the probability of  
11 causing emotional distress. *See Hughes*, 209 P.3d at 976. Accordingly, Plaintiff has carried his  
12 low burden to show that his IIED claim has minimal merit for the purpose of surviving an anti-  
13 SLAPP motion unless one of Defendants’ affirmative defenses applies. Defendants assert two  
14 types of privilege, which the Court addresses in turn.

15 **i. Common Interest Privilege Under California Civil Code § 47(c)**

16 Defendants’ first affirmative defense is that Doe’s allegation of sexual harassment is  
17 privileged under California Civil Code § 47(c), which protects publication made “[i]n a  
18 communication, without malice, to a person interested therein, (1) by one who is also interested, or  
19 (2) by one who stands in such a relation to the person interested as to afford a reasonable ground  
20 for supposing the motive for the communication to be innocent, or (3) who is requested by the  
21 person interested to give the information.” If a communication satisfies § 47(c), that  
22 communication is privileged and provides the defendant with an affirmative defense, “lost only if  
23 [the plaintiff] can show malice.” *Comstock*, 151 Cal. Rptr. 3d at 607; *see also Cruey v. Gannett*  
24 *Co.*, 76 Cal. Rptr. 2d 670, 678 (Ct. App. 1998) (holding that complaints to employers about  
25 workplace harassment should be conditionally privileged subject to a showing of malice). “Courts  
26 have held that the malice required to vitiate the privilege of section 47(c) consists in either the  
27

1 *New York Times* standard of knowledge of falsity or reckless disregard for truth or the older  
2 common law standard of actual ill will.” *Vackar v. Package Machinery Co.*, 841 F. Supp. 310,  
3 314 (N.D. Cal. 1993); *see also Aghmane v. Bank of Am., N.A.*, 696 F. App’x 175, 176 (9th Cir.  
4 2017) (unpublished) (same). “A defendant’s recklessness or knowledge of falsity may be adduced  
5 ‘by accumulation and by appropriate inferences.’” *Aghmane*, 696 F. App’x at 176-77 (quoting  
6 *Fisher v. Larsen*, 188 Cal. Rptr 216 (Ct. App. 1982)).

7 Section 47(c) “has been held to apply to ‘[c]ommunications made in a commercial setting  
8 relating to the conduct of an employee.’” *Said v. Regents of the Univ. of Cal.*, 2017 WL 963171,  
9 at \*5 (Cal. Ct. App. Mar. 10, 2017) (quoting *Cuenca v. Safeway San Francisco Employees Fed.*  
10 *Credit Union*, 180 Cal. App. 3d 985, 995 (Ct. App. 1986)). Specifically, the § 47(c) privilege  
11 covers investigations by private employers of sexual harassment complaints when made without  
12 malice. *Bierbower v. FHP, Inc.*, 82 Cal. Rptr. 2d 393 (Ct. App. 1999). Thus, Doe’s allegations of  
13 sexual harassment were privileged under § 47(c) unless Doe acted with malice. Accepting  
14 Plaintiff’s evidence as true and recognizing that no discovery has yet been conducted, the Court  
15 concludes that Plaintiff’s declaration has adequately alleged that Doe had knowledge of the falsity  
16 of her allegations. This is sufficient to defeat Doe’s claim of privilege under § 47(c). *See*  
17 *Aghmane*, 696 F. App’x at 176-77.

18 **ii. Litigation Privilege Under California Civil Code § 47(b)**

19 Defendants also argue that their communications about Doe’s allegations of sexual  
20 harassment were absolutely privileged under California Civil Code § 47(b), which protects  
21 communication in connection with “any (1) legislative proceeding, (2) judicial proceeding, (3) in  
22 any other official proceeding authorized by law,” subject to certain exceptions not applicable here.  
23 “The usual formulation is that the privilege applies to any communication (1) made in judicial or  
24 quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve  
25 the objects of the litigation; and (4) that have some connection or logical relation to the action.”  
26 *Silberg v. Anderson*, 786 P.2d 365, 369 (Cal. 1990). If applicable, § 47(b) provides a complete  
27

1 defense to all tort claims regardless of malice, with the exception that it does not protect against a  
2 malicious prosecution claim. *Butler v. McCain & Assocs.*, 2016 WL 1726018, at \*4 (Cal. Ct.  
3 App. Apr. 27, 2016).

4 With regard to judicial proceedings, the § 47(b) privilege covers communications related to  
5 anticipated lawsuits, but such a lawsuit must have been “suggested or proposed, orally or in  
6 writing,” must have been anticipated in good faith, and must have been imminent. *Edwards v.*  
7 *Centex Real Estate Corp.*, 61 Cal. Rptr. 2d 518, 530-31 (Ct. App. 1997). Here, Defendants do not  
8 contend that any lawsuit was proposed, anticipated in good faith, or imminent at the time of Doe’s  
9 allegations or SCU’s investigation. Relying on *Comstock*, 151 Cal. Rptr. 3d at 600, Defendants  
10 instead argue that the § 47(b) privilege “extends to statements made in preparation for or to  
11 prompt an investigation that may result in the initiation of official proceedings, including  
12 statements made during harassment investigations.” Anti-SLAPP Mot. at 14. In *Comstock*, the  
13 plaintiff sued a coworker and her employer for claims arising out of sexual harassment. At issue  
14 was whether the plaintiff’s reports of the harassment to the police, a nurse, and her employer were  
15 connected to a judicial or other official proceeding. The California Court of Appeal held that the  
16 plaintiff’s reports were privileged under § 47(b). However, *Comstock* is distinguishable for two  
17 reasons. First, the investigation in *Comstock* included reports to the plaintiff’s human resources  
18 manager of alleged sexual harassment. 151 Cal. Rptr. 3d at 600. The California Court of Appeal  
19 held that “the statements were necessary to address a commonly used affirmative defense in a  
20 sexual harassment case,” in which the employer argues that the employee unreasonably failed to  
21 take advantage of corrective opportunities provided by the employer. *Id.* Thus, in anticipation of  
22 litigation, the plaintiff complained to her employer in order to neutralize a common defense.  
23 There is no such allegation that Doe contemplated litigation when she complained of the alleged  
24 harassment to SCU.

25 Second, the plaintiff in *Comstock* reported her allegations to the police, whose official duty  
26 it is to investigate such complaints, potentially in preparation for prosecution. *Id.* at 598. Here,  
27

1 there is no allegation that Doe or SCU reported the sexual harassment allegations to the police or  
2 any other government agency. In order for the privilege to apply, then, a private university’s  
3 internal investigation of sexual harassment allegations must constitute an “other official  
4 proceeding authorized by law” for the purpose of § 47(b).

5 However, in *Hackethal v. Weissbein*, 592 P.2d 1175 (Cal. 1979), the California Supreme  
6 Court held that the predecessor to § 47(b) was not intended to apply to non-governmental  
7 proceedings. *See id.* at 1179. The California legislature later amended § 47 to extend the privilege  
8 to nongovernmental proceedings reviewable by mandate. *Olaes v. Nationwide Mut. Ins. Co.*, 38  
9 Cal. Rptr. 3d 467, 471 (Ct. App. 2006). Even after this amendment, California courts have refused  
10 to extend the privilege to cover non-governmental proceedings not reviewable by mandate, even  
11 when the body conducting the proceeding was highly regulated by statute. *See Slaughter v.*  
12 *Friedman*, 649 P.2d 886, 890 (Cal. 1982); *Cuenca*, 225 Cal. Rptr. at 857. Neither party has  
13 contended that SCU’s investigation would be reviewable by a writ of mandate. Moreover, in  
14 *Olaes*, the California Court of Appeal relied on the California Supreme Court’s interpretation of  
15 § 47(b)’s predecessor to conclude that a private company’s sexual harassment investigation  
16 procedure is not an “other official proceeding,” even though state law required the company to  
17 take reasonable steps to prevent harassment. *Olaes*, 38 Cal. Rptr. 3d at 472 (“Despite  
18 Nationwide’s attempt to cast its sexual harassment procedure as a quasi-governmental proceeding,  
19 the procedure involved was designed and instituted by a private company.”); *accord Carpenter v.*  
20 *Jack In The Box Corp.*, 2005 WL 950136, at \*5-6 (Cal. Ct. App. Apr. 26, 2005) (“[T]he in-house  
21 investigation by Jack employees into the allegations of sexual harassment, cannot by any stretch of  
22 the imagination be considered an official proceeding authorized by law” as contemplated in the  
23 anti-SLAPP statute). In the instant case, SCU is a private university, as the Court discusses in  
24 more detail below, in Section III.B.1. As such, under *Hackethal*, *Slaughter*, and *Olaes*, SCU’s  
25 internal investigation of sexual harassment allegations does not qualify as an “other official  
26 proceeding” for the purpose of the § 47(b) privilege. As a result, § 47(b) does not apply.

1           Accordingly, Defendants’ special motion to strike the IIED claim as to Doe is DENIED.

2                           **b. NIED Claim Against Doe**

3           “A claim of negligent infliction of emotional distress is not an independent tort but the tort  
4 of negligence to which the traditional elements of duty, breach of duty, causation, and damages  
5 apply.” *Wong*, 117 Cal. Rptr. 3d at 767. The California Supreme Court has “made it clear that to  
6 recover damages for emotional distress on a claim of negligence where there is no accompanying  
7 personal, physical injury, the plaintiff must show that the emotional distress was ‘serious.’” *Id.*  
8 (quoting *Molien v. Kaiser Foundation Hospitals*, 616 P.2d 813 (Cal. 1980)). The California Court  
9 of Appeal has interpreted “serious emotional distress” as “functionally the same” as the “severe  
10 emotional distress” required in an IIED claim. *Id.* at 768.

11           Plaintiff does not explain the basis for his allegation that Doe owed Plaintiff a duty of care.  
12 Compl. ¶ 79. In his opposition to the special motion to strike, Plaintiff only addresses SCU’s duty  
13 of care. Plaintiff does not address Doe’s duty. In its entirety, Plaintiff’s defense of his NIED  
14 claim reads:

15                   As to Plaintiff’s claim for negligent infliction of emotional distress, SCU contends  
16 that it was under no duty to avoid causing emotional distress. SCU is wrong.

17                   Damages for severe emotional distress are recoverable in a negligence action  
18 when they result from the breach of a duty owed the plaintiff that is assumed by  
19 the defendant or imposed on the defendant as a matter of law, or that arises out of  
20 a relationship between the two. *Marlene F. v. Affiliated Psychiatric Med. Clinic,*  
*Inc.*, 48 Cal. 3d 583, 590 (1989) (emphasis added). Here, SCU is in a position of  
21 power over Plaintiff and has a fiduciary tenured relationship of trust.

22 Anti-SLAPP Opp. at 19. Because Plaintiff has failed to establish that Doe owed him a duty of  
23 care, Plaintiff has not carried his burden to show a probability of success on his NIED claim  
24 against Doe. Accordingly, Defendants’ special motion to strike is GRANTED with prejudice as to  
25 the NIED claim against Doe.

26                           **3. Defamation Claim Against Both Defendants**

27           “Under California law, defamation ‘involves the intentional publication of a statement of  
28 fact which is false, unprivileged, and has a natural tendency to injure or which causes special

1 damage.” *Price v. Stossel*, 620 F.3d 992, 999 (9th Cir. 2010) (quoting *Gilbert v. Sykes*, 53 Cal.  
2 Rptr. 3d 752, 764 (Ct. App. 2007)). Only false statements of fact are generally actionable as  
3 defamation. Statements of opinion generally cannot support a defamation cause of action,  
4 although “a statement of opinion that implies a false assertion of fact” could be actionable.  
5 *Hawran v. Hixson*, 147 Cal. Rptr. 3d 88, 116 (Ct. App. 2012). “Whether a statement declares or  
6 implies a provably false assertion of fact is a question of law for the court to decide, unless the  
7 statement is susceptible of both an innocent and a libelous meaning, in which case the jury must  
8 decide how the statement was understood.” *McGarry v. Univ. of San Diego*, 64 Cal. Rptr. 3d 467,  
9 479 (Ct. App. 2007). “To determine whether a statement is actionable fact or nonactionable  
10 opinion, courts use a totality of the circumstances test of whether the statement in question  
11 communicates or implies a provably false statement of fact.” *Id.* “[T]ruth is a complete defense to  
12 a defamation claim.” *Hawran*, 147 Cal. Rptr. 3d at 119.

13 In addition, “[a] plaintiff cannot manufacture a defamation cause of action by publishing  
14 the statements to third persons; the publication must be done by the defendant.” *Live Oak*  
15 *Publishing Co. v. Cohagan*, 286 Cal. Rptr. 198, 201 (Ct. App. 1991). However, there is a narrow  
16 exception to this rule when it is foreseeable that a defendant’s act would result in publication to a  
17 third person. *Id.* Specifically, “where a derogatory statement is placed in a personnel file, the  
18 employee must explain the statement to subsequent employers, who will surely learn of it if they  
19 investigate his or her past employment.” *Id.* at 202. Finally, a defamation cause of action is not  
20 barred by the workers’ compensation exclusivity rule. *Shoemaker*, 801 P.2d at 1063 (citing  
21 *Howland v. Balma*, 192 Cal. Rptr. 286, 287-88 (Ct. App. 1983)).

22 Defendants argue that Plaintiff’s defamation cause of action fails because the statements at  
23 issue were statements of opinion and were true. Anti-SLAPP Mot. at 18. However, it is clear that  
24 Doe’s allegations contained assertions of fact and not statements of opinion. For example, SCU’s  
25 investigation report stated that Doe accused Plaintiff of kissing her on the mouth, ECF No. 39-1 at  
26 160, that Plaintiff hugged Doe so tightly that she could feel his erection pressed against her leg,  
27

1 *id.*, and that Plaintiff touched her knees and her legs, *id.* at 161. Doe told the investigator that  
2 Plaintiff asked Doe how many sexual partners she had had and whether Doe had ever had sex with  
3 a woman. *Id.* Doe also told the investigator that Plaintiff slid his hand into the back pocket of her  
4 pants and “squeezed her butt” on two occasions. *Id.* at 162. Doe told the investigator that Plaintiff  
5 slid his hand under Doe’s shirt and put his hand on her bare back. *Id.* at 163. Each of these is a  
6 statement of fact, not of opinion. *Cf. Dickinson v. Cosby*, --- Cal. Rptr. 3d ---, 2017 WL 5589488,  
7 at \*19-20 (Ct. App. Nov. 21, 2017) (holding that demand letter stating that rape allegations were  
8 false contained statements of fact).

9 Similarly, although SCU’s investigative report contained a range of opinions, it also  
10 characterized Doe’s allegations as facts and explicitly based its opinions on its finding that Doe’s  
11 allegations were credible. *See, e.g.*, ECF No. 39-1 at 197-98 (“[T]he multiple instances of  
12 unwelcome physical conduct described by the Complainant—namely the Respondent having  
13 kissed her face and mouth, hugged her tightly enough that she felt his penis against her leg, put his  
14 hand in the back pocket of her pants and squeezed her butt . . .—satisfy each of the required  
15 elements for the finding of a violation of policy.”). In addition, SCU officials explicitly adopted  
16 the findings of the investigation. *Id.* at 309. As such, Plaintiff has sufficiently identified  
17 statements of fact attributable to Doe and SCU that he alleges are defamatory.

18 As to Defendants’ arguments that the statements were true, the Court again notes that in  
19 the second step of evaluating an anti-SLAPP motion, the Court must accept the Plaintiff’s  
20 evidence as true and may not “weigh evidence or resolve conflicting factual claims.” *See Baral*,  
21 376 P.3d at 608. Plaintiff has submitted declarations unequivocally denying the factual allegations  
22 against him. In addition, Plaintiff’s wife’s declaration, in which his wife states that Plaintiff is  
23 physically incapable of an erection due to his treatment for prostate cancer, may contradict Doe’s  
24 allegation that Doe felt Plaintiff’s erection when Plaintiff hugged her. Montfort Decl. at ¶¶3-4.  
25 Plaintiff also has sufficiently alleged publication, as the allegations became part of his personnel  
26 record and he would necessarily need to publish the allegations in order to prove their falsity. *See*

1 *Live Oak Publishing*, 286 Cal. Rptr. at 201. Finally, no privilege applies, as the Court has  
2 explained above. Accordingly, Plaintiff has carried his low burden of showing that his defamation  
3 claim has at least minimal merit. Defendants’ special motion to strike is DENIED as to the  
4 defamation claim.

5 **B. Motion to Dismiss**

6 The Court now analyzes Defendants’ motion to dismiss. The Court first considers  
7 Plaintiff’s due process claim and then the Court considers Plaintiff’s ADEA claim. The Court  
8 then addresses Plaintiff’s state law claims.

9 **1. § 1983 Claim for Substantive and Procedural Due Process Violations**

10 “To state a claim for relief in an action brought under § 1983, [a plaintiff] must establish  
11 that [he] w[as] deprived of a right secured by the Constitution or laws of the United States, and  
12 that the alleged deprivation was committed under color of state law.” *Am. Mfrs. Mut. Ins. Co. v.*  
13 *Sullivan*, 526 U.S. 40, 49-50 (1999). “Like the state-action requirement of the Fourteenth  
14 Amendment, the under-color-of-state-law element of § 1983 excludes from its reach ‘merely  
15 private conduct, no matter how discriminatory or wrongful.’” *Id.* at 50 (quoting *Blum v. Yaretsky*,  
16 457 U.S. 991, 1002 (1982)). Thus, “[i]n order to recover under § 1983 for conduct by the  
17 defendant, a plaintiff must show ‘that the conduct allegedly causing the deprivation of a federal  
18 right must be fairly attributable to the State.’” *Caviness v. Horizon Community Learning Center,*  
19 *Inc.*, 590 F.3d 806, 812 (9th Cir. 2010) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937  
20 (1982)).

21 “When addressing whether a private party acted under color of law, [the Court] therefore  
22 start[s] with the presumption that private conduct does not constitute governmental action.” *See*  
23 *Sutton v. Providence St. Joseph Med. Center*, 192 F.3d 826, 835 (9th Cir. 1999). “Courts have  
24 used four different factors or tests to identify” when the presumption of private action is overcome  
25 and the private action can be attributed to the state: “(1) public function, (2) joint action, (3)  
26 governmental compulsion or coercion, and (4) governmental nexus.” *Id.* at 835-36; *see also*

1 *Abordo v. Mobi PCS*, 684 F. App’x 631, 632 (9th Cir. 2017) (unpublished) (citing *Sutton*’s  
2 explanation of the four tests).

3 It is not clear from the conclusory allegations of the Complaint which theory of state action  
4 Plaintiff intends to invoke. In his Complaint, Plaintiff alleges that Doe is a former graduate  
5 student at SCU. Compl. ¶ 6. Plaintiff alleges that SCU is “a private Jesuit academic institution.”  
6 Compl. ¶ 15. Directly contradicting his own allegation that SCU is a private institution, Plaintiff  
7 contends without further explanation that SCU “is an entity of the State of California.” Compl. ¶  
8 5. Plaintiff alleges that SCU “is funded in part b[y] federal grants.” Compl. ¶ 5; *see also id.* ¶ 69  
9 (stating that SCU is a “partially federally funded institution”). Plaintiff also alleges that “[a]t all  
10 times material hereto, Defendants acted under color of state law.” Compl. ¶ 8.

11 Defendants argue that Plaintiff has failed to state a § 1983 claim because Plaintiff has not  
12 adequately alleged state action. Mot. at 9-10. In opposition to the motion to dismiss, Plaintiff  
13 advances two arguments. First, Plaintiff contends that whether a party is a state actor is a factual  
14 determination, and thus resolution of this issue is premature on a motion to dismiss. Opp. at 11.  
15 Second, Plaintiff argues that SCU was acting under color of federal and state law because SCU’s  
16 federal funding is contingent on its compliance with Title IX, and SCU’s Gender-Based  
17 Discrimination and Sexual Misconduct Policy—the alleged violation of which is the basis for  
18 Plaintiff’s dismissal—was created to maintain compliance with Title IX. *Id.* at 11-12. Both of  
19 these arguments fail. The Court addresses them in turn.

20 First, “[w]hether a private party engaged in state action is a highly factual question.”  
21 *Brunette v. Humane Society of Ventura Cty.*, 294 F.3d 1205, 1209 (9th Cir. 2002). Even so, the  
22 Ninth Circuit has recognized that “a defendant is entitled to more than the bald legal conclusion  
23 that there was action under color of state law.” *Price v. Hawaii*, 939 F.2d 702, 708 (9th Cir.  
24 1991). In *Price*, for example, the plaintiff sued the State of Hawaii and a number of private parties  
25 for claims arising out of a dispute over a parcel of land. *Id.* at 705. Besides the private parties’  
26 seeking court approval for a land use plan, none of the allegations in the complaint “contain[ed] a  
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1 whisper of a suggestion” that the private parties acted with the State. *Id.* at 707. The district court  
2 dismissed the claims against the private parties pursuant to Rule 12(b)(6). *Id.* The Ninth Circuit  
3 acknowledged the fact-intensive nature of the state action inquiry and the “great liberality in  
4 federal pleading,” but nonetheless affirmed the district court’s dismissal because the complaint  
5 was so lacking. *Id.* at 707-08.

6 In the instant case, Plaintiff’s Complaint offers little more than “the bald legal conclusion”  
7 that “[a]t all times material hereto, Defendants acted under color of state law.” *Price*, 939 F.2d at  
8 708; Compl. ¶ 8. The Court need not assume the truth of such a legal conclusion “merely because  
9 [it is] cast in the form of [a] factual allegation[.]” *Fayer*, 649 F.3d at 1064. Moreover, the  
10 minimal fact that Plaintiff does plead—that SCU receives some unspecified amount of federal  
11 funding—does not by itself transform a private institution into a state actor. The United States  
12 Supreme Court has said that “[t]he Government may subsidize private entities without assuming  
13 constitutional responsibility for their actions.” *S.F. Arts & Athletics, Inc. v. U.S. Olympic*  
14 *Committee*, 483 U.S. 522, 544 (1987) (citing *Blum*, 457 U.S. at 1011; *Rendell-Baker v. Kohn*, 457  
15 U.S. 830, 840 (1982)). Other courts addressing this issue routinely hold that the receipt of  
16 government funds does not by itself transform a private actor into a state actor.

17 For example, in *Rendell-Baker*, former teachers and a former vocational counselor at a  
18 privately operated, mostly publicly funded, and publicly regulated high school brought a civil  
19 rights action against the high school in relation to their discharges. 457 U.S. at 831-33. The  
20 United States Supreme Court held that “the school’s receipt of public funds does not make its  
21 discharge decisions acts of the State.” *Id.* at 840. In coming to this conclusion, the United States  
22 Supreme Court analogized to its decision in *Blum*, where it held that nursing homes’ dependence  
23 on government funding “did not make the acts of the physicians and nursing home administrators  
24 acts of the State.” *Id.*

25 Similarly, in *Caviness*, the Ninth Circuit held that a privately run charter school was not a  
26 state actor for the purposes of § 1983 even though the school was publicly funded. 590 F.3d at  
27

1 808-09, 818. At least three other circuits that have considered similar arguments are in accord, as  
2 are other courts within this district. *See Faparusi v. Case W. Reserve Univ.*, --- F. App'x ---, 2017  
3 WL 4417677, at \*5 (6th Cir. Oct. 4, 2017) (unpublished) (“[R]eceipt of federal funds alone[] does  
4 not convert private conduct to government or state action.” (quoting *Doe v. Case W. Reserve*  
5 *Univ.*, No. 1:17 CV 414, 2017 WL 3840418, at \*9 (N.D. Ohio Sept. 1, 2017))); *Gross v. R.T.*  
6 *Reynolds, Inc.*, 487 F. App'x 711, 719 (3d Cir. 2012) (unpublished) (“[A] private entity does not  
7 become a state actor for the purpose of § 1983 simply because it is subject to state regulations or  
8 receives funding from the state.”); *Grosvenor v. Des Moines Area Community College*, 980 F.2d  
9 734, at \*2 (8th Cir. 1992) (unpublished) (“The Health Center’s alleged funding and regulation are  
10 not dispositive either.”); *Johnson v. Sutter Delta Med. Center*, No. C 11-03628 SI, 2011 WL  
11 5444319, at \*2 (N.D. Cal. Nov. 9, 2011) (“[E]ven had plaintiff brought a § 1983 claim, she would  
12 need to provide some greater showing than simply alleging that defendant receives federal funding  
13 in order to sustain her claim that defendant acted under color of state law.”); *Visintini v. Hayward*,  
14 No. C-08-5393 EMC, 2009 WL 2413356, at \*3 (N.D. Cal. Aug. 5, 2009) (stating that receipt of  
15 funds from Department of Housing and Urban Development does not alone make a landlord a  
16 state actor). Accordingly, the face of Plaintiff’s Complaint does not plead state action sufficient to  
17 support Plaintiff’s § 1983 claim.

18           Second, as to Plaintiff’s argument that SCU acted under color of state law because its  
19 action was compelled by Title IX, this theory does not appear in the Complaint. It is well  
20 established that “[o]n a motion to dismiss, the Court only considers facts pled in the complaint.”  
21 *Bagley v. City of Sunnyvale*, No. 16-CV-02250-LHK, 2017 WL 344998, at \*18 n.4 (N.D. Cal. Jan.  
22 24, 2017). Thus, “the complaint may not be amended by briefs in opposition to a motion to  
23 dismiss.” *Tietzworth v. Sears*, 720 F. Supp. 2d 1123, 1145 (N.D. Cal. 2010); *see also Schneider v.*  
24 *Cal. Dep’t of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (“In determining the propriety of a  
25 Rule 12(b)(6) dismissal, a court *may not* look beyond the complaint to a plaintiff’s moving papers,  
26 such as a memorandum in opposition to a defendant’s motion to dismiss.”). Thus, the Court  
27

1 GRANTS Defendants’ motion to dismiss Plaintiff’s § 1983 claim.

2           However, even if the Court were to consider Plaintiff’s Title IX theory, the Court would  
3 still dismiss the § 1983 claim. Plaintiff argues that SCU’s Gender-Based Discrimination and  
4 Sexual Misconduct Policy—the alleged violation of which is the basis for Plaintiff’s dismissal—  
5 was created to maintain compliance with Title IX. Opp. at 12. Plaintiff also argues that SCU was  
6 obligated by law to conduct an investigation into Doe’s complaint. *Id.* at 13. Plaintiff adds that  
7 SCU risks losing its federal funding if it does not comply with Title IX. *Id.* at 12-13. As a result,  
8 Plaintiff concludes that SCU’s actions were compelled by federal and state law. However,  
9 Plaintiff does not contend that it was the mere fact that SCU conducted an investigation, as  
10 required by law, that deprived him of due process. Nor does Plaintiff allege that any state or  
11 federal law, including Title IX, compelled SCU to conduct the investigation in a certain way or  
12 come to any particular decision about his termination. Plaintiff’s argument thus amounts to a  
13 contention that “a generally applicable statutory requirement, without more, . . . is sufficient to  
14 hold a private employer responsible as a governmental actor.” *Sutton*, 192 F.3d at 837.

15           The Ninth Circuit already considered and rejected this argument in *Sutton*. *See id.* at 837-  
16 39. In *Sutton*, the plaintiff argued that a private medical center acted under color of state law when  
17 the medical center refused to hire him if he did not provide his social security number, as required  
18 by law. *Id.* at 829. The Ninth Circuit held that complying with a generally applicable law was not  
19 enough to transform a private entity into a state actor. It explained:

20           To accept Plaintiff’s argument would be to convert every employer—whether it  
21 has one employee or 1,000 employees—into a governmental actor every time it  
22 complies with a presumptively valid, generally applicable law, such as an  
23 environmental standard or a tax-withholding scheme. Private employers would  
24 then be forced to defend those laws and pay any consequent damages, even  
25 though they bear no real responsibility for the violation of rights arising from the  
26 enactment of the laws. “Statutes and laws regulate many forms of purely private  
27 activity, such as contractual relations and gifts, and subjecting all behavior that  
28 conforms to state law to the Fourteenth Amendment would emasculate the  
[government] action concept.”

1 *Id.* at 838-39 (alteration in original) (quoting *Adams v. S. Cal. First Nat'l Bank*, 492 F.2d 324,  
2 330-31 (9th Cir. 1974)). Moreover, the Ninth Circuit concluded that such an approach would be  
3 inconsistent with U.S. Supreme Court precedent. *Id.* at 839-41.

4 In addition, Plaintiff cites no on point authority for the proposition that a private  
5 university's compliance with Title IX transforms it into a state actor for the purpose of § 1983, and  
6 the Court is aware of none. See *Faparusi*, 2017 WL 4417677 at \*5 ("Despite extensive research,  
7 the Court has not found a single case in which a court has determined that a private school's  
8 compliance with Title IX's regulations make that entity a state actor for purposes of a Fourteenth  
9 Amendment due process claim." (quoting *Doe v. Case Western Reserve University*, No. 1:17 CV  
10 414, 2017 WL 3840418, at \*10 (N.D. Ohio Sept. 1, 2017))). To the contrary, the Sixth Circuit  
11 recently rejected this exact argument. In *Faparusi*, the Sixth Circuit observed that alleging that a  
12 private university acted under color of state law by enforcing Title IX "by itself would ordinarily  
13 be insufficient under *Iqbal-Twombly* pleading standards." 2017 WL 4417677 at \*5. The Sixth  
14 Circuit went on, "But even if we did *Faparusi*'s work for him, it is hard to imagine how the  
15 argument would work. . . . [A] private entity taking action pursuant to a federal law does not  
16 thereby automatically become a state actor." *Id.* The Sixth Circuit then summarized *Doe*, 2017  
17 WL 3840418, a recent case from the Northern District of Ohio. In *Doe*, the plaintiff argued that  
18 the private university's actions were coerced by the federal government because the university  
19 feared that its failure to take action would risk a loss of federal funds. The district court "rejected  
20 the argument because there was no evidence that the federal government participated in the  
21 proceedings against the plaintiff, or dictated the specific finding of responsibility in th[e] case."  
22 *Faparusi*, 2017 WL 4417677 at \*5 (internal quotation marks omitted). The Sixth Circuit found  
23 *Doe*'s reasoning persuasive, as does this Court.

24 Accordingly, even if the Court considered the Title IX theory raised only in Plaintiff's  
25 Opposition, the Court would nevertheless grant Defendants' motion to dismiss the § 1983 claim.  
26 Because it is conceivable that Plaintiff may be able to plead state action under some other theory,  
27

1 the § 1983 claim is dismissed as to Defendant SCU with leave to amend. However, because  
2 Plaintiff concedes in his Opposition that he did not intend to allege the § 1983 claim against  
3 Defendant Doe, *see* Opp. at 11, the § 1983 claim is dismissed as to Defendant Doe with prejudice.

4 **2. ADEA Claim**

5 **a. Notice Requirement**

6 The ADEA provides for private civil actions, but requires that the plaintiff first provide the  
7 Equal Employment Opportunity Commission notice of the plaintiff’s claim. *See Albano v.*  
8 *Schering-Plough Corp.*, 912 F.2d 384, 385 (9th Cir. 1990) (referring to “the requirement that  
9 before filing an action for age discrimination a charge must first be brought before the Equal  
10 Employment Opportunity Commission (‘EEOC’)”). Specifically, 29 U.S.C. § 626(d)(1) states  
11 that “[n]o civil action may be commenced by an individual under this section until 60 days after a  
12 charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity  
13 Commission.” *See also* 29 C.F.R. § 1626.18(b) (“An aggrieved person whose claims are the  
14 subject of a timely pending charge may file a civil action at any time after 60 days have elapsed  
15 from the filing of the charge with the Commission . . .”).

16 Alternatively, in a state such as California that “has a law prohibiting discrimination in  
17 employment because of age and establishing or authorizing a State authority to grant or seek relief  
18 from such discriminatory practice,” the plaintiff may satisfy the notice requirement by filing an  
19 age discrimination charge with the appropriate state agency. 29 U.S.C. § 633(b); *see also Jackson*  
20 *v. Cty. of Sacramento Dep’t of Health & Human Servs.*, 2017 WL 4923297, at \*5 (E.D. Cal. Oct.  
21 31, 2017) (stating that filing a claim with California’s Department of Fair Employment and  
22 Housing (“DFEH”) would satisfy § 633(b)). This notice requirement, however, is distinct from a  
23 traditional exhaustion requirement—in other words, a plaintiff need not fully pursue an  
24 administrative claim with the EEOC or the analogous state agency in order to bring a claim in  
25 federal court. *See Bankston v. White*, 345 F.3d 768, 770 (9th Cir. 2003); *Blackman-Baham v.*  
26 *Kelly*, 2017 WL 679514, at \*12 (N.D. Cal. Feb. 21, 2017). If a plaintiff files a federal suit without

1 satisfying the notice requirement, the United States Supreme Court has stated that “[s]uspension of  
2 proceedings is preferable to dismissal with leave to refile.” *Oscar Mayer & Co. v. Evans*, 441  
3 U.S. 750, 765 n.13 (1979).

4 In the instant case, Plaintiff’s Complaint does not allege that Plaintiff notified the EEOC or  
5 DFEH of his age discrimination claim. As a result, Defendants argue that the ADEA claim is  
6 subject to dismissal for failure to comply with the notice requirement. *See* Mot. at 20. Plaintiff  
7 concedes in his Opposition that he did not notify the EEOC of his claim before filing suit. Opp. at  
8 23. However, Plaintiff states that he “is now informing the EEOC of his filing of this lawsuit.”  
9 *Id.* As the Court explained above, Plaintiff may not add factual allegations to the Complaint by  
10 way of his opposition papers. *See Tietsworth*, 720 F. Supp. 2d at 1145. In any event, the proper  
11 remedy for failure to satisfy the notice requirement appears to be a stay, rather than dismissal. *See*  
12 *Oscar Mayer & Co.*, 441 U.S. at 765 n.13. As such, the Court must consider whether Plaintiff’s  
13 ADEA claim must be dismissed for failure to state a claim under Rule 12(b)(6).

14 **b. Whether the Complaint States an ADEA Claim**

15 With respect to the substance of an ADEA claim, the ADEA forbids “discharge[ing] any  
16 individual . . . because of such individual’s age.” 29 U.S.C. § 623(a)(1). “However, the statute  
17 specifically provides that it is not unlawful for an employer to base employment decisions on  
18 ‘reasonable factors other than age,’ or to discharge an individual ‘for good cause.’” *Douglas v.*  
19 *Anderson*, 656 F.2d 528, 530-31 (9th Cir. 1981) (quoting 29 U.S.C. § 623(f)(1)). The United  
20 States Supreme Court has recognized two theories of employment discrimination in the context of  
21 the ADEA: disparate treatment and disparate impact. *See Smith v. City of Jackson, Miss.*, 544  
22 U.S. 228, 233-240 (2005) (plurality opinion recognizing disparate impact theory under ADEA);  
23 *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (recognizing disparate treatment theory).  
24 In a disparate treatment claim, the employer “treats some people less favorably than others  
25 because of their race, color, religion [or other protected characteristics.]” *Hazen Paper Co.*, 507  
26 U.S. at 609 (alteration in original) (quoting *Teamsters v. United States*, 431 U.S. 324, 335-36, n.15  
27

1 (1977)). Disparate impact claims, by contrast, “involve employment practices that are facially  
2 neutral in their treatment of different groups but that in fact fall more harshly on one group than  
3 another and cannot be justified by business necessity.” *Id.* (quoting *Teamsters v. United States*,  
4 431 U.S. 324, 335-36, n.15 (1977)).

5 “In a disparate treatment case, liability depends on whether the protected trait (under the  
6 ADEA, age) actually motivated the employer’s decision.” *Id.* at 610; *Enlow v. Salem-Keizer*  
7 *Yellow Cab Co.*, 389 F.3d 802, 811 (9th Cir. 2004) (same). In the absence of direct evidence of  
8 age discrimination, a plaintiff can establish a prima facie case of age discrimination using  
9 circumstantial evidence by showing that he was “(1) [a] member[] of the protected class (at least  
10 age 40); (2) performing [his] job[] satisfactorily; (3) discharged; and (4) replaced by [a]  
11 substantially younger employee[] with equal or inferior qualifications.” *Coleman v. Quaker Oats*  
12 *Co.*, 232 F.3d 1271, 1281 (9th Cir. 2000).

13 If the plaintiff relies on circumstantial evidence of age discrimination, then the Court must  
14 apply the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792  
15 (1973). *Enlow*, 389 F.3d at 812. Under that framework, “if an employee presents prima facie  
16 circumstantial evidence of discrimination, the burden shifts to the employer to ‘produc[e] evidence  
17 that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory  
18 reason.’” *Id.* (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000)). If  
19 the employer meets its burden, the burden shifts back to the employee “to prove by a  
20 preponderance of the evidence that the legitimate reasons offered by the defendant were not its  
21 true reasons, but where a pretext for discrimination.” *Reeves*, 530 U.S. at 143.

22 Other courts in the Ninth Circuit have dismissed ADEA claims pursuant to Rule 12(b)(6)  
23 where the plaintiff fails to plead the elements of a prima facie claim of discrimination. *See, e.g.*,  
24 *Stoklas v. Sun Community Federal Credit Union*, 2012 WL 3237716, at \*3 (S.D. Cal. Aug. 7,  
25 2012) (dismissing ADEA claim where plaintiff failed to allege that anyone replaced the plaintiff  
26 after the plaintiff was fired); *Hall v. Schumacher*, 2011 WL 1073177, at \*2 (D. Nev. Mar. 21,

1 2011) (dismissing ADEA claim where plaintiff failed to allege that she was performing her job  
2 satisfactorily or that the people who were promoted instead of the plaintiff were younger than the  
3 plaintiff).

4 In the instant case, as an initial matter, it is not even clear that Plaintiff has attempted to  
5 allege an ADEA claim. The caption of the Complaint lists the second cause of action as “ADEA  
6 Violations (29 U.S.C. § 631 et seq.)” and the Complaint invokes federal jurisdiction based in part  
7 on the ADEA. *See* Compl. ¶ 1. However, the body of the Complaint does not contain an ADEA  
8 cause of action. Rather, the body of the Complaint only contains a wrongful discharge cause of  
9 action that mentions age discrimination in passing. *See* Compl. ¶¶ 57-61.

10 Even setting this anomaly in pleading aside, the Complaint contains only conclusory  
11 allegations that SCU discriminated against Plaintiff based on his age. In the first paragraph of the  
12 Complaint, Plaintiff states that SCU threatened “to suspend and/or terminate Plaintiff from his  
13 tenured position as a professor at SCU due to his being 79 years old.” Compl. ¶ 1. In paragraph  
14 55, Plaintiff asserts that he “believes and will prove the real reason SCU is seeking to suspend or  
15 terminate him is age discrimination in order to avoid paying his tenured salary.” Compl. ¶ 55. In  
16 paragraph 61, Plaintiff alleges that “SCU’s failure to follow its policies as well as state and federal  
17 law was done with malice or with reckless indifference to Plaintiff Heineke’s federally protected  
18 rights and was done to discriminate against him because of his age – he is 79 years old.” Compl.  
19 ¶ 61. Finally, in a declaration that was not signed but which Plaintiff swore was correct in an  
20 attached email, Plaintiff stated that he is 79 years old. Heineke Decl. ¶ 1. In addition, Plaintiff  
21 states that he is “informed and believe[s] that the SCU Business School is seeking to save money  
22 and that firing [him], a tenured professor, is a way for SCU to save \$100,000/year by replacing  
23 [him] with an untenured or adjunct professor.” *Id.* ¶ 31. Plaintiff added that he believes that “the  
24 sexual harassment accusation is being used as a pretext to fire [him] because of [his] age and high  
25 compensation, so SCU can save money.” *Id.*

26 These allegations fail to sufficiently plead an ADEA violation. Aside from reciting that  
27

1 Plaintiff is 79 years old, Plaintiff does not allege any direct indication that he was fired because of  
2 his age. As a result, Plaintiff instead must establish a prima facie case of discriminatory intent  
3 using circumstantial evidence, but the Complaint falls short here, too. Specifically, Plaintiff does  
4 not allege that he was replaced with “a substantially younger employee[] with equal or inferior  
5 qualifications.” *Coleman*, 232 F.3d at 1281. Instead, Plaintiff alleges that SCU would seek to  
6 replace him with “an untenured or adjunct professor.” Heineke Decl. ¶ 31.

7 In his Opposition, Plaintiff attempts to conflate the age of any replacement with tenure  
8 status and salary. For example, Plaintiff states that he has alleged that SCU used the sexual  
9 harassment allegations “as a pretext . . . to terminate Professor Heineke, a 79-year old tenured  
10 professor and replace him with a younger, cheaper, adjunct professor, and SCU admits it has done  
11 so.” MTD Opp. at 12 (internal citations omitted); *see also id.* at 16 (repeating assertion that  
12 Plaintiff has alleged his replacement is “a younger, cheaper adjunct professor”). Plaintiff  
13 misstates the record, and the Court cautions Plaintiff to take greater care in characterizing the  
14 record in the future. Neither the Complaint nor Plaintiff’s declaration allege that any replacement  
15 for Plaintiff will be younger than Plaintiff. As stated above, paragraph 31 of Plaintiff’s  
16 declaration, upon which Plaintiff relies here, only states that his replacement would be untenured  
17 and paid less. It does not state that any replacement would be younger. Moreover, although the  
18 Court limits its review on a motion to dismiss to the facts alleged in the Complaint and any  
19 judicially noticeable facts, the Court notes that Plaintiff’s other declarations similarly lack any  
20 allegations as to the replacement’s age. *See* ECF No. 19 ¶ 3 (separate Plaintiff declaration making  
21 same claim about salary and tenure status of replacement but failing to mention age); ECF No. 39-  
22 1 at 42 ¶ 37 (separate Plaintiff declaration identifying replacement as adjunct professor without  
23 mentioning the adjunct professor’s age). Similarly, the Chacko declaration states only that tenured  
24 professors “are paid substantially more than adjunct professors.” ECF No. 21 ¶ 3. Moreover, the  
25 Guthrie declaration, which Plaintiff cites for the proposition that SCU has admitted to hiring a  
26 younger replacement, does not mention the age of any replacement. It says: “SCU has already  
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1 made arrangements to have another faculty member cover Plaintiff’s courses and changing that at  
2 this time will cost SCU money and will inconvenience the students and faculty scheduled to teach  
3 Plaintiff’s courses.” ECF No. 17-1 ¶ 10.

4 While tenure status or salary may be correlated with age, alleging that an employment  
5 decision was made based on a separate characteristic that correlates with age is not sufficient to  
6 state an ADEA claim, as the following decisions of the United States Supreme Court and Ninth  
7 Circuit demonstrate. In *Hazen Paper Co.*, the United States Supreme Court addressed “whether  
8 an employer violates the ADEA by acting on the basis of a factor, such as an employee’s pension  
9 status or seniority, that is empirically correlated with age.” 507 U.S. at 608. The United States  
10 Supreme Court explained that “[i]t is the very essence of age discrimination for an older employee  
11 to be fired because the employer believes that productivity and competence decline with old age.”  
12 *Id.* at 610. “Congress’ promulgation of the ADEA was prompted by its concern that older workers  
13 were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.” *Id.*  
14 The United States Supreme Court noted, however, that “[w]hen the employer’s decision is wholly  
15 motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes  
16 disappears. This is true even if the motivating factor is correlated with age, as pension status  
17 typically is.” *Id.* at 611.

18 With regard to an employee’s years of service, for example, the United States Supreme  
19 Court explained that “an employee’s age is analytically distinct from his years of service,” even  
20 though age and years of service may often be correlated. *Id.* “An employee who is younger than  
21 40, and therefore outside the class of older workers as defined by the ADEA, may have worked for  
22 a particular employer his entire career, while an older worker may have been newly hired.  
23 Because age and years of service are analytically distinct, . . . it is incorrect to say that a decision  
24 based on years of service is necessarily ‘age based.’” *Id.* (internal citation omitted). As a result, a  
25 decision to fire an older employee solely because he had enough years of service to be close to  
26 vesting his pension benefits would not constitute discriminatory treatment on the basis of age.

1 The United States Supreme Court explained, “The prohibited stereotype (‘Older employees are  
2 likely to be \_\_\_’) would not have figured in this decision, and the attendant stigma would not  
3 ensue.” *Id.* at 612. The United States Supreme Court noted that such an action may not be legal,  
4 “[b]ut it would not, without more, violate the ADEA.” *Id.*

5 The Ninth Circuit applied *Hazen Paper Co.* in *Turney v. Beltservice Corp.*, 92 F.3d 1194  
6 (9th Cir. 1996) (unpublished). In *Turney*, the plaintiff argued that he was terminated because of  
7 his high salary, which was related to his age, and that his replacement “represented younger,  
8 cheaper labor to the company.” *Id.* at \*2. The Ninth Circuit concluded that *Hazen Paper Co.*  
9 controlled because “the motivating factor for terminating Turney appears to be one which is  
10 related to, but not the same as, his age.” *Id.*; see also *Flynn v. Portland General Elec. Co.*, 958  
11 F.2d 377, at \*7 (9th Cir. 1992) (unpublished) (“A desire to cut costs does not necessarily equate  
12 with an intent to discriminate on the basis of age . . .”).

13 As a result, in the instant case, not only has Plaintiff failed to plead that he was replaced  
14 with a substantially younger employee, but Plaintiff has also pled facts that, when accepted as true,  
15 as the Court must on a motion to dismiss, “establish that he cannot prevail on his . . . claim.”  
16 *Weisbuch*, 119 F.3d at 783 n.1 (quoting *Warzon*, 60 F.3d at 1239). Specifically, Plaintiff has pled  
17 that the motivating factor in SCU’s decision to suspend him was a desire to cut costs by replacing  
18 Plaintiff, a tenured, highly paid professor, with an untenured, lower-paid professor. While tenure  
19 status and salary may often relate to age, they are not the same as age.<sup>4</sup> See *Hazen Paper Co.*, 507  
20 U.S. at 612; *Turney*, 92 F.3d 1194, at \*2.

21 As such, Plaintiff has failed to state a claim for an ADEA violation. Defendants’ motion to  
22 dismiss is thus GRANTED as to the ADEA cause of action, to the extent that the Complaint  
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24 <sup>4</sup> These same allegations about tenure status and salary also suggest that even if Plaintiff can  
25 amend the Complaint to allege that his replacement was substantially younger than Plaintiff,  
26 Plaintiff will face difficulty in showing that his age—as opposed to his salary or the allegations of  
27 sexual harassment—were the motivating reason for his discharge. See *Hazen Paper Co.*, 507 U.S.  
at 610. Similarly, Plaintiff’s tenure status and salary allegations are likely to pose a challenge to  
his ability to carry his burden to show pretext if the burden shifts back to him under the  
*McDonnell Douglas* framework.

1 pleads one. Because it is conceivable that Plaintiff could amend the Complaint to allege either  
2 direct evidence of age discrimination or establish a prima facie case using circumstantial evidence,  
3 the Court grants Plaintiff leave to amend as to Defendant SCU. Because an ADEA claim is not  
4 available against an individual defendant, *Miller v. Maxwell's Int'l*, 991 F.2d 583, 588-89 (1993),  
5 and because Plaintiff acknowledges that he did not intend to allege an ADEA claim against to  
6 Defendant Doe, Opp. at 24, the dismissal of the ADEA claim is with prejudice as to Defendant  
7 Doe.

8 **3. State Law Claims**

9 After the Court's rulings on the anti-SLAPP special motion to strike and the dismissal of  
10 Plaintiff's § 1983 and ADEA causes of action, five causes of action remain: wrongful discharge,  
11 IIED (against Doe only), breach of contract, breach of the implied covenant of good faith and fair  
12 dealing, and defamation. All of these remaining causes of action are based on state law. A federal  
13 court may exercise supplemental jurisdiction over state law claims "that are so related to claims in  
14 the action within [the court's] original jurisdiction that they form part of the same case or  
15 controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a).  
16 Conversely, a court may decline to exercise supplemental jurisdiction where it "has dismissed all  
17 claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3); *see also Albingia*  
18 *Versicherungs A.G. v. Schenker Int'l, Inc.*, 344 F.3d 931, 937-38 (9th Cir. 2003) (as amended)  
19 (holding that Section 1367(c) grants federal courts the discretion to dismiss state law claims when  
20 all federal claims have been dismissed). In considering whether to retain supplemental  
21 jurisdiction, a court should consider factors such as "economy, convenience, fairness, and  
22 comity." *Acri v. Varian Assocs.*, 114 F.3d 999, 1001 (9th Cir. 1997) (en banc) (citations and  
23 internal quotation marks omitted). However, "in the usual case in which all federal-law claims are  
24 eliminated before trial, the balance of factors . . . will point toward declining to exercise  
25 jurisdiction over the remaining state law claims." *Exec. Software N. Am., Inc. v. U.S. Dist. Court*,  
26 24 F.3d 1545, 1553 n.4 (9th Cir. 1994) (emphasis omitted), *overruled on other grounds by Cal.*  
27 *Dep't of Water Res. v. Powerex Corp.*, 533 F.3d 1087 (9th Cir. 2008).

1 Here, the factors of economy, convenience, fairness, and comity support dismissal of  
 2 Plaintiff’s remaining state law theories of relief. This case is still at the pleading stage, and no  
 3 discovery has taken place. Federal judicial resources are conserved by dismissing the state law  
 4 theories of relief at this stage. The Court finds that dismissal promotes comity as it enables  
 5 California courts to interpret questions of state law. For these reasons, the Court declines to  
 6 exercise supplemental jurisdiction over Plaintiffs’ state law theories of relief. Accordingly, the  
 7 motion to dismiss is GRANTED as to the state law claims with leave to amend. *See Sikhs for*  
 8 *Justice “SFJ”, Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1097 (N.D. Cal. 2015) (dismissing  
 9 without prejudice the claims over which the court declined to exercise supplemental jurisdiction).

10 **C. The Court’s Previous Order that Jane Doe May Proceed Under Pseudonym**

11 In an order on November 16, 2017, the Court granted Defendants’ administrative motion to  
 12 allow Doe to proceed under pseudonym and to seal the filings containing Doe’s true name. ECF  
 13 No. 54. Because the Court issued this order on the evening before the planned evidentiary hearing  
 14 on Plaintiff’s second emergency motion for a preliminary injunction,<sup>5</sup> the Court did not have time  
 15 to issue a detailed order. As a result, the Court now provides its reasoning for granting the  
 16 administrative motion.

17 “A district court has discretion in deciding whether to permit a party to proceed  
 18 anonymously.” *Advanced Textile*, 214 F.3d at 1067, 1068. The Court must balance the party’s  
 19 need for anonymity with the prejudice to the opposing party and the public’s interest in knowing  
 20 the party’s identity. *Id.* at 1068. “In general, ‘compelling reasons’ sufficient to outweigh the  
 21 public’s interest in disclosure and justify sealing court records exist when such ‘court files might  
 22 have become a vehicle for improper purposes,’ such as the use of records to gratify private spite,  
 23 promote public scandal, circulate libelous statements, or release trade secrets.” *Kamakana v. City*  
 24 *& Cty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006). With regard to allegations of sexual

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 26 <sup>5</sup> After granting the administrative motion, the Court decided to vacate the hearing. *See* ECF No.  
 27 55.

1 assault or sexual harassment in particular, courts in the Ninth Circuit have found that allowing  
2 victims to proceed anonymously serves a strong public interest “in protecting the identities of  
3 sexual assault victims so that other victims will not be deterred from reporting such crimes.” *See*  
4 *Doe v. Penzato*, No. CV10-5154, 2011 WL 1833007, at \*5 (N.D. Cal. May 13, 2011); *R.P. v.*  
5 *Seattle School Dist.*, 2014 WL 639408, at \*1 (W.D. Wash. Feb. 18, 2014); *cf. Jordan v. Gardner*,  
6 986 F.2d 1521, 1525 n.4 (1993) (“In keeping with the tradition of not revealing names of the  
7 victims of sexual assault, we use initials here to protect the privacy of the inmates.”). In *EEOC v.*  
8 *ABM Industries, Inc.*, 249 F.R.D. 588, 592 (E.D. Cal. 2008), for example, a court permitted  
9 plaintiffs to intervene anonymously in part because “[t]hey [we]re concerned that they w[ould] be  
10 embarrassed by the public disclosure of the nature of their allegations against Defendants, which,  
11 if proven, will identify them as victims of sexual harassment and sexual crimes in the small  
12 community where they live and work.”

13 Defendants argued that Doe’s need for anonymity outweighed any potential prejudice to  
14 Plaintiff and the public’s interest in knowing her identity. ECF No. 71 at 3. Defendants alleged  
15 that Plaintiff brought this lawsuit for the purpose of embarrassing and intimidating Doe. *Id.* at 1.  
16 Defendants argued that Plaintiff included in the Complaint private information about Doe’s  
17 performance in his course as well as the sensitive allegations that she privately made in a  
18 confidential university investigation. *Id.* at 3-4. Defendants argued that Plaintiff would suffer no  
19 prejudice as a result of allowing Doe to proceed anonymously because Plaintiff already knows  
20 Doe’s identity. *Id.* at 5. Finally, Defendants argued that the public’s interest weighed in favor of  
21 allowing Doe to proceed anonymously, to prevent other victims of sexual harassment and assault  
22 from being deterred from reporting such behavior. *Id.* at 3.

23 Plaintiff opposed Defendants’ administrative motion.<sup>6</sup> ECF No. 33. Plaintiff argued that  
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25 <sup>6</sup> The Court notes that Plaintiff’s opposition was seven pages long. The Local Civil Rules limit  
26 the length of an opposition to an administrative motion to five pages. *See* Local Civ. R. 7-11(b).  
27 As such, Plaintiff’s opposition is subject to being stricken for failure to comply with the Local  
28 Rules. Nevertheless, the Court fully considered Plaintiff’s arguments. The Court reminds  
Plaintiff to comply with the Local Rules.

1 Doe had not identified what harm she would suffer if made to proceed in her true name. *Id.* at 2-3.  
2 Plaintiff argued that sexual harassment victims, as opposed to sexual assault victims, are not  
3 typically allowed to proceed anonymously. For this proposition, Plaintiff relied on a number of  
4 out-of-circuit cases where the victim seeking to proceed anonymously was the plaintiff. *See id.* at  
5 1. Plaintiff also claims that he “has the right to attack her credibility in public rather than her  
6 hiding behind a cloak of secrecy.” *Id.* at 3. Finally, Plaintiff claims that he “has the right to  
7 defend himself publicly, where there is a greater incentive for truthful testimony. [Doe], as the  
8 accuser, has to proceed publicly so that other presently unknown witnesses may learn that it is she  
9 who has made these accusations and may come forward to provide information or evidence  
10 helpful to Professor Heineke.” *Id.* at 4.

11 The Court found that in the circumstances of this case, Doe’s interest in proceeding  
12 anonymously outweighed any potential prejudice to Plaintiff. First, unlike the cases that Plaintiff  
13 relied upon, Doe is not the plaintiff in this case. She is not the one who has chosen to avail herself  
14 of the public forum of the Court. *See North Jersey Media Grp. Inc. v. Doe Nos. 1-5*, 2012 WL  
15 5899331, at \*4 (S.D.N.Y. Nov. 26, 2012) (“The problem of anonymous plaintiffs involves  
16 considerations entirely different from those involving ‘John Doe’ defendants.”).<sup>7</sup> Second, there is  
17 no prejudice that would result to Plaintiff as a result of allowing Doe to proceed anonymously.  
18 “This is especially true when [Plaintiff] knows [Doe]’s true identi[t]y (as evidenced by the  
19 repeated use of her name in the moving papers).” *R.P.*, 2014 WL 639408, at \*2. Third, Plaintiff’s  
20 assertion that exposure to the public is what incentivizes witnesses in court to tell the truth is  
21 contradicted by Plaintiff’s many filings in this Court, which focus on the importance of testifying

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23 <sup>7</sup> The Court disagrees with Plaintiff’s assertion that the *Advanced Textile* retaliation analysis  
24 applies here. That retaliation analysis more naturally applies when a plaintiff fears retaliation in  
25 response to bringing a lawsuit. Here, Doe does not argue that she fears retaliation in response to  
26 the suit; she argues that the suit *itself*, and the related public exposure, is meant to publicly  
27 embarrass her. *See Doe v. County of El Dorado*, No. 2:13-CV-01433-KJM, 2013 WL 6230342, at  
\*2 (E.D. Cal. Dec. 2, 2013) (explaining that in cases where *Advanced Textile* retaliation analysis  
applied, “plaintiffs feared retaliation because of their suit”); *Dep’t of Fair Emp’t & Hous. v. Law  
Sch. Admission Council, Inc.*, No. C-12-1830 EMC, 2012 WL 3583023, at \*2-3 (N.D. Cal. Aug.  
20, 2012) (omitting *Advanced Textile* retaliation analysis where feared harm was not retaliatory).

1 under penalty of perjury, not the importance of public testimony. *See, e.g.*, Heineke Decl. ¶ 26 (“I  
2 should be afforded the opportunity to show, if necessary, in court (where [Doe] will have to prove,  
3 under oath with substantial credible evidence, and sworn testimony from witnesses who are cross-  
4 examined) that I did not sexually harass her.”). Fourth, because the Court ordered the parties to  
5 refile all documents containing Doe’s true name with her name removed, all the “filings in the  
6 case [will be] available for public review.” *R.P.*, 2014 WL 639408, at \*2. Fifth, the Court  
7 concludes that the public interest is served in allowing an alleged victim of sexual harassment to  
8 be sued under pseudonym to avoid deterring other victims from coming forward.<sup>8</sup> As a result, the  
9 Court granted Defendants’ administrative motion, sealed documents with references to Doe’s true  
10 name, and ordered the parties to refile these documents without Doe’s true name.

11 **IV. CONCLUSION**

12 For the foregoing reasons, Defendants’ special motion to strike is GRANTED IN PART  
13 and DENIED IN PART as follows:

- 14 • Defendants’ special motion to strike is GRANTED with prejudice as to Plaintiff’s  
15 IIED claim against SCU and Plaintiff’s NIED claims against SCU and Doe.
- 16 • Defendants’ special motion to strike is DENIED as to Plaintiff’s § 1983, ADEA,  
17 wrongful discharge, breach of contract, breach of the implied covenant of good  
18 faith and fair dealing, and defamation claims against SCU and Doe, as well as the  
19 IIED claim against Doe.

20 Defendants’ motion to dismiss the complaint in its entirety is GRANTED as follows:

- 21 • The § 1983 and ADEA claims are dismissed with prejudice as to Doe.
- 22 • The § 1983 and ADEA claims are dismissed with leave to amend as to SCU. If

23  
24 <sup>8</sup> Plaintiff’s opposition to the administrative motion to proceed under pseudonym unnecessarily  
25 inserted Doe’s true name in the title of the opposition. Specifically, the administrative motion was  
26 titled “Defendants’ Motion for Administrative Relief to Proceed Under Pseudonym, and Seal  
27 Records Referencing the Named Student.” ECF No. 71. Plaintiff’s opposition goes out of its way  
to use Doe’s true name in its title: “Plaintiff’s Memorandum in Opposition to Defendant [Jane  
Doe’s True Name]’s Motion for Administrative Relief to Proceed Under a Pseudonym.” ECF No.  
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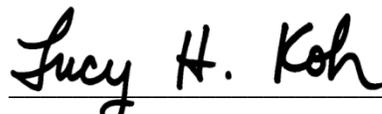
Plaintiff chooses to amend the § 1983 and ADEA claims, he must file an amended complaint within 60 days.

- The Court declined to exercise supplemental jurisdiction over the remaining state law claims. As such, if Plaintiff chooses to amend his § 1983 and ADEA claims, he may reassert the wrongful discharge, breach of contract, breach of the implied covenant of good faith and fair dealing, and defamation claims, as well as the IIED claim against Doe.
- If Plaintiff chooses not to amend the § 1983 or ADEA claims, the wrongful discharge, breach of contract, breach of the implied covenant of good faith and fair dealing, and defamation claims, as well as the IIED claim against Doe are dismissed without prejudice to refile these claims in state court.

If Plaintiff fails to file an amended complaint within 60 days or fails to cure the § 1983 and ADEA deficiencies identified in this order, those claims will be dismissed with prejudice. Plaintiff may not add new causes of action or new parties without a stipulation or leave of the Court.

**IT IS SO ORDERED.**

Dated: December 5, 2017



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LUCY H. KOH  
United States District Judge