Supreme Court of California
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No. 19-55802

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WALLEN LAWSON,

Appellant-Appellant

v.

PPG ARCHITECTURAL FINISHES, INC.,

Defendant-Appellee.

On Appeal from the United States District Court, Central District of California
Case No.: 8:18-cv-00705-AG-JPR
Honorable Andrew J. Guilford

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellee, PPG Industries, Inc. ("PPG") submits this Corporate Disclosure Statement.

PPG certifies the following listed parties may have a pecuniary interest in the outcome of this case. These representations are made to enable the Court to evaluate possible disqualification or recusal:

a) PPG Industries, Inc. is a publicly held company whose shares are traded on The New York Stock Exchange under the ticker symbol PPG. PPG Industries, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of PPG Industries, Inc.'s stock; and

b) PPG Architectural Finishes, Inc., a wholly owned subsidiary of PPG Industries, Inc.

Dated: January 21, 2020

/s/ Michael W. M. Manoukian
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PPG INDUSTRIES, INC.

I. INTRODUCTION

PPG Architectural Finishes, Inc. ("PPG" or "Appellee") terminated Wallen Lawson ("Appellant" or "Lawson") for failing to perform his most essential job duty as a Territory Manager – developing and delivering sales plans to sell PPG products in his assigned territory. After Lawson failed to reach his monthly sales quotas for *eight out of the prior twelve months*, and struggled on consecutive Market Walks, he was placed on a Performance Improvement Plan ("PIP"). The goal of the PIP was to help Lawson improve his performance and meet the expectations and requirements of his job. By the end of his initial 60-day PIP Lawson had not meet this goal so PPG extended the PIP by 30 more days. Despite oversight from Human Resources and both Lawson's Regional Sales Manager and Divisional Manager, Lawson still struggled to meet his job requirements, and, as the District Court found, was ultimately terminated as a result.

Nearly a year after Lawson termination, he filed this lawsuit alleging he was terminated in retaliation for filing an anonymous complaint with PPG's independent ethics and compliance management provider. While PPG did receive two anonymous reports during Lawson's employment (one in April 2017 and one in June 2017), Lawson cannot establish he was terminated in retaliation for making the anonymous complaints, or otherwise allegedly refusing to engage in improper actions. Indeed, PPG did not learn Lawson was the anonymous complaint until after

Appellant commenced this action. Moreover, Lawson's own manager was unaware *any* such anonymous complaint had been made, let alone that Lawson was the reporting party. Accordingly, Appellant cannot establish his protected activity was the cause of any adverse employment action he suffered. Even if Lawson could overcome this insurmountable barrier to establish a prima facie case on appeal, which he cannot do, his retaliation and wrongful termination claims still fail because he was terminated for a legitimate and non-retaliatory reason, and there is simply no evidence of pretext.

On June 21, 2019, after oral argument, the District Court properly granted summary judgment for PPG on all of Appellant's claims.[1] (Excerpts of Record ("ER"), at 18-20.). Only Appellant's First and Second Causes of Action are at issue on appeal. Despite Appellant's tortured, and many times inaccurate recitation of the record, Appellant has not established any basis on which judgement should be reversed.

For these reasons, and the reasons set forth more fully below, PPG respectfully requests the Court of Appeals affirm the District Court's Order.

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[1] Lawson's appeal does not contest the District Court's Order with respect to his Third, Fourth, Fifth or Sixth causes of action, and on that basis, the District Court's Order should be affirmed.

II. JURISDICTIONAL STATEMENT

Lawson's Second Amended Complaint was filed in the United States District Court for the Central District of California. It asserts the following claims: 1) Violation of Cal. Labor Code § 1102.5; 2) Wrongful Termination in Violation of Public Policy; 3) Fair Labor Standards Act, 29 U.S.C. § 201, et seq.; 4) Cal. Labor Code §§ 510, 558, and 1194 et seq., and Wage Order No. 7-2001; 5) Failure to Reimburse for Business Expenses (California Labor Code § 2802); and 6) Unfair Competition Law Violations (Cal. Business & Professions Code § 17200 et seq.). (Supplemental Excerpts of Record ("SER"), 2, ⁋ 2.)

PPG moved for summary judgment on all of Appellant's claims, and, on June 21, 2019, the District Court granted PPG's Motion for Summary Judgment. (ER, 18-20.) As evidenced by Appellant's Opening Brief ("AOB"), Appellant does not appeal the District Court's decision on his Third through Sixth Causes of Action; thus, these issues are waived. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[A]rguments not raised by a party in its opening brief are deemed waived.")

PPG otherwise agrees with Appellant's Jurisdictional Statement in his Opening Brief.

III. ISSUES PRESENTED

A. Whether Appellant waived the argument that the District Court applied the incorrect legal standard on his First and Second Causes of Action because Appellant asserts this argument for the first time on appeal?

B. Whether the District Court correctly granted summary judgment on Appellant's First Cause of Action for whistleblower retaliation under California Labor Code § 1102.5(c) because PPG had legitimate, non-retaliatory reasons for terminating Appellant's employment, and Appellant cannot establish that those reasons were a pretext for retaliation?

C. Whether, in the alternative, PPG is entitled to summary judgment on Appellant's First Cause of Action for whistleblower retaliation under California Labor Code § 1102.5(b) because Appellant cannot show that *anyone* at PPG knew that Appellant submitted any complaints – anonymous, or otherwise – to PPG's independent ethics and compliance management provider during his employment?

D. Whether the District Court correctly granted PPG summary judgment on Appellant's Second Cause of Action for wrongful termination in violation of public policy, because that claim is entirely derivative of his First Cause of Action?

IV. STATEMENT OF THE CASE

A. Lawson Worked As An At-Will Territory Manager For PPG.

PPG manufactures and sells interior and exterior paints, stains, caulks, repair products, adhesives and sealants for homeowners and professionals. During Lawson's employment, PPG sold its products through its own retail stores, and through other retailers such as The Home Depot, Menards, and Lowe's. Lawson was hired by PPG in June 2015, as a Territory Manager ("TM"). (ER, 82, ¶ 2.) In his role as a TM, Lawson managed PPG's sales at several Lowe's stores in and around Orange County, California. (SER, 2, ¶ 2.) Lawson worked independently in

the field and reported to a Regional Sales Manager ("RSM") who managed a team of TMs. At the start of his employment, Lawson reported to RSM Paul Stanton, and, after Paul Stanton was terminated from PPG for performance reasons, Lawson reported to RSM Clarence Moore ("Moore") who was based in Phoenix, Arizona. Moore reported to Divisional Manager Sean Kacsir ("Kacsir"), who was based in Kansas City, Kansas. (ER, 252; 446.)

As a TM, Lawson was responsible for developing and delivering sales plans and managing and increasing the sales of PPG products within his defined territory. (ER, 414, 511.) Lawson describes his role as a TM as being "an ambassador for the PPG company." (ER, 243-244.) Some of Lawson's "Key Responsibilities" included: 1) partnering with Lowe's management teams to develop, drive, and achieve sales growth plans; 2) working cross-functionally with all appropriate Lowe's departments to exceed sales goals; 3) meeting with all Lowe's store personnel weekly, and the District Manager once a month to review sales performance against target; 4) analyzing territory sales performance reports and developing strategic territory business plans to support growth; and 5) aggressively identifying in-store selling opportunities. (*Id.*; ER, 274-275; 414.)

B. Although Lawson Had Some Initial Success, Starting In October 2016, He Failed To Consistently Meet His Monthly Sales Quota And Subsequently Struggled With His Market Walks.

One of the key metrics of success as a TM is the ability to meet monthly sales goals. (ER, 536.) The sales goal is the total of the sales for that TM's specific stores in the previous year. (*Id.*) The TM only needs to as much product as was sold in that same month the previous year to meet their goal. (*Id.*) PPG reviews TMs' sales numbers on a quarterly basis. (ER, 472.) For the twelve-month period of April 2016 to March 2017, Lawson met his monthly goal only four times. (ER, 290-291; 348-352.) Lawson missed his goal for *six consecutive months* beginning in October 2016. (*Id.*)

Since TMs work remotely in the field, the Company also uses Market Walks as a means for RSMs to coach, train and measure the performance of TMs against defined criteria. (ER, 536.) On Market Walks, RSMs and TMs visit several stores within a TM's territory and walk through the store to ensure TMs are building relationships with Lowe's employees, PPG product is properly placed throughout the store, and TMs are training and helping customers. (ER, 245-246, 249-250.) Market Walks are scored in these categories: 1) Sales Results; 2) Sales Operations Checklist; 3) Sales Planning; 4) Relationships; 5) Merchandizing; 6) Sales Tactics; 7) Pro Sales; 8) Administrative Duties; 9) Safety; and 10) Bonus Points. (ER, 536-537, 541-551.) A TM's raw Market Walk score falls into one of five categories: 1)

Exceptional; 2) Excels; 3) Successful; 4) Marginal; or 5) Unsuccessful. (*Id*.) Appellant testified both his RSMs, Stanton and Moore, conducted Market Walks in pretty much the same manner. (ER, 250-252.)

In October 2016, Lawson conducted a Market Walk with RSM Stanton. (ER, 537, 456-548.) On that Market Walk, Lawson excelled and received a score of 92. (*Id*.) However, Lawson struggled on the next three straight Market Walks in December 2016, March 2017, and April 2017. (ER, 537, 546-548, 550-560.)

1. Appellant Scored "Marginal" On His December 2016 Market Walk And "Unsuccessful" On His March 2017 Market Walk, Before Engaging in any Protected Activity.

After RSM Stanton was terminated for performance reasons, RSM Moore temporarily took over for the Southern California region, including Lawson's territory. (ER, 253-254.) Unlike Stanton, Moore provided Lawson with a pre-Market Walk checklist to help Lawson succeed on his Market Walk. (ER, 247.) Moore also spoke with Lawson before his scheduled Market Walks so Lawson could prepare to walk certain stores. (ER, 248.)

In December 2016, Moore conducted a Market Walk with Lawson. (ER, 537.) This was the first Market Walk Moore conducted with Lawson, and together they visited three stores. (*Id*.) Appellant scored a 60 – "Marginal", which was just one point above an "Unsuccessful" rating. (ER, 536, 537, 546-548.) Some areas where Moore noted Lawson struggled included: 1) failing to stock PPG product in specific

locations; 2) failing to complete monthly goals and then misrepresenting on his checklist that the goal had been completed; 3) failing to build relationships and communicate with key Lowe's employees; and 4) failing to update Appellant's Training Roster on each visit . (*Id.*) A Training Roster is a list of Lowe's associates that work at each of the stores within a TM's territory, and Training Rosters had to be updated by the TM after every visit to each store. (ER, 536.)

By early 2017, RSM Moore's territory officially changed to include Lawson's territory in Southern California. (ER, 537.) In March 2017, Moore conducted another Market Walk with Lawson. (ER, 537, 50-560.) They visited three stores in Lawson's territory. (*Id.*) Lawson scored a 58 – "Unsuccessful". (*Id.*) Following his March Market Walk, Lawson received a verbal warning. (ER, 268.) Following the Market Walk, Moore sent Lawson a detailed email identifying numerous shortcomings and areas for improvement. (ER, 419, 514-515.) Some issues Moore identified included: 1) Lawson failed to contemporaneously update his Training Roster, and failed to include some of his stores in his Training Roster altogether; 2) he failed to establish relationships with key Lowe's staff members; 3) Lawson was unfamiliar with a key tool that provided TMs with critical product information; and 4) he failed to stock PPG product in required locations. (*Id.*)

By mid-April 2017, PPG had received Lawson's 12-month sales numbers through March 2017. (ER, 537.) Because Lawson had missed eight of the previous

12 months, the recommendation was to place Lawson on a PIP. (*Id.*) Andy Mayhew, Human Resources Manager, and Moore discussed the PIP, and concluded one reason a PIP was appropriate was because Lawson had failed to achieve his sales goal for six straight months. (ER, 415-418, 447-448; 513.) The decision to put Lawson on a PIP was ultimately made by Human Resources. (ER, 276, 415-418, 420, 428; 442-443, 469-470.)

2. Lawson Again Scored "Unsuccessful" On His April 2017 Market Walk.

On April 21, 2017, Lawson and RSM Moore completed another Market Walk. (ER, 266-267.) This time, Lawson scored a 46 – "Unsuccessful". (ER, 286-287; 348-352.) As with prior Market Walks, Lawson had failed to complete numerous national and regional monthly objectives, including 1) training Lowe's associates and completing his Training Roster; 2) completing PPG product demonstrations and displays; and 3) obtaining the contact information of specific Lowe's employees. (*Id.*) This was the second consecutive Market Walk Lawson scored "Unsuccessful", and third consecutive Market Walk where he had issues with his Training Roster. At the conclusion of the Market Walk on April 21, 2017, Moore discussed Lawson's performance issues with him. (ER, 287.)

C. On The Same Day Lawson's April Market Walk Concluded, An Anonymous Report Was Sent To PPG's Third-Party Ethics Portal.

PPG maintains an Ethics Helpline operated by a third-party administrator, which provides PPG employees a secure way to anonymously report issues. (ER, 525, ¶ 4.) PPG also maintains a Global Code of Ethics, which advises employees how to raise concerns through an online feature called the Compliance Portal, or through a toll-free phone number called the Ethics Helpline, both of which are operated by an independent third-party provider, Convercent. (*Id.* at ¶ 5.) Convercent receives and documents any ethics reports. (ER, 365, 380.)

On April 21, 2017, an anonymous report was submitted to Convercent's online Compliance Portal. (ER, 293, 366, 476-478.) The anonymous report stated that on April 18, 2017, an unidentified "supervisor request[ed] territory managers purposely mis-mix product (paint) for the purpose of getting rid a of a slow moving product off the shelves and selling it at a reduced price."[2] (*Id.*) The anonymous reporter was informed, "Neither Convercent Staff nor your organization will receive your contact information." (*Id.*) The anonymous reporter specifically requested to remain anonymous. (ER 291-292; 353.)

[2] Some of PPG's paint is sent to PPG's customers (e.g., Lowe's) in a neutral base color that is then tinted on-site to fulfill a specific order. A mis-tint occurs when the base paint color is incorrectly tinted. (*See* SER, 4, ⁋ 9.)

David Duffy, PPG's Senior Manager of Corporate Security and Investigations, promptly investigated the anonymous report. (ER, 397-398.) The anonymous report PPG received indicated that the reporter was calling in relation to a store in Long Beach, CA. (ER, 353.) Using the Compliance Portal, PPG confirmed and informed the anonymous reporter that PPG had received and was reviewing the report. (*Id.*) On April 26, 2017, PPG asked the anonymous reporter for more information about where the alleged directive to mis-tint paint occurred since it had no store in Long Beach, CA. (*Id.*) The anonymous reporter failed to provide any additional information, and PPG closed the investigation. (*Id.*; 394-395) Importantly, Duffy was unaware Appellant made the anonymous complaint. (ER, 393.)

Lawson admits he submitted this April 2017 complaint anonymously because he did not want RSM Moore, or anyone else at PPG, to know he was submitting a report. (SER 4, 5, ¶¶ 8, 15; ER, 293-294, 296.) Lawson confirmed this was the ***first time*** Moore directed Lawson to intentionally mis-tint paint. (ER, 297.) Critically, Lawson testified he has no reason to believe that Moore knew Lawson made this anonymous report. (ER, 306.) In fact, Lawson admits he ***told no one*** at PPG he submitted this anonymous complaint. (ER, 305-306.)

D. The PIP Was Delivered To Appellant On May 12, 2017.

Consistent with their early discussions in mid-April, i.e., before any anonymous complaint had been submitted, Mayhew worked with Moore to draft Lawson's PIP. The PIP was delivered to Lawson on May 12, 2017. (ER, 270, 286-287, 348-352.) The goal of Lawson's PIP was to help Lawson improve his performance and help him meet the expectations and requirements of his role as a TM. (ER, 270-274, 348-352, 421-422; 470-471.)

Lawson's PIP identified numerous deficiencies in his performance, including: 1) missing his sales goal in 8 of the last 12 months; 2) inaccurately completing a Training Roster Appellant submitted on May 1, 2017; 3) repeatedly exceeding his allotted five hours of Admin Time per week without pre-approval from his RSM; 4) failing to complete monthly regional and national objectives; and 5) scoring "Unsuccessful" on two consecutive Market Walks on March 15, 2017, and April 21, 2017, respectively. (ER, 286-287, 348-352.) The PIP provided measurable goals for Lawson to accomplish, including: 1) meeting his sales goal for Q2, 2) maintaining an accurate training roster; 3) keeping Admin Time to 5 hours, absent prior approval; 4) timely completing regional and national initiatives; and 5) having a "Successful" Market Walk. (*Id.*) It required he meet these goals "prior to the end of the PIP to continue employment." (*Id.*) Lawson's PIP was set to expire on July 7, 2017. (ER, 348.)

E. PPG Received An Anonymous Complaint On June 15, 2017, Which The Company Subsequently Investigated.

On June 15, 2017, an anonymous complaint was submitted to the PPG's Ethics Helpline.[3] (ER, 299-302; 354-357; 358.) This anonymous reporter alleged that an RSM asked TMs to purposely mis-tint paint and referenced a prior complaint submitted in April 2017. (*Id.*) The anonymous reporter asked to remain anonymous to PPG, and stated that they had not reported the complaint to any supervisors or management. (*Id.*) Lawson testified that he submitted the complaint and that he understood that the person he submitted it to was employed by a third-party, Convercent, and was not a PPG employee. (ER, 298; 299-301.) Likewise, Lawson confirmed he once again submitted his second complaint anonymously. (ER, 298.) When PPG received the complaint, it did not receive the identity of the anonymous reporter (ER, 525, 528-530), and Lawson admitted he has no evidence to the contrary. (ER, 299.)

Like the anonymous complaint from April 2017, PPG opened an investigation led by Duffy, who was assisted by John "Ian" Dalton, PPG's Forensic Audit and Loss Prevention Specialist. (ER, 361; 385.) As part of the investigation, Duffy asked the anonymous reporter to speak with PPG regarding the information in the

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[3]Appellant's Second Amended Complaint, which was filed *after* Appellant's deposition, makes no mention of this June 2017 complaint, nor does he attribute it as a reason for his termination. (SER, 1-17.)

complaint. (ER, 301; 354-358; 384.) The anonymous reporter agreed to speak with Duffy and provided PPG with a phone number. (ER, 302, 358.) Duffy old the reporter that PPG would keep the conversation confidential. (*Id.*)

When Duffy first called the anonymous reporter, no one answered, and Duffy left a voicemail. (ER, 302-303.) On or around June 29, 2017, Duffy spoke with the anonymous reporter for about 15-20 minutes. (ER, 304.) Appellant does not remember identifying himself to Duffy during that call, and Duffy never referred to Appellant by name. (*Id.*) Duffy testified he did not know he was speaking to Appellant. (ER, 386-391.) Duffy guaranteed the reporter confidentiality. (ER, 386.)

After that conversation, Duffy emailed Dalton and Alejandro Sanchez Monjaraz, Global Forensic Audit Director, and stated:

> The reporter was kind enough to provide a phone number on the posted message last night. I spoke to the reporter this afternoon. **The reporter did not provide a name – since they were still concerned about remaining anonymous**...I advised the caller to keep us informed if anything changed or if new information comes to light.

(ER, 374-375, 481, emphasis added.)

On July 6, 2017, Dalton interviewed Moore about the June 2017 anonymous complaint. (ER, 367-368; 402; 479-480.) Moore understood his conversation with Dalton was confidential. (ER, 403, 409.) Dalton told Moore that PPG was investigating expensed-out product, but never told Moore that an anonymous complaint had been filed. (ER, 363-364; 402.) During their interview, Dalton told Moore to send a text message to his TMs that instructed them not to mis-tint paint

anymore. (ER, 369, 377-378, 410; 482.)

As part of the investigation, Dalton also interviewed all fourteen TMs that reported directly to Moore. (ER, 367-368; 479-480.) The TMs informed Dalton that Moore had instructed them to mis-tint paint during multiple weekly conference calls. (ER, 370.) Additionally, several TMs stated that one TM, Laura Sanchez, strongly opposed Moore's directive to mis-tint paint, and stated she would not carry out the practice. (ER, 371.)[4]

Dalton also interviewed Kacsir to determine if Kacsir directed Moore to instruct TMs to intentionally mis-tint paint. (ER, 372-373.) Kacsir confirmed he gave no such instruction to Moore. (*Id.*) Like Moore, Kacsir did not know the extent of the investigation, or that it was initiated because PPG had received an anonymous complaint. (ER, 458-459, 460-465, 468.) Moore did not know Dalton had interviewed anyone else, including Kacsir or the 14 TMs who reported to Moore. (ER, 404-405, 407-408.)

Notably, similar to the first anonymous complaint Lawson alleges he made in April 2017, Lawson never told Moore or anyone else at PPG that he submitted this June 2017 anonymous complaint. (ER, 305.) Dalton did not learn that Lawson was the anonymous reporter until after this lawsuit was filed. (ER, 362; 375-376; 379.)

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[4] Sanchez remained employed as a TM until Lowe's cancelled its contract with PPG in March 2018. (ER, 538.)

F. PPG Extended Lawson's PIP For An Additional 30 Days To Allow Him More Time To Meet The PIP.

On or around June 29, 2017, Lawson told Mayhew that he felt Moore was not properly overseeing his PIP. (ER, 288; 435-436; 444; 454.) Later that day, Mayhew emailed Kacsir and relayed Lawson's concerns regarding his two "Unsuccessful" Market Walks from March and April 2017, and Lawson's feelings that Moore was not overseeing his PIP closely enough. (ER, 454; 523.) Mayhew also told Kacsir that he wanted to be included on all weekly PIP calls between Moore and Lawson. (*Id.;* ER, 437.)

Lawson did not meet his monthly sales goal for April, May, or June 2017, scoring 95.4%, 94.4% and 86.1%, respectively. (ER, 428-429; 519-522.) On July 13, 2017 -- i.e., approximately one month after the second anonymous complaint was filed -- Lawson completed another multi-day Market Walk with Moore. (ER, 258-259, 336-340.) On this Market Walk, Lawson scored a 66 – "Marginal" – which was higher than his previous three Market Walks with Moore, but did not meet the PIP expectation of "Successful." During the Market Walk, Moore told Lawson he would see if he could get Lawson's PIP extended. (ER, 271.)

Although Lawson had not met the requirements of the PIP, Mayhew, Kacsir, and Moore decided to extend it for an additional 30 days because Lawson had shown some improvement. (ER, 271-272; 288-289; 449-451.) Additionally, Moore supported extending the PIP because he recognized that he had not been able to

check in with Lawson as frequently as he intended, and he did not take the decision to terminate Lawson lightly. (ER, 537.) After Lawson's PIP was extended, Mayhew spoke with Lawson roughly every other week. (ER, 437-438.)

G. After Another Unsuccessful Market Walk, Lawson Was Terminated.

To determine whether Lawson had successfully met his PIP, Kacsir asked Moore to conduct an additional Market Walk during Lawson's last week of his extended PIP. (ER, 424-425, 516.) The Market Walk concluded on August 17, 2017, with Lawson scoring a 40 – "Unsuccessful" – his worst Market Walk score during his entire employment. (ER, 274, 283-284, 341-345.) Both Moore and Kacsir attended this Market Walk. (ER, 261.) Some issues identified on Lawson's August 2017 Market Walk were: 1) Lawson visited his second highest volume store only once in over five weeks; 2) Lawson achieved no national or regional objectives at three of his stores; 3) Lawson failed to train associates according to a monthly objective; 4) Lawson was not tracking sales of at least one PPG product; 5) Lawson failed to set up product displays; and 6) Lawson failed to update his Training Roster, leaving it inaccurate. (ER, 274; 341-344; 426-427.)

Notably, while on this Market Walk with Moore, Lawson also failed to adhere to PPG's safety guidelines, and Lawson later violated Company policy by using his cell phone while driving. (ER, 275.) Kacsir reviewed Lawson's August 2017 Market Walk score and, based on what Kacsir witnessed during the Market Walk,

Kacsir believed that Lawson's August 2017 Market Walk was a fairly scored. (ER, 473.) Kacsir and Moore met with Lawson the following morning to discuss the Market Walk results. (ER, 273-274.)

Following the Market Walk, Moore recommended that the Company terminate Lawson's employment. (ER, 537-538.) Mayhew reviewed this recommendation with Michele Minda, Director of Human Resources, and, on September 6, 2017, he met with Lawson and Moore by telephone. (ER, 197-198, 284-285, 346-347.) Mayhew informed Lawson that he was being terminated for failing to meet PPG's standards as set forth in the PIP, and for falsifying his training roster.[5] (ER, 201; 284-285, 346-347; 430-431.) Neither Duffy nor Dalton, who had lead the investigation into the June 2017 anonymous complaint, were involved in the termination decision. (ER, 376, 392-393.)

Moore, Kacsir and Mayhew only learned that Lawson submitted a complaint to the Ethics Hotline after Lawson filed this lawsuit. (ER, 406; 441; 466.)

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[5] During a conversation with Mayhew about the discrepancies in his training roster, Lawson admitted he did not do the training reflected in his roster, and acknowledged he knew such action was falsifying company documents. (ER, 439.) Lawson later denied he "falsified" his training roster, but admitted that he inputted information incorrectly, and, sometimes, his training rosters were wrong. (ER, 279-280.) More specifically, Lawson admitted his training roster and his store log-in reports may have had discrepancies such that his training roster showed he trained Lowe's employees when he was not even present in that particular Lowe's store. (ER, 276-278.) Lawson blamed these discrepancies on the "human factor." (ER, 281-282.)

V. STANDARD OF REVIEW

A district court's order granting summary judgment is reviewed *de novo*. *Szajer v. City of Los Angeles,* 632 F.3d 607, 610 (9th Cir. 2011); *Kohler v. Inter-Tel Techs.,* 244 F.3d 1167, 1171 (9th Cir. 2001). This Court may affirm such an order on any ground supported by the record, whether or not relied upon below. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 956 (9th Cir. 2009).

Moreover, Appellant cannot create a genuine issue of material fact through conclusory allegations. *Angel v. Seattle-First Nat'l Bank,* 653 F.2d 1293, 1299 (9th Cir. 1981). He cannot defeat summary judgment with new facts or argument not presented to the District Court. *Harkins Amusement Enters, Inc. v. Gen. Cinema Corp.,* 850 F.2d 477, 482 (9th Cir. 1988). Before the argument will be considered on appeal, the argument generally must be raised sufficiently for the trial court to rule on it. *See Wagner v. Prof'l Eng'rs in Cal. Gov't*, 354 F.3d 1036, 1044 n.4 (9th Cir. 2004).

Pursuant to Circuit Rule 28-2.5, as to each issue, Appellant is required to "state [in his opening brief] where in the record on appeal the issue was raised and ruled on and identify the applicable standard of review." 9th Cir. R. 28-2.5.

VI. SUMMARY OF THE ARGUMENT

The District Court correctly granted summary judgment for PPG on Appellant's First and Second Causes of Action for retaliation and wrongful

termination in violation of public policy. More specifically, the District Court properly determined that Appellant "failed[ed] to create triable issues regarding pretext, necessitating summary adjudication on [Appellant's] first claim." (ER, 9.) Likewise, the District Court properly held, "[Appellant's] second claim thus depends entirely on the sufficiency of [Appellant's] retaliation claim. But because the Court summarily adjudicated "[Appellant's] retaliation claim… "[Appellant's] second claim for wrongful termination must also be summarily adjudicated in [PPG's] favor." (*Id.*) Significantly, in granting PPG's motion, the District Court correctly disregarded Appellant's conclusory and speculative testimony which was, and remains, unsupported by any evidence in the record. As such, PPG respectfully requests the Court affirm the District Court's Order.

VII. ARGUMENT

A. The District Court's Dismissal Of Appellant's First Cause Of Action For Violation Of Labor Code § 1102.5 Should Be Affirmed.

Appellant alleges he that he suffered retaliation "for reporting his employer's unlawful conduct and practices to the employer's ethics hotline, and for opposing and refusing to participate in what he reasonably believed to be unlawful conduct by his employer..." (SER, 9-10, ¶ 38.) But PPG actually terminated Lawson for objectively failing to meet job expectations. It never knew Lawson had reported the anonymous complaints until this lawsuit, and was completely unaware of them at

the time of his termination. Accordingly, it could not possibly have retaliated against him for this or any other reason.

California Labor Code section 1102.5(b) provides "an employer…shall not retaliate against any employee for disclosing information…to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance…if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute…" Section 1102.5(c) prohibits retaliation "against an employee for refusing to participate in an activity that would result in a violation of state or federal statute…"

Here, PPG had legitimate, non-discriminatory reasons to terminate Appellant – Appellant failed to meet PPG's performance expectations despite ample opportunity to do so. Appellant cannot point to any evidence, direct or circumstantial, of any pretext. Alternatively, summary judgment should be affirmed because Appellant cannot show a causal link between Appellant's two anonymous complaints and his termination.

1. The *McDonnell Douglas* Test Applies To Appellant's Claims For Retaliation And Wrongful Termination In Violation Of Public Policy.

Appellant concedes the *McDonnell Douglas* test was correctly applied to his claim for wrongful termination in violation of public policy. (AOB 17.) However,

he takes issue with the District Court's application of that test to his claim for retaliation under Cal. Labor Code Section 1102.5. Appellant not only waived this argument by failing to raise it below, but also he is legally incorrect.

a. Appellant Waived His Argument That The District Court Incorrectly Applied The *McDonnell Douglas* Test.

The District Court granted PPG's motion for summary judgment on Appellant's retaliation claim under Cal. Labor Code Section 1102.5 and his claim for wrongful termination in violation of public policy. In doing so, the Court applied the *McDonnell Douglas* test to analyze Appellant's claims. Despite ample opportunities to do so, Appellant ***never*** argued that this was the wrong analytical framework for his Section 1102.5 claim. He never proposed a different framework in his briefing and – **even after receiving the Court's tentative order utilizing *McDonnell Douglas*** – he did not raise the issue at oral argument. (ER, 588-620; SER, 18-31.)

This Court will ordinarily not consider arguments raised for the first time on appeal. *See Kaass Law v. Wells Fargo Bank, N.A.*, 799 F.3d 1290, 1293 (9th Cir. 2015) ("Ordinarily, an appellate court will not hear an issue raised for the first time on appeal.").

Unless necessary to "prevent a miscarriage of justice," "when a change in law raises a new issue while an appeal is pending," or "when the issue is purely one of

law," an appellate court should not "review an issue that has been raised for the first time on appeal." *Turnacliff v. Westly*, 546 F.3d 1113, 1120 (9th Cir. 2008); *see also WildWest Institute v. Bull*, 547 F.3d 1162, 1172-73 (9th Cir. 2008) (refusing to consider new issue raised on appeal); *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1321 (9th Cir. 1998) (applying "a 'general rule' against entertaining arguments on appeal that were not presented or developed before the district court").

None of these narrow circumstances are present here. Aside from being erroneous, Appellant's argument is not a pure question of law. To the contrary, the application of the AIR-21 standard that Appellant advocates, like the *McDonnell Douglas* standard, depends on a determination of factual matters established by the record evidence in the case. *See*, *e.g.*, *Turnacliff*, 546 F.3d at 1120 (due process challenge requires determination of facts and therefore is not a pure question of law); *MacDonald v. Grace Church Seattle*, 457 F.3d 1079, 1086 (9th Cir. 2006) (constitutionality of religious organization exemption set forth in the Washington Law Against Discrimination is not a pure question of law, but rather depends on a determination of factual matters.) Appellant had multiple opportunities in the District Court to argue that the Court incorrectly analyzed Appellant's claims yet failed to do so,[6] and neither of the other *Turnacliff* exceptions apply, no miscarriage

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[6] On June 14, 2019, i.e., three days before the hearing on PPG's motion for summary judgment, the District Court issued a fourteen-page "[Tentative] Order Regarding Defendant's Motion for Summary Judgment". (SER, 18-31.) On June 17, 2019,

of justice would result if the Court refuses to review Appellant's argument raised for the first time on appeal.

b. The *McDonnell Douglas* Test Applies To Lawson's Claim For Retaliation.

Even had Appellant argued below that the *McDonnell Douglas* test does not apply, he would be wrong. Courts applying California law to claims under Section 1102.5 consistently apply the burden shifting analysis consistent with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). "The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, non-retaliatory explanation for its acts, and (3) the plaintiff show that this explanation is merely a pretext for the retaliation." *Patten v. Grant Joint Union High School Dist.*, 134 Cal.App.4th 1378, 1384 (2005); s*ee also, Taswell v. Regents of the Univ. of Cal.*, 23 Cal.App.5th 343 (2018) (applying burden-shifting framework to retaliation claims including Section § 1102.5(b)); *Ferretti v. Pfizer Inc.*, No. 11–CV–04486, 2013 WL 140088, at *10 (N.D.Cal. Jan. 10, 2013) ("Courts analyzing claims under Section 1102.5 apply the burden shifting analysis first set forth by the United States Supreme Court in *McDonnell Douglas v. Green*"); *Snead v. Metro. Prop. & Cas. Ins. Co.,* 237 F.3d

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during oral argument on PPG's motion, Appellant's attorney repeatedly referenced the Court's tentative ruling which confirms Appellant's knowledge that the District Court was applying the *McDonnell Douglas* burden shifting test to Appellant's First and Second Causes of Action. (*See* ER, 588-620.)

1080, 1090-93 (9th Cir. 2001) (the *McDonnell Douglas* burden shifting framework applies to state law claims pursued in federal court).

Notably, Appellant has not cited a single case, state or federal, applying California law to support his position the *McDonnell Douglas* test does not apply to his First Cause of Action. As such, his argument should be rejected on the merits.

c. Appellant's Reliance On Section 1102.6 Is Overstated.

The application of Section 1102.6 does not command reversal of the District Court's Order. At best, the application of a clear and convincing standard is triggered only in mixed-motive cases, where there is evidence of **both** a retaliatory motive and a legitimate reason for the adverse action. *See* Judicial Council Of California Civil Jury Instruction 4604 (advising application of section 1102.6 only in "mixed-motive" cases); *Mokler v. County of Orange,* 157 Cal. App. 4th 121, 138 (2007) (burden-shifting framework applies when plaintiff relies on circumstantial evidence). Appellant has introduced no evidence that either of his anonymous complaints played ***any*** part in any allegedly adverse employment action, including his termination. Absent evidence of a retaliatory motive by PPG, the burden of proof set forth in section 1102.6 is inapplicable here. This is simply not a mixed-motives case and, prior to his appeal, Appellant never even suggested that it was. *See Killgore v. Specpro Professional Services, LLC*, 2019 WL 6911975 at *32 (N. D. Cal. 2019).

2. The District Court Properly Granted Summary Judgment On Appellant's First Cause Of Action.

a. PPG Provided Legitimate, Non-Discriminatory Reasons For Appellant's Termination.

PPG concedes Appellant engaged in protected activity when he anonymously lodged his two separate anonymous complaints with PPG via its online portal on April 21, 2017, and via its Ethics Hotline on June 15, 2017. Likewise, PPG concedes Appellant suffered an adverse employment action when he was terminated from his employment for failing to perform the essential duties of his job despite being provided ample opportunity to do so. However, despite these concessions, the District Court's Order accurately documents the undisputed evidence of PPG's legitimate non-discriminatory reasons for Appellant's termination. For example, the District Court held:

- "Plaintiff was fired for 'fail[ing] to meet the performance expectations set forth in the PIP…[PPG] offers sufficient evidence to support this assertion";

- "the PIP required [Appellant] to earn a 'successful' score on his July 2017 Market Walk, which [Appellant] failed to do";

- "[PPG] extended [Appellant's] PIP for an additional thirty days allowing [Appellant] one more opportunity on his August 2017 Market Walk to improve his score…[b]ut [Appellant] scored poorly on this Market Walk too";

- [PPG] thus articulates a legitimate, nondiscriminatory reason for firing [Appellant]";

- "**the record makes clear** [Appellant] consistently performed poorly on his Market Walks";

- "[Appellant] offers **no evidence** that these alleged 'inconsistencies' or deviations impacted [Appellant's] Market Walk score in an outcome determinative way";

- "[Appellant] also **fails to offer evidence** that RSM Moore's purported deviations violated some well-established company policy or practice"; and

- "[Appellant's] conclusion about 'shifting' justifications for the PIP **isn't adequately supported by the record**."

(ER, 7-9, emphasis added.)

Although Appellant tried to minimize or blame his poor performance on other factors, he does not actually dispute that PPG had legitimate, non-retaliatory reasons for placing him on the PIP, and then terminating him. None of Appellant's excuses can hide his repeated poor performance and PPG's sincere belief that Appellant falsified Company records are legitimate reasons for termination.

Appellant struggled to meet job expectations long before he submitted an anonymous complaint in April 2017. Beginning in October 2016, Appellant missed his sales goal for six consecutive months before being placed on a PIP. (ER 286-287; 348-352.). He then continued to miss his goal each month while on the PIP. (ER, *Id*.; 428-429; 519-522.) Additionally, as early as December 2016, Appellant's Market Walks show he consistently had issues with specific duties such as maintaining an up-to-date Training Roster, developing relationships with key employees at Lowe's stores in his territory, and placing product in required areas

throughout the Lowe's stores in his territory. (ER, 266-268; 286-287; 348-352; 419; 514-515; 536-537, ¶¶ 5, 9, 11; 546-548; 550-560). Appellant's efforts to minimize his performance and point the finger at Moore as the bad actor are simply unavailing.

(1) Appellant Failed To Meet His Monthly Sales Goals Starting In 2016, i.e., Before He Reported To Moore.

First, Appellant suggests his failure to meet his sales numbers was because of a territory realignment orchestrated by Moore which "greatly affected Lawson's sales metrics, and Moore opportunistically used the resultant lowered sales numbers as justification for [Appellant's] PIP and firing." (AOB, 12.) To support this conclusory assertion, Appellant offers nothing more than his own self-serving declaration; however, his declaration lacks evidentiary support. (*See*, ER, 84, ¶ 12.) Notably, Appellant does not state when the realignment occurred in relation to his struggling performance. Perplexingly, Appellant attributes the realignment to Moore, but Moore did not assume responsibility for Appellant's territory until early 2017. (AOB, 12; ER, 537, ¶ 10).) Even if we were to assume that the realignment occurred as of January 1, 2017, Appellant already missed his sales numbers for at least five months by that point: April 2016, June 2016, October 2016, November 2016, and December 2016. (ER, 149-150; 348-352.) Ultimately, Appellant's conclusory statement he was given underperforming stores lacks foundation, as he provides no *evidence* on when, and why, the stores underperformed and/or later

closed. Nor can it excuse his poor performance, because sales goals are set based on the performance ***at that store*** in the prior year. (ER, 536, ¶ 4).)

(2) Appellant's PIP Was Warranted Based On Numerous Deficiencies In Appellant's Performance.

Second, while Appellant's poor sales were one aspect that lead to his PIP, there were other, undisputed reasons for placing him on a PIP. As early as December 2016, Appellant's Market Walks demonstrate that he struggled with keeping his Training Roster up to date, developing relationships with key employees at the Lowe's stores in his territory, and placing product in required areas throughout the Lowe's stores in Appellant's territory. (ER, 266-268; 286-287; 348-352; 419; 514-515; 536-537, ¶¶ 5, 9, 11; 546-548; 550-560.) Appellant's 2016 Performance Review demonstrates that these concerns – and others – were present and known to Appellant by February 2017; i.e., two months *before* he was placed on his PIP. (ER, 92 (noting in self-comments that he was behind on training and some stores were missing training); 93 (acknowledging he did not complete the daily store check list every visit), and 94-96 (noting that he did not complete monthly email communications to the Market Director, did not conduct monthly Store Manager/ASM review meetings, and was behind on quarterly PSI meetings).)

(3) Starting In December 2016, i.e., Four Months *Before* Engaging In Protected Activity, Appellant Struggled On Three Consecutive Market Walks.

Third, Appellant does not, and cannot dispute that he struggled on his December 2016, March 2017, and April 2017 Market Walks – admitting he achieved a "marginal" rating in December 2016 (AOB, 6) and an "unsuccessful" rating in March 2017 (AOB, 7). (ER, 537, ⁋⁋ 9, 11, 546-548, 550-560.) Notably, in his Opening Brief, Appellant fails to point out he also scored an "unsuccessful" rating of 46 on his April 2017 Market Walk. (ER, 286-287, 348-352.) Likewise, Appellant received verbal warnings at the conclusion of his March 2016 and April 2016 Market Walks. (*Id.*) Lacking any evidentiary support yet again, Appellant simply concludes, "it is evident that Moore was 'a low grader'". (AOB, 7.) Regardless whether or not this is true, it is undisputed that Moore was giving Lawson low grades ***before*** he engaged in any protected activity.

(4) Appellant Continued To Struggle To Meet Multiple Aspects Of His PIP Despite His PIP Being Extended At Moore's Request.

Fourth, as the District Court concluded, "the PIP's very terms encompassed [Appellant's] overall performance as a TM, including improving [Appellant's] sales numbers *and* [Appellant's] Market Walk scores" (ER, 9, (emphasis in original)), however, once on the PIP, Appellant continued to struggle with *both* his Market Walks *and* sales performance. (ER, 258-259, 274-275, 283-284, 336-345, 426-429,

519-522.) Appellant implies that Moore retaliated against Appellant by giving Appellant a marginal rating on his July Market Walk score because it occurred one week after Moore's meeting with Dalton. (AOB, 11.) While not a passing score, this score was twenty points *higher* than the preceding April Market Walk score, and Appellant's highest score in 2017. Logic dictates that if Moore intended to retaliate against Appellant, he would not have given Appellant his highest Market Walk score in July 2017, or supported giving Appellant an additional 30 days to complete his PIP. In reality, Appellant's poor sales performance, coupled with his low Market Walk scores, warranted the PIP. (ER, 286-287; 415-418; 421-422, 447-448; 470-471; 513, 537, ⁋ 12.)[7]

What is more, Appellant initially had 60 days to meet the requirements of the PIP, a period that was extended for 30 days following the July 2017 Market Walk with Moore's support. (ER, 271-272; 288-289; 449-452; 537, ⁋ 13.) Even with the additional time, Appellant failed to successfully complete the clearly defined terms of the PIP, and his failure to meet PPG's explicit expectations set forth in the PIP warranted the Company's decision to terminate Plaintiff's employment. (ER, 274; 284-284; 341-345; 428-429; 519-522.) To the contrary, Appellant's August 2017 Market Walk score was his lowest ever. (ER, 274; 283-284; 286-287; 341-345; 536-

[7] Appellant's SAC makes no mention of the fact he was on a PIP, and in turn, fails to allege any impropriety with the Company's decision to place him on a PIP.

537, ⁋⁋ 8, 9, 11; 546-548; 550-560.)

(5) Appellant Admits His Training Rosters Contained Inaccuracies.

Sixth, Appellant also alleges that PPG "terminated [Appellant's] employment, citing unfounded allegations that [Appellant] had falsified his training roster." (SER, 9-10, ⁋ 38.) Although Appellant adamantly denies that he "falsified" his training roster, his denial is simply semantical as he admits that he submitted inaccurate information and, as a result, sometimes his Training Rosters were wrong. (ER, 276-280; 281-282.) Regardless of the terminology, the outcome is the same – Appellant's Training Roster contained inaccuracies. (ER, 270, 286-287, 341-345, 421-422, 426-427, 470-471.) Indeed, as Appellant admitted in his self-evaluation, his issues with his Training Roster date as far back as his December 2016 Market Walk, which predates his first anonymous complaint by nearly four months, and his second anonymous complaint by almost six months. (ER, 92, 537; 546-548.)

As the District Court correctly concluded, and as the foregoing makes clear, it is indisputable that PPG had legitimate, non-discriminatory reasons to terminate Appellant for legitimate business reasons – Appellant failed to meet the clearly defined performance expectations set forth in the PIP.[8] It also is undisputed that

[8] Appellant is incorrect in arguing that a "clear and convincing" evidence standard applies to PPG's legitimate non-discriminatory reason, an argument he also never raised in the District Court. *See infra*, at 25. Given the overwhelming and undisputed evidence of PPG's legitimate and non-discriminatory reasons, however,

PPG's identification and criticism of Appellant's performance began well before he engaged in protected activity. As such, the District Court's order granting summary adjudication should be affirmed.

b. Appellant Cannot Show PPG's Reasons For Terminating His Employment Were Pretextual.

Once the employer meets its burden of providing a legitimate reason for the adverse employment action, Appellant "must [then] show that the articulated reason[s] [are] pretextual." *Chuang v. University of California Davis*, 225 F.3d 1115, 1124 (9th Cir. 2000); *see also Guz v. Bechtel Nat'l, Inc.,* 24 Cal.4th 317, 356 (2000); *Morgan, supra,* 88 Cal.App.4th at p. 68, 105. "[T]he plaintiff may establish pretext either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at p. 68. (internal quotations omitted.); *see also*, *Dominguez-Curry v. Nev. Transp. Dep't,* 424 F.3d 1027, 1037 (9th Cir. 2005). If the employee relies solely on circumstantial evidence, then he "must produce specific, substantial evidence of pretext." *Godwin v. Hunt Wesson, Inc.,* 150 F.3d 1217, 1221 (9th Cir. 1998) (internal quotations omitted). "Where the evidence of pretext is circumstantial, rather than direct, the plaintiff must present 'specific' and 'substantial' facts showing that there is a genuine issue for trial."

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it has satisfied its burden to provide those reasons, regardless of the standard the court applies.

Noyes v. Kelly Services, 488 F.3d 1163, 1170 (9th Cir. 2007) (quoting *Godwin,* 150 F.3d at 1222). An appellant must show more than that the employer's justification is false because "courts only require that an employer honestly believed its reason for action, even if its reason is foolish or trivial or even baseless." *Villiarimo v. Aloha Island Air, Inc.,* 281 F.3d 1054, 1063 (9th Cir. 2002) (internal citation and quotation marks omitted). The evidence on pretext, whether direct or indirect, must be considered cumulatively. *Chuang,* 225 F.3d at 1129.

c. Appellant Does Not Have Any Direct Evidence Of Pretext.

Citing to the entire District Court Order, Appellant contends that the District Court "erred in applying an overly burdensome standard regarding Lawson's circumstantial evidence of pretext and in failing to construe all reasonably disputed inferences in favor of Lawson…" (AOB, 33.) Foundationally, as set forth above, Appellant can identify no direct evidence of a retaliatory motive, and in fact admits he has no reason to believe that anyone at PPG ever learned he submitted either anonymous complaint. (ER, 293-294; 296; 305-306.)

Where, as here, Appellant relies solely on circumstantial evidence, he "must produce specific, substantial evidence of pretext." *Godwin v. Hunt Wesson, Inc.,* 150 F.3d 1217, 1221 (9th Cir. 1998) (internal quotations omitted); *Noyes v. Kelly Services,* 488 F.3d 1163, 1170 (9th Cir. 2007) (quoting *Godwin,* 150 F.3d at 1222). As Appellant notes, he could "prove pretext in one of two ways: (1) indirectly, by

showing that the employer's proffered explanation is 'unworthy of credence' because it is internally inconsistent or otherwise not believable; or (2) directly, by showing that unlawful discrimination more likely motivated the employer." *Noyes*, 488 F. 3d at 1170 (citations omitted). Appellant's Opening Brief, however, does neither because the record cannot support such a conclusion.

Here, Appellant has neither specific nor substantial evidence of pretext. Indeed, Appellant has *no* evidence of pretext because no such evidence exists. Appellant's SAC alleges that after he made the April 2017 complaint, "Moore proceeded to unfairly score [Appellant's] market walk evaluations in order to give him failing scores, starting with Lawson's July 13, 2017 market walk." (SER 5, ¶ 17.) According to Appellant, these "unfair" scores lead to his termination. (SER 6, ¶ 18.) The evidence, however, including Appellant's own deposition testimony is in direct conflict with this assertion. According to Appellant, ***every*** Market Walk on which Moore scored him – both ***before and after*** the April 2017 complaint –was unfair. (ER, 262-263.) Appellant also confirmed Moore did not make any comments to him or say anything to him that would give him any indication as to why Moore might be unfairly scoring Appellant's Market Walks. (ER, 264.) Critically, Appellant's July 2017 Market Walk score (66) was *higher* than each of his previous three Market Walks in December 2016 (60), March 2017 (58), and April 2017 (46). (ER, 286-287; 348-352; 537, ¶¶ 9, 11; 546-548; 550-560.) Again,

Appellant also fails to address a key issue – why would Moore inquire about and support extending his PIP if Moore's intent was to have Appellant terminated? Appellant's contentions are nonsensical speculation, which are insufficient to overcome summary judgment. *Sangster v. Paetkau*, 68 Cal.App.4th 151, 162-63 (1998) ("evidence that gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of fact.").

Furthermore, any reliance by Appellant on the temporal proximity of the two anonymous complaints (April and June 2017) and his termination (September 2017), while sufficient to satisfy his initial burden of creating a prima facie case, cannot create a triable issue as to pretext. *Loggins v. Kaiser Permanente International*, 151 Cal.App.4th 1102, 1112 (2007) (temporal proximity "does not, without more, suffice ... to show a triable issue of fact on whether the employer's articulated reason was untrue and pretextual").

(1) Appellant Consistently Performed Poorly On His Market Walks Over The Course Of Eight Months.

Appellant also points to the alleged "sudden drop" in his Market Walk Scores between October 2016 (92) and August 2017 (40), and asserts that this "irregularity, in itself, merits a closer look by a jury, which could reasonably interpret this sudden drop as the product of a highly subjective and unfair paper trail designed to mask retaliatory purpose." (AOB, 30.) Appellant's bald assertion that his Market Walk

scores during this time were a "sudden drop" blatantly ignores the undisputed fact that between those two Market Walks, Appellant had four other Market Walks – three of which were undisputedly before any alleged protected activity occurred: December 2016 (score 60); March 2017 (score 58); April 2017 (score 46); July 2017 (score 66). This is certainly not the decline in performance Courts have opined is sufficient to establish pretext, and none of the cases relied upon by Appellant suggest otherwise. *See Winarto v. Toshiba America Electronics Components, Inc.*, 274 F.3d 1276, 1285-86 (9th Cir. 2001) (decline in performance ratings came *after* plaintiff had reported alleged harassment to her manager);; *Ross v. Campbell Soup Co.*, 237 F.3d 701, 704 (6th Cir. 2001) (negative performance review only occurred after injury and requests for accommodation); *Butler v. City of Prairie Vill.*, 172 F.3d 736, 752 (10th Cir. 1999) (decline in work evaluations occurred *after* request for accommodation). Appellant did experience a decline in Market Walk scores, but it occurred ***before*** his protected activity. Thus, the timing of the Market Walk scores actually refutes – rather than supports – any inference of retaliation.

(2) There Is No Evidence To Support Appellant's Contention That PPG's Reasons For Firing Him Shifted Throughout His Employment

Next, Appellant attempts to show pretext by falsely asserting that PPG's reasons for firing him shifted throughout his employment. (AOB, 12-13, 31.) There is no merit to this argument, and the District Court properly determined that

"[Appellant's] conclusion about the 'shifting' justifications for the PIP isn't adequately supported by the record." (ER, 9.) Likewise, the District Court saw right through Appellant's contention. Regardless whether a PIP was required by a "HR policy" as Appellant alleges Moore told him, or whether it was a program for conducting quarterly reviews of sales performance as Mayhew testified, the fact remains the same: PPG has consistently maintained that Appellant was placed on a PIP in part because he missed his monthly sales goal for 8 of the prior 12 months. (ER, 9; 270; 286-287; 348-352; 415-418; 420; 421-422; 429; 442-443; 447-448; 470-471; 513, ¶ 12.)

Then, without supporting evidence, Appellant asserts that Moore then shifted focus to Appellant's Market Walk scores. This ignores Appellant's PIP, which clearly noted his poor performance on the March 2017 and April 2017 Market Walks, and stated he needed "to achieve a successful walk prior to the end of the PIP to continue employment." (ER, 348-352.) Just as the District Court found "the PIP's very terms encompassed [Appellant's] overall work performance as a TM, including improving [Appellant's] sales numbers *and* [Appellant's] Market Walk scores" (ER, 9), this Court should find the same and affirm the District Court's Order.

Again, without any citation to the record, Appellant also contends that he "presented significant evidence that Moore did not score his market walks in a manner that was fair, honest, and consistent with PPG's normal policies." (AOB,

39.) Even if Appellant believes that Moore should not have taken off as many points as he did for a particular category of a Market Walk, Appellant has put forth no *evidence* that he was treated differently than any other TM, or that Moore scored him in a manner that was inconsistent or different from how he scored other TMs. [9] Nor does Moore's "deviation" from the recommended scoring as to one category in the August Market Walk (i.e. force-outs) represent the type of deviance from Company policy sufficient to support pretext, especially where Moore explained a legitimate, non-retaliatory basis for the deviation and the deviation was not a determinative factor in Appellant's termination. *See Diaz v. Eagle Product, Ltd.*, 521 F.3d 1201, 1214 (9th Cir. 2008) (decision maker violated company policy in failing to consider length of employment in layoff context, where length of employment weighed most heavily in favor of retaining older employees.)

(3) Appellant Admits There Were Discrepancies In His Training Roster.

Finally, Appellant asserts, "Moore fabricated one of the main reasons for Appellant's firing – his allegation that Lawson 'falsified' his training roster", and this "demonstrates an irrationally strong drive by Moore to fire Lawson..." (AOB,

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[9] Appellant argues the fact that Moore did not award him any Bonus Points on his Market Walk suggests this was an inconsistency which is "suggestive of retaliation." (AOB, 30.) However, there is nothing inconsistent with Moore's scoring vis-à-vis Appellant's former manager Stanton, as Stanton was consistent with Moore, as he too did not award Appellant any Bonus Points on the Market Walk he scored. (ER, 536, ⁋ 8; 541-543.)

13, 40-41.) As discussed hereinabove, this argument is unsupported by the evidence, and, notably, Appellant's own deposition testimony confirms that he incorrectly input information into his training roster, and then blamed the discrepancies on the "human factor." (ER, 277-282.) Ultimately, the conclusion that Appellant falsified his training record was a good faith belief held by ***Mayhew*** based on Mayhew's own conversation with Appellant. (ER, 439-440.) While Appellant disagreed with Mayhew's conclusion that he falsified training records, it is undisputed Mayhew honestly believed that to be the case. (ER, 439-440.) Appellant's disagreement with that conclusion is not evidence of pretext, particularly where Mayhew had no knowledge of Appellant having engaged in protected activity. (ER, 406; 441; 466-467.) *See, e.g., King v. United Parcel Service*, 152 Cal. App. 4th 426, 436, 440 (2007), ("It is the employer's honest belief in the stated reasons for firing an employee and not the objective truth or falsity of the underlying facts that is at issue in a discrimination case.")

Simply put, Appellant was ultimately terminated because he failed to meet his PIP despite a 30 day extension, and because PPG had reason to believe he was not conducting the trainings he stated he was doing (i.e. he was submitting false records indicating he had trained Lowe's associates when he had not). Because Appellant can offer no evidence outside of his own speculation that these reasons were false or a pretext for a retaliatory motive, the District Court properly granted summary

judgment as to Appellant's First Cause of Action. *Sangster, supra*, 68 Cal.App.4th at 162-63; *see also Sinai Memorial Chapel v. Dudler*, 231 Cal.App.3d 190, 196-97 (1991) (an issue of fact "is not raised by cryptic, broadly phrased, and conclusory assertions, or mere possibilities").

3. Alternatively, The Court Should Affirm Summary Judgment On Appellant's Section 1102.5(b) Claim Because Appellant Cannot Establish A Prima Facie Case For Retaliation.

Although the District Court found that Plaintiff had established a *prima facie* case of retaliation, there is no evidence in the record that the individuals involved in the decision to terminate him had any knowledge that he had made the anonymous complaints. As set forth above, to establish a *prima facie* case, Appellant must demonstrate a causal link between the protected activity and the employer's adverse action. *Hager v. County of Los Angeles,* 228 CA.4th 1538, 1540 (2014); *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 56, 69-70. The causal link may be established by an inference derived from circumstantial evidence, "such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision." *Morgan, supra,* 88 Cal.App.4th at 69-70 (quoting *Jordan v. Clark,* 847 F.2d 1368, 1376. (9th Cir.1988). "**Essential to a causal link is evidence that the employer was aware that [Appellant] had engaged in the protected activity.**" *Id.* (quoting *Cohen v. Fred Meyer, Inc.,* 686 F.2d 793, 796 (9th Cir.1982)

(emphasis added).) Appellant's failure to provide evidence that would establish this causal link is an alternative grounds for affirming the district court's decision.[10]

Although PPG does not dispute that Appellant made the April 2017 and June 2017 anonymous reports, Appellant's First Cause of Action fails because there is absolutely no evidence of a causal link between Appellant's protected activity and his termination. *Morgan, supra,* 88 Cal.App.4th at 69.

a. Appellant's Section 1102.5(b) Claim Fails Because The Decision Makers Were Unaware Of Either Anonymous Complaint Until *After* Appellant's Termination.

Fatal to his claim, there is no evidence that the decision makers – Moore, Mayhew and Kacsir – had *any* knowledge that Appellant submitted two anonymous complaints until *after* Appellant filed his lawsuit.[11] (ER, 406; 441; 466-467.) Stated differently, it is axiomatic that no one at PPG could have possibly retaliated against Appellant for making either of his two anonymous complaints, because both complaints were just that – *anonymous*. Appellant cannot point to any evidence to

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[10] "In reviewing decisions of the district court, we may affirm on any ground finding support in the record. If the decision below is correct, it must be affirmed, even if the district court relied on the wrong grounds or the wrong reasoning." *Jackson v. S. Cal. Gas. Co.*, 881 F.2d 638, 643 (9th Cir. 1989) (citations omitted).

[11] Although the outcome is the same, technically the Court need only conclude that the undisputed evidence establishes the decision makers had no knowledge of the April 2017 complaint as that is the only alleged protected activity articulated in the SAC. (SER, 4-5, ¶¶ 8, 11-15.) *See Wasco Prods., Inc. v. Southwall Techs., Inc.,* 435 F.3d 989, 992 (9th Cir. 2006) ("[S]ummary judgment is not a procedural second chance to flesh out inadequate pleadings.")

establish this causal connection because no such evidence exists. This is consistent with Appellant's testimony that he did not disclose to Moore, or anyone else at PPG, that he submitted either of the two anonymous complaints. (ER, 293-294; 296; 305-306; SER, 4-5, ¶¶ 8, 15.) Because the individuals involved in the termination decision didn't know Appellant submitted either anonymous complaint until *after* he was terminated, his claim fails. *See Ferretti, supra*, No. 11cv4486, 2013 WL 140088, at *10 (N.D. Cal. June 6, 2016) ("Thus, Plaintiff may establish causation by showing that: (1) one of the decision makers responsible for each of the adverse employment actions taken against Plaintiff had knowledge that Plaintiff had engaged in protected activity, **and** (2) there is a close proximity in time between the protected activity and the adverse employment action." (emphasis added))

Lacking any supporting evidence that there was actually a causal link between either of his anonymous complaints and any allegedly adverse employment action, including his termination, Appellant repeatedly attempts to paint a picture of Moore as a vindictive manager who was set on terminating Appellant for opposing a direct order to intentionally mis-tint paint. For example, to bolster his speculative position Appellant summarily contends "Moore placed Lawson on a performance improvement plan ("PIP"). (AOB, 9.) However, this contention fails for two reasons: 1) Appellant admits that he did not oppose Moore's directive to mi-stint

paint until *after* Moore informed Appellant PPG was placing him on a PIP; and 2) it is unsupported by the evidence.

First, Appellant admits that he submitted his first complaint anonymously on April 21, 2017. (AOB, 8.) Critically, this is the exact same day Appellant scored a 46 – "Unsuccessful" - on his Market Walk, and the exact same day Moore informed Appellant PPG was placing him on a PIP. Then, Appellant concedes that he did not oppose Moore's directive until "[s]oon thereafter", i.e., *after* Moore told Appellant PPG was placing him on a PIP. (AOB, 8.) Accordingly, by Appellant's own admission, there is no way Moore could have retaliated against Appellant by instating the PIP. This contention is simply illogical.

Second, there is simply no *evidence* of a causal connection. Indeed, the decision to put Appellant on a PIP was ultimately made by Human Resources, not by the alleged bad actor Moore. (ER, 276, 415-418, 420, 428; 442-443, 469-470.) This is exactly what the District Court correctly concluded. (ER, 9.) Furthermore, Appellant's contention defies the undisputed evidence that during the July 2017 Market Walk, which occurred *after* both anonymous complaints were filed, Moore told Lawson he would see if he could get Lawson's PIP extended for him (ER, 271), and Moore supported extending the PIP because he recognized he had not been able to check-in with Lawson as frequently as Moore intended, nor did Moore did not take the decision to terminate Lawson lightly. (ER, 537.) The simple fact that

Moore requested and supported extending Appellant's PIP, both of which occurred *after* the two anonymous complaints were submitted, confirms that Moore had no knowledge of either anonymous complaint and, accordingly, did not retaliate against Appellant.

Next, without citation to *any* evidence, Appellant contends that Duffy learned of Appellant's identity though his voicemail greeting when Duffy called Appellant to investigate his June 2017 anonymous complaint. (AOB, 10.). Appellant does not cite to any evidence that Duffy actually learned Appellant's identity because, again, no such evidence exists. In reality, the evidence establishes that Duffy never learned the anonymous reporter's identity even after speaking with him, as evidenced by Duffy's email to Dalton and Duffy's boss confirming, "**The reporter did not provide a name – since they were still concerned about remaining anonymous**." (ER, 374-375, 481, emphasis added.)

Even if the Court assumed Duffy learned Appellant was the individual who submitted the April 2017 and June 2017 reports, once more, there is ***no evidence*** that Duffy shared that information with anyone at PPG, specifically including Minda, Dalton, Moore, Kacsir, or Mayhew. (ER, 25-27; 362; 375-376; 379.) Therefore, even if Duffy did learn Appellant was the anonymous reporter, which PPG does not concede, Appellant cannot establish a causal connection between his anonymous complaint and any adverse employment action because there is *no*

evidence that Duffy disclosed Appellant's identity to *any* of the decision makers who were involved in the decision to put Appellant on a PIP and ultimately terminate him for legitimate performance reasons.

Furthermore, assuming arguendo that a reasonable factfinder reasonably could infer from the evidence that Mayhew, Kacsir, and/or Moore assumed that the anonymous reporter was one of the fourteen TMs on Moore's team, it would require an impermissible inferential leap to conclude that they believed Lawson, and not one of the other thirteen TMs, was the reporter. Although Appellant argues PPG must have known he was the anonymous reporter because he openly opposed Moore's directive to mis-tint paint (AOB, 8-9, 27), this contention is unsupported by ***any*** evidence. In fact, at least one other TM on Moore's team – Laura Sanchez – openly opposed the directive and remained employed by PPG until its contact with Lowe's was cancelled; a fact which completely dispels any possible inference of retaliatory motivation by Moore.

b. Appellant's Section 1102.5(b) Claim Fails Because The Timing Of Events Confirms There Was No Causal Connection Between Any Protected Activity And Any Adverse Employment Action.

The Ninth Circuit has explained that "causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity," but has repeatedly found that durations of four months and greater between the protected activity and termination are too remote to support a finding of causation

based on temporal proximity. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir.2002) (citing cases); *see also Swan v. Bank of Am.*, 360 Fed.Appx. 903, 906 (9th Cir. 2009); *see also*, *Clark County Sch. Dist. v. Breeden,* 532 U.S. 268, 273 (2001) (noting that a court may not infer causation from temporal proximity unless the time between an employer's knowledge of protected activity and an adverse employment action is "very close" and citing cases for the proposition that a three-month and four-month time lapse is insufficient to infer causation); *Ferretti, supra*, No. 11cv4486, 2013 WL 140088, at *10 (plaintiff may establish causation by showing both that the decision maker knew plaintiff engaged in protected activity, ***and*** there was a close proximity in time between the protected activity and the adverse employment action.)

Here, the undisputed timing of events confirms Appellant cannot establish a prima facie case of retaliation because none of the decision makers knew he engaged in any protected activity, and his termination was not made "on the heels of protected activity." Instead, his termination occurred approximately five and a half months after Appellant filed his first anonymous complaint in April 2017, and approximately two and a half months after he filed his second anonymous complaint in June 2017.

Indeed, the decision to place Appellant on a PIP was discussed between Moore and Mayhew *before* Appellant made both of his anonymous complaints. More specifically, in mid-April 2017, PPG received Appellant's 12-month sales

numbers through March 2017, and, because Appellant missed his sales target for 8 of the previous 12 months, the recommendation was to place Appellant on a PIP. (ER, 537, ⁋ 3.) Mayhew and Moore discussed putting Appellant on a PIP, and concluded one reason a PIP was appropriate was because he failed to achieve his sales goal for *six straight months*. (ER, 415-418, 447-448; 513.) Indeed, the District Court properly found that the decision to put Appellant on a PIP was made by Human Resources, not Moore. (ER, 9, 276, 415-418, 420, 428; 442-443, 469-470.)

Furthermore, Moore discussed PPG's decision to place Appellant on a PIP at the conclusion of his Market Walk on April 21, 2017, evidencing the fact that the decision had already been made. Although this was the same day as when the first anonymous complaint was submitted, there is no evidence, nor does Appellant contend, that he submitted any information which identified him as the anonymous reporter. Indeed, even when PPG followed up with the anonymous reporter to request additional information, no such information was submitted.

Also, the undisputed timing of events confirms that after Appellant submitted his second anonymous complaint in June 2017, PPG's actions were actually beneficial to Appellant rather than adverse. Namely, two weeks after Appellant submitted his second anonymous complaint, PPG decided to extend his PIP by 30 days in order to give him additional time to meet PPG's performance expectations. As set forth above, this decision was unequivocally supported by Moore, Kacsir, and

Mayhew. Likewise, Appellant's July-2017 Market Walk score, which occurred more than one month *after* the day he filed his second anonymous complaint, was Appellant's highest Market Walk score of 2017.

Finally, Moore's support and request to extend Appellant's PIP, which occurred three months *after* Appellant allegedly opposed Moore's mis-tint directive in April 2017 (AOB, 8), further evidences that Appellant cannot establish the causation element of his prima facie case.

Thus, there was no temporal proximity between the protected action and the termination to give rise to an inference of causation.

B. The District Court's Order Finding Appellant's Second Cause Of Action For Wrongful Termination In Violation Of Public Policy Fails Should Be Affirmed.

In his Opening Brief, Appellant concedes his Second Cause of Action for wrongful termination in violation of public policy claim was properly analyzed by the District Court. This alone warrants affirming judgment on this claim. Moreover, because the claim is "premised on a violation of §1102.5," it "depends entirely on the sufficiency of [Appellant's] retaliation claim." (AOB, 2; ER, 9.) Under California law, "[t]he elements of a claim for wrongful discharge in violation of public policy are (1) an employer-employee relationship, (2) the employer terminated the plaintiff's employment, (3) the termination was substantially motivated by a violation of public policy, and (4) the discharge caused the plaintiff

harm." *Nosal–Tabor v. Sharp Chula Vista Med. Ctr.*, 239 Cal.App.4th 1224, 1234–35, (2015) (internal quotation marks and citation omitted).

Here, Appellant alleges, "PPG's decision to terminate [Appellant's] employment was motivated in substantial part by [Appellant's] complaint to his employer about his manager's directive to mistint paint, which amounted to theft from Lowe's, and for [Appellant's] refusal to participate in the illegal activity." (SER, 11, ⁋ 43.) As set forth above, Appellant cannot prove that his termination was motivated by any protected activity. The District Court properly held "because the Court summarily adjudicated [Appellant's] retaliation claim …,[Appellant's second claim for wrongful termination must also be summarily adjudicated in [PPG's] favor." As such, the Court should affirm the District Court's Order and determine that summary judgement on Appellant's Second Cause of Action is likewise appropriate. *Casissa v. First Republic Bank,* 2012 WL 3020193, at *11 (N.D.Cal. July 24, 2012) ("To the extent that Plaintiffs' Tameny causes of action rest on the fundamental policy established by section 1102.5(c), these claims fail for the same reason that Plaintiffs have failed to establish a prima facie case for violations of this section.").

VIII. CONCLUSION

For these reasons, PPG respectfully requests this Court affirm the District Court's June 21, 2019 Order granting summary judgment for PPG.

Dated: January 21, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,725 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rules of Appellate Procedure 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2016, Times Roman 14-point font.

Dated: January 21, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January 2020, I electronically filed a true and correct copy of the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system.

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