

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 8 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

VIVIAN EPPS,

Plaintiff-Appellant,

v.

CVS HEALTH CORPORATION,

Defendant-Appellee.

No. 19-16100

D.C. No. 2:18-cv-01274-DGC
District of Arizona,
Phoenix

ORDER

Before: TASHIMA, SILVERMAN, and OWENS, Circuit Judges.

Epps's petition for panel rehearing (Docket Entry No. 68) is denied. Her motion for peremptory challenge (Docket Entry No. 69) is denied as moot.

Non-party Lukashin's request for publication (Docket Entry No. 67) is denied.

No further filings will be entertained in this closed case.

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 16 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

VIVIAN EPPS,

Plaintiff-Appellant,

v.

CVS HEALTH CORPORATION,

Defendant-Appellee.

No. 19-16100

D.C. No. 2:18-cv-01274-DGC

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona

David G. Campbell, District Judge, Presiding

Submitted September 8, 2020**

Before: TASHIMA, SILVERMAN, and OWENS, Circuit Judges.

Vivian Epps appeals pro se from the district court's summary judgment in her diversity action alleging a negligence claim arising out of an incident at a CVS store. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion. *Glick v. Edwards*, 803 F.3d 505, 508 (9th Cir. 2015) (recusal); *Valdivia*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

v. Schwarzenegger, 599 F.3d 984, 988 (9th Cir. 2010) (Fed. R. Civ. P. 60(b)); *DIRECTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 852 (9th Cir. 2007) (default judgment). We affirm.

Epps failed to include any argument in her opening brief regarding the district court's grant of summary judgment on her claims, and thus has waived any challenge to that issue. *See McKay v. Ingleson*, 558 F.3d 888, 891 n.5 (9th Cir. 2009) (arguments not raised in an appellant's opening brief are waived).

The district court did not abuse its discretion in denying Epps's Rule 60(b) motions because Epps presented no basis for post-judgment relief. *See Fed. R. Civ. P. 60(b); Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1093 (9th Cir. 2003) (relief under Rule 60(b) is warranted only where the moving party can show: (i) "newly discovered evidence" within the meaning of Rule 60(b); (ii) that, with the exercise of due diligence, could not have been discovered earlier; and (iii) that earlier production of which would have likely changed the disposition of the case).

The district court did not abuse its discretion in denying Epps's motions for default judgment where defendant indicated that it intended to defend the action by appearing and filing an answer and a motion to dismiss. *See Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.*, 840 F.2d 685, 689 (9th Cir. 1988) (a default judgment is inappropriate if defendant indicates its intent to

defend the action); *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986) (explaining that “default judgments are ordinarily disfavored” and courts should consider several factors in entering a default judgment).

The district court did not abuse its discretion in denying Epps’s motion to recuse District Judge Campbell because Epps failed to demonstrate any basis for recusal. *See United States v. Hernandez*, 109 F.3d 1450, 1453 (9th Cir. 1997) (discussing standard for recusal under 28 U.S.C. §§ 144 and 455); *United States v. McChesney*, 871 F.3d 801, 807 (9th Cir. 2017) (judicial rulings are not a proper basis for recusal).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

All pending motions are denied.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 10. Bill of Costs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature

Date

(use "s/[typed name]" to sign electronically-filed documents)

COST TAXABLE	REQUESTED (each column must be completed)			
DOCUMENTS / FEE PAID	No. of Copies	Pages per Copy	Cost per Page	TOTAL COST
Excerpts of Record*	<div style="border: 1px solid black; width: 60px; height: 25px;"></div>	<div style="border: 1px solid black; width: 60px; height: 25px;"></div>	\$ <div style="border: 1px solid black; width: 80px; height: 25px;"></div>	\$ <div style="border: 1px solid black; width: 80px; height: 25px;"></div>
Principal Brief(s) (<i>Opening Brief; Answering Brief; 1st, 2nd, and/or 3rd Brief on Cross-Appeal; Intervenor Brief</i>)	<div style="border: 1px solid black; width: 60px; height: 25px;"></div>	<div style="border: 1px solid black; width: 60px; height: 25px;"></div>	\$ <div style="border: 1px solid black; width: 80px; height: 25px;"></div>	\$ <div style="border: 1px solid black; width: 80px; height: 25px;"></div>
Reply Brief / Cross-Appeal Reply Brief	<div style="border: 1px solid black; width: 60px; height: 25px;"></div>	<div style="border: 1px solid black; width: 60px; height: 25px;"></div>	\$ <div style="border: 1px solid black; width: 80px; height: 25px;"></div>	\$ <div style="border: 1px solid black; width: 80px; height: 25px;"></div>
Supplemental Brief(s)	<div style="border: 1px solid black; width: 60px; height: 25px;"></div>	<div style="border: 1px solid black; width: 60px; height: 25px;"></div>	\$ <div style="border: 1px solid black; width: 80px; height: 25px;"></div>	\$ <div style="border: 1px solid black; width: 80px; height: 25px;"></div>
Petition for Review Docket Fee / Petition for Writ of Mandamus Docket Fee				\$ <div style="border: 1px solid black; width: 80px; height: 25px;"></div>
TOTAL:				\$ <div style="border: 1px solid black; width: 80px; height: 25px;"></div>

***Example:** Calculate 4 copies of 3 volumes of excerpts of record that total 500 pages [Vol. 1 (10 pgs.) + Vol. 2 (250 pgs.) + Vol. 3 (240 pgs.)] as:

No. of Copies: 4; Pages per Copy: 500; Cost per Page: \$.10 (or actual cost IF less than \$.10);

TOTAL: 4 x 500 x \$.10 = \$200.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Vivian Epps,
10 Plaintiff,

11 v.

12 CVS Health Corporation,
13 Defendant.
14

No. CV18-1274-PHX DGC

ORDER

15 Pro se Plaintiff Vivian Epps sued CVS Health Corporation (“CVS”) alleging
16 injuries received at CVS retail store #2963 (“Store 2963”). Doc. 1. CVS moves for
17 summary judgment (Doc. 71), and Plaintiff has filed a cross motion for summary judgment
18 (Doc. 79). The motions are fully briefed, and oral argument will not aid the Court’s
19 decision. Fed. R. Civ. P. 78(b); LRCiv 7.2(f). For the reasons that follow, the Court will
20 grant CVS’s motion and deny Plaintiff’s motion.

21 **I. Background.**

22 On January 23, 2017, Plaintiff visited Store 2963 in Phoenix, Arizona. *See* Doc. 72
23 ¶ 1. She alleges that she suffered a head injury when a “metal bindery-shade,” situated
24 above the store’s dairy container, fell and hit her on the head. Doc. 1 at 1-2.

25 Plaintiff filed a complaint on April 25, 2018, naming CVS as the sole defendant.
26 *See* Docs. 1, 72 ¶ 2, 84 ¶ 2. German Dobson CVS, LLC (“German”), moved to dismiss the
27 complaint, asserting that it owns and operates Store 2963 and that it had not been properly
28 served. Doc. 14. Plaintiff responded that she chose to sue the “HEADquarters rather than

1 the BODY of the snake.” Doc. 18 at 2. The Court denied German’s motion because it was
2 not a party to the suit and Plaintiff clearly stated her intent to sue CVS and not German.
3 Doc. 24 at 1.

4 At a case management conference on September 27, 2018, the Court explained to
5 Plaintiff that CVS and German were asserting that she had sued the wrong defendant. The
6 Court explained that Plaintiff could amend her complaint to name the correct defendant,
7 but if she chose to sue only CVS and the Court later determined on summary judgment that
8 CVS did not own Store 2963, summary judgment could be entered against her. Doc. 60
9 at 7-14. Plaintiff declined to amend and stated that she would stand on her complaint
10 against CVS. *Id.* The Court accordingly established a schedule for focused discovery on
11 whether CVS can be liable for Plaintiff’s injuries. Doc. 53.

12 Discovery has now closed, and CVS moves for summary judgment. CVS asserts
13 that it cannot be liable to Plaintiff because it is not a possessor of Store 2963 and has no
14 special relationship that establishes a duty to Plaintiff. Doc. 71.

15 The Court explained at the case management conference that Plaintiff is required to
16 follow the Federal Rules of Civil Procedure and the Court’s Local Rules. Doc. 60 at 3-5.
17 The Court apprised Plaintiff of a handbook for pro se litigants prepared by the Court and
18 available on its website. *Id.* at 5. The handbook includes a section on the summary
19 judgment process. *See Representing Yourself in Federal Court in the District of Arizona:*
20 *A Handbook for Self-Represented Litigants* (3d. ed. 2016) at 70-73, *available at* [http://](http://www.azd.uscourts.gov/handbook-self-represented-litigants)
21 www.azd.uscourts.gov/handbook-self-represented-litigants. The Court also explained the
22 summary judgment process to Plaintiff in an order dated February 15, 2019. *See* Doc. 77.

23 Despite this attempted assistance, Plaintiff has filed a bewildering array of
24 documents. These include two motions for summary judgment (Docs. 74, 79), three
25 responses to CVS’s motion for summary judgment (Docs. 73, 76, 83), briefs in support of
26 her motion and response (Docs. 81, 85), a motion to submit copies of other evidence with
27 an accompanying memorandum (Docs. 90, 91), a motion for leave to file a response to
28 Defendants’ reply (Doc. 92), and a motion to amend or correct exhibits with an

1 accompanying memorandum (Docs. 95-96). Plaintiff attaches exhibits, most of them
2 duplicative, to eight of these filings. *See* Docs. 74, 75, 76, 79, 81, 82, 85, 86.

3 After Plaintiff's first motion for summary judgment and two responses to CVS's
4 motion, the Court gave Plaintiff until February 28, 2019 to file a new motion for summary
5 judgment and until March 11, 2019 to file a response brief that complied fully with Rule 56.
6 Doc. 77. Because they were filed after the Court's clarifying order, the Court has focused
7 primarily on Plaintiff's second motion for summary judgment (Doc. 79) and her last
8 response to CVS's motion (Doc. 83).

9 **II. Legal Standard.**

10 A party seeking summary judgment "bears the initial responsibility of informing the
11 district court of the basis for its motion and identifying those portions of [the record] which
12 it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v.*
13 *Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is appropriate if the evidence,
14 viewed in the light most favorable to the nonmoving party, shows "that there is no genuine
15 dispute as to any material fact and the movant is entitled to judgment as a matter of law."
16 Fed. R. Civ. P. 56(a). Summary judgment is also appropriate against a party who "fails to
17 make a showing sufficient to establish the existence of an element essential to that party's
18 case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S.
19 at 322.

20 **III. Negligence.**

21 Because the parties do not dispute choice of law, and both apply Arizona law in
22 their briefs, the court will also apply Arizona law. A negligence action may be maintained
23 in Arizona "only if there is a duty or obligation, recognized by law, which requires the
24 defendant to conform to a particular standard of conduct in order to protect others against
25 unreasonable risks of harm." *Markowitz v. Ariz. Parks Bd.*, 706 P.2d 364, 366 (Ariz. 1985);
26 *see also Gipson v. Kasey*, 150 P.3d 228, 230 (Ariz. 2007) (setting forth the elements of a
27 negligence claim). The primary issue is whether CVS owes a duty to Plaintiff.
28

1 Duty normally is determined as a matter of law. *Beach v. City of Phoenix*, 667 P.2d
 2 1316, 1320 (Ariz. 1983). Under Arizona law, a duty must be based on a special relationship
 3 recognized by the common law or a relationship created by public policy. *See Quiroz v.*
 4 *ALCOA Inc.*, 416 P.3d 824, 829 (Ariz. 2018).

5 **A. Premises Liability.**

6 Arizona recognizes that a possessor of land has an affirmative duty to use reasonable
 7 care to make its premises safe for use by invitees. *See Markowitz*, 706 P.2d at 368. To be
 8 a possessor of land, an entity must occupy the land with the intent to control it. *See*
 9 *Timmons v. Ross Dress for Less*, 324 P.3d 855, 856-57 (Ariz. Ct. App. 2014); Restatement
 10 (Second) of Torts § 328E.

11 CVS argues that it neither possesses nor owns Store 2963, and that the owner of the
 12 store is German. Doc. 71 at 4. CVS does not manage, own, or control German. *Id.* Nor
 13 does CVS control any employees or conduct any business in Arizona. *Id.* CVS supports
 14 these assertions with an affidavit from Melanie Luker, a senior manager of corporate
 15 services for CVS Pharmacy, Inc. *See* Doc. 72-1 at 36-37 ¶¶ 4-9; *see also* Doc. 72 ¶¶ 16-20.

16 Plaintiff responds that CVS is the parent company of Store 2963 and that the store
 17 is a subsidiary of CVS. Doc. 85 at 3. She asserts that a parent, by law, is liable for its
 18 subsidiaries. *Id.* She attaches several exhibits, although her motion cites only a few of
 19 them.

20 Exhibit A states “CVS Pharmacy Retail company” at the top and then states
 21 “Description[:] CVS Pharmacy is a subsidiary of the American retail and health care
 22 company CVS Health.” Doc. 85 at 6. It provides a Rhode Island headquarters location
 23 and states “Wikipedia.” *Id.* It also indicates “Parent organization: CVS Health.” *Id.*
 24 Although it appears there are web addresses and other routing language at the top of the
 25 page, it is not clear where the information originated. *Id.*

26 Exhibit B appears to be language copied from a website with an overview for CVS
 27 Pharmacy, Inc. *Id.* at 8. It states: “The company sells its products through retail stores and
 28 online. . . . The company was incorporated in 1969 and is based in Woonsocket, Rhode

1 Island. CVS Pharmacy Inc. operates as a subsidiary of CVS Health Corporation.” *Id.* The
2 document provides a website address after the cited language. *Id.* It also contains what
3 are presumably webpage extracts, with website addresses for Fortune and Bloomberg.
4 Doc. 85 at 9. The clipped information refers to CVS’s purchase of Aetna, and the name
5 change to CVS Pharmacy, Inc. from CVS, Inc. *Id.* at 9.

6 Exhibit C provides a list of questions and answers and states that CVS Health owns
7 CVS Pharmacy, Inc., but fails to indicate the source of the information. *Id.* at 11.

8 Exhibit D refers to “the Company” without specifying that it is CVS and contains
9 general statements about its performance and operations. *Id.* at 13. It also includes
10 information about profits of CVS Health. *Id.* at 14.

11 Exhibit E appears to be a web search for information about Store 2963. It states that
12 “Cvs Pharmacy #02963 is doing business as a local retailer of German Dobson Cvs, LLC,
13 providing medical supplies and equipment which are considered as Medicare chargeable
14 items.” *Id.* at 17.

15 Exhibit F is an email from Jeannine A. Pratt to Plaintiff which says: “I just received
16 your letter about video for our CVS Store 2963.” *Id.* at 19. Ms. Pratt appears to be an
17 employee of CVS Health. *Id.*

18 Exhibit G appears to be a portion of a web page which states that “CVS Health has
19 more than 9800 CVS Pharmacy stores and more than 1100 Minute Clinic . . . retail
20 locations in 49 states, the District of Columbia, Puerto Rico, and Brazil.” *Id.* at 21. The
21 exhibit contains other information about CVS and an unrelated photograph, apparently of
22 Store 2963. *Id.* at 23.

23 CVS responds that Plaintiff’s evidence cannot be considered because she fails to
24 show its admissibility. *See* Doc. 87 at 2. The Court disagrees. Evidence requires
25 “authentication or identification as a condition precedent to admissibility.” *Id.* “To satisfy
26 the requirement of authenticating or identifying an item of evidence, the proponent must
27 produce evidence sufficient to support a finding that the item is what the proponent claims
28 it is.” Fed. R. Evid. 901(a). Documents that are not properly authenticated cannot *support*

1 a motion for summary judgment. *See Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920,
2 925 (9th Cir. 1987). But evidence need not be in an admissible form to *avoid* summary
3 judgment. *See Celotex*, 477 U.S. at 324; *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir.
4 2003). At this stage, the proper inquiry is not the “admissibility of the evidence’s form,”
5 but whether the contents of the evidence are admissible. *See Quanta Indem. Co. v.*
6 *Amberwood Dev.*, No. CV-11-01807-PHX-JAT, 2014 WL 1246144, at *2 (D. Ariz.
7 March 26, 2014) (quoting *Fraser*, 342 F.3d at 1036). CVS makes no objections regarding
8 the content of the evidence.

9 CVS also argues that the evidence, even if admissible, fails to demonstrate a genuine
10 dispute of material fact. The Court agrees. Plaintiff’s evidence shows that CVS Pharmacy,
11 Inc. is a subsidiary of CVS, but it does not connect this relationship to ownership or
12 possession of Store 2963 as required for premises liability. The closest document appears
13 to be Exhibit F, in which Ms. Pratt refers to Store 2963 as “our store,” but Plaintiff provides
14 no further information. The Court cannot tell from the email whether Ms. Pratt is simply
15 referring to a CVS affiliate or franchise location, or whether CVS has some more
16 significant relationship with German. And Plaintiff provides no additional information on
17 this question.

18 CVS’s sworn affidavit indicates that German owns Store 2963, and nothing
19 provided by Plaintiff refutes that fact. To the contrary, Plaintiff’s Exhibit E states that
20 Store 2963 “is doing business as a local retailer of German Dobson Cvs, LLC.” *Id.* at 17.

21 Nor does the evidence contradict CVS’s assertion that it does not control or manage
22 German. Plaintiff’s evidence says nothing about the relationship between CVS and
23 German. Instead, Plaintiff’s arguments conflate CVS Pharmacy, Inc. with Store 2963 and
24 erroneously equate subsidiary status with ownership or possession for the purposes of
25 premises liability. *See* Doc. 85 at 3; *see also Airbus DS Optronics GmbH v. Nivisys LLC.*,
26 183 F. Supp. 3d 986, 991 (D. Ariz. 2016) (“Generally, a parent corporation is not held
27 liable for the actions of a subsidiary.”).¹

28 ¹ Plaintiff also asserts that “[u]nder the Occupiers Liability Acts 1957 and 1984, an

1 Plaintiff challenges CVS's affidavit under Rule 56(e), arguing that it contains
2 inadmissible hearsay. *See* Doc. 84 ¶¶ 5-9. The Court disagrees.

3 Inadmissible hearsay cannot support or defeat a motion for summary judgment. *Kim*
4 *v. United States*, 121 F.3d 1269, 1276-77 (9th Cir. 1997). But courts may consider hearsay
5 evidence contained in an affidavit where the affiant could later present the evidence in
6 admissible form at trial. *See Fraser*, 342 F.3d at 1036; *Williams v. Borough of W. Chester*,
7 891 F.2d 458, 465 n.12 (3d Cir. 1989). No party argues that Ms. Luker would be unable
8 to testify at trial. And the facts set forth in her affidavit are based on her personal
9 knowledge as a senior manager of corporate services for CVS Pharmacy, Inc. This is
10 sufficient for considering an affidavit on summary judgment. *See* Fed. R. Civ. P. 56(c)(4).

11 In short, Plaintiff presents no evidence to controvert CVS's showing that it does not
12 own Store 2963 or control German. Plaintiff was afforded a fair opportunity to name both
13 CVS and German as defendants in this action, and declined to do so. She was then afforded
14 a reasonable time to conduct discovery. Plaintiff has made multiple filings with numerous
15 exhibits, and yet has failed to produce probative evidence to dispute CVS's assertions. The
16 Court will grant summary judgment on Plaintiff's premises claim because the undisputed
17 evidence shows that CVS did not own Store 2963 or control German.

18 **B. Special Relationship.**

19 Under Arizona law, various categories of relationships can give rise to a duty aside
20 from the landowner-invitee relationship described above, including duties based on
21 contracts, family relationships, and the parties' undertakings. *Gipson*, 150 P.3d at 232.
22 Plaintiff asserts that CVS Health owes her a duty because it has a special relationship with
23 German as the parent company to Store 2963. Doc. 85 at 3. She cites no authority to
24 support this assertion. And even if Plaintiff could show a special relationship between
25 German and CVS (something she has not done), that would not equate to a duty owed to
26 Plaintiff. The relationship would only create a duty of care between German and CVS.

27 Occupier's responsibility to ensure that Invitees to business premises will be reasonable
28 safe in using the premises AND [t]hat the Occupier's owes a common Duty of Care to
Invitees." Doc. 85 at 3. The Court assumes that she is referring to premises liability
because there is no independent basis for liability under an "Occupier's Liability Act."

1 See *Quiroz*, 416 P.3d at 831 (the special employee-employer relationship between father
2 and the employer did not create a special relationship between the employer and any
3 member of the public who may have been exposed to secondary asbestos). Similarly,
4 Plaintiff cites no statute or authority supporting a duty as a matter of public policy. *Quiroz*,
5 416 P.3d at 830-31 (duties based on public policy are primarily derived from state statutes,
6 the common law, or the Restatement).

7 **C. Piercing the Corporate Veil.**

8 Plaintiff argues that because Store 2963 is a subsidiary of CVS, the Court should
9 pierce the corporate veil and allow recovery against CVS under “Section 1159 of the
10 Companies Act 2006.” Doc. 85 at 3. She asserts that a parent corporation may be directly
11 or indirectly liable as an operator under the Supreme Court’s decision in *United States v.*
12 *Best Foods*, 524 U.S. 51, 64-65 (1998). *Id.* at 4. She asserts that a trial is required to
13 determine the power or influence CVS exercised over its subsidiary. *Id.* Even if German
14 was a subsidiary of CVS (something Plaintiff has not shown), Plaintiff has not presented
15 enough evidence to find a genuine issue of fact exists as to whether the corporate veil
16 should be pierced.

17 *Best Foods* is inapposite here – it addresses owner and operator liability under
18 CERCLA, the federal superfund statute. It recognizes that a parent corporation may incur
19 operator liability under CERCLA if it directly participates in operation of a subsidiary’s
20 polluting facility. 524 U.S. at 60. But Plaintiff’s case against CVS is not brought under
21 CERCLA and there is no statutory operator liability here. Plaintiff cites no law for the
22 proposition that a parent corporation can be liable for its subsidiary’s negligence absent
23 piercing of the corporate veil.

24 In determining whether to pierce the corporate veil, the law of the state of
25 incorporation applies. *Gemstar Ltd. v. Ernst & Young*, 917 P.2d 222, 230 (1996). CVS is
26 a Delaware corporation organized under the laws of that state. Doc. 72 ¶ 16. Under
27 Delaware law, piercing a corporate veil requires a fact-intensive inquiry regarding
28 (1) whether the company was adequately capitalized for the undertaking; (2) whether the

1 company was solvent; (3) whether corporate formalities were observed; (4) whether the
2 controlling shareholder siphoned company funds; and (5) whether the company functioned
3 as a façade for the controlling shareholder. *ASEA/AFSCME Local Health 52 Health*
4 *Benefits Tr. v. Abbott Labs.*, No. 17-cv-6704, 2018 WL 3022670, at *3 (N.D. Ill. June 18,
5 2018). Additionally, “[t]o state a ‘veil-piercing claim,’ the plaintiff must plead facts
6 supporting an inference that the corporation, through its alter-ego, has created a sham entity
7 designed to defraud investors and creditors.” *Crosse v. BCBSD, Inc.*, 836 A.2d 492, 497
8 (De. 2003). The test for fraud essentially requires a showing that the subsidiary corporation
9 is nothing more than a legal fiction. *See Pearson v. Component Tech. Corp.*, 247 F.3d 471,
10 485 (3rd Cir. 2001).

11 Plaintiff puts forth the following arguments to support piercing the corporate veil:
12 (1) when CVS decided to stop cigarette sales in their stores, German had no input (Doc. 85
13 at 3); (2) CVS and German operated as a single business entity that collected net revenue
14 (*Id.*; Doc. 86 ¶ 17); and (3) German has inside office space at the CVS headquarters in
15 Rhode Island (Doc. 83 at 2). Plaintiff’s first argument fails because she provides no
16 evidence to support it. She cites to what appears to be a company press release regarding
17 the cessation of the sale of tobacco products, but nothing in this document discusses
18 German’s role or authority in that decision. Doc. 85 at 23. Plaintiff also provides no
19 evidentiary support for her third argument.

20 Plaintiff supports her second argument with a document showing CVS’s operating
21 results for the first three months of 2018. *See* Doc. 85 at 14. She argues that this document
22 shows CVS controlled all of Store 2963’s financial revenue. Doc. 83 at 2. But this
23 document does not call into question CVS or German’s capitalization, solvency, or
24 corporate formalities, nor does it indicate that CVS operated through a sham entity with
25 the intent of defrauding investors or creditors. And while it mentions retail stores, it does
26 not refer to Store 2963 or state that CVS shared revenue with the store. Even if the mention
27 of retail stores were deemed to refer to Store 2963, this document would demonstrate only
28 one factor in a multifaceted inquiry into whether German and CVS operated as a single

1 entity. *See Pearson*, 247 F.3d at 485 (“[T]o succeed on an alter ego theory of liability,
2 plaintiffs must essentially demonstrate that in all aspects of the business, the two
3 corporations actually functioned as a single entity and should be treated as such.”).
4 Plaintiff’s evidence is insufficient to pierce the corporate veil.

5 **IV. Plaintiff’s Motion for Summary Judgment.**

6 Plaintiff cross moves for summary judgment on her negligence claims, asserting
7 that she has compiled overwhelming evidence that Store 2963 is a subsidiary of CVS and
8 CVS is liable for her injuries. Doc. 81 at 1-3. She submits the same evidence to support
9 her motion that she submitted in response to CVS’s motion. As discussed above, this
10 evidence does not establish that CVS owns, occupies, or controls Store 2963. Her evidence
11 is not authenticated and is hearsay, for which she has identified no exception. *See* Fed. R.
12 Evid. 901; Fed R. Evid. 802. The Court cannot grant a motion for summary judgment on
13 inadmissible evidence. *See Canada*, 831 F.2d at 925; *see also Osborn v. Butler*, 712 F.
14 Supp. 2d 1134, 1146 (D. Idaho 2010) (finding statements in a website inadmissible
15 hearsay); *Internet Specialties West, Inc. v. ISPWest*, No. CV 05-3296 FMC AJWX, 2006
16 WL 4568796, at *2 (C.D. Cal. Sept. 19, 2006) (“To be authenticated someone with
17 knowledge of the accuracy of the contents of the internet print-outs must testify.”). The
18 Court will deny Plaintiff’s motion.

19 **V. Plaintiff’s Other Motions.**

20 Since filing her motion for summary judgment, Plaintiff has filed the following
21 documents: (1) a motion to be allowed to submit copies of other evidence; (2) a motion for
22 leave to file a reply to defendant’s response; and (3) a motion to amend or correct exhibits
23 1-10. Docs. 90, 92, 95. The Court will deny these motions.

24 Plaintiff’s first motion, with accompanying memorandum, requests permission to
25 submit, pursuant to Rule 1004, copies of evidence from Exhibits A, B, C, D, E, F, and G.
26 Docs. 90, 91. Plaintiff states that the CEO of CVS had control of the originals of her
27 Exhibits A-G and failed to produce them. Doc. 91. She argues that Exhibits A-G should
28 be admissible even if they are not the originals. *Id.*

1 Plaintiff has filed several different versions of Exhibits A-G. *See* Docs. 76, 81, 85,
2 86. The Court assumes Plaintiff's motion is intended to resolve admissibility challenges
3 to her evidence, but it makes no difference in the outcome of these motions. As shown
4 above, none of Plaintiff's evidence shows that CVS owned Store 2963 or owed her a duty.

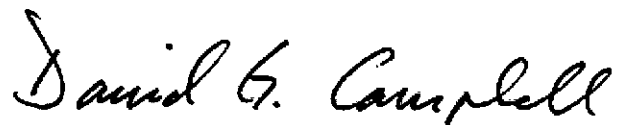
5 Plaintiff's second motion requests leave to respond to CVS's March 22, 2019 reply
6 brief. *See* Doc. 92. Plaintiff fails to offer a reason for a sur-reply, and the Court sees no
7 new argument in CVS's reply that would justify it.

8 Plaintiff's third motion requests leave to file an amended motion to assert a claim
9 under Rule 1004 to admit the evidence in exhibits 1-10 of "Disposition Brief March 4,
10 2019." Doc. 96. She argues that production of the originals is excused as a matter of law.
11 *Id.* Plaintiff did not submit a brief on March 4, 2019. She submitted Exhibits 2-9, attached
12 to her statement of facts in support of her motion for summary judgment (Doc. 80 at 6-38),
13 and the Court can only assume these are the exhibits she is referencing. Because allowing
14 copies rather than originals does not change the nature of this evidence, the Court will deny
15 this motion.

16 **IT IS ORDERED:**

- 17 1. Defendant CVS's motion for summary judgment (Doc. 71) is **granted**.
18 2. Plaintiff's motions (Docs. 79, 90, 92, 95) are **denied**.
19 3. The Clerk shall enter judgment for Defendant and **terminate** this action.

20 Dated this 7th day of May, 2019.

21
22
23 

24 David G. Campbell
25 Senior United States District Judge
26
27
28

1
2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Vivian Epps,

10 Plaintiff,

11 v.

12 CVS Health Corporation,

13 Defendant.
14

NO. CV-18-01274-PHX-DGC

JUDGMENT IN A CIVIL CASE

15 **Decision by Court.** This action came for consideration before the Court. The
16 issues have been considered and a decision has been rendered.

17 **IT IS ORDERED AND ADJUDGED** that, pursuant to the Court's Order filed
18 May 7, 2019, which granted the Motion for Summary Judgment, judgment is entered in
19 favor of defendants and against plaintiff. Plaintiff to take nothing, and the complaint and
20 action are dismissed with prejudice.

21 Brian D. Karth
22 District Court Executive/Clerk of Court

23 May 7, 2019

24 By s/ G. Puraty
25 Deputy Clerk
26
27
28