

1 MORGAN, LEWIS & BOCKIUS LLP
2 Melinda S. Riechert, Bar No. 65504
3 melinda.rieichert@morganlewis.com
4 Claire M. Lesikar, Bar No. 311180
5 claire.lesikar@morganlewis.com
6 1400 Page Mill Road
7 Palo Alto, CA 94304
8 Tel: +1.650.843.4000
9 Fax: +1.650.843.4001

6 Attorneys for Defendant
7 YAHOO HOLDINGS, INC., successor in
8 interest,
9 in part, to liabilities of YAHOO! INC.

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION

13 SCOTT ARD, an individual,
14 Plaintiff,

15 vs.

16 YAHOO! INC., a Delaware corporation,
17 Defendant.

19 GREGORY ANDERSON, an individual,
20 Plaintiff,

21 vs.

22 YAHOO! INC., a Delaware corporation,
23 Defendant.

Lead Case No. 5:16-CV-05635-NC

Jointly Administered with
Case No. 5:16-CV-00527-NC

**DEFENDANT'S NOTICE OF
MOTION AND MOTION FOR
SUMMARY JUDGMENT OR
PARTIAL SUMMARY
JUDGMENT**

Date: October 11, 2017
Time: 1:00 P.M.
Location: Courtroom 7, 4th Floor
Judge: Honorable Nathanael
Cousins

1 **TO THE COURT, PLAINTIFFS, AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE THAT on October 11, 2017 at 1:00 p.m.** at the
3 Courthouse located at 280 South 1st Street, Courtroom 7 – 4th Floor, San Jose, CA
4 95113, Defendant YAHOO HOLDINGS, INC., successor in interest, in part, to
5 liabilities of YAHOO! INC. (“Defendant” or “Yahoo”) will and hereby does move
6 this Court for judgment as a matter of law on each of Plaintiffs’ claims for: (1)
7 Gender Discrimination in Violation of the Fair Employment and Housing Act
8 (“FEHA”); (2) Gender Discrimination in Violation of Title VII; (3) Termination in
9 Violation of Public Policy; (4) Violation of the California Unfair Competition Law
10 (“UCL”); and (5) Request for Declaratory Relief Concerning the Quarterly
11 Performance Review (“QPR”) Process (violation of California and federal WARN
12 Acts, discriminatory and unfair practices, violation of covenant of good faith and
13 fair dealing) on the ground that there is no genuine issue as to any material fact and
14 that Defendant is entitled to judgment as a matter of law.

15 Alternatively, if for any reason summary judgment cannot be had, Defendant
16 moves for partial summary judgment adjudicating that the following issues in the
17 action, or any of them, do not raise a genuine issue of material fact; that no further
18 proof thereon shall be required or permitted at trial of this action; and that any final
19 judgment in this action, in addition to any matters determined at trial, shall be based
20 on these issues so established.

21 1. Gender Discrimination in Violation of the Fair Employment and
22 Housing Act (“FEHA”) by Plaintiff Gregory Anderson against Defendant, on the
23 ground that Plaintiff Gregory Anderson cannot prove that Defendant terminated his
24 employment because of his gender;

25 2. Gender Discrimination in Violation of the Fair Employment and
26 Housing Act (“FEHA”) by Plaintiff Scott Ard against Defendant on the ground that
27 Plaintiff Scott Ard cannot prove that Defendant terminated his employment because
28 of his gender;

1 3. Gender Discrimination in Violation of Title VII by Plaintiff Gregory
2 Anderson against Defendant on the ground that Plaintiff Gregory Anderson cannot
3 prove that Defendant terminated his employment because of his gender;

4 4. Gender Discrimination in Violation of Title VII by Plaintiff Scott Ard
5 against Defendant on the ground that Plaintiff Scott Ard cannot prove that
6 Defendant terminated his employment because of his gender;

7 5. Termination in Violation of Public Policy by Plaintiff Gregory
8 Anderson against Defendant on the ground that Plaintiff Gregory Anderson cannot
9 prove that Defendant terminated his employment because of his gender;

10 6. Termination in Violation of Public Policy by Plaintiff Scott Ard
11 against Defendant on the ground that Plaintiff Scott Ard cannot prove that
12 Defendant terminated his employment because of his gender;

13 7. Violation of the California Unfair Competition Law (“UCL”) by
14 Plaintiff Gregory Anderson against Defendant on the ground that Plaintiff cannot
15 assert a discrimination claim under the UCL which only provides for restitution and
16 injunctive relief and not damages, and on the ground that there is no merit to
17 Plaintiff Gregory Anderson’s discrimination claim;

18 8. Violation of the California Unfair Competition Law (“UCL”) by
19 Plaintiff Scott Ard against Defendant on the ground that Plaintiff cannot assert a
20 discrimination claim under the UCL, which only provides for restitution and
21 injunctive relief and not damages, and on the ground that there is no merit to
22 Plaintiff Scott Ard’s discrimination claim;

23 9. Request for Declaratory Relief that the Quarterly Performance Review
24 (“QPR”) Process violates the federal WARN Act and that officers and directors of
25 Yahoo are personally liable on the ground that Plaintiffs, as former employees, lack
26 standing to pursue claims for declaratory relief, there is no basis for their claims,
27 and WARN does not provide for declaratory relief;

28 10. Request for Declaratory Relief that the QPR Process violates the

1 California WARN Act and that officers and directors of Yahoo are personally liable
2 on the ground that Plaintiffs, as former employees, lack standing to pursue claims
3 for declaratory relief, there is no basis for their claims, and Cal-WARN does not
4 provide for declaratory relief;

5 11. Request for Declaratory Relief that the QPR Process was used in an
6 unlawful and discriminatory manner and that Yahoo permitted its managers to use
7 the QPR Process to engage in discriminatory employment practices on the ground
8 that Plaintiffs, as former employees, lack standing to pursue claims for declaratory
9 relief, and because there is no basis for their claims; and

10 12. Request for Declaratory Relief that the QPR Process violates the
11 covenant of good faith and fair dealing and that the QPR Process was used in a
12 capricious and arbitrary manner in breach of Yahoo’s obligations to its employees
13 on the ground that Plaintiffs lack standing to pursue claims for declaratory relief,
14 and there is no basis for their claims.

15 This Motion is made pursuant to Federal Rule of Civil Procedure Rule 56
16 and based upon this Notice of Motion, the accompanying Memorandum of Points
17 and Authorities, the Index to Evidence and all attached exhibits, Proposed
18 Judgment, all pleadings and papers on file in this action, and upon such other
19 matters and argument as may be presented to the Court at the time of the hearing.
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Page

- I. INTRODUCTION 1
- II. FACTS..... 1
 - A. Yahoo’s Media Organization 1
 - B. Yahoo’s Quarterly Performance Review Ratings And Calibration Sessions 2
 - C. Greg Anderson 5
 - 1. Anderson Received Consistently Low QPR Ratings..... 5
 - 2. Anderson Received Unfavorable Feedback From His Direct Reports In Yahoo’s Employee Engagement Surveys In 2012 And 2013 6
 - 3. Anderson’s Managers, Including Ard, Highlighted Anderson’s Poor Managerial Skills In Anderson’s Annual Performance Reviews..... 7
 - 4. April 2014: Based On Low QPR Scores And YEES Scores, Yahoo Identified Anderson As A Poorly Performing Manager 8
 - 5. September 2014: Anderson Left For His Eight-Month Fellowship And Ard Added Anderson’s Responsibilities To Ard’s Existing Duties 11
 - 6. October 2014: Yahoo Increased Its Focus On Its Poorest Performing Employees..... 11
 - 7. November 2014: Anderson’s QPR Scores Placed Him In The Bottom 5% Of All Yahoo Employees, Yahoo Decided To Terminate His Employment 12
 - D. Scott Ard..... 13
 - 1. July 2014: Yahoo Was Dissatisfied With Ard’s Performance Running The Yahoo Home Page And Transferred Him To Running Its Commerce Sites 13
 - 2. October 2014: Yahoo Considered Terminating Ard’s Employment, But Decided To Hold Off Doing So. 14
 - 3. January 2015: Yahoo Terminated Ard’s Employment Because His Manager Determined That He Added Little Value To The Company 15
 - E. Megan Liberman Has No Record of Discriminating Against Men..... 16
 - F. Statistics Confirm That There Was No Discrimination Against Men In The Media Department Where Ard And Anderson Worked 16

TABLE OF CONTENTS
(continued)

		Page
1		
2		
3	G. Plaintiffs’ Terminations Did Not Trigger Liability Under	
4	WARN or Cal-WARN.	17
5	III. YAHOO IS ENTITLED TO SUMMARY JUDGMENT OF	
6	PLAINTIFFS’ CLAIMS	17
7	A. Plaintiffs’ Gender Discrimination Claims Fail Because They	
8	Cannot Establish A Prima Facie Case Of Gender	
9	Discrimination, Yahoo Had Legitimate Reasons To Terminate	
10	Plaintiffs’ Employment And There Is No Evidence Of Pretext	17
11	1. Anderson Received Low QPR Rankings And Poor	
12	Management Assessments From His Direct Reports And,	
13	As A Result, Was Terminated For Performance	
14	Deficiencies.....	18
15	2. Yahoo Had Legitimate Business Reasons For the	
16	Termination of Anderson’s Employment And He Cannot	
17	Establish Pretext.....	20
18	3. Yahoo Terminated Ard’s Employment Because His	
19	Manager Felt He Was Not Adding Sufficient Value	
20	Commensurate With The Role Of Senior Director and	
21	There Is No Evidence Of Pretext.	20
22	4. Neither Plaintiff Was Qualified For The EIC Autos Role	
23	And The Fact That They Were Not Considered Based On	
24	Their Lack Of Qualifications Does Not Demonstrate	
25	Pretext	21
26	B. Plaintiffs’ Claims For Wrongful Termination In Violation Of	
	Public Policy Fail Because They Were Not Terminated Because	
	They Are Male.....	22
	C. Plaintiffs Cannot Assert Discrimination Claims Under	
	California’s Unfair Competition Law.	23
	D. Plaintiffs’ Terminations Did Not Trigger WARN Or Cal-	
	WARN.....	24
	E. Plaintiffs Cannot Seek Declaratory Relief Because They Are	
	Former Employees, and Because There Is No Basis For Their	
	Claims.....	24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

CASES

Anthoine v. N. Cent. Counties Consortium,
605 F.3d 740 (9th Cir. 2010)..... 19

Bank of the West v. Superior Ct.,
2 Cal. 4th 1254 (1992)..... 23

Barnett v. Washington Mut. Bank, FA,
2004 WL 2857283 (N.D. Cal. Oct. 12, 2004)..... 23

Board of Trustees of Keene State College v. Sweeney
439 U.S. 24 (1978) 17

Cortez v. Purolator Air Filtration Products,
23 Cal. 4th 163 (2000)..... 23

Farmers Ins. Exch. v. Superior Ct.,
2 Cal. 4th 377 (1992)..... 23

Korea Supply Co. v. Lockheed Martin Corp.,
29 Cal. 4th 1144 (2003)..... 23, 24

Kraus v. Trinity Mgmt. Servs., Inc.,
23 Cal. 4th 116 (2000)..... 23

Lewis v. Bayer Corp.,
No. C 03-04403 JSW, 2005 WL 2893869 (N.D. Cal. Nov. 2, 2005) 17, 20, 21

Madrid v. Perot Sys. Corp.,
130 Cal. App. 4th 440 (2005)..... 23, 24

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973)
holding modified by Hazen Paper Co. v. Biggins,
507 U.S. 604 (1993) 17, 19

MedImmune, Inc. v. Genentech, Inc.,
549 U.S. 118 (2007) 25

1 *Morgan v. Regents of Univ. of Cal.*,
 2 88 Cal. App. 4th 52 (2000)..... 21, 22

3 *Roark v. S. Iron R-1 Sch. Dist.*,
 4 573 F.3d 556 (8th Cir. 2009)..... 25

5 *Sarkizi v. Graham Packaging Co.*,
 6 No. 1:13-CV-1435-AWI-SKO, 2014 WL 2506600 (E.D. Cal. June
 3, 2014)..... 22

7 *Slatkin v. Univ. of Redlands*,
 8 88 Cal. App. 4th 1147 (2001)..... 17

9 *Slayman v. FedEx Ground Package Sys., Inc.*,
 10 765 F.3d 1033 (9th Cir. 2014)..... 25

11 *Staudt v. Glastron*,
 12 92 F.3d 312 (5th Cir. 1996)..... 25

13 *Tameny v. Atlantic Richfield Co.*,
 14 27 Cal. 3d 167 (1980)..... 22

15 *Vallimont v. Chevron Energy Tech. Co.*,
 16 434 F. App'x 597 (9th Cir. 2011)..... 18

17 **STATUTES**

18 28 U.S.C. §§ 2201-2202)..... 24, 25

19 29 U.S.C. §2101, *et seq.* 24

20 42 U.S. § 1983 19

21 Cal. Labor Code § 1400(a) 24

22 Cal. Labor Code § 1401..... 24

23 Cal. Labor Code § 1440(d)..... 24

24 California Unfair Competition Law 23, 24

25 Federal WARN Act and the California WARN Act 1

26 Title VII 17, 19

27

28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

While Plaintiffs Greg Anderson (“Anderson”) and Scott Ard (“Ard”) claim that Yahoo terminated their employment because they are men, the undisputed evidence confirms that this is not true. Yahoo terminated Anderson’s employment in November 2014 because of his consistently low quarterly performance ratings, which put him in the bottom 5% of the entire company. Yahoo terminated Ard’s employment in January 2015 because his manager determined that he did not add sufficient value to his team, particularly given his senior level. Neither was replaced. Moreover, statistical data confirms that the Media Organization, where both Plaintiffs worked, did not discriminate against men.

Plaintiffs attempt to excuse their terminations by blaming Yahoo’s performance management system, in which Yahoo gave Quarterly Performance Review (“QPR”) ratings to all of its employees. However, the undisputed facts confirm that there is nothing illegal about Yahoo’s QPR system. Yahoo developed the QPR system with the legitimate objective of raising the employee performance bar and systematically implemented it with checks and balances to ensure impartiality and obviate discriminatory bias.

Plaintiffs also claim that their terminations violated the Federal WARN Act and the California WARN Act (Cal-WARN). Each Act requires a threshold number of terminations from a single location during a set period of time. In the case of both Plaintiffs’ terminations, these threshold numbers were not met, and accordingly their terminations did not trigger liability.

Finally, Plaintiffs, as former employees, do not have standing to assert declaratory relief claims, which, in any event, have no merit.

II. FACTS

A. Yahoo’s Media Organization

Both Plaintiffs worked in Yahoo’s Media Organization. Anderson Dep.

1 232:8-9; Ard Dep. 212:20-23. In September 2013, Yahoo hired Megan Liberman
2 from the New York Times into the Media Organization to be the Editor-In-Chief of
3 News. Liberman Dep. 10:6-24. Yahoo charged Liberman with building an original
4 and breaking news organization and bringing in name talent—decreasing the
5 amount of aggregated content that originates from other sources. Liberman Dep.
6 11:10-15:1. Ard was also part of the Media Organization, responsible for running
7 the Yahoo Home Page. Ard Dep. 68:7-11, 14-19.

8 In January 2014, Plaintiff Anderson moved into the Media Organization to
9 run the Commerce properties, reporting to Plaintiff Ard. Ard Dep., Vol. 2, 319:16-
10 20, Exh. 4; Anderson Dep. 85:7-13. Also in January 2014, Kathy Savitt, who ran
11 Yahoo’s Marketing and Customer Experience organizations, took on the additional
12 responsibility of Head of the Media Organization. Savitt Dep. 12:11-21, 117:12-
13 118:4. In February 2014, Liberman began reporting to Savitt and was given the
14 additional responsibility over the Yahoo Home Page, becoming Ard’s manager.
15 Liberman Dep. 19:21-20:22. 33:7-36:4. In April 2014, Liberman also took
16 responsibility for the Commerce properties, though News remained her primary
17 responsibility. Liberman Dep. 23:12-24. Anderson remained a direct report of
18 Ard through Anderson’s termination in November 2014. Liberman 93:19-96:21.

19 **B. Yahoo’s Quarterly Performance Review Ratings And Calibration**
20 **Sessions**

21 After Marissa Mayer became the Chief Executive Officer of Yahoo in July
22 2012, she determined that she needed to raise the bar on the performance of Yahoo
23 employees. Fagerlund Dep. 61:18-62:2. A lot of employees were not performing
24 and if the company was going to succeed, it needed to raise performance
25 expectations, and employ and recruit high-performing employees. Fagerlund Dep.
26 60:1-15. In the third quarter of 2012, Yahoo initiated a QPR program to rate the
27 performance of its employees on a quarterly basis. Anderson Dep. 50:1-3. The
28 ratings were grouped into five buckets, with employees receiving individual scores

1 in each bucket: Misses (0.0-0.9), Occasionally Misses (1.0-1.9), Achieves (2.0-2.9),
2 Exceeds (3.0-3.9), to Greatly Exceeds (4.0-5.0). Ard Dep. 111:14-23. Yahoo
3 established guidelines for the percentage of employees to be placed in each
4 performance level.

5 QPR was a method to identify the high performing players at Yahoo for
6 promotion and to move out the low-performing players who did not meet the
7 increasing performance requirements, as part of the broader mission to bring
8 excellence into the company. Reses Dep. 27:8-28:8; Savitt Dep. 28:13-29:3. At
9 the beginning of each quarter, each manager prepared a proposed QPR rating for
10 his or her direct reports, to be communicated up the organization. Day Dep. 21:12-
11 15; Higgins Dep. 18:10-17; Reses Dep. 29:5-11, 32:14-33:13. As explained by
12 Ard, when he received the proposed scores from his direct reports who were
13 managers themselves, he discussed the scores with the issuing managers, and
14 recommended changing the score up or down based on his own personal
15 observations. Ard Dep. 104:4-106: 21. The management team in each organization
16 would then meet in a calibration session to review the scores of each individual in
17 the organization. Reses Dep. 32:14-33:13; Fenice Dep. 20:25-21:17; Khroad Dep.
18 38: 10-23. The purpose of the calibration session was to compare employees
19 against other employees in the same organization. Ard Dep. 109:13-20 (“To
20 discuss people against a larger set of employees; to see if there were people maybe
21 across, in the larger part of the org, that, for example, that I might not be aware
22 about, aware of; that performed exceptionally.”); Savitt Dep. 161:5-162:6 (“we
23 were always trying to make sure that one manager’s “Exceeds” was another
24 manager’s “Exceeds”). The manager at the calibration session had to be able to
25 defend the scores of all team members during calibration. Liberman Dep. 73:15-19,
26 74:5-23.

27 During the calibration process, a higher-level manager might change the
28 score assigned to an employee by that employee’s direct manager, based on

1 information received from other employees in the organization and on an
2 assessment of comparative value to other employees in the organization. Ard Dep.
3 110:24-111:10; Kittenplan Dep. 74:12-19; Higgins Dep. 11:23-12:15, 27:16-20.
4 Scores could also be changed to account for expected percentages in each bucket.
5 Reses Dep. 151:15-152:6. For example, in Q1 2015, Liberman decided that,
6 compared to all the employees in her organization, Ard had assigned too many
7 employees in the Exceeds bucket. Ard Dep. Vol. 2, 293:11-17, Exh. 2.
8 Accordingly, she moved some of these employees from a 3.1 or a 3.0 (the bottom
9 of Exceeds) to a 2.9 or a 2.8 (the top of Achieves). Changes to scores, however,
10 were not typical. Liberman Dep. 65:16-76:15.

11 In order to make sure that employees received a fair evaluation of their
12 contributions each quarter, input was not based solely on a direct manager's
13 assessment, but from others in the organization who worked with that individual.
14 Reses Dep. 24:5-21. Calibration sessions gave other managers the opportunity to
15 scrutinize and comment on the scores, based on their personal experience and
16 observations, compared to others. Liberman Dep. 65:16-76:15. In addition, each
17 organization had a Human Resource Business Partners ("HRBP") who would run
18 the QPR process, attend calibration sessions, and ensure that sessions were fair,
19 effective, and not based on illegitimate criteria. Reses Dep. 53:1-13; 105:9-106:17.

20 Following the calibration sessions, the scores were "locked" and employees
21 had access to their performance bucket. Khroad Dep. 73:6-24. Employees were
22 not informed of their specific numerical score within the bucket because the
23 company did not want employees dwelling on the actual number. Reses Dep. 58:3-
24 11. The goal was to drive performance and give feedback, not focus on a score. *Id.*
25 Managers were expected to meet with their direct reports each quarter to go over
26 their performance for the prior quarter and goals for the next quarter. Yahoo also
27 monitored the scores across every team, function, metric, level, type of role, gender,
28 and race to check for fairness. Reses Dep. 105:9-106:17.

1 **C. Greg Anderson**

2 Yahoo hired Anderson as the Managing Editor of Autos in November 2010
3 to work in its Sunnyvale headquarters. Anderson Dep. 73:8-12, Exh. 2. Anderson
4 signed an acknowledgment that he was an at-will employee. Anderson Dep. 73:5-
5 12, 74:4-12, Exhs. 2, 4. In June 2012, Yahoo transferred Anderson to a position of
6 Editorial Director for Yahoo Commerce, which included Autos, Small Business,
7 Shopping, Health, Real Estate, Travel, and Homes. Ard Dep., Vol. 2, 319:16-20,
8 Exh. 4; Anderson Dep. 85:7-13. In this position, he managed a team of employees.
9 Anderson Dep. 107:3-13, Exh. 18.

10 **1. Anderson Received Consistently Low QPR Ratings.**

11 Anderson never received an “Exceeds” or “Greatly Exceeds” QPR rating.
12 Instead, he received the following QPR scores, beginning in 2013: In Q1 2013,
13 Anderson received a 2.0 (Achieves). In Q2 2013, he received a 2.0 (Achieves). In
14 Q3 2013, he received a 1.6 (Occasionally Misses). In Q4 2013, he received a 2.0
15 (Achieves).. In Q1 2014, he received a 2.2 (Achieves). In Q2 2014, he received a
16 2.5 (Achieves).¹ Brotherton Dec. ¶5. These QPR scores were provided to
17 Anderson when he reported to the following managers (at successive periods of
18 time): Brandon Huff, Lisa Stromer, Jai Singh, and then Scott Ard. *Id.* Even though
19 Anderson now claims that Yahoo discriminated against him because he is a man,
20 three out of the four managers assigned to give him scores were men, including
21 Ard. *Id.* Anderson admits that Ard did not discriminate against him in giving him
22 his scores. Anderson Dep. 139:2-140:8.

23
24
25 ¹ Anderson received no rating for Q3 2014, because he was on a leave of absence
26 at the time the ratings were prepared. Liberman Dep. 342:5-10. Ard was
27 Anderson’s manager at the time and the person responsible for giving him the
28 rating. Anderson Dep. 140:9-17 (“And he (Ard) should be the one who would
have assigned you a QPR rating for Q3 2014; is that correct? A: Yes.”). Ard
does not recall doing so. Ard Dep. 284:1-2, 18-20. Anderson never followed up
about not getting a rating for Q3, 2014. Anderson Dep. 140:18-141:9.

1 2. **Anderson Received Unfavorable Feedback From His Direct**
2 **Reports In Yahoo’s Employee Engagement Surveys In 2012**
3 **And 2013.**

4 Yahoo retained a third party to conduct anonymous surveys called the Yahoo
5 Employee Engagement Surveys (“YEES”). Anderson Dep. 110:14-20, Exh. 8,
6 Anderson Dep. 115:16-116:4, Exh. 9. Employees were asked a number of
7 questions about the company, their organization, and their managers, and the scores
8 were compared to the scores received by other managers at Yahoo and in the
9 manager’s organization. *Id.* Anderson received a report on his YEES scores for
10 2012 and 2013. *Id.* Anderson’s scores from his direct reports were consistently
11 below the scores of other managers in his organization and other managers at
12 Yahoo. *Id.* In 2012, 75% of Anderson’s direct reports took the survey and he
13 received more unfavorable than favorable ratings in almost every category
14 surveyed. Anderson Dep. 110:14-20, Exh. 8. He was far below the average of
15 other managers in his organization, Yahoo as a whole, and the survey company’s
16 norm in every category. *Id.* Notably, he received a 73% unfavorable rating on
17 performance enablement (compared to 47% unfavorable rating for other managers
18 in his organization and 48% unfavorable rating for Yahoo as a whole), 50%
19 unfavorable rating on manager effectiveness (compared to 15% unfavorable rating
20 for both other managers in his organization and for Yahoo as a whole) and a 67%
21 unfavorable rating in teamwork (compared to 35% unfavorable rating for both other
22 managers in his organization and Yahoo as a whole). *Id.* at 9, 11, 15. Only 22% of
23 Anderson’s direct reports agreed with the following statements: (1) “My manager
24 does a great job at people management;” (2) “My manager does a great job of
25 managing the work;” and (3) “My manager is an outstanding leader.” By contrast,
26 Yahoo managers overall received favorable responses on these same questions from
27 64% of their direct reports—42 percentage points higher than Anderson. *Id.* at 9.

28 In 2013, 100 % of Anderson’s direct reports took the survey. Anderson Dep.
115:16-116:4, Exh. 9. Anderson again received much less favorable scores than

1 Yahoo managers received overall. For example, on manager effectiveness,
 2 Anderson received only a 43% favorable rating, compared to Yahoo managers
 3 overall who received a 66 % favorable rating on manager effectiveness. *Id.* at 9.
 4 Anderson was not surprised or disappointed at the scores he received. Anderson
 5 Dep. 111:3-23; 115:16-116:4.

6 3. **Anderson’s Managers, Including Ard, Highlighted**
 7 **Anderson’s Poor Managerial Skills In Anderson’s Annual**
 8 **Performance Reviews.**

9 In addition to QPR ratings and YEES scores, Anderson received annual
 10 performance reviews by his managers. Anderson Dep. 98:1-11, 21-24; Brotherton
 11 Dec. ¶6, Exhs. A-C. Throughout Anderson’s employment at Yahoo, his managers
 12 continuously identified Anderson as a manager who struggled with certain core
 13 competencies. For example, in Anderson’s 2011 Performance Review, his manager
 14 wrote, “it’s clear that Greg needs to be better at timely organization and planning.”
 15 Brotherton Dec. ¶6, Exh. A. In Anderson’s 2013 Performance Review, Ard wrote
 16 that Anderson should “[l]earn more about” two subject-matter areas “under his
 17 jurisdiction”—“Homes” and “Travel.” Brotherton Dec. ¶6, Exh. C. Ard wrote that
 18 Anderson focused on the Autos section, which he personally preferred. *Id.* Ard
 19 also wrote that Anderson could “get defensive, and bristle at constructive feedback”
 20 and Ard told Anderson that “likely there is a grain of truth [in the criticism] or it
 21 wouldn’t come up.” Ard also wrote that Anderson did not regularly attend or
 22 schedule meetings with his direct reports. *Id.* If he did, he was often not an active
 23 participant. In this vein, Ard reported that “it seems there are concerns about silo-
 24 ing.” *Id.* Ard counseled Anderson to check his email after hours, because “[a]s a
 25 senior manager [it was] important to be aware and available at all hours (as much as
 26 possible).” *Id.* When asked why Anderson had such low ratings for a sustained
 27 period of time, Ard pointed to Anderson’s “management weaknesses” and his clear
 28 interest in Autos over the other properties that he managed. Ard Dep. Vol. 2,
 319:16-20, Exh. 4.

1 4. **April 2014: Based On Low QPR Scores And YEES Scores, Yahoo Identified Anderson As A Poorly Performing Manager. Yahoo Considered Terminating His Employment But Instead Granted His Request For An Eight-Month Leave of Absence To Attend A Fellowship.**

2
3
4 By March 2014, Yahoo had developed a new focus on manager
5 effectiveness, and Anderson came up as a low performing manager. Savitt Dep.
6 53:17-22; 55:18-24; 59:15-21; 120:6-9; Liberman Dep. 97:11-103:10; 108:13-20,
7 340:21-341:16; Exh. 70; Hill Dep. 31:14-23, 49:9-20, Exh. 54, 55, 57. As the Vice
8 President of Human Resources supporting the Media Organization testified
9 regarding this new focus:

10 It arose out of a conversation relative to a drop in the employee
11 engagement scores across the company and an area that was
12 identified as being of concern in that engagement survey process
13 was people's perspective on whether or not they had a good
14 manager and how they viewed their manager, and that was a
15 particular area that had dropped. And so from a senior
16 leadership perspective, that was seen as problematic and
17 something that needed to be looked into.

18 Day Dep. 72:1-24.

19 There had been a lot of complaints about the quality of the managers. Reses
20 Dep. 114:6-115:9. Poorly performing managers have a disproportionate effect on
21 the team and drive attrition, so if Yahoo could eliminate the employees who were
22 poorly performing managers, it would benefit the morale of the company. *Id.* High
23 performing employees felt demoralized when they had low performing managers.
24 Savitt Dep. 56:3-19. If employees did not respect their managers or their ability to
25 lead them, it might lead them to want to work at other places. *Id.* Liberman felt
26 strongly about the importance of strong managers to an organization, testifying:

27 My personal feeling is that it's bad to have a bad manager in an
28 organization because the managers set the tone for the group
that they are in, and my understanding from the company -- and
also they're not effective in managing those people, and so
therefore, those people are not producing at the level or quality
that they might be if they were better managed. And I have both
observed and worked with both excellent managers and bad
managers and observed this to be true. But also, I know that the
company had an emphasis on strong management and that there
was a priority, particularly for managers, to be strong employees

1 because they would have an effect on their organizations, and
2 that would filter down and affect not just their own performance
3 but the performance of their entire team.

4 Liberman Dep. 340:21-341:16.

5 With heightened attention on the importance of good managers in achieving
6 Yahoo's goals and retaining good employees, Yahoo established initiatives to raise
7 the performance bar for managers, including the creation of a list of poorly
8 performing managers. Day Dep. 72:1-24. Yahoo wanted to use quantitative
9 measurements to determine who the poorly performing managers were, so as to
10 come up with a fair way to evaluate whether someone was an effective manager or
11 a poorly performing manager. Reses Dep. 114:6-115:9. Managers were placed on
12 a list of poorly performing managers using three criteria: low QPR score, number of
13 direct reports, and/or low upward feedback. Ard Dep. 160:12-24.

14 In April 2014, Anderson was placed on the a list of poorly performing
15 managers. Ard Dep. 311:25-312:17; Liberman Dep. 28:13-29:14; Fenice Dep. Exh.
16 26; Savitt Dep. 77:16-78:7. Anderson's managers discussed Anderson's
17 employment at that time, and came up with the recommendation to move forward
18 with termination. Hill Dep., 49:9-20, Exh. 55; Savitt Dep. 138:11-13, 23-24, Exh.,
19 54 ("I wanted to give you a heads up that based on the new focus on manager
20 effectiveness, Greg Anderson has come up as a low performing manager. The
21 recommendation is to terminate. Let me know if you have any questions and/or
22 concerns but directionally it's pretty firm."); Fenice Dep. 49:23-50:11, Exh. 24
23 ("Greg Anderson to be terminated.").

24 In April 2014, before Yahoo came to a final decision on Anderson's
25 termination, Anderson requested permission to take an eight-month personal leave
26 of absence to attend a journalism fellowship with the Knight Wallace Foundation,
27 scheduled to begin in September 2014. Savitt Dep. 12:6-15, Anderson Dep., Exh.
28 11. At the time, Yahoo's Personal Leave Policy limited personal leaves of absence

1 to a maximum of 30 days in any 24-month rolling period. Brotherton Dec. ¶7, Exh.
 2 E. The policy did not guarantee reinstatement after the leave ended. *Id.*

3 In May 2014, Yahoo granted Anderson the personal leave and permission to
 4 attend the fellowship, deciding not to move forward at that time with the
 5 recommendation to terminate Anderson’s employment. Fenice Dep. Exh. 28;
 6 Savitt Dep. 63:10-66:23. Yahoo did so to enable Anderson to participate in the
 7 fellowship. Reses Dep. 127:8-128:5; Savitt Dep. 78:25-79:22. Also, at the time,
 8 Yahoo was planning to launch a digital Autos Magazine in the summer of 2014,
 9 and was actively looking to hire an Editor-In-Chief to run the magazine.²
 10 Anderson had a lot of historical knowledge about Autos at Yahoo, so there was a
 11 thought that permitting Anderson to participate in the fellowship might allow the
 12 opportunity for Anderson eventually to transition his Yahoo Autos knowledge to
 13 the new Editor-In-Chief, once hired. Higgins Dep. 38:2-12. Anderson himself was
 14 not considered a candidate for the Autos Magazine Editor-In-Chief because he did
 15 not have the high-profile status and user draw that Yahoo was looking for in an
 16 Editor-In-Chief. Savitt Dep. 68:18-69:14.

17 Even Ard, as Anderson’s manager, was not a strong supporter of keeping
 18 Anderson, and recommended keeping him “for the short term” “or until there is a
 19 clear succession to a new Autos magazine and EIC” to avoid a hit to Autos revenue.
 20 Hill Dep. 49:9-20, Exh. 55. Even though Savitt granted Anderson the leave, she
 21 determined that Anderson needed to go at some point since he did not have the right
 22 skill set to run Autos, and was not going to be the Editor-In-Chief of the Autos
 23 Magazine once it was created. Fenice Dep. Exh. 26; Savitt Dep. 77:16-78:7, 79:15-
 24 18; 79:23-80:13, 82:16-22 (“He either needs to go on this fellowship or he needs to

25 _____
 26 ² Yahoo decided to create a number of digital magazines each run by an EIC who
 27 would be a talent magnet to draw users to its site and create high quality original
 28 content. Reses. Dep. 144:14-145:14. Susan Kittenplan was charged with hiring
 the EICs. Liberman Dep. 22:16-30:6. Autos was going to transition to being a
 magazine. *Id.*

1 be terminated, because when we have that magazine come, he's not --there's no
2 position for him running that magazine.”).

3 **5. September 2014: Anderson Left For His Eight-Month**
4 **Fellowship And Ard Added Anderson's Responsibilities To**
5 **Ard's Existing Duties.**

6 In August 2014, Anderson left for Michigan and in September 2014, he
7 began his fellowship. Anderson Dep. 146:25-147:6. His manager, Ard, added
8 Anderson's job duties to his own. Ard Dep. 90:4-7; 91:15-92:10. Anderson
9 transitioned his knowledge of Autos to Ard before he left. Anderson Dep. 147:21-
10 25.

11 **6. October 2014: Yahoo Increased Its Focus On Its Poorest**
12 **Performing Employees.**

13 By October 2014, Yahoo realized that it was important to continue to raise
14 the bar of its talent. Savitt Dep. 85:25-86:12; 86:19-87:6 (“[I]n order for us to
15 continue to build the most competitive workforce, we need to constantly be making
16 sure we have the best and brightest for the tasks at hand at Yahoo!, and so we want
17 to enable and promote our best talent, and where we have weaknesses and gaps in
18 skill set based on our evolving challenges, we need to have bandwidth to hire into
19 those positions by making sure that if we know someone is not performing that
20 those people move on to a place where they're a better fit.”).

21 Yahoo therefore decided to sharpen its focus on other measures, in addition
22 to a list of poorly performing managers, to identify its poorest performers. Day
23 Dep. 88:15-90:1. Yahoo noted that there were many employees who were hovering
24 at the low end of the Achieves rating over several quarters, who Yahoo designated
25 as “skimmers” or “serial skimmers.” Khroad Dep. 52:20-53:10; Fenice Dep. 101:4-
26 15, Exh. 33. Yahoo identified five criteria for employees to be on the skimmers list.
27 *Id.* For example, people managers with a QPR average below 2.5 were included on
28 the list. Khroad Dep. 81:10-13; Fenice Dep. 101:4-15, Exh. 33. Anderson was
designated a “skimmer.” Khroad Dep. 65:1-16, Exh. 10. In addition, Yahoo

1 created the “bottom 5% list,” consisting of employees, companywide, who were in
 2 the bottom 5% of QPR scores averaged over the last four quarters. Khroad Dep.
 3 105:25-106:20, 107:4-13, Exh. 18.³

4 7. **November 2014: Anderson’s QPR Scores Placed Him In The**
 5 **Bottom 5% Of All Yahoo Employees, Yahoo Decided To**
 6 **Terminate His Employment.**

7 By November 2014, Anderson’s four quarter QPR ratings placed him in the
 8 bottom 5% of the entire company, and therefore on the bottom 5% list. Khroad
 9 Dep. 107:4-13, Exh. 18. As a result, on November 10, 2014, Liberman, as Vice
 10 President of the organization, notified Anderson of the termination of his
 11 employment. Liberman 162:10-169:1, 169:7-170:8; Khroad Dep. 135:22-136:11,
 12 Exh. 22.

13 Anderson claims he was replaced by a woman, Sharon Carty, who was hired
 14 5 months after his termination, as evidence of discrimination against him because
 15 he is a man. Carty, however, did not replace Anderson. Carty was hired by Susan
 16 Kittenplan as Editor-In-Chief of the Autos Magazine, which did not exist when
 17 Anderson worked at Yahoo. Kittenplan Dep. 37:9-13, 83:3-15. Anderson was not
 18 the Editor-In-Chief of Autos; he was the editorial director of Autos and other
 19 Commerce properties on Yahoo’s website, a role he was assigned when Yahoo’s
 20 focused was more directed toward aggregating content that originated from other
 21 sources. Anderson Dep. 154:15-19; Ard Dep. Vol. 1, 228:1-10. Yahoo’s strategy
 22 for the Magazines, including Autos, was to have a high-profile Editor-In-Chief.
 23 Fenice Dep. 72:10-19. Carty met that requirement. She had a history as a
 24 journalist in the auto industry and was Editor-In-Chief of her auto blog, which was
 25 owned by AOL. Kittenplan Dep. 36:16-37:4. Eight Yahoo employees—five men

26 ³ Defendant added the gender column to the following existing spreadsheets during
 27 discovery at Plaintiffs’ request: (1) Exhibit 10 to the Deposition of Mini Khroad,
 28 attached hereto as Exhibit D; (2) Exhibit 18 to the Deposition of Gregory Anderson,
 attached hereto as Exhibit A; and (3) Exhibit 31 to the Deposition of Anne Fenice,
 attached hereto as Exhibit F. Riechert Dec. ¶ 15.

1 and three women—interviewed Carty and advocated for her hire based on her
 2 extensive experience in the field. Kittenplan Dep. 18:11-19:23, Exh. 43. Josh
 3 Wolk, then Executive Editor-at-Large for Yahoo Entertainment, wrote that “Sharon
 4 has fantastic experience in covering the automotive world. She’s done so at USA
 5 Today, the Wall Street Journal, and now AOL, which means not only does she
 6 know the area well, but she also has experience running a website, and knows how
 7 to engage an online audience of car geeks.” *Id.* Likewise, Brian Raftery, then
 8 Editorial Director, wrote that “Sharon has years of experience in the Auto category,
 9 and has excelled at finding ways to cover cars in ways that appeal to hardcore gear-
 10 heads, curious consumers, and casual enthusiasts alike.” *Id.* Susan Kittenplan also
 11 wrote that Carty “has great journalistic skills, is very savvy with digital content
 12 creation, SEO, etc. and is connected within the car industry in the way we need to
 13 partner with our sales and marketing teams.” *Id.*

14 Before offering the position to Carty, Yahoo offered the position of Editor-
 15 In-Chief of the Autos Magazine to a male, Eddie Alterman, who declined the
 16 position. Kittenplan Dep. 114:13-22, Exh. 30. Liberman was not involved in the
 17 hiring of the Autos Editor-In-Chief. Liberman Dep. 143:3-5.

18 **D. Scott Ard**

19 Jai Singh hired Ard as a Senior Director of Editorial in September 2011. Ard
 20 Dep., Vol. I, 82:1-6, Vol. 2, 326:18-25, Exh. 7. He was hired to lead the editorial
 21 programming for the Yahoo Home Page. Ard Dep. 68:7-11, 14-19. Upon hire, Ard
 22 signed an acknowledgment that he was an at-will employee. Ard Dep., Vol. 2,
 23 326:13-17, Exh. 6.

24 **1. July 2014: Yahoo Was Dissatisfied With Ard’s Performance**
 25 **Running The Yahoo Home Page And Transferred Him To**
 26 **Running Its Commerce Sites.**

27 In February 2014, Ard began reporting to Liberman. Liberman Dep. 33:16-
 28 22; 174:23-24. Ard was based in California while Liberman was based in New
 York. Ard Dep. Vol. 2, 326:18-25, Exh. 7; Liberman Dep. 43:24-25:1. Liberman

1 set out to raise the caliber of the Yahoo Home Page, which Ard was running.
2 Liberman Dep. 34:5-40:20. She disagreed with the choice of Home Page stories
3 and the way they were presented, believing that the quality should be higher.
4 Liberman Dep. 33:7-36:4. Yahoo wanted a change in strategy because it believed
5 the quality of Yahoo's original content was the cause of considerable customer
6 dissatisfaction. Savitt Dep. 18:25-19:23. It wanted more of a true editorial bent on
7 the news. Savitt Dep. 140:13-141:4. It wanted to hire people who had worked at
8 well-known, high-quality editorial organizations who would create original writing,
9 compared to what Yahoo had done in the past, which was more focused on
10 aggregating content from other sources and particularly in breaking news situations
11 where it relied on wire services. Liberman Dep. 11:21-12:20. The strategy
12 included the creation of a number of digital magazines, each with its own Editor-In-
13 Chief, with the intent to increase the content owned and created by Yahoo. Ard
14 Dep. 73:5-7, 73:21-74:3.

15 From the beginning, Liberman felt that Ard was defensive towards her
16 leadership. Liberman Dep. 46:8-20. By July 2014, when the caliber of the Home
17 Page still failed to meet Liberman's expectations under Ard's watch, Liberman
18 made the decision to remove Ard from running the Home Page, and transferred him
19 to running the Commerce sites. Liberman Dep. 34:7-35:5, 51:1-12, 193:17-24.
20 Liberman hired Lauren Johnston, an expert in breaking news, to take over the
21 running of the Home Page and handle Breaking News. Liberman Dep. 51:1-12.

22 **2. October 2014: Yahoo Considered Terminating Ard's**
23 **Employment, But Decided To Hold Off Doing So.**

24 By October 2014, Ard's average QPR score for the most recent 4 quarters
25 was 2.30, below the 2.5 that was expected of a people manager like Ard. Khroad
26 Dep. 65:1-6, Exh. 10. Moreover, Ard's scores were trending downwards. *Id.*
27 Yahoo considered terminating Ard's employment, but decided not to do so at that
28 time, putting the termination on hold. *Id.*

1 3. **January 2015: Yahoo Terminated Ard’s Employment**
2 **Because His Manager Determined That He Added Little**
3 **Value To The Company. He Was Not Replaced.**

4 By early 2015, Liberman could not determine what exactly Ard was
5 contributing to the company. Liberman Dep. 175:16-176:2. Ard held a Senior
6 Director role, which Liberman viewed as a “very senior position” and one that
7 meant he should have been performing “vital service to the company.” Liberman
8 Dep. 310:8-15. In January 2015, Ard wrote to Liberman acknowledging that he
9 knew that she was dissatisfied with his performance and unclear about what he was
10 doing on a day-to-day basis. Liberman Dep. 283:13-18, Exh. 80. Around that time,
11 Liberman determined that a change needed to be made. In Liberman’s view, Ard
12 was not performing a useful, important value to the company, which was certainly a
13 requirement for someone at his job level. Liberman Dep. 309:19-310:15.

14 As she wrote, “[H]e is just not working for me in this role. I cannot keep
15 track of what he is doing (or not doing) and the job is just not a senior director job
16 and is getting smaller all the time as more of the commerce categories move into
17 magazines.” Savitt Dep. Exh. 63; Liberman Dep. 262:21-22, 298:20-299:3. In
18 addition to her own evaluation and experience with him over many months,
19 Liberman spoke to two (male) employees that Ard worked with most actively to
20 confirm that Ard was not performing some important function for her team that she
21 was unaware of, and whether they thought Melissa O’Neal, an individual on Ard’s
22 team two levels below Ard, could absorb his role without interruption to the
23 company or the business. Liberman Dep. 303:15-304:6. They agreed that O’Neal
24 could. *Id.*

25 Ard claims he was replaced by a woman in an attempt to support the notion
26 that he was discriminated against because he is a man. He was not replaced by
27 anyone. Rather, when Ard’s employment terminated, Melissa O’Neal, a woman
28 two levels below him, absorbed and performed his duties, in addition to her own
 duties. Liberman Dep. 309:21-310:15. As Liberman pointed out, “if [an

1 individual] could be eliminated without being replaced and their – the bulk of their
 2 duties absorbed by someone two levels below them, that would seem to be evidence
 3 to me that they were not performing a vital and irreplaceable function of the
 4 company.” Liberman Dep. 332:2-12.

5 **E. Megan Liberman Has No Record of Discriminating Against Men.**

6 Liberman was Ard’s manager at the time of his termination and made the
 7 decision to terminate his employment. Liberman Dep. 255:26-20; Ard Dep. Vol. 2,
 8 298:4-8, Exh. 3. Ard admits that he does not recall Liberman ever making any
 9 discriminatory statements. Ard Dep. 255:11-19. Liberman has a strong record of
 10 hiring men. For example, as of June 14, 2017, all of Liberman’s direct reports
 11 except one were men. Liberman Dep. 323:17-324:3. All of her star hires, highest
 12 paid employees, and most senior employees are men. Liberman Dep. 323:17-
 13 324:3, 326:23-328:18. The first person she hired was Matt Bai from the New York
 14 Times Magazine to be her chief political columnist. *Id.* The second person she
 15 hired was her deputy, Dan Klaidman, former managing editor of Newsweek. *Id.*
 16 She hired Michael Isikoff as chief investigative writer. *Id.* She hired Rafe
 17 Needleman, a man, to be Editor-In-Chief of the Tech magazine. *Id.* She hired a
 18 man to run Yahoo! Finance, Dan Tynan as a columnist for the Tech magazine, Jon
 19 Ward to be senior political reporter and Hunter Walker to be political reporter. *Id.*

20 **F. Statistics Confirm That There Was No Discrimination Against**
 21 **Men In The Media Department Where Ard And Anderson**
 22 **Worked.**

23 Plaintiffs claim that Kathy Savitt, who ran the Media Organization, favored
 24 women. However, the statistics confirm that this is not accurate. From the
 25 beginning of Savitt’s tenure as the leader of the Media Organization in January
 26 2014 until her resignation in September 2015, the ratio of men to women in her
 27 organizations has largely remained the same. Fong Decl. Exh. A

28 Likewise, the ratio of men to women senior managers over Savitt’s tenure
 remained largely the same: From January 15, 2014 to September 30, 2015, the

1 distribution of managers in Kathy Savitt's organization stayed the same.

2 **G. Plaintiffs' Terminations Did Not Trigger Liability Under WARN**
 3 **or Cal-WARN.**

4 In the 30 days leading up to and including Anderson's termination, Yahoo
 5 involuntarily terminated fewer than 50 people, including Anderson, at its Sunnyvale
 6 location. Brotherton Dec. ¶3. In January 2015, Yahoo involuntarily terminated
 7 fewer than 50 people, including Ard, at its Sunnyvale location. *Id.*

8 **III. YAHOO IS ENTITLED TO SUMMARY JUDGMENT OF**
 9 **PLAINTIFFS' CLAIMS**

10 **A. Plaintiffs' Gender Discrimination Claims Fail Because They**
 11 **Cannot Establish A Prima Facie Case Of Gender Discrimination,**
 12 **Yahoo Had Legitimate Reasons To Terminate Plaintiffs'**
 13 **Employment And There Is No Evidence Of Pretext.**

14 To establish a *prima facie* case of discrimination under either Title VII or the
 15 FEHA, each Plaintiff must show that "(1) he was a member of a protected class, (2)
 16 he was qualified for the position he sought or was performing competently in the
 17 position he held, (3) he suffered an adverse employment action, such as
 18 termination, demotion, or denial of an available job, and (4) similarly situated
 19 individuals outside the protected class were treated more favorably or some other
 20 circumstance suggests discriminatory motive." *McDonnell Douglas Corp. v.*
 21 *Green*, 411 U.S. 792, 802 (1973).

22 Once a plaintiff establishes a *prima facie* case of gender discrimination, the
 23 burden of production then moves to the employer to provide a nondiscriminatory
 24 reason for terminating the plaintiff. *McDonnell Douglas Corp.* 411 U.S. at 802-3;
 25 *Slatkin*, 88 Cal. App. 4th at 1156. This is a minimal burden and the employer need
 26 only "articulate some legitimate, nondiscriminatory reason" *Board of Trustees*
 27 *of Keene State College v. Sweeney* 439 U.S. 24, 25 (1978), *quoting McDonnell*
 28 *Douglas*, 411 U.S. at 802. "Failure to perform in accordance with the standards set
 by the employer is sufficient to constitute a legitimate business reason for
 termination." *Lewis v. Bayer Corp.*, No. C 03-04403 JSW, 2005 WL 2893869, at

1 *5 (N.D. Cal. Nov. 2, 2005).

2 The burden then shifts to the plaintiff, who must establish pretext through
3 direct or circumstantial evidence. *Vallimont v. Chevron Energy Tech. Co.*, 434 F.
4 App’x 597, 599 (9th Cir. 2011). “[W]hen the plaintiff relies on circumstantial
5 evidence, that evidence must be specific and substantial to defeat the employer’s
6 motion for summary judgment.” *Id.*

7 Plaintiffs cannot establish a *prima facie* case of gender discrimination
8 because they were not performing competently in the positions they held. Yahoo
9 had legitimate bases to terminate Plaintiffs’ employment and Plaintiffs have not and
10 cannot produce evidence that those legitimate bases were a pretext for gender
11 discrimination.

12 1. **Anderson Received Low QPR Rankings And Poor**
13 **Management Assessments From His Direct Reports And, As**
14 **A Result, Was Terminated For Performance Deficiencies.**

15 Summary judgment is proper because Anderson consistently received low
16 QPR scores from his male and female managers and low YEES scores from his
17 direct reports, who had no input in the decision to terminate his employment. As a
18 result, Anderson cannot establish the element of his *prima facie* case that he was
19 performing competently. As detailed above, starting in Q1 of 2013, Anderson
20 never had an above average QPR score. He failed to obtain an “Exceeds” rating
21 (let alone a “Greatly Exceeds rating) from any of his managers, most of whom were
22 men. His poor performance landed him on a list of poorly performing managers
23 and the serial skimmers list, and his QPR scores ranked him in the bottom 4.2% of
24 all Yahoo employees. In addition, in 2012 and 2013, Yahoo Employee
25 Engagement Survey showed that Anderson’s scores from his direct reports were
26 consistently below the scores of other managers in his organization and other
27 managers at Yahoo by significant margins.

28 Anderson contends that because his Q1 2014 QPR score was reduced by
Lieberman from 2.5 to 2.2 during the calibration process, this is evidence of

1 discrimination. The Ninth Circuit has concluded otherwise. In *Anthoine v. N. Cent.*
 2 *Counties Consortium*, 605 F.3d 740, 753 (9th Cir. 2010), the Ninth Circuit applied
 3 the *McDonnell Douglas* framework to a claim of reverse-gender discrimination
 4 under 42 U.S.C. § 1983 and upheld the district court’s grant of summary judgment
 5 to the employer, who had presented evidence of the plaintiff’s deficient
 6 performance.⁴ The plaintiff, a man, had received a “needs improvement” rating
 7 during his last performance review, which was later downgraded to “unsatisfactory”
 8 by a female manager. *Id.* at 746-47. The plaintiff presented evidence that his
 9 female manager concurred in “excellent” ratings for three women and terminated
 10 all three men, including the plaintiff, on the same day. The court found this
 11 evidence “[wa]s not ‘specific and substantial’ and d[i]d not create a triable issue of
 12 fact as to ultimate issue of gender-based discrimination.” *Id.* at 754.

13 Anderson’s contention that the two-tenths reduction in his first quarter 2014
 14 QPR score demonstrates gender discrimination likewise is without merit. Anderson
 15 received consistently low QPR scores from male managers. The slight reduction of
 16 Anderson’s score for Q1 2014 had no impact—Anderson would have remained on
 17 the serial skimmers list and a list of poorly performing managers even without the
 18 reduction. A manager was considered a serial skimmer if his or her rolling four
 19 quarter average or year-to-date average QPR score was lower than 2.5. Such a
 20 score indicated “sustained subaverage performance.” Fagerlund Dep. 58:4-16.
 21 Even if Anderson’s Q1 2014 score had not been changed from 2.5 to 2.2, his four-
 22 quarter average would have been 2.33, identifying him as a serial skimmer.
 23 Likewise, Anderson would have remained on a list of poorly performing managers
 24 because his QPR scores averaged below 2.5. Accordingly, Anderson cannot
 25 establish that he was competently performing in his position, where he had
 26

27 ⁴ Although addressing a different claim, the Court applied the same standard and
 28 burden shifting principals applicable to Plaintiffs’ FEHA and Title VII claims.
 The Court’s analysis compels the same result here.

1 sustained subaverage performance. As such, summary judgment is proper.

2 2. **Yahoo Had Legitimate Business Reasons For the**
3 **Termination of Anderson’s Employment And He Cannot**
4 **Establish Pretext.**

5 Even assuming Anderson could demonstrate he was performing competently,
6 Yahoo had a legitimate business reason to terminate Anderson’s employment. In
7 March and April 2014, Yahoo decided to terminate Anderson’s employment
8 because he was on a list of poorly performing managers. When Anderson
9 requested a leave of absence to attend a fellowship program, Yahoo gave him this
10 opportunity and obtained a special exemption from termination for Anderson.
11 While Anderson was on leave, Ard assumed all of Anderson’s job duties. By
12 November 2014, Yahoo decided to again focus on its poorest performing
13 employees and terminated Anderson’s employment for his low QPR scores and
14 because he was on the bottom 5% list. There is no evidence to suggest that this
15 legitimate business reason for Anderson’s termination is a pretext for
16 discrimination against males, and indeed, Liberman’s track record for hiring males
17 and the gender composition statistics of the Media Organization over Savitt’s tenure
18 belie any such contention.

19 3. **Yahoo Terminated Ard’s Employment Because His**
20 **Manager Felt He Was Not Adding Sufficient Value**
21 **Commensurate With The Role Of Senior Director and**
22 **There Is No Evidence Of Pretext.**

23 After removing Ard from his position running the Yahoo Home Page and
24 assigning him to run the Commerce Properties, Liberman was unable to ascertain
25 the value that he brought to Yahoo in his Senior Director role. She therefore
26 decided to terminate his employment. “Failure to perform in accordance with the
27 standards set by the employer is sufficient to constitute a legitimate business reason
28 for termination.” *Lewis*, 2005 WL 2893869, at *5. In *Lewis*, the plaintiff was
 terminated for leaving unverified blanks on paperwork, having excessive absences,
 and failing to perform an independent mathematical calculation during production,

1 as her duties required, among other disciplinary issues. *Id.* at *1. The court granted
 2 summary judgment to the employer, finding that the plaintiff failed to present
 3 evidence that other employees were similarly situated, engaged in similar conduct,
 4 or “had a similar record of consistently poor performance.” *Id.* at *4. In evaluating
 5 the defendant’s proffered reason for plaintiff’s termination, the court expressly
 6 upheld performance deficiencies as a legitimate basis for termination. The court
 7 found the plaintiff “failed to perform her duties in compliance with [the
 8 defendant’s] expectations and standard operating procedures.” *Id.* at *5.

9 At the time of his termination, Ard’s rolling four quarter QPR average was
 10 2.50 and his year-to-date average was 2.30. Fagerlund Dep. 58:4-16; Khroad Dep.
 11 Exh. 10, 81:11-13. Moreover, Ard’s scores were trending “Down.” Khroad Dep.
 12 Exh. 10; Fenice Dep. Exh. 33. Ard failed to perform in compliance with Yahoo’s
 13 expectations and he was terminated as a result. There is no evidence to suggest that
 14 the legitimate business reason for Ard’s termination is a pretext for discrimination,
 15 and, as with Anderson’s termination, Liberman’s track record and the gender
 16 composition statistics of the Media Organization belie any such contention

17 **4. Neither Plaintiff Was Qualified For The EIC Autos Role**
 18 **And The Fact That They Were Not Considered Based On**
 19 **Their Lack Of Qualifications Does Not Demonstrate Pretext.**

20 Plaintiffs contend that Yahoo’s failure to appoint either to the Autos Editor-
 21 In-Chief role is evidence of gender discrimination. However, neither Ard nor
 22 Anderson had the high-profile status Yahoo sought for this position. Fenice Dep.
 23 72:10-19; Savitt Dep. 68:18-69:10, 69:1-3, 69:11-14. In addition, the Autos Editor-
 24 In-Chief position would have been a demotion for Anderson, who oversaw Yahoo
 25 Autos and other Commerce Properties in his role as Editorial Director. Anderson
 26 Dep. 154:16-19. Likewise, the Autos Editor-In-Chief position would have been a
 27 demotion for Ard. Fenice Dep. 72:10-19.

28 In *Morgan v. Regents of Univ. of Cal.*, 88 Cal. App. 4th 52, 57 (2000), the
 plaintiff brought a race-based discrimination claim after he was laid off following a

1 budget reduction and not rehired despite his application to multiple positions. In
2 upholding summary judgment for the employer, the Court of Appeal noted that an
3 employee cannot “simply show the employer’s decision was wrong, mistaken, or
4 unwise. Rather, the employee must demonstrate such weaknesses, implausibilities,
5 inconsistencies, incoherencies, or contradictions in the employer’s proffered
6 legitimate reasons for its action that a reasonable factfinder could rationally find
7 them ‘unworthy of credence’.” *Id.* at 75. The court reasoned that “[t]he process by
8 which individuals’ qualifications and work performance are measured against job
9 requirements is often at least partially a subjective one on the part of the evaluator
10 but the plaintiff must do more than establish a *prima facie* case and deny the
11 credibility of the defendant’s witnesses.” *Id.* at 75-76 (citations omitted).

12 Since Yahoo initially offered the Autos Editor-In-Chief position to a man,
13 this negates any inference that Yahoo was only looking for a woman for the
14 position. Nor can Plaintiffs demonstrate that Sharon Carty, a well-known auto
15 blogger with an established following was less qualified than either Plaintiff to
16 serve in this role. While evaluation of candidates’ qualifications may be subjective,
17 Plaintiffs must do more than assert subjectivity as their basis for establishing
18 discrimination. They cannot.

19 **B. Plaintiffs’ Claims For Wrongful Termination In Violation Of**
20 **Public Policy Fail Because They Were Not Terminated Because**
21 **They Are Male.**

22 A wrongful discharge claim requires (1) a public policy; (2) conduct by the
23 employer in violation of public policy, such as termination or other adverse
24 employment action, in retaliation for an employee’s participation in legally
25 protected activity or refusal to commit an illegal act; and (3) damages resulting
26 from the adverse employment action. *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d
27 167, 174, 178 (1980). A FEHA violation may support a *Tameny* claim. *Sarkizi v.*
28 *Graham Packaging Co.*, No. 1:13-CV-1435-AWI-SKO, 2014 WL 2506600, at *7
(E.D. Cal. June 3, 2014). However, in order to establish wrongful discharge on this

1 basis, Plaintiffs must show that discriminatory animus motivated their terminations.
2 As discussed *supra*, they cannot. Accordingly, summary judgment is proper.

3 C. **Plaintiffs Cannot Assert Discrimination Claims Under California’s**
4 **Unfair Competition Law.**

5 Plaintiffs allege that Yahoo violated California Unfair Competition Law
6 (“UCL”) when it discriminated against them based on their gender. Not only did
7 Yahoo not discriminate against them based on their gender, Plaintiffs cannot assert
8 a claim of discrimination under the UCL. The UCL “borrows” violations of other
9 laws and treats them as unlawful practices independently actionable under the UCL.
10 *Farmers Ins. Exch. v. Superior Ct.*, 2 Cal. 4th 377, 383 (1992). The only available
11 remedies are restitution and injunctive relief. *Madrid v. Perot Sys. Corp.*, 130 Cal.
12 App. 4th 440, 467 (2005). Damages are not available. *Korea Supply Co. v.*
13 *Lockheed Martin Corp.*, 29 Cal. 4th 1144 (2003). Nor are penalties. *Barnett v.*
14 *Washington Mut. Bank, FA*, 2004 WL 2857283 *2 (N.D. Cal. Oct. 12, 2004).

15 Thus, Plaintiffs cannot assert a claim for damages for violation of the UCL.
16 A claim for damages is not a claim for restitution under the UCL. *Bank of the West*
17 *v. Superior Ct.*, 2 Cal. 4th 1254, 1266 (1992). An order for “restitution” is an order
18 “compelling a UCL defendant to return money obtained through an unfair business
19 practice to those persons in interest *from whom the property was taken*, that is, to
20 persons who had an ownership interest in the property or those claiming through
21 that person.” *Korea Supply*, 29 Cal. 4th at 1149 (emphasis added). The purpose of
22 restitution under the UCL is “to restore the status quo by returning to the plaintiff
23 funds in which he or she has an ownership interest.” *Korea Supply*, 29 Cal. 4th at
24 1149. *Kraus*, 23 Cal. 4th at 126 (stating that relief under the UCL is available to
25 “restore to the parties in interest money or property taken by means of unfair
26 competition”);, 23 Cal. 4th at 176. The UCL does *not* authorize a monetary remedy
27 where the plaintiff does not have any ownership interest in the money sought.
28 Therefore, disgorging money from an employer that is “neither money taken from a

1 plaintiff nor funds in which the plaintiff has an ownership interest,” is “not an
2 authorized remedy in an individual action under the UCL.” *Korea Supply*, 29 Cal.
3 4th at 1140. As such, damages to which Plaintiff has no ownership interest – such
4 as lost wages under FEHA are not recoverable under the UCL as restitution.

5 In addition, a former employee lacks standing to pursue prospective remedies
6 such as injunctive relief. A plaintiff has standing to seek injunctive relief if he can
7 show a likelihood that he will be harmed by future misconduct; he cannot seek an
8 injunction if he only complains of past harm. *Madrid*, 130 Cal. App. 4th at 463.

9 **D. Plaintiffs’ Terminations Did Not Trigger WARN Or Cal-WARN.**

10 Pursuant to Labor Code section 1401, “[a]n employer may not order a mass
11 layoff, relocation, or termination at a covered establishment unless, 60 days before
12 the order takes effect, the employer gives written notice of the order” Cal.
13 Labor Code § 1400(a). A “mass layoff” is defined as termination of 50 or more
14 employees during any 30-day period from a single location. Cal. Labor Code
15 § 1440(d). Similarly, Federal WARN requirements apply to layoffs of at least 500
16 full-time employees from a single location or 50 employees and 33% of the work
17 force from a single location. 29 USC § 2101, *et seq.* Yahoo did not involuntarily
18 terminate from its Sunnyvale office where Plaintiffs worked a sufficient number of
19 employees to trigger liability under WARN or Cal-WARN. Brotherton Dec. ¶3.
20 Accordingly, Plaintiffs cannot establish that Yahoo violated WARN or Cal-WARN.

21 **E. Plaintiffs Cannot Seek Declaratory Relief Because They Are**
22 **Former Employees, and Because There Is No Basis For Their**
23 **Claims.**

24 Plaintiffs seek declaratory relief “concerning Defendant Yahoo’s QPR
25 Process, including Plaintiff’s rights and remedies under the WARN Acts and
26 pursuant to the Declaratory Judgment Act (28 USC §§ 2201-2202).” Ard Complaint
27 ¶ 70; Anderson Complaint ¶ 75. In support of this claim, Plaintiffs seek
28 declarations that (1) Yahoo’s officers and directors are “personally liable” for
violations of the WARN Acts; (2) that the QPR process violated the WARN Acts;

1 (3) that Yahoo used the QPR process to engage in discrimination; and (4) that
 2 Yahoo breached its legal and contractual obligations to employees via the QPR
 3 process. Ard Complaint ¶¶ 70-76; Anderson Complaint ¶¶ 75-80.

4 Here, Plaintiffs are no longer employees of Yahoo and thus not subject to the
 5 QPR process. In *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033,
 6 1038 (9th Cir. 2014), the named plaintiff brought wage and hour claims on the basis
 7 of misclassification. *Id.* In reversing the district court’s certification of claims for
 8 injunctive and declaratory relief, the Ninth Circuit found that the plaintiff, a former
 9 employee, lacked standing to seek prospective relief because he could no longer
 10 benefit from such relief. *Id.* at 1048. The same is true here. Plaintiffs are no
 11 longer employees and cannot benefit from any declaratory judgment related to the
 12 QPR process, where they are no longer subject to that process. Likewise, Plaintiffs’
 13 claims for declaratory relief based upon alleged violations of the WARN Acts do
 14 seek relief against an ongoing violation that impacts them. The Declaratory
 15 Judgment Act was not intended as a “medium for securing an advisory opinion.”
 16 *MedImmune, Inc.*, 549 U.S. at 139. Plaintiffs’ claims are a mere rehashing of their
 17 prior claims and do not demonstrate a continuous, remediable harm subject to
 18 declaratory relief.⁵

19 Moreover, where the WARN Acts provide specific statutory remedies for
 20 violations, declaratory relief is improper. *See Staudt v. Glastron*, 92 F.3d 312, 314
 21 (5th Cir. 1996) (“The Exclusive remedy for violation of [WARN] is a civil action
 22 for statutory damages and attorney’s fees.”). Accordingly, there is no basis on
 23 which Plaintiffs may seek declaratory relief with respect to their WARN claims
 24 where such relief is precluded by statute.

25 _____
 26 ⁵ Although requesting declaratory relief in addition to damages is not prohibited,
 27 where the request serves no remedial purpose, such claims are both
 28 “unnecessary and inappropriate.” *Roark v. S. Iron R-1 Sch. Dist.*, 573 F.3d 556,
 562 (8th Cir. 2009). Plaintiffs’ claims for declaratory relief serve no remedial
 purpose, especially where their underlying claims lack merit.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: August 25, 2017

MORGAN, LEWIS & BOCKIUS LLP

By /s/ Melinda S. Riechert
Melinda S. Riechert
Attorneys for Defendant