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 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS/THEIR MOTION FOR SUMMARY JUDGMENT

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

[Filed concurrently with Notice of Motion and Motion; Memorandum of Points and Authorities; Statement of Uncontroverted Facts and Conclusions of Law, Declarations and Exhibits in Support Thereof; Compendium of Evidence; [Proposed] Order; and [Proposed] Judgment]

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

Complaint filed: April 13, 2015

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF ARGUMENTS 1

II. UNDISPUTED MATERIAL FACTS 2

A. Plaintiff's Employment With Equinox. 2

B. Plaintiff's Status as an At-Will Employee. 2

C. Plaintiff Acknowledges Equinox's Non-Retaliation Policies. 3

D. Equinox Clarifies Compensation Plan for Equinox West LA MAs. 4

E. Plaintiff's Complaints Regarding Sales Activities of Other MAs. 4

F. The Investigation Into Questionable Sales Activities at the West LA Club and Plaintiff's Reassignment to the Marina Del Rey Club. 5

G. Plaintiff's Voluntary Resignation. 9

H. Plaintiff's Allegations That Equinox Management Defamed Her. 10

III. LEGAL ARGUMENT 10

A. Plaintiff Has Agreed to Dismiss her Claims Alleging Violations of Labor Code §§ 2698 *et seq.* and 226. 10

B. The Club Defendants Were Not Plaintiff's Employer and Should be Dismissed From this Action. 11

C. Plaintiff's First Cause of Action for Violations of California Labor Code § 1102.5, *et seq.* Fails As A Matter of Law. 11

1. Plaintiff Cannot Establish a *Prima Facie* Claim for Retaliation. 11

2. Equinox Had Legitimate, Non-Retaliatory Business Reasons For Reassigning Plaintiff to the Marina Del Rey Club. 14

3. Plaintiff Cannot Show The Reasons She Was Reassigned to the Marina Del Rey Club Were Pretextual. 14

D. Plaintiff's Third, Fourth and Fifth Causes of Action Fail Because of Plaintiff's At-Will Status. 15

1. Plaintiff's Claim for Breach of Contract of the "Compensation Plan Agreement" Fails As A Matter of Law. 15

2. Plaintiff's At Will Status Precludes Her from Stating Claims for Breach of Express Oral Contract and Implied-In-Fact Contract Not to Terminate Employment Without Good Cause. 16

E. Plaintiff's Causes of Action for Wrongful Termination in Violation of Public Policy Fail As A Matter Of Law. 17

F. Plaintiff's Defamation Claim Fails As A Matter of Law. 18

1. There Was No False Statement of Fact. 19
2. Plaintiff Has No Evidence of Publication to a Third Party. 20
3. There is No Liability Due to the Common Interest Privilege.....20
G. Plaintiff's Intentional Infliction of Emotional Distress ("IIED") Claim Fails As A Matter of Law. 22
1. Plaintiff's IIED Claim Is Barred by the Exclusive Remedy of California's Workers' Compensation Act ("WCA"). 22
2. Even If Plaintiff's IIED Claim is Not Barred, Plaintiff Cannot Establish a *Prima Facie* Case of IIED Because Plaintiff Cannot Establish Extreme and Outrageous Conduct.....23
H. Plaintiff's Punitive Damages Claim Fails As A Matter of Law. 24
IV. CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Buscemi v. McDonnell Douglas Corp. (9th Cir. 1984)
736 F.2d 1348 24

Celotex Corp. v. Catrett (1986)
477 U.S. 317 ..... 2, 3

Clark County Sch. Dist. v. Breede (2001)
532 U.S. 268 13

Lieberman v. Fieger (9th Cir. Cal. 2003)
338 F.3d 1076 ..... 19, 20

Schuler v. Chronicle Broad. Co. (9th Cir. Cal. 1986)
793 F.2d 1010 12

St. Mary's Honor Ctr. v. Hicks (1993)
509 U.S. 502 14

Thomas v. Starz Entm't, LLC (C.D. Cal. 2016)
(Case No. 2:15-cv-09239-CAS (MRWx)). 12

CALIFORNIA CASES

Alcorn v. Ambro Eng'g, Inc. (1970)
2 Cal.3d 493 23

Am. Computer Corp. v. Sup. Ct. (1989)
213 Cal.App.3d 664 18

Arteaga v. Brink's, Inc. (2008)
163 Cal.App.4th 327 13

Burton v. Sec. Pac. Nat. Bank (1988)
197 Cal.App.3d 972 15

Cervantez v. J.C. Penney Co. (1979)
24 Cal.3d 579 23

Cole v. Fair Oaks Fire Prot. Dist. (1987)
43 Cal.3d 148 ..... 22, 24

College Hospital Inc. v. Sup. Ct. (1994)
8 Cal.4th 704 ..... 24, 25

Cuenca v. Safeway S.F. Employees Fed. Credit Union (1986)
180 Cal.App.3d 985 ..... 20, 21

Deaile v. General Telephone Co. of Calif.
(1974) 40 Cal.App.3d 841 20

Dore v. Arnold Worldwide, Inc. (2006)
39 Cal.4th 384 ..... 15, 17

Foley v. Interactive Data Corp. (1988)
47 Cal.3d 654 (1988) 18

Gregory v. McDonnell Douglas Corp. (1976)
17 Cal.3d 596 ..... 14, 19

Guz v. Bechtel Nat'l, Inc. (2000)
24 Cal.4th 317 ..... 15, 16

Haggard v. Kimberly Quality Care, Inc. (1995)
39 Cal.App.4th 508 17

Holmes v. Gen. Dynamics Corp. (1993)
17 Cal.App.4th 1418 17

Hughes v. Pair (2009)
46 Cal.4th 1035 23

in Turner v. Anheuser-Busch, Inc. (1994)
7 Cal.4th 1238 18

Janken v. GM Hughes Electronics (1996)
46 Cal.App.4th 55 23

Kelly-Zurian v. Wohl Shoe Co. (1994)
22 Cal.App.4th 397 24

King v. UPS, Inc. (2007)
152 Cal.App.4th 426 21

Lundquist v. Reusser (1994)
7 Cal.4th 1193 21

McGrory v. Applied Signal Tech., Inc. (2013)
212 Cal.App.4th 1510 16

Miklosy v. Regents of Univ. of Cal. (2008)
44 Cal. 4th 876 22

Mokler v. County of Orange (2007)
157 Cal.App.4th 121 11

Mueller v. County of Los Angeles (2009)
176 Cal.App.4th 809 12

Rochlis v. Walt Disney Co. (1993)
19 Cal.App.4th 201 18

Schachter v. Citigroup, Inc. (2009)
47 Cal.4th 610 15

Taus v. Loftus (2007)
40 Cal.4th 683 19

Trammell v. Western Union Tel. Co. (1976)
57 Cal.App.3d 538 24

CALIFORNIA STATUTES

Cal. Civ. Code § 3294(b) 24

Cal. Gov't Code § 12928 11

Civ. Code § 3294(c)(1) 24

Civil Code § 47(c) 20, 21, 22

Civil Code § 48 21

Civil Code § 3294 24

Cal. Labor Code § 226 10

Cal. Labor Code § 1102.5, *et seq.* 11, 12, 14

Cal. Labor Code § 2698, *et seq.* 10

Cal. Labor Code § 2922 15

Cal. Labor Code § 3600 *et seq.* 22

OTHER AUTHORITIES

Fed. R. Civ. P. 56(a) 1

Local Rule 7-3 10

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENTS

This case involves an at-will Membership Advisor ("MA") of Defendant Equinox Holdings, Inc. ("Equinox") who quit rather than be reassigned from the West LA club to the Marina Del Rey club following an investigation into the sales activities at the West LA club. That investigation uncovered various questionable sales activities by the West LA MAs. Unlike other MAs, Plaintiff Tamar Kasbarian ("Plaintiff") was not terminated from her employment as a result of the investigation. She was merely reassigned to the Marina Del Rey club.

Nevertheless, Plaintiff alleges that she was retaliated against for complaining about (1) a correction that was made to the compensation plan of all West LA MAs seven months before Plaintiff was reassigned and (2) the sales activities of other MAs at the West LA club. No admissible evidence supports her claims. Rather, it is undisputed that Plaintiff was reassigned to the Marina Del Rey club for legitimate non-retaliatory business reasons based on the results of the investigation.

Moreover, Plaintiff's breach of contract claims fail because the undisputed evidence demonstrates she was employed at will. Plaintiff's claims for wrongful termination are similarly untenable because it is undisputed Plaintiff quit.[1] Plaintiff's inability to produce admissible evidence demonstrating a false statement of fact was published to a third party is fatal to her defamation claim. Plaintiff's claim for intentional infliction of emotional distress fails because it is preempted by the Workers Compensation Act's exclusivity rule and the conduct upon which she relies to support this claim does not rise to the requisite level of outrageous conduct necessary to state a claim. Finally, because Plaintiff cannot demonstrate a managing agent acted with malice, her prayer for punitive damages falls too. Accordingly, because there is no genuine dispute as to any material fact, Equinox is entitled to judgment as a matter of law. Fed.

[1] Plaintiff has not pled a cause of action for constructive termination and the time to do so has long since passed. (*See* Court Order dated April 28, 2016.)

R. Civ. P. 56(a); *Celotex Corp. v. Catrett* (1986) 477 U.S. 317. Summary judgment in favor of Defendant Equinox is proper.

II. UNDISPUTED MATERIAL FACTS[2]

A. Plaintiff's Employment With Equinox.

Plaintiff was hired as a MA at Equinox's Santa Monica club on or about October 15, 2010. (Uncontroverted Fact ("UF") No. 1.) In January 2014, Plaintiff began working at Equinox's West Los Angeles club ("West LA club"). (UF No. 2.)[3] During Plaintiff's employment at the Santa Monica and West LA clubs, Jack Gannon ("Gannon") was the Vice President of the West Coast (UF No. 4). From about October 2011 through about June 2015, Brian Hemedinger ("Hemedinger") was the Regional Director of Operations of the Santa Monica and West LA clubs. (UF No. 5.) General Manager Kira Simonson ("Simonson") supervised Plaintiff at the West LA club from about January 2014 to about January 2015. (UF No. 6.)

B. Plaintiff's Status as an At-Will Employee.

Plaintiff's personnel file includes an Employee Handbook: Receipt Acknowledgment Form with Plaintiff's signature dated October 15, 2010. (UF No. 7.) In particular, the Employee Handbook stated:

> I acknowledge that the receipt of the Employee Handbook in no way creates a contract between Equinox and me. Moreover, I understand and agree that all matters discussed in the Employee Handbook are subject to change or modification from time to time except the At-Will Employment Policy specified therein. The At-Will Employment Policy represents the final and complete agreement concerning the duration of my employment. I acknowledge that any change in the At-Will Employment Policy is effective only if set forth in a written document signed by the CEO of Equinox and myself.

(UF No. 8.) Plaintiff's personnel file also includes an Offer Letter, dated October 15, 2010, which Plaintiff acknowledged receiving. (UF No. 9.) In particular, the Offer

[2] The facts stated herein are being treated as undisputed only for purposes of the instant motion for summary judgment.

[3] At the West LA club, MAs were referred to as Membership Executives. However, their job duties were the same. (UF No. 3.) For simplicity, the position is referred to as "MA."

Letter stated:

> We are excited at the prospect of you joining the Company, you should be aware that our relationship is "employment-at-will." That means you are free, at any time, for any reason, to end your employment with the Company and that the Company may do the same. Our agreement regarding the at-will nature of your employment may not be changed, except in a writing signed by the Company's Chief Executive Officer. Given the at-will nature, the Company may from time to time add to, modify, or discontinue its compensation policies, employee benefit plans or other aspects of your employment.

(UF No. 10.) Plaintiff's personnel file also includes an Employee Confidentiality and Non-Solicitation Agreement with Plaintiff's signature dated October 14, 2010. (UF No. 11.) This Agreement stated: "You agree and understand that nothing in this Agreement shall alter or modify the 'at-will' nature of your employment with the Company or confer on [y]ou any right with respect to continuation of your employment with the Company." (UF No. 12.)

In her deposition, Plaintiff admitted that she did not have a contract with Equinox; no one ever told her that she was guaranteed employment for a certain time period; and no one ever told her that she was anything other than an at-will employee. (UF No. 13.)

C. <u>Plaintiff Acknowledges Equinox's Non-Retaliation Policies.</u>

The Employee Handbook Plaintiff acknowledged receiving also included Equinox's non-retaliation policy as well as complaint procedures for reporting retaliation. (UF No. 14.) In particular, Equinox's policy strictly prohibits retaliation against any employee for "filing a complaint and [Equinox] will not knowingly permit retaliation by management, employees, or co-workers." (UF No. 15.) Equinox's policy also prohibits retaliation against any employee for "using this complaint procedure or for filing, testifying, assisting, or participating in any manner in any investigation, proceeding, or hearing conducted by a governmental enforcement agency. Additionally, Equinox will not knowingly permit any retaliation against any employee who complains of prohibited harassment or who participates in an investigation." (*Id.*) The complaint procedure as outlined in the Employee Handbook permits an employee to report retaliation to his or

her manager, Human Resources, or through Equinox's Ethics Hotline. (UF No. 16.)

D. Equinox Clarifies Compensation Plan for Equinox West LA MAs.

In or about June 2014, Hemedinger informed Plaintiff and other MAs that the compensation plan for all West LA MAs was being clarified, so that the market bonuses would be paid out individually and not cumulatively for reaching a certain sales goal. (UF No. 17.) For example, the plan provided for a particular market bonus upon reaching a certain goal of sales:

- 100% of goal – MA would receive an extra $20 per sale
- 115% of goal – MA would receive an extra $40 per sale
- 125% of goal – MA would receive an extra $55 per sale
- 150% of goal – MA would receive an extra $70 per sale

(UF No. 18.) For the West LA club, Equinox's Payroll Department was adding the bonuses together as opposed to giving one of the bonuses above depending on the overall percentage. (UF No. 19.)

Plaintiff testified that she complained about what she viewed as a "change" in the compensation plan to the following managerial employees: Hemedinger, Gannon, Simonson, Veronica Santarelli ("Santarelli") (Regional Sales Manager), Matt Gonzalez (Director of Sales), Barry Holmes ("Holmes") (Senior Vice President of Sales), and Scott Rosen ("Rosen") (Chief Operating Officer) ("COO"). (UF No. 20.) Despite Plaintiff's complaints about the compensation plan, Plaintiff continued to work at Equinox for seven months after the "changed" compensation plan was instituted in July/August 2014 and continued to work for Equinox until she quit in February 2015. (UF No. 21.)

E. Plaintiff's Complaints Regarding Sales Activities of Other MAs.

Plaintiff testified that she complained to Hemedinger, Simonson, and possibly to Gannon in February or March 2014 that she believed that a MA at West LA was using one-month guest passes and/or gift cards to sign up members for what they believed was a month-long membership, but in actuality, was signing them up for a year-long membership by using their credit cards without authorization. (UF No. 22.)

According to Plaintiff, "charging credit cards without people's approval and telling people they were signing up for a month-long contract, but then signing them up for a year-long contract" were the only "illegal activities" about which she complained to Equinox (UF No. 23); the other complaints involved "things against Equinox policies that were happening as well." (UF No. 24.) Plaintiff admitted that she could not identify any statute, ordinance, regulation, local law, state law, or federal law that was violated as a result of this alleged activity. (UF No. 25.)

Plaintiff also testified that she complained to Hemedinger and Simonson about the sales activities of another MA. (UF No. 26.) Specifically, Plaintiff complained that this MA was giving away "free months" to potential members, allowing "freezes" for members, and offering "three month" deals. (UF No. 27.)

F. The Investigation Into Questionable Sales Activities at the West LA Club and Plaintiff's Reassignment to the Marina Del Rey Club.

In or around December 2014, COO Rosen was touring the West LA club when he was told by a member that a MA had charged a membership to another member's credit card without that member's authorization. (UF No. 28.) Rosen contacted Tracy Cuva, Senior Director of Equinox's Member Services Department, gave her the information received from the member, and asked Member Services to investigate this sale. (UF No. 30.)[4] Member Services' investigation, which was conducted by Cuva, confirmed that this was an unauthorized sale processed by a MA at the West LA Club (Plaintiff was not implicated in this transaction). (UF No. 31.) This MA was relocating to New York but, based on the investigation results, she was not hired to work for Equinox in New York. (UF No. 32.)

As a result of this member complaint, Rosen also asked Cuva to have Member Services conduct an investigation of sales transactions at the West LA club. (UF No. 33.) Apart from requesting that the investigation be conducted and asking Jim Burger (Senior

[4] Member Services is Equinox's billing department (centrally based in New York) which handles membership contracts and membership sales, including auditing of membership sales. (UF No. 29.)

Director of Loss Prevention) to travel to the West LA club and continue the investigation after Member Services finished their portion of the investigation, Rosen did not participate in that investigation. (UF No. 34.) Cuva instructed Kevin Stanfa ("Stanfa") (Manager of Compliance and Special Projects), to review sales transactions at the West LA club. (UF No. 35.) After Stanfa reported finding various anomalies associated with sales transactions at the West LA club, Cuva instructed Stanfa to prepare a summary detailing his findings. (UF No. 36.) Stanfa then prepared a workbook with three spreadsheets regarding the following sales activities: (1) 2014 Freezes[5]; (2) Modification to Direct Bill;[6] and (3) West LA Sales Breakdown. (UF No. 37.) Once these were prepared, Cuva emailed the spreadsheets to Rosen, Holmes and Gannon and summarized the results of the Member Services investigation. (UF No. 37.) In her email, Cuva 8indicated that these spreadsheets "all reflect patterns unhealthy for the business." (UF No. 39.) Cuva noted as follows:

- The 2014 Freezes spreadsheet shows that West LA is an outlier in members who request a freeze in the first 60 days of membership who also go on to cancel in the same year.
- The Modification to Direct Bill spreadsheet reflects members in the last quarter of 2014 whose billing was modified from the credit card payment type to direct bill the day before billing ran. The Company average is four per club. West LA had 28 modifications to direct bill.
- The West LA Breakdown spreadsheet shows questionable sales from two MAs (Plaintiff and the MA moving to New York). The other three MAs were

[5] A "freeze" is when a membership is frozen for a certain period of time for a particular reason. (Declaration of Tracy Cuva ("Cuva Decl."), ¶ 4.) A medical freeze, for example, is when a membership is frozen because a member cannot work out for medical reasons. (*Id.*) A medical freeze allows a member to avoid paying the ongoing monthly fee while the membership is frozen, but requires documentation from the member's doctor to substantiate the medical freeze. (*Id.*) Another type of freeze is when a membership is frozen due to employment reasons (*i.e.*, a member is laid off, relocated, etc.) (*Id.*)

[6] A "Modification to Direct Bill" is when a credit card is taken off a member's file before the bill is about to be processed and no billing occurs. (Cuva Decl., ¶ 5.) As a result, the member cannot be billed and an overdue balance is applied to the member's account. (*Id.*)

> reviewed and did not reflect the same anomalies seen with Plaintiff and the MA moving to New York. The questionable sales included selling memberships to members with the credit card of another member (almost universally without requesting a referral credit) or re-contracting over a previously 3-day'd membership and either using the credit from the previous sale or recharging the same credit card, credit card not present for numerous sales transactions, 3-day cancellations with no or just one member visit, new memberships which were previously finance cancelled and had balances on account that were waived.

(UF No. 40.) Neither Cuva nor Stanfa were aware Plaintiff had made any complaints about changes to her compensation plan or about the alleged activities of other MAs. (UF No. 41.)

In addition, Burger was asked to interview the sales team at the West LA club. (UF No. 42.) When Burger came to Los Angeles to conduct his interviews in late January 2015, its sales team consisted of three MAs, Plaintiff and two other MAs who were supervised by the Simonson and an Assistant General Manager. (UF No. 43.) (A MA was fired on or about January 20, 2015 for improper sales activities. (UF No. 44.))

At Burger's request, Member Services provided him with the spreadsheets summarizing their findings of questionable sales transactions at the West LA club. (UF No. 45.) Burger then met with Cuva and Stanfa and they discussed their findings regarding the questionable sales at the West LA club. (UF No. 46.) Burger had a subsequent meeting with Stanfa to review the spreadsheets Member Services had prepared. (UF No. 47.) These spreadsheets showed anomalies in various sales transactions, including whether or not a contract was signed, whether or not a credit card was present for the sales transaction, whose credit card was used for the sales transactions, if another individual's credit card number was used for the sales transaction instead of the member's credit card number, whether or not a member had any visits to a club, etc. (UF No. 48.) Burger also had a couple of telephone conversations with Stanfa regarding the anomalies in various sales activities at the West LA Club. (UF No. 49.)

In late January 2015, Burger went to Los Angeles to interview various employees regarding sales activities of the West LA MAs. (UF No. 50.) Prior to the interviews, Burger and Gannon discussed suspending all of the individuals interviewed as part of the investigation pending the results of the investigation. (UF No. 51.) Burger then interviewed the following individuals: (1) the Assistant General Manager; (2) Plaintiff; (3) another MA; (4) a relatively newly hired MA; and (5) Simonson. (UF No. 52.) Burger had never heard of or spoken to Plaintiff prior to this investigation meeting. (UF No. 53.)

On January 30, 2015, Plaintiff met with Burger and Leah Ball of Human Resources regarding West LA's sales practices. (UF No. 54.) Plaintiff answered questions about her sales activities, as well as the activities of other MAs. (UF No. 55.) While Burger did not find Plaintiff credible, he felt, at that time, that there was insufficient information to warrant Plaintiff's termination. (UF No. 56.)

After Burger completed his interview of Plaintiff, Burger, Gannon and Hemedinger met briefly to discuss Burger's impressions. (UF No. 57.) Gannon then advised Plaintiff that she was being suspended. (UF No. 58.) All of the MAs interviewed as part of the investigation (with the exception of the relatively new MA) were suspended pending investigation. (UF No. 59.) Gannon also advised Plaintiff to report back to the West LA club at 2:00 p.m. the next day for another meeting. (UF No. 60.) According to Plaintiff, Equinox told her that she would not have access to her email[7] or payroll account[8] and escorted her out of the building in front of Equinox's clientele, staff and all of her peers. (UF No. 61.)

Plaintiff met with Hemedinger and Gannon at the West LA club on January 31, 2015 and was told that the investigation was concluded and that she would be working at the Marina Del Rey club. (UF No. 64.) The decision was made to reassign Plaintiff to

[7] It is Equinox's policy to turn off email access for hourly employees who have been suspended pending investigation or who are on a leave of absence. (UF No. 62.)

[8] Prior to Burger's interview of Plaintiff, Gannon had the Payroll Department prepare a final paycheck for Plaintiff so that she could be paid in accordance with California law in the event the decision was made to terminate her employment. (UF No. 63.)

the Marina Del Rey club because Equinox wanted to rebuild the team of MAs in the West LA club and to create a fresh culture, as a result of the investigation findings. (UF No. 65.)

In addition, although Plaintiff's compensation plan would change once at Marina Del Rey to align with the compensation can of Marina Del Rey MAs (UF No. 66)[9], Equinox considered the reassignment a lateral move. (UF No. 67.) Equinox's expectation was she would earn at least the same amount of money because the Marina Del Rey club was a high performing club and the memberships for the Marina Del Rey club were less expensive than the memberships for the West LA club. (UF No. 69.) As a result, it was easier to sell more memberships. (UF No. 70.) Gannon emailed Plaintiff the compensation plan for the Marina Del Rey Club on or about January 31, 2015. (UF No. 71.) Plaintiff testified that no one from Equinox ever told her that she was being "terminated" or "demoted" as part of her reassignment to the Marina Del Rey club. (UF No. 72.)

G. Plaintiff's Voluntary Resignation.

Plaintiff was told to report to the Marina Del Rey club on February 2, 2015 at 9:00 a.m. (UF No. 74.) However, before doing so, Plaintiff resigned, via email, on the morning of February 2, 2015, effective immediately. (UF No. 75.) Plaintiff's last day of employment was February 2, 2015. (UF No. 76.) Plaintiff never reported to work at the Marina Del Rey club. (UF No. 77.)

As of February 1, 2015, the only remaining MA at the West LA club was the recently hired MA. (UF No. 78.) As of April/May 2015, the West LA club had an entirely new sales team and sales management. (UF No. 79.) Plaintiff testified that she was unaware of any other MA at the West LA club complaining about the unauthorized use of credit cards or telling someone that they were being signed up for a one-month membership but signing them up for a year instead. (UF No. 80.)

[9] In fact, when Plaintiff was asked what her compensation would be at the Marina Del Rey club, she was sent the compensation plan of a Marina Del Rey MA. (UF No. 68.)

H. Plaintiff's Allegations That Equinox Management Defamed Her.

Plaintiff alleges that she believes unnamed Equinox managers and supervisors intentionally and maliciously published slanderous and defamatory statement of facts about Plaintiff that were untrue by "insinuate[ing] and/or suggest[ing] that she was involved in the fraudulent activities and/or unfair business practices of certain [MAs] and/or managers and supervisors" and that "she was terminated for engaging in such fraudulent activities and/or unfair business practices." (Complaint 15:6-16.)

Plaintiff, however, testified that no one ever asked her if she had been terminated from Equinox for improper behavior and she testified she had no evidence to substantiate her claim that Equinox told anyone that she had been terminated for improper behavior. (UF No. 81.)

Plaintiff also testified that she could not identify a single statement attributed to Hemedinger about her that she believed to be false. (UF No. 82.) Plaintiff testified that she only heard second and third-hand that Gannon had called her "crazy." (UF No. 83.) Plaintiff also testified that other managerial employees told her that she was acting "crazy." (UF No. 84.) Lastly, Plaintiff testified that she heard Gannon refer to her as "Amy Winehouse." (UF No. 85.)

III. LEGAL ARGUMENT

A. Plaintiff Has Agreed to Dismiss her Claims Alleging Violations of Labor Code §§ 2698 et seq. and 226.

After the parties' Local Rule 7-3 conference, Plaintiff agreed to dismiss her second claim for violation of Private Attorney General Act (Labor Code § 2698, *et seq.*) and her tenth claim failure to provide accurate itemized wage statements. (*See* Declaration of Dorothy L. Black ("Black Decl.") in Compendium of Evidence, ¶ 2, Exh. A).) Additionally, although her sixth cause of action for wrongful termination references the Fair Employment and Housing Act ("FEHA") in the title of the cause of action, Plaintiff actually does not allege a claim under FEHA and her counsel acknowledged the same during her deposition. (*See* Plaintiff's Depo. Volume I, 243:3-24 (Black Decl., Exh. B.).)

B. The Club Defendants Were Not Plaintiff's Employer and Should be Dismissed From this Action.

In connection with its Removal, Defendant Equinox Holdings, Inc. set forth evidence demonstrating that the Sepulveda Club and the Marina Del Rey Club were sham defendants.[10] (*See*, Notice of Removal, ¶ 13, Declaration of Patricia Wencelblat ("Wencelblat Decl."), ¶ 3.) Plaintiff never sought remand on the grounds that they were not sham defendants or any other ground for that matter. (Black Decl., 3.) In any event, Plaintiff cannot produce any admissible evidence demonstrating that either Equinox Fitness Sepulveda, Inc. or Equinox Fitness Marina Del Rey, Inc. were ever her employer, joint or otherwise. Plaintiff admitted she never received any W-2s during her employment reflecting either club as her employer. (UF No. 86.) The law is well settled that the employer identified on the W-2 is the presumptive employer. Cal. Gov't Code § 12928. Moreover, neither club has any employees nor has ever had an employment relationship with or made any employment decisions regarding Plaintiff. (UF No. 87.)

C. Plaintiff's First Cause of Action for Violations of California Labor Code § 1102.5, *et seq.* Fails As A Matter of Law.

1. Plaintiff Cannot Establish a *Prima Facie* Claim for Retaliation.

To establish a *prima facie* case of retaliation under California Labor Code § 1102.5, *et seq.* ("§ 1102.5"), a plaintiff must show (1) she engaged in a protected activity, (2) her employer thereafter subjected her to an adverse employment action, and (3) there is a causal link between the two. *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 138. If a plaintiff establishes the *prima facie* case of retaliation, "the defendant must counter with evidence of a legitimate, non-retaliatory explanation for its acts. *Id.* at 140. If the defendant meets this requirement, the plaintiff must then show the explanation is merely a pretext for retaliation." *Id.*

[10] Equinox also removed on the grounds that Gannon and Hemedinger were not properly served and therefore dismissed from the state court action by the state court's Order, effective March 1, 2016. (*See* Notice of Removal, ¶¶ 30-31. Gannon Decl. and Hemedinger Decl., ¶¶ 2-4.Farber Declaration, ¶ 23, 31-32, Exhibit V.) Plaintiff never sought remand on the grounds they were properly served, never challenged her failure to effectuate proper service on them and agreed to remove them from caption of the case so that it no longer reflects them as defendants. (Black Decl. ¶ 3.)

a. Plaintiff did not engage in "protected activity."

Plaintiff never disclosed any legal violations to Equinox or to any other covered entity and there is no evidence that Plaintiff refused to participate in an activity which would result in a violation of the law. (UF Nos. 23-25.) In addition, based on Plaintiff's testimony that she believed that using a credit card without approval and telling a member they could sign up for a one month membership were "illegal" activities, Plaintiff's claim under § 1102.5 is barred because she did not have reasonable cause to believe a law was being violated and could not articulate which law was being violated either in her complaint or at her deposition. (UF Nos. 23-25.) Indeed, to state a claim under § 1102.5, the employee has to specify what statute, regulation, or rule she believed the employer was violating. *Thomas v. Starz Entm't, LLC* (C.D. Cal. 2016) (Case No. 2:15-cv-09239-CAS (MRWx)).

b. There was no "adverse employment action."

Assuming, *arguendo*, that Plaintiff could demonstrate that she engaged in protected activity, she still cannot make out a *prima facie* case under § 1102.5 claim because she suffered no adverse employment action. Plaintiff quit. (UF No. 75.)

In addition, Plaintiff has presented no evidence that her reassignment to the Marina Del Rey club was an adverse employment action. Indeed, Equinox has shown through admissible evidence that Plaintiff had the potential to earn the same or more at the Marina Del Rey club and others who did not complain were treated similarly. *Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822 (transfers are treated as personnel decisions, not whistleblower retaliation).

c. Plaintiff cannot show a causal connection between any "protected activity" and any "adverse employment action"

Although Plaintiff would like this Court to believe that her reassignment at the end of January 2015/early February 2015 was in retaliation for complaints she raised in February and March 2014, she cannot create a triable issue of fact on this issue. *See Schuler v. Chronicle Broad. Co.* (9th Cir. Cal. 1986) 793 F.2d 1010, 1011 (subjective

personal feelings and opinions cannot create a genuine issue of material fact to defeat summary judgment motion). Here, there is no causal or temporal connection between Plaintiff's complaints and the decision to reassign her about a year later, particularly given (1) the undisputed intervening fact Rosen initiated an initial investigation, through Member Services, after a member complained to him about another MA, (2) the undisputed fact Member Services conducted an investigation into the sales activities of West LA's MAs at Rosen's direction, (3) Plaintiff's admission that she never complained to Rosen about alleged unlawful activities by West LA's MAs, and (4) the undisputed fact Plaintiff's reassignment to the Marina Del Rey club ultimately resulted from the West LA investigation triggered by Rosen after the member complaint. These undisputed facts defeat any speculative allegation by Plaintiff that she was retaliated against by Equinox. Accordingly, summary judgment is warranted for these additional reasons.

In addition, Plaintiff cannot set forth evidence even suggesting that her complaints about questionable sales activities of other MAs were a "substantial motivating factor" in the decision to reassign her to the Marina Del Rey club. First, Plaintiff testified that she is not aware of any other MAs complaining about the kinds of issues she was raising. (UF No. 80.) Second, Equinox has shown that another MA was treated the same as Plaintiff after his interview with Burger (*i.e.*, suspended pending the investigation). (UF No. 59.)

Further, even when an adverse employment action closely follows protected activity does not necessarily establish a claim of retaliation. "Cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case of retaliation uniformly hold that temporal proximity must be 'very close.'" *Clark County Sch. Dist. v. Breede* (2001) 532 U.S. 268, 273 (citation omitted); *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 356-57 (temporal proximity between plaintiff's termination just days after he informed his employer of his alleged disability and filed a

workers' compensation claim by itself did not create a triable fact as his employer raised questions about the employee's performance before he engaged in protected activity, and the employee's termination was based on those performance issues).

Likewise, the temporal proximity between Plaintiff's complaints to Rosen, Holmes, Simonson and Hemedinger about her compensation plan back in June 2014 and her reassignment to the Marina Del Rey club seven months in February 2015 is insufficient to establish pretext and does not discredit Equinox's proffered reasons for reassigning Plaintiff to the Marina Del Rey club. Similarly, Plaintiff's complaints about the sales activities of other MAs (putting aside for the moment the question of whether such complaints constituted protected activity) beginning in January of 2014 is similarly inadequate to show her reassignment in 2015 was pretextual.

2. Equinox Had Legitimate, Non-Retaliatory Business Reasons For Reassigning Plaintiff to the Marina Del Rey Club.

For the sake of argument, even though Plaintiff cannot establish a retaliation claim under § 1102.5, her reassignment to the Marina Del Rey club was based on legitimate, non-retaliatory business reasons. Specifically, Equinox conducted an investigation into the sales activities at the Marina Del Rey club and, while it did not believe it have enough information at that time to terminate Plaintiff, it decided to reassign Plaintiff to a different club so that it cold rebuild the sales team in West LA and create a fresh sales culture.

3. Plaintiff Cannot Show The Reasons She Was Reassigned to the Marina Del Rey Club Were Pretextual.

Since Equinox has clearly articulated legitimate, non-retaliatory business reasons reassigning Plaintiff to the Marina Del Rey club, her retaliation claim survives only if she can demonstrate: (a) these reasons were pretextual; and (b) Equinox actually harbored a discriminatory intent. *McDonnell Douglas*, 411 U.S. at 802. Specifically, Plaintiff (who at all times bears the burden of persuasion) must prove, by substantial, responsive and admissible evidence, that the reasons given are a pretext to mask an unlawful, discriminatory motive. *St. Mary's Honor Ctr. v. Hicks* (1993) 509 U.S. 502, 506. Mere suspicions as to the employer's motive do not constitute substantial responsive evidence

sufficient to overcome summary judgment. *Burton v. Sec. Pac. Nat. Bank* (1988) 197 Cal.App.3d 972, 978. Here, Plaintiff cannot produce any substantial, responsive and admissible evidence that the reasons given for her reassignment to the Marina Del Rey club were pretext for retaliation. Accordingly, her retaliation claim fails as a matter of law.

D. Plaintiff's Third, Fourth and Fifth Causes of Action Fail Because of Plaintiff's At-Will Status.

To establish a breach of contract claim, Plaintiff must prove: (1) the existence of the contract; (2) her performance or excuse for nonperformance; (3) Defendant's breach; and (4) damages to Plaintiff as a result of the breach. *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389; *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 350, 355.

1. Plaintiff's Claim for Breach of Contract of the "Compensation Plan Agreement" Fails As A Matter of Law.

Here, because Equinox clarified the compensation plan due to a payroll processing error, Plaintiff cannot sustain a claim as to that contract because Plaintiff continued to work for Equinox under the clarified compensation plan for months after it was instituted. This is true even if the clarification was a change due to a "typo" as Plaintiff claims. Under California law an employer can unilaterally change the terms of employment of an at-will employee at any time and "an employee who continues in the employ of the employer after the employer has given notice of changed terms or conditions of employment has accepted the changed terms and conditions." *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610 *quoting DiGiacinto v. Ameriko-Omserv Corp.* (1997) 59 Cal.App.4th 629, 637.

It is undisputed that Plaintiff was employed at will. Under Labor Code § 2922, "[a]n employment, having no specified term, may be terminated at the will of either party on notice to the other." In addition to the presumption of at-will employment, Plaintiff acknowledged her at-will employment in no less than three separate documents and admitted that she did not have a contract with Equinox; no one ever told her that she was guaranteed employment for a certain time period; and no one ever told her that she was

anything other than an at-will employee. (UF Nos. 7-13.) Accordingly, this claim fails.

2. Plaintiff's At Will Status Precludes Her from Stating Claims for Breach of Express Oral Contract and Implied-In-Fact Contract Not to Terminate Employment Without Good Cause.

Here, Plaintiff claims she entered into a contract (express and/or implied-in-fact) with Equinox wherein Equinox agreed not to terminate her employment without good cause and that Equinox breached its contract with Plaintiff by terminating her employment without good cause.

As a preliminary matter, these two claims are barred because, by Plaintiff's own admission, Equinox did not terminate her employment – ***Plaintiff resigned from Equinox***. (UF No. 75.) For this reason alone, these claims fail as a matter of law.

Moreover, Plaintiff's at-will status precludes her from being able to bring these contract claims. As noted above, in addition to being presumptively at will, the undisputed evidence demonstrates Plaintiff was an at-will employee. (UF Nos. 7-13.) Under an agreement entered into by both parties, Equinox could discharge Plaintiff at any time, with or without notice, and for any lawful reason. *Guz*, 24 Cal.4th at 335-336. Indeed, "unless at-will employers are to be held to a good-cause standard for termination, no inference of discrimination can reasonably be drawn from the mere lack of conclusive evidence of misconduct by the employee." *McGrory v. Applied Signal Tech., Inc.* (2013) 212 Cal.App.4th 1510, 1533.

Moreover, because Plaintiff's employment was at-will, Equinox's motive for reassigning Plaintiff to the Marina Del Rey club is irrelevant. *Guz*, 24 Cal.4th at 350-351. It is immaterial whether Equinox acted in "bad faith" or "without probable cause." *Id.* It is also immaterial whether Plaintiff's reassignment to the Marina Del Rey club was "fair" – if employment is at-will, Equinox, like any other employer, "may act peremptorily, arbitrarily or inconsistently." *Id.* Regardless, while not required, Equinox had legitimate, non-discriminatory justifications for her reassignment: the questionable sales activities at the West LA club and the desire to change the sales culture at the West

LA club and not because she reported allegations of improper behavior by other MAs or because she complained about her compensation plan being changed.

Further, Plaintiff's argument regarding an "implied contract" lacks merit. Plaintiff cannot have an implied contract that contradicts the terms of an express contract relating to the same subject matter. *E.g.*, *Dore*, 39 Cal.4th at 393-94 (plaintiff employee could not have reasonably assumed that his employer would only fire him for good cause where no one had made such a promise and he had signed an express statement of at-will employment); *Haggard v. Kimberly Quality Care, Inc.* (1995) 39 Cal.App.4th 508, 521 ("'There cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results.'" (Citations omitted)). Here, Plaintiff expressly affirmed the at-will nature of her employment. (UF Nos. 7-13.)

Lastly, assuming *arguendo*, Plaintiff could demonstrate an express or implied-in-fact contact not to terminate absent good cause, these claims still fail as matter of law. As set forth above, Plaintiff quit and Equinox had good cause for its actions. *See* discussion in Section III.3(C) above. For these reasons, summary judgment on her fourth and fifth claims for breach of contract is proper.

E. Plaintiff's Causes of Action for Wrongful Termination in Violation of Public Policy Fail As A Matter Of Law.

To establish a *prima facie* case of wrongful termination in violation of public policy, a plaintiff must show: (1) an employer-employee relationship exists; (2) the plaintiff was terminated; (3) the plaintiff's termination was a violation of public policy, *i.e.*, a "nexus" exists between the plaintiff's termination and the employee's protected activity; (4) the termination was the legal cause of the plaintiff's damages; and (5) the nature and extent of the plaintiff's damages. *See, e.g.*, *Holmes v. Gen. Dynamics Corp.* (1993) 17 Cal.App.4th 1418, 1426.

Here, Plaintiff cannot establish a *prima facie* case of wrongful termination in violation of public policy because Plaintiff was not terminated. By Plaintiff's own admission, Equinox did not terminate her employment – ***Plaintiff quit.*** (UF No. 75.) For

this reason alone, these wrongful termination claims fail as a matter of law.

Moreover, any attempt by Plaintiff now to amend her complaint to include a claim for "constructive discharge" must be rejected because the time for any such amendments has long since passed (s*ee*, Court Order of April 28, 2016) and such an amendment would be futile. Plaintiff's reassignment to Marina Del Rey, even if it resulted in a loss of pay cannot support a constructive termination 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). Thus, there are no facts to support a constructive discharge claim even if Plaintiff had so pled.

Moreover, assuming, *arguendo*, Plaintiff could somehow get over this legal hurdle (which she cannot) her claim still fails because her actions (*i.e.*, complaining about MAs' alleged "illegal" activities) did not serve a public interest weighty enough to give rise to a claim for wrongful discharge in violation of public policy. *See, e.g., Am. Computer Corp. v. Sup. Ct.* (1989) 213 Cal.App.3d 664 (complaint that employees were stealing by paying for consultants who were not providing any services to the company not covered by the public policy rule); *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654 (1988) (complaint that employee was suspected of embezzlement not covered by the public policy rule). Indeed, there is no causal link between Plaintiff's complaints and her reassignment to the Marina Del Rey club. Questionable sales practices by Plaintiff were revealed by Cuva and Stanfa's separate review of her sales activities, neither of whom had any information that she had complained about her compensation plan or about other MAs.

F. <u>Plaintiff's Defamation Claim Fails As A Matter of Law.</u>

To prevail on a defamation cause of action, a plaintiff must prove that (1) the defendant made a publication of fact (and not simply opinion) (2) that is false, (3)

defamatory, (4) unprivileged, and (5) has a natural tendency to cause damage. *Taus v. Loftus* (2007) 40 Cal.4th 683, 720. As a preliminary matter, Plaintiff's defamation claim fails because she cannot demonstrate that certain of the alleged defamatory statements were actually made. Plaintiff testified that she heard second-hand from Simonson and Santarelli that Gannon called her "crazy." Plaintiff also testified that she heard third-hand from Nick Johnstone and Jack Mangin that Gannon called her "crazy." Plaintiff also testified that Simonson and Johnston told her directly that she was acting "crazy." Lastly, Plaintiff testified that she heard Gannon refer to her as "Amy Winehouse."

Thus, aside from comments she allegedly heard first-hand from Gannon, Simonson or Johnstone, Plaintiff has no admissible evidence that the other alleged defamatory statements were made as she is relying on hearsay for which there is no exception.

1. There Was No False Statement of Fact.

Because a statement must be demonstrably false to be defamatory, a statement of opinion cannot be the basis for a claim of defamation. Whether an allegedly defamatory statement constitutes fact or opinion is a question of law. *Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 601. In examining whether any statement constitutes constitutionally protected opinion, the Ninth Circuit examines first whether a reasonable factfinder could conclude that the contested statement implies an assertion of objective fact. *Lieberman v. Fieger* (9th Cir. Cal. 2003) 338 F.3d 1076, 1079 In making this analysis, the court must examine the totality of the circumstances in which the statement was made, engaging in a three-part inquiry: (1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, (2) whether the defendant used figurative or hyperbolic language that negates that impression, and (3) whether the statement in question is susceptible of being proved true or false. *Id.* In *Lieberman*, 338 F.3d at1079, the Court found that no reasonable viewer would have taken as factual expressions such as "Looney Tunes," "crazy," and "nuts." *Id.* Similarly, the Court found that a reasonable viewer would have perceived the phrase "mentally imbalanced" as part of a stream of a rhetoric. *Id.*

Here, like in *Lieberman*, the "crazy" and "Amy Winehouse" comments constitute opinions, not assertions of objective fact. There is no evidence that Gannon or anyone else at Equinox truly believed that Plaintiff was, in fact, crazy or that she was, in fact, "Amy Winehouse." Plaintiff's testimony that that Gannon and other unidentified "people assumed because [she] was very vocal that [she] was being insane" is insufficient to prove that these comments were assertions of objective fact.

2. Plaintiff Has No Evidence of Publication to a Third Party.

While Plaintiff's complaint indicates that she believed that Equinox ruined her reputation by telling individuals that she had been terminated for improper behavior, she testified that no one ever asked her if she had been terminated from Equinox for improper behavior and she had no evidence to substantiate her claim that Equinox told anyone that she had been terminated for improper behavior. (UF No. 81.) Plaintiff has no evidence that these alleged defamatory statements were published to a third party. Indeed, despite Plaintiff's allegations, she testified that no one ever asked her if she had been terminated from Equinox for improper behavior and she had no evidence to substantiate her claim that Equinox told anyone that she had been terminated for improper behavior. (*Id.*)

3. There is No Liability Due to the Common Interest Privilege.

Civil Code § 47(c) provides in part that a statement is privileged if it is made "in communication, without malice, to a person interested therein: (1) by one who is also interested; or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent…" The common interest privilege is recognized "where the communicator and the recipient have a common interest and the communication is of a kind reasonably calculated to protect or further that interest." *Deaile v. Gen. Tel. Co. of Calif.* (1974) 40 Cal.App.3d 841, 846.

"Communications . . . relating to the conduct of an employee have been held to fall squarely within the qualified privilege for communications to interested persons." *Cuenca v. Safeway S.F. Employees Fed. Credit Union*, (1986) 180 Cal.App.3d 985, 995 (summary judgment granted to employer for libel based on report to board of directors

alleging kickbacks and false expense reports submitted by employee). Because an employer and its employees have a common interest in preserving morale and job efficiency, an employer's statements to employees regarding the reasons for termination of another employee generally are privileged. *King v. UPS, Inc.* (2007) 152 Cal.App.4th 426, 440 (employer statement to employees that truck driver had been fired for falsifying his timecard and driver's log was privileged because employer had legitimate interest in communicating termination reason, namely to inform employees of penalties for falsifying records.) Thus, to the extent any "defamatory" statements were made internally, they are privileged communications for which Equinox cannot be held liable.

Once defendant establishes the communication is privileged, it is ***plaintiff's burden*** to prove the statement was made with malice. *Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1208. Moreover, Civil Code § 48 provides that "malice is not inferred from the communication." Plaintiff must set forth evidence, other than the alleged defamatory material, that malice was the motivating cause of defendant's statements.

The malice necessary to destroy the qualified privilege is "'actual malice or malice in fact, that is, a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person.' Malice may also be established by showing that the publisher of a defamatory statement lacked reasonable grounds to believe the statement true and therefore acted with reckless disregard for the plaintiff's rights." *Cuenca*, 180 Cal.App.3d at 997. The determination of whether the privilege applies can be determined by way of a summary judgment motion, as in *Cuenca*.

Here, Plaintiff claims that that since the end of her employment, Plaintiff's former colleagues and peers have informed her that they were aware of Equinox's investigation of the alleged fraudulent activities and alleged unfair business practices at West LA and that some of them believed that Equinox had terminated Plaintiff's employment. These allegedly defamatory statements, if made at all, fall within the qualified privilege of Civil Code § 47(c). Further, no evidence exists that the allegedly defamatory statements were made to anyone outside of Equinox.

Assuming, *arguendo*, Plaintiff could put forth admissible evidence that the statements were made and would otherwise constitute defamation, Plaintiff cannot overcome the privilege imposed on these employment communications because she cannot show the statements were motivated by malice. Plaintiff must but cannot prove each acted with hatred or ill will toward Plaintiff, or they lacked reasonable grounds for believing the truth of false statements, or they made the statements for a reason other than to protect the interest of the one for whom the protection is given. All of the alleged defamatory statements were based on their observations, conversations with Plaintiff or the observations of other Equinox employees, for the interests of Equinox's effective management of the West LA club. Any statements about Plaintiff's job performance were part of their job responsibilities as managers for Equinox. Civil Code § 47(c) applies, and as such, the subject statements cannot be considered defamatory.

G. Plaintiff's Intentional Infliction of Emotional Distress ("IIED") Claim Fails As A Matter of Law.

1. Plaintiff's IIED Claim Is Barred by the Exclusive Remedy of California's Workers' Compensation Act ("WCA").

In the employment context, IIED claims are generally preempted by the exclusive remedy provisions of the WCA. Cal. Lab. C. § 3600 *et seq.*; *Miklosy v. Regents of Univ. of Cal.* (2008) 44 Cal. 4th 876, 902 (IIED claim based on whistleblower retaliation barred by workers' compensation exclusivity). Except for limited exceptions, the workers' compensation system is the exclusive remedy for such on the job injuries, including alleged emotional harm as a result of personnel decisions or negative interactions with co-workers. *Cole v. Fair Oaks Fire Prot. Dist.* (1987) 43 Cal.3d 148, 154. Even if alleged wrongful conduct is characterized as intentional, unfair, or outrageous, it is nevertheless covered by the workers' compensation system's exclusivity provisions. *Id.*

Here, Plaintiff bases her IIED claim upon allegations that she was subject to Equinox's discriminatory, harassing and retaliatory actions. (Complaint 17:6-8.) Plaintiff's IIED claim fails as a matter of law as her allegations involve nothing more than simple personnel decisions (*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, etc.). In addition, Plaintiff cannot show that anyone from Equinox acted with an intent to injure her rather than simply carrying out their job duties. Further, Plaintiff's whistleblower claim was a risk inherent in her employment relationship and thus preempted by the workers' compensation exclusivity rule.

2. Even If Plaintiff's IIED Claim is Not Barred, Plaintiff Cannot Establish a *Prima Facie* Case of IIED Because Plaintiff Cannot Establish Extreme and Outrageous Conduct.

California recognizes a claim for IIED only when there is: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050. Even if Plaintiff's IIED claim was not preempted, the conduct attributed to Equinox does not rise to the level of extreme and outrageous conduct necessary to support an IIED claim.

"Outrageous conduct" has been defined as conduct that is "so extreme as to exceed all bounds of that usually tolerated in a civilized community" (*Cervantez v. J.C. Penney Co.* (1979), 24 Cal.3d 579, 593) and "so 'extreme and outrageous as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community'" (*Alcorn v. Ambro Eng'g, Inc.* (1970) 2 Cal.3d 493, 499, fn. 5). Courts routinely hold that personnel management actions (such as criticism of an employee's performance or workplace behavior, discipline, suspension, and termination of employment) and criticism of work performance, even if alleged to be retaliatory, such as those alleged here, do not support a claim for IIED. *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 65, 79-80. As a matter of law, 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. Moreover, in *Cole*, the California Supreme Court held that a supervisor's behavior, even if egregious, does not create a claim for IIED. *Cole*, 43 Cal.3d at 160.

Here, 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, etc.) rise to the level of sufficient to state a cause of action for IIED. Rather, as in the above-describe cases, these allegations fall far short of any "extreme or outrageous" conduct that is so "extreme as to exceed all bounds of that usually tolerated in a civilized community." *Id*. Thus, summary judgment should be granted as to Plaintiff's IIED claim.

H. <u>Plaintiff's Punitive Damages Claim Fails As A Matter of Law.</u>

To recover punitive damages, Plaintiff must prove by clear and convincing evidence that an "officer, director, or managing agent" of Equinox committed alleged wrongful conduct with "oppression, fraud or malice." Cal. Civ. Code § 3294(b); *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 419-22. Here, Plaintiff cannot meet her burden because she cannot show through admissible evidence, much less clear and convincing evidence, that any managing agent acted with the requisite oppression, fraud or malice. "Oppression," in the context of Civil Code § 3294, means subjecting a person to cruel and unjust hardship in conscious disregard of his or her rights. *Trammell v. Western Union Tel. Co.* (1976) 57 Cal.App.3d 538. To show malice, a plaintiff must establish a managing agent intended to cause injury or engaged in "despicable" conduct with a willful and conscious disregard of the rights or safety of others. Civ. Code § 3294(c)(1). The word "despicable" is a "powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.'" *College Hospital Inc. v. Sup. Ct.* (1994) 8 Cal.4th 704, 725-726. Here, Plaintiff's allegations fall far short of "clear and convincing" evidence of oppression, fraud or malice. The undisputed evidence shows all of the

actions complained of by Plaintiff were routine personnel decisions administered for legitimate, non-retaliatory business reasons. (UF No. 65.) Furthermore, the decision to reassign Plaintiff was not based on anything other than a desire to rebuild the team of MAs in the West LA club and create a fresh culture, as a result of the investigation findings. (*Id.*) Therefore, Plaintiff's demand for punitive damages must also fail.

IV. CONCLUSION

For all of the foregoing reasons, Equinox respectfully requests that the Court grant its motion for summary judgment on all claims alleged by Plaintiff in her Complaint. Alternatively, Equinox respectfully requests that any causes of action found by the Court not to have a genuine issue of material fact be summarily adjudicated in Equinox's favor.

.Dated October 7, 2016
:

JACKSON LEWIS P.C.

By: /s/Mia Farber
Mia Farber
Dorothy L. Black

Attorneys for Defendant
EQUINOX HOLDINGS, INC.

4819-9375-0840, v. 4-2445-0618, v. 1