SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES - WEST DISTRICT

ARIANNA DAVIS, as an Individual; CRYSTAL WILLIAMS as an Individual; and NOELLE RODRIGUEZ, as an Individual,

Plaintiff(s),

vs.

BIG GRRRL BIG TOURING, INC, a Delaware Corporation; MELISSA JEFFERSON (pka "LIZZO"), as an Individual; SHIRLENE QUIGLEY, as an Individual, and DOES 1 through 10, inclusive,

Defendant(s).

CASE NO.: 23SMCV03553

[TENTATIVE] ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' BIG GRRRL BIG TOURING, INC., MELISSA JEFFERSON, AND SHIRLENE QUIGLEY'S SPECIAL MOTION TO STRIKE PORTIONS OF PLAINTIFFS' COMPLAINT

Dept.: I
Hearing Date: 1/2/2024
Hearing Time: 9:00am

I. Background

Plaintiffs Arianna Davis, Crystal Williams, and Noelle Rodriguez (collectively "plaintiffs") filed this employment discrimination action against defendants Big Grrrl Big Touring, Inc. ("BGBT"), Melissa Jefferson ("Lizzo"), and Shirlene Quigley ("Quigley" and collectively "defendants"). According to the operative complaint, plaintiffs are professional dancers who worked with Lizzo. (Compl., ¶11.)[1] Plaintiffs allege that in March 2021, Davis and

[1] The court typically does not cite from the complaint on a special motion to strike. However, the parties and witnesses' recollections of events vary so widely that it is best to focus on the allegations to provide context for the lawsuit. This is not meant to imply that the court takes the allegations as true. That said, the various declarations plaintiffs submitted in support of their opposition papers are consistent with the allegations cited herein, although the

Williams first met Lizzo as contestants on her reality television show called "Watch Out for the Big Grrrls" ("WOFTBG"). (*Id.* at ¶12.) The show centered on contestants competing for the opportunity to join Lizzo as dancers on her tours and live performances. (*Ibid.*) Plaintiffs contend that Rodriguez was hired in or around May 2021 by Lizzo and BGBT for a music video and later as part of a performance group that supported Lizzo during live shows. (*Id.* at ¶14.) While Rodriguez was working on a music video for Lizzo, she claims she was approached with another job opportunity that would have required her to work at during the same period as rehearsals for Lizzo's shows. (*Ibid.*) Plaintiffs claim that Rodriguez spoke with Lizzo's tour manager, Carlina Gugliotta, about taking this opportunity, to which Gugliotta stated, "Do you want the job or not?", implying that Rodriguez should not take any other jobs while hired as a tour dancer. (*Ibid.*)

Plaintiffs Davis and Williams contend they were first introduced to defendant Quigley in or around August 2021, which is when filming for WOFTBG began. (Compl., ¶16.) Quigley was allegedly vocal about her religious beliefs and purportedly proselytized whenever the opportunity arose. (*Ibid.*) Plaintiffs assert that Quigley was particularly interested in Davis and preached at her about their shared Christian identity. (*Ibid.*) After finding out about Davis's virginity while filming, Quigley purportedly made a point of bringing that up in the following months and sharing it in interviews and on social media without Davis's permission. (*Id.* at ¶17.)

Plaintiffs allege that one of the requirements for WOFTBG was a nude photoshoot that made some contestants uncomfortable, including Davis. (Compl., ¶18.) Davis claims she did not want to be photographed nude but felt she would be sent home if she refused or did not perform well. (*Id.* at ¶18.) Davis claims that she broke down in tears from the stress and was eventually allowed to participate partially clothed. (*Id.* at ¶19.) Plaintiffs assert that both Williams and Davis were chosen to be part of the dance team accompanying Lizzo on tour. (*Id.* at ¶20.) Plaintiffs performed with Lizzo from September 2021 to April 2022. (*Ibid.*)

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declarations defendants submitted in support of their motion are not consistent with the more troubling allegations. Because in the Special Motion to Strike context the court (for prong two, discussed below) must take evidence in opposition to the motion as true and draw all reasonable inferences in the opposing party's favor, the court recites from the complaint and plaintiffs' declarations here. Defendants deny many of these allegations and the court is, of course, making no factual findings as to any of it.

In April 2022, plaintiffs began preparing for Lizzo's "The Special Tour" and worked closely with Quigley, the captain of the dance team. (Compl., ¶21.) Plaintiffs state that Quigley continued to proselytize to everyone around her regarding Christianity and sexuality. (*Ibid.*) She purportedly derided those who engaged in pre-marital sex, spoke about her masturbation habits, spoke about her sexual fantasies, and would simulate oral sex on a banana, which made plaintiffs uncomfortable. (*Id.* at ¶¶21-22.) Plaintiffs contend that Quigley continued to minister them by keeping tabs on Davis's virginity, preaching at Rodriguez for being a non-believer, interrogating Davis about her religious beliefs, and becoming upset if Davis disagreed. (*Id.* at ¶¶23-24.) Quigley was allegedly not the only one, however, as others in supervisory roles at BGBT would allegedly have prayer circles prior to rehearsals and performances. (*Id.* at ¶25.) Plaintiffs state that while the prayer circle was not an official requirement, it soon became clear to them that the failure to participate was looked down upon. (*Ibid.*) Rodriguez purportedly did not want to lead the prayer but was pressured to do so. (*Ibid.*) Plaintiffs claim that complaints regarding Quigley's proselytizing and instances of sexual harassment by bus drivers went unaddressed by management, although management claims to the contrary especially as to the bus driver. (*Id.* at ¶¶26-27.)

After the domestic portion of the tour came to an end in November 2022, plaintiffs began to look for work to fill the time until the European leg of the tour was to begin in February 2023. (Compl., ¶28.) Because BGBT preferred that plaintiffs took on no additional jobs, it instructed plaintiffs' agents to place plaintiffs on a "soft hold," meaning plaintiffs would not be paid during this gap period but also could not take on other work. (*Ibid.*) Plaintiffs assert that due to the "soft hold," they became financially dependent on the income from this tour. (*Id.* at ¶29.) Plaintiffs learned, however, that other members of the tour were on a retainer, meaning that they were paid a portion of their tour rate during breaks in exchange for not taking other jobs. (*Ibid.*) The dance team then began discussing how to negotiate for a retainer. (*Ibid.*)

Plaintiffs contend they performed with Lizzo at her Amsterdam show in February 2023. (Compl., ¶32.) After the show, Lizzo invited the dancers out with her at night. (*Ibid.*) Plaintiffs concede that attendance was not mandatory, but they assert that those who attended such events

were favored by Lizzo, selected to perform with her more regularly, and enjoyed better job security. (*Ibid.*) Plaintiffs contend that Davis and Rodriguez were rushed into accepting Lizzo's invitation without knowing that the club was Bananenbar, where patrons interacted with nude performers. (*Id.* at ¶¶33-34.) Davis and Rodriguez claim that they tried to withdraw after learning about the club but were unable to do so. They assert that things got out of hand when they reached the club. (*Id.* at ¶¶34-35.) Specifically, Lizzo and others allegedly pressured Davis into touching the naked breast of one of the performers, despite Davis expressing her discomfort both verbally and physically. (*Id.* at ¶¶35-36.) Later, when the tour was in Paris, Lizzo invited the dancers out to Crazy Horse without explaining that this was a nude cabaret bar. (*Id.* at ¶39.)

Plaintiffs state that around March 9, 2023, the dance team submitted a request for a retainer of 50 percent of their weekly tour rate during the "soft hold" periods to BGBT and Lizzo, a number consistent with what some others were getting. (Compl., ¶40.) On March 16, the dance team received an email from Ashley Joshi, a BGBT accountant, who offered a retainer. (*Id.* at ¶41.) In the email, Joshi scolded the dancers for their "unacceptable and disrespectful" behavior on tour but did not explain specifically what behavior triggered this comment, and informed the dance team that such behavior was grounds for termination. (*Ibid.*) Plaintiffs point out that the dance team is comprised of full-figured women of color and plaintiffs assert that only they were spoken to in this way (meaning other groups were allegedly treated differently). (*Ibid.*) While BGBT did eventually agree to a larger retainer, management allegedly treated the black members of the dance team differently than others, calling the black dancers lazy and unprofessional; stereotypical tropes purportedly aimed at deriding plaintiffs based on their race. (*Id.* at ¶¶43-44.)

On April 20, 2023, the dance team had an eight-hour rehearsal scheduled. At the end of the rehearsal, Lizzo appeared. (Compl., ¶45.) Lizzo purportedly stated that the dancers were not up to par and accused them of drinking before shows. (*Ibid.*) Plaintiffs contend Lizzo made them re-audition for their spots and the eight-hour rehearsal extended to a grueling twelve hours. (*Ibid.*) Plaintiffs assert that the re-audition process was brutal. (*Id.* at ¶46.) Davis allegedly had to use the restroom but felt she might be fired if she left the stage at any point during the audition. (*Ibid.*)

Plaintiffs state Davis eventually lost control of her bladder but, still fearing termination, danced in her soiled clothing until she could run off to change during a brief break. (*Ibid.*)

On April 21, Lizzo called another meeting with the dance team to reiterate none of their jobs was safe and reiterated that drinking before shows was prohibited. (Compl., ¶48.) Plaintiffs assert that Williams spoke up and said that dancers did not drink before shows, which resulted in tension between Lizzo, management, and Williams, with the rejoinder that the declining quality of the performance was the reason for the accusation. (*Ibid.*) That same day, Davis was called into a meeting with Lizzo and the choreographer, Tanisha Scott, during which they questioned whether she was struggling with something because she seemed less committed to her position. (*Id.* at ¶49.) Davis claims that the two pressured her for an explanation about her personality changes. (*Ibid.*) However, these comments were purportedly really focused on Davis's weight gain, given Lizzo's statements after a music festival on that specific point. (*Id.* at ¶¶49-50.) Davis disclosed that she had anxiety and depression and had been diagnosed with an eating disorder. (*Id.* at ¶51.) Davis reiterated her commitment to the tour but Lizzo and Scott allegedly dismissively offered her time off for therapy. (*Ibid.*) Plaintiffs assert that Davis felt that if she accepted the offer, they would see her as too weak for the tour and so Davis declined because she felt it was the only way she could keep her job. (*Ibid.*) It should be noted that defendants contend that there was no hidden motive and that they were trying only to be supportive and accommodate Davis.

Williams was terminated around April 26, 2023, in the hotel lobby by Gugliotta under the guise of budget cuts; Rodriguez later questioned Gugliotta on her decision to terminate Williams in a public place. (Compl., ¶52.) On April 27, the dancers were called into a meeting with Lizzo purportedly to discuss notes on their dancing. (*Id.* at ¶53.) However, according to plaintiffs, once in the room Lizzo addressed Williams' firing and demanded to know who questioned her decision to fire Williams. (*Ibid.*) Plaintiffs state that Lizzo said she preferred that the dance team did not socialize with Williams before she left. (*Ibid.*) Lizzo also allegedly added that weight gain was a cause of termination and supposedly looked at Davis. (*Ibid.*) Plaintiffs claim that Davis suffers from an eye condition that causes her sometimes to become disoriented in stressful situations and

so in such situations she has a habit of making recordings so she can review them later. (*Id.* at ¶54.) Davis claims that she recorded this particular meeting due to its stressful nature. According to Davis, the recording was done in order to mitigate any issues that might be caused by her disability. (*Ibid.*)

Plaintiffs contend that the dancers were called into an emergency wardrobe fitting on May 3. (Compl., ¶55.) They were made to hand in their phones when they arrived. (*Ibid.*) Plaintiffs assert that Lizzo then entered and furiously stated she knew that someone had recorded the prior meeting. (*Ibid.*) She purportedly threatened to go person-by-person to learn who made the recording, but before she actually did so Davis admitted that she had recorded it. (*Id.* at ¶¶55-56.) Davis explained that she wanted to have a copy of the notes Lizzo had given them and that she had already deleted the recording. (*Id.* at ¶56.) Plaintiffs state Davis was fired on the spot. (*Ibid.*) According to defendants, Davis admitted not only recorded the prior meeting but sending the recording to Williams, which was a violation of Davis's contract and that is why Davis was fired. As Lizzo was leaving, Rodriguez claims to have stopped her and stated she did not appreciate how Lizzo handled the situation and resigned on the spot. (*Id.* at ¶57.) Plaintiffs assert that Lizzo then aggressively approached Rodriguez, cracking her knuckles, balling her fists, and stating, "You're lucky. You're so fucking lucky!" (*Ibid.*) Rodriguez contends she feared that Lizzo was going to hit her and would have done just that had other dancers not intervened. (*Ibid.*) Plaintiffs state that other dancers escorted Rodriguez back to her room due to their fear that Lizzo might return. (*Id.* at ¶58.)

Plaintiffs contend that Davis was forced to stay behind in the meeting room by Lizzo's security guard. (Compl., ¶59.) Under the watch of the tour's co-manager, the guard allegedly went through Davis's phone and iCloud to confirm whether the recording had been deleted. (*Ibid.*) Davis claims she was scared and wanted to leave the room, which is why she agreed to having her phone searched. (*Ibid.*) She states that she felt that she could not leave, however, until her phone was searched.

Currently before the court is the defendants' special motion to strike ("SMS") the complaint. Plaintiffs oppose.

This matter was previously on before the court on November 22. At that point, the court requested that the parties provide additional authority interpreting language contained in *Lyle v. Warner Bros. Productions* (2006) 38 Cal.4th 264 regarding the viability of sexual harassment claims where no disparate treatment or impact was alleged. The parties have submitted their list of cases and the matter is now ripe for resolution.

II. Evidentiary Issues

Defendants submitted 20 declarations with their moving papers. That was followed by plaintiffs' evidentiary objections to each of those declarations. And in reply, defendants responded to each of the objections to their declarations (and lodged their own objections).

As defendants are likely aware, the number of declarations submitted here was unnecessary. One declaration by a person with personal knowledge, detailing the relevant situation, is sufficient on a motion where the standards for summary judgment apply. The court observes that defendants emphasize the fact that they submitted 20 declarations in reply. But this is not a numbers game. As long as plaintiffs submit one declaration that disputes the material facts in defendants' 20 declarations, the burden on the second prong is satisfied. Accordingly, the number of declarations is of no moment to the court at this stage. Indeed, even at trial jurors are instructed not to "make any decision simply because there were more witnesses on one side than the other. If you believe it is true, the testimony of a single witness is enough to prove a fact." That is all the more pertinent here, where (as discussed below) the court cannot weigh the evidence (as jurors must). The court can make an educated guess as to why so many declarations were filed. The court would ask that such not recur unless there is some kind of *legal* justification for it. No more need be said on that point at present.

Equally troubling, defendants' approach resulted in an avalanche of evidentiary objections by plaintiffs. The court has reviewed the objections. The vast majority are at least partly made on the basis of relevance. The court disfavors such objections. By definition, if the proffered evidence is irrelevant then it can have no part in the court's analysis, objection or no. On the other hand, if the evidence is relevant then the objection is not well taken. This is not to say that the evidence in question is in fact relevant and material to the court's analysis. It is only to say

that if it is discussed below, then by definition, the court finds that it is relevant (although not necessarily weighty or dispositive). If it is not discussed below, then it forms no dispositive part of the court's reasoning, and the objection is moot. The parties should refrain from making relevance (or 352) objections in motions in the future absent some good reason to do so. (And, interestingly, a relevance objection is never waived in motion practice. It is error for the court to consider evidence that has no probative value, whether or not an objection is made.)

Aside from that, the court will not rule on the individual objections. Many of the objections are to immaterial evidence. Plaintiffs are reminded of our Supreme Court's statement in *Reid v. Google* (2010) 50 Cal.4th 512, 532-533 that only meritorious objections should be raised and even then, only to evidence that makes a difference. Here, the objections do not meet that standard and constitute the " 'blunderbuss objections to virtually every item of evidence' " that the *Reid* Court explicitly warned against. Any meritorious objections are lost within the pages of unmeritorious objections.

This is not to say that the court has accepted defendants' evidence *carte blanche*. Many of the declarations contain hearsay and statements without foundation or personal knowledge. The court has not considered statements that suffer from these defects. But that does not leave a hole in defendants' evidence for generally there was at least some evidence for each of the material points made by the defense, and the court does not weigh the evidence at this stage.

Defendants also filed evidentiary objections in reply. The court declines to rule on defendants' numerous objections to immaterial evidence for the same reasons. With that said, where the material portions of the declarations suffer from issues on personal knowledge (like one plaintiff attesting to something another plaintiff experienced), the gap is easily filled because the plaintiff with personal knowledge also submitted a declaration detailing their point of view. The declarations are not conclusory, as they provide sufficient explanation for why plaintiffs felt the way they did or perceived certain actions as pretextual. For the same reasons, the declarations are not speculative. Most of the hearsay objections lack merit, as some statements are by people authorized by the party to make statements. (See Evid. Code, § 1222.) Those that have merit are rarely to material evidence.

That leaves the objection to the jurat. Plaintiffs do not specify where they executed the declaration and only end with, "I declare under penalty of perjury for the State of California that the above is true and correct." Defendants argue this violates Code of Civil Procedure section 2015.5. The place of execution is missing, but the court believes there is substantial compliance. In *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, our Supreme Court undertook a detailed analysis of section 2015.5's amendments. It noted that the Legislature expressly required that all declarations, regardless of where they were signed, state that they would be subject to California's perjury laws. "[W]e need not decide whether, in order to sustain a California perjury conviction, a declaration signed outside the state must be made 'under the laws of the State of California.' The critical concern here is that such language is necessary for validity and admissibility purposes. When the Legislature clarified the extraterritorial reach of the perjury statute, it also sought to enhance the trustworthiness of out-of-state unsworn declarations used in California proceedings by maximizing the declarant's specific understanding that his false promises to tell the truth carried the potential for criminal prosecution *in California.* After conscious reflection on the issue, the Legislature achieved this purpose by inserting a *requirement* that, whenever an unsworn declaration was made elsewhere for use here, the document must acknowledge, on its face, that the statements it contained were made under penalty of *California's* 'laws.' We can only conclude that an out-of-state declaration which materially deviates from section 2015.5 in this regard cannot be used as evidence." (*Id.* at p. 618, emphasis in original.)

Here, all three declarations declare they are made subject to California's perjury laws. That substantially complies with section 2015.5's requirements. The court's long understanding has been that where the location of the execution is blank, the declaration is nonetheless valid so long as it specifically is subject to California's perjury laws. The more typical language is "under the laws of the State of California" rather "for the State of California," but the court interprets that difference to be immaterial. From the court's perspective, the declarants have placed themselves under penalty of perjury under the laws of the State of California for purposes of the declarations they signed, wherever they might have signed them. (The reason that the location

had been important, and still might be, is that if the declaration is signed in California, then it is automatically subject to California's perjury laws, whether or not it expressly so states.) In short, the court is not going to throw out the case on the curable jurat to the extent it is defective (and it likely is not defective anyway).

III. Legal Standards

The California Legislature has authorized that a special motion to strike may be filed in lawsuits that seek to "chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc., § 425.16, subd. (a).) Code of Civil Procedure section 425.16, subdivision (b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

Accordingly, section 425.16 is based on a two-step process for determining whether a SMS should be granted. First, the court decides whether the defendant has made a threshold showing that the challenged claims or causes of action arise from a protected activity. (See Code Civ. Proc., § 425.16, subd. (b)(1).) "A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in [section 425.16,] subdivision (e)." (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1043.) The California Supreme Court has summarized the analysis as follows: "At that stage, we said, the moving defendant must identify the acts alleged in the complaint that it asserts are protected and what claims for relief are predicated on them. In turn, a court should examine whether those acts are protected and supply the basis for any claims. It does not matter that other unprotected acts may also have been alleged within what has been labeled a single cause of action; these are 'disregarded at this stage.' (*Baral, supra*, 1 Cal.5th at p. 396.) So long as a 'court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached' with respect to these claims. (*Ibid.*)" (*Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995, 1010, parallel citations omitted.)

If the defendant makes that threshold showing, the burden shifts to the plaintiff to establish a likelihood of prevailing on the complaint, which has sometimes been referred to as "minimal merit." (See Code Civ. Proc., § 425.16, subd. (b)(1).) The burden on the plaintiff is like the burden imposed to defeat a summary judgment motion: the plaintiff must submit admissible evidence showing that it can prevail. (*Billauer v. Escobar-Eck* (2023) 88 Cal.App.5th 953, 962, review denied (June 14, 2023).) The court does not weigh the evidence or determine issues of credibility, nor does the court resolve any factual disputes. (*Ibid.*) Rather, as in a summary judgment motion, if the plaintiff can put forward evidence that, if true, would establish its claim in light of all reasonable favorable inferences, then the SMS will be denied. (*Ibid.*) Such is not intuitively obvious from the statute's language. The Legislature's words are that the motion is to be granted "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." An unadorned reading of that language might suggest that the court is to weigh the evidence and determine whether plaintiff is more likely than not to win. But such is not the law. Consistent with notions of due process and fair access to the courts, this language has been authoritatively construed to mean that there must be some probability of success, but not in the more likely than not sense. Rather, all the court must determine is whether there is *some* probability, meaning plaintiff has put forth enough evidence such that, if it is believed, is sufficient to allow a reasonable jury to find in plaintiff's favor.

The court notes that where the SMS applies, it is a potent tool. Once brought, discovery is generally stayed until the motion is heard. Unlike a summary judgment motion, which is typically brought after discovery and which can (or must) be continued if the opposing party makes a showing that discovery might yield evidence to defeat the motion, an SMS presumes that the plaintiff already has some evidence to support the claim. Further, a summary judgment motion, if denied, is reviewable only by writ; it generally becomes moot after the trial is over (either because the moving party won or because it was overtaken by the actual trial evidence). In sharp contrast, the court's ruling on an SMS is immediately appealable. The court notes that point because it well explains why it is that the court cannot weigh the evidence. If the court were allowed to do so, the SMS would quickly become a substitute for a jury trial, and it would so

become in a way that would imperil due process. Thus, the court's power is sharply circumscribed in such a motion. That said, though, if the complaint lacks evidentiary support—in whole or in part—the court can, and must, strike it or the offending parts of it.

IV. Court's Ruling and Analysis

Defendants move to strike paragraphs 12, 16-19, 21-25, 35-39, 45-46, 48-51, 53, 55-57, 59, 64-65, 83, 92, 111-112, and 135 in whole, and paragraphs 34, 47, 73, 81, 84, 93, 110, and 126 in part. The allegations concern all nine causes of action and can be split into general categories of wrongful conduct, as discussed below. If the motion is granted in full, the court believes that there is nothing left of the complaint, and that an outright dismissal would be in order.

A. Acts in Furtherance of the Defendants' Right of Petition or Free Speech (Prong One)

To invoke Code of Civil Procedure section 425.16, a defendant need only demonstrate that a suit arises from the defendant's exercise of free speech or petition rights. (See Code Civ. Proc., § 425.16, subd. (b); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) This is determined by "the gravamen or principal thrust of the action." (See *In re Episcopal Church Cases* (2009) 45 Cal.4th 467, 477.) "In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech." (*City of Cotati*, *supra*, 29 Cal.4th at p. 78, emphasis in original.) "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (Code Civ. Proc., § 425.16, subd. (b)(2).)

Defendants argue that the acts complained of in the complaint all consist of activity that is part of the creative process and therefore protected under section 425.16, subdivision (e)(4). Subdivision (e)(4) protects "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e)(4).) What constitutes a statement made in connection with an issue of public interest is the same under subdivisions (e)(3) and (4). (*Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107,

115-119.) There is (another) two-step test to determine this issue. "First, we ask what 'public issue or [ ] issue of public interest' the speech in question implicates—a question we answer by looking to the content of the speech. (§ 425.16, subd. (e)(4).) Second, we ask what functional relationship exists between the speech and the public conversation about some matter of public interest." (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 149–150.)

Defendants insist that the television show and Lizzo's own fame are within the public interest. "Here, the Court of Appeal properly identified three nonexclusive and sometimes overlapping categories of statements within the ambit of subdivision (e)(4). (See *Rand Resources, supra*, 247 Cal.App.4th at pp. 1091–1092.) The first is when the statement or conduct concerns 'a person or entity in the public eye'; the second, when it involves 'conduct that could directly affect a large number of people beyond the direct participants'; and the third, when it involves 'a topic of widespread, public interest.' (*Rivero v. American Federation of State, County, and Municipal Employees, AFL–CIO* (2003) 105 Cal.App.4th 913, 919; see *id.* at pp. 919–924.)" (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 621, parallel citations omitted.)

Defendants point out that Lizzo's concerts, television shows, and public statements on certain issues are in the public interest due to her status as a major celebrity. (Lizzo Decl., ¶¶11-16.)[2] The court agrees. "In *Nygård*, this court held that ' "an issue of public interest" . . . is *any issue in which the public is interested.* In other words, the issue need not be "significant" to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest.' (*Id.* at p. 1042.)" (*Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 143, emphasis by *Nygård* court.) Plaintiffs argue in opposition that Lizzo's status as a celebrity alone is insufficient because there can be no claimed public interest in cast meetings and outings, prayer groups, or things like that. Stripped of context, plaintiffs are correct. But when the issue becomes *Lizzo's* cast meetings and outings, prayer groups, and things like that while on tour, the analysis is different. It is Lizzo's celebrity that elevates these perhaps mundane issues into those average citizens want to know more about. (See *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337,

[2] Although the first prong analysis requires a focus on the pleadings, extrinsic evidence can be used, as here, to clarify whether the act that forms the basis of an element in a cause of action is protected activity. (See *Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 111.)

1347 ["The public's fascination with Brando and widespread public interest in his personal life made Brando's decisions concerning the distribution of his assets a public issue or an issue of public interest. Although Hall was a private person and may not have voluntarily sought publicity or to comment publicly on Brando's will, she nevertheless became involved in an issue of public interest by virtue of being named in Brando's will"].) The court believes that the first step of the *FilmOn* analysis is satisfied.

As to the second *FilmOn* step, defendants assert that acts that further the creative process are protected. "Courts have held that acts that 'advance or assist' the creation and performance of artistic works are acts in furtherance of the right of free speech for anti-SLAPP purposes. (*Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 143 [writing, casting, and broadcasting popular television show are acts in furtherance of free speech].)" (*Symmonds v. Mahoney* (2019) 31 Cal.App.5th 1096, 1106 [selection of drummer for concert was sufficiently within the public interest to be protected under subdivision (e)(4)].) This is true but defendants' argument overstates the connection between certain acts and the creative process. While many of these acts occurred during a tour and in preparation for it, that alone does not satisfy the second *FilmOn* step. The second step requires a consideration "whether a defendant—through public or private speech or conduct—participated in, or furthered, the discourse that makes an issue one of public interest." (*FilmOn, supra,* 7 Cal.5th at p. 151.) "[W]e reject the proposition that any connection at all—however fleeting or tangential—between the challenged conduct and an issue of public interest would suffice to satisfy the requirements of section 425.16, subdivision (e)(4). . . At a sufficiently high level of generalization, any conduct can appear rationally related to a broader issue of public importance. What a court scrutinizing the nature of speech in the anti-SLAPP context must focus on is the speech at hand, rather than the prospects that such speech may conceivably have indirect consequences for an issue of public concern." (*Rand, supra,*6 Cal.5th at p. 625.) Accordingly, the analysis needs to be more granular. Thus, while the court understands the argument and agrees that the fact that this case involves a well-known mega-celebrity brings a lot of conduct into the constitutionally protected ambit that would not otherwise be there, it is not without bound; the court must look closely at the actual things alleged and the

evidence presented to determine if it is fairly within our outside of constitutionally protected speech or the public interest.

It is worth identifying which purportedly protected acts supply the elements of plaintiffs' various causes of action. The first and second causes of action for FEHA violations concern sexual harassment and failure to prevent sexual harassment. Plaintiffs claim defendants were forcing Davis and Williams to participate in the nude photoshoot and causing plaintiffs to attend nude shows against their will at Bananenbar and Crazy Horse (Compl., ¶¶18-19, 32-39, 62, 64-65), as well as Quigley's charged comments about Davis's virginity, sexual statements and gestures on tour (*id.* at ¶¶17, 21-22, 64, 73). Finally, plaintiffs also claim that they suffered sexual harassment by a tour bus driver and male crew members. (*Id.* at ¶¶27, 47, 73.)

The third and fourth causes of action for FEHA violations concern religious harassment and the failure to prevent it. The acts that supply the element of wrongful conduct here include Quigley's statements on religion and sexuality, as well as proselytizing to members and conducting forced prayer circles prior to rehearsals and performances. (Compl., ¶¶16-17, 21-25, 81, 83-84, 92-93, 96.) The fifth cause of action for racial discrimination in violation of FEHA focuses on statements describing the black members of the dance team as lazy, unprofessional, and having a bad attitude. (*Id.* at ¶¶41, 44, 52.) The sixth cause of action for disability discrimination in violation of FEHA concerns the private personnel meeting between Davis, Lizzo, and Scott; Davis's anxiety during the re-audition process that made her feel like she had no choice but to urinate on herself; and Lizzo's statements that weight gain is grounds for termination from the dance team. (*Id.* at ¶¶45-47, 49-51, 110-112.)

The seventh cause of action for intentional interference with prospective economic relations is based on statements by tour management and BGBT accountants that plaintiffs should remain on a "soft hold" when they were on break from touring. (Compl., ¶¶14, 28-29, 40, 43, 122-123.) The eighth cause of action for assault concerns Lizzo's statements and conduct towards Rodriguez after her resignation. (*Id.* at ¶¶57, 126.) The ninth and final cause of action details Davis's confinement by tour management and security while they confirmed the meeting recording had been deleted. (*Id.* at ¶¶59-60, 135.)

Defendants contend that all of the allegations supporting all of the causes of action concern the creative process. The nude photoshoot, they assert, took place during filming of WOFTBG to choose dancers for the tour, and providing feedback on dancers or terminating employees who were not up to par is encompassed within that process. The court agrees. The creation of a television show is an exercise of free speech. (*Tamkin, supra,* 193 Cal.App.4th at p. 143.) Hiring and firing dancers for a television show and eventual tour is also part of the creative process. " 'Music, as a form of expression and communication, is protected under the First Amendment.' (*Ward v. Rock Against Racism* (1989) 491 U.S. 781, 790; see also *McCollum v. CBS, Inc.* (1988) 202 Cal.App.3d 989, 999 ['First Amendment guarantees of freedom of speech and expression extend to all artistic and literary expression,' including 'music' and 'concerts'].) . . . A singer's selection of the musicians that play with him both advances and assists the performance of the music, and therefore is an act in furtherance of his exercise of the right of free speech." (*Symmonds, supra,* 31 Cal.App.5th at pp. 1105–1106, parallel citations omitted.) Thus, the nude photoshoot is protected. Plaintiffs do not really challenge this or certain other acts.

The court believes this protection extends to providing feedback to dancers during various meetings, as well as the re-audition process. All of this is part of creating the performance that the artist envisions in her head. The private meeting with Davis is protected too. As alleged and as the evidence supports, the meeting centered around Davis's personality changes during the tour. Davis alleges that was feigned concern and was a veiled reference to her weight gain. (Compl., ¶49 ["LIZZO and Ms. Scott pressed Ms. DAVIS for an explanation why she seemed less bubbly and vivacious than she did prior to the tour starting. In professional dance, a dancer's weight gain is often seen as that dancer getting lazy or worse off as a performer. LIZZO's and Ms. Scott's questions about Ms. DAVIS's commitment to the tour were thinly veiled concerns about Ms. DAVIS's weight gain, which LIZZO had previously called attention to after noticing it at the South by Southwest music festival"].) Maybe so, but the allegations still indicate this meeting was related to Davis's job performance on tour. Lizzo attests that she worried that the tour was too much for Davis and wanted to check-in with her. (Lizzo Decl., ¶11.) This bears a relationship to Davis's health on tour, and according even to plaintiffs, Davis's job safety.

The "soft hold" and comments within the context of retainer negotiations are also protected. When dancers are on break between performances and not on retainer, tour management will sometimes be informed about dates dancers might be working on the tour in the future and will therefore ask that the dancers be placed on a "soft hold" for those dates. (Joshi Decl., ¶10.) The idea is to keep those dancers available for the tour dates. (*Ibid.*) The negotiations for a "soft hold" retainer are protected because they concern staffing for a tour. Joshi's comments during negotiations are also protected because they communicate lax job performance during concerts and note that this is grounds for termination. (*Id.* at Exh. A ["We also want to take this opportunity to address recent attitudes that have been unacceptable and disrespectful. We'd like to remind all of you to hold yourselves to the highest level of etiquette and professionalism for Lizzo and her tour. Frankly, this type of behavior is grounds for termination / replacement of your role on the touring party and will not be tolerated going forward"].) Production of a show and personnel decisions related to that are protected.

The same applies to the comments calling black members of the dance team lazy, unprofessional, and snarky. While the comments are alleged to be racist, the court cannot let plaintiffs' allegations of motive control the analysis on the first prong. On the first prong, the court must examine "the conduct of defendants without relying on whatever improper motive the plaintiff alleged." (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 888.) As our Supreme Court reasoned in *Navellier v. Sletten* (2002) 29 Cal.4th 82, it "the preamble to the statute does reflect a purpose to protect the 'valid exercise' of speech and petition rights. (§ 425.16, subd. (a).) But the Legislature's expression of 'a concern in the statute's preamble with lawsuits that chill the valid exercise of First Amendment rights does not mean that a court may read a separate proof-of-validity requirement into the operative sections of the statute. [Citations.] Rather, any "claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff's [secondary] burden to provide a prima facie showing of the merits of the plaintiff's case." ' (*Navellier*, at p. 94; see *City of Montebello v. Vasquez*, *supra*, 1 Cal.5th at pp. 422–425 [lawfulness of activity generally addressed in the second step].) To conclude otherwise would effectively shift to the defendant a burden statutorily

assigned to the plaintiff. (See § 425.16, subd. (b)(1) [if acts are protected, it is for the 'plaintiff [to] establish[ ] that there is a probability that the plaintiff will prevail on the claim'].)" (*Id.* at p. 580, parallel citations omitted, emphasis by *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356 court, cited by *Navellier* Court.) These comments were purportedly made by management within the context of retainer negotiations and the tour. (Compl., ¶¶43-44.) Comments on job performance are in furtherance of the creative process.

The prayer circles also pass the first prong, although in the court's mind it is a closer call. There is more than one declaration indicating that this is industry practice or meant to settle nerves prior to the performance. (See, e.g., Walker Decl., ¶10 ["It is common in the industry for the performers to huddle or gather and pray before shows"]; Green Decl., ¶7 ["I am usually backstage with the stage performers and Lizzo before each show. The group prayer led by Lizzo before the show is primarily a way for everyone to connect with one another more deeply and touch base in preparation for their performance, while also seeking protection and safety for everyone who put on the show and everyone attending"].) That bears a functional relationship to the creative process.

Quigley's religious and sexual comments during rehearsals are more difficult. As noted above, plaintiffs' allegations regarding Quigley's intent do not control. But even with that said, the court does not understand how the comments are connected to the creative process. Defendants generally argue that it is part of the creative process, which is fine to the extent these are comments made during dance practice by a dance captain. But as plaintiffs point out in opposition, there has to be more. It is not enough that the comments were made during the general creative process, the actions at issue must *advance* the creative process. There is nothing from the bare allegations regarding Quigley's comments about religion and sexuality that indicate they advanced or assisted the dancers' performance. Notably, not a single one of the 20 declarants states that the comments contributed to the creative process. There are comments on how this was part of "girl talk" that plaintiffs have taken out of context. (See, e.g., Mooring Decl., ¶6 ["The reality is that we were a group of women who were together all the time – traveling, rehearsing, socializing – on tour and we talked about 'girl talk,' including things like our

sexuality. We did not talk about this all the time but it was certainly a topic that we covered. Quigley joined these conversations too, but she certainly did not talk about sex, sexual acts or sexual fantasies all the time"].) But saying it is "girl talk" or that plaintiffs are not telling the truth does not equate to furthering the creative process. Defendants have not met their burden as to this facet of the complaint. The same applies to Quigley's purported proselytizing during the tour. All the declarations that mention Quigley studying ministry indicate that this was a personal choice and was not related to the production of the tour. (See, e.g., Van Decl., ¶11 ["I am aware that Quigley was studying ministry, and would often read the Bible *on her breaks during tour*"], emphasis added.) Quigley's own declaration emphasizes her discussions about her faith took place mostly during breaks. (Quigley Decl., ¶13 ["I am a Christian and vocal about my love of Jesus. For the past two years, I have been studying ministry, and for the past nine months I have been working on setting up a faith-based nonprofit organization. *On breaks while on tour*, I would often sit and read the Bible as part of my studies. Sometimes other dancers asked me about what I was studying, about my faith and about my past. Some of Lizzo's dancers believed in Jesus and some did not. That did not affect how I treated or interacted with them"], emphasis added.) There is no functional relationship. In short, Lizzo's status as a celebrated performing artist may make some of what happens related to the tour matters of public interest when they would otherwise not be, but that extension is not infinitely elastic.

There is also no articulated functional relationship between the creative process and failure to address sexual harassment by bus drivers. Gordon provides her recollection of the event but does not connect it to furthering the creative process. "My recollection of what we were told about the alleged incident was that Williams accidentally bumped into a certain tour bus driver, who told her in a suggestive way that she could do that again. Gugliotta and I took the complaint very seriously. I am informed and believe that Gugliotta spoke with the lead tour bus driver about the incident and requested that he speak with the driver in question to ensure that this type of behavior did not happen again. To my knowledge, the bus driver did not engage in any other alleged misconduct. Certainly no other issues with this bus driver or additional alleged instances of sexual harassment by him or any other driver were ever reported to me thereafter. In fact, I

followed up with Plaintiffs and the other female dancers in the dance cast about the bus driver and the alleged incident that had been reported about his conduct, and I asked whether there had been any other incidents. They assured me that everything was okay. I thanked them for bringing the incident to our attention, and told them to let me know of any other incidents of inappropriate behavior. None of them did." (Gordon Decl., ¶4.) It is defendants' burden to articulate how this relates to advancing or assisting in the creative process but they have not met that burden. To the extent they intend to argue that the safety of staff is the key, there is nothing linking that safety to the creative process, at least in the moving papers.

The court also does not see the functional relationship between Bananenbar and Crazy Horse, and the performances. Plaintiffs allege that it was voluntary in name but not in reality for job security. (Compl., ¶32 ["After the show, LIZZO invited the dancers out with her on the town. These invitations were not unusual, and attendance was not mandatory, but it was well known that dance cast members were expected to endear themselves to LIZZO."] Lizzo attests these events are for teambuilding so everyone can spend more time together in a relaxed environment. (Lizzo Decl., ¶28.) She adds that the Crazy Horse invitation was meant to "inspire [the dancers'] creativity and improve the overall performance of our show." (*Id.* at ¶32.) Lizzo notes that other major stars, such as Beyonce, have incorporated elements from the Crazy Horse show. (*Ibid.*) The court is not sure how voluntary off-the-clock time at a club bears a functional relationship to the performance of a set dance routine. Of course, the court understands it as a general matter, in that seeing others can inspire a person to work harder or lead to new ideas. (*Id.* at ¶32 ["I also believed that attending the show would be helpful to the dancers, particularly those who were newer to the industry, so they could watch how the Crazy Horse dancers moved their bodies and gain more confidence and self-assurance themselves"].) At least one declarant says these events helped the improve the show because everyone could bond. (Brown Decl., ¶11 ["It definitely helped bring the performers closer together and helped improve our shows because we had these occasions to bond"].) But this activity was, according to defendants, voluntary. (See, e.g., Quigley Decl., ¶49, Baptiste Decl., ¶5, Brown Decl., ¶11; Mooring Decl., ¶10.) Not all the dancers were required to attend clubs to aid their performance of pre-choreographed numbers.

Given that, the court is not sure how something that no one had to say no to (according to defendants) is going to aid the creative process. Further, Lizzo's declaration as to her intent undercuts defendants' theory. "To be frank, I was enjoying a night out at Bananenbar with friends and did not have any expectations about who would attend or how long they would stay." (*Id.* at ¶30.) The functional relationship between this voluntary off-the-clock club activity and the concert performance is missing.[3]

That leaves the false imprisonment and assault actions. Those do not meet the functional relationship test. Running through a person's phone and coercing them not to leave while doing so in order to delete an audio recording bears no relationship to the performance of a concert, and defendants articulate no such relationship. The same is true of an attempted assault during a meeting. The fact that it took place during a meeting with dancers on tour does not mean there is an automatic relationship. Without more, arguing with someone or attempting to hit them does not further the creative process.

Given the above analysis, defendants satisfy their burden on the first prong in part. The motion is DENIED, however, to the allegations regarding Quigley's religious and sexual comments, management's failure to address sexual harassment issues, attendance at Bananenbar and Crazy Horse, Davis's false imprisonment, and Lizzo's purported assault. This necessarily means that the motion is DENIED to the eighth and ninth causes of action. The court does not discuss them on the second prong analysis. The burden shifts on the remaining allegations.

B. Likelihood of Success (Prong Two)

If defendant makes a threshold showing that the challenged cause of action is one arising from protected activity, the burden shifts to the plaintiff to establish a likelihood of prevailing on the complaint. (See Code Civ. Proc., § 425.16, subd. (b)(1).) "[T]he plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548.)" (*Wilson v. Parker, Covert & Chidester*

[3] The court notes, though, that this is a close question. For that reason, the court addresses prong two as to these activities below in the margin.

(2002) 28 Cal.4th 811, 821, parallel citation omitted.) A trial court does not weigh the evidence or its comparative strength. (*Ibid.*) However, a trial court "should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." (*Ibid.*)

1. First Cause of Action—FEHA Sexual Harassment

"A hostile work environment sexual harassment claim requires a plaintiff employee to show: (1) he or she was subjected to unwelcome sexual advances, conduct or comments; (2) the harassment was based on sex; and (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 279; *Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 202–203.)" (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1524, parallel citations omitted.) Of all the acts that formed the basis of this cause of action, only the nude photoshoot is at issue on this second prong.

On that particular issue, plaintiffs point to Davis's declaration, where she attests that participating in the nude photoshoot caused her to panic and made her feel terrified. "This nude photo shoot 'challenge' was a part of the competition, and I believed poor performance or outright refusal to do the challenge would have resulted in me being viewed as a non-team player, penalize the image Lizzo had of me, and no longer be considered for a spot on Lizzo's tour. . . This dilemma forced me to decide between a once in a lifetime opportunity and putting my body on display. After footage was seen of me . . . crying and panicking, I was informed that I would be allowed to participate in the photo shoot partially clothed in a nude bra and nude underwear. This was my first experience of a sexually charged and uncomfortable environment in Lizzo's Camp." (Davis Decl., ¶¶7-8.)

One of the issues the court discussed at the oral argument was the question of the *Lyle* Court's language concerning the viability of FEHA sexual harassment claims in same-sex environments. "For FEHA claims, the discrimination requirement has been phrased similarly: 'To plead a cause of action for [hostile work environment] sexual harassment, it is "only necessary to show that gender is a substantial factor in the discrimination, and that if the plaintiff 'had been

a man she would not have been treated in the same manner.' " [Citation.]' (*Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 348; see *Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 1001 [quoting *Accardi*].) Accordingly, it is the disparate treatment of an employee on the basis of sex—not the mere discussion of sex or use of vulgar language—that is the essence of a sexual harassment claim." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 280, parallel citations omitted.) Specifically, the *Lyle* Court, after noting that FEHA and Title VII use the same hostile work environment sexual harassment standard, cited the U.S. Supreme Court's opinion in *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75 as providing guidance on the element of harassment due to sex. "Rather, ' "[t]he critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." ' (*Ibid.*, quoting *Harris, supra,* 510 U.S. at p. 25 (conc. opn. of Ginsburg, J.).) This means a plaintiff in a sexual harassment suit must show 'the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina*[*tion*] . . . because of . . . sex." ' (*Oncale, supra,* 523 U.S. at p. 81.)" (*Lyle, supra,* 38 Cal.4th at pp. 279–280, parallel citations omitted, emphasis by *Oncale* Court.)

In response to the court's request, the parties provided five cases each for the court to consider. Plaintiffs identified *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, *Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547, *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, *Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, and *Sharp v. S&S Activewear LLC* (2023 9th Cir.) 69 F.4th 974. Defendants identified *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, *In the Matter of the Accusation of the Dep't of Fair Employment & Hous.* (Apr. 29, 2003) FEHC Dec. No. 03-07 [2003 WL 21689611], *Brennan v. Townsend & O'Leary Enterprises, Inc.* (2011) 199 Cal.App.4th 1336, *Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, and *Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519. *Taylor* is an overlapping case.

Most of the cases presented by the parties offer clarity on this issue of same-sex sexual harassment. Such a claim is, as the cases indicate, actionable. *Lyle*, as the court now reads it,

was discussing one of the evidentiary avenues that a plaintiff could pursue to demonstrate discrimination due to sex, and that avenue was differential treatment of men and women. The case that provided the most guidance on the plaintiff's required evidentiary burden was *Oncale*, which was cited at length by *Lyle*. "If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex. . . . [¶] We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII." (*Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 79.) However, the *Oncale* Court was clear that the plaintiff still needed to present some evidence of harassment *due to* their sex.

> 'The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.' *Harris, supra,* at 25, 114 S.Ct., at 372 (GINSBURG, J., concurring). [¶] Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina[tion]* . . . because of . . . sex.'

(*Oncale, supra,* 523 U.S. at pp. 80–81, emphasis by *Oncale* Court.)

There was a note of caution in the Court's analysis as well. It noted that courts and juries must use "[c]ommon sense, and an appropriate sensitivity to social context . . . to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." (*Oncale, supra,* 523 U.S. at p. 82.)

Some of the cases cited by the parties put this varied evidentiary burden on display.[4] One landmark California Supreme Court case, *Miller*, demonstrated that the widespread sexual favoritism of certain employees could create a hostile work environment for non-favored employees because the favoritism implied that women were sexual playthings and the only way to get ahead was to have sex with the manager; this, the Court held, created an atmosphere "demeaning to women." (*Miller, supra,* 36 Cal.4th at p. 468, internal citations omitted.) *Singleton* and *Taylor* held that the plaintiffs were subject to same-sex sexual harassment because their identities as heterosexual men were attacked by other men in the workplace. "Putting this point another way, given that Ross and Umi had targeted Singleton's identity as a heterosexual male, it is axiomatic that they would treat women 'differently,' i.e., not attack them for the same reason. It follows that the harassment was 'because of sex,' i.e., it employed attacks on Singleton's identity as a heterosexual male as a tool of harassment." (*Singleton, supra,* 140 Cal.App.4th at p. 1562.) The *Taylor* court emphasized, however, that the attacks do not need to be motivated by sexual interest or desire to be actionable under FEHA. (*Taylor, supra,* 222 Cal.App.4th at pp. 1239–1240.) *Lewis* held that same-sex harassment claims were proper where the plaintiff was subject to sexual advances, conduct, and comments that stemmed from the defendant's sexual interest in the plaintiff. (*Lewis, supra,* 224 Cal.App.4th at pp. 1527-1528.) In *Sharp*, the Ninth Circuit held that both men and women could complain of a hostile work environment due to sex based on the pervasive and inescapable misogynistic music blasted in the

[4] *Roby* and *Brennan* were not as strong as the other cited cases, though the court appreciates their analyses. *Roby* dealt with harassment based on a disability and medical condition (*Roby, supra,* 47 Cal.4th at p. 710), while the court in *Brennan* was more concerned with whether the plaintiff experienced or saw any severe or pervasive sexual harassment in her immediate work environment; the ruling is not focused on the issue of discrimination due to sex (*Brennan, supra,* 199 Cal.App.4th at p. 1352).

warehouse on a daily basis. (*Sharp, supra,* 69 F.4th at p. 981.) The Fair Employment and Housing Commission's opinion took *Oncale*'s cautionary note to heart and held that the conduct complained of was not motivated by discrimination based on sex, but instead was nonactionable "locker room" conduct between men. (*In the Matter of the Accusation of the Dep't of Fair Employment & Hous.*, FEHC Dec. No. 03-07, at *6.)

Thus, these cases illustrate that there are a variety of ways to establish discrimination due to sex. But, as is likely clear from the summaries, none of these evidentiary methods apply here. There is no indication of any sexual interest in the plaintiffs, nor any widespread sexual favoritism, so those evidentiary avenues are closed. There is no evidence indicating that plaintiffs, and Davis in particular, have been treated differently due to their sex or that men would have been treated differently as to the portions of the motion that made it to prong two. Not a single one of plaintiffs' declarations states as much or even supports that inference. Nor is there any evidence indicating that the female defendants were motivated by a general hostility to women in dealing with plaintiffs. Both *Lyle* and *Oncale* are clear that there must be some evidence of discrimination *due to* sex and there is none here. The motion is GRANTED as to the nude photoshoot allegations in the first cause of action.[5]

2. Second Cause of Action—FEHA Failure to Prevent Sexual Harassment

"[T]here can be no claim for failure to take reasonable steps necessary to prevent sexual harassment when an essential element of sexual harassment liability has not been established." (*Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4th 1307, 1316.) The motion is GRANTED as to the nude photoshoot allegations in the second cause of action as well.

3. Third Cause of Action—FEHA Religious Discrimination

The only act plaintiffs need to address in this cause of action is the prayer circles. "There are three elements to a prima facie case under section 12940, subdivision (*l*): the employee sincerely held a religious belief; the employer was aware of that belief; and the belief conflicted

[5] To the extent that the nightclubs, though, had passed muster under prong one, plaintiffs would have succeeded on prong two. There is at least some evidence that males working for Lizzo were either not pressured to go to the clubs, or at least not pressured to participate in any explicit activities while there. Accordingly, the declarations supporting that activity would have been sufficient even under the *Lyle* analysis.

with an employment requirement. (*Friedman v. Southern Cal. Permanente Medical Group, supra,* 102 Cal.App.4th at p. 45.)" (*California Fair Employment & Housing Com. v. Gemini Aluminum Corp.* (2004) 122 Cal.App.4th 1004, 1011, parallel citations omitted.) Preliminarily, the court observes that this cause of action is more accurately described as "reverse discrimination." Plaintiffs allege they were discriminated against because they did not share Quigley's religious beliefs and did not join in the prayer circle. The court is unaware of any published California case on this type of claim. However, there is federal authority indicating that such a claim is viable and in that situation the plaintiff need not establish they were part of a protected group. (See *Noyes v. Kelly Services* (9th Cir. 2007) 488 F.3d 1163, 1168–1169; *Shapolia v. Los Alamos Nat. Laboratory* (10th Cir. 1993) 992 F.2d 1033, 1038.) The analysis in these cases makes sense to the court. For that reason, the court does not believe plaintiffs must establish they are part of a protected group on the basis of religion when alleging reverse religious discrimination.

Plaintiffs satisfy their burden. They present evidence that Quigley and others were aware of the fact that they some did not share their religious beliefs. (Davis Decl., ¶16; Rodriguez Decl., ¶7; C. Williams Decl., ¶8.) Despite knowing this, prayer circles prior to rehearsal or performances were essentially mandatory (allegedly), even if a person did not want to take part. (*Ibid.*) Rodriguez specifically attests that when she stated she did not want to lead the prayer because "this practice made [her] uncomfortable in a work setting[,]" she continued to be singled out by staff like Melissa Charlot. (*Id.* at ¶7.) Plaintiffs also satisfy the element that the belief conflicts with an employment requirement. Plaintiffs were allegedly required (as a practical matter) to attend the prayer circles, even if they did not want to and even if they spoke up like Rodriguez. The court is aware, of course, that the defense has submitted contrary evidence from multiple declarants. But, as discussed above, the court does not here weigh the evidence. The question is not whether plaintiff's evidence is stronger than defendant's evidence, or whether plaintiff has more declarations or fewer. It is whether plaintiff has *some evidence* that, if believed, would be sufficient. Once that threshold is met (as it is here), the court's analysis ceases.

In reply, defendants argue for the first time that all of plaintiffs' FEHA claims fail because FEHA does not apply outside of California. "The salutary rule is that points raised in a reply brief for the first time will not be considered unless good cause is shown for the failure to present them before. (See *In Re Marriage of Millet* (1974) 41 Cal.App.3d 729, 732; 6 Witkin, Cal.Procedure (2d ed. 1971) Appeal, § 442, p. 4405.)" (*Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010, parallel citations omitted.) The court will not address this argument, as it was raised for the first time in reply, despite facts in the complaint indicating that offensive conduct occurred out of state and out of the country. This applies to all the FEHA claims.[6]

Next, defendants reiterate what they said in their moving papers: the evidence is against plaintiffs. Defendants cite to their declarations indicating that the prayer circles were voluntary and no one was pressured into joining. (See, e.g., A. Williams Decl., ¶8; Locke Decl., ¶9.) As the court has already said many times, the court cannot weigh the evidence on this motion. (See *Billauer, supra,* 88 Cal.App.5th at p. 962.)

Finally, defendants argue that even if the conduct occurred, it was not pervasive enough to be actionable. That might or might not prove to be the case. For purposes of this motion, though, the court believes that plaintiffs have put forth enough evidence to live to fight another day. The motion is DENIED to this cause of action.

4. Fourth Cause of Action—Failure to Prevent Religious Discrimination

"Employers are required to 'take all reasonable steps necessary to prevent discrimination' in the workplace. (§ 12940, subd. (k).)" (*California Fair Employment & Housing Com., supra,* 122 Cal.App.4th at p. 1024.) Plaintiffs point out that supervisors led this activity, and that is enough. Rodriguez and Williams identify Charlot as leading at least one prayer circle and pushing back when Rodriguez did not want to take part. (Rodriguez Decl., ¶7; C. Williams Decl., ¶8.) Charlot is the assistant of Tanisha Scott, who choreographed the routines. (Scott Decl., ¶4.)

[6] That said, and the astute reader probably saw this coming, the court cannot resist at least a little commentary. No doubt California cannot impose its laws on other states or countries. The fact that a company in Europe, for example, runs afoul of California's FEHA laws is not actionable just because the plaintiff is a Californian. But that is not a blanket rule. Where the employer is a California entity and the plaintiff is a Californian, the fact that plaintiff and her supervisor are out of state provides no license to discriminate. Defendants have presented no evidence here that imposing liability under FEHA would improperly require California to inject its laws into other jurisdictions, even were the issue timely and properly raised.

Further, Green, Lizzo's personal assistant, attests to seeing Lizzo lead the prayer groups. "I am aware of allegations regarding religious harassment and discrimination, and dancers purportedly being pressured to participate in prayers. I am usually backstage with the stage performers and Lizzo before each show. *The group prayer led by Lizzo* before the show is primarily a way for everyone to connect with one another more deeply and touch base in preparation for their performance, while also seeking protection and safety for everyone who put on the show and everyone attending." (Green Decl., ¶7, emphasis added.) Not only was there a failure to prevent the discrimination, but supervisors took part in the allegedly problematic events.

The parties spend time arguing about Quigley's actions but that is not material here, as her actions comments did not make it past the first prong. Had they, though, the court believes that the evidence would have been sufficient to overcome the motion. The motion is DENIED to the prayer circle allegations.

5. Fifth Cause of Action—FEHA Racial Discrimination

"To establish a prima facie case of a racially hostile work environment, Thompson was required to show that (1) he was a member of a protected class; (2) he was subjected to unwelcome racial harassment; (3) the harassment was based on race; (4) the harassment unreasonably interfered with his work performance by creating an intimidating, hostile, or offensive work environment; and (5) the [defendant] is liable for the harassment. (*Barrett v. Whirlpool Corp.* (6th Cir.2009) 556 F.3d 502, 515 [Title VII claim]; see *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [FEHA environmental sexual harassment claim]; see also Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2009) ¶ 10:111, p. 10–23.)" (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 876, parallel citations omitted.)

At issue are the comments that the dance team members were "lazy, unprofessional, 'snarky,' and generally had bad attitudes." (Compl., ¶101.) Plaintiffs Davis and Williams present enough evidence to establish that they were subject to racial harassment. They establish that they are part of a protected class, subject to unwelcome and racist comments that were mostly pointed at black members of the dance team, and that the harassment interfered with their work environment. (Davis Decl., ¶¶36, 39; C. Williams Decl., ¶¶16, 20.) These comments came about

in response to the dancers' request for a retainer, where Joshi berated them, as well as other instances of such comments by management. (Davis Decl., ¶¶36, 39.) In particular, Williams was fired in the hotel lobby where she could be seen by others. (C. Williams Decl., ¶20.) Both also attest to increased tension with management, including lashing out at dancers by saying they were drinking. (Davis Decl., ¶36; C. Williams Decl., ¶¶20.)

In reply, defendants contend that a single email is not sufficient to establish a pervasive atmosphere of discrimination. But it is not just a single email. The two plaintiffs also state there was increased tension thereafter. Further, Davis states that "BGBT management treated the black members of the dance team wildly different than the other members, for they called us lazy, unprofessional and told us that we had 'bad attitudes.' These remarks were made by white members in management." (Davis Decl., ¶39.) The implication is that it happened more than once. Whether that is true is a question for the trier of fact.

Frankly, this is not the strongest evidence of racial animus, impact on the working environment, or prevalence the court has ever seen. But in making inferences in plaintiffs' favor, it is sufficient. For example, turning to the email, Joshi claims such a retainer is not industry standard for dancers (but is for others), while Davis says a retainer is industry standard. (Joshi Decl., ¶4; Davis Decl., ¶34.) That automatically sets up a triable issue of material fact on the industry standard, which leaves the question of differential treatment on the retainer an open question.[7] The court can infer that the work environment became more tense due to this conflict between the black dancers and white management, especially where black dance team members were being fired in a hotel lobby after a request for a retainer.

Defendants' evidence that other black dancers did not experience racism only establishes a triable issue of material fact. The court cannot accord more weight to one person's experience on this motion. The motion is DENIED to this cause of action.

[7] And it is possible that an industry standard that did not give dancers retainers had its roots in racial animus. The court is not saying that is the case here, as there is no evidence on that. But these sorts of questions on industry standards or standards of care are typically questions of fact (i.e., dueling experts) and the evidence here does not conclusively answer those questions.

6. Sixth Cause of Action—FEHA Disability Discrimination

"The elements of a disparate treatment disability discrimination claim are that the plaintiff (1) suffered from a disability or was regarded as suffering from a disability, (2) could perform the essential duties of a job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability. (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 310.)" (*Glynn v. Superior Court* (2019) 42 Cal.App.5th 47, 53, fn. 1, parallel citations omitted.) Davis states that she was called into a meeting on April 20 with Lizzo and Scott, at which point she disclosed her depression, anxiety, and binge eating disorder. (Davis Decl., ¶¶48.) Prior to then, she was performing her job and reiterated to the two that this would not affect her performance. (*Id.* at ¶49.) Davis claims that she already felt that this meeting was pretextual and was really about her weight gain, which was caused by her binge eating disorder. (*Id.* at ¶¶48-50.) Davis was then fired two weeks later. (*Id.* at ¶57.) If credited, the short lapse between disclosure of her mental health issues and Davis's termination would establish adverse employment action due to disability. The issue, however, is intervening conduct.

Defendants argue that Davis was fired for her recording of the meeting in violation of the NDA. (Lizzo Decl., ¶¶51-52.) Davis had admitted recording a meeting on April 27 due to a preexisting eye disorder and a general lack of feeling safe. (Davis Decl., ¶51.) On May 3, Lizzo held another meeting expressing her betrayal that someone recorded the April 27 meeting and that she was going to go around the room, person by person, until she found out who did it. (*Id.* at ¶54; Lizzo Decl., ¶52.) Davis preemptively raised her hand to admit she recorded the meeting *and sent it to Williams*; Davis was fired on the spot. (Davis Decl., ¶¶56-57; Lizzo Decl., ¶52.)

The temporal proximity between the meeting and Davis's termination is interrupted by Davis's voluntary confession to recording the meeting and sending it to Williams, and the immediate termination of her employment in response. The court emphasizes that the recording of the session would not be enough to overcome plaintiff's showing were that the only issue. But the fact is that Davis admitted not only recording the session, but also sending it to Williams, who had just been fired by Lizzo. And sending the recording to Williams had nothing to do with any

disability. That was the purported reason for the termination, and Davis offers no explanation as to why that conduct would not be grounds for termination. Nor is there any evidence that would suggest that the given reason is merely pretextual, which would require a jury to resolve. In short, as plaintiffs candidly and forthrightly admitted during oral argument, no reasonable jury could find causation here. The motion is GRANTED as to this cause of action.

7. Seventh Cause of Action—Intentional Interference with Prospective Economic Advantage

The elements for a claim for intentional interference with prospective economic advantage are: " ' "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." [Citations.]' (*Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 521–522.)" (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153.) "The case law recognizes that 'the interference tort applies to interference with *existing* noncontractual relations which hold the promise of future economic advantage.' (*Westside Center*, *supra*, 42 Cal.App.4th at p. 524, citing *Blank*, *supra*, 39 Cal.3d 311, and *Youst*, *supra*, 43 Cal.3d 64.) The tort's requirements 'presuppose the relationship existed *at the time* of the defendant's allegedly tortious acts lest liability be imposed for actually and intentionally disrupting a relationship which has yet to arise.' (*Westside Center*, at p. 526, italics added.)" (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 517–518, emphasis by *Roy Allan* Court.)

Plaintiffs contend that placing them on a "soft hold" interfered with their ability to accept other job offers. (Davis Decl., ¶¶19-20; C. Williams Decl., ¶¶10-12; Rodriguez Decl., ¶¶2, 9-10). In order for this claim to be actionable, thought, plaintiffs need to identify the *existing* noncontractual relationship with which defendants interfered by placing plaintiffs on a "soft hold." As defendants point out in reply, not a single declaration identifies any existing relationship. Rodriguez comes the closest, but her declaration makes clear that these were

relationships that *could* exist, not ones that already did. "While hired for and preparing for the 2021 festival tour rehearsals, *I was approached with a few job opportunities* that would conflict or overlap into the first scheduled rehearsal day for Lizzo's live shows and festival tour. After learning via email that the rehearsals for Lizzo's live shows were postponed, I approached Lizzo's tour manager, Carlina Gugliotta (hereinafter referred to as 'Ms. Gugliotta'), while Covid testing at Center Staging in Burbank, about possibly taking on a one-day job opportunity. Ms. Gugliotta responded, 'Do you want the job or not?' implying that if I wanted to keep my position as a tour dancer, I could not take any other positions." (Rodriguez Decl., ¶2, emphasis added.) Being unable to take on a job due to the "soft hold" does not constitute intentional interference with a prospective economic relationship. Further, other than this example, the "soft hold" did not cause any plaintiff to lose any discrete prospective economic relationship. To prevail on this cause of action, there must be a specific opportunity that plaintiff lost. There is just no evidence of that other than the single statement by Rodriguez, which is not sufficient. And, to prevail plaintiffs must show that the "soft hold" is itself inherently wrongful. Unlike interference with contractual relations (which only requires knowing interference), this tort requires that the interference be wrongful. Plaintiffs have not established that the "soft hold" is wrongful in and of itself. (To the extent that the "soft hold" was motivated by racial animus, that is dealt with in the FEHA claim discussed above.) The motion is GRANTED as to this cause of action.

C. Summary

This case presents a number of difficult issues. Although not every allegation involves protected activity or matters of public interest, many do. And the courts are rightfully wary of injecting themselves into the creative process. Speech, including entertainment or other forms of expression, are protected rights and the law wisely disfavors chilling such conduct. Indeed, that is one of the drivers behind the Legislature's enactment of the SMS. On the other hand, the fact that the alleged incidents take place in the entertainment or speech world is no shield of invulnerability or license to ignore laws enacted for the protection of California's citizens. Finding the right balance is often no easy task, and this case is a perfect example. It is dangerous for the court to weigh in, ham-fisted, into constitutionally protected activity, but it is equally

dangerous to turn a blind eye to allegations of discrimination or other forms of misconduct merely because they take place in a speech-related environment. The court has tried to thread this needle, although the court, being a trial court only, is well aware that this is likely only the first stop on this case's journey.

The court also notes that although (as discussed above) the SMS standard is similar to the summary judgment standard, there are some differences. Summary judgment comes after discovery. Some things are easy enough to allege or even declare but may not stand up following a review of the documents or the crucible of deposition examination. As to the portions of this motion that were denied, the court does not mean to suggest that defendants are precluded from bringing a summary adjudication motion, either as a legal or even as a practical matter. Of course, the court does not know how it will rule should such a motion be brought; it is only to say that the court's mind as to what the record will show at that stage is open.

V. Conclusion

In light of the foregoing, defendants' SMS is GRANTED as to the nude photoshoot allegations in the first and second causes of action, and is granted as to the sixth cause of action for FEHA disability discrimination and the seventh cause of action for intentional interference with prospective economic relationship. It is DENIED as to the remainder. Clerk to provide notice.

DATED: January 30, 2024

Hon. Mark H. Epstein
Judge of the Superior Court