Mia Farber (SBN 131467)
Dorothy L. Black (SBN 211260)
JACKSON LEWIS P.C.
725 South Figueroa Street, Suite 2500
Los Angeles, California 90017-5408
Telephone: (213) 689-0404
Facsimile: (213) 689-0430
farberm@jacksonlewis.com
dorothy.black@jacksonlewis.com

Attorneys for Defendant
EQUINOX HOLDINGS, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TAMAR KASBARIAN,

Plaintiff,

vs.

EQUINOX HOLDINGS, INC., EQUINOX FITNESS MARINA DEL REY INC., EQUINOX FITNESS SEPULVEDA, INC., inclusive,

Defendants.

Case No.: 2:16-CV-01795 MWF (JCx)

DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

[F.R.C.P. Rule 56]

[Filed concurrently with Objections to Plaintiff's Disputed Facts, [Proposed] Order Re Objections to Plaintiff's Disputed Facts, Objections to Evidence, [Proposed Order Re Objections to Evidence and Supplemental Declaration of Dorothy L. Black]

Date: November 7, 2016
Time: 10:00 a.m.
Courtroom: 165

Complaint filed: April 13, 2015

I. INTRODUCTION

The material facts of this case remain undisputed: (1) Plaintiff was an at-will employee; (2) an investigation into the sales activities at the West LA club was conducted by individuals who had no knowledge of Plaintiff's alleged complaints of unethical sales activities; (3) the investigation uncovered various questionable sales activities by the West LA Membership Advisors ("MAs"); (4) Plaintiff quit rather than be reassigned from the West LA club to the Marina Del Rey club following the investigation, and (5) Plaintiff has not identified any a local, state, or federal statute, rule or regulation she had reasonable cause to believe was being violated or a public policy.

Plaintiff cannot create triable issues of fact by relying on a declaration that is inconsistent with her sworn deposition testimony. *Yeager v. Bowlin* (9th Cir. 2012) 693 F.3d 1076, 1080 (party cannot create issue of fact by a declaration contradicting her own deposition). Her reliance on matters which are not supported by admissible evidence, which are completely immaterial or which merely embellish but do not actually controvert Equinox Holding, Inc.'s ("Equinox") undisputed facts, also are unavailing. *Oculus, LLC v. Oculus VR, Inc.* (C.D. Cal. June 8, 2015) 2015 U.S. Dist. LEXIS 74666, *11 ("[a] party cannot create a genuine issue of material fact simply by making assertions in its legal papers. Rather, there must be specific, admissible evidence identifying the basis for the dispute."). The Court need not "hunt" to find evidentiary basis for material facts. *Carmen v. San Francisco Unified Sch. Dist.* (9th Cir. 2001) 237 F.3d 1026, 1029-31 (affirming summary judgment where plaintiff failed to cite to declaration establishing genuine disputed material fact; judges not required to comb the record).

II. Equinox Holdings, Inc. Was Plaintiff's Employer

Plaintiff fails to provide any evidence or case law to support keeping Equinox Fitness Marina Del Rey (EFMDR) and Equinox Fitness Sepulveda, Inc. (EFSI) in this case. First, Plaintiff offers no authority for the proposition that Equinox Holdings, Inc. does not have standing to argue that it was the only Equinox entity that employed Plaintiff. Second, Plaintiff long conceded that EFSI and EFMDR are nothing more than

sham defendants. (*See*, Notice of Removal, ¶ 13, Declaration of Patricia Wencelblat ("Wencelblat Decl."), ¶ 3; Declaration of Dorothy L. Black ("Black Decl."), ¶3.) Thus, Plaintiff's argument that she does not know who is bringing this motion is disingenuous at best. Third, Plaintiff's conclusory statements in her declaration in which she indicates that she was employed by both Equinox Holdings, Inc. and Equinox Fitness Sepulveda, Inc. is insufficient to create a triable issue of fact. This inadmissible conclusion[1] is unsupported by any evidence and contradicted by her testimony that her W-2s did not reflect EFSI or EFMDR. (UF 86.) *See also* Gov't Code § 12928. In addition, Plaintiff offers no evidence that either club ever made any employment decisions regarding Plaintiff. (UF No. 87.)[2] Plaintiff admits she never went to work at the Marina Del Rey club. (UF 74-77.) Accordingly, EFSI and EFMDR should be dismissed with prejudice.

III. Plaintiff's First Claim for Violations of Labor Code § 1102.5 Fails.

A. Plaintiff offers no evidence that she engaged in "protected activity."

Labor Code § 1102.5 requires the employee to have reasonable cause to believe that there is a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation. Lab. Code § 1102.5. Plaintiff does not offer any evidence to demonstrate she disclosed a "legal violation" to Equinox under Labor Code § 1102.5. (UF Nos. 23-25.) Plaintiff's subjective opinion (or even that of Gannon) that unapproved credit card use and members being told they could sign up for one-month memberships were "illegal" activities constitutes nothing more than inadmissible speculation and conjecture which is insufficient to create a triable issue of fact.

Simply put, Plaintiff has not identified any statute, rule or regulation she had reasonable cause to believe was being violated as a result of these activities, which is fatal to her claim. As set forth in Equinox's moving papers, to state a retaliation claim under Labor Code § 1102.5, the employee has to specify what statute, regulation, or rule

[1]Conclusory statements are not evidence. *Ashcroft v. Iqbal* (2009) 556 U.S. 662, 663.
[2]Gannon corrected his deposition in which he mistakenly indicated that ESFI has employees. (Supplemental Declaration of Dorothy L. Black, ¶ 2, Exh. A.)

she believed the employer was violating. In *Thomas v. Starz Entm't, LLC* (C.D. Cal. 2016) (Case No. 2:15-CV-09239-CAS (MRWx)), which Plaintiff fails to mention in her Opposition, the Court dismissed Plaintiff's complaint (which included a Labor Code § 1102.5 retaliation claim) "because plaintiff…failed to identify any underlying statute, rule, or regulation on which his retaliation claims are based." [3][4] Summary judgment is proper due to Plaintiff's failure to identify any such statute, regulation, or rule.

B. Plaintiff offers no evidence of an "adverse employment action."

Plaintiff's Labor Code § 1102.5 claim fails because there is no evidence she suffered an adverse employment action. Even if Plaintiff's reassignment to Marina Del Rey had resulted in a loss of pay, that action cannot support a "constructive discharge" claim as a matter of law. A "dissatisfactory work assignment" is not the kind of egregious circumstance that would justify a bona-fide constructive discharge. *Rochlis v. Walt Disney Co.* (1993) 19 Cal.App.4th 201 *disapproved on other grounds in Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238 (a demotion in job level, even when accompanied by reduction in pay, does not constitute a constructive discharge). Plaintiff's Opposition completely ignores *Rochlis* and instead cites to a string of inapposite cases dealing with an "adverse employment action" under FEHA.

Further, Plaintiff's argument that the "change" in the compensation plan constituted a "constructive discharge" is belied by the undisputed facts that (1) Plaintiff continued to work under the "changed" compensation plan for seven months until she resigned and (2) Plaintiff admits all of the West LA club MAs were affected, and (3)

[3] Plaintiff's reliance on *Boston v. Penny Lane* (2009) 170 Cal.App.4th 936 and *Franklin v. Monadnock Co.* (2007) 151 Cal.App.4th 252 is misguided because they were wrongful termination cases in which the public policy relied on was contained in the Health & Safety Code § 1596.881, not § 1102.5.

[4] The wrongful termination in violation of public policy cases Plaintiff relies on are of no assistance to her because each alleged a specific statute, rule or regulation consistent with § 1102.5. Moreover, the legislature did not include "public policy" as a basis for an 1102.5 claim and the statutory rule of construction is that the omission was intentional. *Kleitman v. Sup. Crt.* (1999) 74 Cal.App.4th 324, 334.

there is no evidence that any of those MAs complained of "unethical" sales activities.

Also, Plaintiff provides no authority that calling her "crazy," "tattletale," "too aggressive" or to "focus on what you can control" are sufficiently egregious to justify a constructive discharge. Plaintiff fails to establish any causal link between her job allegedly being threatened after the "changed" compensation plan and the investigation and her resignation months later. Indeed, other than timing which is insufficient in and of itself to support a retaliation claim (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 356-57), Plaintiff does not set forth any admissible evidence to link the investigation of the West LA MAs, set in motion by a member complaint to Rosen, and investigated by Cuva, Stanfa and Burger to these alleged "threats" to her job.

Plaintiff's unsubstantiated belief that Equinox "falsely suspected and targeted her" in an investigation of unethical conduct is not supported by admissible evidence. Plaintiff was identified by Member Services as having questionable sales (UF 40) and it is undisputed that Cuva and Stanfa were unaware of Plaintiff ever complaining about "unethical" sales activities at West LA. It also is undisputed that Burger did not know who Plaintiff when he went to West LA prior to interviewing her. (UF 53.) It is immaterial who asked Burger to interview the West LA MAs as Plaintiff offers no evidence he did so on a whim. Indeed, Plaintiff testified that she "possibly" complained to Gannon about alleged unethical sales activities but Gannon confirmed she did not do so. (UF 22.) Plaintiff concedes she and other West LA MAs were interviewed and at least one other MA was also suspended. (Plaintiff declares two MAs were discharged and two other MAs were transferred to other locations. (See, Kasbarian Decl., ¶10, 6:18-20.))

Plaintiff cannot create a disputed fact by describing her one-day paid suspension pending the investigation as being "suspended in purgatory", considering another MA who did not make complaints was similarly suspended. (UF 59.) And, it is undisputed that Equinox's policy is to suspend email accounts of suspended employees. (UF 62.)

Lastly, Plaintiff does not dispute that the duties of a MA and Membership Executive were the same (UF 3) or that Equinox considered the move to be a lateral

move (UF 67). There is no admissible evidence to dispute she had the potential to earn the same or more at the Marina Del Rey club, irrespective of what her hourly rate was going to be, because it was a high performing club with less expensive memberships. As Plaintiff was not subjected to intolerable working conditions resulting in her constructive termination her § 1102.5 claim fails.

C. Plaintiff has not causally linked any protected activity to any adverse employment action.

Assuming Plaintiff engaged in a protected activity and suffered an adverse employment action (neither of which she has done), her claim still fails because she hasn't causally connected the two. It is undisputed that Rosen initiated the investigation, through Member Services, after a member complained to him about another MA. It is also undisputed that Member Services conducted an investigation into the sales activities of West LA's MAs at Rosen's direction and that Member Services found anomalies with sales conducted by Plaintiff. Similarly, it is undisputed that Plaintiff never complained to Rosen about alleged unlawful sales activities by West LA's MAs. And, it is undisputed that Plaintiff's reassignment to the Marina Del Rey club ultimately resulted from the West LA investigation triggered by Rosen. These undisputed facts defeat any speculative allegation by Plaintiff that she was retaliated against by Equinox.

Plaintiff testified that she is not aware of any other MAs complaining about the kinds of issues she was raising. (UF No. 80.) Instead, Plaintiff attempts to create a triable issue of fact by arguing that the newly hired MA was not suspended and reassigned; however, Equinox itself asserts this fact but also distinguishes him based on him being newly hired. (UF 78.) *See also*, Gannon Deposition at pages 71:16-72:20 attached to Declaration of Carney Shegerian, ¶9, Exh. 18. Each of these reasons doom Plaintiff's retaliation claim under § 1102.5.

IV. <u>Plaintiff's Wrongful Termination in Violation of Public Policy Claims Fail.</u>

Equinox agrees that, standing alone, a constructive termination is neither a tort nor a breach of contract, and thus not actionable. (See Opposition ("Oppo."), 14:17.) "An

actual or constructive discharge in violation of fundamental public policy gives rise to a tort action in favor of the terminated employee." *Turner*, 7 Cal.4th at 1252. It cannot seriously be disputed that the tort of constructive termination in violation of public policy has different elements than the tort of wrongful termination in public policy. Under CACI 2430, Plaintiff must plead and prove each of the following "[e]ssential [f]actual [e]lements" to establish a prima facie claim of wrongful termination in violation of public policy: (1) Defendant employed Plaintiff; (2) Defendant discharged Plaintiff; (3) the violation of public policy was a substantial motivating reason for Plaintiff's discharge; and (4) the discharge caused Plaintiff harm. Conversely, under CACI 2432, Plaintiff must plead and prove each of the following "[e]ssential [f]actual [e]lements" to establish a prima facie claim of constructive discharge in violation of public policy: (1) Defendant employed Plaintiff; (2) Plaintiff was subjected to working conditions that violated public policy, in that [describe conditions imposed on the employee that constitute the violation]; (3) Defendant intentionally created or knowingly permitted these working conditions; (4) these working conditions were so intolerable that a reasonable person in Plaintiff's position would have had no reasonable alternative except to resign; (5) Plaintiff resigned because of these working conditions; (6) Plaintiff was harmed; and (7) the working conditions were a substantial factor in causing Plaintiff's harm. To be intolerable, the adverse working conditions must be unusually aggravated or involve a continuous pattern of mistreatment; trivial acts are insufficient. *Id.*[5]

Contrary to Plaintiff's argument, *Haney v. Aramark Uniform Services, Inc.*, 121 Cal.App.4th 623, 641 (2004), does not set forth the elements of a "constructive discharge" in violation of public policy claim. (Oppo. 18:17-21.) *Haney* does not discuss constructive discharge at all since the plaintiff was actually terminated. Because Plaintiff cannot prove at least one key element to her sixth and seventh wrongful termination claims (*i.e.*, she was not fired, she quit), these claims fail as a matter of law.

[5] Ironically, Plaintiff cites to CACI 2430, not 2432, in support of one of her argument that she has stated a claim for wrongful termination in violation of public policy. Oppo. 20:10.

Moreover, as detailed above, Plaintiff hasn't shown that she was subjected to working conditions intentionally created or knowingly permitted by Equinox that were so intolerable that a reasonable person in Plaintiff's position would have had no reasonable alternative except to resign. CACI 2432; *Cloud v. Casey* (1999) 76 Cal.App.4th 895 (affirming summary judgment on constructive discharge claim because working conditions, while discriminatory, were not so intolerable as to justify resignation).

Assuming Plaintiff could get over any of these various legal hurdles, her sixth and seventh claims fail for the additional reason that she has not shown the existence of a "public policy." Plaintiff relies on her alleged reports to support these claims and asserts that "Here defendants' unlawful practices were in violation of FEHA and Labor Code section 1102.5 and the public policies underlying these statutes." (Opp., 20:17-21:9). First, complaining about fraudulent business practices does not violate the FEHA. FEHA protects against discrimination, harassment and retaliation based on enumerated characteristics. Cal. Gov't Code §12940 *et seq.* Plaintiff is not relying on FEHA in this Action. Black Decl., Exh. B, 243:3-24. Second, for the same reasons set forth above, such complaints will not support a violation of § 1102.5. Third, neither *Haney* nor *Collier v. Sup.Ct.* (1991) 228 Cal.App.3d 1117 cited by plaintiff to support her argument that her internal complaints about suspected "unethical" sales activities rise to the level of a fundamental public policy. In *Collier*, which involved the appeal of the sustaining of a demurrer, the court held, "Where, as here and in Tameny, the alleged misconduct involves violations of the antitrust laws, the public interest in encouraging an employee to report the violation is even clearer. Antitrust laws provide for both criminal prosecution and civil liability." In *Haney*, the plaintiff alleged the specific statutes were violated by the fraudulent billing practices about which he complained. Further, "the tort of wrongful termination is not a vehicle for [Plaintiff's attempted] enforcement of an employer's internal policies or the provisions of its agreement with others." *Turner*, 7 Cal.4th at 1257. Plaintiff's failure to identify a statutory or constitutional policy that would be thwarted by her alleged "termination" dooms her wrongful termination claims for this

reason a well. *Id.*

In addition, as discussed above, Plaintiff has not shown, through admissible evidence, a causal link between any protected activity and Equinox's actions.

Finally, Plaintiff has not raised any triable issues as to pretext. Contrary to Plaintiff's argument, Equinox has not offered shifting or different reasons. As discussed above, it is irrelevant who asked Burger to go to the West LA Club. It is undisputed that Burger in fact went to the West LA Club to interview the MAs and spoke to Gannon at the conclusion of those interviews. (UFs 52, 57.) Moreover, there is nothing inconsistent about the reasons given for suspending Plaintiff and the other MA, reassigning Plaintiff and not suspending and reassigning the newly hired MA as explained by Gannon in the testimony submitted by Plaintiff. See, Shegerian Decl., ¶9, Exh. 18, 71:16-72:20. Plaintiff has not put forth any evidence that reassigning her but permitting the newly hired MA to remain would not accomplish the goal of changing the sales culture of West LA. The testimony of Hemedinger does not reference "all" MAs, it only references Plaintiff. The testimony of Holmes does not talk about culture at all, is unclear as to when the referenced discussion occurred and specifically notes he did not recall each individual case. The testimony cited by Rosen also does not reference time and is consistent with UF 79. For each of the foregoing reasons, summary judgement as to the wrongful termination claims is proper.

V. Plaintiff's Intentional Infliction of Emotional Distress ("IIED") Claim Fails.

Despite Plaintiff's misrepresentation to the contrary, Equinox need only negate (disprove) one essential element -- not all elements -- of Plaintiff's IIED claim in order to have it summarily dismissed. *Nissan Fire v. Marine Ins. Co., Ltd. v. Fritz Cos., Inc.* (9th Cir. 2000) 210 F.3d 1099, 1102. Here, summary judgment is proper because Plaintiff has not and cannot establish that Equinox engaged in "extreme and outrageous conduct." None of the alleged actions (*i.e.*, Equinox clarified its compensation plan, investigated questionable sales activities, suspended Plaintiff pending the investigation, reassigned Plaintiff to a new location, and changed her compensation plan to align with those of the

other MAs at the new location) rise to the level sufficient to state an IIED claim. The imposition of workplace discipline, including suspension, transfer or termination, does not amount to extreme or outrageous conduct. *Buscemi v. McDonnell Douglas Corp*. (9th Cir. 1984) 736 F.2d 1348, 1352.

Plaintiff's reliance on *Accardi v. Sup. Ct.*, 17 Cal.App.4th 341 (1993) is misplaced because it involved a discrimination claim and it holds that "[e]motional distress caused by misconduct in employment relations involving, for example,…demotions, criticisms of work practices, negotiations as to grievances, is a normal part of the employment environment" and is barred by the workers' compensation exclusivity rule. *Id.* at 352.

VI. Plaintiff's Breach of Contract Claims Fail As A Matter of Law.

Summary judgment on Plaintiff's Third, Fourth and Fifth breach of contract claims is proper based on her at will status. Plaintiff has not controverted her deposition testimony that (1) she did not have a contract with Equinox, (2) no one ever told her that she was guaranteed employment for a certain time period, and (3) no one ever told her that she was anything other than an at-will employee. More importantly, Plaintiff also does not deny receiving no less than 3 separate documents which Plaintiff acknowledged receiving. (UF No. 13.) *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 393-934 (employee could not have reasonably assumed that his employer would only fire him for good cause where no one made such a promise and he signed an express statement of at-will employment). And, Plaintiff resigned.

Additionally, Plaintiff does not contest, and thereby concedes, that her breach of contract claim based "compensation plan agreement" fails as a matter of law because Plaintiff accepted the terms of the "changed" compensation plan agreement by continuing to work for seven months after the "changed" plan was instituted. *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610 (citation omitted).

VII. Plaintiff's Defamation Claim Fails As A Matter of Law.

Plaintiff does not challenge that the alleged defamatory statements are privileged communications among interested parties and/or constitute inadmissible hearsay. As

such, Plaintiff's defamation claim fails for these reasons alone. Plaintiff's defamation claim also fails because, other than her unsubstantiated conclusion and speculation to the contrary, Plaintiff has offered no admissible evidence to prove that the individuals who heard the alleged defamatory comments could have reasonably understood the alleged defamatory statement to be one of fact (*i.e.*, Plaintiff was insane or Amy Winehouse). *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260; CACI 1707.

VII. Plaintiff Cannot Recover Punitive Damages Against Equinox.

Equinox does not argue in its moving papers certain Equinox employees were managing agents and others were not but instead argued Plaintiff could not demonstrate any managing agent acted with malice, oppression or fraud. Plaintiff's claims of "shifting or false reasons" falls far short of meeting this burden. As shown above, Equinox has not provided shifting or false reasons. There is no admissible evidence that Equinox shifted or fabricated any evidence to justify Plaintiff's one-day paid suspension pending investigation and reassignment. Plaintiff cannot dispute the fact Burger did not find her credible (UF 56). Gannon -- not Hemedinger and Holmes -- was the one who ultimately decided to reassign Plaintiff. Plaintiff also fails to explain how removing her and one other MA and allowing the newly hired MA to remain at West LA failed to create a fresh culture or is inconsistent. The testimony of Gannon cited by Plaintiff in support of her PF 37 states: "Q: And why did you make the decision to transfer [Plaintiff] to the Marina Del Rey club? A: To -- in an attempt to address the West L.A. culture of improper business practices and to transfer her to another location." (Gannon Depo., 81:7-11.)

VIII. CONCLUSION

Equinox respectfully request its Motion for Summary Judgment be granted.

.Dated October 24, 2016

JACKSON LEWIS P.C.

By: /s/Mia Farber
Mia Farber
Dorothy L. Black
Attorneys for Defendant
EQUINOX HOLDINGS, INC.

4837-7905-6187, v. 1