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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 JENNIFER BREAR BRINKER,  
12 Plaintiff,  
13 v.  
14 AXOS BANK, et al.,  
15 Defendants.

Case No. 22-cv-386-MMA (DDL)

**ORDER (1) GRANTING MOTION  
TO DISMISS; AND (2) DENYING AS  
MOOT MOTION TO STRIKE**

[Doc. Nos. 13, 14]

16  
17 Plaintiff Jennifer Brear Brinker (“Plaintiff”) brings this whistleblower retaliation  
18 action against Defendants Axos Bank, Axos Financial Inc. (“Axos Financial”), John  
19 Tolla, Eshel Bar-Adon, and Tom Constantine (collectively, “Defendants”). *See* Doc.  
20 No. 4 (“First Amended Complaint” or “FAC”). Defendants Axos Bank, John Tolla,  
21 Eshel Bar-Adon, and Tom Constantine move to dismiss Plaintiff’s first, third, fourth,  
22 fifth, sixth, and eighth cause of action pursuant to Federal Rule of Civil Procedure  
23 12(b)(6). *See* Doc. No. 13. Defendant Axos Financial Inc. moves to dismiss all causes of  
24 action against it. *See id.* Defendants also move to strike paragraph 96 in the First  
25 Amended Complaint pursuant to Federal Rule of Civil Procedure 12(f). *See* Doc. No. 14.  
26 Plaintiff filed an opposition to Defendants’ motion to dismiss, to which Defendants  
27 replied. *See* Doc. Nos. 23, 25. The Court found the matter suitable for determination on  
28 the papers and without oral argument pursuant to Federal Rule of Civil Procedure 78(b)

1 and Civil Local Rule 7.1.d.1. *See* Doc. No. 26. For following reasons, the Court  
2 **GRANTS** Defendants’ motion to dismiss and **DENIES AS MOOT** Defendants’ motion  
3 to strike.<sup>1</sup>

#### 4 **I. BACKGROUND**<sup>2</sup>

5 In October 2018, Plaintiff was hired by Axos Bank as a Senior Independent Credit  
6 Review Officer for the Governance, Risk Management, and Compliance Department.  
7 FAC ¶ 12. Plaintiff was responsible for reviewing Axos Bank’s loan portfolios to  
8 examine, measure, monitor and report weaknesses and deficiencies with the Bank’s  
9 lending and risk management standards and practices. *Id.* Broadly, Plaintiff alleges that  
10 Axos Bank intentionally understaffs its compliance departments and hires inexperienced  
11 and under-qualified compliance personnel in an effort to conceal its failure to comply  
12 with federal banking regulations, safe and sound banking practices, and its own policies.  
13 *Id.* ¶ 1. Plaintiff further alleges that she uncovered a dizzying array of compliance and  
14 risk-management issues that had previously been “overlooked,” or “undetected” and that  
15 she faced consistent hostility from management, improper efforts to dilute her findings,  
16 and retaliation for being honest about the state of the Bank’s internal controls and  
17 compliance efforts. *Id.* ¶ 3.

#### 18 **A. Correspondent Lending Review**

19 In November 2018, Plaintiff began review of Axos Bank’s “Correspondent  
20 Lending” portfolio. *Id.* ¶ 18. Corresponding Lending (“CL”) is a third-party lending  
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23 <sup>1</sup> The Court concludes that Plaintiff has exhausted her ability to amend once as a matter of course  
24 pursuant to Federal Rule of Civil Procedure 15(a)(1) and therefore considers the instant motion to  
25 dismiss and motion to strike. *See* Doc. Nos. 27, 28, 29; *see also Estate of Nunez v. County of San Diego*,  
26 No. 16-cv-1412-BEN-MDD, 2017 U.S. Dist. LEXIS 108183, at \*10–13 (S.D. Cal. July 10, 2017)  
(concluding that plaintiffs needed leave from the court to amend their complaint as “Plaintiffs have  
27 failed to demonstrate they obtained *all of the opposing parties’ written consent* to amend their  
28 complaint[.]”) (emphasis added).

<sup>2</sup> Because this matter is before the Court on a motion to dismiss, the Court must accept as true the  
allegations set forth in the First Amended Complaint. *See Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425  
U.S. 738, 740 (1976).

1 product where Axos Bank serves as lender of record for non-Bank entities that cannot  
2 extend loans in their own names. *Id.* Plaintiff asserts she uncovered numerous problems  
3 with the CL program during her review, including problems with internal financial  
4 controls, compliance with AML best practices, failure to monitor compliance with  
5 lending guidelines, failure to monitor program risk factors pursuant to a directive from  
6 the Bank’s primary regulator, systematic financial and credit formula errors, and failure  
7 to monitor and accurately report borrower creditworthiness. *Id.* ¶ 19.

8 Plaintiff created a draft report containing her critiques, but was told to “socialize”  
9 the report findings with the business unit and senior management in a series of meetings.  
10 *Id.* ¶ 26. Management refused to provide any commentary or plans to remediate the  
11 deficiencies. *Id.* The executive manager (and Chief Legal Officer), Eshel Bar-Adon,  
12 refused to acknowledge the deficiencies. *Id.* As a result of Defendant Bar-Adon’s delay,  
13 the many “socialization” discussions, and the many management edits, the report was  
14 more than four months late and was significantly watered down before it was presented to  
15 the Board of Directors and released to the OCC. *Id.*

16 Plaintiff alleges that, after finally negotiating remediation plans with senior  
17 management, Plaintiff continued communicating with CL personnel who ignored her  
18 remediation efforts and reminders, so the audit records repeatedly became past due  
19 during 2019. *Id.* ¶ 29. By early 2020, Axos’s Chief Risk Officer instructed Plaintiff to  
20 host daily meetings with the CL business unit to close out several past-due findings. *Id.* ¶  
21 30. Plaintiff was thwarted by Defendant Bar-Adon who criticized her for being “too  
22 bureaucratic” when she sought to establish accurate and effective risk management  
23 practices relevant to a customer shared with another business unit that held an \$87.5  
24 million credit line from the Bank. *Id.*

## 25 **B. Equipment Finance Portfolio**

26 While still attempting to negotiate her findings from the review of the  
27 Correspondent Lending Portfolio, Plaintiff embarked on a review of Axos’s Equipment  
28 Finance (“EQF”) Portfolio that represented approximately \$150M in lending assets at the

1 time. *Id.* ¶ 31. Plaintiff asserts she uncovered a variety of issues, including concerns  
2 regarding underwriting standards, accounting problems, and improper risk ratings. *See*  
3 *id.* ¶¶ 32–37.

4 Plaintiff alleges that, during the EQF ICR “exit meeting” with Chief Credit Officer  
5 Tom Constantine to review her draft report, he attacked her findings, attacked the scope  
6 of the report, and attacked Plaintiff’s recommendations to improve the credit  
7 underwriting policies and risk rating criteria. *Id.* ¶ 38. Defendant Constantine demanded  
8 that Plaintiff rewrite the report as he was unwilling to provide any of the required  
9 management responses to remediate credit deficiencies or findings presented in the draft  
10 report. *Id.* Management at the Bank ultimately delayed and watered down the ICR  
11 report relating to the Equipment Finance Portfolio over Plaintiff’s objections. *Id.*  
12 Plaintiff was later told the EQF business unit thought she was “crazy.” *Id.*

### 13 **C. Warehouse Lending Review**

14 After her Equipment Finance Review, Plaintiff started a review of the Warehouse  
15 Lending Portfolio, which represented approximately \$430 million in lending assets at the  
16 time. As with her other reviews, Plaintiff asserts she uncovered a host of problems,  
17 including a lack of skilled credit analysts, underwriting and AML deficiencies, improper  
18 risk ratings and covenant monitoring, insider dealing and investor fraud, and improper  
19 report of out of compliance loans. *See id.* ¶¶ 41–47, 49–53.

20 Plaintiff alleges that she raised all these concerns with management and prepared a  
21 draft report. *Id.* ¶ 48. Her draft report was watered down and delayed by management  
22 during the “socializing” process through edits made over Plaintiff’s objections. *Id.* Even  
23 so, her final report contained nine negative findings that were significant enough to be  
24 escalated to the Board of Directors. *See id.*

### 25 **D. The Board Expresses Concern Over Plaintiff’s Findings**

26 In January of 2020 Plaintiff was told to work full-time on remediating the findings  
27 that she had put in her reports because the Board of Directors was concerned with the  
28 number of findings that she had issued and the lack of remediation progress by the Bank.

1 *Id.* ¶ 54. Many of the remediation periods were again extended because of the Bank’s  
2 refusal to resolve these issues. *Id.* ¶ 55. Plaintiff repeatedly complained about the length  
3 of time involved in remediating her findings. *Id.*

#### 4 **E. Lender Finance Review**

5 Plaintiff started her report on Axos’s Lender Finance Portfolio in April of 2020.  
6 Plaintiff asserts she immediately discovered that Axos had not resolved many of the  
7 issues raised in her prior ICR report, including issues related to loan monitoring and  
8 administration. *Id.* ¶ 56. She also discovered a number of other problems with the credit  
9 approval process and monitoring of loans. *Id.* ¶ 57.

10 In July 2020, Plaintiff circulated a draft of her Lender Finance report. *Id.* ¶ 59.  
11 There were at least eight draft versions circulated and Plaintiff expressed concern over  
12 the management involvement. *Id.* But even with management interference, the final  
13 report contained eleven negative findings about gaps in internal controls, documentation,  
14 reporting, collateral monitoring, risk ratings and credit administration. *Id.*

#### 15 **F. Plaintiff’s HR Complaint and First “Severance” Offer**

16 Plaintiff alleges that, as a result of Plaintiff’s vigorous efforts to perform her job,  
17 she was faced with hostility at Axos. *Id.* ¶ 60. She was repeatedly told that she was “too  
18 negative” and needed to “lower her standards[,]” and she was also given unfairly negative  
19 performance reviews. *Id.* “Faced with hostility to her work and retaliation, Plaintiff  
20 complained about retaliation and other issues to HR in October of 2020. *Id.* ¶ 61.

21 In early November, the Executive Vice President of Human Resources, Mary Ellen  
22 Ciafardini, told Plaintiff that she had found “no merit” to the complaints and that Plaintiff  
23 had to “solve” the problem because “it couldn’t go on like this any longer.” *Id.* ¶ 62. Ms.  
24 Ciafardini indicated that Plaintiff would have to leave the Bank, asking what kind of  
25 severance would make her happy to leave and asking her to propose a severance in return  
26 for a full release of any claims against the Bank. *Id.* Two days after this meeting, Ms.  
27 Ciafardini called Plaintiff back to reiterate the offer to leave Axos and asked Plaintiff to  
28 “let her know” what it would take to get her to leave Axos. *Id.* ¶ 63.

1 **G. Warehouse Lending Supplemental Report**

2 In or around September of 2020, Plaintiff and her colleague, Anthony Maniscalco  
3 began working on a 2020 Warehouse Lending Portfolio audit. *Id.* ¶ 64. Plaintiff asserts  
4 that she and Mr. Maniscalco both raised significant concerns regarding compliance with  
5 AML laws and procedures, including failure to collect information on beneficial owners,  
6 failure to assess the strength of personal guarantees made to secure loans, failure to  
7 obtain spousal consents, failure to investigate the propriety of SEC waivers, failure to  
8 collect required tax return information, failure to obtain audited financials to determine  
9 creditworthiness of borrowers, failure to properly underwrite increases in credit lines, and  
10 failure to acquire appropriate corporate documents, among others. *Id.* ¶ 65.

11 Plaintiff and Mr. Maniscalco reported these concerns throughout the investigation  
12 and through draft reports submitted to Plaintiff's supervisor and reiterated these findings  
13 in numerous communications with Defendant Tolla in December 2020. *Id.* ¶ 66. On or  
14 around December 17, 2020, Plaintiff and Mr. Maniscalco submitted an initial draft 2020  
15 summary on the Warehouse Lending Portfolio that raised a number of issues, including  
16 poor risk rating procedures, problems with underwriting of loans, including failure to  
17 collect necessary documents, failure to monitor the loans, including failure to monitor the  
18 financial condition of loan guarantors, failure to amend CRA's to reflect changes in the  
19 Credit Approval Memo, continued failure to use an accurate leverage ratio, continued  
20 lack of expertise of credit professionals, and continued failure to monitor loan covenants.  
21 *Id.* ¶ 69.

22 **H. Plaintiff's Complaint About Axos's Review and Compliance Practices**

23 Plaintiff alleges that, in addition to the specific weaknesses that Plaintiff identified  
24 through her review of various Axos business units, she complained throughout her tenure  
25 about Axos's audit, review, and compliance practices more generally. *Id.* ¶ 70. Among  
26 other things, Plaintiff repeatedly pointed out that many of the staff Axos employed to  
27 underwrite loans and monitor credit exposure lacked credit experience and the training  
28 necessary to adequately perform their jobs. *See id.*

1 **I. Plaintiff’s Complaints About Axos’s Discriminatory Policies and Practices**

2 Plaintiff alleges that Axos maintains a policy and practice of paying women less  
3 than men in the same or substantially similar job positions, even though those employees  
4 perform substantially equal or similar work. *Id.* ¶ 75. Axos also promotes men more  
5 frequently to better compensated job positions and levels than women despite similar  
6 qualifications and duties. *Id.* Plaintiff became aware of these policies and practices,  
7 through conversations with her fellow employees, including one male employee who was  
8 paid nearly twice as much as Plaintiff despite them having the same position. *Id.*

9 Additionally, Plaintiff experienced numerous other forms of discriminatory  
10 behavior aimed at women while employed with Axos. *Id.* ¶ 76. For example, she was  
11 subjected to insensitive and/or disparaging comments by Axos’s CEO, and Plaintiff and  
12 other women were also delegated a significant amount of administrative tasks compared  
13 to their male counterparts in similar roles. *Id.*

14 Plaintiff first complained of these policies, practices, and comments to her  
15 supervisors and Defendant Tolla in or around January 2020. *Id.* ¶ 77. However, Axos  
16 failed to conduct any further investigation. *Id.*

17 Plaintiff’s formal complaint to HR in or around October 2020 also addressed the  
18 discrimination that Plaintiff had experienced. *Id.* ¶ 78. However, Plaintiff’s complaints  
19 were once again dismissed. *Id.* In early November, Ms. Ciafardini told Plaintiff that she  
20 had found “no merit” to the complaints and that Plaintiff had to “solve” the problem. *Id.*  
21 Ms. Ciafardini indicated that Plaintiff would have to leave the Bank, asking what kind of  
22 severance would make her happy to leave and asking her to propose a severance in return  
23 for a full release of any claims against the Bank. *Id.* Two days after this meeting, Ms.  
24 Ciafardini called Plaintiff back to reiterate the offer to leave Axos and asked Plaintiff to  
25 “let her know” what it would take to get her to leave Axos. *Id.* ¶ 79.

26 **J. Plaintiff and Other ICR Personnel Who Supported Her Are Terminated**

27 Plaintiff alleges that, on January 5, Defendant Tolla informed Plaintiff and several  
28 other members of the ICR team that they were being terminated. *Id.* ¶ 80. Plaintiff was

1 offered a severance of \$27,076.96 in return for a “settlement and general release” of any  
2 claims against Axos and for signing an “over-the-top” declaration under oath. *Id.* ¶ 81.  
3 Through the terms of the settlement agreement, Axos also sought to prevent Plaintiff  
4 from engaging in whistleblower activity and reporting any instances of discriminatory  
5 behavior she had experienced or observed. *See id.* ¶ 82.

6 Axos’s settlement agreement also required Plaintiff to not disclose any information  
7 obtained during her work for the Bank to any third party and required her to certify that  
8 she had destroyed any documents or information that she obtained in the course of her  
9 work. *Id.* ¶ 83. When Plaintiff declined to sign the release, Axos increased its efforts at  
10 intimidation, sending her a “cease and desist” letter on January 12 that threatened  
11 litigation and demanded Plaintiff not provide any information pertaining to Axos to any  
12 third party and inform Axos if she had previously shared any such information with a  
13 third party. *Id.* ¶ 84. Axos also demanded that Plaintiff sign another declaration that  
14 stated, among other things, that she “understands that if it is discovered that I have used  
15 such Proprietary information for any purpose or provided such Proprietary Information to  
16 a third party or third parties to use, I will be exposed to have improperly used stolen  
17 information.” *Id.* Axos subsequently has pursued its claims against Plaintiff in  
18 arbitration. *Id.* ¶ 85.

19 Plaintiff brings eight claims in her First Amended Complaint: (1) Sarbanes-Oxley  
20 Act (SOX) Retaliation (18 U.S.C. § 1514A) against all Defendants; (2) Whistleblower  
21 Retaliation in violation of Cal. Lab. Code § 1102.5 against Defendants Axos Bank and  
22 Axos Financial; (3) violation of California Equal Pay Act Lab. Code § 1197.5 against  
23 Defendants Axos Bank and Axos Financial; (4) Gender Discrimination in violation of  
24 FEHA Gov. Code § 12940, *et seq.* against Defendants Axos Bank and Axos Financial;  
25 (5) Failure to Prevent Discrimination and Harassment in violation of Gov. Code  
26 § 12940(j)(k) against Defendants Axos Bank and Axos Financial; (6) Retaliation in  
27 violation of FEHA against Defendants Axos Bank and Axos Financial; (7) Wrongful  
28 Termination in violation of Public Policy; (8) Unlawful Business Practices (Cal. Bus. &



1 Prof. Code §§ 17200, *et seq.*) against Defendants Axos Bank and Axos Financial. *Id.* ¶¶  
2 88–145.

## 3 **II. LEGAL STANDARD**

4 A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint. *Navarro*  
5 *v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A pleading must contain “a short and plain  
6 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.  
7 8(a)(2). However, plaintiffs must also plead “enough facts to state a claim to relief that is  
8 plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also*  
9 Fed. R. Civ. P. 12(b)(6). The plausibility standard demands more than a “formulaic  
10 recitation of the elements of a cause of action,” or “‘naked assertions’ devoid of ‘further  
11 factual enhancement.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*,  
12 550 U.S. at 555, 557). Instead, the complaint “must contain sufficient allegations of  
13 underlying facts to give fair notice and to enable the opposing party to defend itself  
14 effectively.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

15 In reviewing a motion to dismiss under Rule 12(b)(6), courts must assume the truth  
16 of all factual allegations and must construe them in the light most favorable to the  
17 nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996)  
18 (citing *Nat’l Wildlife Fed’n v. Espy*, 45 F.3d 1337, 1340 (9th Cir. 1995)). The court need  
19 not take legal conclusions as true merely because they are cast in the form of factual  
20 allegations. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987) (quoting *W. Min.*  
21 *Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)). Similarly, “conclusory allegations  
22 of law and unwarranted inferences are not sufficient to defeat a motion to dismiss.”  
23 *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998). In determining the propriety of a  
24 Rule 12(b)(6) dismissal, courts generally may not look beyond the complaint for  
25 additional facts. *See United States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003).

26 Where dismissal is appropriate, a court should grant leave to amend unless the  
27 plaintiff could not possibly cure the defects in the pleading. *Knappenberger v. City of*  
28

1 *Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1127  
2 (9th Cir. 2000)).

### 3 **III. REQUEST FOR JUDICIAL NOTICE**

4 While, generally, the scope of review on a motion to dismiss for failure to state a  
5 claim is limited to the contents of the complaint, *see Warren v. Fox Family Worldwide,*  
6 *Inc.*, 328 F.3d 1136, 1141 n.5 (9th Cir. 2003), a court may, however, consider certain  
7 materials, including matters of judicial notice, without converting the motion to dismiss  
8 into a motion for summary judgment, *see United States v. Ritchie*, 342 F.3d 903, 908 (9th  
9 Cir. 2003). For example, “a court may take judicial notice of matters of public record,”  
10 *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) (quoting *Lee v.*  
11 *City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001), *overruled on other grounds by*  
12 *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125–26 (9th Cir. 2002)), and of  
13 “documents whose contents are alleged in a complaint and whose authenticity no party  
14 questions, but which are not physically attached to the pleading,” *Branch v. Tunnell*, 14  
15 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith*, 307 F.3d at  
16 1125–26; *see also* Fed. R. Evid. 201.

17 A judicially noticed fact must be one not subject to reasonable dispute in that it is  
18 either: (1) generally known within the territorial jurisdiction of the trial court; or (2)  
19 capable of accurate and ready determination by resort to sources whose accuracy cannot  
20 reasonably be questioned. *See* Fed. R. Evid. 201(b); *see also Khoja*, 899 F.3d at 999  
21 (quoting Fed. R. Evid. 201(b)).

22 Plaintiff asks the Court to judicially notice three exhibits in support of her  
23 opposition to the motion to dismiss: (1) an October 4, 2022 “Right to Sue” Letter from  
24 the California Department of Fair Employment and Housing (“DFEH”); (2) the  
25 “Commission Guidance Regarding Management’s Report on Internal Control Over  
26 Financial Reporting Under Section 13(a) or 15(d) of the Securities Exchange Act of  
27 1934,” available on the Securities and Exchange Commission’s website; and (3) the  
28 “Internal Routine and Controls Section 4.2” from the RMS Manual of Examination

1 Policies, available on the Federal Deposit Insurance Corporation’s website. *See* Doc. No.  
2 23-2. Defendants have not opposed this request.

3 The Court may take judicial notice of Exhibit A. “Plaintiffs’ DFEH charges and  
4 right-to-sue letters are ‘public records whose accuracy is not in dispute.’” *Anderson v.*  
5 *Smithfield Packaged Meats Corp.*, No. 2:20-cv-01655-AB-MRWx, 2020 U.S. Dist.  
6 LEXIS 156420, at \*5 (C.D. Cal. Mar. 26, 2020) (quoting *Dornell v. City of San Mateo*,  
7 19 F. Supp. 3d 900, 904 n.3 (N.D. Cal. 2013)) (taking judicial notice of a party’s DFEH  
8 complaint and right-to-sue letter). The Court may also take judicial notice of Exhibits B  
9 and C because “[u]nder Rule 201, [a] court can take judicial notice of public records and  
10 government documents available from reliable sources on the Internet, such as websites  
11 run by governmental agencies.” *U.S. ex rel. Modglin v. DJO Glob. Inc.*, 48 F. Supp. 3d  
12 1362, 1381 (C.D. Cal. 2014) (collecting cases in which courts have taken judicial notice  
13 of the websites of government agencies).

14 Accordingly, the Court **GRANTS** Plaintiff’s request and takes judicial notice of  
15 Exhibits A, B, and C submitted in support of her opposition to the motion to dismiss.

#### 16 **IV. DISCUSSION**

17 Defendants Axos Bank, John Tolla, Eshel Bar-Adon, and Tom Constantine move  
18 to dismiss Plaintiff’s first, third, fourth, fifth, sixth, and eighth causes of action pursuant  
19 to Federal Rule of Civil Procedure 12(b)(6). *See* Doc. No. 13. Defendant Axos Financial  
20 Inc. moves to dismiss all causes of action against it pursuant to Federal Rule of Civil  
21 Procedure 12(b)(6). *See id.* The Court assesses each claim in turn.

#### 22 **A. Claim 1: Sarbanes-Oxley Act (SOX) Retaliation (18 U.S.C. § 1514A)**

23 In her first cause of action, Plaintiff alleges violation of the Sarbanes-Oxley Act,  
24 18 U.S.C. § 1514A, against all Defendants. FAC ¶¶ 88–96. Pursuant to the Sarbanes-  
25 Oxley Act:

26  
27 No [publicly-traded] company . . . including any subsidiary or affiliate  
28 whose financial information is included in the consolidated financial  
statements of such company . . . or any officer, employee, contractor,

1 subcontractor, or agent of such company . . . may discharge . . . threaten,  
2 harass, or in other manner discriminate against an employee in the terms and  
3 conditions of employment because of any lawful act done by the employee—

4 (1) to provide information . . . regarding any conduct which the employee  
5 reasonably believes constitutes a violation of section 1341 [mail fraud], 1343  
6 [wire fraud], 1344 [bank fraud], or 1348 [securities or commodities fraud],  
7 any rule or regulation of the Securities and Exchange Commission, or any  
8 provision of Federal law relating to fraud against shareholders, when the  
9 information or assistance is provided to or the investigation is conducted by

10 (A) a Federal regulatory or law enforcement agency;

11 (B) any Member of Congress or any committee of Congress; or

12 (C) a person with supervisory authority over the employee . . . .

13 18 U.S.C. § 1514A.

14 To state a prima facie case under 18 U.S.C. § 1514A, Plaintiff must plead that:  
15 (1) she engaged in a protected activity; (2) Defendant knew or suspected, actually or  
16 constructively, that she engaged in the protected activity; (3) she suffered an adverse  
17 employment action; and (4) the circumstances were sufficient to raise the inference that  
18 the protected activity was a contributing factor in the adverse action. *Van Asdale v. Int'l*  
19 *Game Tech.*, 577 F.3d 989, 996 (9th Cir. 2009). The Court confines its analysis to the  
20 elements challenged in Defendants' motion to dismiss.

21 *1. All Defendants*

22 a. Legal Standard

23 As an initial matter, the parties dispute the pleading standard applicable to the first  
24 element of Plaintiff's SOX claim. Defendants maintain that the standard set forth in *Van*  
25 *Asdale v. Int'l Game Tech.*, 577 F.3d 989 (9th Cir. 2009), controls. *See* Doc. No. 13-1 at  
26  
27  
28

1 13–20; Doc. No. 25 at 7.<sup>3</sup> *Van Asdale* adopted the standard set forth in *Platone v. FLYi,*  
2 *Inc.*, 25 IER Cases 278, 287, 2006 DOLSOX LEXIS 105, \*33 (Dep’t of Labor Sept. 29,  
3 2006), and held, in relevant part: First, “to constitute protected activity under Sarbanes-  
4 Oxley, an employee’s communications must definitively and specifically relate to [one]  
5 of the listed categories of fraud or securities violations under 18 U.S.C. § 1514A(a)(1).”  
6 *Van Asdale*, 577 F.3d at 996–97 (internal quotation marks and alteration omitted).  
7 Second, the complaint must “approximate . . . the basic elements of securities fraud” of  
8 the kind of fraud or violation alleged. *See id.* at 1001 (citation omitted). Plaintiff  
9 maintains that the standard for pleading protected activity under the Sarbanes-Oxley Act  
10 was relaxed when the Administrative Review Board (“ARB”) abrogated *Platone* in  
11 *Sylvester v. Parexel Int’l LLC*, No. 07-123, 32 IER Cases 497, 2011 WL 2165854, at  
12 \*14–15 (U.S. Dept. of Labor May 25, 2011) (en banc) and urges this Court to follow the  
13 reasoning in *Erhart v. Bofi Holding, Inc.*, 269 F. Supp. 3d 1059, 1072 (S.D. Cal. 2017).  
14 *See* Doc. No. 23 at 9–11.

15 In a 2016 opinion, the *Erhart* court held: “With *Platone* abrogated, *Sylvester* now  
16 provides the ARB’s interpretation of 18 U.S.C. § 1514A(a)(1). The Court believes that  
17 the Ninth Circuit consistent with its approach in *Van Asdale*, would similarly defer to the  
18 ARB’s reasonable interpretation of the statute that is now provided in *Sylvester*.” *Erhart*  
19 *v. Bofi Holding, Inc.*, No. 15-cv-02287-BAS(NLS), 2016 U.S. Dist. LEXIS 131761, at  
20 \*31–32 (S.D. Cal. Sept. 26, 2016). Two years later, in *Wadler v. Bio-Rad Labs., Inc.*,  
21 916 F.3d 1176 (9th Cir. 2019), the Ninth Circuit cited both *Van Asdale* and *Sylvester* with  
22 approval.

23 Having considered the parties’ briefing, and having conducted an independent  
24 review of the relevant case law, the Court adopts the reasoning of *Erhart v. Bofi Holding,*  
25

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26  
27 <sup>3</sup> Defendants also point to *Rocheleau v. Micosemi*, 680 Fed. App’x 533, 535 (9th Cir. 2017) as support  
28 for their arguments, but by its own terms, *Rocheleau* is “not appropriate for publication and is not  
precedent except as provided by 9th Cir. R. 36-3.”

1 *Inc.*, 445 F. Supp. 3d 831, 845–46 (S.D. Cal. 2020) and *Erhart v. Bofi Holding, LLC*,  
2 2020 U.S. Dist. LEXIS 57137, at \*27–31 (S.D. Cal. Mar. 31, 2020), which reconcile *Van*  
3 *Asdale* with *Sylvester*. The *Erhart* court summarized the standard set forth in *Sylvester*,  
4 which requires a plaintiff to show she had a “reasonable belief” that the reported conduct  
5 constituted a violation of federal law:

6  
7 To recap, Erhart’s Sarbanes-Oxley whistleblower retaliation claim requires  
8 him to demonstrate he “provide[d] information . . . regarding any conduct  
9 which [he] reasonably believe[d] constitute[d] a violation of section 1341  
10 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities or  
11 commodities fraud], any rule or regulation of the Securities and Exchange  
12 Commission, or any provision of Federal law relating to fraud against  
13 shareholders . . . .” 18 U.S.C. § 1514A(a)(1). Hence, Erhart does “not have to  
14 prove that he reported an actual violation.” *See Wadler v. Bio-Rad Labs., Inc.*,  
15 916 F.3d 1176, 1186-87 (9th Cir. 2019). Rather, Erhart has “to prove only  
16 that he ‘reasonably believed that there might have been’ a violation.” *See id.*  
17 at 1187 (quoting *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 1001 (9th Cir.  
18 2009)).

19 The “reasonable belief” standard includes both a subjective component  
20 and an objective component. *E.g.*, *Wadler*, 916 F.3d at 1187-88, *Van Asdale*,  
21 577 F.3d at 1000. For the subjective component, Erhart must demonstrate he  
22 believed the conduct he reported violated one of the categories of laws in  
23 § 1514A. *Van Asdale*, 577 F.3d at 1000. “The objective reasonableness  
24 component . . . ‘is evaluated based on the knowledge available to a reasonable  
25 person in the same factual circumstances with the same training and  
26 experience as the aggrieved employee.’” *Wadler*, 916 F.3d at 1188 (quoting  
27 *Sylvester v. Parexel Int’l LLC*, No. 07-123, 2011 DOLSOX LEXIS 39, 2011  
28 WL 2517148, at \*12 (Dep’t of Labor May 25, 2011)). This evaluation  
“requires an examination of the reasonableness of a complainant’s beliefs, but  
not whether the complainant actually communicated the reasonableness of  
those beliefs to management or the authorities.” *Id.* (quoting *Sylvester*, 2011  
DOLSOX LEXIS 39, 2011 WL 2517148, at \*13).

Moreover, “[t]o encourage disclosure, Congress chose statutory  
language which ensures that “an employee’s reasonable but mistaken belief  
that an employer engaged in conduct that constitutes a violation of one of the  
six enumerated categories is protected.” *Van Asdale*, 577 F.3d at 1001.

1 Therefore, an employee is not required to “essentially prove the existence of  
2 fraud before suggesting the need for an investigation,” as such a requirement  
3 “would hardly be consistent with Congress’s goal of encouraging disclosure.”  
4 *Id.* at 1002.

5 *Erhart*, 445 F. Supp. 3d at 845–46 (alterations in original).

6 The Court now turns to the merits of the parties’ arguments.

7 b. Analysis

8 First, Defendants argue that Plaintiff fails to allege that she had a reasonable basis  
9 to believe the conduct she reported violated one of a limited set of federal law provisions  
10 and that Plaintiff fails to allege facts showing that Brinker engaged in activity protected  
11 under Section 1514A. *See* Doc. No. 13-1 at 11–19. As described above, the “reasonable  
12 belief” standard includes a subjective component and an objective component. *Erhart*,  
13 445 F. Supp. 3d at 846 (first citing *Wadler*, 916 F.3d at 1187–88; then citing *Van Asdale*,  
14 577 F.3d at 1000).

15 For the subjective component, Plaintiff must plausibly plead she believed the  
16 conduct she reported violated one of the categories of laws in § 1514A. *See id.* (citing  
17 *Van Asdale*, 577 F.3d at 1000). “The objective reasonableness component . . . ‘is  
18 evaluated based on the knowledge available to a reasonable person in the same factual  
19 circumstances with the same training and experience as the aggrieved employee.’”  
20 *Erhart*, 445 F. Supp. 3d at 846 (quoting *Wadler*, 916 F.3d at 1188 (itself quoting  
21 *Sylvester v. Parexel Int’l LLC*, 2011 DOLSOX LEXIS 39, 2011 WL 2517148, at \*12)).  
22 Plaintiff alleges the following:

23  
24 At all material times Defendant was subject to 18 U.S.C. § 1514A, which  
25 prohibits the company “or any officer, employee, contractor, subcontractor,  
26 or agent of such company” from “discharge[ing], demot[ing], suspend[ing],  
27 threaten[ing], harass[ing], or in any other manner discriminat[ing] against an  
28 employee in the terms and conditions of employment because of any lawful  
act done by the employee to provide information, cause information to be  
provided, or otherwise assist in an investigation regarding any conduct which

1 the employee reasonably believes constitutes a violation of section 1341,  
2 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange  
3 Commission, or any provision of Federal law relating to fraud against  
4 shareholders, when the information or assistance is provided to or the  
5 investigation is conducted by a Federal regulatory or law enforcement agency  
6 . . . or a person with supervisory authority over the employee (or such other  
7 person working for the employer who has the authority to investigate,  
8 discover, or terminate misconduct). Plaintiff actually and reasonably believed  
9 that the conduct and actions listed above violated federal statutes, rules and  
10 regulations, including Section 404 of the Sarbanes Oxley Act of 2002 and the  
11 Securities Fraud Statutes. Defendants harassed, threatened, discharged and  
12 retaliated against Plaintiff because she made oral and written complaints  
13 regarding weaknesses in Axos’s internal financial controls and what she  
14 reasonably believed to be illegal or unlawful conduct in violation of state and  
15 federal statutes, rules and regulations. Plaintiff made these complaints to her  
16 employer, by and through its agents and employees, as well as to the OCC.

17 FAC ¶¶ 89–91.

18 “Without knowing what particular conduct [Plaintiff] asserts [s]he believed  
19 constituted a violation of any of the categories of laws enumerated in Section 1514(a)(1),  
20 the Court cannot meaningfully analyze whether [s]he plausibly alleges a belief that is  
21 objectively reasonable.” *See Erhart*, 2016 U.S. Dist. LEXIS 131761, at \*38–39.  
22 Accordingly, the Court cannot say that the operative complaint fairly puts Defendants on  
23 notice of the claim against them. *See Starr*, 652 F.3d at 1216 (holding that a complaint  
24 “must contain sufficient allegations of underlying facts to give fair notice and to enable  
25 the opposing party to defend itself effectively.”); *see also Erhart*, 2016 U.S. Dist. LEXIS  
26 131761, at \*39 (“[T]he test for protected activity under *Sylvester* and Section  
27 1514A(a)(1) is not what the Court, now reviewing [the plaintiff’s] alleged discoveries at  
28 [the defendant bank], believes may violate one of Section 1514A(a)(1)’s categories. The  
standard instead focuses on [the plaintiff’s] belief at the time he reported [the  
defendant’s] alleged misconduct—and whether a reasonable person in his position, not  
the Court’s, would have believed that the conduct constituted a violation of the relevant



1 laws. The Court cannot now articulate [plaintiff’s] beliefs for him after the fact.”). The  
2 Court therefore **GRANTS** Defendants’ motion to dismiss on this basis.<sup>4</sup>

3 Defendants additionally argue that the claim should be dismissed to the extent it  
4 seeks punitive and exemplary damages because such damages are not recoverable under  
5 Section 1514A. Doc. No. 13-1 at 12 fn.4. Plaintiff seems to concede this point as she did  
6 not address the argument in her opposition to the motion to dismiss.<sup>5</sup> The Court  
7 concludes this provides another basis for dismissal of Plaintiff’s SOX claim as to all  
8 Defendants. *See Erhart v. Bofi Fed. Bank*, 2022 U.S. Dist. LEXIS 141027, at \*2, \*2 fn.1  
9 (S.D. Cal. Aug. 8, 2022) (citing 18 U.S.C. § 1514A(c)) (additional citation omitted); *see*  
10 *also Schmidt v. Levi Strauss & Co.*, 621 F. Supp. 2d 796, 803 (N.D. Cal. 2008) (internal  
11 citations and quotation marks omitted) (“[A]ny additional remedies not mentioned [in  
12 1514A] would be limited to similar relief to make the employee whole.”).

13 2. *Defendants Bar-Adon and Tom Constantine*

14 Defendants Bar-Adon and Constantine additionally move to dismiss Claim 1 on  
15 the ground that Plaintiff fails to allege facts showing they directly or indirectly engaged  
16 in any unfavorable or adverse employment action against Plaintiff. Doc. No. 13-1 at 20–  
17 22.

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18  
19  
20 <sup>4</sup> Defendants also move to dismiss Claim 1 on the grounds Plaintiff fails to allege conduct  
21 approximating a federal securities fraud violation. *See* Doc. No. 13-1 at 19–20. The Court is not  
22 persuaded. “[A]n employee is not required to ‘essentially prove the existence of fraud before suggesting  
23 the need for an investigation,’ as such a requirement ‘would hardly be consistent with Congress’s goal  
24 of encouraging disclosure.’” *Erhart v. Bofi Holding, Inc.*, 445 F. Supp. 3d 831, 845–46 (S.D. Cal. 2020)  
25 (quoting *Van Asdale*, 577 F.3d at 1002); *see also Erhart v. Bofi Holding, Inc.*, 269 F. Supp. 3d 1059,  
26 1072 (S.D. Cal. 2017) (quoting *Sylvester v. Parexel Int’l LLC*, No. 07-123, 32 IER Cases 497, 2011 WL  
27 2165854, at \*18 (U.S. Dept. of Labor May 25, 2011)) (en banc) (“The plaintiff, [ ] ‘can have an  
28 objectively reasonable belief of a violation’ even if the plaintiff ‘fails to allege, prove, or approximate  
specific elements of fraud, which would be required under a fraud claim against the defrauder  
directly.’”).

<sup>5</sup> The Court notes that Plaintiff also did not oppose Defendants’ motion to strike these same allegations  
under Federal Rule of Civil Procedure 12(f). However, in light of the Court’s decision to grant  
Defendants’ Rule 12(b)(6) motion as to Claim 1, the Court **DENIES AS MOOT** Defendants’ motion to  
strike paragraph 96 of the First Amended Complaint under Rule 12(f). *See* Doc. No. 14.

1 a. Defendant Eshel Bar-Adon

2 Plaintiff alleges that Defendant Bar-Adon “is the Chief Legal Officer of Axos  
3 Financial, Inc. and Executive Vice President, Strategic Partnerships for Axos Bank.”  
4 FAC ¶ 10. Plaintiff further alleges that, in response to her draft Correspondent Lending  
5 review, which Plaintiff began in November 2018,

6  
7 management refused to provide any commentary or plans to remediate the  
8 deficiencies. The executive manager (and Chief Legal Officer), [Defendant]  
9 Eshel Bar-Adon, refused to acknowledge the deficiencies, including the need  
10 for a contingency plan for the potential Bankruptcy of one of the primary  
11 customers. As a result of [Defendant] Bar-Adon’s delay, the many  
12 “socialization” discussions, and the many management edits, the report was  
13 presented to the Board of Directors and released to the OCC.

14 *Id.* ¶ 27. Additionally,

15  
16 By early 2020, Axos’s Chief Risk Officer instructed [Plaintiff] to host daily  
17 meetings with the CL business unit to close out several past-due findings.  
18 Eventually, she was thwarted by the Chief Legal Officer [Defendant Bar-  
19 Adon] who criticized her for being “too bureaucratic” when she sought to  
20 establish accurate and effective risk management practices relevant to a  
21 customer shared with another business unit that held an \$87.5 million credit  
22 line from the Bank.

23 *Id.* ¶ 30.

24 In her opposition, Plaintiff argues that “it is reasonable to infer that Bar-Adon  
25 would have played an instrumental role in her termination. As Chief Legal Officer, he  
26 was responsible for assessing whether the Bank was actually violating the law.” Doc.  
27 No. 23 at 20. Drawing all reasonable inferences, the allegations are not sufficient to  
28 plausibly state a claim under Section 1514A against Defendant Bar-Adon. *See Cahill*, 80  
F.3d at 337–38 (citing *Nat’l Wildlife Fed’n*, 45 F.3d at 1340) (“In reviewing a motion to

1 dismiss under Rule 12(b)(6), courts must assume the truth of all factual allegations and  
2 must construe them in the light most favorable to the nonmoving party.”). Plaintiff does  
3 not allege Defendant Bar-Adon was directly or indirectly involved in the adverse  
4 employment decision, and it is not apparent from the FAC that other factors, like the size  
5 of the company, would raise a reasonable inference Defendant Bar-Adon was involved  
6 simply by the nature of his position. The Court concludes this provides another basis for  
7 dismissal of Plaintiff’s SOX claim against Defendant Bar-Adon.

8           b.     Defendant Tom Constantine

9           Plaintiff alleges that Defendant Constantine “is Executive Vice President & Chief  
10 Credit Officer at Axos Bank and Chief Credit Officer & Executive Vice President for  
11 Axos Financial, Inc.” FAC ¶ 11. Plaintiff further alleges that, during the Equipment  
12 Finance ICR “exit meeting” with Defendant Constantine to review Plaintiff’s draft report,

13  
14           he attacked her findings, attacked the scope of the report, and attacked  
15 [Plaintiff’s] recommendations to improve the credit underwriting policies and  
16 risk rating criteria. [Defendant] Constantine demanded that [Plaintiff] re-  
17 write the report as he was unwilling to provide any of the required  
18 management responses to remediate credit deficiencies or findings presented  
19 in the draft report.

20 *Id.* ¶ 38.

21           In her opposition, Plaintiff argues that “it is reasonable to infer that this high-level  
22 manager was instrumental in [Plaintiff’s] unlawful termination.” Doc. No. 23 at 21.  
23 Drawing all reasonable inferences, the allegations are not sufficient to plausibly state a  
24 claim under Section 1514A against Defendant Constantine. *See Cahill*, 80 F.3d at 337–  
25 38 (citing *Nat’l Wildlife Fed’n*, 45 F.3d at 1340). Plaintiff does not allege Defendant  
26 Constantine was directly or indirectly involved in the adverse employment decision and,  
27 similarly to Defendant Bar-Adon, it is not apparent from the FAC that other factors, like  
28 the size of the company, would raise a reasonable inference Defendant Constantine was

1 involved simply by the nature of his position. The Court concludes this provides another  
2 basis for dismissal of Plaintiff’s SOX claim against Defendant Constantine.

3       3.     *Conclusion*

4       In sum, the Court **GRANTS** Defendants’ motion and **DISMISSES** Plaintiff’s SOX  
5 claim as to all Defendants.

6 **B.     Claim 3: Violation of California Equal Pay Act Lab. Code § 1197.5**

7       In her third cause of action, Plaintiff alleges violation of the California Equal Pay  
8 Act (“EPA”), Cal. Lab. Code § 1197.5, against Defendants Axos Bank and Axos  
9 Financial. FAC ¶¶ 103–10. Defendants argue that Plaintiff fails to allege facts plausibly  
10 showing entitlement to relief. Doc. No. 13-1 at 22–25. Defendants urge that the “only  
11 ‘allegations’ relating to [Plaintiff’s] EPA claim are mere unadorned and formulaic  
12 recitations of the statute.” *Id.* at 24.

13       Plaintiff alleges that she “is a woman who was paid wages lower than those paid to  
14 male employees of similar qualifications, seniority, and experience.” FAC ¶ 108. She  
15 further alleges that “Axos maintained and continues to maintain a policy and practice of  
16 paying women less than men in the same or substantially similar job positions, even  
17 though those employees perform substantially equal or similar work[,]” that “Axos  
18 promotes men more frequently to better compensated job positions and levels than  
19 women despite similar qualifications and duties[,]” and that “[d]uring her employment,  
20 [Plaintiff] became aware of these policies and practices, through conversations with her  
21 fellow employees, including one male employee who was paid nearly twice as much as  
22 [Plaintiff] despite them having the same position.” *Id.* ¶ 75. This is insufficient to  
23 survive the motion to dismiss.

24       “[T]hat an unidentified comparator performs ‘substantially similar work’ is a legal  
25 conclusion.” *Davis v. Inmar, Inc.*, No. 21-cv-03779 SBA, 2022 U.S. Dist. LEXIS  
26 155126, at \*14 (N.D. Cal. Aug. 29, 2022) (citing *Werner v. Advance Newhouse P’ship,*  
27 *LLC*, No. 1:13-CV-01259-LJO, 2013 U.S. Dist. LEXIS 117285, 2013 WL 4487475, at \*5  
28 (E.D. Cal. Aug. 19, 2013) (parenthetical information omitted). Additionally, although

1 Plaintiff alleges one unidentified “male employee [ ] was paid nearly twice as much as  
2 [Plaintiff] despite them having the same position[,]” FAC ¶ 75, Plaintiff “fails to plead  
3 facts showing her and her comparator’s roles required substantially equal skill, effort, and  
4 responsibility, and were performed under similar working conditions.” *See id.*; *see also*  
5 *Banawis-Olila v. World Courier Ground, Inc.*, No. 16-cv-00982-PJH, 2016 U.S. Dist.  
6 LEXIS 99756, at \*7 (N.D. Cal. July 29, 2016) (quoting *Suzuki v. State Univ. of N.Y. Coll.*  
7 *at Old Westbury*, No. 08-CV-4569 TCP, 2013 U.S. Dist. LEXIS 83555, 2013 WL  
8 2898135, at \*4 (E.D.N.Y. June 13, 2013)) (“Bald allegations that male employees were  
9 paid more than female employees, however, will not survive a motion to dismiss” when  
10 “a plaintiff failed to allege how his or her position and the comparison position were  
11 substantially similar”).

12 Accordingly, the Court **GRANTS** Defendants’ motion and **DISMISSES** Plaintiff’s  
13 EPA claim.

#### 14 **C. Claims 4 – 6: FEHA Claims**

15 Plaintiff brings several causes of action for gender discrimination, harassment, and  
16 retaliation under California’s Fair Employment and Housing Act (“FEHA”) against  
17 Defendants Axos Bank and Axos Financial. FAC ¶ 111–32. Defendants argue that  
18 Plaintiff fails to allege facts showing Brinker has exhausted her administrative remedies  
19 as required to bring FEHA claims in this Court. Doc. No. 13-1 at 23. Plaintiff argues  
20 that she is “required to *exhaust* her administrative remedies, not to *plead exhaustion* of  
21 her administrative remedies.” Doc. No. 23 at 24 (emphasis in original).

22 To pursue claims for violations of FEHA in federal court, a plaintiff must first  
23 exhaust his or her administrative remedies. *Rodriguez v. Airborne Express*, 265 F.3d  
24 890, 896 (9th Cir. 2001). To exhaust administrative remedies on a FEHA claim, a  
25 claimant must first file an administrative complaint with the California Department of  
26 Fair Employment and Housing (“DFEH”) and then obtain a right-to-sue notice from  
27 DFEH. *Id.*; Cal. Gov’t Code § 12960. Upon receiving a right to sue letter, a plaintiff has  
28 one year to file his or her FEHA claim in a judicial forum. Cal. Gov’t Code § 12965(b).

1 The plaintiff ultimately bears the “burden to plead and prove timely exhaustion of  
2 administrative remedies, such as filing a sufficient complaint with [DFEH] and obtaining  
3 a right-to-sue-letter” prior to filing a claim under FEHA in court. *Kim v. Konad USA*  
4 *Distribution, Inc.*, 226 Cal. App. 4th 1336, 1345 (2014) (citing *Garcia v. Los Banos*  
5 *Unified School Dist.*, 418 F. Supp. 2d 1194, 1215 (E.D. Cal. 2006)).

6 As described *supra* Section III, the Court has granted Plaintiff’s request for judicial  
7 notice of a right-to-sue letter from the DFEH. *See* Doc. No. 23-2 at 9–11. The right-to-  
8 sue letter is dated October 4, 2022. *See id.* Plaintiff filed her First Amended Complaint  
9 on July 7, 2022. *See* FAC. Thus, Plaintiff obtained the right-to-sue-letter after filing suit.  
10 Plaintiff has therefore failed to plead timely exhaustion of administrative remedies. *See*  
11 *Kim*, 226 Cal. App. 4th at 1345 (citing *Garcia*, 418 F. Supp. 2d at 1215); *see also*  
12 *Rosholm v. BYB Brands, Inc.*, No. SACV 15-1738 JVS (KESx), 2016 U.S. Dist. LEXIS  
13 48684, at \*14 (C.D. Cal. Feb. 22, 2016) (citing *Rodriguez v. Airborne Express*, 265 F.3d  
14 890, 896 (9th Cir. 2001)) (“A claimant must exhaust administrative remedies before  
15 filing a FEHA discrimination suit in federal court.”); *Andrade v. Arby’s Rest. Grp., Inc.*,  
16 No. 15-cv-03175 NC, 2015 U.S. Dist. LEXIS 150031, at \*11–14 (citing *Garcia*, 418 F.  
17 Supp. 2d at 1215) (finding, regarding alleged violations of FEHA, that a plaintiff “must  
18 allege facts regarding who the [DFEH right-to-sue] letter permits her to sue and on what  
19 grounds” to sufficiently allege exhaustion).

20 Accordingly, the Court **GRANTS** Defendants’ motion and **DISMISSES** Plaintiff’s  
21 FEHA claims.

22 **D. Claim 8: Unlawful Business Practices, Cal. Bus. & Prof. Code §§ 17200 et seq.**

23 In her eighth cause of action, Plaintiff alleges violation of Cal. Bus. & Prof. Code  
24 § 17200 *et seq.* (“Unfair Competition Law” or “UCL”) against Defendants Axos Bank  
25 and Axos Financial. FAC ¶¶ 140–45. Defendants argue that “the only monetary relief  
26 available under the UCL is UCL restitution” and that Plaintiff fails to identify lost money  
27 or property in which Plaintiff has a vested interest. Doc. No. 13-1 at 26. Defendant  
28 urges that “UCL restitution requires that the defendant ‘take’ from the plaintiff money or

1 property, or fail to give to plaintiff money or property in which the plaintiff has a vested  
2 interest.” *Id.* at 26 (citations omitted). Plaintiff argues that “Defendants’ unlawful  
3 business practice of paying Plaintiff less than men in a comparable position entitles her to  
4 restitution of the money to which she is owed by statutory right.” Doc. No. 23 at 26.

5 The UCL “establishes three varieties of unfair competition—acts or practices  
6 which are unlawful, or unfair, or fraudulent.” *Cel-Tech Commc’ns, Inc. v. L.A. Cellular*  
7 *Tel. Co.*, 20 Cal. 4th 163, 180 (Cal. 1999) (internal quotations omitted). “Because the  
8 statute is written in the disjunctive, it is violated where a defendant’s act or practice  
9 violates any of the foregoing prongs.” *Davis v. HSBC Bank*, 691 F.3d 1152, 1168 (2012).  
10 Plaintiff alleges that Defendants Axos Bank and Axos Financial violated all three prongs.  
11 FAC ¶ 142. The Court therefore addresses each prong in turn.

12 Even assuming unequal pay can form the basis of a UCL claim, Plaintiff fails to  
13 plausibly plead the unlawful prong of the UCL because—as discussed in the preceding  
14 section—she fails to plausibly plead a violation of the EPA. A UCL claim “stands or  
15 falls depending on the fate of antecedent substantive causes of action.” *Portelli v. WWS*  
16 *Acquisition, LLC*, No. 17-CV-2367 DMS (BLM), 2018 WL 9539773, at \*4 (S.D. Cal.  
17 July 6, 2018) (quoting *Krantz v. BT Visual Images*, 107 Cal. Rptr. 2d 209, 219 (Cal. Ct.  
18 App. 2001)).

19 As to the unfair prong, “[a]n act or practice is unfair if the consumer injury is  
20 substantial, is not outweighed by any countervailing benefit to consumers or to  
21 competition, and is not an injury the consumers themselves could reasonably have  
22 avoided.” *Tietsworth v. Sears*, 720 F. Supp. 2d 1123, 1137 (N.D. Cal. 2010) (quoting  
23 *Daugherty v. Am. Honda Motor Co.*, 51 Cal. Rptr. 3d 118, 129 (Cal. Ct. App. 2006)).  
24 “To sufficiently plead a claim under the UCL’s ‘unfair’ prong, plaintiffs must allege facts  
25 supporting all three elements.” *In re Sony Grand Wega KDF-E A10/A20 Series Rear*  
26 *Projection HDTV Television Litig.*, 758 F. Supp. 2d 1077, 1091 (S.D. Cal. 2010). Here,  
27 Plaintiff neglects to include any facts that might support the unfair prong’s elements.  
28 Accordingly, Plaintiff fails to adequately plead the unfair prong. Similarly, Plaintiff does

1 not sufficiently plead the fraudulent prong because she fails to “state with particularity  
2 the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b).<sup>6</sup> Accordingly, the  
3 Court concludes that Plaintiff fails to state a claim under the unfair and fraudulent prongs.

4 Because Plaintiff fails to adequately plead her UCL cause of action under all three  
5 prongs, the Court **GRANTS** Defendants’ motion and **DISMISSES** Plaintiff’s UCL  
6 claim.

#### 7 **E. Axos Financial**

8 Axos Financial additionally argues that it “is incorrectly named as a defendant”  
9 because Axos Financial is “a distinct and separate legal entity” from Axos Bank” and  
10 Plaintiff has not alleged “facts that show Axos Financial treats Axos Bank as its alter ego  
11 or that otherwise justify piercing the corporate veil.” *See* Doc. No. 13-1 at 26–27  
12 (citation omitted).

13 Plaintiff alleges that she was “hired by Axos Bank in October of 2018.” FAC ¶ 12.  
14 Plaintiff has not pleaded any facts regarding Axos Financial beyond alleging that it is “a  
15 Bank holding company that is publicly trade on the New York Stock Exchange[,]”  
16 “Defendant Axos Bank is a wholly owned subsidiary of Axos Financial Inc.[,]” that  
17 Defendant Bar-Adon is the “Chief Legal Officer of Axos Financial, Inc.” and Defendant  
18 Tom Constantine is the “Chief Credit Officer & Executive Vice President for Axos  
19 Financial, Inc.” *Id.* ¶¶ 7, 8, 10, 11 (emphasis omitted). This is insufficient to state a  
20 claim based on alter-ego liability. *See In re Currency Conversion Fee Antitrust Litig.*,  
21 265 F. Supp. 2d 385, 426 (S.D.N.Y. 2003) (“[P]urely conclusory allegations cannot  
22 suffice to state a claim based on veil-piercing or alter-ego liability, even under the liberal  
23 notice pleading standard[.]”). Plaintiff appears to concede as much, and instead argues  
24 that “[t]he Court should grant [Plaintiff] leave to amend to add additional allegations” as  
25

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26  
27 <sup>6</sup> “[The Ninth Circuit] [has] specifically ruled that Rule 9(b)’s heightened pleading standards apply to  
28 claims for violations of the [ ] UCL.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009)  
(citing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102–05 (9th Cir. 2003)).



1 she is “prepared to allege many additional facts to support an alter ego theory.” Doc. No.  
2 23 at 22.

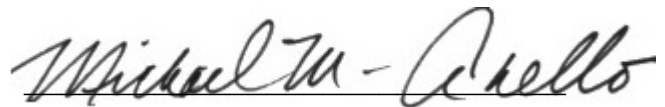
3 Based on the foregoing, including the reasoning *supra* Sections IV.A–IV.D, the  
4 Court **GRANTS** Defendant Axos Financial’s motion and **DISMISSES** all claims to the  
5 extent Plaintiff brings them against Defendant Axos Financial.

6 **V. CONCLUSION**

7 For the foregoing reasons, the Court **GRANTS** Defendants’ motion to dismiss and  
8 **DENIES AS MOOT** Defendants’ motion to strike. Although Plaintiff has failed to  
9 adequately plead her claims against Defendants, it is not clear that she would be unable to  
10 do so if given leave to amend. Accordingly, dismissal is without prejudice and with  
11 leave to amend. *See Knappenberger*, 566 F.3d at 942. Plaintiff must file an amended  
12 complaint on or before **January 17, 2023**.

13 **IT IS SO ORDERED.**

14 Dated: December 15, 2022



15  
16 HON. MICHAEL M. ANELLO  
17 United States District Judge  
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