

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

**GREGORY J. ANDREWS,
Plaintiff,**

v.

**U.S. BANK NATIONAL
ASSOCIATION, et al.,
Defendants.**

Case No. 8:22-cv-00117-DOC-DFM

**ORDER GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY
JUDGMENT [37]**

1 Before the Court is a Motion for Summary Judgment (“Motion” or “Mot.”) (Dkt. 37)
2 brought by Defendants U.S. Bank National Association (“U.S. Bank”) and U.S. Bancorp
3 Investments, Inc. (“USBI”) (“Defendant” or “Defendants”). The Court heard oral argument on
4 the Motion on October 17, 2022. Having reviewed the briefing submitted by the parties, the
5 Court **GRANTS** Defendant’s Motion.

6 7 **I. Background**

8 **A. Facts¹**

9 Plaintiff began work at U.S. Bank on June 16, 2017 as a Wealth Management Consultant.
10 Defendant’s Statement of Uncontroverted Facts (“SUF”) (Dkt. 52) ¶ 2. Plaintiff was based out
11 of U.S. Bank’s Private Wealth Management Office in Newport Beach, California. Rod Dolan
12 was Plaintiff’s direct supervisor from July 2017 through Plaintiff’s termination on December 16,
13 2019. *Id.* ¶¶ 4–8, 324. At the time of his termination, Plaintiff’s title was Senior Vice President,
14 Managing Director of the Business Owners Advisory Services group (“BOAS”). *Id.* ¶ 3. As a
15 Managing Director, Plaintiff was responsible for maintaining relationships with customers,
16 business development, and business transition seminars. *Id.* ¶ 9. Plaintiff engaged clients for,
17 and oversaw, two main kinds of work: strategic business assessments and merger and
18 acquisition (M&A) coaching. *Id.* ¶ 10. In overseeing the strategic business assessments and
19 M&A engagements, Plaintiff oversaw two employees—Edgars Gulbis and Ary Aptin. *Id.* ¶ 14;
20 Pl’s Dep. 37:16- 25. In 2019, Plaintiff was able to perform his job without any modification to
21 the workplace. *Id.* ¶ 88; Plaintiff’s Deposition Transcript (“Pl.’s Dep.”) (Dkt. 59-1) 218:9-13. He
22 was also able to do his job as a Managing Director and claims that he was one of the most
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25 ¹ Unless indicated otherwise, to the extent any of the facts are identified as disputed in Plaintiff’s Statement of Genuine
26 Disputed Material Facts (“SGDMF”) (Dkt. 55-1), the Court concludes that Plaintiff proffers no evidence to dispute the facts
27 and considers them undisputed or otherwise immaterial for purposes of resolving this Motion. See Fed. R. Civ. P. 56(e)(2);
28 L.R. 56- 3. See also *Nelson v. Pima Community College*, 83 F.3d 1075, 1081-82 (9th Cir. 1996) (“[M]ere allegation and
speculation do not create a factual dispute for purposes of summary judgment.”). The Court relies on sworn deposition
testimony on material points. *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991). Further, to the extent the
Court relies on evidence to which the parties have objected, the Court has considered and overruled those objections. As to
any remaining objections, the Court finds it unnecessary to rule on them because the Court does not rely on the disputed
evidence.

1 successful Managing Directors—rating his own performance as “excellent.” *Id.* ¶ 90. According
2 to Plaintiff, he had stellar performance reviews. *Id.* ¶ 91.

3 Plaintiff has motor tics that present in several ways, including shrugging his shoulder,
4 facial tics, and flipping his wrist. SUF ¶¶ 21–24 . In 2018, Plaintiff sought treatment for his
5 motor tics for the first time and was diagnosed with an unspecified tic disorder. Deposition of
6 Dr. Comeau (“Comeau Dep.”) (Dkt. 59-2) 23:10-14. The treating psychiatrist also identified an
7 anxiety disorder that influenced Mr. Andrews’s motor tics. *Id.* No treating psychiatrist, however,
8 has diagnosed Plaintiff with Tourette’s, and Plaintiff’s medical records reflect no history of
9 Plaintiff having a verbal tic. SUF ¶¶ 36, 41. According to Plaintiff, in 2019, he developed an
10 issue with using his right hand for typing. *Id.* ¶ 58. Nonetheless, he was still able to type and do
11 his job, and did not inform anyone at U.S. Bank, including Rob Dolan, that he had any issue
12 with typing; nor did he request an accommodation for typing. *Id.* ¶¶ 59–60, 62–63. Plaintiff also
13 did not display any outward limitations to anyone at U.S. Bank, including Rob Dolan, in his
14 ability to perform his job or any other limitations on major life activities. *Id.* ¶¶ 64–65. Plaintiff
15 has not been limited by “Tourette’s Syndrome” or a tic condition in his ability to care for
16 himself, to see, to hear, to walk, to stand, to sit, to lift, to speak, to learn, to read, to think, to
17 communicate, to concentrate, or interact with others. *Id.* ¶¶ 66–71, 75–77; Pl.’s Dep. 77:2-16.
18 When asked if his “Tourette’s Syndrome” or a tic condition limited his ability to eat or breathe,
19 Plaintiff identified the following events: He could not eat due to “stress” after meeting with
20 Dolan on October 29; he could not eat on one occasion when he had a bad reaction to the drug;
21 he became out of breath at the October 30, 2019 meeting. *Id.* ¶¶ 83–84. When asked if his tic
22 disorder or “Tourette’s Syndrome” ever limited his ability to sleep, Plaintiff testified that he
23 currently wakes up intermittently to “roll over” and “give [himself] shoulder relief and averred
24 that is the only limitation he has on sleep.” SUF ¶ 86.

25 On approximately October 2, 2019, Edgars Gulbis raised concerns to Rod Dolan about
26 working with Plaintiff and about Plaintiff’s work with clients. *Id.* ¶ 95. In a meeting on October
27 29, 2019, between Plaintiff and Rob Dolan, Dolan provided some positive feedback on
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1 Plaintiff's performance as well as concerns regarding Plaintiff's performance, including
2 concerns from Dolan's earlier conversation with Edgars Gulbis. *Id.* ¶¶ 97–99. At the October 29,
3 2019, meeting with Plaintiff, Rod Dolan told Plaintiff that Edgars Gulbis and Ary Aptin would
4 be a shared resource between Plaintiff and other Managing Directors, rather than being solely
5 dedicated to Plaintiff's projects. *Id.* ¶ 100.

6 On October 30, 2019, Plaintiff left Rod Dolan a voicemail that said *inter alia*: “In light of
7 your decisions and the fact that both Ary [Aptin] and Edgars[Gulbis] are more than likely gonna
8 work with other groups, that I really shouldn't be responsible for their time. I can't supervise
9 people when I don't know what they're doing. So I think they should report to you.” *Id.* ¶¶ 113-
10 114. That same day, Plaintiff called an unplanned meeting with Edgars Gulbis and Ary Aptin
11 and confronted them about Gulbis' reports to Dolan. *Id.* ¶¶ 127, 133–34. During that meeting,
12 Plaintiff used contextualized profanity. *Id.* ¶ 136. Following the confrontation, Gulbis was left in
13 tears and immediately reported Plaintiff's behavior to Rochelle Ward, U.S. Bank's head of
14 Private Wealth Management for the Orange County, CA office, Rod Dolan, and Human
15 Resources. *Id.* ¶¶ 138, 141–47. That day, Rod Dolan also informed Debby Gabris, an HR
16 Business Partner with U.S. Bank based out of St. Louis, Missouri, that there had been a meeting
17 between Plaintiff and two BOAS staff members, Ary Aptin and Edgars Gulbis, and that Plaintiff
18 had yelled at Gulbis and Aptin. *Id.* ¶¶ 150, 165.

19 On October 31, 2019, Edgars Gulbis informed Debby Gabris—and she recorded in her
20 notes—that Plaintiff “is inappropriate, he can be very vindictive, narcissistic, combative,
21 unprofessional, threatening. It can really change sometimes, like yesterday, he never comes back
22 and apologizes.” *Id.* ¶ 173.

23 On November 1, 2019, Debby Gabris interviewed Ary Aptin. *Id.* ¶ 176. Aptin reported to
24 Debby Gabris—and she recorded in her notes—that the October 30, 2019 confrontation, “[t]he
25 whole meeting [Plaintiff] was talking, he was virtually just yelling at us.” Aptin also reported
26 being “frightened during the meeting,” and being unsure “what [Plaintiff] was going to do, he
27 used the f word a lot. . . . [Plaintiff] can be super nice, but then he can get very volatile, I almost
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1 felt like I was going to have to jump in between the [two] of them as it was getting pretty
2 heated.” *Id.* ¶¶ 177–78. Aptin also reported that, during the October 30, 2019, confrontation,
3 Plaintiff said, “You don’t think that I know you talked to Rod about us not taking that deal?” *Id.*
4 ¶ 179.

5 That same day, Gabris attempted to set up an interview with Plaintiff on November 4,
6 2019, which Plaintiff asked to delay until after his doctor’s appointment. *Id.* ¶¶ 180–181. Gabris
7 interviewed Plaintiff on November 5, 2019. *Id.* ¶ 183. When she asked Plaintiff about his
8 demeanor on October 30, 2019, he stated that he was “clearly upset,” that he “didn’t sleep on
9 Tuesday night, kept waking up, couldn’t eat that night or the next morning,” and “couldn’t take
10 [his] pills since [he] had not eaten, and you must take them on a full stomach.” *Id.* ¶ 188.
11 Plaintiff did not tell Gabris what kind of medication he took. *Id.* ¶ 189. Plaintiff told Gabris that
12 Edgars was “undermining” him, so he “confronted him on it” and “raised [his] voice.” *Id.* ¶ 193.

13 On November 7, 2019, Gabris informed Dolan that the U.S. Bank Central Investigations
14 Team (CIT) would be taking over the Human Resources investigation because it could qualify
15 for retaliation. *Id.* ¶ 197. Jennifer Strada began the CIT investigation on November 7, 2019. *Id.* ¶
16 199. Strada conducted interviews with Edgars Gulbis, Ary Aptin, Rod Dolan, Rochelle Ward,
17 and Plaintiff. *Id.* ¶ 205.

18 During Strada’s interview of Edgars Gulbis, Gulbis told her—and she documented—
19 that, during the October 30, 2019 confrontation, Plaintiff “was getting more combative and you
20 could see the ‘anger in his eyes.’” *Id.* ¶ 215. According to Gulbis, Plaintiff used profanity and
21 told Gulbis, “[D]on’t you *** think I don’t know who it is.” *Id.* ¶ 216. During Strada’s interview
22 of Ary Aptin, Aptin told her—and she documented—that, during the October 30, 2019
23 confrontation, Plaintiff was “visibly upset,” “[b]ecame more aggressive and got louder w/
24 [Gulbis],” and “leaned forward and pointed his finger at [Gulbis] in an aggressive manner.” *Id.* ¶
25 219. Gulbis informed Strada—and everyone else with whom he spoke about the October 30,
26 2019 confrontation—of his belief that Plaintiff blew up and yelled at him because he reported
27 concerns to Rod Dolan. *Id.* ¶ 218.

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1 During Strada’s interview of Rochelle Ward, Ward told her—and she documented—that
2 Ward was familiar with Gulbis feeling pushed around by Plaintiff, that there were issues with
3 Plaintiff embellishing and overpromising to clients, that he gets “irritated easily” and that
4 Plaintiff had a “tick.” *Id.* ¶ 225–27. After Ward told her of Plaintiff’s “tick,” Strada wrote
5 “(Tourette’s?)” in her notes because Strada had a childhood friend whose father had Tourette’s
6 and so wondered whether the tick might be associated with this personal knowledge of
7 Tourette’s. *Id.* ¶ 228. Strada, however, did not connect any speculation that a tic might be
8 associated with Tourette’s with Plaintiff’s actions during the October 30, 2019, confrontation
9 because, according to Strada, she was investigating what believed to be voluntary behavior such
10 as: Plaintiff deciding to schedule an in-person meeting, Plaintiff confronting Edgars Gulbis for
11 undermining him to Rod Dolan, Plaintiff making specific statements in context, and Plaintiff
12 using profanity in context. *See* Declaration of Jennifer Strada (“Strada Decl.”) (Dkt. 39) ¶ 14,
13 Ex. H (Interview Notes with Rochelle Ward). Strada also did not tell Gabris, Dolan, or anyone
14 else that she had wondered whether the tics Ward mentioned might have been associated with
15 Tourette’s, or mention that possibility to anyone. *SUF* ¶ 230. Dolan also never saw Strada’s
16 underlying interview notes from her investigation. *Id.* ¶ 222.

17 The only reference Plaintiff made to his medication made in his interview with Strada
18 was after discussing the October 29, 2019 meeting with Rod Dolan, which Plaintiff said “upset
19 him so much” that he “did not sleep” or “take his meds.” *Id.* ¶¶ 233–34. Plaintiff told Strada that
20 he “didn’t take his meds for tics.” *Id.* ¶ 235. When Strada asked Plaintiff about the October 30
21 meeting with Edgars Gulbis and Ary Aptin, Plaintiff did not raise the issue of medication again
22 or discuss any medical condition. *Id.* ¶¶ 238–39. When Strada asked Plaintiff if there was any
23 additional information that “might be relevant” or could “better help [her] understand what
24 occurred,” Plaintiff did not mention taking medication, or a failure to take medication, or any
25 medical condition. *Id.* ¶¶ 240–42. Strada then prepared a report concluding that the investigation
26 substantiated the allegation of Plaintiff’s retaliation against Gulbis for raising concerns to Dolan
27 and recommended termination of Plaintiff’s employment. *Id.* ¶ 257.

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1 Plaintiff learned that his employment with U.S. Bank was terminated on December 16, 2019
2 during a phone call with Strada, Gabris, and Dolan. *Id.* ¶¶ 324–327. During the December 16,
3 2019 meeting, Plaintiff suggested that instead of being terminated, he should be put on disability
4 leave as a result of his medication and condition. Pl.’s Dep. 25:21-26:5. Although the
5 documented reason for Plaintiff’s termination was retaliation in violation of U.S. Bank policy,
6 *id.* ¶ 325, Plaintiff believes he was discriminated against as a result of his Tourette’s condition.
7 *Id.* ¶ 341. None of Plaintiff’s treating physicians have attributed the October 30, 2019,
8 confrontation to taking or skipping medication, to a tic disorder, or to a Tourette’s Syndrome. *Id.*
9 ¶¶ 337–339. Plaintiff also never asked for a reasonable accommodation before the termination
10 meeting and did not inform anyone at U.S. Bank that he was disabled before the termination
11 meeting. *Id.* ¶ 390.

12 **B. Procedural History**

13 Plaintiff filed his Complaint in the Superior Court of California, County of Orange on
14 December 15, 2021. (Dkt. 1-1). On January 24, 2022, the action was removed to this Court.
15 (Dkt. 1). Plaintiff’s complaint alleges the following causes of action against Defendants: (1)
16 disability discrimination in violation of the California Fair Employment and Housing Act
17 (FEHA), (2) failure to provide accommodations in violation of California’s Fair Employment
18 and Housing Act, (3) failure to engage in an interactive process to determine an effective and
19 reasonable accommodation in violation of California’s Fair Employment and Housing Act, (4)
20 wrongful termination in violation of public policy, (5) unfair and fraudulent business acts or
21 practices in violation of California Business and Professions Code Section 17200. Plaintiff
22 alleges an additional cause of action against USBI: failure to provide copies of employee
23 personnel records in violation of California Labor Code Section 1198.5. *See generally*
24 Complaint.

25 Defendants filed the present Motion for Summary Judgment on September 19, 2022.
26 (Dkt. 37). Plaintiff filed his Opposition to Defendant’s Motion (“Opp’n”) on September 26,
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1 2022. (Dkt. 55). Defendants filed their Reply (“Reply”) on October 3, 2022. (Dkt. 68). The
2 Court heard oral arguments on the Motion on October 17, 2022.

3 4 **I. Legal Standard**

5 Summary judgment is proper if “the movant shows that there is no genuine dispute as to
6 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
7 56(a). Summary judgment is to be granted cautiously, with due respect for a party’s right to have
8 its factually grounded claims and defenses tried to a jury. *Celotex Corp. v. Catrett*, 477 U.S.
9 317, 327 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A court must view
10 the facts and draw inferences in the manner most favorable to the non-moving party. *United*
11 *States v. Diebold, Inc.*, 369 U.S. 654, 655 (1992); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d
12 1156, 1161 (9th Cir. 1992).

13 The moving party bears the initial burden of demonstrating the absence of a genuine issue
14 of material fact for trial, but it need not disprove the other party’s case. *Celotex*, 477 U.S. at 323.
15 When the non-moving party bears the burden of proving the claim or defense, the moving party
16 can meet its burden by pointing out that the non-moving party has failed to present any genuine
17 issue of material fact as to an essential element of its case. *See Musick v. Burke*, 913 F.2d 1390,
18 1394 (9th Cir. 1990).

19 Once the moving party meets its burden, the burden shifts to the opposing party to set out
20 specific material facts showing a genuine issue for trial. *See Liberty Lobby*, 477 U.S. at 248–49.
21 A “material fact” is one which “might affect the outcome of the suit under the governing
22 law” *Id.* at 248. A party cannot create a genuine issue of material fact simply by making
23 assertions in its legal papers. *S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde &*
24 *Co., Inc.*, 690 F.2d 1235, 1238 (9th Cir. 1982). Rather, there must be specific, admissible,
25 evidence identifying the basis for the dispute. *See id.* The Court need not “comb the record”
26 looking for other evidence; it is only required to consider evidence set forth in the moving and
27 opposing papers and the portions of the record cited therein. Fed. R. Civ. P. 56(c)(3); *Carmen v.*
28 *S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001). The Supreme Court has held that

1 “[t]he mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence
2 on which the jury could reasonably find for [the opposing party].” *Liberty Lobby*, 477 U.S. at
3 252.

4 **II. Discussion**

5 Defendants move for summary judgment pursuant to Fed. R. Civ. P. 56 and Local Rule
6 56 on all causes of action in Plaintiff’s Complaint: (1) disability discrimination in violation of
7 the California FEHA; (2) failure to accommodate disability; (3) failure to engage in the
8 interactive process to accommodate disability; (4) wrongful termination in violation of public
9 policy; (5) violation of California Business and Professions Code Section 17200; and (6)
10 violation of California Labor Code Section 1198.5. *See* Motion at 2.

11 Specifically, Defendants argue they are entitled to summary judgment on the grounds that (1)
12 Plaintiff’s disability discrimination claim fails because Plaintiff cannot establish a prima facie
13 case of disability discrimination, Defendants terminated Plaintiff for a legitimate, non-
14 discriminatory reason, and Plaintiff cannot make the requisite showing of pretext; (2) Plaintiff’s
15 failure to accommodate and interactive process claims fail because Plaintiff did not request a
16 reasonable accommodation, and now fails to identify a reasonable accommodation; (3)
17 Plaintiff’s wrongful termination and unfair competition claims fail because they are predicated
18 on the above claims; (4) Plaintiff’s personnel records claim fails because Defendant provided
19 Plaintiff’s personnel record within 30 days of his request; and (5) Plaintiff’s claim for punitive
20 damages fails because he lacks clear and convincing evidence that a managing agent of
21 Defendant acted with oppression, malice, or fraud. *See generally* Motion.

22 For reasons set forth below, the Court GRANTS summary judgment in favor of
23 Defendants and DISMISSES Plaintiff’s claims in their entirety.

24 **A. Disability Discrimination Claim**

25 Under FEHA, it is unlawful for an employer to discharge any person from employment
26 because of a physical or mental disability, unless the employee is unable to perform his or her
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1 essential duties even with reasonable accommodations. Cal. Gov. Code §§ 12940(a), (a)(2).
2 California courts have adopted the three-step burden-shifting analysis on summary judgment of
3 a disability discrimination claim under the FEHA: (1) “the plaintiff bears the burden of
4 establishing a prima facie case of discrimination”; (2) “the burden then shifts to the employer to
5 offer a legitimate, nondiscriminatory reason for the adverse employment action”; and (3) if the
6 employer does so, “the plaintiff must offer evidence” of pretext sufficient to withstand summary
7 judgment. *Alamillo v. BNSF Ry. Co.*, 869 F.3d 916, 920 (9th Cir. 2017).

8 A prima facie case for disability discrimination requires the plaintiff to show: (1) he
9 suffers from a disability; (2) he is otherwise qualified to do his job; and (3) he was subjected to
10 adverse employment action because of his disability. *Faust v. California Portland Cement Co.*,
11 150 Cal. App. 4th 864, 886 (2007).

12 Under FEHA, the definition of mental disability “includes any mental or psychological
13 disorder or condition that limits a major life activity. Cal Code Regs. Tit. 2, § 11065(d)(1).
14 Physical disability includes having a physiological disease, disorder, or condition that, by
15 affecting the neurological or musculoskeletal body systems, special sense organs or skin, limits
16 a major life activity. Cal. Gov. Code § 12926 (k)(1)(A), (B). A condition “limits a major life
17 activity if it makes the achievement of the major life activity difficult.” Cal Govt. Code §
18 12926(m)(B)(ii). “Major life activity” is construed broadly and includes physical, mental, and
19 social activities, and working.” Cal Govt. Code § 12926 (k)(1)(B)(iii).

20 The Court finds a genuine dispute about whether Plaintiff suffers from a disability,
21 specifically whether Plaintiff’s tic condition made achievement of sleep difficult. Although
22 Plaintiff has never testified that he was limited in his ability to sleep *during* his employment
23 with U.S. Bank, Plaintiff’s expert testimony reveals that he suffers from a motor tic condition
24 that impairs his ability to sleep. (Dkt. 59-3 at 17). *See Reese v. Barton Healthcare Systems*, 693
25 F. Supp. 2d 1170, 1181 (E.D. Cal. 2020) (Plaintiff’s declaration that she was unable to sleep
26 more than 2-4 hours four to six days a week demonstrated a material fact dispute).

1 The Court also finds a genuine dispute as to the second element regarding whether
2 Plaintiff was otherwise qualified to do his job. To show that Plaintiff was otherwise qualified to
3 do his job, Plaintiff must prove he “could perform the essential duties of [his] job with or
4 without reasonable accommodations.” *Pietro v. Walt Disney Co.*, 2012 WL 4755415, at *7
5 (C.D. Cal. Oct. 4, 2012). The record demonstrates that Plaintiff was largely successful in his
6 role, receiving positive performance reviews in 2017 and 2018. SGDMF ¶¶ 11–12 (undisputed
7 by Defendants).

8 The Court, however, finds no genuine dispute as to the third element of Plaintiff’s prima
9 facie case—that the adverse employment action was “because of” a disability. This element
10 requires Plaintiff to prove his disability was “a substantial motivating reason” for Defendant’s
11 decision to terminate him. *Alamillo*, 869 F.3d 916 at 920. “An adverse employment decision
12 cannot be made ‘because of’ a disability, when the disability is not known to the employer.”
13 *Brundage v. Hahn*, 57 Cal. App. 4th 228, 236 (1997); *Avila*, 165 Cal. App. 4th at 1247. “[A]n
14 employer ‘knows an employee has a disability when the employee tells the employer about his
15 condition, or when the employer otherwise becomes aware of the condition, such as through a
16 third party or by observation.’ *Faust*, 150 Cal. App. 4th at 887. “While knowledge of [a]
17 disability can be inferred from the circumstances, knowledge will only be imputed to the
18 employer when the fact of disability is the only reasonable interpretation of the known facts.”
19 *Brundage*, 57 Cal. App. 4th at 237. The threshold issue is whether there is direct evidence that
20 the motive for the Defendant’s conduct was related to the Plaintiff’s physical or mental
21 condition. *Glynn v. Superior Court*, 42 Cal. App. 5th 47, 53 (2019).

22 According to Plaintiff, Defendant’s knowledge of his disability can be inferred from six
23 separate incidents where Plaintiff purportedly attempted to notify investigators of his condition,
24 and that Defendant turned a blind eye towards Plaintiff’s disability. Opp’n at 10, 23. None of
25 these incidents, however, provide enough factual support for Plaintiff’s allegations to overcome
26 Defendant’s Motion.

1 First, Plaintiff claims that during his interview with Gabris on October 31, he informed
2 Gabris that he “believed his behavior was because he was unable to take medications to treat his
3 disability.” Opp’n at 10. Plaintiff misstates the record regarding his conversation with Gabris.
4 Plaintiff does not dispute that he spoke with Gabris on November 5 and reported to her that he
5 “couldn’t take [his] pills since [he] had not eaten, and you must take them on a full stomach.”
6 SUF ¶¶ 188–89. Plaintiff also does not dispute that Plaintiff made any mention of a disability
7 during his interview with Gabris, told Gabris what kind of medication he took, and that Gabris
8 never asked Plaintiff what kind of medication he took. *Id.*

9 Second, Plaintiff points to Strada’s interview with Aptin, where Aptin stated to Strada
10 that Plaintiff was “out of breath” and did not seem well, and that Mr. Andrews told him at the
11 start of the meeting that he had not taken his medication. Opp’n at 11. Despite Aptin’s report,
12 Strada never asked him any follow-up or went back to Mr. Gulbis. *Id.* The mere indication that
13 Plaintiff did not seem well and indicated that he failed to take his medication is insufficient to
14 support an inference that Strada had knowledge of Plaintiff’s disability, as “vague or conclusory
15 statements that reveal only an unspecified incapacity are insufficient to make the employer
16 aware of its obligations under FEHA.” *Avila*, 165 Cal. App. 4th at 1249.

17 Third, before Ms. Strada interviewed anyone, Ms. Gabris told Ms. Strada she thought Mr.
18 Andrews should take a “stress leave.” Opp’n at 11. Gabris’s reference to a “stress leave”
19 provides no indication that she or Strada knew that Plaintiff’s stress was caused by any tic
20 disorder.

21 Fourth, Plaintiff Strada, that he thought his conduct was because of the inability to take
22 his medications that treat his disability. *Id.* He also reported to her that his heart rate was
23 elevated. *Id.* Again, Plaintiff misstates the record by claiming that he told Strada that he needed
24 to take medication “to treat his disability.” Plaintiff does not dispute the fact that, during his
25 conversation with Strada, Plaintiff indicated he “didn’t take his meds for tics,” SUF ¶ 235;
26 SGDMF at 77. Plaintiff also does not dispute telling Strada that he was a healthy person and that
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1 he made no mention of his medication or medical condition when asked about his October 30
2 meeting with Gulbis and Aptin. SUF ¶¶ 236–242; SGDMF at 77–80.

3 Fifth, Rochelle Ward, the person supervising the entire U.S. Bank Private Wealth group
4 in Newport, told Ms. Strada that she thought Mr. Andrews suffered from tics, and Strada made a
5 note herself wondering if Mr. Andrews suffered from Tourette’s. *Id.* Though Strada may have
6 speculated about a possible connection between Plaintiff’s tics and Tourette’s syndrome, this
7 would not lead a reasonable factfinder to conclude that Strada had knowledge of Plaintiff’s
8 disability and acted on that knowledge in her capacity as an investigator. Strada’s testimony
9 indicates that she did not connect any speculation about Tourette’s with Plaintiff’s actions
10 because she was investigating what she believed to be voluntary behavior. SUF ¶ 229. Plaintiff
11 therefore cannot proffer requisite facts to create a genuine dispute about whether Strada’s
12 speculation about his disorder was a substantial motivating reason for her decision to
13 recommend termination.

14 Sixth, at the December 16 meeting where Mr. Andrews was terminated, he asked if he
15 needed to go on disability leave. Opp’n at 11. Plaintiff, however, was offered the opportunity to
16 provide additional information to inform the then-ongoing investigation into his conduct and
17 declined to mention any purported medical condition as a justification of, or need for,
18 accommodation. SUF ¶¶ 240–42. In any event, the decision to discharge Plaintiff was made
19 before the December 16, 2019 meeting between Rod Dolan, Debby Gabris, Jennifer Strada, and
20 Plaintiff. Plaintiff did not inquire about leave until the December 16, 2019 meeting at which his
21 discharge was communicated.

22 None of the six incidents that Plaintiff articulates are sufficient to survive summary
23 judgment. In *Hollis*, the Court of Appeal found that the trial court properly granted summary
24 judgment where the employee failed to provide enough information to put his employer on
25 notice that he was suffering from a qualifying disability before it terminated his employment.
26 *Hollis v. Fed. Express Corp.*, 2015 WL 3610714 at *4, 6 (Cal. Ct. App. June 10, 2015). The
27 Court reasoned that the facts known to the employer at the time it decided to terminate
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1 plaintiff's employment supported a reasonable belief that plaintiff was not, in fact, disabled. *Id.*
2 at *7. For example, plaintiff never provided his employer with documentation or other
3 information showing that he suffered from back pain prior to the incident that gave rise to his
4 termination. *Id.* Plaintiff also never informed anyone at his company that he was suffering from
5 a back condition, or that he could not otherwise perform his job. *Id.*

6 Like in *Hollis*, Plaintiff failed to provide Defendant with reasonable notice of his tic
7 disorder before Defendant made the decision to terminate him. Through the course of his
8 employment with Defendant, Plaintiff never provided documentation about his condition and the
9 effect that it had on his ability to perform. Motion at 25. During the investigation into his
10 conduct on October 30, Plaintiff only made cryptic references to "medications" and "tics"
11 without ever specifying that he required treatment for a disability. Plaintiff also does not dispute
12 that he never told Dolan (who made the decision to terminate) that he was disabled, that he had a
13 tic condition or Tourette's, or that he was taking medication. Motion at 19. Even if Plaintiff can
14 show that Dolan was aware that Plaintiff had outwardly visible motor tics such as involuntary
15 shoulder shrugging, this does not necessarily establish Dolan's knowledge that Plaintiff was
16 limited in a major life activity. Motion at 20. Plaintiff cannot create a genuine dispute as to
17 Defendant's knowledge of Plaintiff's disability where the fact of disability was not "the only
18 reasonable interpretation of the known facts." *Brundage*, 57 Cal. App. 4th at 237.

19 Because the evidence fails to establish a prima facie case of disability discrimination, the
20 Court need not proceed to the second and third steps of the FEHA's burden-shifting paradigm.

21 Accordingly, the Court GRANTS Defendant's Motion with respect to Plaintiff's
22 Disability Discrimination Claim.

23 **B. Failure to Accommodate and Interactive Process Claim**

24 The FEHA requires employers to make reasonable accommodations for "the known
25 physical or mental disability of an employee." Cal. Gov't Code § 12940(m). Courts have
26 interpreted "reasonable accommodation" within the meaning of FEHA as "a modification or
27 adjustment to the workplace that enables the employee to perform the essential functions of the
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1 job held or desired.” *Nadaf–Rahrov v. Neiman Marcus Grp., Inc.*, 166 Cal. App. 4th 952, 974
2 (2008). The FEHA also requires employers “to engage in a timely, good faith, interactive
3 process with the employee . . . to determine effective reasonable accommodations, if any, in
4 response to a request for reasonable accommodation by an employee ... with a known physical
5 or mental disability or known medical condition.” Cal. Gov’t Code § 12940(n).

6 As established above, Plaintiff cannot show that Defendant had knowledge of his
7 disability. Moreover, Plaintiff cannot identify a reasonable accommodation that “would have
8 been available at the time the interactive process should have occurred.” *Alamillo*, 869 F.3d at
9 922-23; *see also Stevenson v. Abbott Labs*, 2014 WL 12677326, at *5 (C.D. Cal. Mar. 21, 2014)
10 (“the ‘interactive process’ requirement applies only when a reasonable accommodation is
11 possible”). Plaintiff argues that Defendants should have “acknowledged [his behavior on
12 October 30] was an isolated incident,” given him a “strong reprimand,” and allowed him to
13 continue working. *SUF ¶¶ 356–358*. Such suggestions, however, “do not qualify as reasonable
14 accommodations under California law.” *See Alamillo*, 869 F.3d at 922 (“‘Reasonable
15 accommodation’ does not include excusing a failure to control a controllable disability or giving
16 an employee a ‘second chance’ to control the disability in the future.”); *see also Reynoso v.*
17 *Cnty. of Ventura*, 2022 WL 2092909, at *15 (C.D. Cal. Mar. 8, 2022).

18 Accordingly, the Court GRANTS Defendant’s Motion with respect to Plaintiff’s Failure to
19 Accommodate and Interactive Process Claims.

20 **C. Wrongful Termination and Unfair Competition Claims**

21 As the parties agree, Plaintiff’s claims for wrongful termination and unfair competition
22 are predicated on the above claims. *See Opp’n* at 26; *Reply* at 30. Accordingly, they fail for the
23 same reasons. The Court GRANTS Defendant’s Motion with respect to Plaintiff’s Wrongful
24 Termination and Unfair Competition Claim.
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1 **D. Personnel Records Claim**

2 Under Cal. Lab. Code § 1198.5(a), former employees have the right to receive a copy of
3 their personnel records “relating to the employee's performance or to any grievance concerning
4 the employee.” Furthermore, the employer shall make the contents of those personnel records
5 available to the former employees “within 30 calendar days from the date the employer receives
6 a written request” Cal. Lab. Code § 1198.5(b)(1).

7 To establish a violation of § 1198.5, Plaintiff bears the burden of proving the following
8 elements: (1) Defendant was Plaintiff’s employer; (2) Defendant maintains personnel records
9 relating to Plaintiff’s performance or to any grievance concerning Plaintiff; (3) Plaintiff or his
10 representative submitted a written request to Defendant to receive a copy of the maintained
11 personnel records; (4) Defendant did not provide Plaintiff with a copy of the requested personnel
12 records within 30 calendar days of its receipt of Plaintiff’s request; (5) Plaintiff and Defendant
13 did not otherwise agree to a date for production of the requested personnel records outside of the
14 30-calendar-day window; and (6) Defendant had not already complied with a post-discharge
15 request from Plaintiff to inspect or receive a copy of the personnel records within the same year.
16 *See* Cal. Labor Code § 1198.5.

17 The evidence establishes that Plaintiff was a dual employee of both U.S. Bank and USBI.
18 *See* Plaintiff’s Declaration (Dkt. 56), Ex. A (“Dual Employee Acknowledgment Form”). The
19 parties also agree that, on December 29, 2019, Plaintiff requested his personnel file from Gabris,
20 a HR Business Partner at U.S. Bank; that Plaintiff confirmed receipt of the file on January 6,
21 2020, and noted that it was missing his performance reviews; and, that same day, Plaintiff was
22 sent his performance reviews. *SUF ¶¶ 359–62*. Because Plaintiff received the entirety of his
23 personnel file by January 6, 2020, *id.*, U.S. Bank provided Plaintiff’s personnel file within the
24 statutory 30 days of his request. *See* Cal. Lab. Code § 1198.5(k).

25 To the extent Plaintiff seeks to establish that Defendant USBI separately violated Cal.
26 Lab. Code § 1198.5(b)(1), Plaintiff cannot satisfy the remaining elements as to USBI. Plaintiff
27 stated during his deposition that he was not aware that U.S. Bank and USBI had separate HR
28 departments, and that he did not know whether certain employees worked for U.S. Bank or

1 USBI. *See* Pl.’s Dep. 259:19–260:20. Plaintiff thus cannot show that he separately requested a
2 copy of his personnel file from USBI; that USBI maintained separate personnel records relating
3 to Plaintiff’s performance or any grievance concerning Plaintiff; or that USBI failed to provide
4 him with the file within the required time period.

5 Accordingly, the Court GRANTS Defendant’s Motion with respect to Plaintiff’s Personnel
6 Records Claim.

7
8 **E. Punitive Damages**

9 California Civil Code § 3294 provides for punitive or exemplary damages “[i]n an action
10 for the breach of an obligation *not* arising from contract.” Cal. Civ. Code § 3294(a). A plaintiff
11 may recover such damages “in addition to the actual damages,” *id.*, where he establishes “by
12 clear and convincing evidence” that an officer, director, or managing agent of Defendants was
13 guilty of “oppression, fraud, or malice.” *Aquino v. Super. Ct.*, 21 Cal. App. 4th 847, 857-58
14 (1993). “Clear and convincing evidence” requires a finding of “substantial probability.” *In re*
15 *Angelia P.*, 28 Cal. 3d 908, 919 (1981) (the evidence must be “so clear as to leave no substantial
16 doubt [and] sufficiently strong to command the unhesitating assent of every reasonable mind”) (quotation marks and citations omitted).

17 The terms “malice,” “oppression,” and “fraud” are statutorily defined. “Malice” means
18 conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct
19 which is carried on by the defendant with a willful and conscious disregard of the rights or
20 safety of others. Cal Civ. Code § 3294(c)(1). “The phrase ‘conscious disregard’ is something
21 used to describe the highly culpable state of mind which justifies an exemplary award.” *G.D.*
22 *Searle & Co. v. Superior Court*, 49 Cal. App. 3d 22, 32 (1975). “In order to justify an award of
23 punitive damages on this basis, the plaintiff must establish that the defendant was aware of the
24 probable dangerous consequences of his conduct, and that he willfully and deliberately failed to
25 avoid those consequences. *Taylor v. Superior Court*, 24 Cal.3d 895–896 (1979)

26 “Oppression” means despicable conduct that subjects a person to cruel and unjust
27 hardship in conscious disregard of that person’s rights. Cal Civ. Code § 3294(c)(2). “Fraud”
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1 means an intentional misrepresentation, deceit, or concealment of a material fact known to the
2 defendant with the intention on the part of the defendant of thereby depriving a person of
3 property or legal rights or otherwise causing injury. Cal Civ. Code § 3294(c)(3).

4 In California, “an award of exemplary damages cannot be based on mere speculation; it
5 depends instead on a definite showing of a willingness to vex, harass, or injure consistent with a
6 wrongful intent to injure.” *Roth v. Shell Oil Company*, 185 Cal.App.2d 676, 682 (1960).

7 “Punitive damages are appropriate if the defendant's acts are reprehensible, fraudulent or in
8 blatant violation of law or policy.... [Punitive damages] are proper only when the tortious
9 conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent
10 citizens should not have to tolerate.” *Tomaselli v. Transamerica Ins. Co.*, 25 Cal.App.4th 1269,
11 1286–87, 31 Cal.Rptr.2d 433 (1994).

12 As the Court concludes above, Defendants were unaware of Plaintiff's alleged disability.
13 Additionally, the record does not reflect any clear and convincing evidence that any officer,
14 director, or managing agent of Defendants acted with “malice,” “oppression,” or “fraud” in
15 dealing with Plaintiff, or otherwise “willfully and consciously” disregarded Plaintiff's rights
16 during the relevant time period.

17 Accordingly, the Court GRANTS Defendant's Motion with respect to Plaintiff's Punitive
18 Damages Claim.

