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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TAMAR KASBARIAN, Plaintiff, vs. EQUINOX HOLDINGS, INC., EQUINOX FITNESS MARINA DEL REY INC., EQUINOX FITNESS SEPULVEDA, and DOES 1 to 50, inclusive, Defendants.	Case No.: 2:16-CV-01795 MWF (JCx) **The Honorable Michael W. Fitzgerald** **PLAINTIFF TAMAR KASBARIAN'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT EQUINOX HOLDINGS, INC.'S MOTION FOR SUMMARY JUDGMENT OR ADJUDICATION** (Filed concurrently with Statement of Genuine Issues; Objections to Evidence; [Proposed] Order on Plaintiff's Objections to Evidence; [Proposed] Order Denying Summary Judgment) Date: November 7, 2016 Time: 10:00 a.m. Ctrm.: 165 Action Filed: April 13, 2015

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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

Defendant Equinox Holdings, Inc.'s Motion for Summary Judgment or Adjudication of Claims cannot be granted for a host of reasons, both procedurally and substantively. The facts, at the very least, are disputed in nature to show a model case of retaliation.

Tamar Kasbarian began her career at Equinox in October of 2010, as a membership advisor at the high volume Santa Monica location. She naturally and quickly excelled at her job, consistently meeting and exceeding her sales goals, and year after year winning all-expense-paid trips to New York and Miami for her top sales performance. She was generally regarded as a top membership advisor.

Not surprisingly, Kasbarian was promoted to membership executive at the highest tier and highest paying club, a "flagship club" at the West Los Angeles location. However, to Kasbarian's misfortune, a few short months after she started at the West L.A. location, in January of 2014, she observed other membership advisors conducting fraudulent and "fake" sales, where they charged clients' credit cards without their authorization. Upon observing this unlawful activity, Kasbarian immediately reported it to regional vice president Jack Gannon, regional director Brian Hemedinger, and Kira Simonson, her supervisor. She continued to make complaints throughout 2014 to management, but to no avail. Instead, Kasbarian was called ***"crazy"*** by Gannon, a ***"tattletale"*** by Simonson, and ***"too aggressive"*** by Hemedinger and was told just to ***"focus on what you can control."***

Not only was Kasbarian insulted and demeaned after her complaints, but, in June of 2014, Gannon and Hemedinger suddenly started to reduce her commission and bonus checks. Kasbarian complained to them about her owed wages and specifically told them that what they were doing with her pay was illegal and that she would and has consulted with an attorney about the pay discrepancies. In return, she was threatened and told that that it was ***"strongly suggested that she does not challenge the pay,"*** that she was

"***jeopardizing her career"*** with her complaints, that she was ***"lucky she did not have to pay them back,"*** and that they ***"strongly suggest that she does not challenge the pay."***

After months of complaining about defendants' repeated unlawful actions to no avail, and after management's resistance, Kasbarian in turn was accused of doing the very thing she complained about and was targeted for investigation, which was, as defendants admit, *all unsubstantiated*. Despite defendants' admission that Kasbarian was found not to have committed fraudulent activity, she was still ***suspended,*** by Gannon, and then subsequently ***demoted*** to membership advisor (the position in which she started in 2010) from the "flagship club" in West LA to lowest tiered "suburban club" in Marina del Rey, with a significant reduction in pay, from **$19.23 per hour to $9.00 per hour.**

The determination that a reasonable employee would have been compelled to quit is "quintessentially a jury function." *Thompson v. Tracor Flight Systems*, 86 Cal.App.4th 1156, 1170-1171 (2001). In light of the above aggravating factors and the circumstances, including her multiple complaints of illegality that were met with warnings, threats, and the turning of such concerns of illegality into an unsubstantiated investigation against, Kasbarian had only one choice: to resign. A reasonable person in her shoes would have felt compelled to resign, rather than continue to work for management and supervisors who had lied about her, insulted her, unfairly targeted her, left her suspended in purgatory, demoted her, and impugned her integrity. This, coupled with defendants' plethora of inconsistent and false testimony surrounding Kasbarian's suspension and reassignment, reeks of nothing but resounding pretext in this case. *Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000) (evidence that defendants' claimed reasons for suspending and reassigning Kasbarian are "unworthy of credence" is probative of pretext and retaliation). Summary judgment is not available here, nor is summary adjudication.

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2. STATEMENT OF FACTS

A. Kasbarian's Exemplary 4.5-Year Career with Equinox Where She Excels as a Membership Advisor and Is Promoted to Membership Executive.

Kasbarian was first employed by Equinox Holdings, Inc. (collectively, "defendant" or "Equinox") as a membership advisor at the Santa Monica branch in October of 2010, worked her way up to membership executive at the West Los Angeles location in October of 2013, and was forced to resign on February 2, 2015. (Plaintiff's Statement of Facts ("PSF") 1.) She excelled at her job, was consistently a top performer, and was ranked "exceeding expectations" on her performance reviews year after year. (PSF 2.) Her supervisor, Veronica Santarelli, noted on her reviews: ***"Tamar has a lot of integrity and upholds a high moral character," "She is someone people trust,"*** and ***"Tamar finished last year at 107% to plan, so she exceeded our desired results. She is very driven, see's*** [sic] ***sales as a 'Lifeblood' culture and takes initiative to make things happen."*** (PSF 3.) Kira Simonson, Kasbarian's other supervisor, noted on her review that Kasbarian ***"[t]akes a vested interest in the needs of the member or prospect and ensures their expectations are exceeded."*** (PSF 4.)

Scott Rosen, COO of Equinox, who worked closely with Kasbarian, testified that she was ***"one of the better advisors,"*** that she was a ***"top performer,"*** that ***"she wrote the most sales,"*** and that ***"she could handle the member base at the West L.A. location"*** because ***"she was very aggressive, very confident."*** (PSF 5.) Barry Holmes, vice president of sales, testified that Kasbarian was a ***"good performer," "met her goals,"*** and ***"was absolutely consistently above budget."*** (PSF 6.)

B. Kasbarian Receives All-Expense-Paid Trips for Four Consecutive Years as a Reward for Her Top Sales Performance.

For four consecutive years, starting in 2011, Equinox sent Kasbarian on trips to New York and Miami as rewards for her top sales performance. (PSF 7.)

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C. Kasbarian Is Promoted to Membership Executive at the West Los Angeles Branch with a Higher Compensation Plan.

In October of 2013, Kasbarian was promoted to membership executive with a higher compensation plan at the West Los Angeles ("West L.A.") branch, which was a "flagship club," the highest tier club at Equinox. (PSF 8.) As a membership executive, her hourly rate increased to $19.23, along with increases in commissions and bonuses. (PSF 9.)

D. Beginning in January of 2014, Kasbarian Observes Membership Advisors at West L.A. Engaging in Fraudulent and Unlawful Activity by Charging Clients' Cards Without Authorization.

Beginning in January of 2014, Kasbarian observed certain membership advisors at the West L.A. location, including Lauren Beck and Devin Mcelvogue, engaging in fraudulent and unlawful conduct, specifically charging members' and guests' credit cards for recurring year-long membership fees, without their approval, when they authorized only one-month membership fees. (PSF 10.) Moreover, Kasbarian observed Mcelvogue doing three-month deals, in which he gave members three months for the price of one-month, although that was against policy at Equinox. (PSF 11.)

E. Beginning in January of 2014, Kasbarian Complains to Simonson, Hemedinger, Gannon, and Others About the Fraudulent Activity.

Kasbarian complained on multiple occasions to regional director Hemedinger, her supervisor, Simonson, and regional vice president Gannon, as well as others, about the unlawful conduct she observed the other West L.A. membership advisors engage in, including Beck's and Mcelvogue's charging clients' and potential clients' credit cards without their approval and telling them that they were signing up for only month-long memberships, but instead charging them for recurring year-long membership contracts. (PSF 12, 13.)

F. Defendant Admits that the Conduct Kasbarian Complained of Is Both Illegal and Is the Type of Conduct that Should Have Been Investigated.

Gannon admitted in testimony that he believes that the type of conduct Kasbarian

complained of is illegal and is the type of conduct that needs to be investigated.(PSF 14.)

G. Immediately After Kasbarian Complains of Illegal Activity, Her Supervisors and Managers Make Negative and Demeaning Comments and Threats About Her.

(1) Kasbarian's Supervisor, Simonson, Calls Her a "Tattletale," Hemedinger Calls Her "Too Aggressive," and Matt Gonzales Tells Her to "Worry About What You Can Control."

Kasbarian's supervisor, Simonson, called her a "tattletale," Hemedinger called her "too aggressive," and Matt Gonzales told her to "worry about what you can control." (PSF 42, 43.)

(2) Regional Vice President Gannon Tells Kasbarian She Is "Crazy."

After Kasbarian complained about the fraudulent sales, regional vice president Gannon began making inappropriate, demeaning, and false comments about her, including the following:

- ***"She's really great at sales, but she's crazy."*** (PSF 15.)
- ***"Is she being crazy again?"*** (PSF 16.)
- ***"You're acting out."*** **(**PSF 17.)
- Gannon referred to Kasbarian as ***"Amy Winehouse"*** on multiple occasions. (PSF 18.)

H. First Retaliation – Pay Shortage: In June of 2014, Kasbarian, Suddenly and for the First Time Since She Started Working at West L.A., Is Cheated On Her Commissions and Bonuses Check for May of 2014 by 25% to 33%.

In June of 2014, five months after Kasbarian started complaining about the fraudulent activities of other membership advisors, she was suddenly and for the first time paid less than she was owed by 25% to 33% on her commissions and bonuses check for May of 2014. (PSF 19.)

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I. In June of 2014, Kasbarian Complains to Gannon, Rosen, and Holmes About Their Failure to Pay Her $2,000.00 in Unpaid Commissions and Bonuses and Tells Them She Thinks What They Are Doing Is Illegal and that She Consulted Counsel.

In June of 2014, immediately after receiving her check and noticing that she was not paid correctly, Kasbarian complained to Gannon, COO Rosen COO, and vice president of sales Holmes. (PSF 20.) Kasbarian also told them that she thought what they were doing with her pay was illegal, as they cut her pay after she made complaints of unlawful activity and told them that she had consulted with counsel. (PSF 44, 45.)

J. Second Retaliation – Cut in Pay: In July of 2014, Gannon and Hemedinger Slash Kasbarian's Compensation Package Permanently.

In July of 2014, Gannon and Hemedinger permanently lowered Kasbarian's compensation package, stating that they had been paying her "too much" and in "error" since she had been working at West L.A., starting in October of 2013, and told her she was "lucky that they are not asking you to pay the difference back" and that they "strongly suggest that she does not challenge the pay." (PSF 21, 46.)

K. Third Retaliation – Threats: Shortly After Kasbarian Complains About Her Wages, Her Supervisor Tells Her Not to Complain About Her Pay Because She Will "Jeopardize" Her Job.

Shortly after Kasbarian's complaints about unpaid commissions and bonuses, her supervisor, Simonson, told her not to complain about her pay because she would jeopardize her job. (PSF 22, 45.)

L. In January of 2015, a Member Complains that His Credit Card Was Charged Without His Authorization, and Two Membership Advisors that Kasbarian Complained About Are Fired for Fraudulent Sales.

In January of 2015, a membership advisor at West L.A. who Kasbarian complained was engaging in unlawful activity was fired for charging guests without their approval. (PSF 23.)

M. On January 30, 2015, Defendant Finally Launches an Investigation of West L.A., But Kasbarian Is Harassed with Questions About Her Membership Sales Practices.

In late January of 2015, Gannon launched an investigation and requested that Kasbarian be questioned. Kasbarian was interviewed on January 30, 2015, and was harassed with questions about multiple memberships that she sold. (PSF 24.)

N. At the Beginning of Kasbarian's Interview, She Notifies Senior Director of Loss Prevention Burger of the Fraudulent Sales Practices that She Reported for Months, as Burger Admits.

At the beginning of Kasbarian's interview, she notified senior director of loss prevention Jim Burger of the fraudulent activity and unauthorized membership sales that she had observed and complained about to management for months. (PSF 25.)

O. Fourth Retaliation - Acts: Although Kasbarian's Interview Concludes that She Did Not Engage in Any Fraudulent Activity, Defendant Suspends Her, Restricts Her Access to Her E-mail, and Escorts Her Out of the Building.

That same day, immediately after the interview, Gannon suspended Kasbarian, effective immediately, removed her access to her e-mail, and escorted her out of the building. (PSF 26.)

P. Fifth Retaliation – Intent: On January 30, 2015, a Final Paycheck for Kasbarian Is Cut, Indicating Equinox's Plan to Terminate Her Employment That Day.

On January 30, 2015, a final paycheck for Kasbarian was cut, indicating Equinox's plan to terminate her employment that day. (PSF 27.)

Q. Defendant Prepared a Final Paycheck for Kasbarian, Even Prior to Her Interview, in Preparation for Her Discharge.

Gannon admits that he prepared a final paycheck for Kasbarian, even prior to her interview, in preparation for terminating her employment, but Kasbarian was found not

to have committed any terminable offense. (PSF 28.)

R. On January 31, 2015, Despite Defendant's Admissions Clearing Kasbarian, Defendant Demotes Her to Membership Advisor at $9.00 Per Hour at Marina del Rey, the Lowest of Tier Clubs.

On January 31, 2015, Kasbarian met with Gannon, and he informed her that she would be reinstated, but demoted to membership advisor at the Marina del Rey location, which was the lowest tier club, on a lower compensation plan than at West L.A. or Santa Monica, where she started. (PSF 29.) Kasbarian was told that she would be paid $9.00 per hour at the Marina del Rey office; this was a $10.00 per hour decrease from what she was paid at the West L.A. branch, $19.23 per hour. (PSF 30.)

S. Defendant Admits that Urban Clubs, Such as Santa Monica and West L.A., Generate More Revenue than Suburban Clubs, Like Marina del Rey.

Holmes, vice president of sales, admitted that urban clubs, such as Santa Monica, tend to generate more revenue than suburban clubs, such as the Marina del Rey location, and that the West L.A. location is a higher tier club than urban clubs. (PSF 31.)

T. Hemedinger Testifies that It Was "Best for Tamar If She Had the Opportunity to Be a Membership Advisor at a Different Location," While Acknowledging that She Would Be Going to a Lower Tier Location than When She Started with the Company.

Hemedinger admitted in deposition that defendants thought it would be "best for Tamar if she had the opportunity to be a membership advisor at a different location," while acknowledging that she would be going to a lower tier location than when she started with the company. (PSF 32.)

U. On February 2, 2015, Kasbarian Believes She Is No Longer Welcome at Equinox, Feels Pushed Out and Overwhelmed by the Intolerable Working Conditions and Is Forced to Resign.

On February 2, 2015, the day Kasbarian was supposed to start at the Marina del

Rey location, she believed she was no longer welcome at Equinox and felt pushed out because she was forced to take a demotion and a significant pay cut and to restart her business and client base. Because of that, along with the overwhelming stress of the interrogation and suspension and the fear of being fired, she was forced to resign. (PSF 33.)

V. Kasbarian Sees a Psychiatrist for Her Overwhelming Anxiety, Depression, and Panic Attacks.

Kasbarian suffered from insomnia, lack of appetite, panic attacks, and depression after she was forced to resign from Equinox. She was so severely emotionally distressed that she had to see a psychiatrist, who prescribed her medicine for depression and to help her sleep. (PSF 34.)

W. Defendants' Inconsistent and False Reasons for Suspending Kasbarian and Transferring Her to a Lower Tier Club with a Significant Pay Cut

Defendants' reason for suspending Kasbarian and transferring her to a lower tier club with a significant pay cut was that they wanted a "clean slate" at the West L.A. location. However, there are a number of inconsistencies and falsities in defendants' reasons.

(1) Burger, Senior Director of Loss Prevention, Testifies that Gannon Asked Him to Do the Investigation While Gannon States that He Never Asked Burger to Do an Investigation or Even Spoke with Him.

Senior director of loss prevention Burger testified that Gannon contacted him and asked him to do an investigation at West L.A. and that he reported to Gannon throughout, yet Gannon stated that he never initiated the investigation and did not speak with Burger at all until after the investigation was completed. (PSF 35.)

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(2) Defendant Admits that Kasbarian Did Not Engage in Any Terminable Conduct, But Demote Her Anyway, While Another Membership Advisor Who Also Did Not Engage in Any Inappropriate Conduct Was Able to Remain at West L.A.

Hemedinger and Holmes admit that Kasbarian did not engage in any terminable conduct, but they moved her out of West L.A. anyway, yet one other membership advisor was allowed to stay at the West L.A. location, although he also did not engage in any terminable conduct. (PSF 36.)

(3) Rosen, Hemedinger, and Holmes Inconsistently Testify They Removed All West L.A. Membership Advisors Who Were Not Discharged to Create a Fresh Culture, Which Gannon Contradicts.

Rosen, Hemedinger, and Holmes all testified that they removed all of the membership advisors at West L.A. whose employment was not terminated after the investigation in order to create a fresh culture, yet Gannon stated that he let one membership advisor stay at the club and never even suspended him. (PSF 37.)

3. ARGUMENT

A. The Applicable Summary Judgment Standard

Federal courts, sitting in diversity, procedurally apply the Federal Rules of Civil Procedure while substantively applying state law. *Snead v. Metropolitan Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1090 (9th Cir. 2001). Thus, the moving party has the initial burden of proof of showing "no genuine dispute as to any material fact." F.R.C.P. Rule 56. Once it does, the burden shifts to the non-moving party to produce admissible evidence of a triable issue of fact. F.R.C.P. Rule 56. "If a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive, summary judgment is inappropriate, *because it is for the trier of fact to decide which story is to be believed.*" *Washington v. Garrett,* 10 F.3d 1421, 1433 (9th Cir. 1993) (emphasis added).

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B. Summary Adjudication Is Available *Only* as to Noticed Issues, Precluding Adjudication of Issues *Defendants Never Raised.*

A party seeking summary judgment always bears the responsibility of informing the district court and the opposing party of the specific grounds for its motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Pittman v. Cuyahoga County Dept. of Children & Family Services*, 640 F.3d 716, 723 (6th Cir. 2011); *Katz v. Children's Hosp. of Orange County*, 28 F.3d 1520, 1534 (9th Cir. 1994).

Issue No. 1: Defendant fails to dispose properly of the entity defendants. Defendant does not make it clear which entity defendants they are stating are not Kasbarian's employers and, therefore, does not properly seek adjudication of this issue. First, defendant's Motion for Summary Judgment notice states only that defendant Equinox Holdings, Inc. is making the motion. (MSJ, 2:5-6.) However, Issue No. 1 in the Notice of Motion says, "*The club defendants* were not plaintiff's employer . . ."—defendant fails to state specifically who the "club defendants" are. Is it Equinox Holdings, Inc., the entity defendant that is bringing the motion? Is it all of the named entity defendants or just one? Without clearly listing the exact entity defendants, the motion does not properly give plaintiff notice of the exact issue of which it is seeking adjudication, and, as a result, the Court cannot dismiss any of the entity defendants.

Issues Nos. 10, 11, 12, 14: Defendant also claims that, "Although plaintiff has not pled a cause of action for constructive discharge, such a claim (even if properly pled) would fail as a matter of law because . . ." (Def. Notice, 3:22-4:6.) However, it is not clear what "claim" defendant is talking about. Again, constructive employment termination is not a "claim" and is not required to be raised separately. It is something that connects to an actionable claim, such as a wrongful discharge or retaliation claim, both of which plaintiff has pled. From defendant's notice, plaintiff is left guessing what defendant is arguing, and defendant certainly has not met its initial burden as to whatever issue it is attempting to adjudicate.

Issue No. 13: Defendant seeks to adjudicate summarily the wrongful termination

of employment in violation of public policy claim because "Plaintiff was not terminated." However, plaintiff claims that the adverse employment action was a constructive employment termination, and that negates this issue by law, as defendant fails to notice as an issue and address. Therefore, this claim cannot be adjudicated on that basis.

Issues Nos. 20, 21: Defendant does not raise as an issue for summary adjudication whether Kasbarian can establish that she suffered severe emotional distress in regard to her IIED claim, thereby waiving this argument as well. It is sufficient for Kasbarian to defeat summary adjudication of her IIED claim merely by showing a disputed issue as to whether defendants' conduct were outrageous.

Issue No. 22: Defendant fails to meet its burden as the moving party to dispose completely of plaintiff's punitive damages prayer. Civil Code section 3294 permits an award of punitive damages against a corporation whose managing agent, ***director, or officer authorized, ratified, or approved the wrongful act.*** *White v. Ultramar,* 21 Cal.4th 563 (1999); Civil Code § 3294(b). Defendant does not even notice this issue, nor does it address it in its papers. Defendant attacks only the issue of whether defendants, as managing agents only, engaged in malicious, oppressive, or fraudulent conduct, and it certainly does not address whether any managing agent, director, or officer *ratified or approved* such conduct. Thus, even if defendant's noticed issues of summary adjudication as to the prayer for punitive damages were accepted as true, its motion still does not completely eliminate Kasbarian's prayer for punitive damages, and this Court cannot summarily adjudicate it.

C. The Evidence Negates Summary Adjudication of Kasbarian's Wrongful Employment Termination and Labor Code § 1102.5 Claims (Issues Nos. 2-6, 9-16).

(1) Equinox Constructively Discharged Kasbarian, and This Constitutes an Adverse Employment Action.

A constructive discharge is an adverse employment action. *See Steele v. Youthful Offender Parole Bd.,* 162 Cal.App.4th 1241, 1253 (2008). The employee need

not say, "I quit," as the "employment relationship is actually severed involuntarily by the employer's acts, against the employee's will." *Turner v. Anheuser-Busch, Inc.*, 7 Cal.4th 1238, 1244-1245 (1994). An employer's discriminatory animus is determined by the causal relationships among the various working conditions that create an intolerable working environment. *See Trop v. Sony Pictures Entertainment, Inc.*, 129 Cal.App.4th 1133, 1147-1149 (2005).

"Whether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact." *Valdez v. City of Los Angeles*, 231 Cal.App.3d 1043, 1056 (1991). Constructive discharge occurs when an employer engages in conduct that essentially forces him or her to resign involuntarily or puts the employee in a position in which "a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except not to return to work." *Colores v. Board of Trustees of Calif. State Univ.*, 105 Cal.App.4th 1293, 1305 (2003). Here, the conditions were intolerable for Kasbarian, a very successful membership executive, employed for almost five years, who loved and excelled at her job, as defendants:

- **Reduced her commissions and bonus structure** at West LA after her repeated complaints about unlawful activity, sales and charges, despite having been paid the first six months without an issue;
- **Insulted and demeaned** her as a result of her complaints by regional vice president Gannon, who called her ***"crazy,"*** called a ***"tattletale"*** by her supervisor, Kira Simonson, called ***"too aggressive"*** by regional sales director Hemedinger, and told to ***"focus on what you can control"*** by supervisor Matt Gonzales;
- **Threatened her with losing her job** and told she was *"jeopardizing her career,"* not to *"ruin"* how much she was getting paid, that she was *"lucky she did not have to pay them back,"* and that they *"strongly suggest that she does not challenge the pay"* after her complaints of unlawful activity and her complaints about her reduction in pay;

- **Falsely suspected and targeted her** in an investigation for unethical conduct;
- **Suspended her** and denied her access to e-mail *even after* it was discovered that Kasbarian was not guilty of committing any of the investigated fraudulent conduct and sales;
- **Demoted her** to membership advisor (the position in which she started in 2010) and more than one club level from "flagship club" in West LA to "suburban club" in Marina del Rey, with a significant reduction in pay from **$19.23 per hour to $9.00.**

The determination that a reasonable employee would have been compelled to quit is "quintessentially a jury function." *Thompson v. Tracor Flight Systems, supra*, 86 Cal.App.4th at 1170-1171. In light of the above aggravating factors and the circumstances, Kasbarian had only one choice: to resign. A reasonable person in her shoes would have felt compelled to resign, rather than continue to work for management and supervisors who had lied about her, insulted her, unfairly targeted her, left her suspended in purgatory, demoted her, and impugned her integrity.

(2) Kasbarian Is Not Required to Plead a Separate Constructive Discharge Claim (Issues Nos. 10-14).

"Standing alone, constructive discharge" is not a tort. An employee must independently prove a tort in connection with the employment termination to obtain damages for wrongful discharge. *Turner v. Anheuser-Busch, supra*, 7 Cal.4th at 1251. Again, constructive employment termination is not a "claim" and is not required to be raised separately.

Additionally, plaintiff has given defendants notice that plaintiff is claiming that she was constructively discharged and forced to resign from Equinox. Unless defendants failed to read Kasbarian's Complaint thoroughly, they would not have missed the distinct constructive discharge language. Plaintiff's Complaint refers to her "forced resignation," "constructive employment termination," and "constructive discharge" throughout. (PSF 41.)

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(3) Forced Administrative Leaves, Suspensions, Demotions, and Reductions in Pay All Constitute Adverse Employment Actions.

Case law establishes that *administrative leaves, even with pay, constitute adverse employment actions. Horsford v. Board of Trustees of California State University*, 132 Cal.App.4th 359, 374 (2005) ("suspension from duty . . . , even if the leave is with pay, constitutes an adverse employment action"). *Horsford* is particularly instructive. *Id.* The plaintiff in that case was removed from his position and placed on administrative leave because of the employer's claim that he was "mentally unstable." *Id.* The plaintiff remained on the payroll and was eventually returned to his position, rank, and salary. *Id.* The court found that under those circumstances a jury reasonably could have concluded that the employment action violated the plaintiff's rights and that the leave was "unjustified," constituting an adverse employment action that was actionable under FEHA. *Id.* That is exactly what happened to Kasbarian. She was removed from her position and placed on suspension. This constitutes an adverse employment action by defendants.

Additionally, courts have found that demotions and actions that result in reductions in pay satisfy the requirement of an "adverse employment action." *Guz v. Bechtel Nat'l Inc.*, 24 Cal.App.4th 317, 355 (2000) (employment "termination, ***demotion, or denial of an available job"*** is an adverse action); *Thomas v. Department of Corrections*, 77 Cal.App.4th 507, 511 (2000) (termination of employment and ***demotion are adverse actions***); *McRae v. Dep't of Corrections and Rehab.*, 142 Cal.App.4th 377, 393 (2006) (action that results in a ***reduction in pay satisfies requirement***); *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 970 (9th Cir. 2002) (***pay cut is adverse employment action***); *Leamon v. Workers' Comp. Appeals Bd.*, 190 Cal.App.3d 1409 (1987).

Here, not only was Kasbarian's suspension an adverse employment action, but her forced reassignment with a pay cut is considered an adverse employment action.

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(4) Evidence of Defendants' False, Inconsistent, and Pretextual Reasons for Discharge Negates Summary Adjudication.

(a) Evidence of the Falsity and Inconsistency of Defendants' Alleged Reason for Suspending Kasbarian and Reassigning Her Raises Inferences of Discrimination.

Evidence that defendants' claimed reasons for firing Kasbarian are "unworthy of credence" is probative of pretext and retaliation. *Reeves v. Sanderson Plumbing, supra*, 530 U.S. 133. "Proof that the employer's proffered reasons are unworthy of credence may 'considerably assist' a circumstantial case of discrimination, because it suggests the employer had cause to hide its true reasons." *Guz* at 361; *Nazir v. United Air Lines, Inc.*, 178 Cal.App.4th 243, 277-283 (2009). The fact-finder's disbelief of defendants' reasons (particularly when accompanied by suspicion of mendacity) may, along with elements of the *prima facie* case, suffice to show intentional discrimination. *Rejection of defendants' proffered reasons permits the trier of fact to infer the ultimate reason.*

Here, defendants have provided inconsistent alleged reasons for suspending and reassigning Kasbarian: (1) senior director of loss prevention Burger testified that Gannon asked him to investigate the West L.A. location and that he reported to him throughout the investigation, yet Gannon states that he never initiated the investigation, did not contact Burger to conduct an investigation at West L.A., and did not speak with Burger at all until after the investigation was completed (PSF 35); (2) Hemedinger and Holmes admit that Kasbarian did not engage in any terminable conduct, but moved her out of the West L.A. location anyway, yet one other membership advisor was allowed to stay at West L.A., although he also did not engage in any terminable conduct (PSF 36); (3) Gannon, Rosen, Hemedinger, and Holmes all testified that they wanted to "create a fresh culture at West L.A." and that that was why they removed all of the membership advisors at West L.A. whose employment was not terminated after the investigation, yet Gannon stated that he let one membership advisor stay at the club and never even suspended him, despite his testimony that he moved Kasbarian to "create a fresh culture"

(PSF 37). These facts establish that the reason for Kasbarian's suspension is "unworthy of credence" and, thus, not a legitimate business purpose.

(b) Kasbarian's Work History Supports Pretext and Discrimination.

"Pretext may also be inferred . . . [from] the terminated employee's job performance before termination." *Flait v. North American Watch Corp.*, 3 Cal.App.4th 467, 479 (1992). Firing a highly rated employee is evidence of pretext. *Id.* at 479; *Shager v. Upjohn Co.*, 913 F.2d 398, 401 (7th Cir. 1990). Defendants' false reasons for suspending and reassigning Kasbarian are entirely inconsistent with her exemplary work during her tenure at Equinox, as she was commended by both of her supervisors, and even Equinox's COO, Rosen, testified that she was ***"one of the better advisors,"*** that she was a ***"top performer,"*** that ***"she wrote the most sales,"*** and that ***"she could handle the member base at the West L.A. location"*** because ***"she was very aggressive, very confident."***

(c) Timing Evidence Also Negates Summary Adjudication and Establishes a Causal Connection.

"[A]n employer generally can be liable for the retaliatory actions of its supervisors." *Wysinger v. Automobile Club of Southern California*, 157 Cal.App.4th 413, 420 (2007); *Colarossi v. Coty US Inc.*, 97 Cal.App.4th 1142, 1153 (2002). "The causal link may be established by an inference derived from circumstantial evidence, 'such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision." *Fisher v. San Pedro Peninsula Hospital*, 214 Cal.App.3d 590, 615 (1989). When adverse employment decisions are taken within a reasonable time after an employee engages in protected activity, causation may be inferred. *Flait* at 479. Such "timing of events" is one type of circumstantial evidence that can prove causation. *Colarossi* at 1153; *Sada v. Robert F. Kennedy Med. Ctr.*, 56 Cal.App.4th 138, 156 (1997).

The fact that *shortly after* and during the year of Kasbarian's complaints about fraudulent conduct and her unpaid commissions and bonuses, beginning in January of 2014 and

continuing throughout 2014, she had her compensation plan reduced, was subjected to investigation for the same conduct she complained of, and was suspended, reassigned, and demoted is sufficient to show animus. *Colarossi* at 1153; *Sada* at 156 (close timing of complaint and firing precludes summary judgment); *California Fair Employment & Housing Com. v. Gemini Aluminum Corp.*, 122 Cal.App.4th 1004, 1023 (2004); *Hanson v. Lucky Stores*, 74 Cal.App.4th 215, 224 (1999); *Flait* at 479; *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal.4th 1028, 1062 (2005). Although "[a] long period between an employer's adverse employment action and the employee's earlier protected activity may lead to the inference that the two events are not causally connected . . . if between these events the employer engages in a pattern of conduct consistent with a retaliatory intent, there may be a causal connection." *Wysinger* at 421.

D. The Wrongful Employment Termination in Violation of Public Policy Claim Must Survive (Issues Nos. 9-16).

(1) An Employee's Internal Complaints About an Employer's Illegal Conduct Are Sufficient to Support Wrongful Discharge Claims.

(a) Discharges that Violate Public Policy Are Illegal.

To establish a claim for wrongful discharge in violation of public policy, Kasbarian must show that that: (1) she was employed by Equinox, (2) Equinox constructively discharged her, (3) a violation of public policy substantially motivated the constructive discharge, and (4) the constructive discharge caused harm to her. *Haney v. Aramark Uniform Services, Inc.*, 121 Cal.App.4th 623, 641 (2004). Claims for wrongful discharge in violation of public policy are based "on whether the matter affects society at large, whether the policy is sufficiently clear, and whether it is fundamental, substantial, and well established at the time of the termination." *Scott v. Phoenix Schools, Inc.*, 175 Cal.App.4th 702, 708 (2009); *Hentzel v. Singer Co.*, 138 Cal.App.3d 290, 295-296 (1982). The seminal California Supreme Court decision in *Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167, 178 (1980), held:

> The courts have been sensitive to the need to protect the individual employee from discriminatory exclusion from the opportunity of employment

whether it be by the all-powerful union or employer.

The courts have described the rationale for wrongful discharge claims as follows:

> [T]here can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy. Any other conclusion would sanction lawlessness, which courts by their very nature are bound to oppose.

Casella v. Southwest Dealer Services, Inc., 157 Cal.App.4th 1127, 1138-1139 (2007), *quoting Gantt v. Sentry Insurance*, 1 Cal.4th 1083, 1094 (1992).

(b) Only the Public Policy Underlying the Statute Needs to Be Violated.

In *Casella*, 157 Cal.App.4th at 1140, the court described the general categories of public policy claims in the following types of employee conduct:

> (1) [R]efusing to violate a statute; (2) performing a statutory obligation; (3) exercising a statutory right or privilege; and (4) *reporting an alleged violation of a statute of public importance.*

Id. at 1138-1139 (emphasis added).

An employee who complains internally about an employer's illegal conduct engages in protected activity that supports a wrongful discharge claim. Labor Code section 1102.5(b) provides the statutory basis for this public policy. *Green v. Ralee Engineering Co.*, 19 Cal.4th 66, 87 (1998); *Collier v. Superior Court*, 228 Cal.App.3d 1117, 1123 (1991). Section 1102.5(b) "evince[s] a strong public interest in encouraging employee reports of illegal activity in the work place."[1] *Collier* at 1121. In addition, as was stated in *Collier*, ***actual violations of law are not needed for public policy claims,*** which require only that an employer violate a fundamental *public policy* expressed in a constitution, statute, or regulation. 228 Cal.App.3d at 1123.

Numerous California cases and federal decisions support the principle that an em-

[1] A public policy claim can be based on *internal* reports and/or complaints of "illegal, unethical or unsafe practices." *Green*, 19 Cal.4th at 85 (internal complaints of employer's shipping of defective parts supported a public policy claim under § 1102.5); *Collier*, 228 Cal.App.3d at 1123 (internal complaints of illegal conduct supported wrongful employment termination claim under § 1102.5); *Gould v. Maryland Sound Industries, Inc.*, 31 Cal.App.4th 1137, 1149 (1995) (internal complaints about overtime wages supported wrongful discharge claim); *Parada v. City of Colton*, 24 Cal.App.4th 356, 365 (1994); *see Holmes v. General Dynamics Corp.*, 17 Cal.App.4th 1418, 1434 (1993).

ployee engages in protected activity in reporting a violation of the law. *See Boston v. Penny Lane,* 170 Cal.App.4th 936 (2009) (work place safety regulations were source of public policy in wrongful discharge matter, even with no evidence that regulations were violated); *Franklin v. Monadnock Co.*, 151 Cal.App.4th 252 (2007) (general work place safety statutes were source of public policy in wrongful discharge matter, even with no evidence that statutes were violated).

(2) To Prove Liability, the Public Policy Violation Need Be Only "a Substantial Motivating Reason" for the Discharge.

An employee need show only that a defendant's violation of public policy was "a *substantial* motivating reason" for her firing to establish liability. CACI 2430, 2507 (emphasis added). This does not require that the violation of public policy be the only reason. "A substantial motivating reason" is defined as "a reason that actually contributed to the [adverse employment action]. It must be more than a remote or trivial reason. It does not have to be the only reason motivating the [adverse employment action]." CACI 2507.

(3) Kasbarian's Complaints About Retaliation Are Protected Acts.

The employee "must show that the important public interest [she] seek[s] to protect are 'tethered to fundamental policies' in the statute(s) on which she relies." *Diego v. Pilgrim United Church of Christ*, 231 Cal.App.4th 913, 921-922 (2014). ***California has recognized that reports of fraudulent actions, including retaliation for complaining about such actions, are protected activities tethered to fundamental public policies.*** *Haney v. Aramark Uniform Services, supra,* 121 Cal.App.4th 623, held that in California there is a fundamental public policy of discouraging fraud. In *Haney,* the plaintiff alleged that he was fired because he complained about fraudulent billing practices. 121 Cal.App.4th at 629-630. The *Haney* court held that such complaints were "sufficient to state a claim for retaliatory discharge in violation of a public policy": "We conclude that when an employer discharges an employee who refuses to defraud a customer, the employer has violated a fundamental public policy and may be liable in tort for wrongful

discharge." *Id.* at 643; *see also Casella, supra,* 157 Cal.App.4th 1127 (reporting company's misrepresentation of customer's payments was tied to a public policy). Here, defendants' unlawful practices were in violation of FEHA and Labor Code section 1102.5 and the public policies underlying these statutes. *See Gantt, supra*, 1 Cal.4th at 1090-1091; *Tameny v. Atlantic Richfield Co., supra,* 27 Cal.3d 167 (employee discharged for refusing to participate in illegal price-fixing scheme); *Collier v. Superior Court, supra,* 228 Cal.App.3d 1117 (employee fired for reporting suspected violations of law by other employees sufficient to state a cause of action under Labor Code section 1102.5).

E. The Intentional Infliction of Emotional Distress Claim Survives Summary Adjudication (Issues Nos. 20, 21).

(1) Defendant's Notice on Its Face Fails to Dispose of This Claim.

It is important to note that defendant did not notice as an issue for adjudication whether Kasbarian suffered severe emotional distress. Defendant claims only that IIED fails because defendants did not engage in outrageous conduct. Accordingly, summary adjudication cannot be decided on that issue, even if it is found that Kasbarian did not suffer severe emotional distress.

(2) There Is a Disputed Issue as to Whether Defendants Engaged in Extreme or Outrageous Conduct.

Kasbarian's claims for retaliation and wrongful constructive employment termination all support her claim for intentional infliction of emotional distress, as an "employer's decision [constructively] to discharge an employee [that] results from an animus that violates the fundamental policy" is "misconduct [that] cannot be considered a normal part of the employment relationship." *Cabesuela v. Browning-Ferris Industries of California, Inc.*, 68 Cal.App.4th 101, 112 (1998).

F. The Workers' Compensation Exclusivity Rule Does Not Bar Kasbarian's IIED Claim.

Defendants cannot hope to hide behind the workers' compensation exclusivity rule.

"The Legislature did not intend that an employer be allowed to raise the exclusivity rule for the purpose of deflecting a claim of discriminatory practices." *Accardi v. Sup. Ct.*, 17 Cal.App.4th 341, 352 (1993) (citations omitted). The exclusivity provision of the workers' compensation law does not bar a plaintiff from alleging emotional distress because of discriminatory actions. *Murray v. Oceanside Unified School Dist.*, 79 Cal.App.4th 1338, 1363 (2000); *Fretland v. County of Humboldt*, 69 Cal.App.4th 1478, 1492 (1999).

G. The Breach of Contract Claims Survive (Issues Nos. 6-8).

"Though Labor Code section 2922 prevails where the employer and employee have reached no other understanding, it does not overcome their 'fundamental . . . freedom of contract' to depart from at-will employment." *Guz*, 24 Cal.4th at 336; *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 677 (1988). Additionally, the presumption of at-will employment under Labor Code section 2922 does not apply under an implied or express agreement. *Guz* at 336; *Foley* at 680; *Khajavi v. Feather River Anesthesia Med. Group*, 84 Cal.App.4th 32, 38 (2000). Under *Guz*, when the "evidence logically permits conflicting inferences [of whether an implied contract exists], a question of fact is presented." The existence of an implied agreement depends on the "totality of the circumstances" in view of the parties' "actual understanding" on the basis of the *Foley* factors: (1) oral assurances of continued employment on the basis of job performance, (2) the length of the employee's tenure, (3) the employer's practice of terminating employment only for cause, and (4) the industry practice of terminating employment only for cause. *Foley* at 680-682; *Guz* at 336. At-will language in an employee handbook or acknowledgment does not mean that employment is at-will. *Guz* at 340-341; *McLain v. Great Am. Ins. Cos.*, 208 Cal.App.3d 1476, 1485 (1989). The factors suggest that this is a triable issue.

H. Kasbarian's Defamation Claim Must Survive (Issues Nos. 17-19).

"Defamation is an invasion of the interest in reputation[, which] involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." *Smith v. Maldonado*, 72

Cal.App.4th 637, 645 (1999). The tort of defamation "involves (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage." *Taus v. Loftus*, 40 Cal.4th 683, 720 (2007).

Here, Kasbarian has presented sufficient facts to establish that defendants made false statements: (1) that she is crazy and that she was acting crazy and (2) that she engaged in fraudulent or inappropriate conduct. In any case, the fact that defendants knew that Kasbarian was making legitimate complaints, which they did not want to address, but which in fact were true, as they were substantiated by an investigation and resulted in the discharge of membership advisors whom Kasbarian complained about, supports a reasonable, good faith belief that defendants published a false accusation regarding her sanity. Moreover, defendants' testimony admits that Kasbarian was found not to have engaged in the fraudulent conduct, thereby verifying that these statements were false. Kasbarian testified that members and other individuals outside Equinox sent her text messages regarding these alleged statements, thereby satisfying the publication requirement and circumventing the common interest privilege.

Accordingly, Kasbarian has presented sufficient facts to establish triable issues of fact for her defamation causes of action.

I. Defendant Fails to Meet Its Burden of Establishing a Complete Defense to Adjudicate Punitive Damages (Issue No. 22).

(1) Defendant's Notice on Its Face Fails to Dispose of This Claim.

Defendant fails to meet its burden as the moving party to dispose completely of plaintiff's punitive damages prayer. Section 3294 permits an award of punitive damages against a corporation whose managing agent, ***director, or officer authorized, ratified, or approved the wrongful act.*** *White v. Ultramar, supra,* 21 Cal.4th 563; Civil Code § 3294(b). Defendant does not even notice this issue, nor does it address it in its papers. Defendant attacks only the issue of whether defendants, as managing agents only, engaged in malicious, oppressive, or fraudulent conduct, and it certainly does not address whether any managing agent, director, or officer *ratified or approved* such conduct.

Thus, even if defendant's noticed issues of summary adjudication as to the prayer for punitive damages were accepted as true, its motion still does not completely eliminate Kasbarian's prayer for punitive damages, and this Court cannot summarily adjudicate it. Therefore, punitive damages should not be disposed of for this reason alone.

(2) There Is a Disputed Issue as to Kasbarian's Claim for Punitive Damages.

Even if defendant properly noticed this issue, nowhere are punitive damages warranted more than here. If this Court finds that any claim survives, the prayer for punitive damages must also survive. From shifting and false reasons for Kasbarian's suspension and reassignment to evidence that defendants intentionally sought out a reason they could use to reassign her without even notifying her of the reasons she was being suspended or reassigned to the fact that this conduct was committed by the regional vice president of the company (Gannon)[2] and the regional sales director (Hemedinger), both officers and managers of the company, all show that punitive damages are required. (PSF 38.) *See Cloud v. Casey*, 76 Cal.App. 895 (1999) (employer liable for punitive damages because it discriminated against the plaintiff, then hid its illegal conduct with false explanations).[3]

Moreover, defendant fails to meet its burden of establishing that neither of the decision-makers in Kasbarian's suspension and reassignment, specifically Gannon and Hemedinger, was a managing agent. Defendant provides no evidence that Gannon and Hemedinger could not determine, create, modify, or change policy, let alone any other evidence. Regardless, as was discussed above, Gannon clearly is an officer of Equinox, as well a managing agent.

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[2] Gannon is responsible for the financial performance of 25 Equinox clubs, and he establishes the local policy for those clubs in the Western region. (PSF 39.) Gannon also directly supervises all managers at the 25 Equinox clubs he oversees in California and indirectly supervises 2,500 employees. (PSF 40.)

[3] If there exists a triable issue of fact regarding whether a corporate employee is a managing agent, it must be determined by the trier of fact. *Davis v. Kiewit Pacific Co.*, 220 Cal.App.4th 358, 366 (2013). Additionally, an employee need not be able to create or modify express corporate policy to be categorized as a "managing agent," but can merely implement or facilitate *ad hoc* policy. *White*, 21 Cal.4th at 582.

The conduct here allows a trier of fact to find malicious, oppressive, and/or fraudulent behavior. In *Cloud,* 76 Cal.App.4th 895, the court held that the employer was liable for punitive damages because it discriminated, ***then attempted to hide is illegal conduct with false explanations,*** while, in *Stephens v. Coldwell Banker*, 199 Cal.3d 1394 (1988), a ***"program of unwarranted criticism of plaintiff's job performance to justify plaintiff's demotion"*** was found oppressive because it had no factual justification. ***"Trickery and deceit"*** are reprehensible wrongs, especially when done intentionally, through affirmative acts of misconduct. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 (1993). All of the above, and more, are present here.

4. CONCLUSION

For the foregoing reasons, plaintiff, Tamar Kasbarian, respectfully requests that this honorable Court deny defendant Equinox Holdings, Inc.'s Motion for Summary Judgment in its entirety.

Dated: October 17, 2016 SHEGERIAN & ASSOCIATES, INC.

By: /S/ Carney R. Shegerian
Carney R. Shegerian, Esq.

Attorneys for Plaintiff,
TAMAR KASBARIAN

KASBARIAN v. EQUINOX, et al. USDC Case No. 2:16-CV-01795 MWF (JCx)

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am an employee in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 225 Santa Monica Boulevard, Suite 700, Santa Monica, California 90401.

On October 17, 2016, I served the foregoing document, described as **"PLAINTIFF TAMAR KASBARIAN'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT EQUINOX HOLDINGS, INC.'S MOTION FOR SUMMARY JUDGMENT OR ADJUDICATION,"** on all interested parties in this action by placing a true copy thereof in a sealed envelope, addressed as follows:

Mia Farber, Esq.
Dorothy L. Black, Esq.
JACKSON LEWIS P.C.
725 South Figueroa Street, Suite 2500
Los Angeles, California 90017-5408

☒ **(BY CM/ECF NOTICE OF ELECTRONIC FILING)** I electronically filed the document with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

☒ **(FEDERAL)** I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare, under penalty of perjury under the laws of the United States of America, that the above is true and correct.

Executed on October 17, 2016, at Santa Monica, California.

Edgar Claros