

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA

3  
4 ROBERT MACKINNON,  
5 Plaintiff,  
6 v.  
7 LOGITECH INC., et al.,  
8 Defendants.

Case No. 15-cv-05231-TEH

**ORDER GRANTING IN PART  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT AND  
DENYING IN PART PLAINTIFF'S  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

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10 This matter is currently before the Court on Plaintiff Robert MacKinnon's motion  
11 for partial summary judgment (ECF No. 39) and Defendants Logitech Inc.'s and Lifesize,  
12 Inc.'s motion for summary judgment (ECF No. 61). As indicated in the Court's April 12,  
13 2017 order requiring supplemental briefs (ECF No. 87), the Court finds the majority of the  
14 parties' motions suitable for resolution without oral argument. For the reasons discussed  
15 below, the Court now GRANTS IN PART Defendants' motion and DENIES IN PART  
16 Plaintiff's motion, with the issues of Plaintiff's Maryland statutory age discrimination  
17 claim and Defendants' affirmative defenses remaining for subsequent resolution.

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19 **BACKGROUND**

20 Plaintiff Robert MacKinnon contends that he was jointly employed by Defendants  
21 Logitech Inc. and Lifesize, Inc., and that he was terminated by both companies on  
22 January 2, 2015. He asserts that he was terminated either because of age discrimination or  
23 because Defendants did not want to pay him restricted stock units that he contends he was  
24 promised at a company-wide meeting on November 11, 2014. He also contends that he  
25 was defamed by comments about his performance by Defendants' employees.

26 Following the Court's ruling on Defendants' motion to dismiss the third amended  
27 complaint ("TAC"), the following claims remain: (1) abusive discharge in violation of  
28 Maryland public policy; (2) breach of implied contract; (3) defamation; (4) age

1 discrimination in violation of the federal Age Discrimination in Employment Act  
2 (“ADEA”); and (5) age discrimination in violation of Maryland Code, State Government,  
3 section 20-602.

4 MacKinnon seeks summary judgment on his age discrimination and contract claims  
5 and on Defendants’ affirmative defenses. Defendants seek summary judgment on all  
6 claims. This order resolves the motions as to all issues except MacKinnon’s Maryland  
7 statutory age discrimination claim and Defendants’ affirmative defenses.

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9 **LEGAL STANDARD**

10 Summary judgment is appropriate when “there is no genuine dispute as to any  
11 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.  
12 56(a). Material facts are those that may affect the outcome of the case. *Anderson v.*  
13 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is “genuine”  
14 if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving  
15 party. *Id.* The court may not weigh the evidence and must view the evidence in the light  
16 most favorable to the nonmoving party. *Id.* at 255.

17 A party seeking summary judgment bears the initial burden of informing the court  
18 of the basis for its motion, and of identifying those portions of the pleadings or materials in  
19 the record that demonstrate the absence of a genuine issue of material fact. *Celotex Corp.*  
20 *v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of  
21 proof at trial, it “must affirmatively demonstrate that no reasonable trier of fact could find  
22 other than for the moving party.” *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984  
23 (9th Cir. 2007). However, on an issue for which its opponent will have the burden of proof  
24 at trial, the moving party can prevail merely by “pointing out to the district court . . . that  
25 there is an absence of evidence to support the nonmoving party’s case.” *Celotex*, 477 U.S.  
26 at 325. If the moving party meets its initial burden, the opposing party must then set out  
27 specific facts showing a genuine issue for trial to defeat the motion. *Anderson*, 477 U.S.  
28 at 250.

1 **DISCUSSION**

2 **I. Claims Against Lifesize, Inc.**

3 The Court first considers Defendants’ motion for summary judgment on all claims  
4 against Defendant Lifesize, Inc. MacKinnon contends that he was jointly employed and  
5 terminated by Defendants Logitech Inc. and Lifesize, Inc.

6 However, Defendants present evidence that Lifesize, Inc. was not incorporated until  
7 October 2014 and did not have any sales employees until July 2015. Malloy Decl. ¶ 3  
8 (ECF No. 44-11). A separate entity, Lifesize Communications, Inc., was acquired by  
9 Logitech in 2009, and Craig Malloy became the CEO of the Lifesize division of Logitech  
10 in February 2014.<sup>1</sup> Id. ¶ 4. At the November 11, 2014 all-hands meeting, Malloy repeated  
11 several times that, “[w]e are all Logitech employees.” Nov. 11, 2014 Tr. at 47:13-21  
12 (Ex. J to Perry Decl. (ECF No. 64-3)). MacKinnon’s April 11, 2017 supplemental brief  
13 presents evidence that “Lifesize” had an internal advisory board, but this evidence says  
14 nothing about whether Lifesize, Inc. employed MacKinnon or even had any employees at  
15 the time of his termination. In addition, the testimony indicates that the board existed  
16 several years before Lifesize, Inc. was incorporated, thus suggesting that “Lifesize” refers  
17 to the Lifesize division of Logitech. Moreover, MacKinnon himself testified that he  
18 believed he was employed by Logitech at the time of his termination, explaining that:

19 My paycheck came from Logitech. . . . My employee stock  
20 purchase plan was through Logitech. My 401-K was from  
21 Logitech. The letter I received in the mail telling me I was  
22 terminated was from Logitech. The three-week check that was  
sent to me in the mail came from Logitech headquarters in  
California. My dealings afterwards were with Logitech HR.  
I worked for Logitech. My corporate card was Logitech.

23 MacKinnon Dep. at 49:8-50:1 (Ex. C to Perry Decl. (ECF No. 61-4)). No reasonable juror  
24 could conclude that MacKinnon was ever employed, let alone terminated, by Lifesize, Inc.  
25 Accordingly, Defendants’ motion for summary judgment on all claims asserted against  
26 Lifesize, Inc. is GRANTED.

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28 <sup>1</sup> See May 18, 2016 Order at 8 n.1 (ECF No. 28) (discussing “some confusion in the TAC” between Lifesize, Inc. and Lifesize Communications, Inc.).

1     **II.     Abusive Discharge in Violation of Maryland Public Policy**

2             Defendants also move for summary judgment on MacKinnon’s claim that his  
3     termination was an abusive discharge in violation of the public policy of the State of  
4     Maryland. MacKinnon asserts that his termination violated Maryland’s public policy  
5     “because it was intended to interfere with his collection of the Restricted Stock Units to  
6     which he was entitled.” TAC ¶ 46 (ECF No. 22). He argues in his opposition that his  
7     termination also violated Maryland’s public policy against age discrimination. However, a  
8     claim for abusive discharge under Maryland law “is inherently limited to remedying only  
9     those discharges in violation of a clear mandate of public policy which otherwise would  
10    not be vindicated by a civil remedy.” *Makovi v. Sherwin-Williams Co.*, 316 Md. 603, 605  
11   (1989) (emphasis added). MacKinnon fails to rebut Defendants’ arguments that such civil  
12   remedies exist in this case by way of breach of contract and statutory age discrimination  
13   claims. Accordingly, Defendants’ motion for summary judgment on MacKinnon’s abusive  
14   discharge claim under Maryland law is GRANTED.

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16    **III.    Breach of Contract**

17             Next, MacKinnon and Defendants both seek summary judgment on MacKinnon’s  
18    breach of contract claim.<sup>2</sup> MacKinnon asserts that a contract to provide him with restricted  
19    stock units in Lifesize, Inc. was established at an all-hands meeting hosted by CEO Craig  
20    Malloy on November 11, 2014, and that Defendants breached that contract by terminating  
21    him before granting him any stock units.

22             Malloy announced at the November 2014 meeting that Lifesize, Inc. was being spun  
23    off as “a separate company that’s owned by Logitech,” and that Logitech agreed to  
24    distribute a certain percentage of stock shares “to the employees of the company.”  
25    Nov. 11, 2014 Tr. at 51:13-52:7. He further explained that:

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28             <sup>2</sup> MacKinnon also moves for summary judgment on his claim for breach of the  
implied covenant of good faith and fair dealing. However, the Court previously dismissed  
that claim with prejudice. May 18, 2016 Order at 5.

1 We all become owners, everyone in the company, all  
2 employees current and future will be granted equity in the new  
3 Lifesize Inc. . . . [T]his equity will come in the form of what  
4 we call a performance stock unit, it's really a share of the – a  
5 share – you know, a portion of the company, but there's – it's  
6 only granted at a certain – a certain date, and it's not – it's not  
7 time based, it's 100 percent triggered by some change or  
8 control event.

9 So it's not like if – if you've worked in companies where  
10 you've been granted – you know, here at Logitech, granted  
11 options at a company where they vest on a yearly basis, a four-  
12 year vest, that's not what these are.

13 This – you'll be granted shares of stock that vest immediately  
14 at 100 percent when there is some type of a contract of control.

15 Id. at 58:10-59:6. He then explained that the “change or control event” could be an IPO, or  
16 “a spinout to . . . Logitech shareholders as a dividend,” or an acquisition of some type, but  
17 he emphasized that “nothing is contemplated, nothing has been discussed, haven't even  
18 talked about it.” Id. at 59:7-60:12.

19 The slides shown at the meeting stated that “Logitech has granted Lifesize 6% of  
20 the outstanding equity for employee stock grants,” and that the change was  
21 “[a]nticipate[d]” to “formally take effect with employees transferred to Lifesize Inc. [on]  
22 Apr 1, 2015.” Ex. A to Wayne Reply Decl. at LG001805-06 (ECF No. 50-4).<sup>3</sup> The slides  
23 also repeated Malloy's oral explanation that vesting would be “100% triggered by a  
24 ‘change of control’ event, not time,” and announced an intent to “provide letters of PSU  
25 [performance stock unit] grant before the end of December.” Id. at LG001808.

26 As the transcript demonstrates, at no time during the November 2014 meeting did  
27 Malloy discuss any specific stock grant to any specific employee, including MacKinnon.  
28 Nor did Malloy make any promises of continued employment. In addition, MacKinnon  
testified that he was never “informed of what [his] stock units would be in the new  
company.” MacKinnon Dep. at 45:21-23. His own testimony therefore disproves the

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<sup>3</sup> This ECF citation is to the redacted version of the exhibit filed with Defendants' amended motion to file documents under seal. The Court's order granting that motion (ECF No. 51) directed MacKinnon to file a redacted version of the exhibit. MacKinnon did so, but the version he filed (ECF No. 54) redacted the entire exhibit and not just the portions requested by Defendants and ordered by the Court to be sealed.

1 allegation in his complaint that he “was to have 300 RSUs [restricted stock units] vest in  
2 2015, with an additional 300 RSUs vest[ing] no later than November 2016.” TAC ¶ 56.  
3 As this Court previously explained, a contract cannot be “so uncertain and indefinite that  
4 the intention of the parties on material questions cannot be ascertained.” *Sutcliffe v. Wells*  
5 *Fargo Bank, N.A.*, 283 F.R.D. 533, 552 (N.D. Cal. 2012) (citing *Ladas v. Cal. State Auto.*  
6 *Ass’n*, 19 Cal. App. 4th 761, 770 (1993)). The amount of stock is one such material  
7 question.

8 MacKinnon also argues that he “should have received [stock units] on  
9 December 31, 2014, according to the vesting schedule in place,” Pl.’s Opp’n at 25 (ECF  
10 No. 66), but this argument is unpersuasive for two reasons. First, the record establishes  
11 that any stock units offered to Lifesize employees were not scheduled to vest until some  
12 future “change of control” event that had not yet been contemplated, not on December 31,  
13 2014. Second, the announcement that PSU grant letters would be provided by the end of  
14 December was just that – an announcement – or, at best, a promise. A promise cannot  
15 create a contract without consideration, Cal. Civ. Code § 1550, and MacKinnon offered no  
16 consideration here.

17 Put simply, no reasonable jury could find that MacKinnon had a contract relating to  
18 restricted or performance stock units in Lifesize, Inc. The Court therefore GRANTS  
19 Defendants’ motion and DENIES MacKinnon’s motion for summary judgment on his  
20 breach of contract claim.

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#### 22 **IV. Defamation**

23 Defendants also seek summary judgment on MacKinnon’s defamation claim.  
24 Defamation requires “(a) a publication that is (b) false, (c) defamatory, and  
25 (d) unprivileged, and that (e) has a natural tendency to injure or that causes special  
26 damage.” *Taus v. Loftus*, 40 Cal. 4th 683, 720 (2007) (internal quotation marks omitted).  
27 The only defamation claim that survived Defendants’ motions to dismiss is based on a  
28 January 2, 2015 email from Matt Collier, then a Vice President at Logitech who oversaw

1 MacKinnon’s sales team. Collier Decl. ¶¶ 2-3 (ECF No. 44-16). In that email, Collier  
2 explained the termination of several sales representatives, including MacKinnon, as  
3 follows:

4 As you may know, we have made a few performance related  
5 changes in the Americas today. These were difficult decisions  
6 and are reflective [of] our sales performance in Q3/15. As a  
7 sales team we failed to deliver on our commitment to the  
8 company so I have taken these actions to shore up our business  
and our performance going into Q4/15. As stated these are  
largely performance based actions, [and] HR is already  
working to open new job requisitions in territories and  
positions affected by these actions. These positions should be  
posted by early next week.

9 Jan. 2, 2015 email (Ex. B to Collier Decl. (ECF No. 44-18)).

10 Although evaluations of an employee’s performance are often non-actionable  
11 statements of opinion, *Jensen v. Hewlett Packard Co.*, 14 Cal. App. 4th 958, 970-71  
12 (1993), Collier’s email specifically refers to “sales performance in Q3/15.” Thus, the  
13 email could reasonably be interpreted as implying that MacKinnon failed to meet his sales  
14 numbers for the third quarter of fiscal year 2015. Unlike general opinions about an  
15 employee’s performance, this is an objectively measurable fact that could give rise to a  
16 defamation claim. See, e.g., *Gould v. Maryland Sound Indus., Inc.*, 31 Cal. App. 4th 1137,  
17 1153-54 (1995) (accusations of “poor performance” were unactionable statements of  
18 opinion, but accusation that employee “made a \$100,000 mistake in estimating [a] bid”  
19 was an actionable “statement of fact susceptible to proof or refutation by reference to  
20 concrete, provable data”).

21 However, the evidence conclusively establishes that MacKinnon did not achieve  
22 either his sales quota or sales forecast for the third quarter of the 2015 fiscal year. The  
23 sales incentive plan for the quarter shows that his team achieved only 75.98% of their sales  
24 quota. Ex. K to Wayne Decl. (ECF No. 39-12). MacKinnon admits that the team did not  
25 achieve its quota, and he further admits that the team failed to meet its sales forecast for  
26 the quarter. MacKinnon Dep. at 70:20 to 71:16 (Ex. B to Wayne Decl. (ECF No. 39-3)).  
27 He contends that his team leader, Bill Drucis, revised the sales forecast without consulting  
28 the rest of the team, *id.*, but that does not create a genuine dispute that the team failed to

1 meet its final sales forecast. In addition, the team failed to meet the original forecast,  
2 coming in “[j]ust below” it. *Id.* MacKinnon presents no evidence that sales performance  
3 was measured in any other way than by sales quotas and forecasts. Consequently, even if  
4 Collier’s email were interpreted as presenting a statement of fact regarding MacKinnon’s  
5 “sales performance in Q3/15,” no reasonable juror could conclude that the statement was  
6 false. Defendants’ motion for summary judgment on MacKinnon’s defamation claim is  
7 therefore GRANTED.

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9 **V. Age Discrimination**

10 Finally, MacKinnon and Defendants both move for summary judgment on  
11 MacKinnon’s age discrimination claims under the ADEA and Maryland Code, State  
12 Government section 20-602. The Court has requested supplemental briefing relevant to  
13 the latter claim, April 12, 2017 Order at 1-2, and now addresses only MacKinnon’s ADEA  
14 claim.

15 The parties do not dispute the following procedural history: MacKinnon was  
16 terminated on January 2, 2015. He received a right to sue letter from the California  
17 Department of Fair Employment and Housing (“DFEH”) on March 12, 2015. Ex. F to  
18 Labor Decl. (ECF No. 44-7). That letter instructed MacKinnon that, if he wanted a federal  
19 right to sue notice, he had to file a complaint with the EEOC “within 30 days of receipt of  
20 this DFEH Notice of Case Closure or within 300 days of the alleged discriminatory act,  
21 whichever is earlier.” *Id.* MacKinnon filed EEOC complaints on May 20 and June 8,  
22 2015, Ex. G to Labor Decl. (ECF No. 44-8), and received right to sue letters from the  
23 EEOC on June 18 and June 23, 2015, Ex. H to Labor Decl. (ECF No. 44-9).<sup>4</sup> He first  
24 sought leave to amend his complaint to add an ADEA claim on September 14, 2015. Mot.  
25 for Leave to File Second Am. Compl. (Ex. K to Notice of Removal (ECF No. 1-11)).

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28 <sup>4</sup> The June 23 right to sue letter closed the May 20 complaint and was sent by the  
EEOC field office in Oakland, California. The June 18 letter closed the June 8 complaint  
and was sent by the EEOC field office in San Antonio, Texas.

1 Defendants argue that MacKinnon’s ADEA claim is untimely. In response,  
2 MacKinnon relies on the June 23 EEOC right to sue letter and contends that his ADEA  
3 claim was timely because he filed it within 90 days of receiving that letter, as required by  
4 29 U.S.C. § 626(e). He further argues that his May 20 EEOC complaint was timely filed  
5 within 180 days of his termination, as required by 29 U.S.C. § 626(d)(1)(A), but that  
6 statute does not apply in states, like California, that have “a law prohibiting discrimination  
7 in employment because of age and establishing or authorizing a State authority to grant or  
8 seek relief from such discriminatory practice,” 29 U.S.C. § 633(b). In such states, the  
9 EEOC charge must be filed “within 300 days after the alleged unlawful practice occurred,  
10 or within 30 days after receipt by the individual of notice of termination of proceedings  
11 under State law, whichever is earlier.” 29 U.S.C. § 626(d)(1)(B). MacKinnon’s DFEH  
12 right to sue letter correctly informed MacKinnon of these deadlines.

13 In this case, 30 days after receipt of the DFEH letter was earlier than 300 days of  
14 MacKinnon’s termination. Thus, if MacKinnon wanted to file a separate EEOC  
15 complaint, he had to do so within 30 days of receiving the March 12, 2015 DFEH letter.  
16 He did not file his EEOC complaint until May 20, 2015 – 69 days after the DFEH letter  
17 was issued – and that filing was therefore untimely.<sup>5</sup> That MacKinnon sought leave to add  
18 his ADEA claim within 90 days of the June 23, 2015 EEOC right to sue letter is therefore  
19 irrelevant, as meeting the 90-day deadline “does not change the requirement that the filing  
20 of the charge with the EEOC must itself be timely. See *Phillips v. Gen. Dynamics Corp.*,  
21 811 F. Supp. 788, 794 (N.D.N.Y. 1993) (discussing filing requirements under similar Title  
22 VII regulations).

23 Because MacKinnon’s EEOC claim was untimely, the Court GRANTS Defendants’  
24 motion and DENIES Mackinnon’s motion for summary judgment on his ADEA claim.  
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27 <sup>5</sup> Although MacKinnon might not have received the right to sue letter on the date it  
28 was issued, it would be unreasonable to conclude, and MacKinnon does not argue, that he  
did not receive it within a few days.

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**CONCLUSION**

In sum, the Court GRANTS IN PART Defendants’ motion for summary judgment and DENIES IN PART Plaintiff’s motion for partial summary judgment. Summary judgment is GRANTED to Defendants as to all of MacKinnon’s claims against Defendant Lifesize, Inc. and all claims except the Maryland statutory age discrimination claim against Defendant Logitech Inc. The Court has ordered supplemental briefing on that claim and will resolve whether summary judgment to either party is appropriate, along with Plaintiff’s motion for summary judgment on Defendants’ affirmative defenses, after considering the parties’ additional arguments.

**IT IS SO ORDERED.**

Dated: 04/13/17

  
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THELTON E. HENDERSON  
United States District Judge