Supreme Court of California
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Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
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**No. S273887**

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**IN THE SUPREME COURT**
**OF THE STATE OF CALIFORNIA**

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MICHELLE HIMES,

*Plaintiff–Appellant*,

v.

SOMATICS, LLC,

*Defendant–Respondent*.

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On Request from the U.S. Court of Appeals for the Ninth Circuit
for Answer to Certified Questions of California Law

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# RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION FOR JUDICIAL NOTICE

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Defendant-Respondent Somatics LLC ("Somatics") submits this opposition to the motion for judicial notice filed by Plaintiff-Appellant Michelle Himes ("Plaintiff").

Plaintiff's motion asks this Court to take judicial notice of a 28-year-old decision from a foreign country applying foreign law, *Hollis v. Dow Corning Corp.*, 4 SCR 634 (1995). *Hollis* is a split decision, and Plaintiff contends that the majority opinion supports her position in this appeal. Plaintiff cannot dispute that the dissenting opinion agrees with Somatics and amici that a subjective causation standard, focusing on a plaintiff's own testimony about refusing treatment, "fails to take into account the inherent unreliability of the plaintiff's self-serving assertion." *Id.* at 688; *see id.* at 689 ("It could hardly be expected that the patient who is suing would admit that [she] would have agreed to have the [treatment] even knowing all the accompanying risks." (internal quotation marks omitted)). Even where a plaintiff is "perfectly sincere in stating that in hindsight she believed that she would not have consented," this statement cannot "conclude[] the matter" of causation because "it is likely to be coloured by the trauma occasioned by the failed [treatment]." *Id.* at 688-89; *accord id.* at 689 (a subjective standard "put[s] a premium on hindsight" (internal quotation marks omitted)).

The analysis of the *Hollis* majority opinion has never been incorporated into U.S. law. In fact, the only U.S. decision on Westlaw that so much as mentions *Hollis* is a federal district court opinion invoking the Canadian case when stating the broad principle that "Canadian common law and statutory law provides protection from product harm and remedies for individuals who are injured by products." *Shadbolt v. Bernzomatic, Newell Rubbermaid, Inc.*, 2013 WL 4737205, at *2 (E.D. Cal. Sept. 3, 2013).

Plaintiff's motion to take judicial notice of *Hollis* is improper for several reasons. First, Plaintiff's reliance on the law of Canada is inappropriate. This case is indisputably governed by California law and by U.S. legal doctrines common throughout this country. Not only has Plaintiff been unable to identify any California authority supporting her flawed causation arguments, she has also been unable to identify any supporting authority from the high courts of *forty-nine other states* (or any U.S. territory). Only after completely striking out under U.S. law does Plaintiff now attempt to invoke the law of a foreign nation. Canadian supreme court decisions are published in English (as well as French), but that doesn't make them any more applicable here than a decision from China, Saudi Arabia, or Guatemala. To be sure, a citation to an out-of-*state* U.S. decision can be useful as persuasive precedent because the Court will be able to understand the decision within the context of similar common-law doctrines, as well as the ways in which those common-law principles interact with federal (U.S.) regulatory frameworks, such as F.D.A. regulations. A decision from a foreign country offers no such contextual guideposts.

Moreover, Plaintiff fails to provide the Court with information necessary to clarify Canadian law for purposes of her motion for judicial notice. *See* Cal. Evid. Code § 453 (judicial notice is appropriate only where the requesting party "[f]urnishes the court with sufficient information to enable it to take judicial notice of the matter"); *cf. In re Marriage of Nurie*, 176 Cal. App. 4th 478, 509 (2009) ("While we are authorized to take judicial notice of the law of foreign nations and public entities in foreign nations, we decline to do so here because [the movant] has submitted insufficient evidence to enable us to determine with confidence either the procedure or the substantive rules [a foreign nation] would employ." (internal quotation

marks, citations and alterations omitted); *In re Marriage of Paillier*, 144 Cal. App. 4th 461, 468 (2006) (appellants "have not furnished us with sufficient information to enable us to take judicial notice of" foreign law). Plaintiff does not offer any information regarding the *current* state of Canadian law; she identifies only a nearly thirty-year-old decision, with no assurances that it represents the current state of Canadian law. Regrettably, Plaintiff has a history of offering unreliable citations to this Court. *See, e.g.*, Somatics' Consolidated Answer to Amicus Briefs at 16-17 (exposing that, when claiming to find support for her position under Texas law based on a Fifth Circuit *Erie* guess, Plaintiff inappropriately failed to disclose to this Court that the Supreme Court of Texas had subsequently issued a decision *expressly repudiating* her position); *id.* at 8 n.2, 11 n.4 (identifying multiple instances in which, when purportedly quoting from the record and district court opinion, Plaintiff improperly removed words from sentences in order to fundamentally change the sentences' meaning). Absent ordering supplemental briefing from the parties on Canadian law, and having the parties obtain Canadian law experts to inform the Court about the current state of foreign law, Plaintiff's motion for judicial notice provides no guidance to this Court. The motion offers only an irrelevant and unreliable data point from a foreign country. *See also* California Rule of Court 8.252(a) (a plaintiff cannot obtain judicial notice without establishing "[w]hy the matter to be noticed is relevant to the appeal").

Plaintiff also offers the Court no information about the relevant regulatory context in Canada, including how medical devices are regulated through Canada's equivalent of the United States Food and Drug Administration. She offers no information about the legal relationship between physicians and patients in Canada (whether statutory, common-law

or through professional ethics), or about Canada's legal protections for the field of biomedical innovation (whether statutory or at common law). Without such information, this Court cannot determine how a Canadian decision impacts the application of the learned intermediary doctrine as currently used in California and throughout the United States. As the PhRMA amicus brief notes, *every U.S. jurisdiction* applies the learned intermediary doctrine and *nearly three dozen U.S. jurisdictions* have already specifically confirmed that, under the doctrine, a plaintiff cannot establish causation without evidence that a stronger warning would alter her physician's prescription decision. *See* PhRMA Br. at 47-57 (Addendum).

To the extent that the laws of the United States and Canada differ on issues relevant to this case, any such difference may derive in part from a distinctive element of Canadian law which Plaintiff declines to disclose to this Court: Unlike the United States, Canada has a "loser pays" rule in litigation, which makes unsuccessful plaintiffs bear expenses of litigation. *See, e.g.*, Erik S. Knutsen, *The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada*, 36 Queen's L.J. 113, 114 (2010) ("Under [Canada's] current fee shifting regime, an unsuccessful litigant must pay not only his own legal costs but also a proportion of the successful litigant's legal fees.").[1] Canada's "loser pays" rule disincentivizes litigation, especially

[1] *See also* Emily P. Overfield, *Shifting the E-Discovery Solution: Why Taniguchi Necessitates A Decline in E-Discovery Court Costs*, 118 Penn St. L. Rev. 217, 218 & n.2 (2013) ("At the end of English litigation, the non-prevailing party is responsible for all of the prevailing party's litigation-related expenses and fees. . . . Canada also uses this model."); Ann M. Scarlett, *Imitation or Improvement? The Evolution of Shareholder Derivative Litigation in the United States, United Kingdom, Canada, and Australia*, 28 Ariz. J. Int'l & Comp. L. 569, 606 (2011) ("Canada follows the English 'loser pays' rule, which requires the losing party to pay at least some of the

borderline or meritless litigation. *See id*. (Canada's rule creates financial risks that "deter weak claims").[2] The "loser pays" rule renders less necessary the manufacturer protections entrenched in the U.S. learned intermediary doctrine; a vital safeguard for medical manufacturers *already exists* in Canada to prevent a deluge of meritless tort claims that would cripple the medical manufacturer industry and hinder patient access to life-saving treatment. Plaintiff's proposed expansion of manufacturer liability would thus not, in Canada, have the same crushing impact on biomedical innovation and patient healthcare outcomes as it would in the United States.[3]

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successful party's legal costs."); *Prod. Design Servs., Inc. v. Sutherland-Schultz, Ltd*., 2015 WL 12743607, at *7 (S.D. Ohio July 24, 2015) ("Courts in the United States typically follow the 'American Rule," which prohibits an award of attorneys' fees to a prevailing party in the absence of an exception . . . . In contrast, Canadian . . . courts follow the 'English Rule' and allow a fee award to the prevailing party . . . ." (citations omitted)); *Taylor v. LSI Logic Corp*., 689 A.2d 1196, 1201 (Del. 1997) (acknowledging "the 'loser pays' rule, applicable under Canadian law"); *Northmobiletech, LLC v. Simon Prop. Grp., Inc*., 2013 WL 12090092, at *8 (W.D. Wis. May 21, 2013) (same).

[2] Notably, here, Plaintiff brought tort claims based on "an inaccurate and unscientific" theory that she experienced a side effect that the medical community recognizes is *not* an actual side effect of ECT. APA Brief at 9, 14. Plaintiff would be disincentivized from bringing such scientifically meritless claims in Canada because losing would be more expensive. Canadian law does not support opening the doors widely to claims such as Plaintiff's because Canada already has safeguards in place to prevent such claims.

[3] Plaintiff argues that her proposed liability expansion wouldn't harm the field of biomedical innovation because issuing stronger warnings is a relatively inexpensive task. *See* Plaintiff's Consolidated Answer to Amicus Briefs at 24. But it is the expense of defending against a flood of longer-lasting lawsuits, not the expense of issuing longer warnings, that could financially overwhelm biomedical innovators. *See* Somatics' Answering Brief at 51-53; Somatics' Consolidated Answer to Amicus Briefs at 26-28; CLS Brief at 16, 23-24; CJAC Brief at 14; PLAC Brief at 2.

Finally, Plaintiff's motion for judicial notice is also improper due to its timing. There is nothing new about Plaintiff's newly-identified case law: *Hollis* was issued in 1995, more than a quarter century before Plaintiff filed her merits briefs in this case. Plaintiff chose not to cite *Hollis* in her opening or reply briefs, even though she made the same arguments there for which she now purports to rely on *Hollis*. She only belatedly tacks on this citation in her amicus answer and accompanying motion, once Somatics' opportunities to file a full brief in response have ended. This is an abuse of process and not the appropriate purpose of a motion for judicial notice. This Court has discretion to deny any motion to take judicial notice of a foreign nation's laws, *see* Cal. Evid. Code § 452 (stating that "[j]udicial notice *may* be taken" of such matters, not that judicial notice *must* be taken (emphasis added)), and the Court should do so here to prevent Plaintiff's sandbagging tactics from being used by other litigants in future.

## CONCLUSION

This Court should recognize Plaintiff's judicial notice motion for what it is: a desperate attempt to distract and deceive this Court with an outdated, out-of-context reference to an isolated decision of a foreign nation—offered only after full merits briefing and six amicus briefs confirmed that the law of California (and, indeed, of all U.S. jurisdictions) resoundingly rejects Plaintiff's position in this appeal. This Court should deny the motion for judicial notice, and ignore references to the Canadian decision in Plaintiff's brief responding to the six amicus briefs.

Dated: January 12, 2023

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned declares:

I am over the age of 18 years and am not a party to or interested in the above-entitled cause. On the date stated below, I caused to be served:

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The foregoing is true and correct. Executed under penalty of perjury at New Haven, Connecticut.

Dated: January 12, 2023

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Supreme Court of California
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**STATE OF CALIFORNIA**
Supreme Court of California

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1/12/2023

Date

/s/Jonathan Freiman

Signature

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