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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Audrey Davis,

Plaintiff /
Counterclaim-Defendant,

v.

Rhondie Voorhees,

Defendant /
Counterclaim-Plaintiff,

and,

ERAU,

Defendant.

Case No. 3:21-cv-08249-DLR

**OPPOSITION TO DEFENDANT
RHONDIE VOORHEES' MOTION
FOR JUDGMENT ON THE
PLEADINGS AS TO COUNT III**

1 **1.0 INTRODUCTION**

2 Our military members should be free to attend to their duties without being
3 concerned that while they are on active duty, someone will take advantage of their absence
4 by seeking a default against them. The Servicemembers' Civil Relief Act (“SCRA”) was
5 enacted to ensure that our military members have this comfort.

6 Once the SCRA was enacted, everyone had fair notice of the fact that if their own
7 personal sense of decency would not impede their desire to take advantage of a
8 servicemember, then federal law would. Unfortunately, neither obstacle stopped
9 Defendant Rhondie Voorhees in this case from trying to take advantage of Plaintiff Audrey
10 Davis’s service to our country.

11 Voorhees was aware that Ms. Davis was on active duty training when she sought
12 default. Even if she lacked actual knowledge, the SCRA requires that a litigant make an
13 effort to ascertain whether the defendant is on active duty. In this case, Voorhees’s counsel
14 (acting as her agent) dishonestly and unethically claimed that “to the best of [his]
15 knowledge, [Davis] is not in the military service,” despite being informed of that very fact.
16 Nevertheless, Voorhees sought default anyway – hoping that she would not get caught.

17 Even when Davis returned from duty and retained counsel, Voorhees unreasonably
18 refused to back away from her flawed attempt at defaulting Davis and instead chose to
19 multiply the proceedings solely to engage in attrition against a servicemember and college
20 student. Her first excuse was to claim that Ms. Voorhees was not “really” a service member.
21 Now, she has the belated excuse that there is no SCRA violation as long as no default
22 judgment is entered – seeking to be excused for all of her prior unethical conduct because
23 it just didn’t work out for her the way she had hoped. This is not how the SCRA works.

24
25

2.0 FACTUAL BACKGROUND

Audrey Davis was sexually assaulted. Doc. 49 at ¶ 8. Defendants ERAU and its Dean of Students, Rhondie Voorhees, were indifferent to her case. *Id.* at ¶ 15. They went so far as to put her in classes with her assailant. When she complained, their response was to tell her that she could use an alias – as if she had done something wrong. Accordingly, Davis exercised her First Amendment right to circulate a petition calling for Voorhees to resign. *Id.* at ¶¶ 32-33. Voorhees reacted in a manner unbecoming of an educator – she sued Davis for defamation.

This is where the vexatious conduct really began. On February 15, 2021, Ms. Davis circulated the petition calling for Voorhees to resign. Doc. 49-1. Voorhees then threatened Davis. Davis reluctantly capitulated to this bullying by Voorhees and other staff at ERAU by withdrawing and de-publishing the petition. *See* Doc. 49 at ¶¶ 32-47. Davis did so even though she was well within her rights to publish it. Nevertheless, Voorhees was not satisfied with censoring a sexual assault victim. She wanted to destroy this young woman, financially, for having the audacity to question her. *See id.* at ¶¶ 44-47; Email correspondence between Voorhees and Davis, produced as VOORHEES000293-302, attached as **Exhibit 1**.

Voorhees filed suit. She then sought an application for entry of default on July 8, 2021, and by operation of Arizona procedure, default was immediately entered. *See* Doc. 17-3. Voorhees submitted an Affidavit/Declaration on Default and Entry of Default alongside the application. Doc. 49-3. In the Affidavit, Defendant Voorhees, through counsel, attested under oath to follow the SCRA: “To comply with the requirements of 50 U.S.C.A. § 520, I verify that, to the best of my knowledge, the above-named party is not in the military service....” *Id.* at ¶ 3. This was a knowing, willful, and unethical lie.

1 Between April 2021 and June 2021, Ms. Davis’s father had been emailing with
2 Voorhees’s counsel, and he discussed Davis’s involvement in military training several
3 times. *See* Email correspondence between Patrick Davis and Voorhees counsel, produced
4 as VOORHEES 000282-292, attached as **Exhibit 2**. On April 13, 2021, Mr. Davis
5 expressly told Voorhees’s counsel that “*Audrey has been on field exercise for the ROTC at*
6 *Ft. Huachuca . . . we may have not been clear that our response would be delayed due to*
7 *work/military conflicts.*” *Id.* at VOORHEES000288. On April 22, 2021, Voorhees’s
8 counsel accused Ms. Davis of lying, stating “*it appears you have your father lying for you*
9 *. . . Dr. Voorhees confirmed with the Army ROTC that there have been no ROTC activities*
10 *considered ‘field exercises’ since the trip to Fort Huachuca[.]*” *Id.* at VOORHEES000287.
11 On April 22, 2021, Mr. Davis responded that his daughter was not lying, that she “*had a*
12 *field exercise to Huachuca and a range exercise to qualify which they flew in Blackhawk*
13 *helicopters. Ms. Voorhees is misinformed.*” *Id.*

14 On May 20, 2021, Voorhees’s legal counsel reached out to Mr. Davis to get Ms.
15 Davis’s physical address to serve her with a complaint. *Id.* at VOORHEES000282. On June
16 1, 2021, Ms. Davis’s father informed Voorhees’s counsel that Ms. Davis would be on active
17 duty attending Army training at Ft. Knox for the remainder of the summer. Doc. 49 at ¶¶
18 48-49; Doc. 49-2; *see also* **Exhibit 2** at VOORHEES000282 (“*[S]he is going to Ft. Knox*
19 *for Army training the remainder of the summer. If there is any possibility of this not going*
20 *to formal proceedings I would ask humbly that you and Dr. Voorhees reconsider*”).

21 With this actual knowledge that Davis would be unable to respond to the complaint,
22 Voorhees saw an opportunity to obtain an easy victory by default. All she had to do was
23 find a way to lie about Davis’s military status. She found the opportunity to do so in the
24 form of counsel who would lie for her, on her behalf, and for her benefit.

1 Once Davis retained counsel and sought to set aside the default, Defendant Voorhees
2 vigorously litigated to maintain her illegally obtained advantage. Ms. Davis produced
3 orders showing that she was under military orders when the default was sought – a fact that
4 Davis’s father had shared with Voorhees’ counsel.

5
6 A photograph of a military order document with the text: "YOU ARE ORDERED TO ACTIVE DUTY FOR TRAINING (ADT) FOR PERIOD SHOWN. ON COMPLETION OF THE PERIOD OF ADT. U"

7 *See* Active Duty Orders, Doc. 17-4 at 17-18.

8 Voorhees and her counsel zealously sought to deprive Davis of due process by
9 seeking to preclude Ms. Davis from offering a defense to the complaint in the state court
10 action. Instead of stipulating to set aside the default and proceed with the case on the merits,
11 Voorhees opposed any such efforts and her counsel filed three separate motions to strike
12 Ms. Davis’s court filings, as follows:

- 13 • On July 19, 2021, Davis filed a motion to stay proceedings in the state court case
14 *pro se* and then, after retaining counsel, filed a supplement on September 19, 2021.
15 *See* Supplement to Motion to Stay, attached as **Exhibit 3**.
- 16 • On Oct. 1, 2021, Voorhees filed a motion to strike Davis’s supplement. Doc. 17-5.
- 17 • On Oct. 7, 2021, Davis filed a motion to deem the default void or set it aside (Doc.
18 17-4) and filed a motion to dismiss. Doc. 24-11.
- 19 • On Oct. 8, 2021, Voorhees filed a motion to strike Davis’s motion to deem the
20 default void or set it aside. Doc. 17-6.
- 21 • On Oct. 8, 2021, Voorhees also filed a motion to strike Davis’s motion to dismiss.
22 Doc. 17-7.

23 The common thread through all of these filings by Voorhees? That since Davis was
24 in Default, she had no right to defend herself.

1 For Voorhees to claim she never “sought” a default is a lie that this Court should
2 punish, not reward. Doc. 75 at 7. She not only sought it, but filed multiple motions to strike
3 – *seeking to deprive Davis of even the opportunity to argue that default should be set aside.*

4 **3.0 LEGAL STANDARD**

5 “A motion for judgment on the pleadings under Rule 12(c) is properly granted when
6 taking all the allegations in the non-moving parties’ pleadings as true, the moving party is
7 entitled to judgment as a matter of law. *Fajardo v. County of L.A.*, 179 F.3d 698, 699 (9th
8 Cir. 1998). In other words, judgment under Rule 12(c) is inappropriate if the facts as pled
9 would entitle the plaintiff to a remedy. *See Merchants Home Delivery Serv., Inc. v. Hall &*
10 *Co.*, 50 F.3d 1486, 1488 (9th Cir. 1995).

11 The Court generally cannot consider evidence outside the pleadings unless the Court
12 treats the motion as one for summary judgment under Rule 56, but the Court can take
13 “judicial notice of undisputed matters of public record, including documents on file in
14 federal or state courts,” without converting the motion. *Harris v. County of Orange*, 682
15 F.3d 1126, 1132 (9th Cir. 2012); *see Five Points Hotel Partnership v. Pinsonneault*, 835 F.
16 Supp. 2d 753, 757 (D. Ariz. 2011) (citing *Intri-Plex Techs., Inc. v. Crest Group, Inc.*, 499
17 F.3d 1048, 1052 (9th Cir. 2007)).

18 Rule 12(c) motions for judgments on the pleadings and Rule 12(b)(6) motions to
19 dismiss for failure to state a claim are functionally identical. *See Dworkin v. Hustler*
20 *Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). The same standard of review applies
21 to both types of motions. *See id.*

22 **4.0 LEGAL ARGUMENT**

23 Voorhees seeks to evade liability under the SCRA by arguing that an ROTC cadet
24 at active duty training, on active duty orders, does not count as serving her country. And

1 in the alternative, since she only sought default, and it did not ripen to a *judgment* thanks
 2 to Davis’s efforts to set it aside, that her extreme efforts to deprive this service member of
 3 due process should be endorsed as perfectly lawful and proper actions.

4 If this Court wishes to endorse an order that abides such conduct, that is this Court’s
 5 prerogative under Article III. But, it is unthinkable that this is where any court would place
 6 our servicemembers. If this Court endorses this argument, then our servicemembers must
 7 be on notice that from this day forward, there is a way for unethical litigants to deprive
 8 them of due process – simply get a *default* against them. All the unethical party needs to
 9 do after that is incompetently seek default *judgment* and all is forgiven. This position is
 10 absurd, contrary to the intent of the statute and contrary to instructions about the SCRA
 11 handed down from the Supreme Court.¹

12 The SCRA “was created to allow for the suspension of civil actions for those persons
 13 in the military in order to allow military personnel to devote their entire energy to the
 14 defense of the nation.” *Bernhardt v. Alden Cafe*, 864 A.2d 421, 425 (N.J. Super. App. Div.
 15 2005) (internal quotation omitted). “The Act has long been liberally construed to protect
 16 those men and women who drop their own affairs to take up the burdens of their country.”
 17 *Sprinkle v. SB&C Ltd.*, 472 F. Supp. 2d 1235, 1244 (W.D. Wash. 2006) (citing *Boone v.*
 18 *Lightner*, 319 U.S. 561, 574 (1943); *Conroy v. Aniskoff*, 507 U.S. 511, 516 & n.9 (1993)).
 19 It protects the career officer as well as the temporary soldier. *See Omega Indus., Inc. v.*
 20 *Raffaele*, 894 F. Supp. 1425, 1434 (D. Nev. 1995). The Supreme Court has instructed

21 _____
 22 ¹ There is a single unpublished decision on which Voorhees relies from a Court that did not
 23 review the entire statute, nor did it employ a full set of rules of statutory construction. *See*
 24 *Palaciosreal v. Indem. Co. of California, Inc.*, No. CV1300993RGKDTBX, 2013 U.S. Dist.
 25 LEXIS 201940 (C.D. Cal. Oct. 21, 2013). That case is not binding on this court, and as an
 unpublished decision, is of dubious persuasive value. To whatever extent this Court wishes to
 acknowledge that case, it should do so by showing how a court should properly interpret it, and
 show no deference to the incomplete and illogical reasoning in that case.

1 lower courts that “the Act must be read with an eye friendly to those who dropped their
2 affairs to answer their country's call.” *Maistre v. Leffers*, 333 U.S. 1, 6 (1948); *see also*
3 *Davis v. Jacobson*, 2014 U.S. Dist. LEXIS 157693, at *9 (D. Conn. Nov. 7, 2014).

4 Voorhees, instead, asks that this court read the Act by ignoring its purpose. If it
5 does so, everyone in the United States who wants to take advantage of a military member’s
6 status should find a way to forum shop their claims into Arizona – because it will be the
7 place where this deference and reverence for our military will come to die.

8 To interpret the statute as Voorhees argues ignores the purposes of the SCRA, i.e.:

9 (1) to provide for, strengthen, and expedite the national defense
10 through protection extended by this Act . . . to servicemembers
11 of the United States to enable such persons **to devote their
entire energy to the defense needs of the Nation**; and

12 (2) to provide for the **temporary suspension of judicial and
administrative proceedings and transactions** that may
13 adversely affect the civil rights of servicemembers during their
14 military service.

15 50 U.S.C. § 3092. (Emphasis added).

16 **4.1 Plaintiff Was a Servicemember**

17 Voorhees claims that someone on active duty while in ROTC is not a “real
18 servicemember.”² The offensiveness of such a claim, on its face, is disgraceful. But, when
19 we examine the statute, it is also sanctionably false.

20 The SCRA protects active duty members of the United States military from certain
21 obligations during the period which they are engaged in active service. *See* 50 U.S.C.
22 § 3901, *et seq.* A servicemember is a “member of the uniformed services, as that term is

23 ² Davis does not argue that merely being an ROTC cadet places her in the status of “active
24 duty.” It is the fact that *she was on active duty orders at the time* that makes her a servicemember
25 under the Act. Were she merely an ROTC cadet, at the time, but attending classes at ERAU, she
would not claim protection under the Act.

1 defined in section 101(a)(5) of title 10, United States Code.” 50 U.S.C. 3911(1). This
2 includes the armed forces. *See* 10 U.S.C. § 101(a)(5).

3 The servicemember must be engaged in active military service.

4 (2) Military service. The term “military service” means—

5 (A) in the case of a servicemember who is a member of the Army, Navy,
6 Air Force, Marine Corps, or Coast Guard—

7 (i) active duty, as defined in section 101(d)(1) of title 10, United States
8 Code, ...

(C) any period during which a servicemember is absent from duty on account
9 of sickness, wounds, leave, or other lawful cause.

10 50 U.S.C. § 3911.

11 Active duty includes:

12 ... full-time duty in the active military service of the United States. Such term
13 includes full-time training duty, annual training duty, and attendance, while
14 in the active military service, at a school designated as a service school by
15 law or by the Secretary of the military department concerned. Such term does
16 not include full-time National Guard duty.

17 10 U.S.C. § 101(d)(1).

18 An ROTC student *engaged in active military training* falls under the active duty
19 categorization of the SCRA. Courts have repeatedly found that official ROTC training is
20 active military service in the context of Federal Tort Claims Act actions. *See, e.g., Brown*
21 *v. United States*, 151 F.3d 800, 805 (8th Cir. 1998) (“Senior ROTC training activities are
22 mandatory and supervised, and are defined as ‘active military service’ by the Veterans
23 Benefits Act.”); *Wake v. United States*, 89 F.3d 53 (2d Cir. 1996); *Callis v. Shannon*, 93
24 Civ. 4983 (RPP), 1994 U.S. Dist. LEXIS 3711 (S.D.N.Y. Mar. 25, 1994). Accordingly,
25 Davis was engaged in “active duty.”

Moreover, the SCRA expressly extends rights and protections to “[a] member of a
reserve component who is ordered to report for military service.” 50 U.S.C. § 3917.

1 Pursuant to the Cadet Contract, Ms. Davis agreed to enlist in the Reserve Component of
2 the United States Army as part of her scholarship contract. Doc. 75-3 at Part II.2.a.
3 (“**ENLISTMENT AGREEMENT.** As a condition for member in the Army ROTC
4 Program, I agree to enlist in the Reserve Component of the United States Army (*with an*
5 *assignment to the USAR Control Group (ROTC)*) for a period prescribed by the Secretary
6 of the Army”).

7 Ms. Davis was a member of the United States ROTC program and was engaged in
8 official military training when Defendant Voorhees filed her Affidavit/Declaration on
9 Default and Entry of Default. Doc. 49-3. Her duties during these official activities amount
10 to active duty military service for the purposes of the SCRA. Finally, Mrs. Davis’s orders
11 requiring her to report for training specifically note that Mrs. Davis was being ordered to
12 active duty. *See* Active Duty Orders, Doc. 17-4 at 17-18.

13 **4.2 The SCRA Applies In This Case**

14 The SCRA is not narrowed to merely “default *judgments*,” as Voorhees seeks to
15 define that term. “The Soldiers’ and Sailors’ Civil Relief Act is always to be liberally
16 construed to protect those who have been obliged to drop their own affairs to take up the
17 burdens of the nation.” *Boone*, 319 U.S. at 576. The SCRA defines “judgment” to mean
18 “any judgment, decree, order, or ruling, final or temporary.” 50 U.S.C. § 3911. While the
19 *Palaciosreal* decision indeed supports Voorhees’s position, the *Palaciosreal* court failed
20 to even look at the definitions that the statute itself provides. This Court should not make
21 the same mistake that the *Palaciosreal* court made. It must look at the definitions in the
22 SCRA, as the 9th Circuit would have, had the plaintiff appealed in *Palaciosreal*.

23 Voorhees asks for an absurd and narrowed reading of the term “default judgment”
24 in 50 U.S.C. § 3931 to mean that any Plaintiff can act abusively toward a servicemember,

1 including providing a knowingly false sworn statement, and there is no liability so long as
2 the abuse and deprivation of due process stops right at the line before *judgment*. Doc. 75
3 at 7-9. Neither the *Palaciosreal* court nor Defendant appear to have consulted the statute's
4 clearly enumerated definitions in § 3911.

5 In accord, the Judge Advocates General School prepares officers to survey the entire
6 SCRA to construe its meaning.

7 **(7) Timing of Motion for Default.** In a traditional sense, one
8 often thinks of default judgments being entered shortly after a
9 defendant fails to answer or otherwise appear in a case. Things
10 can be more complicated and a judgment tantamount to a
11 default judgment can occur at any time. In fact, the SCRA
12 defines judgment very broadly to include “any judgment,
13 decree, order, or ruling, final or temporary.” Thus, focus needs
14 be placed on the meaning of any court decision.

15 *The Judge Advocate General's School's Guide to the Servicemembers Civil Relief Act*, 37
16 (March 2006).

17 While the *Palaciosreal* court applied a single rule of statutory construction, it
18 skipped right over all the others. 2013 U.S. Dist. LEXIS 201940, at *8 (C.D. Cal. Oct. 21,
19 2013). “It is a fundamental canon of statutory construction that the words of a statute must
20 be read in their context and with a view to their place in the overall statutory scheme. *Davis*
21 *v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). “The purpose of statutory
22 construction is to discern the intent of Congress in enacting a particular statute.” *Robinson*
23 *v. U.S.*, 586 F.3d 683, 686 (9th Cir. 2009) (quoting *United States v. Daas*, 198 F.3d 1167,
24 1174 (9th Cir. 1999)). “We may also use canons of construction, legislative history, and the
25 statute's overall purpose to illuminate Congress's intent.” *Pacific Coast Fed'n. of*
Fishermen's Ass'ns. v. Glaser, 937 F.3d 1191, 1198 (9th Cir. 2019) (cleaned up).

“We must examine the meaning of the words to see whether one construction makes
more sense than the other as a means of attributing a rational purpose to Congress.” *United*

1 *States v. Rundo*, 990 F.3d 709, 718 (9th Cir. 2021) (quoting *Longview Fibre Co. v.*
2 *Rasmussen*, 980 F.2d 1307, 1311 (9th Cir. 1992)). “When a statute is fairly susceptible of
3 two constructions, one leading inevitably to mischief or absurdity and the other consisting
4 of sound sense and wise policy, the former should be rejected and the latter adopted.”
5 *Estrella v. Brandt*, 682 F.2d 814, 817-818 (9th Cir. 1982) (citation omitted). “[I]f a statute
6 is amenable to two alternative interpretations, the one that leads to the more reasonable
7 result will be followed.” *Astaire v. Best Film & Video Corp.*, 136 F.3d 1208, 1209 (9th Cir.
8 1998) (citation omitted). Each of these statements is a variation of the same theme: *If*
9 *possible, construe a statute so that the result is reasonable.*

10 In *Murdock v. Murdock*, the South Carolina Appellate Court interpreted the term
11 “judgment” in its broad, expansive meaning. 526 S.E.2d 241 (S.C. App. 1999). During a
12 divorce, the trial court continued a hearing on child support to allow more time for the
13 husband to obtain counsel. *Id.* at 244. The trial court entered a judgment against him for
14 child support and debt allocation, and the appellate court reversed, finding that the
15 judgment was a default judgment subject to scrutiny under the SCRA. *Id.* at 246. The
16 servicemember was on active duty and could not attend the hearings. *Id.* The South
17 Carolina Appellate Court understood that “judgment” has a broader meaning than what
18 Voorhees insists on here. There was an order to show cause for failure to pay child support,
19 and the trial court was reversed. This was not a traditional default judgment either. While
20 that case is no more binding than the incomplete analysis in *Palaciosreal*, it is just as
21 persuasive. And in that case, the appellate court did a more faithful analysis of the SCRA.

22 Here, it is unreasonable to interpret Voorhees’s zealous attempts to snatch a default
23 as anything other than pursuing a judgment. Voorhees lied on her Affidavit. Doc. 49-3 at ¶
24 3. After lying and obtaining a default under false pretenses, Voorhees filed three separate
25 motions to try to prevent Davis from defending herself. Docs. 17-5 – 17-7. Meanwhile,
Voorhees was on notice that Ms. Davis was a member of ROTC. Each email Ms. Davis

1 sent to Voorhees included her ROTC signature. See **Exhibit 1** at VOORHEES000294,
 2 000299. Moreover, Voorhees’s counsel **was explicitly told that Ms. Davis would be**
 3 **attending Army training.** See Doc. 49-2. So where is the truth in the claim that “to the
 4 best of [Voorhees’s counsel’s] knowledge, [Davis] is not in the military service?” This
 5 should result in a referral for prosecution for perjury, not in a reward of dismissal.³

6 While Davis was on active duty training, Voorhees pursued a default judgment by
 7 submitting a knowingly false affidavit. Even if this had come with no financial impact to
 8 Ms. Davis, it should be the subject of severe sanctions. However, it did come with financial
 9 impact – it forced Ms. Davis to incur tens of thousands of dollars in fees to rectify the effect
 10 of that knowingly false statement. Doc. 17-4.

11 This exploitation of service members while they are on active duty is the exact type of
 12 harm the SCRA grants relief from in the form of reimbursement of attorneys’ fees and
 13 punitive damage awards pursuant to 50 U.S.C. §§ 4042 & 4043. Voorhees “had an
 14 affirmative duty in [Ms. Davis’s] absence, to provide the court with an affidavit (1) setting
 15 forth facts showing [Ms. Davis] was not in the military; or (2) either setting forth that [Ms.
 16 Davis] was in the military or alleging she was unable to ascertain whether or not [she] was
 17 in the military.” *Murdock*, 526 S.E.2d at 246. Voorhees, despite having constructive and
 18 actual notice, filed a false affidavit against Ms. Davis, and Ms. Davis has a valid claim for
 19 relief under the SCRA against Voorhees.

20 **5.0 REQUEST FOR CERTIFICATION IN THE ALTERNATIVE**

21 In the event that this Court disagrees with Ms. Davis’ position, Ms. Davis requests
 22 leave to file an immediate interlocutory appeal to the 9th Circuit pursuant to 28 U.S.C. §

23 ³ It is worth noting that Voorhees was somehow able and motivated enough to do
 24 detective work to find out precisely which exercises took place when. See **Exhibit 2** at
 25 VOORHEES000287. However, she could not call the ROTC office at her own university?
 The fact is, Voorhees did not want to find evidence that she couldn’t seek default – the ends
 justified the means for her.

1 1292(b). Ms. Davis is not only bringing this claim to vindicate her own interests – but to
2 serve all of her fellow service members who might otherwise find themselves similarly
3 treated. If this Court believes that the SCRA truly excuses Voorhees’ conduct, it most
4 certainly cannot do so without acknowledging that the conditions of 28 U.S.C. § 1292(b)
5 are met here.

6 The Ninth Circuit has determined that “[c]ertification under § 1292(b) requires the
7 district court to expressly find in writing that all three § 1292(b) requirements are met.”
8 *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). That statute provides:

9 When a district judge, in making in a civil action an order not otherwise
10 appealable under this section, shall be of the opinion that such order involves
11 a controlling question of law as to which there is substantial ground for
12 difference of opinion and that an immediate appeal from the order may
13 materially advance the ultimate termination of the litigation, he shall so state
14 in writing in such order. The Court of Appeals which would have jurisdiction
15 of an appeal of such action may thereupon, in its discretion, permit an appeal
16 to be taken from such order, if application is made to it within ten days after
17 the entry of the order: Provided, however, That application for an appeal
18 hereunder shall not stay proceedings in the district court unless the district
19 judge or the Court of Appeals or a judge thereof shall so order.

20 28 U.S.C. § 1292(b).

21 In this case, there are clearly two controlling issues of law – (1) whether an ROTC
22 member on active duty orders is protected by the SCRA; and (2) whether a violation of the
23 SCRA occurs prior to the entry of a default judgment, as that term is defined outside of the
24 SCRA, or whether the SCRA’s language itself controls.

25 In the event that the Court finds that both legal issues fall in Voorhees’ favor, it is
not reasonably disputable that there is at least a substantial ground for difference of opinion.
Further, it is clear that resolving these issues, immediately on appeal, will materially
advance the ultimate termination of the litigation. In fact, it is the only remaining claim
brought against Voorhees. If this motion is granted, there will no longer be a federal

1 question between these two parties, and this Court could dismiss the state claims between
2 these parties under Fed. R. Civ. P. 12(b)(1). Of course, Voorhees would not be deprived of
3 the ability to then re-file in state court, again, to resolve the state claims.

4 Accordingly, while Davis is confident that the motion should be denied, if it is
5 granted, it is an appropriate subject for certification for immediate appeal.

6 **6.0 CONCLUSION**

7 For the foregoing reasons, Ms. Davis respectfully requests that the Court deny
8 Defendant Voorhees's motion for judgment on the pleadings. In the alternative, if the Court
9 does grant the motion, it should certify it for immediate appeal under 28 U.S.C. § 1292(b).

10
11 Dated: February 21, 2023

Respectfully submitted,

/s/ Marc J. Randazza

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Case No. 3:21-cv-08249-DLR

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of February, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I further certify that a true and correct copy of the foregoing document being served via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Marc J. Randazza
Randazza Legal Group, PLLC

RANDAZZA | LEGAL GROUP

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