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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ANDREW PASHMAN,

No. C-13-02835 DMR

Plaintiff(s),

**ORDER GRANTING DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT  
[DOCKET NO. 27]**

v.

AETNA INSURANCE CO,

Defendant(s).

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Before the court is a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 filed by Defendants Aetna Insurance Company of Connecticut (“Aetna”) and Medicity,<sup>1</sup> Inc. (“Medicity”). [Docket No. 27.] The court conducted a hearing on the motion on June 26, 2014. For the reasons stated below, the motion is **granted**.

**I. FACTS**

This action is a dispute between Plaintiff Andrew Pashman and Defendants, his former employer. Plaintiff alleges seven causes of action against Defendants: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) failure to pay wages due in violation of California Labor Code § 200 *et. seq*; (4) violation of California Labor Code § 232; (5) wrongful termination in violation of public policy; (6) libel; and (7) slander. All claims are brought against both Medicity and Aetna.

**A. Background**

Medicity offers health and related technology services to providers, payers, employers, and consumers. Plaintiff was hired by Medicity in March 2010 as a Regional Vice President of Sales.

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<sup>1</sup> At all relevant times, Medicity was a subsidiary of Aetna.

1 His job duties were to sell Medicity software and services to hospitals and health systems. Plaintiff  
2 signed an acknowledgment stating that “Employment by the Company is ‘at-will,’ not for a definite  
3 term, and may be terminated by the Company at any time, for any reason.” Plaintiff does not  
4 dispute that he was an at-will employee. *See* Cal. Labor Code § 2922 (“An employment, having no  
5 specified term, may be terminated at the will of either party on notice to the other.”).

6 In June 2010, Medicity promoted Plaintiff to Enterprise Area Vice President, which  
7 included the duties of managing three Regional Vice Presidents of Sales. On May 11, 2012,  
8 Plaintiff transferred back to Regional Vice President of Sales and ceased all management duties on  
9 that date. During the relevant period, Plaintiff was supervised by Greg Miller, Medicity’s Senior  
10 Vice President of Sales and Marketing. Plaintiff was also supervised by Patricia Hayward after she  
11 was hired by Medicity in mid-August 2012.

12 Medicity terminated Plaintiff’s employment on October 2, 2012.

13 **B. Plaintiff’s Commission Plans**

14 In 2012, the time period relevant to this lawsuit, Plaintiff’s sales commissions were governed  
15 by two different plans. On February 1, 2012, Plaintiff signed the “FY 2012 Enterprise Area VP  
16 Commission Plan” (“EAVP Plan”). The EAVP Plan governed Plaintiff’s commissions up to May  
17 11, 2012. Under the EAVP Plan, Plaintiff was eligible for commissions on personal sales and lesser  
18 commissions on sales generated by those reporting to him. The EAVP Plan includes the following  
19 terms:

20 All commission payments require the EAVP to be employed by Medicity at the time the  
21 payment is due . . . . Commissions will be paid as Medicity receives any payment for  
software or services . . . .

22 After May 11, 2012, when Plaintiff transitioned back to a Regional Vice President role,  
23 Plaintiff’s commissions were governed by the “Enterprise Regional Vice President plan” (“ERVP  
24 Plan”). Under the ERVP Plan, Plaintiff was eligible for commissions on his personal sales only.  
25 The ERVP Plan includes the same provision as the one quoted above from the EAVP:

26 All commission payments require the ERVP to be employed by Medicity at the time the  
27 payment is due . . . . Commissions will be paid as Medicity receives any payment for  
software or services . . . .

1 The EAVP and ERVP Plans are the only contracts at issue in this lawsuit. For purposes of  
2 this motion, it is undisputed that both plans are enforceable contracts between Plaintiff and  
3 Defendants.

4 **C. Chronology of Relevant Events**

5 **1. May–August 2012 Communications Regarding Commission for Banner Health Deal**

6 During his employment with Medicity, Plaintiff worked on a transaction with Banner Health  
7 that involved multiple entities affiliated with Aetna contracting to provide services and software to  
8 the client. Medicity signed a contract with Banner Health on May 9 or 10, 2012. The Banner  
9 Health contract was a “shared savings” deal, meaning that rather than receiving direct up-front  
10 payments from Banner Health, Medicity’s potential share of the revenue would be paid out as a  
11 percentage of the shared savings, if any, that Banner Health realized by using the technology  
12 provided by Medicity.

13 On June 15, 2012, Plaintiff sent an email to Miller regarding commissions from the Banner  
14 Health deal for himself and his sales representative. Plaintiff noted, “You indicated that [the Banner  
15 Health deal] still has not been valued and would look into this early next week.” Peters Decl. Ex.  
16 RR.

17 On July 10, 2012, Plaintiff and Miller had a telephone call regarding the Banner Health  
18 commissions, during which Miller informed Plaintiff he was not ready to have the substantive  
19 discussion. Miller also raised a question about Plaintiff’s eligibility for the commission. Also on  
20 July 10, 2012, Brent Dover, the division president, emailed Aetna Human Resources specialist  
21 Caroline Wilke, likely referring to Plaintiff when stating that he had “decided to move against the  
22 topic of our call today. I need to engage your team to initiate the process of removal of the  
23 employee. I understand this might be a long process, but I want to get started.” That same day,  
24 Miller forwarded himself emails regarding Plaintiff dating from 2010 to 2012.

25 On July 11, 2012, Plaintiff sent an email to Miller noting that the Banner Health deal had  
26 been signed on May 9, 2012, that Plaintiff had transitioned out of his manager role on May 11, 2012,  
27 and that Plaintiff believed he had a “right to be paid the manager’s commission on the Banner deal .

1 . . .” Peters Decl. Ex. M. Plaintiff also stated, “I am sorry that you felt I was ‘interrogating you’ by  
2 asking about my commission. I think it is completely fair and reasonable to inquire about when and  
3 how my commission will be paid on deals.” *Id.*

4 On July 12, 2012, Miller sent an email to Plaintiff stating that Miller was again not ready to  
5 discuss Plaintiff’s commission for the Banner Health deal because Medicity did not know how it  
6 would be paid for the Banner deal yet, “given the unique shared savings model [] that puts any  
7 revenue potential out 2 years from now.” JSUMF 36; Peters Decl. Ex. W. Miller noted that  
8 commissions might not be paid at all. Peters Decl. Ex. W (“[I]f we don’t hit the savings goal,  
9 there’s nada for any of us.”). Miller also stated, “And, as per the comp plan, we don’t pay  
10 commissions until we get cash. And if we aren’t going to get cash for 2 years, then we can’t pay  
11 commissions until then anyway . . . .” *Id.* Miller also noted that “[p]er the commission plan, to get  
12 paid commissions, Salesforce.com<sup>2</sup> has to be up to date at all times,” but that Plaintiff’s  
13 Salesforce.com entries were not up to date and were missing key information, and that Plaintiff was  
14 not following the “Storyleaders” methodology for recording his work. *Id.* See also Keane Decl. Ex.  
15 I (EAVP Plan) at D000024 (“[T]o be eligible for commission payment, every opportunity must be  
16 up to date and accurate in Salesforce.com and the Storyleaders methodology is followed for every  
17 opportunity.”); Ex. J (ERVP Plan) at D000034 (same).

18 On July 16, 2012, Plaintiff spoke with Dover by phone regarding Plaintiff’s commission for  
19 the Banner Health deal. Dover told Plaintiff that Dover would look into it, but that Plaintiff needed  
20 to “stop talking about a lawsuit against the company,” to which Plaintiff replied he had never  
21 mentioned the subject to either Dover or Miller, but acknowledged there had been talk of the subject  
22 among the sales team.

23 On July 31, 2012 and August 1, 2012, Plaintiff and Dover communicated via email about  
24 Plaintiff’s commission for the Banner Health deal. Dover told Plaintiff that Miller would speak to  
25 Plaintiff about the Banner commission later that week and had “good news on this topic.” Peters

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26 <sup>2</sup> Salesforce.com appears to be the reporting system used by Medicity employees to document  
27 progress on their work with prospective or active clients.

1 Decl. Ex. AA. On or about August 2, 2012, Miller called Plaintiff and told him he would be getting  
2 paid on the Banner deal.

3 On August 14, 2012, Plaintiff sent an email to Miller and Andrew Fullmer, a controller who  
4 handled commissions for Medicity, stating that Plaintiff was sending “the subject form for the  
5 Banner Health commission for your approval even though the deal has not been value[d] [] yet . . . .  
6 I would like to have this recorded on my commission statement as a payable even if the deal value is  
7 a TBD.” Peters Decl. Ex. EE. Miller responded to both Plaintiff and Fullmer stating: “[Plaintiff] is  
8 correct. He should be paid on Banner as the Manager . . . . Whenever we figure out the deal value  
9 (what we are getting paid from ACS<sup>3</sup>), we’ll need to work into the commission process.” Peters  
10 Decl. Ex. EE.

## 11 **2. August–September 2012: Conflicts With Patricia Hayward**

12 Patricia Hayward became Plaintiff’s supervisor when she was hired by Medicity in mid-  
13 August 2012. Hayward testified that during one of their first interactions, Plaintiff told Hayward, “I  
14 don’t really need a manager” and “I don’t expect to be micromanaged.” Keane Decl. Ex. D  
15 (Hayward Dep.) at 25:5-26:5 (Hayward testifying that Plaintiff’s “attitude was, ‘I don’t need you or  
16 want you here’”).

17 On September 5, 2012, Hayward, Miller, Plaintiff and others held a telephonic brainstorming  
18 session. After the call ended, Plaintiff called Hayward. Hayward expected a debrief conversation  
19 about the brainstorm session. Instead, Hayward testified that Plaintiff was “venting some incredibly  
20 pent-up frustrations at Medicity.” Hayward Dep. at 125:9-14.

21 Hayward testified that Plaintiff was “shouting and screaming” at her for ten to fifteen  
22 minutes, saying, “You are not going to micromanage me, I am not going to deal with this, this is just  
23 a horrible way to treat people.” Hayward Dep. at 120:21-22, 121:6-8, 122:4-5. Hayward told  
24 Plaintiff several times that she was uncomfortable with the way that Plaintiff was speaking to her,  
25 and asked him several times “take [it] down a few notches,” but that Plaintiff continued to shout at

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26  
27 <sup>3</sup> ACS was the contracting entity for Banner Health.

1 her. Hayward Dep. 121:10-11, 123:23-25. Hayward testified that by the time the call was finished,  
2 she was “shaking because it was so ridiculously over the top” and that she felt like Plaintiff “was  
3 going to go postal; he was that angry and upset and shouting to that kind of volume and with that  
4 sort of ferocity.” Hayward Dep. at 122:5-6, 124:14-16.

5 The next day, September 6, 2012, Hayward called Miller and told him what had happened.  
6 Hayward Dep. at 122:23-24. Hayward told Miller that she “[had] never been spoken to like this,  
7 either personally or professional” and that one “should never speak to another human being like that,  
8 let alone your boss.” Hayward Dep. 122:24-123:5. Miller suggested that Hayward send Plaintiff an  
9 email, which Hayward did on the same day. The email stated, in part:

10 I wanted to follow up to our call yesterday after the strategy session because I’m feeling  
11 uncomfortable with our interaction and want to make sure you and I start our working  
relationship “on the right foot.”

12 Having been in your shoes as a territory representative before, I understand the pressures and  
13 anxiety, especially when there is a deal so close to winning, only to have it get sideways at  
14 the 11th hour—it’s frustrating for sure . . . . I hope you can understand the pressures that I am  
under too. Personally, I hold myself very accountable for our performance as a team and can  
only expect the same from each team member.

15 . . . . From our conversation yesterday, it feels like you believe you were being micro-  
16 managed, but I assure you that was not the purpose or intent. The objective of the call was  
17 simply to discuss various strategies amongst several people with different points of view . . .  
. Taking things said with positive intent is extremely important to these situations, our  
culture and work environment.

18 . . . . Our call yesterday after the strategy call made me very uncomfortable and it wasn’t in  
19 line with those values. I was especially uncomfortable with your confrontational attitude and  
20 the volume of the discussion. I don’t know if you are feeling specific or excessive pressures  
21 or anxieties—personally or professionally—but it is never appropriate in a workplace  
22 environment to take the tone you did, with me as your manager or with any other  
Aetna/Medicity colleague. I encourage you to vet concerns with me in a productive and  
positive manner where we can work together to find solutions to issues that arise. I don’t  
mean to suggest that we always have to agree, but we need to be able to handle  
disagreements and issues constructively, openly and honestly.

23 Keane Decl. Ex. E.

24 On September 10, 2012, Plaintiff responded to Hayward’s email. Plaintiff stated, “[F]rankly,  
25 I am confused over a number of your comments. Specifically, I would like to better understand  
26 what you are feeling uncomfortable about relative to our discussion and also what you feel is not  
27 compatible with Aetna values. I am also confused by your description of ‘aggressive approach’

1 during our call with my suggestion on how to reconcile our differences . . . .” Keane Decl. Ex. L at  
2 D000394. Plaintiff stated that he was “surprised [to] see an e-mail from [Hayward] outlining such  
3 concerns when they did not seem apparent in the actual discussion.” *Id.* See also Hayward Dep.  
4 123:18-19 (Hayward testifying that Plaintiff’s response was “I have no idea what you are talking  
5 about. I thought yesterday’s call was great”). Hayward testified that this response led her “to  
6 realize that [Plaintiff] had no intention of being honest, because there is no possible way he couldn’t  
7 understand what had happened yesterday, especially when I told him no less than three times to just  
8 tone it down.” Hayward Dep. at 123:20-24.

9 Hayward also received complaints from clients about Plaintiff. According to Hayward, in  
10 late September 2012, Hayward received a call from a client who was upset and felt that Plaintiff was  
11 holding up a deal to structure it in a way so that he would get paid commissions. On September 21,  
12 2012, Hayward sent an email to Miller regarding a transaction with Providence Oregon stating,  
13 “Apparently Andrew has given the customer knowledge of HIS issues around compensation tied to  
14 milestones and payments within contracts. Her feeling is he has held up this SOW [Statement of  
15 Work] because he is afraid of how he will get paid.” Keane Decl. Ex. S (emphasis in original).  
16 Hayward also told Miller that the client “is very afraid that anytime we do any sort of upgrade  
17 additional contracting with us, he will drag out negotiations so that he will get paid appropriately. I  
18 don’t know about you but a customer should NEVER have that feeling. I don’t mind a little ‘hey  
19 can you will do [sic] me a big favor’ type discussions so we get payment terms set in our favor but  
20 we should never ever hold up contracts for commission reasons.” *Id.* (emphasis in original). On  
21 September 22, 2012, Hayward sent an email to the client apologizing for Plaintiff’s behavior. Keane  
22 Decl. Ex. L at D000395 (“I am really embarrassed for Medicity because of the comments [Plaintiff]  
23 made about his commission payments relative to the SOW. I am very sorry if he made you feel  
24 responsible for his income in any way, or you felt like he purposely delayed the SOW, but most  
25 importantly, for making this process uncomfortable for you or anyone else within your team  
26 organization.”).

27 Hayward testified that she had received a customer complaint and had been told that Plaintiff  
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1 had disclosed some details of the Medicity compensation plan to a customer; Hayward reported this  
2 allegation to Human Resources. It is not clear from the record whether Hayward was referring to  
3 the same events she discussed in her September 21, 2012 email to Miller or a different event.

### 4 **3. September–October 2012: Investigation Into Plaintiff**

5 On September 6, 2012, Miller sent Hayward an email stating: “I am going to talk with a  
6 senior Aetna HR person about how to move on Andrew now and circumvent the Aetna process. I  
7 think it’s time for him to leave and Brent [Dover] does too.” Peters Decl. Ex. DD.

8 Plaintiff was on vacation from September 18 to 29, 2012. During that time, on September  
9 27, 2012, Aetna opened an investigation into Plaintiff’s conduct as an employee. The investigator in  
10 charge was Peter Getz. On September 27, 2012, Getz interviewed Miller as well as Hayward, and  
11 Miller forwarded emails regarding Plaintiff to Getz.

12 On the same day, Miller sent an email to Getz summarizing some of his concerns about  
13 Plaintiff. The email states in its entirety:

14 Hi Peter – here is a quick synopsis of things with Andrew Pashman:

- 15 • He has been here for a little over 2 years
- 16 • Throughout that time, he has had numerous HR violations – inappropriate comments,  
17 behavior, etc. He has had multiple conversations with me and Medicity HR about these  
18 events. I sent you some of the emails that relate to his actions and behavior
- 19 • About a year ago, he insulted an executive at a prospective customer (Schumacher Group)  
20 and the executive asked that Andrew not return to the account. We have yet to close this deal  
21 due to the damage it cause. [sic]
- 22 • About 2 months ago, he was calling other members of our sales team, trying to rally  
23 support to file a class action lawsuit against Medicity related to commission payments
- 24 • Patty Hayward joined us 1 month ago. In his first call with Patty, he told her how he was  
25 going to be managed
- 26 • In his second call with Patty, he verbally screamed at her (I forgot to mention that I had a  
27 call with Andrew back in May where he verbally screamed at me and used excessive  
28 profanity (“F-bombs” directed at me and others)
- Last week, 2 separate prospective customers complained about Andrew. The first,  
Providence Health System in Oregon, talked to Patty about how Andrew told them that he  
needed to structure the payment terms in a way to ensure he gets paid his commissions faster.  
This Providence Oregon was very offended and asked that Andrew not be on the account.

1 • The second event last week was with Providence Health System in Southern CA (a sister  
2 organization to the Oregon Providence, but a completely separate situation). "Kim" at  
3 Providence told Patty how Andrew was rude and condescending to their team and was  
4 appalled by his behavior. They asked that he not be on the account.

5 There are obviously a ton of details in between, but I hope you get the gist...

6 Let me know how else I can help.

7 Keane Decl. Ex. R.

8 By September 28, 2012, Miller and others at Medicity had formulated a procedure for  
9 terminating Plaintiff: he would be interviewed by Getz "first thing Monday morning and [Getz] feels  
10 he will be able to get Andrew to trip himself up," after which Plaintiff would be told he was on  
11 administrative leave; Getz would have access to Plaintiff's email to "try[] to find anything related to  
12 the issues"; and on Tuesday morning, Miller would call Plaintiff to terminate him. Peters Decl. Exs.  
13 FF, GG.

14 Getz proceeded as planned. Early on Monday, October 1, 2012, Getz interviewed Plaintiff  
15 by phone for approximately 30–35 minutes. Getz and Plaintiff spoke about several incidents during  
16 Plaintiff's employment, including one in which Plaintiff referred to an Aetna employee as a "man  
17 servant," and another where he made a comment about "coconut bras and grass skirts" during a sales  
18 call with fifty attendees, apparently after a meeting in Hawaii.

19 At the conclusion of the interview, Getz informed Plaintiff he was on paid administrative  
20 leave while the investigation was being conducted, that the results of Getz' investigation would be  
21 presented to an employment lawyer at Aetna, and the outcome could result in a number of things  
22 including a warning letter, suspension or up to termination. Plaintiff told Getz about David Duntz, a  
23 Medicity management employee who might be able to rebut Miller's allegations of Plaintiff's  
24 conduct; Getz called Duntz two or three times but never spoke with him. Getz also invited Plaintiff  
25 to provide him with a written statement later that day; Plaintiff emailed Getz early the next day  
26 (October 2, 2012) informing Getz that Plaintiff intended to provide a written statement. Apparently  
27 Plaintiff never provided Getz this written statement, because Plaintiff was notified of his termination  
28 two hours later.

1           **4. October 2, 2012: Termination and Plaintiff's Response**

2           Miller and Plaintiff had scheduled a conference call for 9 a.m. PST on October 2, 2012,  
3 which Plaintiff did not attend. Miller called Plaintiff's cell phone and home phone, and left a  
4 voicemail on the latter stating that Miller would be sending a letter to Plaintiff's personal email  
5 address.

6           Miller sent the letter as promised to Plaintiff's personal email address at 9:33 a.m. The  
7 termination letter had the subject line, "Termination for performance and inappropriate behavior."  
8 Keane Decl. Ex. O (Termination letter). It stated that Plaintiff was being terminated for  
9 "unsatisfactory performance and inappropriate behaviors, which includes your rude and condensing  
10 [sic] tone when speaking to internal and external customers, requests from several prospective  
11 customers to not have you involved in their account, using a loud tone when speaking to your  
12 manager, being disrespectful to your managers and colleagues, telling your direct manager how you  
13 were going to be managed and your excessive use of profanity." Keane Decl. Ex. O. Miller noted,  
14 "More recently, it was brought to our attention [that] you had a discussion about your commissions  
15 with a prospective customer and needed to structure the payment terms in a way to ensure you get  
16 paid your commissions faster. We received feedback from another customer how you were rude and  
17 condensing [sic] to their team and asked you not to be on the account." *Id.*

18           Later that day, Plaintiff responded to his termination letter by sending Miller an email stating  
19 that the explanation given to him in the letter was "inconsistent with reality." Keane Decl. Ex. P.  
20 Plaintiff also stated that "[Getz] was very, very clear in . . . his questions about whether or not I was  
21 planning a class action lawsuit. Perhaps I was stupid to confirm to him that there had been  
22 discussion among the sales reps and others concerning commission payments and suing the  
23 company, but there it is." *Id.* Plaintiff also stated, "Given all these facts and inconsistencies it is  
24 painfully obvious that my termination is based on a 'concern' about me possibly taking action  
25 regarding commissions." *Id.*

26           Getz's investigation continued even after Plaintiff was terminated. Getz interviewed Paula  
27 Jones on October 3, 2012, regarding some of the allegations being investigated by Getz. Getz closed  
28

1 the investigation on October 3, 2012.

2 **D. Status of Deals At Plaintiff's Termination**

3 At the time of Plaintiff's termination, he was apparently involved in several transactions.  
4 The evidence in the record regarding these deals is sparse. It is undisputed that the Hawaii Pacific  
5 deal had not closed. Nor had the Providence SoCal deal, in part because not all of the information  
6 requested by the client had been provided.

7 As mentioned above, the Banner Health deal was signed on May 9 or 10, 2012, and it was a  
8 "shared savings" arrangement in which Medicity would be paid a percentage of the shared savings,  
9 if any, that the client realized by using the technology, rather than via direct up-front payments.  
10 Plaintiff testified that Miller told him the commissionable amount on the Banner Health deal would  
11 be calculated on book value for the products and services sold. However, nothing in the EAVP Plan  
12 plan states that a "shared savings deal" would be valued based on "book value," and there is no  
13 evidence that Medicity ever calculated a "book value" for the Banner Health contract. Sometimes  
14 the pricing for deals would change during the course of ongoing negotiations. Such was the case  
15 with the Banner Health deal. Approximately one year after Plaintiff's termination, Medicity entered  
16 into a fixed fee agreement with ACS for the services it would provide to Banner, so that payment  
17 was no longer based on a shared savings model.

18 **E. Plaintiff's Retention of Medicity Equipment and Documents**

19 Plaintiff signed a Nondisclosure Agreement of Invention, Noncompetition and  
20 Nonsolicitation Agreement when he began his employment with Medicity. Paragraph 1.b. of the  
21 Agreement required him at the time of termination to "immediately deliver to the Company all  
22 documents, records, writing, specifications, programs or other materials of any kind, including  
23 copies, which are in my possession or control and which contain any Confidential Information."  
24 Keane Decl. Ex. H.

25 In the October 2, 2012 termination letter, Medicity directed Plaintiff to return all Medicity  
26 equipment, including his laptop, immediately to the company's office in Salt Lake City, Utah.  
27 Three weeks later, on October 23, 2012, Medicity received Plaintiff's Medicity equipment,

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1 including a laptop and USB card. Plaintiff also had a backup drive that he had used during his  
2 employment with Medicity, which contained his expense reports, holiday schedules, account  
3 information, presentations, marketing materials, benefit information, and information on actual or  
4 potential Medicity customers on whom he was working at the time. Plaintiff deleted this backup  
5 drive approximately one week after his termination.

6 After his termination, Plaintiff did not return the Medicity documents he had printed or the  
7 Medicity documents that he maintained on a hard drive and later deleted. Plaintiff produced  
8 documents in the current litigation regarding deals with Providence Oregon, Providence SoCal,  
9 Hawaii Pacific Health, St Joseph's Health System, and Mercy Health. Plaintiff did not notify  
10 Medicity that he had retained the Medicity documents that he produced in the present litigation.

11 Plaintiff also retained a Medicity powerpoint presentation on the topic of sales stages. The  
12 word "Medicity" appears on three slides. After Plaintiff's termination, he distributed this  
13 presentation to four or five employees in the sales team of his new employer, Citi. The powerpoint  
14 presentation outlined the sales stages as described by author Jeff Thull in his published and publicly  
15 available book: "Mastering the Complex Sale." Plaintiff testified that his reason for showing the  
16 presentation to his colleagues at Citi was to "giv[e] them an idea of how Jeff Thull represents or has  
17 defined the basic five sales stages, so to give them some idea of the concept short of reading Jeff  
18 Thull's book." Keane Decl. Ex. B (Pashman Dep.) at 133:20-25.

19 After Defendants' counsel contacted Plaintiff's counsel in January 2014 about Plaintiff's use  
20 of the powerpoint presentation, Plaintiff deleted all documents on his personal computer that related  
21 to the time period of his employment with Medicity.

#### 22 **F. Statements Made by Medicity After Plaintiff's Termination**

23 On October 2, 2012, Miller sent an email to sixteen Medicity employees stating: "Andrew  
24 Pashman is no longer with Medicity. Please do not contact or speak with Andrew about anything  
25 related to Medicity, Aetna or EB. If you were working with Andrew on anything in particular,  
26 please reach out to Patty Hayward or me." Plaintiff has no evidence that this email was published to  
27 anyone who was not a Medicity employee.

1 On November 5, 2012, Miller sent an email to 25 Medicity employees in the sales, sales  
2 support, and marketing departments within Medicity, stating: “Team, I have reason to believe that  
3 our sales pipeline<sup>4</sup> and forecast may have been sent to someone at Certify Data Systems. Under the  
4 concept of ‘only the paranoid survive,’ please be aware of this. Also, if you do find that Certify is  
5 suddenly showing up in a deal where they weren’t before, please let me know ASAP.” Peters Decl.  
6 Ex. MM.

7 Also on November 5, 2012, Miller sent an email to two Medicity management employees:

8 I got some info over the weekend that leads me to believe that Pashman shared our pipeline  
9 with a former Medicity employee who we fired 2 1/2 years ago, Dawn Bowes, that now  
10 works for Certify. And now with Certify showing up in Providence So. CA and Now Prov  
11 Oregon, I think m [sic] gut is right...I only have circumstantial evidence, but I have a very  
12 plausible scenario for how this might have occurred. Dawn and Andrew have very similar  
13 personalities and issues.

14 Keane Decl. Ex. W. Plaintiff has no evidence that this email was published to anyone who was not a  
15 Medicity employee.

16 Shortly after sending the above email, Miller sent an email to two Aetna Human Resources  
17 employees stating in its entirety:

18 I received some information over the weekend that leads me to believe that Andrew Pashman  
19 may have shared our pipeline/forecast with a salesperson at Certify Data Systems, which is a  
20 competitor of Medicity. This person at Certify worked in sales at Medicity, but she was  
21 terminated 2 1/2 years ago. The information I heard over the weekend was essentially that  
22 she is going to harm Medicity. The Certify person and Andrew have very similar  
23 (vindictive) personalities.

24 This morning, I learned that Certify Data Systems is involved in 2 significant sales  
25 opportunities, both of which were the 2 accounts where Andrew Pashman was previously  
26 involved and coincidentally, were the 2 accounts most recently asked that Andrew be  
27 removed from their account (Providence Oregon and Providen So. CA). Certify was in no  
28 way involved in either of these deals until last week.

My evidence is circumstantial and gut feel at this point. I wanted to make you aware of this,  
however, just in case we might want to remind Andrew about how any Medicity/Aetna  
information is confidential.

Keane Decl. Ex. T. Plaintiff has no evidence that this email was published to anyone who was not a

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<sup>4</sup> The First Amended Complaint (“FAC”) defines a “sales pipeline” as “essentially a list of prospects.” FAC [Docket No. 6] at ¶ 57.

1 Medicity employee. Miller forwarded this email to Getz and stated, “I wanted to make you aware of  
2 this situation as well. I don’t know if you have any special tricks to figure out if Pashman leaked  
3 this information...” Peters Decl. Ex. NN.

4 Miller testified that his belief that Plaintiff had shared the Medicity pipeline/forecast with a  
5 competitor was based in part on a statement allegedly made by Dawn Bowes to Miller’s ex-wife at a  
6 dinner. Bowes told Miller’s ex-wife that she was “going to cause some serious harm to Medicity.”  
7 Peters Decl. Ex. B (Miller Dep.) at 86:10-14; 88:4-22. Shortly after Miller’s ex-wife told Miller she  
8 had heard the comment from Bowes, Bowes allegedly showed up for the first time at two accounts  
9 that Medicity had been pursuing. Miller did not contact Dawn Bowes about her remark regarding  
10 harming Medicity.

11 Hayward testified that Miller “intimated” to her that he believed Plaintiff had given the  
12 Medicity sales pipeline to a competitor because the competitor was showing up in a deal when it had  
13 previously not been there.

14 According to Steve House, a Medicity employee, in October or November 2012, Miller  
15 stated on a sales call with Medicity salespeople that after “he was terminated[,] Andrew Pashman  
16 had taken Medicity’s sales pipeline and given it to a competitor.” Peters Decl. Ex. QQ (House  
17 Declaration).

18 On November 15, 2012, Plaintiff received a text message from Doug Arent<sup>5</sup> saying Miller  
19 “has everyone convinced that you stole the listing gave it to the other vendor. Had lunch with Bryant  
20 yesterday and he Seem convinced. [sic] Bill and I had to explain to him why it wasn’t you.” Peters  
21 Decl. Ex. PP.

## 22 II. LEGAL STANDARD

23 A court shall grant summary judgment “if . . . there is no genuine dispute as to any material  
24 fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The burden of  
25 establishing the absence of a genuine issue of material fact lies with the moving party, *see Celotex*

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26  
27 <sup>5</sup> The parties do not explain who Doug Arent is or his relationship with the parties.

1 *Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986), and the court must view the evidence in the light  
2 most favorable to the non-movant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)  
3 (citation omitted). A genuine factual issue exists if, taking into account the burdens of production  
4 and proof that would be required at trial, sufficient evidence favors the non-movant such that a  
5 reasonable jury could return a verdict in that party’s favor. *Id.* at 248. The court may not weigh the  
6 evidence, assess the credibility of witnesses, or resolve issues of fact. *See id.* at 249. Conclusory  
7 statements without factual support are insufficient to defeat a motion for summary judgment.  
8 *Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1103 (9th Cir. 2008).

9 To defeat summary judgment once the moving party has met its burden, the nonmoving party  
10 may not simply rely on the pleadings, but must produce significant probative evidence, by affidavit  
11 or as otherwise provided by Federal Rule of Civil Procedure 56, supporting the claim that a genuine  
12 issue of material fact exists. *TW Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630  
13 (9th Cir. 1987). In other words, there must exist more than “a scintilla of evidence” to support the  
14 non-moving party’s claims, *Anderson*, 477 U.S. at 252; conclusory assertions will not suffice. *See*  
15 *Thornhill Publ’g Co. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). Similarly, “[w]hen opposing  
16 parties tell two different stories, one of which is blatantly contradicted by the record, so that no  
17 reasonable jury could believe it, a court should not adopt that version of the facts” when ruling on  
18 the motion. *Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007).

### 19 III. DISCUSSION

20 Defendants move for summary judgment on all seven claims pleaded by Plaintiff in the First  
21 Amended Complaint. The court notes that it has diversity jurisdiction over this case. Both sides  
22 analyze the issues in this motion under California law. The court agrees that the substantive law of  
23 California governs. *Nelson v. Int’l Paint Co.*, 716 F.2d 640, 643 (9th Cir. 1983) (“In diversity cases,  
24 the district court normally applies the substantive law of the forum state . . .”).

#### 25 A. Breach of Contract

26 The FAC alleges that “Defendant[s] breached the written and signed [EAVP] Plan, by  
27 refusing to pay the commissions owed to [Plaintiff] pursuant to that agreement.” FAC at ¶ 34. The  
28

1 FAC does not allege the specific deals for which Plaintiff had not been paid. The only two deals  
2 mentioned in the FAC are the Banner Health deal and a deal with Hawaii Pacific Health. FAC at ¶¶  
3 15, 18, 22, 23, 25, 27. Plaintiff now claims he was owed unpaid commissions on the following  
4 deals: (1) Banner Health, (2) Providence Oregon, (3) Providence SoCal, (4) Exempla, (5) Christus,  
5 and (6) Texas Health Resources.

### 6 **1. Express Terms**

7 “A contract must be so interpreted as to give effect to the mutual intention of the parties as it  
8 existed at the time of contracting . . . .” Cal Civ. Code § 1636; *Ben-Zvi v. Edmar Co.*, 40  
9 Cal.App.4th 468, 473 (1995). “When a contract is reduced to writing, the intention of the parties is  
10 to be ascertained from the writing alone, if possible.” Cal. Civ. Code § 1639. “We may not create  
11 for the parties a contract which they did not make, and cannot insert in the contract language which  
12 one of the parties now wishes were there.” *Ben-Zvi*, 40 Cal.App.4th at 473 (quotation and ellipsis  
13 omitted). “The language of a contract is to govern its interpretation, if the language is clear and  
14 explicit, and does not involve an absurdity.” Cal. Civ. Code § 1638. “The words of a contract are to  
15 be understood in their ordinary and popular sense.” *Founding Members of the Newport Beach*  
16 *Country Club v. Newport Beach Country Club, Inc.*, 109 Cal.App.4th 944, 955 (2003).

17 The text of the EAVP Plan is clear that commissions will be paid when Medicity receives  
18 payment. EAVP Plan at D000024 (“Commissions will be paid as Medicity receives any payment  
19 for software or services . . . .”). The text is also clear that only individuals employed by Medicity at  
20 the time payment is due may receive commissions. *Id.* (“All commission payments require the  
21 EAVP to be employed by Medicity at the time the payment is due . . . .”). Plaintiff acknowledged at  
22 his deposition that his understanding of the EAVP Plan was that “as the commission plan states, I  
23 don’t get paid until the customer starts paying . . . us money.” Thus, it is undisputed that under the  
24 express terms of the EAVP Plan, Plaintiff was only owed commissions on deals which resulted in  
25 payments to Medicity while Plaintiff was still employed by Medicity.

26 The record is bare with respect to five of the six deals for which Plaintiff claims he was not  
27 paid commissions owed. It is undisputed that the Providence SoCal deal had not closed by the time  
28

1 of Plaintiff's termination. Plaintiff points the court to no evidence regarding whether the Providence  
2 Oregon, Exempla, Christus, and Texas Health Resources deals existed, let alone closed or resulted in  
3 payments to Medicity during Plaintiff's employment.<sup>6</sup> Plaintiff asserts that he has "alleged and  
4 presented facts supporting his claim he is owed commissions on . . . client matters," *see* Opp. at 24,  
5 but none of the cited evidence remotely supports his claim.<sup>7</sup> In the absence of evidence, a  
6 reasonable jury cannot conclude that Plaintiff was owed commissions for the Providence SoCal,  
7 Providence Oregon, Exempla, Christus, and Texas Health Resources deals.

8       Regarding the sixth client, it is undisputed that the Banner Health deal closed prior to  
9 Plaintiff's termination. However, the undisputed facts also show that, at the time of Plaintiff's  
10 termination, the deal was structured in such a way that Medicity would only receive payment as a  
11 percentage of the savings that Banner Health would eventually realize from the Medicity products, if  
12 any. Plaintiff points to no evidence that Banner Health made any payments to Medicity when the  
13 deal was structured under this "shared savings" model.<sup>8</sup> At the hearing, Plaintiff's counsel  
14 repeatedly conceded that Plaintiff had not earned the Banner Health commission as of the date of his  
15 termination. Thus, under the express terms of the EAVP Plan, Plaintiff was owed no commission  
16 for this deal.

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17  
18       <sup>6</sup> After the court held a hearing on the motion, Plaintiff filed an unsolicited sur-reply attaching  
19 additional evidence purporting to show that Plaintiff was owed a commission on the Exempla,  
20 Providence Oregon, and Christus deals. *See* Docket No. 34. These materials are not properly before  
the court. *See* Civil L.R. 7-3(d) ("Once a reply is filed, no additional memoranda, papers, or letters may  
be filed without prior Court approval" except in circumstances inapplicable here).

21       <sup>7</sup> Plaintiff cites only Joint Statement of Undisputed Material Fact ("JSUMF") 9 ("Plaintiff  
22 alleges he was owed unpaid commissions on the following deals: Banner Health, Providence Oregon,  
23 Providence SoCal, Exempla, Christus, Texas Health Resources."); JSUMF 66 ("At the time of Plaintiff's  
24 termination, the Hawaii Pacific deal had not closed."); JSUMF 67 ("At the time of Plaintiff's  
25 termination, the Providence SoCal deal had not closed, in part because not all the information requested  
by the client had been provided."); and JSUMF 71 ("Approximately one year after Plaintiff's  
26 termination, Medicity entered into a fixed fee agreement with ACS for the services it would provide to  
Banner."). None of these facts supports Plaintiff's claim that he was owed commissions on particular  
27 deals prior to his termination.

28       <sup>8</sup> A year after Plaintiff was terminated, the Medicity deal was restructured into a fixed fee  
arrangement wherein Medicity received a fixed payment of \$8.8 million from Banner Health. JSUMF  
71; Keane Decl. Ex. J (Medicity Statement of Work for Banner Health Network) at D000402-03.  
However, Plaintiff does not argue that he was entitled to a commission on the basis of this payment.



1 Health.

2 Even assuming that the contract should be interpreted as Plaintiff suggests, Plaintiff has  
3 almost no evidence to support that, prior to his termination, the Banner Health deal had a “book  
4 value” to use as a basis for paying Plaintiff a commission. The only evidence to which Plaintiff  
5 points are two emails in the same thread sent by Brent Dover to Plaintiff and others on February 6  
6 and 7, 2012, *before* the Banner Health deal closed on May 10, 2012. *See* Opp. [Docket No. 30] at  
7 17. The emails have the subject heading, “Banner Executed LOI [Letter of Interest].” Peters Decl.  
8 Ex. J. In the February 6 email, Dover stated, “Here is the LOI that has been executed by Banner. I  
9 have no idea if these are the actual numbers that will be carried forward and counted towards  
10 Medicity or not—we will just have to wait and see. This will give us insight into what the client is  
11 thinking/expecting.” Peters Decl. Ex. J. In the February 7 email, Dover states:

12 For several reasons, for our monthly report I would like to show Banner as in Contract  
13 Negotiations and at a TCV of \$13M for Medicity (the approximate value of the Exhibit in  
14 the LOI that was signed yesterday).

14 I have serious doubts about if that is the correct value or not—but let's use that information  
15 to continue to press for an answer.

16 Andrew-please make these changes in the monthly report. I think we currently show Banner  
17 in Best of Few at \$5M. Paula-can you please make the change to Negotiating and \$13M in  
18 Salesforce.com.

18 Peters Decl. Ex. J. From the face of these documents, it is clear that they do not support Plaintiff's  
19 argument. First, they refer to valuations of a prospective deal for purposes of a letter of interest.  
20 Second, Dover explicitly states that he has “no idea if these are the actual numbers” and has “serious  
21 doubts about if that is the correct value” for the deal. Upon this weak showing, a jury could not  
22 reasonably conclude that the Banner Health deal had been given a “book value” prior to Plaintiff's  
23 termination.

### 24 **3. Miller's Statements About Paying A Commission**

25 Finally, Plaintiff argues that Miller told Plaintiff on August 2, 2012 that Plaintiff “would be  
26 getting paid on the Banner deal.” *See* Opp. at 17. Plaintiff does not explain the significance of this  
27 statement vis-a-vis his breach of contract claim either in the FAC or in his opposition. “On a motion  
28

1 for summary judgment, the plaintiff’s allegations and theories of liability are confined to those found  
2 in the operative complaint.” *See Maples v. SolarWinds, Inc.*, No. C 12-6066 SBA, -- F.Supp. 2d --,  
3 2014 WL 2860848 at \*8 (N.D. Cal. June 23, 2014) (citing *Coleman v. Quaker Oats Co.*, 232 F.3d  
4 1271, 1292 (9th Cir. 2000) (“A complaint guides the parties’ discovery, putting the defendant on  
5 notice of the evidence it needs to adduce in order to defend against the plaintiff’s allegations.”)). It  
6 is improper for the court to invent a theory of liability for Plaintiff that Plaintiff himself failed to  
7 present, e.g., whether Miller’s statements constituted an oral modification to the commission plans,  
8 with the result that Plaintiff had actually earned the Banner Health commission prior to his  
9 termination.<sup>11</sup> *See Williams v. Cnty. of Alameda*, No. C 12-02511 SBA, -- F.Supp.2d --, 2014 WL  
10 556008 at \* 12 (N.D. Cal. Feb. 10, 2014) (“This Court only considers arguments that are specifically  
11 and distinctively raised by the parties in their briefs.”) (citing *Indep. Towers of Wash. v. Washington*,  
12 350 F.3d 925, 929 (9th Cir. 2003)).

### 13 **B. Breach of Implied Covenant of Good Faith and Fair Dealing**

14 Defendants next move for summary judgment on Plaintiff’s claim for breach of the implied  
15 covenant of good faith and fair dealing.

16 Every contract possesses an implied covenant of good faith and fair dealing in which  
17 “neither party will do anything which will injure the right of the other to receive the benefits of the  
18 agreement.” *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 684 (1988). The scope of conduct  
19 prohibited by the implied covenant depends on the purposes and express terms of the contract.  
20 *Carma Developers, Inc. v. Marathon Development California, Inc.*, 2 Cal.4th 342, 373 (1992).  
21 “[A]s a general matter, implied terms should never be read to vary express terms” of a contract. *Id.*  
22 at 374. *See also Tollefson v. Roman Catholic Bishop*, 219 Cal.App.3d 843, 853-854 (1990) (the  
23 covenant of good faith and fair dealing “cannot be used to imply an obligation which would  
24 completely obliterate a right expressly provided by a written contract”) (disapproved on other  
25 grounds in *Scott v. Pacific Gas & Electric Co.*, 11 Cal.4th 454, 474 n. 5 (1995)). “Although breach

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26  
27 <sup>11</sup> The court notes, however, that such an argument would be contrary to Plaintiff’s concession  
28 at oral argument that he had not earned a commission on the Banner Health deal prior to his termination.

1 of the implied covenant often is pleaded as a separate count, a breach of the implied covenant is  
2 necessarily a breach of contract.” *Digerati Holdings, LLC v. Young Money Entm’t, LLC*, 194 Cal.  
3 App. 4th 873, 885 (2011).

4 The primary basis for Plaintiff’s claim is that the implied covenant prohibits Defendants  
5 from terminating his employment in order to avoid paying Plaintiff the commissions he was owed.  
6 However, as discussed above, no reasonable juror could find that Plaintiff had earned commissions  
7 under either the ERVP or EAVP Plans at the time of his termination. Indeed, the evidence supports  
8 that only one deal – Banner Health – was closed before Plaintiff’s termination. At oral argument,  
9 Plaintiff conceded that even though Banner Health had signed a contract, Plaintiff had not earned a  
10 commission on the Banner Health deal while he was employed with Medicity pursuant to the terms  
11 of the ERVP and EAVP commission plans. The only evidence in the record regarding client  
12 payments on that deal indicate that Banner Health did not make any payments to Medicity until a  
13 year after Plaintiff was terminated. The covenant of good faith may not “be read to prohibit a party  
14 from doing that which is expressly permitted by an agreement.” *Carma Developers, Inc.*, 2 Cal.4th  
15 at 374. Under the terms of the ERVP and EAVP commission plans, Plaintiff was not entitled to a  
16 commission on a deal that had not resulted in a payment to Medicity while Plaintiff was employed.  
17 Thus, Defendants cannot be held liable for breach of the implied covenant of good faith and fair  
18 dealing for doing what Defendants were expressly permitted to do by the terms of the ERVP and  
19 EAVP: refuse to pay Plaintiff a commission for which Medicity did not receive payment until a year  
20 after Plaintiff left Medicity’s employment.

21 Plaintiff offers a second theory for this claim: the implied covenant prohibits employers from  
22 terminating employees to avoid paying commissions the employee “would be earning shortly  
23 thereafter.” The only case cited by Plaintiff in support of this argument is *Guz v. Bechtel Nat. Inc.*,  
24 24 Cal.4th 317, 318 (2000). In *Guz*, the plaintiff was laid off when his work unit was eliminated.  
25 The plaintiff sued his former employer, among other things, for age discrimination and breach of the  
26 implied covenant of good faith and fair dealing. The plaintiff claimed that the implied covenant  
27 precluded the defendants from “terminating him arbitrarily, as by failing to follow its own policies,  
28

1 or in bad faith.” *Id.* at 326-27. The California Supreme Court found that the trial court properly  
2 dismissed the plaintiff’s claim for breach of the implied covenant of good faith and fair dealing. The  
3 court first noted that an implied covenant could not impose substantive duties on contracting parties  
4 beyond those incorporated into the specific terms of their agreement. “If an employment is at will,  
5 and thus allows either party to terminate for *any or no* reason, the implied covenant cannot decree  
6 otherwise.” *Id.* at 327 (emphasis in original). Thus, the court concluded that “if the employer’s  
7 termination decisions, however arbitrary, do not breach such a substantive contract provision, they  
8 are not precluded by the covenant . . . . [A] breach of the implied covenant cannot logically be based  
9 on a claim that the discharge of an at-will employee was made without good cause.” *Id.* (citation  
10 and brackets omitted).

11 In dicta, the *Guz* court stated, “We do not suggest the covenant of good faith and fair dealing  
12 has no function whatever in the interpretation and enforcement of employment contracts.” *Id.* at  
13 353, n. 18 (emphasis added). The court described one scenario that could give rise to a claim for  
14 breach of the covenant of good faith and fair dealing:

15 [T]he covenant prevents a party from acting in bad faith to frustrate the contract’s actual  
16 benefits. **Thus, for example, the covenant might be violated if termination of an at-will  
17 employee was a mere pretext to cheat the worker out of another contract benefit to  
18 which the employee was clearly entitled, such as compensation already earned.**

19 *Id.*

20 Plaintiff argues that the emphasized language quoted from *Guz* supports his theory that the  
21 implied covenant prohibits an employer from terminating an employee to avoid paying a  
22 commission he “would be earning shortly.” The language in *Guz* does not support this argument.  
23 *Guz* states that the implied covenant might be violated if the termination is aimed at cheating the  
24 employee out of “compensation *already earned.*” *Guz* does not suggest that the implied covenant  
25 theory can be stretched to cover situations where an employee is terminated, and is not able to  
26 collect commissions that are prospective and not yet earned. *Accord Remus v. Fios, Inc.*, No. C 11-  
27 01264 CRB, 2012 WL 707477 at \*9 (N.D. Cal. Mar. 5, 2012) (granting summary judgment against  
28 plaintiff on implied covenant claim, where plaintiff salesman argued that defendant’s decision to

1 change commission rate for a commission that had not yet been earned frustrated plaintiff's  
2 expectation for amount of the prospective commission, because "[t]o read the Compensation Plan as  
3 implying that the covenant of good faith and fair dealing prevented Defendant from taking away  
4 prospective commissions is in direct conflict with the stated language of the Compensation Plan")  
5 (quotation omitted). Indeed, to permit an implied covenant claim on Plaintiff's theory would be to  
6 effectively limit an employer's right to fire an at-will employee simply because there was an  
7 indefinite prospect of a commission in the future.

8 Although Plaintiff cited only *Guz*, the court, conducting its own research, has found at least  
9 one case in which a court denied summary judgment on an implied covenant claim where there was  
10 sufficient evidence to show that an employee had been terminated in order to avoid paying her a  
11 future commission. *McCollum v. XCare.net, Inc.*, 212 F. Supp. 2d 1142, 1155 (N.D. Cal. 2002). In  
12 *McCollum*, which relied upon *Guz*, the plaintiff submitted sufficient evidence to show that the  
13 defendant had terminated the plaintiff in order to avoid paying her a \$570,130 commission on an  
14 imminent \$10 million deal that was signed one week after plaintiff was terminated. *Id.* *McCollum*  
15 is factually distinguished from the instant case because the plaintiff in *McCollum* raised triable  
16 issues on her related breach of contract cause of action as to whether she had in fact *earned* the  
17 anticipated commission.<sup>12</sup> Here, as discussed above, no reasonable juror could find that Plaintiff  
18 earned the Banner Health commissions, especially in light of the fact that his counsel repeatedly  
19 conceded that Plaintiff had *not* earned commissions on that deal at the time of his termination.

20 Accordingly, the court finds that there is no genuine issue of material fact as to whether  
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22 <sup>12</sup> *McCollum*'s compensation plan included a provision under which she would forfeit any  
23 undisbursed commissions if she resigned; there was a fact dispute over whether *McCollum* resigned or  
24 was terminated. *Id.* at 1147. *McCollum* also raised a triable issue of fact as to whether a different  
25 provision in her compensation plan, which allowed her employer to remove her from an account at its  
26 discretion, was unconscionable. *Id.* at 1152.

25 In addition, the wages to be paid to the *McCollum* plaintiff were more ascertainable than they  
26 are here: the commission to be paid in *McCollum* was a fixed-fee arrangement that was scheduled to be  
27 signed days *before* the plaintiff was terminated (although due to unexplained delays it was ultimately  
28 signed one week afterward), whereas the Banner Health deal was a shared savings arrangement that may  
not have ever led to a commission.

1 Defendants violated the covenant of good faith and fair dealing, and grants Defendants' summary  
2 judgment motion on that claim.

3 **C. California Labor Code § 203 Claim**

4 California Labor Code § 203 imposes penalties on employers who willfully fail to pay “any  
5 wages of an employee who is discharged.” Cal. Labor Code § 203(a). Plaintiff argues that  
6 Defendants violated this statute by failing to pay Plaintiff the commissions he was due. For the  
7 reasons stated above, no reasonable factfinder could conclude that Plaintiff had earned the wages he  
8 claims he is due. Accordingly, summary judgment is granted against Plaintiff on the Section 203  
9 claim.

10 **D. California Labor Code § 232 Claim**

11 Defendants move for summary judgment on Plaintiff's claim for violation of California  
12 Labor Code § 232. However, at the hearing, Plaintiff's counsel voluntarily withdrew the claim, to  
13 which Defendants did not object. Accordingly, the summary judgment motion as to this claim is  
14 denied as moot. *See Maples*, 2014 WL 2860848 at \*9 (“The proper course of action is to construe  
15 [a] voluntary withdrawal as a motion to amend under Federal Rule of Civil Procedure 15(a)” and  
16 grant that motion if it is unopposed) (citing *Hells Canyon Preservation Council v. U.S. Forest Serv.*,  
17 403 F.3d 683, 689 (9th Cir. 2005)).

18 **E. Claim for Wrongful Discharge In Violation of Public Policy (*Tameny* Claim)**

19 Plaintiff argues that his termination for alleged misconduct was actually motivated by  
20 Defendants' desire to avoid paying Plaintiff for the commissions he had earned. Opp. at 15.  
21 Plaintiff alleges that this conduct constitutes a wrongful discharge in violation of public policy.  
22 Medicity contends he was terminated due to a history of unsatisfactory performance and  
23 inappropriate behavior.

24 **1. Legal Standard**

25 Under California law, “[a]n at-will employment may be ended by either party at any time  
26 without cause, for any or no reason, and subject to no procedure except the statutory requirement of  
27 notice.” *Guz*, 24 Cal. 4th at 335. *See also* Cal. Labor Code § 2922 (“An employment, having no  
28

1 specified term, may be terminated at the will of either party on notice to the other.”). However, “an  
2 exception to the employment at-will doctrine is recognized where the employee’s termination was  
3 the result of a violation of the fundamental principles of public policy.” *Stoval v. Basin St.*  
4 *Properties*, No. 12-CV-04661-JST, 2013 WL 6002758 at \*3 (N.D. Cal. Nov. 12, 2013) (citing  
5 *Tameny v. Atl. Richfield Co.*, 27 Cal.3d 167, 170 (1980)). In such cases, “the discharged employee  
6 may maintain a tort action and recover damages traditionally available in such actions.” *Tameny*, 27  
7 Cal.3d at 170.

8 To prevail on a claim for wrongful discharge in violation of public policy, sometimes  
9 referred to as a *Tameny* claim, a plaintiff must establish that (1) an employer-employee relationship  
10 existed; (2) plaintiff’s employment was terminated; (3) the violation of public policy was a  
11 motivating reason for the termination; and (4) the termination was the cause of plaintiff’s damages.  
12 *Haney v. Aramark Unif. Servs., Inc.*, 121 Cal.App. 4th 623, 641 (2004). The “public policy”  
13 underlying the claim must be (1) supported by either constitutional or statutory provisions; (2)  
14 “public” in the sense that it “inures to the benefit of the public” rather than merely serving the  
15 interests of individuals; (3) well-established at the time of plaintiff’s discharge; and (4)  
16 “fundamental” and “substantial.” *Stevenson v. Super. Ct.*, 16 Cal.4th 880, 889-90 (1997).

## 17 **2. Violation of Public Policy**

18 In the FAC, Plaintiff specifically identifies two statutes that purportedly express the “public  
19 policy” underlying this claim: California Labor Code §§ 232 and 232.5. FAC at ¶ 48. However,  
20 Plaintiff appears to have abandoned the argument that these two statutes supply the public policy  
21 underpinning for his *Tameny* claim, as he does not discuss them in his opposition brief.

22 In fact, Plaintiff’s opposition never clearly articulates the fundamental public policy upon  
23 which he bases this claim, and instead focuses on the constellation of facts relevant to the issue of  
24 pretext. However, the court cannot reach the question of pretext without first determining whether  
25 there was an alleged violation of a fundamental, well-established public policy, grounded in a  
26 California statute or constitutional provision. Plaintiff appears to rely on the public policy  
27 articulated in *Gould v. Maryland Sound Industries, Inc.*, 31 Cal.App.4th 1137 (1995). In *Gould*, the  
28

1 California Court of Appeal pointed to California Labor Code Sections 201, 202 and 216 in support  
2 of its holding that “the prompt payment of wages due an employee is a fundamental public policy.”<sup>13</sup>  
3 31 Cal.App.4th at 1147. Thus, a plaintiff states a claim for wrongful discharge when he alleges that  
4 his employer discharged him “in order to avoid paying him the commissions . . . and other amounts  
5 he had earned, [thereby violating] a fundamental public policy of this state.” *Id.* at 31 Cal.App.4th  
6 at 1148.

7 There are few cases considering this aspect of the *Gould* decision, but at least some courts  
8 have cited to *Gould* to permit *Tameny* claims alleging that the employer terminated the employee to  
9 avoid paying earned commissions. *See, e.g., Lim v. Prudential Ins. Co. of Am.*, No. 00-56403, 36 F.  
10 App’x 267, 269-70 (9th Cir. May 17, 2002) (following *Gould* and finding that plaintiff stated a  
11 *Tameny* claim by alleging that defendant terminated her employment “in order to avoid paying her  
12 commissions she earned in the course of her work as an insurance representative”; noting also that  
13 “*Gould* is a state court of appeal decision rather than a California Supreme Court decision . . . . We  
14 note, however, that the question whether *Gould* accurately states the law of California might best be  
15 left to the California courts to decide”).

16 *Gould* stands for the proposition that firing an employee in order to avoid paying him the  
17 commissions he has earned violates a fundamental public policy of California, and thus supports a  
18 wrongful discharge claim. At least one court arguably has interpreted *Gould* to permit a wrongful  
19 discharge claim where the plaintiff alleges that his employer terminated him in order to avoid paying  
20 prospective commissions. *See McCollum*, 212 F. Supp. 2d at 1155. But as discussed above,  
21 *McCollum* is factually distinguishable from this case, as there were triable issues of fact regarding  
22 whether the plaintiff had in fact *earned* the commissions in dispute.

23 In this way, *McCollum* is consistent with *Remus*. There, the plaintiff did not dispute that he  
24 had been paid all commissions earned at the time of his termination. *Remus*, 2012 WL 707477 at

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25  
26 <sup>13</sup> These statutes require an employer to pay an employee’s “earned but unpaid wages” or  
27 “wages . . . due” promptly upon the employee’s termination or resignation, and penalize employers who  
28 have the ability to pay “wages due and payable” but refuse to pay after a demand has been made. *See*  
Cal. Labor Code §§ 201, 202, 216.

1 \*10. Instead, he complained that he had been “deprived of commissions based on anticipated but  
2 uncommitted future business from Intel—essentially *future* commissions that were *unearned* at the  
3 time of termination.” *Id.* (emphasis in original). The plaintiff brought a *Tameny* claim on the basis  
4 that his employer’s “primary motivation for terminating [his] employment was to prevent [him] from  
5 receiving any commission from the Intel contract to which he was entitled as well as retaliation due  
6 to his complaining concerning the compensation decisions made by the defendant.” *Id.* at \*9. The  
7 court noted that *Gould* “support[s] the general proposition that the prompt payment of *wages due* is  
8 a fundamental public policy” but found “no legal authority that would support [the] claim that  
9 complaining about future modification to his work assignment or the loss of future wages constitutes  
10 protected activity . . . .” *Id.* at \*10-11 (emphasis added). Because “[t]here is no statute or  
11 constitutional provision that deems complaints about changes to prospective, unearned wa[g]es to be  
12 protected activity,” the court found that the plaintiff “failed to demonstrate [that] he engaged in a  
13 protected activity” and entered summary judgment against him. *Id.* at \*11. *See also Sinclair v.*  
14 *Servicemaster Co.*, No. CIV 07-0611 FCD/DAD, 2007 WL 2254448 at \*4 (E.D. Cal. Aug. 3, 2007)  
15 (“California public policy does not prohibit termination of employees in order to avoid paying *future*  
16 wages not yet earned. Thus, plaintiff’s allegation that defendant terminated his employment in order  
17 to avoid paying any future wages or compensation due fails to state a claim for wrongful termination  
18 in violation of public policy”; denying *Tameny* claim based on plaintiff’s claim that employer  
19 terminated him in order to avoid future award of restricted stock).

20 Plaintiff cites to two cases that ostensibly support his reading of *Gould*, but neither confirm  
21 that firing an at-will employee in order to avoid paying as yet unearned wages violates established  
22 California public policy. In *Kelly v. Stamps.com Inc.*, 135 Cal.App.4th 1088 (2005), the plaintiff  
23 was seven months pregnant when she was terminated two months before her planned maternity  
24 leave. Her termination also came two months prior to planned bonus she had been promised months  
25 before. *Id.* at 1091. The court held that there was a triable issue of fact regarding whether plaintiff’s  
26 termination had been a discriminatory discharge on the basis of pregnancy. *Id.* at 1102. The  
27 plaintiff had also brought a *Tameny* claim alleging that the defendant had terminated her in order to

1 avoid paying her a bonus, in violation of the “fundamental public policy entitling employees to  
2 prompt payment of wages due.” *Id.* at 1104. The trial court granting summary judgment in favor of  
3 the defendant, but did not specifically discuss this claim. *Id.* The defendant’s only argument on this  
4 claim on appeal was that plaintiff was not entitled to her bonus. Rejecting this argument, the  
5 California Court of Appeal noted that if the defendant was found to have terminated the plaintiff for  
6 discriminatory reasons, the plaintiff might have been entitled to the bonus, and reversed the trial  
7 court’s decision. *Id.* Thus, as with *McCollum*, there were disputed facts as to whether the *Kelly*  
8 plaintiff had actually earned the bonus.

9 Finally, Plaintiff cites *Costanza v. Simon Equipment Co., Inc.*, No. B177455, 2006 WL  
10 2349594 (Cal. Ct. App. Aug. 29, 2006). In *Costanza*, the plaintiff was a shareholder and senior  
11 executive for the defendant, a closely held corporation. The plaintiff contended that the other  
12 shareholders had “breached their fiduciary duties by terminating her employment and denying her a  
13 bonus, since she had a right, as a shareholder, to employment and bonuses as a return on her  
14 investment in the [corporation].” *Id.* at \*16. The court held that the plaintiff had failed to raise a  
15 triable issue of fact for her breach of fiduciary duty claim because the corporation “had no formal  
16 bonus policies . . . [and instead] the directors had complete discretion to determine whether and  
17 how much each employee should receive . . .” *Id.* at \*17. In that context, the court noted that  
18 “[t]he fact that [the plaintiff] was terminated days before the end of the fiscal year raises a suspicion  
19 that the action was taken to avoid payment of a substantial bonus. Nonetheless, the decision is  
20 protected by the business judgment rule. It was reasonable for the directors to decide not to award a  
21 bonus to Leann after she engaged in activities harmful to the Company.” *Id.* at \*17. Thus *Costanza*  
22 does not support Plaintiff’s argument regarding wrongful discharge because the claim at issue in  
23 *Costanza* was a breach of fiduciary duty claim, and in any event, the fact that the termination of  
24 employment raised the suspicion that it was taken to avoid payment of the bonus ultimately did not  
25 preclude summary judgment on that claim.

26 The public policy underlying a Tameny claim must be “well-established at the time of  
27 plaintiff’s discharge.” *Stevenson*, 16 Cal.4th at 890. Plaintiff has conceded that he had not earned  
28

1 the Banner Health commissions at the time of his termination. California public policy does not  
2 clearly prohibit termination of employees in order to avoid paying future commissions not yet  
3 earned. For these reasons, the court grants summary judgment in favor of Defendants on the  
4 Tameny claim.

#### 5 **F. Libel and Slander Claims**

6 Plaintiff alleges that Miller’s written and oral communications to other Medicity employees  
7 about his belief that Plaintiff had shared internal sales information with a competitor constitute libel  
8 and slander. The communications forming the basis of Plaintiff’s defamation claims are as follows:

- 9 1. Miller’s November 5, 2012 email to two Medicity management employees.
- 10 2. Miller’s November 5, 2012 email to two Aetna Human Resources employees.
- 11 3. Miller’s spoken communication to Hayward.
- 12 4. Miller’s spoken communication to House and other Medicity sales employees.

13 Opp. at 23-24. The details of these communications are described above in Section I.F.

14 “Defamation constitutes an injury to reputation; the injury may occur by means of libel or  
15 slander.” *Shively v. Bozanich*, 31 Cal. 4th 1230, 1242 (2003) (citing Cal. Civ. Code § 44). “In  
16 general . . . a written communication that is false, that is not protected by any privilege, and that  
17 exposes a person to contempt or ridicule or certain other reputational injuries, constitutes libel.” *Id.*  
18 (citing Cal. Civ. Code, § 45; Rest.2d Torts, § 568(1)). “A false and unprivileged *oral*  
19 communication attributing to a person specific misdeeds or certain unfavorable characteristics or  
20 qualities, or uttering certain other derogatory statements regarding a person, constitutes slander.”  
21 *Id.* at 682-83 (citing Cal. Civ. Code § 46; Rest.2d Torts, § 568(2)). The present case involves  
22 defamation claims based upon both libel and slander.

23 To constitute defamation, a communication must be “unprivileged.” Cal. Civ. Code §§ 45,  
24 46. Defendants argue that the common interest privilege, codified at California Civil Code § 47(c),  
25 protects the statements that Miller made to Medicity staff, because the statements were reasonably  
26 calculated to protect Defendants’ sales information.

27 California Civil Code § 47(c) grants a conditional privilege against defamation to  
28 communications made without malice on subjects of mutual interest. A privileged publication is

1 made “without malice, to a person interested therein, (1) by one who is also interested, or (2) by one  
2 who stands in such a relation to the person interested as to afford a reasonable ground for supposing  
3 the motive for the communication to be innocent, or (3) who is requested by the person interested to  
4 give the information.” Cal. Civ. Code § 47(c). While defendants have the burden of proving that an  
5 allegedly defamatory statement falls within the scope of the common interest privilege, plaintiffs  
6 have the burden of proving that the statement was made with malice. *Lundquist v. Reusser*, 7  
7 Cal.4th 1193, 1203 (1994).

### 8 **1. Common Interest**

9 With respect to the requirement that the communication be made between people with a  
10 shared or common interest, “[c]ommunications made in a commercial setting relating to the conduct  
11 of an employee have been held to fall squarely within the qualified privilege for communications to  
12 interested persons.” *Cuenca v. Safeway San Francisco Employees Fed. Credit Union*, 180  
13 Cal.App.3d 985, 996 (1986). In *Cuenca*, oral and written statements made by the supervisory  
14 committee of the defendant credit union to the board of directors about its suspicions that the  
15 plaintiff, an employee in the credit union, took kickbacks and spent much of his work time on  
16 outside matters were privileged under Section 47(c). *Id.* at 991, 996. The written statements were  
17 made in a report marked “Absolutely Personal and Confidential” and were distributed only to  
18 members of the supervisory committee and the board of directors. The appellate court upheld the  
19 trial court’s summary judgment decision finding the statements conditionally privileged, noting that  
20 the statements were “directly relevant to plaintiff’s fitness as manager of the Credit Union and as  
21 such were matters of direct interest to the Credit Union’s supervisory committee, its auditor, and its  
22 board of directors.” *Id.* at 996.

23 Here, the undisputed facts show that the communications at issue were made by Miller,  
24 Plaintiff’s former supervisor, to (1) two Medicity management employees, (2) two Aetna Human  
25 Resources employees, (3) Plaintiff’s supervisor, and (4) to Steve House and other Medicity  
26 salespeople on a sales conference call. This is not, as Plaintiff contends, “reckless publication to a  
27 wide range of people.” *Opp.* at 25. Instead, these recipients shared Miller’s interest in protecting  
28

1 Medicity’s sales pipeline and other economic interests, and ensuring that Medicity sales employees  
2 followed the company’s policies. The statements were also limited in scope—they were short  
3 statements about Miller’s suspicion that Plaintiff had shared Medicity’s pipeline with a competitor  
4 and the bases of Miller’s belief, rather than broader statements about Plaintiff’s work performance.  
5 To the extent Miller stated that Plaintiff had a “vindictive” personality, he did so in the context of  
6 explaining why he felt it was plausible that Plaintiff would share Medicity’s information.

7 Plaintiff’s only argument against a finding of common interest between these individuals is  
8 that *Cuenca* stands for the proposition that only high-ranking employees share a common interest in  
9 an employee’s performance, and information about that performance must be shared in a limited,  
10 confidential medium. However, case law is to the contrary. In fact, employers may share a common  
11 interest in an employee’s or former employee’s performance with not only a supervisory committee  
12 or board of directors, but also with other employees in the same company or even third parties, and  
13 even outside of the context of confidential management meetings. In *Deaile v. General Telephone*  
14 *Co.*, 40 Cal.App.3d 841, 845 (1974), the plaintiff was formerly employed as the chief operator of a  
15 telephone company. Her former employer told not only management personnel but also other  
16 operators that the plaintiff had been forced into retirement because she had used sick leave to take  
17 vacation time. The court found these statements to be “clearly privileged.” *Id.* at 847. “Clearly, an  
18 employer is privileged in pursuing its own economic interests and that of its employees to ascertain  
19 whether an employee has breached his responsibilities of employment and if so, to communicate, in  
20 good faith, that fact to others within its employ so that (1) appropriate action may be taken against  
21 the employee; (2) the danger of such breaches occurring in the future may be minimized; and (3)  
22 present employees may not develop misconceptions that affect their employment with respect to  
23 certain conduct that was undertaken in the past.” *Id.* at 849. *See also Williams v. Taylor*, 129  
24 Cal.App.3d 745, 751-52 (1982) (statements about theft by and dishonesty of a former employee  
25 made by an officer and a manager of an auto body shop to insurance adjusters who referred business  
26 to the shop were protected by conditional privilege, because speakers and insurance adjusters had  
27 common commercial interests in their business-customer relationship).



1 The bases for Plaintiff's argument that Miller acted with reckless disregard in making the  
2 disputed statements are that (1) Miller lacked a factual basis for making his statements; (2) Miller  
3 traced the termination email that he sent to Plaintiff;<sup>14</sup> (3) Miller's statements affected Plaintiff's  
4 reputation, which is especially important to workers in the sales industry; and (4) Miller failed to  
5 investigate the statement allegedly made by Bowes.

6 With respect to Plaintiff's first contention, the evidence (and the statements themselves)  
7 show that Miller did have a factual basis for the statements. Miller testified that the basis for his  
8 statements was information that his ex-wife had received from a former Medicity employee, Dawn  
9 Bowes, who stated that she was going to "going to cause some serious harm to Medicity." Shortly  
10 thereafter, the former employee unexpectedly showed up at two deals being pursued by Medicity.  
11 Miller noted that the two deals were accounts in which Plaintiff had been previously involved and  
12 were also the two clients that "most recently [had] asked that [Plaintiff] be removed from their  
13 account." JSUMF 96. These facts provide a reasonable basis for Miller's statements about Plaintiff.  
14 In addition, with respect to the two November 5, 2012 emails, Miller qualified his belief by noting  
15 that he "only [has] circumstantial evidence" and a "gut feel" based on the information he had  
16 received "over the weekend." JSUMF 95, 96.

17 Next, Plaintiff does not explain how Miller's tracing of the termination email amounts to  
18 malice for purposes of the conditional privilege. The inquiry requires the court to consider evidence  
19 not of Miller's general suspicion of Plaintiff, but specifically of Miller's reckless disregard for the  
20 truth or falsity of his statements. That Miller traced the termination email does not lead to the  
21 inference that Miller did not have a reasonable belief that the statements he made about Plaintiff  
22 having shared Medicity's pipeline with a competitor were true. Likewise, the fact that Miller's

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23  
24 <sup>14</sup> Miller used an email tracking service to confirm that Plaintiff received and opened the  
25 October 2, 2012 email terminating his employment. The service also produced an email receipt showing  
26 that Plaintiff had forwarded his termination email from Miller to "KEMNITZERANDERSON." Miller  
27 received this email receipt. Based on the email receipt, Miller concluded that Pashman had forwarded  
28 the termination email to a law firm called Kemnitzer Barron & Krief LLP in San Francisco. Miller sent  
emails to Getz, Brent Dover, and other Medicity Human Resources employees stating the same.

The court notes that Plaintiff did not raise this argument regarding defamation in his Opposition,  
but instead did so during the hearing.

1 statements attack an important asset for a salesperson—i.e., the salesperson’s reputation—is  
2 unconnected with Miller’s subjective belief in or reckless disregard for the truth or falsity of his  
3 statements.

4 Finally, Plaintiff argues that Miller’s failure to investigate the statement allegedly made by  
5 Bowes amounts to reckless disregard. However, while “a lack of inquiry and investigation may  
6 supply the sufficient inference of lack of good faith or negligence sufficient to supply the element of  
7 malice” in light of all of the relevant evidence, mere failure to inquire “cannot constitute lack of  
8 reasonable or probable cause” to believe in the truth of the publication. *Rollenhagen*, 116  
9 Cal.App.3d at 423. *See also Vackar v. Package Machinery Co.*, 841 F.Supp. 310, 314 (N.D. Cal.  
10 1993) (“Mere negligence in investigating the truth of the allegedly defamatory statements is  
11 insufficient to establish malice.”).

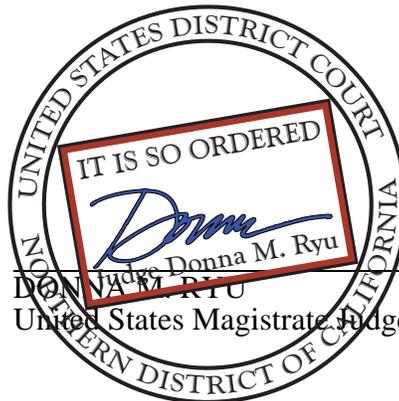
12 Because Miller’s statements were made to other Medicity employees who shared Miller’s  
13 interest in protecting Medicity’s sales pipeline and policies, and because Plaintiff has failed to raise  
14 triable issues of fact regarding whether Miller acted with malice, the common interest privilege in  
15 Section 47(c) applies. Privileged statements are not defamatory. Summary judgment is granted for  
16 Defendants on the libel and slander claims.<sup>15</sup>

17 **IV. CONCLUSION**

18 For the foregoing reasons, the motion for summary judgment is **granted**.

19  
20 IT IS SO ORDERED.

21  
22  
23 Dated: July 18, 2014



24  
25  
26 <sup>15</sup> Because the conditional privilege applies, the court declines to consider Defendants’ other  
27 arguments against the defamation claims, namely, that the statements Miller made were non-actionable  
28 opinion or were substantially true.