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

JENNIFER BREAR BRINKER,  
Plaintiff,  
v.  
AXOS BANK, et al.,  
Defendants.

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

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS’  
MOTION TO DISMISS**

[Doc. No. 45]

Plaintiff Jennifer Brear Brinker (“Plaintiff”) has filed a Third Amended Complaint against Defendants Axos Bank and John Tolla (collectively, “Defendants”). *See* Doc. No. 44 (“Third Amended Complaint” or “TAC”). Defendants now move to dismiss Plaintiff’s first cause of action, retaliation in violation of the Sarbanes Oxley Act (“SOX”), 18 U.S.C. § 1514A. *See* Doc. No. 45. Plaintiff filed an opposition to Defendants’ motion,<sup>1</sup> to which Defendants replied. *See* Doc. Nos. 46, 47. The Court

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<sup>1</sup> Plaintiff is once again reminded that “the Civil Local Rules require that briefs, including footnotes, be ‘no smaller than 14-point standard font (e.g. Times New Roman).’” Doc. No. 43 at 1 fn.1 (quoting CivLR 5.1.a). Any further non-compliant filings will be rejected.

1 found the matter suitable for determination on the papers and without oral argument  
2 pursuant to Federal Rule of Civil Procedure 78(b) and Civil Local Rule 7.1.d.1. *See* Doc.  
3 No. 48. For following reasons, the Court **GRANTS IN PART** and **DENIES IN PART**  
4 Defendant’s motion to dismiss.

### 5 **I. BACKGROUND**

6 As this case is before the Court on Plaintiff’s fifth attempt to plead her claims, *see*  
7 Doc. Nos. 1 (Complaint), 4 (Amended Complaint), 19 (Second Amended Complaint,  
8 stricken from the docket for noncompliance with Fed. R. Civ. P. 15), 31 (Second  
9 Amended Complaint), 44 (Third Amended Complaint), and third motion to dismiss, *see*  
10 Doc. Nos. 13, 36, 45, the Court incorporates its prior Dismissal Orders, *see* Doc. Nos. 30,  
11 43, by reference here. The Court does not recount the factual background, but rather  
12 provides an overview on the procedural history of this case and the Court’s prior rulings.

13 Plaintiff initiated this action on March 21, 2022. *See* Doc. No. 1 (“*Compl.*”).  
14 Plaintiff initially named Axos Bank, Axos Financial, Inc., John Tolla, Eshel Bar-Adon,  
15 and Tom Constantine as defendants, and pleaded claims for (1) SOX retaliation; and  
16 (2) whistleblower retaliation in violation of California Labor Code § 1102.5. *Id.* After  
17 more than three months had elapsed with no activity, including proof of service, the  
18 Court ordered Plaintiff to show cause why the case should not be dismissed for failure to  
19 serve pursuant to Federal Rule of Civil Procedure<sup>2</sup> 4(m) and Civil Local Rule 4.1(b). *See*  
20 Doc. No. 3. Plaintiff never responded to the Court’s OSC. Instead, Plaintiff filed an  
21 Amended Complaint. *See* Doc. No. 4. By way of her First Amended Complaint,  
22 Plaintiff asserted eight causes of action—in addition to the two previously pleaded  
23 claims, she added the following: (3) violation of California’s Equal Pay Act, Cal. Labor  
24 Code § 1197.5 (“EPA”); (4) gender discrimination in violation of the Fair Employment  
25 and Housing Act, Cal. Gov. Code § 12940 *et seq.* (“FEHA”); (5) failure to prevent  
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28 <sup>2</sup> Unless otherwise noted, all “Rule” references are to the Federal Rules of Civil Procedure.

1 discrimination and harassment in violation of FEHA; (6) retaliation in violation of  
2 FEHA; (7) wrongful termination in violation of public policy; and (8) unlawful business  
3 practices, Cal. Bus. & Prof. Code § 17200 *et seq.* (“UCL”). The defendants thereafter  
4 moved to dismiss the First Amended Complaint and moved to strike a paragraph  
5 contained therein. Doc. Nos. 13, 14.

6 A few days before Plaintiff’s opposition was due, Plaintiff filed a second amended  
7 complaint. Doc. No. 19. The Court rejected the filing and struck the document from the  
8 record as the Court had not provided leave to amend, and there was no indication the  
9 defendants consented to the amendment. Doc. No. 20 (citing Fed. R. Civ. P. 15(a)(2)).  
10 Plaintiff then filed an opposition to the defendants’ motion to dismiss. Doc. No. 23. In  
11 her opposition, Plaintiff represented in a footnote that the defendants had consented to the  
12 initial amendment—i.e., filing the First Amended Complaint—and therefore that she was  
13 permitted to file a second amended complaint pursuant to Federal Rule of Civil  
14 Procedure 12(a)(1)(B). As a result, the Court directed the defendants to file a statement  
15 of position, *see* Doc. No. 27, which only seemed to complicate the issue rather than  
16 provide any clarity, *see* Doc. Nos. 28, 29.

17 Ultimately, the Court granted the defendants’ motion to dismiss in its entirety and  
18 denied the motion to strike as moot. Doc. No. 30. In particular, the Court found that  
19 Plaintiff: (1) failed to plead any authority enumerated in SOX § 1514, nonetheless that  
20 she reasonably believed in a violation of the authority, and that Plaintiff did not allege  
21 Bar-Adon’s and Constantine’s involvement in the alleged adverse employment decision;  
22 (3) failed to plead any comparator in support of her EPA claim; (4–6) failed to plead  
23 timely exhaustion of her FEHA claims; and (8) failed to adequately support her UCL  
24 claim under any of the three prongs. *Id.* The Court also dismissed Axos Financial for  
25 failure to plead any facts supporting this defendant’s involvement, or sufficient  
26 information to justify an alter ego theory of liability. *Id.*

27 On January 17, 2023, Plaintiff filed her Second Amended Complaint, naming only  
28 Axos Bank, Axos Financial, and John Tolla as defendants. Doc. No. 31. Because

1 Plaintiff neglected to include a redlined version of her amended as required by the Civil  
2 Local Rules, the Court issued a Discrepancy Order directing her to do so. Doc. No. 32.  
3 Plaintiff subsequently cured this noncompliance by filing a redlined version of her  
4 Second Amended Complaint. Doc. No. 35.

5 The defendants moved to dismiss, *see* Doc. No. 36, which the Court granted in part  
6 and denied in part, *see* Doc. No. 43. Namely, the Court again dismissed Axos Financial  
7 and Plaintiff's FEHA claims. The Court found that Plaintiff's EPA claim survived  
8 dismissal, and as a result, her UCL claim survived as well. The Court also addressed  
9 Plaintiff's SOX retaliation claim at length, as will be discussed further below. At bottom,  
10 only to the extent Plaintiff premised her claim upon a reasonable belief she reported  
11 securities fraud did her SOX claim survive dismissal.

12 On August 2, 2023, Plaintiff filed the Third Amended Complaint. *See* TAC.  
13 Plaintiff names only Axos Bank and John Tolla as Defendants, and she brings five claims  
14 against them: (1) SOX retaliation; (2) whistleblower retaliation, Cal. Labor Code  
15 § 1102.5; (3) violation of the EPA; (4) wrongful termination in violation of public policy;  
16 and (5) violation of the UCL. Defendants now move to dismiss Plaintiff's SOX  
17 retaliation claim to the extent it is based upon a violation of the rules and statutes the  
18 Court previously found were not adequately or properly pleaded.

## 19 **II. LEGAL STANDARD**

20 A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint. *Navarro*  
21 *v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A pleading must contain "a short and plain  
22 statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P.  
23 8(a)(2). However, plaintiffs must also plead "enough facts to state a claim to relief that is  
24 plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also*  
25 Fed. R. Civ. P. 12(b)(6). The plausibility standard demands more than a "formulaic  
26 recitation of the elements of a cause of action," or "'naked assertions' devoid of 'further  
27 factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*,  
28 550 U.S. at 555, 557). Instead, the complaint "must contain sufficient allegations of

1 underlying facts to give fair notice and to enable the opposing party to defend itself  
2 effectively.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

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

14 Where dismissal is appropriate, a court should grant leave to amend unless the  
15 plaintiff could not possibly cure the defects in the pleading. *Knappenberger v. City of*  
16 *Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1127  
17 (9th Cir. 2000)).

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

19 Plaintiff has filed a request for judicial notice in support of her opposition to  
20 Defendant’s motion. *See* Doc. No. 46-1. Plaintiff asks the Court to take judicial notice  
21 of seven exhibits: (A) her October 4, 2022 “Right to Sue” letter from the California  
22 Department of Fair Employment and Housing; (B) the “Commission Guidance Regarding  
23 Management’s Report on Internal Control Over Financial Reporting Under Section 13(a)  
24 or 15(d) of the Securities Exchange Act of 1934,” available on the Securities and  
25 Exchange Commission’s (“SEC”) website; (C) the “Internal Routine and Controls  
26 Section 4.2” from the RMS Manual of Examination Policies, available on the Federal  
27 Deposit Insurance Corporation’s website; (D) AXOS Financial, Inc.’s 2021 Form 10-K,  
28 available on the SEC’s website; (E) Public Company Accounting Oversight Board

1 (“PCAOB”) Release No. 2007- 005A, dated June 12, 2007, available on the PCAOB’s  
2 website; (F) the SEC’s adoption of the PCAOB’s standard set forth in Release No. 2007-  
3 005A; and (G) the PCAOB Staff Audit Practice Alert, dated October 24, 2013.

4 Defendant has not responded to Plaintiff’s request.

5 While, generally, the scope of review on a motion to dismiss for failure to state a  
6 claim is limited to the contents of the complaint, *see Warren v. Fox Family Worldwide,*  
7 *Inc.*, 328 F.3d 1136, 1141 n.5 (9th Cir. 2003), a court may consider certain materials,  
8 including matters of judicial notice, without converting the motion to dismiss into a  
9 motion for summary judgment, *see United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir.  
10 2003). For example, “a court may take judicial notice of matters of public record,” *Khoja*  
11 *v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) (quoting *Lee v. City of*  
12 *Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001), *overruled on other grounds by Galbraith*  
13 *v. County of Santa Clara*, 307 F.3d 1119, 1125–26 (9th Cir. 2002)), and of “documents  
14 whose contents are alleged in a complaint and whose authenticity no party questions, but  
15 which are not physically attached to the pleading,” *Branch v. Tunnell*, 14 F.3d 449, 454  
16 (9th Cir. 1994), *overruled on other grounds by Galbraith*, 307 F.3d at 1125–26; *see also*  
17 Fed. R. Evid. 201. A judicially noticed fact must be one not subject to reasonable dispute  
18 in that it is either: (1) generally known within the territorial jurisdiction of the trial court;  
19 or (2) capable of accurate and ready determination by resort to sources whose accuracy  
20 cannot reasonably be questioned. *See* Fed. R. Evid. 201(b); *see also Khoja*, 899 F.3d at  
21 999 (quoting Fed. R. Evid. 201(b))

22 The Court previously granted Plaintiff’s request for judicial notice as to Exhibits  
23 A–D, *see* Doc. No. 43 at 6, and for those same reasons, **GRANTS** her request here. As  
24 to Exhibits E, F, and G, the Court finds that they are publicly available documents that  
25 are neither subject to reasonable dispute nor can be reasonably questioned. *See U.S. ex*  
26 *rel. Modglin v. DJO Glob. Inc.*, 48 F. Supp. 3d 1362, 1381 (C.D. Cal. 2014) (collecting  
27 cases in which courts have taken judicial notice of the websites of government agencies).  
28 Accordingly, the Court **GRANTS** Plaintiff’s request as to Exhibits E, F, and G as well.

#### IV. DISCUSSION

1  
2 The Court reiterates that to state a prima facie claim under 18 U.S.C. § 1514A,  
3 Plaintiff must plead that: (1) she engaged in a protected activity; (2) Defendants knew or  
4 suspected, actually or constructively, that she engaged in the protected activity; (3) she  
5 suffered an adverse employment action; and (4) the circumstances were sufficient to raise  
6 the inference that the protected activity was a contributing factor in the adverse action.  
7 *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 996 (9th Cir. 2009). As to the protected  
8 activity element, the anti-retaliation statute protects an employee who “provide[s]  
9 information . . . regarding any conduct which the employee reasonably believes  
10 constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud],  
11 or 1348 [securities or commodities fraud], any rule or regulation of the Securities and  
12 Exchange Commission, or any provision of Federal law relating to fraud against  
13 shareholders . . . .” 18 U.S.C. § 1514A(a)(1). The second to last segment, “any rule or  
14 regulation of the [SEC],” refers to “administrative rules or regulations,” not statutes. *See*  
15 *Wadler v. Bio-Rad Labs., Inc.*, 916 F.3d 1176, 1186–87 (9th Cir. 2019).

16 Defendants move to dismiss Plaintiff’s SOX retaliation claim, only challenging the  
17 sufficiency of Plaintiff’s pleading of the second element, and only to the extent her claim  
18 is premised upon a violation of 17 C.F.R § 240.13a-15, 17 C.F.R § 240.13a-14, and 15  
19 U.S.C. § 78m(b)(2)(B).

##### 20 **A. 17 C.F.R. §§ 240.13a-15(a) and 240.13a-14**

21 Plaintiff identifies 17 C.F.R. §§ 240.13a-15(a) and 240.13a-14 and she pleads that  
22 she reasonably believed the conduct she complained of violated these regulations. *See*,  
23 *e.g.*, TAC ¶¶ 34, 42, 47, 54, 69. First, Rule 13a-15(a) provides, in full:

24  
25 Every issuer that has a class of securities registered pursuant to section 12 of  
26 the Act (15 U.S.C. 781), other than an Asset-Backed Issuer (as defined in  
27 § 229.1101 of this chapter), a small business investment company registered  
28 on Form N-5 (§§ 239.24 and 274.5 of this chapter), or a unit investment trust  
as defined in section 4(2) of the Investment Company Act of 1940 (15 U.S.C.

1 80a-4(2)), must maintain disclosure controls and procedures (as defined in  
2 paragraph (e) of this section) and, if the issuer either had been required to file  
3 an annual report pursuant to section 13(a) or 15(d) of the Act (15 U.S.C.  
4 78m(a) or 78o(d)) for the prior fiscal year or had filed an annual report with  
5 the Commission for the prior fiscal year, internal control over financial  
6 reporting (as defined in paragraph (f) of this section).

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17 C.F.R. § 240.13a-15(a). “Internal control over financial reporting” is defined as:

a process designed by, or under the supervision of, the issuer’s principal executive and principal financial officers, or persons performing similar functions, and effected by the issuer’s board of directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles and includes those policies and procedures that:

(1) Pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer;

(2) Provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the issuer are being made only in accordance with authorizations of management and directors of the issuer; and

(3) Provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the issuer’s assets that could have a material effect on the financial statements.

17 C.F.R. § 240.13a-15(f).

Rule 13a-14 in turn “requires that for every report filed under Section 13(a) of the Exchange Act, including Form 10-Q and 10-K financial reports, each principal executive and principal financial officer of the issuer must sign a certification as to the accuracy of the financial statements within the report.” *United States SEC v. Jensen*, 835 F.3d 1100, 1112 (9th Cir. 2016) (citing 17 C.F.R. § 240.13a-14). The rule “includes an implicit

1 truthfulness requirement,” and therefore a certifying principal can be held liable for  
2 violating this rule where he or she certifies the filing includes “no material misstatements  
3 or omissions but does not have a sufficient basis to believe that the certification is  
4 accurate.” *Id.*

5 Having reviewed Plaintiff’s Third Amended Complaint, as well as the arguments  
6 for and against dismissal on this basis, the Court concludes that Plaintiff has plausibly  
7 pleaded a SOX retaliation claim based upon her belief that she was reporting a violation  
8 of these SEC rules sufficient to survive dismissal. Plaintiff pleads a host of issues she  
9 identified during her Portfolio reviews: underwriting failures and concerns with  
10 underwriting standards, failure to monitor loan covenants, AML and KYC concerns and  
11 deficiencies, failure to implement contingency plans, failure to analyze the Portfolios,  
12 accounting problems with respect to operating lease schedules, improper risk ratings, and  
13 lack of skilled credit analysts. *See* TAC ¶¶ 21–26, 36–37, 40, 49, 51, 53. With respect to  
14 all of these issues, she contends that the Bank was left at risk of holding risky loans, with  
15 inaccurate reserves for loan losses, over-exposed to risky borrowers, and unable to  
16 accurately state the value of its assets. *See, e.g., id.* ¶¶ 27, 43, 70. Plaintiff also alleges  
17 that the excessive role of management in editing her reports, and failure to address the  
18 issue and concerns she raised, created a risk that the Bank’s financial statements would  
19 not reflect her independent analysis but the self-interested conclusions of management.  
20 *See id.* ¶¶ 29, 55. These allegations are sufficiently plausible, at this stage, to state a SOX  
21 retaliation claim premised upon a reasonable belief that Plaintiff complained of  
22 Defendants’ failure to maintain adequate internal controls and inaccurate certification of  
23 those controls in its financial reports. Accordingly, the Court **DENIES** Defendant’s  
24 motion on this basis.

25 **B. 15 U.S.C. § 78m(b)(2)(B)**

26 Turning to 15 U.S.C. § 78m(b)(2)(B)(ii), this section of the Foreign Corrupt  
27 Practices Act, 15 U.S.C. § 78dd-1 *et seq.*, requires securities issuers to “devise and  
28 maintain a system of internal accounting controls sufficient to provide reasonable

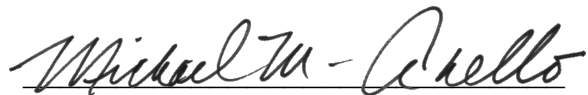
1 assurances” that four enumerated controls are in place. 15 U.S.C. § 78m(b)(2)(B). The  
 2 Court reiterates that the Ninth Circuit case of *Wadler*, is instructive on this issue. 916  
 3 F.3d at 1182, 1187; *see also Baker v. Smith & Wesson, Inc.*, 40 F.4th 43, 48 (1st Cir.  
 4 2022) (finding on summary judgment that the FCPA is not an SEC rule or regulation and  
 5 noting that the plaintiff “concedes that Section 78m(b)(2), (5) is not . . . a provision of  
 6 Federal law relating to fraud against shareholder”) (internal quotation marks and citations  
 7 omitted). The Ninth Circuit has made it clear that “rule or regulation” does not mean  
 8 statute, and “law” does not mean rule or regulation. *See Wadler*, 916 F.3d at 1186.  
 9 Therefore, for an unlisted statute to be covered by § 1514A, it must relate to shareholder  
 10 fraud. As the Court previously explained, § 78m is facially neither an enumerated  
 11 statute, an SEC rule or regulation, nor a law relating to shareholder fraud. Plaintiff does  
 12 not address this argument in opposition and therefore seemingly concedes this point.  
 13 Accordingly, the Court **GRANTS** Defendant’s motion on this basis and **DISMISSES**  
 14 Plaintiff’s SOX retaliation claim to the extent it is based upon her reporting of an alleged  
 15 violation of § 78m(b)(2)(B).

16 **V. CONCLUSION**

17 Based upon the foregoing, the Court **GRANTS IN PART** and **DENIES IN PART**  
 18 Defendant’s motion to dismiss. In particular, the Court **DISMISSES** Plaintiff’s SOX  
 19 retaliation claim to the extent it is premised upon 15 U.S.C. § 78m **without leave to**  
 20 **amend**. The Court **DIRECTS** Defendant to file an answer to the Third Amended  
 21 Complaint within **twenty-one (21) days** of the date of this Order.

22 **IT IS SO ORDERED.**

23 Dated: October 31, 2023

24 

25 HON. MICHAEL M. ANELLO  
 26 United States District Judge