

1 PAUL HASTINGS LLP
ELENA R. BACA (SB# 160564)
2 elenabaca@paulhastings.com
RYAN D. DERRY (SB# 244337)
3 ryanderry@paulhastings.com
515 South Flower Street, 25th Floor
4 Los Angeles, CA 90071-2228
Telephone: (213) 683-6000
5 Facsimile: (213) 627-0705

6 Attorneys for Defendants
VIACOM INC. and BLACK
7 ENTERTAINMENT TELEVISION LLC

8
9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA

11
12 ZOLA MASHARIKI,

13 Plaintiff,

14 vs.

15 VIACOM INC.; BLACK
16 ENTERTAINMENT TELEVISION,
LLC; Stephen Hill, and DOES 1 through
17 50, inclusive,

18 Defendants.

CASE NO. 2:17-cv-03366 PSG (ASx)

**DEFENDANT BLACK
ENTERTAINMENT TELEVISION
LLC'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF ITS MOTION TO
DISMISS PURSUANT TO
FEDERAL RULE OF CIVIL
PROCEDURE 12(b)(6)**

Date: July 17, 2017
Time: 1:30 p.m.
Place: Courtroom 6A
Judge: Hon. Philip S. Gutierrez

Complaint filed: May 3, 2017

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Deadline

1 **I. INTRODUCTION AND FACTUAL BACKGROUND**¹

2 No one has treated Plaintiff Zola Mashariki (“Mashariki”) unfairly, let alone
 3 unlawfully. For over thirty-five years, BET® has shared with the world the culture,
 4 strength, varied experiences, and stories of the Black community through its
 5 television, online, and mobile platforms. For more than a decade, Debra Lee
 6 (Chairman and CEO of Defendant Black Entertainment Television LLC (“BET”))
 7 has been at its helm, leading an executive team largely comprised of women and
 8 persons of color. Lee’s and BET’s commitment to providing opportunities and
 9 advancement to women is long-standing and real.² BET, with the support of Lee,
 10 offered Mashariki a contract as BET’s Executive Vice President and Head of
 11 Original Programming (“BET-EVP Contract”). *See* Dkt. No. 1 at ¶ 24. BET, with
 12 the support of Lee, gave Mashariki an opportunity to work in television, despite
 13 Mashariki’s prior experience being *solely* in the production of feature films, not
 14 episodic television. *Id.* at ¶ 4.

15 By Mashariki’s own admission, her time at BET was tumultuous; peers and
 16 subordinates complained about Mashariki’s behavior and management style which
 17 led BET to propose that Mashariki work with a professional coach.³ *Id.* at ¶¶ 9, 44
 18 and 46. Lee needed an effective leader for BET’s Original Programming; she came
 19 to realize that Mashariki was not that person. Lee elected to exercise BET’s right to
 20 end the BET-EVP Contract before its natural term. Before Lee could meet with
 21 Mashariki to communicate her decision, Mashariki left work and, eventually, began
 22 a leave of absence.

23
 24 ¹ For the purposes of this Motion, where relevant, BET accepts, as “true”,
 25 Mashariki’s factual allegations. Nonetheless, BET adamantly denies that anyone
 26 treated Mashariki unlawfully, including Defendant Stephen Hill.

27 ² *See, e.g.* Request for Judicial Notice dated May 30, 2017, filed concurrently
 28 herewith (“RJN”), Ex. A (*BET Networks’ Leading Women Defined Summit*,
 established and led by Lee) available at <http://www.bet.com/topics/1/leading-women-defined.html>.

³ One BET employee who worked for Mashariki retained an attorney and accused Mashariki of pregnancy discrimination.

1 On February 28, 2017, the day before Mashariki’s scheduled return-to-work
2 date, Mashariki was informed (through her counsel) that her employment was being
3 terminated and she need not report to work the next day. Dkt. No. 1 at ¶ 63.
4 During the ensuing discussions, Mashariki’s lawyer said that Mashariki had
5 planned to extend her leave to April 11, 2017; out of compassion and empathy,
6 BET said it would therefore make the *effective date* of the termination April 11,
7 2017. *See* Dkt. No. 1 at 16 FN 1, ¶ 66. The BET-EVP Contract contemplated a 60
8 day period following termination during which health benefits and salary continued
9 and Mashariki could consider whether to execute a standard separation and general
10 release agreement in the form that was attached to the BET-EVP Contract.

11 One month later, on March 29, 2017, Lee announced in two internal
12 communications that Stephen Hill, President of Programming (and Mashariki’s
13 supervisor), had resigned; in the interim his duties would be assumed by Connie
14 Orlando, a female senior executive at BET. Dkt. No. 1 at ¶¶ 67-68. Lee also
15 mentioned in one of those communications that Mashariki “will also be departing
16 the network.” *Id.* Inexplicably, Mashariki sent dozens of BET employees a
17 deceptive, if not dishonest, email: despite having received notice February 28,
18 2017 and multiple communications thereafter that her BET-EVP Contract and
19 employment was terminated, Mashariki implied to the world that she was, in fact,
20 still employed by BET and would be returning to her position following her
21 medical leave. *Id.* at ¶ 70. The confusion Mashariki’s email caused, accompanied
22 by her lawyer’s statements to the press, triggered an alleged “media storm” and
23 required BET to respond. *Id.* at ¶¶ 72; *see, e.g.*, Request for Judicial Notice
24 (“RJN”) Ex. B.

25 Mashariki then sued—filing a complaint designed more with an eye towards
26 securing press coverage than framing legally cognizable claims. The Complaint is
27 filled with inflammatory argument and unsupported legal conclusion. For example,
28 Mashariki claims BET, under Debra Lee’s leadership, fosters a “good old boys’

1 club” and “misogynistic culture [that] oppresses women in the workplace.” Dkt.
 2 No. 1 at 8:14, ¶ 29. Mashariki included rumors and sensational descriptions of
 3 alleged events that do not appear to relate to any of her listed eighteen claims. For
 4 example, Mashariki describes an unidentified female co-worker as being “in a ‘dark
 5 place,’” and another unidentified female co-worker who purportedly told Mashariki
 6 that Hill’s micromanaging felt as though Hill was ““keeping his boot on the back of
 7 her neck.”” *Id.* at ¶¶ 33, 52. Worse still, Mashariki conflates parties and, within her
 8 claims, does little more than list the legal elements. Ultimately, Mashariki places
 9 this Court—and BET—in the impermissible position of not actually knowing what
 10 the alleged factual basis is for her eighteen claims, or whether they can be validly
 11 stated.

12 Accordingly, BET moves to dismiss the entire complaint, with its “shotgun
 13 pleading.” BET also requests that three other claims be dismissed with prejudice
 14 because two that are asserted against BET’s former executive, Hill, cannot be
 15 asserted against him as a matter of law; and, as for the eighteenth claim, Mashariki
 16 has not and will not be able to state a legally cognizable claim for defamation.

17 **II. RULE 8 REQUIRED MASHARIKI TO PLEAD FACTS**
 18 **DEMONSTRATING PLAUSIBLE CLAIMS AGAINST BET**

19 Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a case
 20 where the complaint fails to state a claim upon which relief can be granted. In
 21 reviewing a motion to dismiss under Rule 12(b)(6), a court must accept the
 22 allegations in the complaint as true and draw all reasonable inferences in favor of
 23 the plaintiff. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

24 However, to survive a challenge to the legal sufficiency of the claims under
 25 Rule 12(b)(6), a plaintiff must allege “more than labels and conclusions.” *Twombly*,
 26 550 U.S. at 555. Courts “are not bound to accept as true a legal conclusion couched
 27 as a factual allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing
 28 *Twombly*, 550 U.S. at 555) (internal quotation marks omitted). Naked assertions

1 devoid of further factual enhancement or “threadbare recitals of the elements of a
2 claim for relief, supported by mere conclusory statements,” are insufficient to
3 survive a motion to dismiss. *Id.* at 663. Instead, a plaintiff’s factual allegations
4 must “state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 556,
5 570.

6 **III. MASHARIKI’S COMPLAINT MUST BE DISMISSED BECAUSE IT**
7 **IS LITTLE MORE THAN “SHOTGUN PLEADING”**

8 Beyond containing sufficient factual allegations, a complaint must also
9 demonstrate clarity regarding the interplay of factual allegations, the respective
10 claims for relief, and alleged wrongdoer.

11 Courts in the Ninth Circuit are intolerant of what has been colloquially
12 termed “shotgun pleadings.” Such offending pleadings are “where the plaintiff
13 recites a collection of general allegations toward the beginning of the Complaint,
14 and then ‘each count incorporates every antecedent allegation by reference [.]’”).
15 *Sollberger v. Wachovia Securities, LLC*, No. SACV 09-0766 AG (ANx), 2010 WL
16 2674456, at *4 (C.D. Cal. Jun. 30, 2010) (citations omitted). Courts have found
17 them “unacceptable”, in that they “overwhelm defendants with an unclear mass of
18 allegations and make it difficult or impossible for defendants to make informed
19 responses to the plaintiff’s allegations.” *Id.*

20 Imprecision results in uncertainty regarding each claim—unfairly limiting
21 defendants’ and the court’s ability to adjudicate (much less, understand) the issues
22 before it:

23 Simply put, then, the problem with a shotgun pleading is
24 that it prevents the parties and the court from
25 understanding what the case is really about because the
26 pleadings are cluttered with irrelevant and unrelated facts.
27 The consequence is that discovery becomes a fool’s
28 errand in which parties seek out facts relating to claims
whose parameters are so fuzzy, amorphous and ill-defined
as to be utterly indeterminate.

1 *Destfino v. Kennedy*, No. CV-F-08-1269 LJO DLB, 2009 WL 63566 at *6 (E.D.
2 Cal. Jan. 8, 2009) (citations omitted).

3 Here, Mashariki does precisely that. The first 19 pages of the Complaint (75
4 paragraphs to be precise) purport to provide the factual support of each of
5 Mashariki's eighteen claims. *See generally* Dkt. No. 1. The initial paragraph in
6 each claim then states: "Ms. Mashariki re-alleges and incorporates by each and
7 every allegation in this Complaint as if fully set forth herein." *See, e.g.*, Dkt. No. 1,
8 at ¶¶ 76, 85, 94. What then follows is little more than the legal elements of each
9 claim. *See, e.g.*, Dkt. No. 1, at ¶¶ 77-78, 86-89, 95-103. As a result, it is unclear
10 from her Complaint which allegation(s) is/are intended to support which claim(s)
11 for relief.

12 Mashariki compounds the confusion—likely to mask the fact that Viacom
13 has been improperly joined—by conflating Viacom and BET (collectively referring
14 to both as "the Company") throughout the Complaint. *See, e.g.*, Dkt. No. 1 at ¶ 3
15 ("[T]he Company unlawfully terminated Ms. Mashariki . . ."); ¶ 27 ("[T]he
16 Company has discriminated and retaliated against her . . ."); ¶ 35 ("The Company
17 also denied . . .").

18 Mashariki, impermissibly, has made it impossible to discern the alleged
19 misconduct of each party, as required. *See Sollberger*, 2010 WL 2674456 at *4
20 (explaining improper use of the omnibus term 'Defendants,' without identifying
21 specific alleged wrongs); *EEOC v. La Rana Hawaii, LLC*, 888 F. Supp. 2d 1019,
22 1046 (D. Haw. 2012) ("[T]he majority of the Complaint refers collectively to
23 'Defendants' without distinction between the two parties. . . . [Plaintiff] must
24 allege specifically what wrongdoing it is assigning to each Defendant."). No one
25 should have to guess. Indeed, due process compels that Mashariki provide
26 sufficient notice of what facts she contends support her claims as to each of the
27 named Defendants. Accordingly, while certain claims should be dismissed with
28

1 prejudice (as discussed below), at a minimum, Mashariki should be required to
 2 eliminate the imprecision and guesswork required by her present Complaint.

3 **IV. MASHARIKI'S SECOND, EIGHTH, AND EIGHTEENTH CLAIMS**
 4 **SHOULD BE DISMISSED FOR ADDITIONAL REASONS**

5 Setting aside, momentarily, that the current pleading fails to provide
 6 sufficient notice of her alleged claims, Mashariki's second claim (for hostile work
 7 environment based on sex under Title VII) and eighth claim for (for gender
 8 discrimination under the California Fair Employment and Housing Act ["FEHA"])
 9 as asserted against Hill, and eighteenth claim as asserted against Viacom and BET
 10 (for defamation) should be dismissed with prejudice on other grounds.

11 **A. Mashariki Cannot Assert A Claim Against Hill Under Her Second**
 12 **and Eighth Claims For Relief**

13 Although BET's former executive (and Mashariki's former supervisor), Hill,
 14 has not yet appeared, Mashariki has asserted claims against him, individually, in her
 15 second claim for relief alleging hostile work environment under Title VII and
 16 eighth claim for relief alleging gender discrimination under FEHA. *See* Dkt. No. 1
 17 at 21:24-26 ("Count II"); 26:22-24 ("Count VIII").

18 Hill, an individual, cannot be liable for a violation of Title VII. *See, e.g.,*
 19 *Miller v. Maxwell Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) (holding no
 20 individual liability under Title VII). Nor can he be held liable for gender
 21 discrimination under FEHA. *See Janken v. GM Hughes Elecs.*, 46 Cal. App. 4th 55
 22 (1996) (holding that a plaintiff cannot assert a claim for gender discrimination
 23 under FEHA against an individual employee supervisor).

24 Accordingly, as a matter of law, Hill should be dismissed with prejudice
 25 from the second and eighth claims for relief.

26 **B. Mashariki's Fails To State A Legally Viable Claim of Defamation**

27 In her eighteenth claim for relief, Mashariki contends BET defamed her. *See*
 28 Dkt. No. 1 at ¶¶ 206-212. Defamation requires that Mashariki plead facts showing

1 that someone authorized to speak on behalf of BET: (i) intentionally published
2 (ii) a statement of fact (iii) that is false, (iv) unprivileged, and (v) “has a natural
3 tendency to injure or which causes special damage.” *Smith v. Maldonado*, 72 Cal.
4 App. 4th 637, 645 (1999); *see also* Cal. Civ. Code §§ 45, 46.

5 In Paragraph 207, Mashariki appears to premise her defamation claim on
6 BET’s alleged statements to the press “that Ms. Mashariki’s March 30, 2017 email
7 to her team misrepresented the facts and were without merit.” Dkt. No. 1 at ¶ 207.
8 Paragraph 206, the first paragraph listed in her defamation claim, however, also
9 incorporates *every other paragraph in the Complaint*. *See* Dkt. No. 1 at ¶ 206. In
10 so doing, it becomes anyone’s guess whether the defamation statement is solely
11 within Paragraph 207 or something found in the other 211 paragraphs of
12 Mashariki’s Complaint.

13 BET has combed through the Complaint. At best, it finds another five
14 statements that Mashariki claims are untrue and, thus, may (or may not) be
15 incorporated into her defamation claim. Regardless of whether she intended to rely
16 on one or all of them, none states an actionable claim of defamation.

17 **1. The “Statements” Described In Paragraphs 57, 70, 72 and**
18 **207 Are Too Vague To Be Actionable As Defamation**

19 A defamation claim cannot be premised on an ambiguous alleged statement:
20 “[A]lthough a plaintiff need not plead the allegedly defamatory statement verbatim,
21 the allegedly defamatory statement must be specifically identified, and the plaintiff
22 must plead the substance of the statement.” *Jacobson v. Schwarzenegger*, 357 F.
23 Supp. 2d 1198, 1216 (C.D. Cal. 2004). A plaintiff must also “specifically identify
24 who made the statements, when they were made and to whom they were made.”
25 *PAI Corp. v. Integrated Sci. Sols., Inc.*, No. C-06-5349 JSW (JCS), 2007 WL
26 1229329, at *9 (N.D. Cal. Apr. 25, 2007).

27 Of the six alleged statements that Mashariki may be relying on for her
28 defamation claim, four are too vague to be actionable. Mashariki alleges:

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Paragraph 57	“Upon information and belief . . . a senior BET executive defamed Ms. Mashariki by telling employees that she was ‘faking’ her condition. . . . these untrue and defamatory comments were rampant throughout the Company.” Dkt. No. 1 at ¶ 57.
Paragraph 70	“In response to press inquiries about Ms. Mashariki’s email, the Company commented that, ‘These claims misrepresent the facts and are without merit. We strongly deny any allegation of wrongdoing. In addition, we will not comment on specific employee matters.’ Carlos Greer, <i>Exec shake-up at BET is ‘next-level crazy’</i> , Page Six, March 31, 2017.” Dkt. No. 1 at ¶ 70.
Paragraph 72	“In the media storm that ensued, several anonymous ‘insiders’ made comments to the press that supported the Company’s implied messaging. For instance, a network insider informed Page Six that, ‘[Ms. Mashariki] was terminated as a result of her own performance prior to taking medical leave. They then allowed her to keep her contract, so she was able to keep her salary and benefits after being diagnosed. She is definitely terminated.’ Carlos Greer, <i>Exec shake-up at BET is ‘next-level crazy’</i> , Page Six, March 31, 2017.” Dkt. No. 1 at ¶ 72.
Paragraph 207	“BET harmed Ms. Mashariki by falsely telling reporters that Ms. Mashariki’s March 30, 2017 email to her team misrepresented the facts and were without merit.” Dkt. No. 1 at ¶ 207.

1 In each of these four statements, Mashariki fails to plead sufficient (critical)
 2 facts such as *who* the purported speaker was, and to *whom*, in *what context*, or *when*
 3 the statement was purportedly made. The lack of specifics forecloses a
 4 determination of whether each alleged statement is opinion, true, or subject to any
 5 potential privileges. *See, e.g., United States ex rel. Fryberger v. Kiewit Pac. Co.*,
 6 41 F. Supp. 3d 796, 814-15 (N.D. Cal. 2014) (dismissing plaintiff’s defamation
 7 claim without leave to amend because the Second Amended Complaint “repeat[ed]
 8 the same” “impermissibly vague and conclusory” allegations that “did not permit
 9 the Court to identify the statements at issue, nor to conclude whether the statements
 10 were permissible ‘opinion’ statement” as in the First Amended Complaint.).

11 Without such information, neither Defendants nor the Court can “reasonably
 12 infer” that Mashariki was defamed. *See Richardson v. HRHH Gaming Senior*
 13 *Mezz, LLC*, 99 F. Supp. 3d 1267, 1278 (D. Nev. 2015) (“Because ‘Plaintiff fail[ed]
 14 to identify the persons that made the allegedly defamatory statements, who the
 15 statements were published to, and when the statements were made,’” the Court
 16 could not “reasonably infer” that Defendant had defamed Plaintiff[;]” defamation
 17 claim dismissed). Accordingly, to the extent Mashariki’s defamation claim is
 18 based on these statements, it fails.

19 **2. The Statements Described In Paragraphs 68 and 71, Stating**
 20 **Mashariki Was Leaving BET, Are Not Actionable As The**
 21 **Complaint Demonstrates That, When Made, They Were**
 22 **True**

23 This leaves Mashariki with two of her original six potentially allegedly
 24 defamatory statements to support her claim. They fail because, as Mashariki’s
 25 Complaint reveals, when made—the statements were true. It is Hornbook law that
 26 truth is an absolute defense to a claim of defamation. *See, e.g., Cal. Civ. Code*
 27 *§§ 45-46* (requiring “false publications” for libel or slander).

28 Those two relevant statements are:

Paragraph 68	“[On March 29, 2017,] . . . Ms. Lee falsely claimed that, ‘Additionally, Zola Mashariki, EVP, and Head of Original Programming, will also be departing the network.’” Dkt. No. 1 at ¶ 68 (<i>see also</i> ¶ 65, referencing statement generally).
Paragraph 71	“The Company later repeated its false statement that Ms. Mashariki was no longer an employee: ‘BET rep Tracy McGraw, who confirms that Mashariki is no longer with the network, insists that they did nothing wrong.’” Dkt. No. 1 at ¶ 71.

Here, Mashariki admits she was told on February 28, 2017, that her employment was being terminated. Dkt. No. 1 at ¶ 63. Thus, BET’s CEO’s statement that Mashariki would be “departing the network” and, later, Ms. McGraw’s alleged “confirmation” that Ms. Mashariki was “no longer with the network” were both true statements. Because a required element of defamation is that the statement be untrue—and neither described comment on its face is untrue—these alleged statements cannot be considered defamatory.⁴

3. Mashariki’s Defamation Claim Further Fails Because She Has Not Pled Facts Demonstrating Any Statement Was Made With Malice

Finally, it is axiomatic that a defamation cause of action cannot be maintained against a “public figure” unless the plaintiff sufficiently pleads facts demonstrating the alleged false statement(s) was/were made with malice. *See Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 270 (9th Cir. 2013) (applying California law: “Because Trump University is a limited purpose public figure, to prevail on its defamation claim it must establish that Makaeff made her statements

⁴ Moreover, the alleged statement in Paragraph 68 is also privileged under the common interest privilege. *See* Cal. Civ. Code 47(c). Lee sent the email referenced in Paragraph 68 to personnel of BET and there is no claim of malice. *See id.*

1 with ‘actual malice,’ i.e., knowledge of their falsity or reckless disregard of their
2 truth.’) (citations omitted). California recognizes that an individual need not be a
3 general public figure, but may be a limited purpose (or “vortex”) public figure with
4 respect to the underlying alleged statements. *See Ampex Corp. v. Cargle*, 128 Cal.
5 App. 4th 1569, 1577 (2005) (“The limited purpose public figure is an individual
6 who voluntarily injects him or herself or is drawn into a specific public controversy,
7 thereby becoming a public figure on a limited range of issues.”). The California
8 Supreme Court explained the rationale behind the limited purpose public figure rule
9 in *Reader’s Digest Association v. Superior Court*, 37 Cal.3d 244 (1984):

10 [P]ublic figures are generally less vulnerable to injury
11 from defamation because of their ability to resort to
12 effective “self help.” Such persons ordinarily enjoy
13 considerably greater access than private individuals to the
14 media and other channels of communication. This access
15 in turn enables them to counter criticism and to expose the
16 fallacies of defamatory statements. . . . [P]ublic figures
are [also] less deserving of protection than private persons
because public figures, like public officials, have
“voluntarily exposed themselves to increased risk of
injury from defamatory falsehood concerning them.”

17 37 Cal.3d at 253 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974)).

18 Here, Mashariki, as she describes herself, is “one of the entertainment
19 industry’s most sought-after creative minds.” Dkt. No. 1 at ¶ 1. She worked as an
20 Executive Vice President and Head of Original Programming for BET (Dkt. No. 1
21 at ¶ 17)—a household name and the premier television network focused on Black
22 audiences. *See also* Dkt. No. ¶ 5 (alleging Mashariki joined BET because “BET’s
23 brand spoke to her.”) By doing so, Mashariki invited and accepted the potential
24 media attention and public commentary that would follow. *See, e.g., McGarry v.*
25 *Univ. of San Diego*, 154 Cal. App. 4th 97, 115 (2007) (“[O]ne’s voluntary decision
26 to pursue a career in sports, whether as an athlete or a coach, ‘invites attention and
27 comment’ regarding his job performance and thus constitutes an assumption of the
28 risk of negative publicity.”) (citing *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1119

1 (N.D. Cal. 1984). Indeed, as Mashariki alleges, the press was interested in her
2 employment status, and the attention it received, due to the confusion Mashariki's
3 email caused, accompanied by her lawyer's statements to the press, resulted in a
4 "media storm." Dkt. No. 1 at ¶¶ 68-70, 72; RJN B.

5 Given Mashariki's high-profile position at BET, there should be no dispute
6 she is a public figure or, at the very least, a limited purpose public figure. *See, e.g.,*
7 *Roe v. Doe*, No. C 09-0682 PJH, 2009 U.S. Dist. LEXIS 59440, at *35 (N.D. Cal.,
8 Jun. 20, 2009) (holding a basketball coach/general manager for NBA franchises
9 was a limited-purpose public figure for purposes of statements regarding
10 performance); *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 26 (2007) (holding a plastic
11 surgeon plaintiff became a limited purpose public figure by injecting himself into
12 the public debate regarding plastic surgery and personal enhancement); *Rudnick v.*
13 *McMillan*, 25 Cal. App. 4th 1183, 1190 (1994) (holding plaintiff was a limited
14 public figure by speaking to a publisher about his concerns regarding publicly held
15 reserved land and working with the publisher to edit an article for publication).

16 Accordingly, Mashariki must plead facts sufficiently demonstrating any or all
17 of the six allegedly defamatory statements were made with actual malice. *See*
18 *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1108 (N.D. Cal. 1999) ("Public figures
19 must prove actual malice in order to recover on defamation claims); *see also*
20 *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1063 (9th Cir. 1998) ("[W]hen 'a
21 plaintiff seeks damages . . . for conduct which is prima facie protected by the First
22 Amendment, the danger that the mere pendency of the action will chill the exercise
23 of First Amendment rights requires more specific allegations than would otherwise
24 be required.'") (*quoting Franchise Realty Interstate Corp. v. Bd. of Culinary*
25 *Workers*, 542 F.2d 1076, 1083 (9th Cir. 1976)).

26 Mashariki, however, does not even come close—relying again on legal
27 conclusions that do not meet the minimum pleading requirements, let alone the
28 elevated standard for malice. *See e.g.,* Dkt. No. 1 at ¶ 211 ("Defendants' conduct

1 has been deliberate, willful, oppressive, malicious, fraudulent, and conducted in
 2 callous disregard of Ms. Mashariki’s rights[.]”) Such conclusive allegations do not
 3 satisfy her pleading requirement. *See, e.g., Makedeff*, 715 F.3d at 270 (a limited-
 4 purpose public figure “must show by clear and convincing evidence that
 5 [defendant] ‘entertained serious doubts as to the truth’ of [its] statements.”)
 6 (citations omitted). Accordingly, for this independent reason, Mashariki’s
 7 defamation claim should be dismissed.

8 **C. Mashariki’s Deficient Second, Eighth, and Eighteenth Claims For**
 9 **Relief Should Be Dismissed Without Leave to Amend**

10 As the Ninth Circuit has recognized, a dismissal of a complaint with
 11 prejudice is proper when a court finds that “allegation[s] of other facts consistent
 12 with the challenged pleading could not possibly cure the deficiency.” *Schreiber*
 13 *Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986); *see*
 14 *also Eminence Capital LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003)
 15 (recognizing that dismissal with prejudice is appropriate where it is clear “that the
 16 complaint could not be saved by amendment.”); *Saul v. United States*, 928 F.2d
 17 829, 843 (9th Cir. 1991) (denying plaintiff leave to amend, despite his offer of
 18 proof to add injunctive and class relief to his prayer for relief: “A district court
 19 does not err in denying leave to amend where the amendment would be futile, or
 20 where the amended complaint would be subject to dismissal.”) (citations omitted).

21 Here, Mashariki’s second and eighth claims, as asserted against Hill and her
 22 eighteenth claim cannot be cured by amendment. Neither Title VII nor FEHA
 23 allow for individual liability, as asserted in the second and eighth claims. As for
 24 her defamation (eighteenth claim)—even if Mashariki were to try to clarify the
 25 vagueness of her Complaint and specifically incorporate the alleged comments
 26 about which she complains—it will still fail for three reasons.

27 First, presumably if Mashariki had known the names of the alleged speakers
 28 or could have provided more detail as to the four vague allegations, she would have

1 so pled. Second, as for the two statements that are demonstratively true, she cannot
2 cure that. Third, as for malice, again, if Mashariki had facts that would suggest that
3 any of the statements were made out of malice, presumably she would have
4 asserted those facts. Nor does it seem likely that any facts demonstrating malice by
5 the alleged speaker at the time the statement was made exists: (i) three of the
6 identified statement are denials of her allegations of wrongdoing (thus invited by
7 her email to her “team” and statements to the press); (ii) two were Lee’s vanilla
8 statement that Mashariki would be leaving BET; and (iii) the last is asserted on
9 “information and belief” and may never have happened, at all.

10 Accordingly, absent a legitimate offer of proof as to how Mashariki could
11 possibly cure these defects—something Mashariki will be unable to provide—the
12 Court should dismiss her second and eighth claims asserted against Hill and her
13 eighteenth claim of defamation, without leave to amend. *See Foman v. Davis*, 371
14 U.S. 178, 183 (1962) (leave to amend is unnecessary where any such amendment
15 would be “futile.”). Anything less would unfairly require BET to expend additional
16 financial and other resources defending against insufficiently pled (and, ultimately,
17 not legally cognizable) claims. *See Twombly*, 550 U.S. at 546 (in analyzing the
18 sufficiency of plaintiff’s allegations, “[i]t is one thing to be cautious before
19 dismissing a[] . . . complaint in advance of discovery, but quite another to forget
20 that proceeding to . . . discovery can be expensive.”); *Associated Gen. Contractors*
21 *of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528, n. 17 (1983) (“[A] district court must
22 retain the power to insist upon some specificity in pleading before allowing a
23 potentially massive factual controversy to proceed.”). *That*, in turn, would allow
24 Mashariki to misuse the judicial process—something this Court should not allow.

1 **V. CONCLUSION**

2 For the foregoing reasons, BET respectfully request that the Court dismiss
3 Mashariki’s Complaint in its entirety, and, as for Mashariki’s second and eighth
4 claims, as asserted against Hill, and her eighteenth claim for defamation, that these
5 claims be dismissed with prejudice.

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7 DATED: May 30, 2017

PAUL HASTINGS LLP
ELENA R. BACA
RYAN D. DERRY

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By: /s/ Elena R. Baca

ELENA R. BACA

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Attorneys for Defendants
VIACOM INC. and BLACK
ENTERTAINMENT TELEVISION LLC

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