

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

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

CHARLES MATTHEW ERHART,
Plaintiff,

v.

BOFI HOLDING, INC.,
Defendant.

Case No. 15-cv-02287-BAS-NLS
consolidated with
15-cv-02353-BAS-NLS

ORDER:

(1) GRANTING IN PART AND DENYING IN PART BOFI HOLDING, INC.’S MOTION FOR JUDGMENT ON THE PLEADINGS (ECF No. 78); AND

(2) DENYING CHARLES MATTHEW ERHART’S MOTION FOR JUDGMENT ON THE PLEADINGS (ECF No. 96)

And Consolidated Case

Presently before the Court are the parties’ cross-motions for judgment on the pleadings. (ECF Nos. 78, 96.) The Court finds these motions suitable for determination on the papers submitted and without oral argument. *See* Fed. R. Civ. P. 78(b); Civ. L.R. 7.1(d)(1). For the following reasons, the Court **GRANTS IN**

1 **PART** and **DENIES IN PART** BofI Holding, Inc.’s motion (ECF No. 78) and
2 **DENIES** Charles Matthew Erhart’s motion (ECF No. 96).

4 **BACKGROUND**

5 The Court and the parties are well versed in the competing allegations that
6 form the basis of these consolidated actions. Consequently, the Court provides only
7 a synopsis of the parties’ allegations here.

8 BofI Holding, Inc. is the publicly-traded holding company for BofI Federal
9 Bank, a federally-chartered savings and loan association that operates several brands
10 of banks including Bank of Internet.¹ (*See* Erhart’s First Amended Complaint
11 (“FAC”) ¶ 4, ECF No. 32; BofI’s FAC ¶ 10, ECF No. 12 in Case No. 15-cv-2353.)
12 BofI hired Charles Matthew Erhart as a Staff Internal Auditor in its headquarters in
13 San Diego, California. (Erhart’s FAC ¶ 3; BofI’s FAC ¶ 7.)

14 The pleadings paint two different pictures of Erhart’s time at BofI. In his First
15 Amended Complaint, Erhart presents a captivating account of his tenure as an auditor
16 in a turbulent corporate environment. (Erhart’s FAC ¶¶ 3–75.) Erhart recounts how,
17 time and again, he battled against pressure from senior management as he discovered
18 conduct he believed to be wrongful. (*Id.*) For example, Erhart claims he unearthed
19 evidence that BofI failed to turn over information that was responsive to a subpoena
20 from the Securities and Exchange Commission. (*Id.* ¶¶ 26–31.) Erhart also allegedly
21 discovered that BofI’s Chief Executive Officer was “depositing third-party checks
22 for structured settlement annuity payments into a personal account, including nearly
23 \$100,000 in checks made payable to third parties.” (*Id.* ¶ 44.)

24 When BofI learned Erhart was potentially reporting these activities to the
25 Bank’s principal regulator, Erhart claims BofI engaged in a pattern of retaliatory

26 ¹ Since this lawsuit was filed, BofI Holding, Inc. rebranded itself as Axos Financial, Inc.
27 *See* Axos Financial, Inc., Registration of Securities (Form 8-A) (Sept. 13, 2018). To be consistent
28 with the pleadings, the Court refers to the company by its prior name. And unless the distinction
is relevant, the Court uses the term “BofI” to refer to either BofI Holding, Inc. or BofI Federal
Bank.

1 conduct against him. (*See* Erhart’s FAC ¶¶ 53–74.) This alleged conduct included
2 BofI (i) repeatedly contacting Erhart while he was out sick from work, (ii) demanding
3 the return of his company-issued laptop, (iii) making false statements about his
4 medical leave and alleged whistleblowing activities, and (iv) ultimately terminating
5 him. (*Id.*) Based on these allegations, Erhart brings seven claims against BofI,
6 including whistleblower retaliation in violation of the Sarbanes–Oxley Act and the
7 Dodd–Frank Wall Street Reform and Consumer Protection Act.² (*Id.* ¶¶ 76–163.)

8 In contrast, BofI’s countersuit portrays Erhart as an entry-level internal auditor
9 who conducted improper “rogue investigations.” (BofI’s FAC ¶¶ 7, 23–28.) BofI
10 claims Erhart “abused his power” as an auditor by “initiating and conducting his own
11 unplanned and unapproved investigations into matters that were outside the scope of
12 the” Bank’s internal audit plans. (*Id.* ¶ 24.) In doing so, Erhart allegedly
13 “misrepresented to other BofI employees that he was conducting authorized
14 investigations as part of his job.” (*Id.* ¶ 26.) The Bank also contends that Erhart
15 accessed confidential information for personal gain, disseminated confidential
16 information to “a website that allows comments on the stocks of publicly traded
17 companies,” and abandoned his job. (*Id.* ¶¶ 27, 31, 40–41.) In light of these
18 allegations, BofI brings its own catalog of eight claims against Erhart, including
19 breach of contract, breach of the duty of loyalty, and violation of the Computer Fraud
20 and Abuse Act. (*Id.* ¶¶ 47–98.)

21 The Court consolidated these actions but did not direct the parties to file
22 consolidated pleadings. (ECF No. 31.) The parties now bring cross-motions for
23 judgment on the pleadings.

24
25
26 ² Erhart’s First Amended Complaint pleads a total of ten claims, but the Court previously
27 dismissed Erhart’s claims for violation of California’s Confidentiality of Medical Information Act,
28 breach of the implied covenant of good faith and fair dealing, and intentional infliction of emotional
distress. (ECF No. 44.) Although the Court dismissed these claims with leave to amend, Erhart
chose not to file a Second Amended Complaint.

LEGAL STANDARD

1
2 Under Federal Rule of Civil Procedure 12(c), “[a]fter the pleadings are
3 closed—but early enough not to delay trial—a party may move for judgment on the
4 pleadings.” “Judgment on the pleadings is properly granted when, accepting all
5 factual allegations in the complaint as true, there is no issue of material fact in
6 dispute, and the moving party is entitled to judgment as a matter of law.” *Chavez v.*
7 *United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) (brackets omitted). “When a
8 party invokes Rule 12(c) to raise the defense of failure to state a claim, the motion
9 faces the same test as a motion under Rule 12(b)(6).” *Landmark Am. Ins. Co. v.*
10 *Navigators Ins. Co.*, 354 F. Supp. 3d 1078, 1081 (N.D. Cal. 2018).

11 A motion to dismiss under Rule 12(b)(6) “tests the legal sufficiency” of the
12 claims asserted in the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.
13 2001). The court must accept all factual allegations pleaded in the complaint as true
14 and must construe them and draw all reasonable inferences from them in favor of the
15 nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir.
16 1996). To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed
17 factual allegations; rather, it must plead “enough facts to state a claim to relief that is
18 plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A
19 claim has facial plausibility when the plaintiff pleads factual content that allows the
20 court to draw the reasonable inference that the defendant is liable for the misconduct
21 alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at
22 556).

ANALYSIS

I. Erhart’s Motion

23
24
25
26 Erhart moves for judgment on the pleadings as to seven of Boff’s claims. At
27 the outset, the Court underscores that, with few exceptions, it is limited under Rule
28 12(c) to considering the factual allegations contained in the pleadings. *See* Fed R.

1 Civ. P 12(b)–(c); *see also United States v. Real Prop. Located at 9832 Richeon Ave.,*
 2 *Downey, Cal.*, 234 F. Supp. 2d 1136, 1137 (C.D. Cal. 2002). As explained in the
 3 Court’s prior order regarding Erhart’s affirmative defenses, BofI cannot impose tort
 4 liability on Erhart for conduct that is protected activity under state or federal
 5 whistleblower statutes. (*See* ECF No. 40 at 32:18–33:14.) But a pleadings motion
 6 is not the proper venue to resolve the parties’ competing factual contentions regarding
 7 what transpired during Erhart’s tenure at the Bank.³ With this point in mind, the
 8 Court addresses each of Erhart’s seven challenges to BofI’s claims.

9
 10 **A. Fraud**

11 Erhart first challenges BofI’s claim that he committed fraud, arguing that BofI
 12 fails to plead this claim with the required specificity. (Erhart’s Mot. 5:3–6:13.)
 13 Under California law, the elements of a cause of action for fraud are:
 14 “(1) misrepresentation (false representation, concealment, or nondisclosure),
 15 (2) knowledge of falsity (or ‘scienter’), (3) intent to defraud (i.e., to induce reliance),
 16 (4) justifiable reliance, and (5) resulting damage.” *Lazar v. Superior Court*, 12 Cal.
 17 4th 631, 632 (1996). Rule 9(b) in turn requires that “[i]n all averments of fraud or
 18 mistake, the circumstances constituting fraud . . . shall be stated with particularity.”
 19

20 ³ The Court also notes the possibility that one or more of BofI’s common law tort claims
 21 may be displaced by California’s Uniform Trade Secrets Act (“CUTSA”), Cal. Civ. Code §§ 3426–
 22 3426.10. “[A] prime purpose of [the uniform act] was to sweep away the adopting states’
 23 bewildering web of rules and rationales and replace it with a uniform set of principles for
 24 determining when one is—and is not—liable for acquiring, disclosing, or using ‘information . . . of
 25 value.’” *SilvacocData Sys. v. Intel Corp.*, 184 Cal. App. 4th 210, 239 n.22 (2010), *disapproved on*
 26 *other grounds by Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 337 (2011). In light of
 27 CUTSA’s breadth and purpose, courts have concluded the statute “supersedes claims based on the
 28 misappropriation of confidential information, whether or not that information meets the statutory
 definition of a trade secret.” *E.g., Mattel, Inc. v. MGA Entm’t, Inc.*, 782 F. Supp. 2d 911, 987 (C.D.
 Cal. 2011). Although BofI does not plead a trade secret misappropriation claim, the primary thrust
 of several of BofI’s tort claims is that Erhart improperly misappropriated its “confidential
 information.” (*See* BofI’s FAC ¶¶ 54–79.) Erhart’s motion, however, does not argue that these
 claims fail because they are displaced by CUTSA. Because this issue was not raised, the Court will
 not further explore it in this order.

1 Fed. R. Civ. P. 9(b); *see also Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th
2 Cir. 2009) (providing Rule 9(b) applies to state law fraud claims). “To comply with
3 Rule 9(b), allegations of fraud must be ‘specific enough to give defendants notice of
4 the particular misconduct which is alleged to constitute the fraud charged so that they
5 can defend against the charge and not just deny that they have done anything
6 wrong.’” *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (quoting
7 *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993)). Hence, allegations of fraud
8 “must be accompanied by ‘the who, what, when, where, and how’ of the misconduct
9 charged.” *Kearns*, 567 F.3d at 1124 (quoting *Vess v. Ciba-Geigy Corp. USA*, 317
10 F.3d 1097, 1106 (9th Cir. 2003)).

11 BofI’s fraud claim is predicated on Erhart purportedly conducting rogue
12 investigations at the Bank. (BofI’s FAC ¶¶ 72–79.) BofI alleges Erhart’s “primary
13 job duty was to prepare audits of various aspects of BofI’s operations as specifically
14 assigned to him, . . . within the parameters of the Internal Audit Plan approved by
15 [BofI’s] independent Audit Committee.” (*Id.* ¶ 10.) One of Erhart’s supposed rogue
16 audits, an unapproved payroll investigation, “was not part of the 2014 Audit Plan.”
17 (*Id.* ¶ 27(a).) BofI alleges that Erhart nonetheless “knowingly made false statements
18 to BofI employees that he was conducting authorized official investigations and
19 audits as part of his job as a Staff Internal Auditor,” including in several emails to
20 employees in December 2014 “to request information for his unapproved payroll
21 audit.” (*Id.* ¶¶ 73–74.)

22 Even if BofI’s fraud claim is not compelling, Rule 12(c) tests the sufficiency
23 of the pleadings, and BofI’s claim provides Erhart with “notice of the particular
24 misconduct which is alleged” to allow him to “defend against the charge.” *See Bly-*
25 *Magee*, 236 F.3d at 1019. BofI’s pleading provides the requisite who (Erhart), what
26 (making false statements that he was conducting authorized official investigations
27 and audits as part of his job to obtain information improperly), when (December 11,
28 15, 19, and 22, 2014), where (at BofI), and how (by sending e-mails to employees

1 who are identified by name in the pleading). *See Kearns*, 567 F.3d at 1124. BofI
2 alleges that (1) Erhart knew his statements were false, (2) Erhart intended to deceive
3 the other employees to gain access to confidential information, and (3) the Bank was
4 harmed by his conduct. (BofI’s FAC ¶¶ 72–79.) BofI thus pleads a claim for fraud.
5 Erhart’s other arguments against this claim are better suited for summary judgment
6 or trial. Therefore, eliminating this claim under Rule 12(c) is not appropriate.

7 8 **B. Breach of the Duty of Loyalty**

9 Erhart argues BofI cannot maintain a breach of the duty of loyalty claim
10 against him because no binding authority imposes a duty of loyalty on lower-level
11 employees. (Erhart’s Mot. 6:14–9:25.) He also argues the claim fails because BofI
12 (i) does not allege Erhart “transferred” his loyalty to another employer and (ii) his
13 alleged conduct was not “inimical” to BofI’s best interests. (*Id.*) The elements of a
14 breach of the duty of loyalty claim are: “(1) the existence of a relationship giving rise
15 to a duty of loyalty; (2) one or more breaches of that duty; and (3) damage
16 proximately caused by that breach.” *Huong Que, Inc. v. Luu*, 150 Cal. App. 4th 400,
17 410 (2007). “During the term of employment, an employer is entitled to its
18 employees’ ‘undivided loyalty.’” *Fowler v. Varian Assocs., Inc.*, 196 Cal. App. 3d
19 34, 41 (1987) (quoting *Sequoia Vacuum Sys. v. Stransky*, 229 Cal. App. 2d 281, 287
20 (1964)). “The duty of loyalty is breached, and the breach ‘may give rise to a cause
21 of action in the employer, when the employee takes action which is inimical to the
22 best interests of the employer.’” *Id.* at 414 (quoting *Stokes v. Dole Nut Co.*, 41 Cal.
23 App. 4th 285, 295 (1995)). Inimical means: “1. Behaving like an enemy;
24 hostile. 2. Opposite or adverse in effect or tendency.” *Inimical*, Black’s Law
25 Dictionary (10th ed. 2014).

26 As BofI’s alleged employee and agent, Erhart owed it a duty of loyalty during
27 his term of employment. *See Fowler*, 196 Cal. App. 3d at 41; *see also People v.*
28 *Frangadakis*, 184 Cal. App. 2d 540, 549 (1960) (“There is seldom any reason to

1 distinguish between the service of an agent and that of a servant or employee. Most
2 of the rules relating to duties, authority, liabilities, etc., are applicable to servants as
3 well as other agents.” (emphasis omitted)). And the Court is unpersuaded by Erhart’s
4 argument that a “lower-level” employee cannot owe an employer a duty of loyalty.
5 “California courts generally have not distinguished between managerial employees
6 and lower-level employees with respect to the duty of loyalty.” *E.D.C. Techs., Inc.*
7 *v. Seidel*, 216 F. Supp. 3d 1012, 1016 (N.D. Cal. 2016). Indeed, if a customer service
8 representative at a bank sold customer lists and account information to a competitor,
9 the employee would not be able to escape liability for breach of the duty of loyalty
10 simply because of the job’s potential “lower-level” status. The Court therefore will
11 not hold, as a matter of law, that Erhart—a staff internal auditor—lacked a duty of
12 loyalty to BofI.

13 BofI must still plausibly plead that Erhart breached his duty of loyalty. The
14 Bank’s pleading identifies various examples of Erhart’s conduct that BofI believes
15 constitutes a breach of this duty. (BofI’s FAC ¶ 65(a)–(e).) Several of these
16 examples are not plausible. For instance, BofI claims Erhart breached his duty of
17 loyalty because he failed “to fulfill his job duties.” (*Id.* ¶ 65(c).) That allegation may
18 mean Erhart was an unsatisfactory employee, but it does not mean he failed to be
19 loyal to BofI. The Court is similarly unconvinced that Erhart plausibly violated his
20 duty of loyalty simply because he conducted “additional investigations and audits
21 that were outside the scope of the 2014 and 2015 Internal Audit Plans.” (*Id.* ¶ 65(a).)

22 BofI, however, also alleges that Erhart “wrongfully distribut[ed] BofI’s
23 Confidential Information to unauthorized recipients.” (BofI’s FAC ¶ 65(e).) For
24 example, BofI claims Erhart “disseminated . . . Confidential Information . . . to
25 contributors to a website that allows comments on the stocks of publicly traded
26 companies.” (*Id.* ¶ 41(h).) BofI further claims it was harmed by Erhart’s conduct.
27 (*Id.* ¶ 67.) When these allegations are accepted as true and construed in BofI’s favor,
28 this conduct could be viewed as “inimical to the best interests of” BofI and constitute

1 a breach of Erhart’s duty of loyalty. *See Stokes*, 41 Cal. App. 4th at 295.
2 Accordingly, Erhart’s Rule 12(c) challenge to this claim is unpersuasive.

3 4 **C. Negligence**

5 Erhart next challenges Boff’s negligence claim. He argues that an employer
6 cannot maintain a common law negligence claim against an employee, and that Boff
7 fails to establish why Erhart, an entry-level auditor, owed it a duty of care. (Erhart’s
8 Mot. 9:26–11:19.) “The elements of a negligence cause of action are the existence
9 of a legal duty of care, breach of that duty, and proximate cause resulting in injury.”
10 *Castellon v. U.S. Bancorp*, 220 Cal. App. 4th 994, 998 (2013). “The first element,
11 duty, ‘may be imposed by law, be assumed by the defendant, or exist by virtue of a
12 special relationship.’” *Doe v. U.S. Youth Soccer Ass’n, Inc.*, 8 Cal. App. 5th 1118,
13 1128 (2017) (quoting *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 985
14 (1993)). Absent certain circumstances, “[e]veryone is responsible, not only for the
15 result of his or her willful acts, but also for an injury occasioned to another by his or
16 her want of ordinary care or skill in the management of his or her property or person.”
17 Cal. Civ. Code § 1714; *see also Rowland v. Christian*, 69 Cal. 2d 108, 112 (1968).

18 In addition, under the California Labor Code, “[o]ne who, for a good
19 consideration, agrees to serve another, shall perform the service, and shall use
20 ordinary care and diligence therein, so long as he is thus employed.” Cal. Lab. Code
21 § 2854; *see also id.* § 2859 (“An employee is always bound to use such skill as he
22 possesses, so far as the same is required, for the service specified.”). “An employee
23 who is guilty of a culpable degree of negligence is liable to his employer for the
24 damages thereby caused to the employer.” *Id.* § 2865. An employee “is guilty of a
25 ‘culpable *degree* of negligence’ when he fails to use ordinary care, consistent with
26 the degree of skill required and to be used as provided in Labor Code sections 2858
27 and 2859.” *Dahl-Beck Electric Co. v. Rogge*, 275 Cal. App. 2d 893, 907 (1969)
28 (citations omitted).

1 The Court is unpersuaded by Erhart’s challenges to the legal sufficiency of
2 BoffI’s negligence claim. Section 2865 of the California Labor Code plainly provides
3 that if Erhart, a former employee of BoffI, “is guilty of a culpable degree of
4 negligence,” he is liable to BoffI “for the damage thereby caused to the employer.”
5 *See also Rogge*, 275 Cal. App. 2d at 907. Erhart does not point the Court to—and
6 the Court has not found—a published California case that provides otherwise.⁴
7 Therefore, BoffI’s allegations establish that Erhart owed it a duty of care, and BoffI’s
8 pleading sufficiently states the remaining elements of a negligence claim.
9 Consequently, resolving this claim under Rule 15(c) is not warranted.

11 **D. California Penal Code Section 502**

12 Erhart also moves to dispose of BoffI’s claim under California Penal Code
13 section 502. (Erhart’s Mot. 11:20–13:11.) He argues the claim fails because (i) he
14 did not overcome any technical or code-based barriers to access BoffI’s data, and
15 (ii) he used his company-issued laptop as an employee acting in the course and scope
16 of his employment. (*Id.*) Among other things, section 502 imposes criminal liability
17 on a person who “[k]nowingly accesses and without permission adds, alters,
18 damages, deletes, or destroys any data, computer software, or computer programs
19 which reside or exist internal or external to a computer, computer system, or
20

21 ⁴ Although there are several cases that discuss section 2865 in the indemnification context,
22 those cases do not “hold that section 2865 cannot be used for direct negligence claims against
23 employees.” *See Moore v. Pflug Packaging & Fulfillment, Inc.*, No. 17-CV-05823-YGR, 2018
24 WL 2430903, at *5, n.7 (N.D. Cal. May 30, 2018) (collecting and discussing cases). The Court
25 agrees that section 2865’s “plain language supports a broader range of permissible claims” than
26 simply employer claims for indemnification. *See James v. Childtime Childcare, Inc.*, No. CIV.S-
27 06-2676 DFL DA, 2007 WL 1589543, at *2 (E.D. Cal. June 1, 2007); *see also Rogge*, 275 Cal.
28 App. 2d at 906–07 (discussing jury instructions in the context of a direct negligence claim under
section 2865); *Div. of Labor Law Enf’t v. Barnes*, 205 Cal. App. 2d 337, 349 (1962) (reasoning, in
the context of section 2865, that the employer appellants “may, by proper amendment, state a cause
of action in negligence against [an employee]”); *but see 1538 Cahuenga Partners, LLC v. Fabe*,
No. B222023, 2012 WL 19519, at *17 (Cal. Ct. App. Jan. 5, 2012) (unpublished) (rejecting the
proposition that a corporate employer can rely on section 2865 to bring a professional negligence
claim against the employer’s inhouse counsel).

1 computer network.” Cal. Penal Code § 502(c)(4). The statute also grants a private
2 right of action for compensatory damages and other relief to “the owner . . . of the
3 computer . . . or data who suffers damage or loss by reason of a violation.” *Id.* §
4 502(b)(8).

5 Erhart’s two attacks on BofI’s section 502 claim are unavailing. First, section
6 502 does not require that Erhart “hack” into BofI’s computer system or overcome
7 code-based barriers for him to be potentially liable for the unauthorized taking or
8 destruction of BofI’s data. The statute punishes a person who “[k]nowingly
9 accesses” a computer system for specified unauthorized uses. *See* Cal. Penal Code §
10 502(c)(1)–(3), (4), (11). The statute defines “access” as meaning “to gain entry to,
11 instruct, cause input to, . . . or communicate with, the . . . memory function resources
12 of a computer, computer system, or computer network.” *Id.* § 502(b)(1). Therefore,
13 section 502(c) “does not require *unauthorized* access. It merely requires
14 *knowing* access.” *United States v. Christensen*, 828 F.3d 763, 789 (9th Cir. 2015).
15 And “[a] plain reading of the statute demonstrates that its focus is on unauthorized
16 taking[, deletion,] or use of information,” as opposed to unauthorized access to the
17 computer system. *See id.*; *see also* Cal. Penal Code § 502(c)(4). BofI adequately
18 alleges that Erhart knowingly accessed one of its computers to destroy data without
19 authorization. (BofI’s FAC ¶¶ 43–44, 82.) The Court therefore rejects Erhart’s first
20 argument concerning his alleged access to BofI’s computer system. *Cf. Christensen*,
21 828 F.3d at 789 (“We conclude that the term ‘access’ as defined in the California
22 statute includes logging into a database with a valid password and subsequently
23 taking, copying, or using the information in the database improperly.”).

24 Erhart’s second argument may have merit based on the evidence, but it is
25 inappropriate at the pleadings stage. Erhart argues BofI’s claim fails because he
26 accessed “and used his laptop as an employee acting in the course and scope of his
27 employment.” (Erhart’s Mot. 12:27–13:2.) Indeed, section 502 exempts conduct
28 occurring during the course and scope of employment:

1 [Section 502(c)] does not apply to punish any acts which are committed
2 by a person within the scope of his or her lawful employment. For
3 purposes of this section, a person acts within the scope of his or her
4 employment when he or she performs acts which are reasonably
5 necessary to the performance of his or her work assignment.

6 Cal. Penal Code § 502(h); *but see Chrisman v. City of Los Angeles*, 155 Cal. App.
7 4th 29, 37 (2007) (providing that a police officer who logged in to a police database
8 to satisfy personal curiosity about celebrities was acting within the scope of his
9 employment); *see also Christensen*, 828 F.3d at 789 n.8 (discussing section 502(h)).
10 Here, however, BofI alleges Erhart’s actions “were not committed within the scope
11 of his lawful employment at BofI and were not reasonably necessary to the
12 performance of his work assignments at BofI.” (BofI’s FAC ¶ 83.) Upon review of
13 BofI’s factual allegations, these assertions withstand scrutiny at the pleadings stage.
14 The Court thus rejects Erhart’s second argument and will not invoke Rule 12(c) to
15 disturb BofI’s section 502 claim.

16 **E. The Computer Fraud and Abuse Act**

17 The Court next turns to BofI’s lone federal claim under the Computer Fraud
18 and Abuse Act (“CFAA”), 18 U.S.C. § 1030. Erhart contends this claim is defective
19 because BofI’s allegations are conclusory and Erhart was authorized to use his
20 company-issued laptop. (Erhart’s Mot. 13:12–15:24.) “The CFAA prohibits acts of
21 computer trespass by those who are not authorized users or who exceed authorized
22 use.” *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1065 (9th Cir. 2016).
23 One type of forbidden computer trespass occurs when an individual “intentionally
24 accesses a protected computer without authorization, and as a result of such conduct,
25 causes damage and loss.” 18 U.S.C. § 1030(a)(5)(C). The term “protected computer”
26 includes a computer that is “exclusively for the use of a financial institution.” *Id.* §
27 1030(e)(2)(A). And “damage” is “any impairment to the integrity or availability of
28 data, a program, a system, or information.” *Id.* § 1030(e)(8). Further, the CFAA not

1 only imposes criminal liability, but also creates a private right of action for “[a]ny
2 person who suffers damage or loss by reason of a violation of this section.” *Id.* §
3 1030(g).

4 In response to Erhart’s Rule 12(c) challenge, BofI contends its factual
5 allegations state a claim under several provisions of the CFAA, including the one
6 excerpted above, § 1030(a)(5)(C). (BofI’s Opp’n 11:16–14:11.) *See also* 18 U.S.C.
7 § 1030(a)(5)(C). The Court agrees that BofI states a claim under § 1030(a)(5)(C),
8 notwithstanding Erhart’s argument that he was authorized to use his company-issued
9 laptop. BofI alleges Erhart’s “laptop was a protected computer under the [CFAA]”
10 because it was to be exclusively used for his work at BofI, a qualifying financial
11 institution. (BofI’s FAC ¶ 93.) *See also* 18 U.S.C. § 1030(e)(2)(A), 4(A). BofI also
12 alleges that Erhart “knowingly deleted large amounts of data from his BofI-issued
13 laptop, and intentionally caused damage, without authorization, to his laptop.” (*Id.* ¶
14 92.) The Bank further claims it “has sustained, and will continue to sustain, loss and
15 damages according to proof, but in excess of \$5,000.” (*Id.* ¶¶ 93, 95.)

16 In addition, BofI’s pleading contains factual allegations that preclude Erhart’s
17 argument that he was authorized to use the computer as an employee when the alleged
18 misconduct occurred. The Ninth Circuit has explained that “an employer gives an
19 employee ‘authorization’ to access a company computer when the employer gives
20 the employee permission to use it.” *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127,
21 1133 (9th Cir. 2009). On the other hand, “a person uses a computer ‘without
22 authorization’ under [the CFAA] . . . when the employer has rescinded permission to
23 access the computer and the defendant uses the computer anyway.” *Id.* at 1135; *see*
24 *also United States v. Nosal*, 844 F.3d 1024, 1029 (9th Cir. 2016). Although Erhart
25 may have initially had authorization to use his company-issued laptop, BofI alleges
26 it “informed Erhart that it had not, and would not, authorize him to keep physical
27 possession of his BofI issued-laptop during his leave of absence.” (BofI’s FAC ¶
28 43.) The Bank also repeatedly requested the “return of Erhart’s BofI issued-laptop

1 for safekeeping while he was on a leave of absence.” (*Id.* ¶¶ 43–44.) BofI therefore
2 allegedly “rescinded permission to access the computer,” making Erhart’s future use
3 unauthorized. *See LVRC Holdings*, 581 F.3d at 1133. BofI claims Erhart
4 nevertheless “deleted large amounts of data” from the Bank’s laptop, including “a
5 mass deletion . . . the same day he returned his laptop to BofI.” (BofI’s FAC ¶ 44.)
6 Consequently, BofI sufficiently states a claim under the CFAA.

7 Given that BofI states a viable claim under at least one provision of the CFAA,
8 the Court declines to opine on whether the Bank’s factual allegations demonstrate
9 Erhart committed any of the statute’s other computer offenses. And a pleadings
10 motion is not the appropriate venue to resolve any friction between the CFAA’s
11 prohibitions and the protected activity alleged in Erhart’s whistleblower retaliation
12 suit. The Court thus denies Erhart’s request to dispose of BofI’s CFAA claim via
13 Rule 15(c).

14 15 **F. California’s Unfair Competition Law**

16 Erhart’s motion next focuses on BofI’s claim under California’s Unfair
17 Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200. (Erhart’s Mot. 16:1–
18 17:25.) The UCL prohibits “unfair competition,” which includes “any unlawful,
19 unfair or fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200. “The
20 UCL’s purpose is to protect both consumers and competitors by promoting fair
21 competition in commercial markets for goods and services.” *Kasky v. Nike, Inc.*, 27
22 Cal. 4th 939, 949 (2002). “Its coverage is sweeping, embracing anything that can
23 properly be called a business practice and that at the same time is forbidden by law.”
24 *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999)
25 (internal quotation marks omitted). “By prohibiting unlawful business practices,
26 ‘section 17200 ‘borrows’ violations of other laws and treats them as unlawful
27 practices’ that the [UCL] makes independently actionable.” *Valdez v. Seidner-*
28

1 *Miller, Inc.*, 33 Cal. App. 5th 600 (2019) (quoting *De La Torre v. CashCall, Inc.*, 5
2 Cal. 5th 966, 980 (2018)).

3 BofI's derivate UCL claim is tenuous, but Erhart does not convincingly
4 demonstrate that the Court should dispose of it under Rule 15(c). Erhart first
5 contends the claim fails because BofI does not plead he is in competition with the
6 Bank, but "under the unfair competition statute, 'competition between the parties is
7 not a prerequisite to relief Emphasis is . . . placed upon the word 'unfair' rather
8 than on 'competition.'" *In re Pomona Valley Med. Grp., Inc.*, 476 F.3d 665, 675 (9th
9 Cir. 2007) (quoting *Ball v. Am. Trial Lawyers Ass'n*, 14 Cal. App. 3d 289, 303
10 (1971)). Further, Erhart does not otherwise persuasively argue that the UCL is
11 inapplicable. Indeed, when construed in the Bank's favor, BofI's pleading
12 demonstrates this dispute is related to BofI's commercial activities and Erhart's
13 occupation or "business" as an internal auditor. Hence, the Court cannot conclude
14 that the UCL is inapplicable as a matter of law. *Cf. That v. Alders Maint. Ass'n*, 206
15 Cal. App. 4th 1419, 1427 (2012) (rejecting application of the UCL where the
16 defendant homeowners association did not "participate as a business in the
17 commercial market," and the parties' dispute was "not related to any activity that
18 might be deemed in the least bit commercial"); *see also Burks v. Poppy Const. Co.*,
19 57 Cal. 2d 463, 468 (1962) ("The word 'business' embraces everything about which
20 one can be employed, and it is often synonymous with 'calling, occupation, or trade,
21 engaged in for the purpose of obtaining a livelihood or gain.'").

22 Erhart also argues BofI's UCL claim is inadequate because the Bank does not
23 explain in its pleading how Erhart's alleged conduct misled consumers. This
24 showing, however, is not required for BofI to state a claim under the UCL's
25 "unlawful" prong. "Because Business and Professions Code section 17200 is written
26 in the disjunctive, it establishes three varieties of unfair competition—acts or
27 practices which are unlawful, or unfair, or fraudulent. 'In other words, a practice is
28 prohibited as "unfair" or "deceptive" even if not "unlawful" and vice versa.'" *Cel-*

1 *Tech*, 20 Cal. 4th at 180. BofI adequately pleads that Erhart committed substantive
2 violations of law, which can serve as the basis for its derivative claim under the UCL’s
3 unlawful prong; therefore, the Bank is not required to plead that Erhart also engaged
4 in deceptive or unfair business practices. Accordingly, the Court rejects Erhart’s
5 challenges to BofI’s UCL claim.

6 7 **G. Conversion**

8 Finally, Erhart moves to dispose of BofI’s conversion claim under Rule 15(c).
9 (Erhart’s Mot. 17:26–20:15.) “Conversion is the wrongful exercise of dominion over
10 the property of another. The elements of a conversion claim are: (1) the plaintiff’s
11 ownership or right to possession of the property; (2) the defendant’s conversion by a
12 wrongful act or disposition of property rights; and (3) damages.” *Lee v. Hanley*, 61
13 Cal. 4th 1225, 1240 (2015).

14 The tort of conversion was traditionally limited to tangible personal property,
15 but the tort has since “expanded well beyond its original boundaries.” *Welco Elecs.,*
16 *Inc. v. Mora*, 223 Cal. App. 4th 202, 210 (2014). “In determining whether property
17 that was taken is subject to a conversion claim, courts have recognized that
18 “[p]roperty is a broad concept that includes every intangible benefit and prerogative
19 susceptible of possession or disposition.” *Id.* at 211 (internal quotation marks
20 omitted) (quoting *Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003)); *see also*
21 *CTC Real Estate Servs. v. Lepe*, 140 Cal. App. 4th 856, 860 (2006) (noting that one’s
22 personal identifying information “is a valuable asset” because its misuse “can have
23 serious consequences to that person” and it can be the object of theft). Therefore,
24 courts have entertained cases for conversion of various property including credit card
25 information, bootlegged copies of musical recordings, and a company’s net operating
26 loss amounts. *Id.* at 210–14 (collecting cases). Consequently, “the unauthorized
27 taking of an intangible property interest not merged with or reflected in tangible
28 property can be an actionable conversion.” *Id.* at 211. Furthermore, absolute

1 ownership of the property is not required; the plaintiff “need only allege it is entitled
2 to immediate possession at the time of conversion. *Farmers Ins. Exch. v. Zerin*, 53
3 Cal. App. 4th 445, 452 (1997) (emphasis omitted) (quoting *Bastanchury v. Times-
4 Mirror Co.*, 68 Cal. App. 2d 217, 236 (1945)).

5 BofI claims Erhart is liable for conversion because he took personal possession
6 of BofI’s property, including “documents containing Confidential Information” and
7 a disc named “Bank of Internet,” without the Bank’s authorization. (BofI’s FAC ¶¶
8 31–33, 55–56.) BofI claims the converted information includes “non-public personal
9 information of BofI employees, business counterparties, and clients.” (*Id.* ¶ 11.)
10 BofI further claims “Erhart has not returned BofI’s property that he took personal
11 possession of and converted to his own use without BofI’s authorization or consent.”
12 (*Id.* ¶ 57.) Having reviewed BofI’s factual allegations, the Court concludes BofI
13 states an actionable conversion claim. *Cf. Angelica Textile Servs., Inc. v. Park*, 220
14 Cal. App. 4th 495, 508, 510 (2013) (noting employee’s possession of “thousands of
15 pages of [tangible] documents that plaintiff owns” supports a conversion claim, but
16 also that the claim may ultimately fail if the defendant is “able to show that they have
17 no value”); *but see also infra* note 3. Accordingly, the Court is unpersuaded by
18 Erhart’s challenge to this claim under Rule 15(c).

19 Overall, Erhart does not demonstrate that judgment on the pleadings is
20 appropriate with respect to any of the claims he challenges. Consequently, the Court
21 denies his motion for judgment on the pleadings under Rule 15(c).

22 23 **II. BofI’s Motion**

24 BofI’s motion for judgment on the pleadings raises four challenges to Erhart’s
25 pleading regarding: (1) the exhaustion of his claim under the Sarbanes–Oxley Act;
26 (2) the legal sufficiency of portions of his three whistleblower retaliation claims; (3)
27 the adequacy of his UCL claim; and (4) the proper named defendant for his action.
28 The Court will address each item.

1 **A. Exhaustion of Sarbanes–Oxley Claim**

2 BofI first argues partial judgment on the pleadings is appropriate regarding
3 Erhart’s whistleblower retaliation claim under the Sarbanes–Oxley Act. (BofI’s Mot.
4 7:1–11:16.) BofI contends Erhart failed to fully exhaust his administrative remedy
5 with the Occupational Safety and Health Administration (“OSHA”) before filing his
6 lawsuit. (*Id.* 9:14–11:16.) Therefore, BofI seeks a ruling that this claim fails to the
7 extent it rests on protected activity that was not adequately raised in Erhart’s
8 administrative complaint filed with OSHA. (*Id.*) Erhart counters that he has
9 adequately pled administrative exhaustion, and he claims resolving BofI’s challenge
10 requires a factual determination because the Court should consider “the materials
11 submitted to OSHA and what transpired.” (Erhart’s Opp’n 4:12–8:11.)

12 The Court is familiar with this issue because BofI previously challenged
13 Erhart’s First Amended Complaint based on exhaustion via a motion to strike
14 portions of the pleading. (ECF No. 35-1 at 24:1–25:8; *see also* ECF No. 3-1 at 21:14–
15 23:11.) The Court denied BofI’s motion to strike, stating:

16 The Court declines BofI’s invitation to carve up Erhart’s amended
17 pleading based on what he included in his administrative complaint. The
18 Bank’s motion overlooks the fact that Erhart is not simply bringing a
19 claim under Sarbanes–Oxley. He has nine other claims. Although
20 Sarbanes–Oxley may require Erhart to exhaust his administrative
21 remedies before bringing a whistleblower retaliation claim, Dodd–Frank
22 does not. The same is true for Erhart’s whistleblower retaliation claim
23 under California Labor Code § 1102.5. Consequently, even if Erhart
24 failed to fully exhaust his administrative remedies under Sarbanes–
25 Oxley, the allegations BofI seeks to remove from his pleading are
26 appropriately included to support Erhart’s other claims Thus, the
27 Court will not strike them.

28 (ECF No. 44 at 36:24–37:10.) Accordingly, although BofI’s present motion arises
under Rule 12(c) instead of Rule 12(f), the motion essentially seeks the same relief
as the Bank’s prior attack on Erhart’s pleading.

1 The Court remains unconvinced that partially resolving Erhart’s Sarbanes–
2 Oxley claim on the pleadings is appropriate. Erhart alleges he exhausted his
3 administrative remedies. (Erhart’s FAC ¶ 18.) And the Court already determined
4 that Erhart states a plausible whistleblower retaliation claim under Sarbanes–Oxley.
5 (ECF No. 44 at 11:14–21:27.) In addition, even if this Court were to now examine
6 Erhart’s administrative complaint to determine whether a portion of his Sarbanes–
7 Oxley claim is unexhausted, Erhart requests permission to submit additional evidence
8 regarding his administrative claim to demonstrate he meets his exhaustion burden.
9 (Erhart’s Opp’n 4:24.) By now, there has been substantial discovery on the merits of
10 Erhart’s claim, and the Court prefers to consider the partial exhaustion issue without
11 the constraints of a pleadings motion. The Court could convert BofI’s pleadings
12 motion into a summary judgment motion and allow the parties to submit any
13 additional relevant evidence, *see* Fed. R. Civ. P. 12(d), but BofI has already informed
14 the Court that it intends to seek summary adjudication of Erhart’s Sarbanes–Oxley
15 claim. (*See* ECF No. 119.) Therefore, the Court denies without prejudice BofI’s
16 partial exhaustion contentions, and BofI can renew these arguments in its
17 forthcoming evidentiary motion.⁵

18

19 **B. Partial Disposition of Whistleblower Retaliation Claims**

20 Aside from the exhaustion issue, BofI requests the Court rule that Erhart’s
21 whistleblower retaliation claims partially fail to the extent that they are based on
22 certain factual allegations in his pleading. (BofI’s Mot. 11:18–20:20.) In response,
23 Erhart argues that (1) his pleading states a cognizable claim for each whistleblower
24 retaliation cause of action, and (2) this Court “is not required to parse out specific
25

26

27 ⁵ The Court also cautions Erhart, however, that if he believes additional evidence beyond
28 the content of his administrative complaint is necessary to substantiate his contention that he
exhausted his administrative remedies, he will need to provide this evidence to the Court to allow
it to fully consider this issue.

1 factual allegations and decide whether or not each alone could state a claim for relief”
2 under the whistleblower statutes. (Erhart’s Opp’n 8:24–25.)

3 The Court previously addressed this issue with respect to Erhart’s federal
4 whistleblower retaliation claims. Upon concluding Erhart stated cognizable claims,
5 the Court denied Boff’s request to “analyze all of Erhart’s allegations and delineate
6 between exactly which of those factual allegations are actionable and which of those
7 are not.” (See ECF No. 55 at 4:17–19.) Boff’s present request only differs in that
8 the Bank now asks the Court to analyze a smaller subset of Erhart’s factual
9 allegations.

10 The Court is unmoved by Boff’s motion. Initially, Boff’s request to dispose
11 of only part of certain claims under Rule 15(c) on implausibility grounds is
12 unconventional. Courts have entertained partial motions for judgment on the
13 pleadings when the motion resolves at least an entire cause of action or an affirmative
14 defense. *E.g., Strigliabotti v. Franklin Res., Inc.*, 398 F. Supp. 2d 1094, 1097 (N.D.
15 Cal. 2005). This “result seems sound in terms of giving the district [court] greater
16 flexibility and promoting efficiency and economy.” 5C Wright & Arthur
17 R. Miller, *Federal Practice and Procedure* § 1369 (3d ed. 2004). Many courts,
18 however, have refused to entertain motions for judgment on the pleadings that seek
19 to dispose of only a part of an individual claim or defense. *See United States v. Real*
20 *Prop. & Improvements Located at 2366 San Pablo Ave., Berkeley, Cal.*, No. 13-CV-
21 02027-JST, 2013 WL 6774082, at *1 (N.D. Cal. Dec. 23, 2013); *see also, e.g., Kenall*
22 *Mfg. Co. v. Cooper Lighting, LLC*, 354 F. Supp. 3d 877, 896 (N.D. Ill. 2018)
23 (collecting cases); *Living on the Edge, LLC v. Lee*, No. CV-14-5982-MWF-JEMX,
24 2015 WL 12661917, at *4 (C.D. Cal. Aug. 25, 2015) (noting that parties “cannot
25 move for judgment on the pleadings with respect to less than a full cause of action”).

26 This Court need not determine, however, whether it would ever entertain such
27 a limited motion under Rule 15(c). The Court will not do so in these circumstances
28 because considering Boff’s partial motion for judgment on the pleadings would not

1 promote efficiency or economy. *See* 5C Wright & Arthur R. Miller, Federal Practice
2 and Procedure § 1369 (3d ed. 2004). The Court already determined that Erhart states
3 plausible federal whistleblower retaliation claims.⁶ The Court discerns little value,
4 if any, in further scrutinizing the partial sufficiency of Erhart’s claims at this late
5 stage of the proceeding. BofI’s targeted challenges to Erhart’s fact-intensive
6 whistleblower retaliation claims are better suited for a partial summary judgment
7 motion or trial. Consequently, the Court denies BofI’s request for judgment on the
8 pleadings as to only parts of Erhart’s whistleblower retaliation claims.

9 10 **C. Unfair Competition Law**

11 Unlike its challenges to BofI’s whistleblower retaliation claims, BofI seeks
12 judgment on the pleadings as to Erhart’s entire cause of action under the UCL.
13 (BofI’s Mot. 20:22–21:16.) BofI argues Erhart’s UCL claim fails because the alleged
14 facts do not “show any ongoing conduct,” which precludes injunctive relief. (*Id.*)
15 The Bank has not previously challenged the legal sufficiency of this claim.

16 The Court incorporates its prior discussion of the standards for UCL claims.
17 Here, the Court has previously determined that Erhart’s complaint sufficiently pleads
18 substantive legal violations, which can also serve as the basis for his derivative UCL
19 claim. *See Farmers Ins. Exch. v. Superior Court*, 2 Cal. 4th 377, 383 (1992); *see*
20 *also Isuzu Motors Ltd. v. Consumers Union of U.S., Inc.*, 12 F. Supp. 2d 1035, 1048
21 (C.D. Cal. 1998) (rejecting effort to dismiss UCL claim based on “defendant’s
22 publication of defamatory and disparaging statements”); *Judd v. Weinstein*, No. CV-
23 185724-PSG-FFMX, 2018 WL 7448914, at *8 (C.D. Cal. Sept. 19, 2018) (rejecting
24 dismissal of UCL claim where the allegedly defamatory statements were made

25
26 ⁶ BofI has not previously challenged the legal sufficiency of Erhart’s claim for
27 whistleblower retaliation under California Labor Code section 1102.5. This statute has a broader
28 scope than the whistleblower protection provisions under Sarbanes–Oxley and Dodd–Frank. *See*
Cal. Labor Code § 1102.5(a). Because the Court has already concluded Erhart states claims under
these two federal whistleblower statutes, Erhart similarly states a cognizable claim under section
1102.5.

1 pursuant to a business activity). Erhart alleges that BofI “continues to engage in
2 some or all of the . . . unfair and unlawful business practices” described in his
3 pleading. (Erhart’s FAC ¶ 127.) His pleading also identifies some of the conduct
4 that is purportedly ongoing. (*See id.* ¶ 74B (alleging BofI “has continued to widely
5 publish false and defamatory statements about Plaintiff” regarding collaboration with
6 “‘short sellers’ of BofI’s stock”); ¶ 150 (alleging false statements about Plaintiff’s
7 business and personal reputation “will continue to be published by [BofI]”). Erhart
8 seeks “an injunction prohibiting Defendant from engaging in the unfair and unlawful
9 conduct described.” (*Id.* ¶ 128.) Consequently, Erhart sufficiently states a UCL
10 claim, and BofI’s motion to resolve this claim under Rule 15(c) is unpersuasive.

11 12 **D. Improperly Named Defendant**

13 Last, BofI Holding, Inc. argues it “is incorrectly named as the defendant” in
14 Erhart’s action and “incorrectly described as ‘d/b/a BofI Federal Bank and Bank of
15 the Internet.’” (BofI’s Mot. 21:20–21.) BofI submits that “BofI Holding, Inc. is the
16 holding company for BofI Federal Bank, its consolidated subsidiary,” and “Erhart
17 was at no time employed by BofI Holding, Inc.” (*Id.* 21:21–24.) BofI therefore asks
18 that all claims against BofI Holding, Inc. “be dismissed with leave to amend for the
19 limited purpose of naming the proper defendant.” (*Id.* 21:24–25.) Erhart responds
20 that this error “can be readily corrected and [BofI] should stipulate to an amendment
21 to correct the name.” (Erhart’s Opp’n 14:7–10.) Regardless, given that Erhart agrees
22 BofI is incorrectly named in the pleading, the Court dismisses Erhart’s claims and
23 grants him leave to amend for the limited purpose of naming the proper defendant.


24 25 **CONCLUSION**

26 In light of the foregoing, the Court **GRANTS IN PART** and **DENIES IN**
27 **PART** BofI’s motion for judgment on the pleadings (ECF No. 78). The Court grants
28 BofI’s request to dismiss Erhart’s claims because he names the incorrect defendant.

1 Erhart is granted leave to amend for the limited purpose of naming the correct entity
2 defendant. No other changes or corrections to the new pleading are authorized.
3 Erhart shall file a Third Amended Complaint that makes this correction no later than
4 **May 3, 2019**. The Court denies the remainder of Boff's motion. Further, the Court
5 **DENIES** Erhart's motion for judgment on the pleadings (ECF No. 96).

6 **IT IS SO ORDERED.**

7
8 **DATED: April 30, 2019**


9 **Hon. Cynthia Bashant**
10 **United States District Judge**

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28