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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

<p>MARCUS R. WHITTEN,</p> <p style="text-align: right; padding-right: 20px;">Plaintiff,</p> <p style="text-align: center; padding: 10px 0;">vs.</p> <p>RIGHTTHING, LLC, a Delaware Limited Liability Corporation (formerly THE RIGHT THING, INC., an Ohio Corporation); TERRY TERHARK, an individual; and DOES 1 through 20 inclusive,</p> <p style="text-align: right; padding-right: 20px;">Defendants.</p>	<p>CASE NO. 10-cv-1889-MMA (CAB)</p> <p>ORDER AFFIRMING TENTATIVE RULING GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT</p> <p>[Doc. No. 27]</p>
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This employment action is before the Court on Defendants RightThing, LLC and Terry Terhark's ("Defendants") motion for summary judgment, pursuant to Federal Rule of Civil Procedure 56. [Doc. No. 27.] On December 16, 2011, the Court issued a tentative ruling granting in part and denying in part Defendants' motion. [Doc. No. 33.] On December 19, 2011, the Court held a hearing on the motions.

Having considered the submissions of the parties and considered the arguments of counsel, the Court **AFFIRMS** its tentative ruling for the reasons stated on the record during the hearing, and in accordance therewith:

The Court **GRANTS** Defendants' motion for summary judgment on Plaintiff's claim for breach of implied contract.

1 The Court **GRANTS** Defendants’ motion for summary judgment on Plaintiff’s fraud and
2 deceit claims.

3 The Court **DENIES** Defendants’ motion for summary judgment on Plaintiff’s disparate
4 treatment employment discrimination claim and Plaintiff’s claims of failure to prevent
5 employment discrimination and wrongful termination.

6 The Court **GRANTS** Defendants’ motion for summary judgment on Plaintiff’s disparate
7 impact employment discrimination claim.

8 The Court **GRANTS** Defendants’ motion for summary judgment on Plaintiff’s defamation
9 claim.

10 The Court **GRANTS** Defendants’ motion for summary judgment on all claims against
11 Defendant Terry Terhark and dismisses Terhark from this action.

12 * * *

13 Additionally, upon further review of the applicable case law and the submissions of the
14 parties, the Court finds that Plaintiff is not entitled to recover punitive damages on his remaining
15 age discrimination claims. To seek punitive damages under FEHA, a plaintiff must “prove[] by
16 clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice.”
17 Cal. Civ. Code § 3294(a); *Tomaselli v. Transamerica Ins. Co.*, 25 Cal. App. 4th 1269, 1287
18 (1994). “The evidence must be so clear as to leave no substantial doubt” that Defendants acted
19 with the requisite intent to injure Plaintiff. *Harbison v. Am. Motorists Ins. Co.*, 636 F. Supp. 2d
20 1030, 1044 (E.D. Cal. 2009) (citing *Shade Foods v. Innovative Products Sales & Marketing, Inc.*,
21 78 Cal. App. 4th 847, 890-91 (2000)). Plaintiff’s age discrimination claims are primarily based on
22 the allegation that he was unlawfully terminated due to his age and high salary. Defendants claim
23 Plaintiff was fired due to his “poor performance,” but according to Plaintiff, this was really a pre-
24 text for his wrongful termination. Plaintiff presents the modicum of evidence necessary to defeat
25 Defendants’ motion for summary judgment as to the majority of his FEHA claims. However,
26 Plaintiff fails to put forth any evidence, let alone clear and convincing evidence, that raises a
27 triable issue as to whether his termination involved fraud, oppression or malice. Accordingly, the
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1 Court **GRANTS** Defendants' motion and **DISMISSES** Plaintiff's claim for punitive damages.

2 **IT IS SO ORDERED.**

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4 DATED: December 21, 2011

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Hon. Michael M. Anello
United States District Judge

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