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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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ROBERT TERRY; CREST CORPORATION;
and CREST IRREVOCABLE BUSINESS
TRUST DBA FREEDOM MEDIA,

Plaintiffs,

v.

REGISTER TAPES UNLIMITED, INC.;
REGISTER TAPES UNLIMITED, L.P.;
EDWARD DOUGLAS ENDSLEY, and DOES
1 through 50, inclusive,

Defendants.

No. 2:16-CV-00806 WBS AC

MEMORANDUM AND ORDER RE:
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

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Plaintiffs Robert Terry, Crest Corporation, and Crest Irrevocable Business Trust DBA Freedom Media brought this breach of contract and disability discrimination, retaliation, and harassment case against defendants Register Tapes Unlimited, Inc. and Register Tapes Unlimited, L.P., and Edward Endsley, president of Register Tapes Unlimited (collectively "RTUI"). Before the court is defendants' motion for summary judgment. (Docket No.

1 114.)

2 I. Factual and Procedural Background

3 This case concerns RTUI's register tape advertising
4 business. Register tape advertising involves selling advertising
5 space on the back of receipt tapes at grocery stores. (Pls.'
6 Statement of Undisputed Facts ("SUF") ¶ 6 (Docket No. 117-3.))
7 RTUI enters into agreements with grocery store chains to provide
8 register tape with color advertising on the reverse side and then
9 enters into agreements with local businesses to advertise on the
10 grocery receipt tape at a specific grocery store or stores. (Id.
11 ¶ 6.) RTUI uses sales representatives to identify local
12 businesses who are interested in advertising on the register tape
13 and to sell advertising contracts to those businesses. (Id. ¶
14 7.)

15 Plaintiff Terry was such a salesperson. (Id. ¶ 9.)
16 Terry was also the owner of Freedom Media ("Freedom"). (Id. ¶
17 9.) Freedom contracted with companies like RTUI to sell register
18 tape advertising in the area. (Id. ¶ 9-10.) Terry then sold
19 register tape advertising to local businesses for Freedom. (Id.
20 ¶¶ 10-11.) At the end of 2000, Terry incorporated Crest
21 Corporation. (Id. ¶ 25.) Crest took over Freedom's business,
22 and sales commissions for Freedom's contracts were thereafter
23 paid to Crest. (Id.)

24 A. Safeway Agreements

25 In October 1999, Freedom and RTUI entered into an
26 agreement ("1999 Freedom-RTUI Agreement") that provided that if,
27 with Freedom's assistance, RTUI secured a register tape contract
28 with Safeway, Freedom would receive a portion of the gross

1 profits as that term was defined and calculated in the agreement.
2 (Id. ¶ 18.) Under this contract, Freedom agreed to assist RTUI
3 in obtaining an agreement with Safeway to provide it with
4 register tape. In exchange for this assistance, Freedom would be
5 entitled to a ten-percent share of the "gross profits" realized.
6 (Id.)

7 In May 2000, RTUI signed a regional agreement with
8 Safeway ("the 2000 Safeway-RTUI Agreement") pursuant to which
9 RTUI would provide register tape to Safeway stores in the Seattle
10 area, as well as the Baltimore/Washington, D.C./Northern Virginia
11 metroplex. (Id. ¶ 22.) RTUI and Freedom agreed that Freedom
12 would manage register advertising sales in the Seattle area.
13 (Id. ¶ 23.) Terry subsequently moved to Seattle and acquired
14 office space for Freedom in the area. (Id.) The 2000 Safeway-
15 RTUI Contract expired in 2003 and subsequent negotiations for a
16 new agreement were unsuccessful. (Id. ¶ 31, 32.)

17 From December 1, 2003 to September 2009, RTUI had no
18 contractual right to place ads on Safeway register tape and did
19 not provide any printed or blank register tape to Safeway. (Id.
20 ¶ 33.) After RTUI lost the Safeway business, plaintiffs did not
21 make any sales on behalf of RTUI or perform any work for RTUI
22 until RTUI entered into a contract with Kroger around April 2004.
23 (Id. ¶ 34.)

24 In 2009, Safeway advised RTUI that Safeway had
25 cancelled its agreement with RTUI's competitor. (Id. ¶ 47.) On
26 September 14, 2009, RTUI and Safeway entered into a nationwide
27 agreement (the "2009 Safeway-RTUI Agreement") to provide register
28 tape to Safeway stores and print third-party advertising on the

1 tape. (Id. ¶ 48.) Plaintiffs played no role in negotiating the
2 2009 agreement and there were no discussions with Safeway about
3 the plaintiffs during negotiations. (Id. ¶ 49.) Shortly before
4 the 2009 Safeway-RTUI Agreement was signed, RTUI notified all of
5 its sales agents, including plaintiffs, of the pending agreement
6 and advised that they could begin to solicit advertising for
7 placement on Safeway register tape. (Id. ¶ 50.) After RTUI and
8 Safeway signed the agreement, plaintiffs were assigned 45 Safeway
9 stores in the Sacramento area, to which Terry specifically
10 requested to be assigned. (Id. ¶ 51.)

11 In January 2011, Terry inquired for the first time into
12 whether he was entitled to a share of gross profits earned by
13 RTUI under the 2009 Safeway-RTUI Agreement, pursuant to the 1999
14 Freedom-RTUI Agreement. (Id. ¶ 93.)

15 B. Terry's Accident

16 In October 2010, Terry was involved in an automobile
17 accident in Alaska. (Id. ¶ 95.) In February 2011, Terry sent an
18 email to RTUI to provide notice of the accident. (Id. ¶ 65.)
19 Terry did not request any accommodation in his email and did not
20 file a workers' compensation claim. (Id. ¶ 66.) At an annual
21 sales meeting in February 2011, Terry told Endsley that the
22 accident had affected his short-term memory and speech but that
23 it had "started getting better." (Id. ¶ 67.)

24 In early 2011, RTUI contracted with Frank Mirahmadi, a
25 register tape salesperson, who would be reporting to Terry in the
26 Sacramento area. (Id. ¶ 71.) In the summer of 2013, Terry and
27 Mirahmadi got in a disagreement about a specific account. (Id. ¶
28 72.) Mirahmadi accused Terry of poaching the client. (Id. ¶

1 72.) In September 2013, Endsley decided to separate them and
2 divided the Sacramento area between Terry and Mirahmadi. (Id.)

3 On September 24, 2013, after Endsley had carved a
4 separate area for Mirahmadi, RTUI received an email from Terry
5 attaching a letter from his physician stating that Terry was "in
6 need of accommodation for his work." (Id. ¶ 73.) RTUI responded
7 stating that "the control and method of [Terry's] work, including
8 the hours worked and how [he] work[s], is dependent on [Terry].
9 Any accommodations or adjustments in how [Terry] perform[s] the
10 work must be made by [Terry]." (Id. ¶ 74.) Terry responded and
11 characterized RTUI's answer as "denying accommodation." (Id. ¶
12 75.) RTUI once again responded and reiterated that all
13 accommodations must be made by Terry because he controls the way
14 he performs the job. RTUI then offered "the same compensation
15 structure with decreased responsibilities." (Id. ¶ 76.) Terry
16 continued to make sales for Crest. (Id. at 77.)

17 C. Plaintiffs' Suit

18 Plaintiff filed suit on January 16, 2016 and alleged
19 the following ten causes of action: (1) breach of the 1999
20 Freedom-RTUI Agreement; (2) breach of implied covenant of good
21 faith and fair dealing; (3) disability discrimination in
22 violation of California's Fair Employment and Housing Act
23 ("FEHA"), Cal. Gov. Code § 12926; (4) failure to engage in the
24 interactive process in violation of FEHA; (5) failure to
25 accommodate in violation of FEHA; (6) retaliation in violation of
26 FEHA; (7) hostile work environment and harassment in violation of
27 FEHA; (8) failure to prevent discrimination in violation of FEHA;
28 (9) wrongful adverse action in violation of public policy; and

1 (10) failure to pay wages pursuant to the Labor Code.¹ Count
2 Seven of the Second Amended Complaint ("SAC") was dismissed
3 pursuant to the parties' stipulation on June 21, 2017. (Docket
4 No. 43.) Defendants now move for summary judgment on the
5 remaining claims. (Docket No. 114.)

6 II. Legal Standard

7 Summary judgment is proper "if the movant shows that
8 there is no genuine dispute as to any material fact and the
9 movant is entitled to judgment as a matter of law." Fed. R. Civ.
10 P. 56(a). A material fact is one that could affect the outcome
11 of the suit, and a genuine issue is one that could permit a
12 reasonable jury to enter a verdict in the non-moving party's
13 favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
14 (1986).

15 The party moving for summary judgment bears the initial
16 burden of establishing the absence of a genuine issue of material
17 fact and can satisfy this burden by presenting evidence that
18 negates an essential element of the non-moving party's case.
19 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

20 Alternatively, the movant can demonstrate that the non-moving
21 party cannot provide evidence to support an essential element
22 upon which it will bear the burden of proof at trial. Id. Any
23 inferences drawn from the underlying facts must, however, be
24 viewed in the light most favorable to the party opposing the
25 motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475

26 ¹ Plaintiffs do not cite what section of the Labor Code
27 defendants allegedly violated, either in the Second Amended
28 Complaint or in their opposition to defendants' motion for
summary judgment.

1 U.S. 574, 587 (1986).

2 III. Breach of Contract (Count One)

3 1. Terry's Claim for Breach of Contract

4 Defendant contends that Terry's claim pursuant to the
5 1999 Safeway Agreement should be dismissed because he was not a
6 party to the agreement. The court agrees. A cause of action for
7 breach of contract requires plaintiff to show that a contract
8 between the parties existed. CDF Firefighters v. Maldonado, 158
9 Cal. App. 4th 1226, 1239 (2008). Terry signed the 1999 Safeway
10 Agreement as a "Trustee, for and on behalf of Freedom Media," and
11 not in his individual capacity. (SAC Ex. E "1999 Safeway
12 Agreement.") Because Terry was not a party to the contract,
13 defendants cannot be liable to Terry for breach of this
14 agreement. See Conder v. Home Sav. of Am., 680 F. Supp. 2d 1168,
15 1174 (C.D. Cal. 2010). Accordingly, the court will grant partial
16 summary judgment as to Terry's claim.

17 2. Freedom's Claim for Breach of Contract

18 "A cause of action for breach of contract requires
19 proof of the following elements: (1) existence of the contract;
20 (2) plaintiff's performance or excuse for nonperformance; (3)
21 defendant's breach; and (4) damages to plaintiff as a result of
22 the breach." CDF Firefighters, 158 Cal. App. 4th at 1239.
23 Defendants contest only the breach and damages elements of this
24 claim.

25 Defendants argue that the 1999 Freedom-RTUI Agreement
26 applied only to the 2000 RTUI-Safeway Agreement that expired in
27 2003. If so, plaintiffs were not entitled to compensation for
28 profits under the 2009 Safeway Agreement and defendants therefore

1 did not breach the agreement. The agreement describes how
2 Freedom "has initiated negotiations with Safeway . . . to enter
3 into a contract whereby R.T.U.I. will provide register tape to
4 Safeway in exchange for the rights for R.T.U.I. to sell third-
5 party advertising to be printed on the back of the register
6 receipt tapes." (SAC Ex. F.) Defendants argue that the 1999
7 Freedom-RTUI Agreement thus refers to a specific agreement
8 already contemplated at the time of the drafting of the 1999
9 Freedom-RTUI Agreement -- and not all future contracts -- because
10 the 1999 Freedom-RTUI agreement goes on to state that "Freedom is
11 assisting R.T.U.I. in negotiations to obtain the aforementioned
12 agreement between Safeway and R.T.U.I.," that "R.T.U.I. desires
13 to obtain the agreement," and that "Freedom hereby agrees to
14 assist R.T.U.I. in obtaining the aforementioned agreement with
15 Safeway." (Id.) Under defendants' view, the 1999 Freedom-RTUI
16 Agreement entitled plaintiffs to compensation only under the 2000
17 RTUI-Safeway Agreement.

18 Plaintiffs in turn argue that the language in the
19 contract is ambiguous and therefore summary judgment is
20 inappropriate. Specifically, Plaintiffs contend that the 1999
21 Freedom-RTUI Agreement committed RTUI to compensate Freedom for
22 any and all business RTUI did with Safeway thereafter.
23 Plaintiffs rely on the clause that states that RTUI "will pay
24 Freedom ten percent (10%) of gross profit for as long as R.T.U.I
25 or its successors conduct business with Safeway." (SAC Ex. F.)
26 Under plaintiffs' view, the phrase "conduct business" does not
27 limit defendants' contractual obligations to any particular
28 contract. Instead, because defendants were in talks with Safeway

1 for an indeterminate time between the two Safeway contracts,
2 defendants have been conducting business with Safeway since the
3 2000 RTUI-Safeway Agreement. Accordingly, under that
4 interpretation, defendants' failure to compensate plaintiff for
5 profits made under the 2009 Safeway Agreement breached the 1999
6 Freedom-RTUI Agreement.

7 Under California law, "[a] contract must be so
8 interpreted as to give effect to the mutual intention of the
9 parties as it existed at the time of contracting, so far as the
10 same is ascertainable and lawful." Cal. Civ. Code § 1636. "The
11 language of a contract is to govern its interpretation, if the
12 language is clear and explicit, and does not involve an
13 absurdity." Id. at § 1638. "[T]he intention of the parties is
14 to be ascertained from the writing alone, if possible." Id. at §
15 1639. "The whole of a contract is to be taken together, so as to
16 give effect to every part, if reasonably practicable, each clause
17 helping to interpret the other." Id. at § 1641.

18 "The Court's determination of whether an ambiguity
19 exists is a question of law." Centigram Argentina, S.A. v.
20 Centigram Inc., 60 F. Supp. 2d 1003, 1007 (N.D. Cal. 1999)
21 (citing WYDA Assocs. v. Merner, 42 Cal. App. 4th 1702, 1710
22 (1996). "[W]hen two equally plausible interpretations of the
23 language of a contract may be made parole evidence is admissible
24 to aid in interpreting the agreement." WYDA Assocs., 42 Cal.
25 App. 4th at 1710; see also Meridian Project Sys., Inc. v. Hardin
26 Const. Co., LLC, 426 F. Supp. 2d 1101, 1109 (E.D. Cal. 2006).
27 "If there is no material conflict over extrinsic evidence, the
28 court may interpret an ambiguous term as a matter of law." Best

1 Buy Stores, L.P. v. Manteca Lifestyle Ctr., LLC, 859 F. Supp. 2d
2 1138, 1147 (E.D. Cal. 2012) (citing Lonely Maiden Prods., LLC v.
3 GoldenTree Asset Mgmt., LP, 201 Cal. App. 4th 368, 377 (2d Dist.
4 2011)).

5 The court finds the language in the 1999 Freedom-RTUI
6 Agreement to be unambiguous. First, the circumstances that the
7 1999 Freedom-RTUI Agreement clearly describes refer only to a
8 previously contemplated contract with Safeway, and not any future
9 contracts. The 1999 Freedom-RTUI Agreement describes how
10 "Freedom has initiated negotiations with Safeway" specifically to
11 obtain "a contract whereby R.T.U.I. will provide register tape."
12 (SAC Ex. F.) The 1999 Freedom-RTUI Agreement describes the
13 purpose of the 1999 Freedom-RTUI Agreement: "R.T.U.I. desires to
14 obtain the agreement [with Safeway] and have Freedom assist in
15 the negotiating an agreement [with Safeway] on behalf of
16 R.T.U.I." (Id.) As a result, under the 1999 Freedom-RTUI
17 Agreement, Freedom "agree[d] to assist R.T.U.I. in obtaining the
18 aforementioned agreement [with Safeway]." (Id.) The background
19 information memorialized in the agreement, and Freedom's
20 obligations under the agreement, refer only to a previously
21 contemplated contract for register tape.

22 Second, because Freedom's only obligation under this
23 agreement is to negotiate a previously contemplated contract, it
24 is unreasonable to interpret the commissions clause to entitle
25 Freedom to payment in perpetuity. A contract is ambiguous only
26 if it is "reasonably susceptible" to multiple reasonable
27 interpretations. Brobeck, Phleger & Harrison v. Telex Corp., 602
28 F.2d 866, 871 (9th Cir. 1979). Plaintiffs' request for the

1 court to read the contract to entitle Freedom to indefinite
2 payments regardless of the value, length, or content of the
3 contract negotiated in 1999 by Freedom, or despite Freedom's lack
4 of participation in future Safeway contracts, is not reasonable.
5 Indeed, plaintiffs' interpretation would grant plaintiff profits
6 that were clearly not contemplated by the parties in the 1999
7 Freedom-RTUI contract. The 1999 Freedom-RTUI Agreement binds
8 Freedom to assisting RTUI in obtaining a contract for "register
9 tape" only (SAC Ex. F), but plaintiffs seek "10% gross profit for
10 register tape, Customer Information Center displays ('CIC'),
11 shopping cart advertisements, and bench seating advertising at
12 Safeway stores" from other RTUI-Safeway contracts. (SAC ¶
13 17(a).) The 1999 Freedom-RTUI Agreement, however, defined "gross
14 profit" to mean "profit after cost of tape and total paid
15 commissions," and thus clearly contemplated profits for only
16 register tape and an agreement involving only register tape. (See
17 SAC Ex. F (emphasis added).)

18 Finally, the phrase "as long as R.T.U.I. or its
19 successors conduct business" does not create ambiguity. The
20 phrase is not part of a general clause. Instead, the phrase
21 modifies the previous paragraph wherein the parties again mention
22 a specific and previously contemplated contract with Safeway:

23
24 Freedom hereby agrees to assist R.T.U.I. in
25 obtaining the aforementioned agreement with
26 Safeway. R.T.U.I. agrees to compensate Freedom
upon consummation of an agreement with Safeway in
exchange for the following covenants and fees:

27 R.T.U.I. or its successors will pay Freedom ten
28 percent (10%) of gross profit for as long as
R.T.U.I. or its successors conduct business with
Safeway, its subsidiaries, or any successor

1 company of Safeway for sales made by R.T.U.I . .
2 . . .

3 (Id.) Further, the 1999 Freedom-RTUI Agreement explicitly
4 conditions compensation on "consummation of an agreement with
5 Safeway" and, contrary to plaintiffs' contention, does not
6 entitle Freedom to compensation for R.T.U.I.'s "communications
7 with Safeway" in the time between the two contracts. (SAC Ex. F;
8 Pls.' Opp. Mot. Summ. J. at 23.)

9 Plaintiffs' only evidence suggesting that the 1999
10 Freedom-RTUI Agreement was to apply to all business with Safeway
11 thereafter is the lack of contact between RTUI and Safeway prior
12 to the 2000 RTUI-Safeway Agreement. Plaintiffs contend that "the
13 sole and important purpose of the Safeway Agreement was to
14 introduce Defendants to Safeway." (Pls.' Opp. Mot. Summ. J. at
15 23.) But "parol evidence is admissible only to prove a meaning
16 to which the language is 'reasonably susceptible,' not to flatly
17 contradict the express terms of the agreement." Winet v. Price,
18 4 Cal. App. 4th 1159, 1167 (1992). The 1999 Freedom-RTUI
19 Agreement does not compensate Freedom for introducing RTUI to
20 Safeway. Instead, the 1999 Freedom-RTUI Agreement explicitly
21 declares that the "covenants and fees" will be for the
22 "consummation of an agreement" after "Freedom . . . assist[s]
23 R.T.U.I. in obtaining" an agreement with Safeway for register
24 tape, for which Freedom "ha[d] [already] initiated negotiations"
25 at the time of the 1999 Freedom-RTUI Agreement. (SAC Ex. F.)

26 Indeed, plaintiffs' conduct after the 1999 Freedom-RTUI
27 Agreement confirms that the agreement applied only to the
28 specific contract negotiated by Freedom on behalf of RTUI. RTUI

1 notified all sales agents, including plaintiffs, of the pending
2 agreement with Safeway shortly before 2009 and advised that they
3 could solicit advertising for placement on Safeway register tape.
4 (Pls.' SUF ¶ 50.) After the 2009 Safeway Agreement was signed,
5 plaintiff Crest was assigned about 45 Safeway stores in the
6 Sacramento area. (Pls.' SUF ¶ 51.) Terry specifically requested
7 Crest be assigned to those stores. (Pls.' SUF ¶ 51.) Terry did
8 not ask about gross profits until 2011 despite being fully aware
9 that defendants were selling register tape to Safeway since 2009.
10 (Pls.' SUF ¶ 93.) The language of the contract, the
11 circumstances surrounding the creation of the contract, and
12 plaintiffs' behavior after the parties entered into the contract
13 all support the conclusion that the 1999 Freedom-RTUI Agreement
14 applied only to the 2000 RTUI-Safeway Agreement, and not all
15 future business with Safeway. Accordingly, defendants' failure
16 to pay plaintiffs a share of profit under the 2009 Safeway
17 Agreement does not violate the 1999 Freedom-RTUI Agreement and
18 this claim fails as a matter of law. The court will therefore
19 grant summary judgment as to Count One.

20
21 IV. Breach of the Implied Duty of Good Faith and Fair Dealing
(Count Two)

22 "The covenant of good faith and fair dealing, implied
23 by law in every contract, exists merely to prevent one
24 contracting party from unfairly frustrating the other party's
25 right to receive the benefits of the agreement actually made."
26 Guz v. Bechtel Nat'l, Inc., 24 Cal. 4th 317, 349 (2000). "[I]f
27 the plaintiff's allegations of breach of the covenant of good
28 faith 'do not go beyond the statement of a mere contract breach

1 and, relying on the same alleged acts, simply seek the same
2 damages or other relief already claimed in a companion contract
3 cause of action, they may be disregarded as superfluous as no
4 additional claim is actually stated.'" Deerpoint Grp., Inc. v.
5 Agrigenix, LLC, 345 F. Supp. 3d 1207, 1240 (E.D. Cal. 2018)
6 (citing Bionghi v. Metro. Water Dist., 70 Cal. App. 4th 1358,
7 1370 (2d Dist. 1999); Careau & Co., 222 Cal. App. 3d 1371, 1395
8 (2d Dist. 1990).

9 Here, plaintiffs' claim for breach of the implied duty
10 of good faith and fair dealing is superfluous. First, the
11 alleged acts under each claim are the same. Plaintiffs' breach
12 of contract claim relies on defendants allegedly "failing to
13 provide Plaintiff with correct payment per the terms of the
14 contracts and by failing to provide Plaintiff with the necessary
15 documentation for him to ascertain the exact amount of . . .
16 underpayments." (SAC ¶ 41.) The claim for breach of the duty of
17 good faith and fair dealing similarly relies on defendant
18 "fail[ing] to provide Plaintiff with the necessary documentation
19 for him to ascertain the exact amount of . . . underpayments."
20 (SAC ¶ 46.) Second, plaintiffs seek the same damages under both
21 claims. Both claims allege loss of "percentages of profits" from
22 business with Safeway in the amount of \$5,000,000. (SAC ¶¶ 41,
23 43, 46, 48.) Plaintiffs' allegations for breach of the implied
24 duty of good faith and fair dealing, "do not go beyond the
25 statement of a mere contract breach." See Deerpoint, 345 F.
26 Supp. 3d at 1240. Accordingly, the court will grant summary
27 judgment as to Count Two.
28

1 V. FEHA Claims (Counts Three, Four, Five, Six, and Eight)²

2 Plaintiff asserts six claims under California's Fair
3 Employment and Housing Act (FEHA). Defendants move for summary
4 judgment on all claims and argue plaintiff Terry is not an
5 employee under the meaning of the statute.

6 FEHA does not protect independent contractors. S.G.
7 Borello & Sons, Inc. v. Dep't. of Indus. Relations, 48 Cal. 3d
8 341, 359 (1989). For the purposes of FEHA, an employee is "any
9 individual under the direction and control of an employer under
10 any appointment or contract of hire or apprenticeship, express or
11 implied, oral or written Employee does not include an
12 independent contractor as defined in Labor Code Section 3353."
13 Cal. Code Regs. tit. 2, §§ 7286.5(b) & 7286.5(b)(1); see also
14 Strother v. S. Cal. Permanente Med. Grp., 79 F.3d 859, 866 (9th
15 Cir. 1996). Section 3353 of the Labor Code defines an
16 independent contractor as "any person who renders service for a
17 specified recompense or a specified result, under the control of
18 his principal as to the result of his work only and not as to the
19 means by which such result is accomplished." Cal. Labor Code §
20 3353.

21 In evaluating an employment relationship, "traditional
22 common law principles of agency and respondeat superior supply
23 the proper analytical framework under FEHA." Patterson v.
24 Domino's Pizza, LLC, 60 Cal. 4th 474, 499 (2014). In FEHA cases,
25 "courts consider the totality of the circumstances bearing on the

26 ² Terry is not claiming any violation of FEHA on behalf
27 of Plaintiffs Freedom and Crest. Because Freedom and Crest are
28 not parties to any remaining claim, the court will dismiss
Freedom and Crest from this action.

1 nature of the work relationship of the parties, with an emphasis
2 on the extent to which the defendant controls the plaintiff's
3 performance of employment duties." Rhodes v. Sutter Health, 949
4 F. Supp. 2d 997, 1003 (E.D. Cal. 2013) (citing Hall v. Apartment
5 Inv. & Mgmt. Co., Civ. No. 08-03447, 2011 WL 940185, at *5 (N.D.
6 Cal. Feb. 18, 2011); Vernon v. State, 116 Cal. App. 4th 114, 124
7 (1st Dist. 2004)).

8 Other factors to be taken into account include "payment
9 of salary or other employment benefits and Social Security taxes,
10 the ownership of the equipment necessary to performance of the
11 job, the location where the work is performed, the obligation of
12 the defendant to train the employee, the authority of the
13 defendant to hire, transfer, promote, discipline or discharge the
14 employee, the authority to establish work schedules and
15 assignments, the defendant's discretion to determine the amount
16 of compensation earned by the employee, the skill required of the
17 work performed and the extent to which it is done under the
18 direction of a supervisor, whether the work is part of the
19 defendant's regular business operations, the skill required in
20 the particular occupation, the duration of the relationship of
21 the parties, and the duration of the plaintiff's employment."
22 Id. (quoting Vernon, 116 Cal. App. 4th at 125).

23 "Of these factors, the extent of the defendant's right
24 to control the means and manner of the workers' performance is
25 the most important." Vernon, 116 Cal. App. 4th at 126. "'A
26 finding of the right to control employment requires . . . a
27 comprehensive and immediate level of "day-to-day" authority over
28 employment decisions.'" Doe I v. Wal-Mart Stores, Inc., 572 F.3d

1 677, 682 (9th Cir.2009) (quoting Vernon, 116 Cal. App. 4th at
2 127-28).

3 The court finds that there is an issue of material fact
4 as to whether or not Terry was RTUI's employee. Although Terry
5 was free to determine his schedule, breaks, and hours, and was
6 not subject to sale quotas (Pls.' SUF ¶ 62), RTUI controlled the
7 product Terry could sell, the price that Terry could charge, for
8 whom Terry could sell ads, and where Terry could sell ads.
9 Although Terry was "authorized to sell any[]" kind of
10 advertisement, Terry sold only "what Doug [Endlsey] t[old] [him]
11 he want[ed] [him] to." (Terry Dep. at 41: 14-21.) RTUI
12 determined the price salespeople could charge because salespeople
13 were required to follow RTUI's national rate cards. (Krocak Dep.
14 at 79:23-25.) Cf. Toyota Motor Sales U.S.A., Inc. v. Superior
15 Court, 220 Cal. App. 3d 864, 876 (2d Dist. 1990) (finding that
16 plaintiff was an employee where "[defendant] determined what
17 would be delivered, when and to whom and what price would be
18 charged."). RTUI also limited for whom Terry could sell ads and
19 had the "authority to discharge" him. See Vernon, 116 Cal. App.
20 4th at 125. "If somebody went to work for the competitor, Doug
21 [Endsley] would fire them." (Terry Dep. at 111:9-11.) Further,
22 RTUI determined where Terry could and could not sell ads. After
23 the dispute with Mirahmadi, RTUI created a district for Mirahmadi
24 where Terry could no longer work. (Pls.' SUF ¶ 72.) Whether
25 RTUI's control over Terry's work suffices to establish an
26 employer-employee relationship is thus a question of fact.

27 Moreover, although defendants emphasize that RTUI never
28 withheld taxes for Terry, never provided insurance, and never

1 reimbursed Terry for employment expenses (Pls.' SUF ¶¶ 57-61),
2 those facts are insufficient for the court to grant summary
3 judgment. "An employer cannot change the status of an employee
4 to one of independent contractor by illegally requiring him to
5 assume burdens which the law imposes directly on the employer."
6 Toyota, 220 Cal. App. 3d at 877. These facts are "merely the
7 legal consequences of an independent contractor status not a
8 means of proving it." Id. Instead, "[t]he issue here is whether
9 [Terry] was an independent contractor in the first place who was
10 legally obligated to pay his own taxes." Hennighan v. Insphere
11 Ins. Sols., Inc., 38 F. Supp. 3d 1083, 1106 (N.D. Cal. 2014); cf.
12 Toyota, 220 Cal. App. 3d at 876 (finding that plaintiff providing
13 "his own car, expenses and insurance" is "at most" a "'a
14 secondary element,' and, without more, worthy of little weight").

15 Finally, defendants emphasize that RTUI never paid
16 Terry directly, which "while not controlling, is at least strong
17 evidence that an employment relationship did not exist." Vernon,
18 116 Cal. App. 4th at 126. But the record is inconclusive. While
19 defendants contend that RTUI "made all commission payments" to
20 Crest, plaintiffs argue that two to three years ago RTUI changed
21 the payee from Crest to Terry. (Pls.' SUF ¶ 53; Terry Dep. at
22 67:6-25.) Accordingly, the court cannot at this stage determine
23 that an employer-employee relationship did not exist.

24 A. FEHA Disability Discrimination (Count Three)

25 "To establish a prima facie case of disability
26 discrimination, a plaintiff must show that: (1) she suffered from
27 a disability; (2) could perform the essential duties of the job
28 with or without reasonable accommodations, i.e., she was a

1 'qualified individual'; and (3) was subjected to an adverse
2 employment action because of the disability. McCarthy v. R.J.
3 Reynolds Tobacco Co., 819 F. Supp. 2d 923, 934 (E.D. Cal. 2011)
4 (quoting Brundage v. Hahn, 57 Cal. App. 4th 228, 236 (2d
5 Dist.1997)). Defendants argue that plaintiff cannot recover for
6 discrimination as a matter of law because Terry could not perform
7 the essential duties of the job.

8 The court finds an issue of material fact as to Terry's
9 ability to perform the essential duties of the job. On the one
10 hand, by Terry's own allegations he suffers from impaired memory
11 and "processing speed," "migraines," "low energy," "fatigue," and
12 a "reduced ability to work for an extended period" of time. (SAC
13 ¶ 28.) On the other, defendants concede that after Terry asked
14 for accommodation and after that accommodation was denied, Terry
15 "continued to make new sales and renewal sales in Alaska and to a
16 limited extent the Sacramento area stores that he retained. He
17 also made sales and renewals for register tape advertising . . .
18 for placement on stores in Washington, Oregon and Idaho and
19 elsewhere." (Pls.' SUF ¶ 77.) Further, although Terry's sales
20 levels were declining (Pls.' SUF ¶ 79), Terry was not subject to
21 any sales quotas, so the number of sales was not an essential
22 component of the job he was hired to perform. Accordingly, the
23 court cannot conclude that plaintiff could not perform his job
24 "with or without accommodation" as a matter of law. See
25 McCarthy, 819 F. Supp. 2d at 934. The court will therefore deny
26 defendants' motion as to Count Three.

27 B. Failure to Engage in Interactive Process (Count Four)

28 Under FEHA, "[o]nce an employer becomes aware of the

1 need for accommodation, that employer has a mandatory obligation
2 . . . to engage in an interactive process with the employee to
3 identify and implement appropriate reasonable accommodations.”
4 Ravel v. Hewlett-Packard Enter., Inc., 228 F. Supp. 3d 1086, 1097
5 (E.D. Cal. 2017) (quoting Humphrey v. Mem’l Hosps. Ass’n, 239
6 F.3d 1128, 1137 (9th Cir. 2001)). “The interactive process
7 requires communication and good-faith exploration of possible
8 accommodations between employers and individual employees, and
9 neither side can delay or obstruct the process.” Id.
10 “Employers, who fail to engage in the interactive process in good
11 faith, face liability for the remedies imposed by the statute if
12 a reasonable accommodation would have been possible.” Id. at
13 1137-38. Defendants argue that, as a matter of law, defendants
14 engaged in the interactive process with Terry.

15 The court disagrees and finds an issue of material
16 fact. After Terry first requested accommodation, RTUI told Terry
17 that “[a]ny accommodations or adjustments in how [Terry]
18 perform[s] the work must be made by [Terry].” (Pls.’ SUF ¶ 74.)
19 After Terry took RTUI’s response as a denial of accommodation,
20 RTUI again responded stating that “any accommodation must come
21 from [Terry] because as an Independent contractor [Terry]
22 control[s]” how he performs his job. (Pls.’ SUF ¶ 76.) RTUI
23 also offered “the same compensation structure with decreased
24 responsibilities.” (Id.) In this second response, RTUI offered
25 to meet with Terry to discuss his situation. (Id.) Whether
26 RTUI’s offer to meet with Terry to further discuss the issue,
27 after clearly telling Terry that all accommodations must be made
28 by him, suffices as engagement is a question for the trier of

1 fact. Accordingly, the court will deny defendants' motion as to
2 Count Four.

3 C. Failure to Accommodate (Count Five)

4 "A reasonable accommodation is 'a modification or
5 adjustment to the workplace that enables the employee to perform
6 the essential functions of the job held or desired.'" McCarthy,
7 819 F. Supp. 2d at 935. Defendants argue that there was no
8 reasonable accommodation available and that defendants did
9 accommodate Terry by "relieving Terry of some work volume" and by
10 hiring Mirahmadi to alleviate some of Terry's workload. (Mot.
11 Summ. J. at 45, 47.)

12 "An 'employer cannot prevail on summary judgment on a
13 claim of failure to reasonably accommodate unless it establishes
14 through undisputed facts' that 'reasonable accommodation was
15 offered and refused,' that 'there simply was no vacant position
16 within the employer's organization for which the disabled
17 employee was qualified and which the disabled employee was
18 capable of performing with or without accommodation,' or that
19 'the employer did everything in its power to find a reasonable
20 accommodation, but the informal interactive process broke down
21 because the employee failed to engage in discussions in good
22 faith.'" Dep't of Fair Employment & Hous. v. Lucent Techs.,
23 Inc., 642 F.3d 728, 743-44 (9th Cir. 2011) (quoting Jensen v.
24 Wells Fargo Bank, 85 Cal. App. 4th 245 (2000)).

25 Defendants have not carried their burden. First, the
26 hiring of Mirahmadi was never "offered" as an accommodation to
27 Terry. By defendants' admission, Mirahmadi was hired because
28 Mirahmadi reached out to Finkelstein and because he had a good

1 reputation as a salesperson. (Pls.' SUF ¶ 71.) Defendants offer
2 no evidence suggesting that RTUI hired Mirahmadi in order to
3 accommodate Terry.

4 Further, defendants have not established how the lower-
5 volume accommodation was reasonable given Terry's doctor's report
6 of Terry's "[m]ild orientation loss," "sustained attention
7 impairments," and "[m]oderate impairments in cognitive
8 proficiency." (Boucher Decl. Ex. H at 2.) Defendants also did
9 not offer a different position within the company. Finally,
10 defendants have failed to show that they did "everything in
11 [their] power to find a reasonable accommodation," because they
12 have not offered any evidence to suggest that they considered
13 Terry's proposed accommodation of hiring a personal assistant for
14 him. (See id. at 6.) Accordingly, the court cannot determine,
15 as a matter of law, that, given Terry's condition, RTUI's
16 suggestions and actions constituted reasonable accommodations.
17 The court will therefore deny defendants' motion as to Count
18 Five.

19 D. Retaliation (Count Six)

20 "Retaliation occurs when a plaintiff engages in
21 protected activity and suffers an adverse employment action as a
22 result." Lelaind v. City & Cty. of San Francisco, 576 F. Supp.
23 2d 1079, 1091 (N.D. Cal. 2008) (citing Cornwell v. Electra
24 Central Credit Union, 439 F.3d 1018, 1034-35 (9th Cir. 2006)).
25 California Government Code § 12940(h) makes it unlawful for "any
26 employer . . . to discharge, expel, or otherwise discriminate
27 against any person because the person has opposed any practices
28 forbidden under [FEHA]." The phrase "otherwise discriminate"

1 encompasses "the same forms of adverse employment activity that
2 is actionable under section 12940(a)", namely "'ultimate
3 employment actions' such as termination or demotion, but also the
4 entire spectrum of employment actions that are reasonably likely
5 to adversely and materially affect an employee's job performance
6 or opportunity for advancement in his or her career." Yanowitz
7 v. L'Oreal USA, Inc., 36 Cal. 4th 1028, 1050-51, 1054 (2005).

8 Here, plaintiffs offer evidence that suggests that RTUI
9 did retaliate against Terry. William Krocak, RTUI's Director of
10 Human Resources, stated that he may have had discussions with
11 RTUI about getting rid of Terry. (Krocak Dep. at 194:14-20.)
12 Krocak also agreed that RTUI's suggestion for Terry to work less
13 constituted a demotion from Regional Sales Manager to Independent
14 Marketing Consultant. (Id. at 179.) Further, although RTUI
15 divided Sacramento between Mirahmadi and Terry before Terry asked
16 for accommodations, since that division, Terry has been unable to
17 generate new business, has had his territory further diminished,
18 and has allegedly not been provided with an adequate sales force.
19 (Terry Decl. ¶¶ 13-16.) These facts create an issue of material
20 fact as to whether defendants retaliated against plaintiff.
21 Accordingly, the court will deny defendants' motion as to Count
22 Six.

23 E. Failure to Prevent Discrimination and Retaliation
24 (Count Eight)

25 It goes without saying that anytime a defendant
26 discriminates it also by definition fails to prevent
27 discrimination. Defendants' only argument against plaintiffs'
28 claim for failure to prevent discrimination depends on the court
granting summary judgment as to plaintiffs' claim for

1 discrimination (Count Three). Because the court will not grant
2 summary judgment as to the discrimination claim, it will also
3 deny summary judgment as to Count Eight.

4 VI. Wrongful Action in Violation of Public Policy (Count Nine)

5 Defendants argue that Terry's disability was not a
6 substantial factor in any alleged adverse employment action. For
7 the reasons discussed under the retaliation claim, the court
8 finds an issue of material fact as to whether Terry's disability
9 was a factor in RTUI's subsequent adverse treatment of Terry.
10 Accordingly, the court will deny summary judgment as to Count
11 Nine.

12 V. Failure to Pay Wages (Count Ten)

13 Defendants argue only that Terry is not an employee and
14 is therefore not entitled to wage protections under the
15 California Labor Code. Like under FEHA claims, "[t]he principal
16 test of an employment relationship is whether the person to whom
17 service is rendered has the right to control the manner and means
18 of accomplishing the result desired." S. G. Borello & Sons, Inc.
19 v. Dep't of Indus. Relations, 48 Cal. 3d 341, 350 (1989). Courts
20 also consider "(a) whether the one performing services is engaged
21 in a distinct occupation or business; (b) the kind of occupation,
22 with reference to whether, in the locality, the work is usually
23 done under the direction of the principal or by a specialist
24 without supervision; (c) the skill required in the particular
25 occupation; (d) whether the principal or the worker supplies the
26 instrumentalities, tools, and the place of work for the person
27 doing the work; (e) the length of time for which the services are
28 to be performed; (f) the method of payment, whether by the time


1 or by the job; (g) whether or not the work is a part of the
2 regular business of the principal; and (h) whether or not the
3 parties believe they are creating the relationship of employer-
4 employee." Narayan v. EGL, Inc., 616 F.3d 895, 900 (9th Cir.
5 2010) (citing Borello, 48 Cal. 3d 341, 351 (1989)).

6 As discussed above, RTUI controlled the product Terry
7 could sell, the price that Terry could charge, for whom Terry
8 could work, and where Terry could sell ads. As to the secondary
9 factors, Terry was one of many salespersons, was subject to
10 Endsley's instructions, and had been working for defendant for
11 over 20 years. The evidence thus creates a triable issue of fact
12 as to whether Terry was an employee. Accordingly, the court will
13 deny summary judgment as to Count Ten.

14 IT IS THEREFORE ORDERED that defendants' Motion for
15 Summary Judgment (Docket No. 114) be, and the same hereby is,
16 GRANTED as to Claims One and Two of the Second Amended Complaint.

17 IT IS FURTHER ORDERED that defendants' Motion for
18 Summary Judgment be, and the same hereby is, DENIED as to Claims
19 Three, Four, Five, Six, Eight, Nine, and Ten of the Second
20 Amended Complaint.

21 Dated: March 3, 2020

22 
23 **WILLIAM B. SHUBB**
24 **UNITED STATES DISTRICT JUDGE**