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**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 GRANTING IN PART
AND DENYING IN PART
MOTION TO DISMISS AND
STRIKE ALLEGATIONS FROM
FIRST AMENDED COMPLAINT**

[ECF No. 35]

BOFI FEDERAL BANK,
Plaintiff,

v.

CHARLES MATTHEW ERHART,
Defendant.

Plaintiff Charles Matthew Erhart commenced this whistleblower retaliation action against Defendant BofI Holding, Inc. alleging violations of the Sarbanes–Oxley Act of 2002, the Dodd–Frank Wall Street Reform and Consumer Protection Act, and California state law.¹ In a consolidated countersuit, BofI claims Erhart, a

¹ BofI Holding, Inc. is the publicly-traded holding company for BofI Federal Bank, a federally-chartered savings and loan association that operates several brands of banks including Bank of Internet. The Court uses the term “BofI” to refer to either BofI Holding, Inc. or BofI Federal Bank.

1 former internal auditor, violated California state law and the Computer Fraud and
 2 Abuse Act by disseminating BofI’s confidential information to *The New York*
 3 *Times*—causing its stock price to plummet—and by deleting hundreds of files from
 4 his company-issued laptop.

5 Previously, the Court dismissed Erhart’s federal whistleblower retaliation
 6 claims with leave to amend. (ECF No. 31.) Erhart filed a First Amended Complaint,
 7 and BofI now moves to again dismiss Erhart’s federal whistleblower retaliation
 8 claims, as well as several of his state law causes of action. (ECF No. 35.) In
 9 addition, BofI seeks to strike numerous allegations from the First Amended
 10 Complaint. (*Id.*) Erhart opposes. (ECF No. 36.)

11 The Court finds BofI’s motion suitable for determination on the papers
 12 submitted and without oral argument. *See* Fed. R. Civ. P. 78(b); Civ. L.R. 7.1(d)(1).
 13 For the following reasons, the Court **GRANTS IN PART** and **DENIES IN PART**
 14 BofI’s motion to dismiss and strike allegations from Erhart’s First Amended
 15 Complaint.

16 **I. BACKGROUND**²

17 **A. BofI’s Internal Audit Department**

18 In September 2013, Erhart began working as an internal auditor for BofI at
 19 its headquarters in San Diego, California. (First Amended Complaint (“FAC”) ¶¶
 20 3–4, 9, ECF No. 32.) Erhart reported to Jonathan Ball, Vice President (“VP”)–
 21 Internal Audit. (*Id.* ¶ 9.) One level above VP Ball on the corporate hierarchy was
 22 John Tolla, Senior Vice President (“SVP”)–Audit and Compliance. (*Id.* ¶ 10.) VP
 23 Ball and the internal audit department were to report to SVP Tolla “for
 24 administrative purposes only” to allow the audit department “to have independence
 25 to do its function without undue pressure from senior management.” (*Id.*) However,
 26 as detailed below, Erhart alleges SVP Tolla repeatedly interfered with the audit

27
 28 ² The following narrative is based on the allegations in Erhart’s First Amended Complaint.
 At the motion to dismiss phase, the Court assumes that Erhart’s factual allegations are true. *See,*
e.g., O’Brien v. Welty, 818 F.3d 920, 924 (9th Cir. 2016).

1 department's investigations and independence. (*See id.* ¶¶ 15, 24–25, 30, 42, 47, 49,
2 52, 56.)

3 **B. Alleged Wrongdoing**

4 From late 2013 to early 2015, Erhart claims he repeatedly encountered
5 conduct at BofI that he believed to be wrongful, and he provides over a dozen
6 examples of this conduct. (*See* FAC ¶¶ 11–45.) The conduct he describes runs the
7 gamut from BofI allegedly miscalculating an accounting entry to making loans to
8 notorious criminals. (*See id.*) The Court will highlight several of Erhart's examples.

9 **1. Deposit Concentration Risk Findings and Negative**
10 **Performance Review**

11 In November 2014, Erhart sent an e-mail to Chief Risk Officer Thomas
12 Williams regarding the Bank's deposit concentration risk—the risk posed to a bank
13 “when a large percentage of its deposits are derived from a few depositors” and
14 these depositors may suddenly withdraw their funds. (FAC ¶ 22.) Erhart allegedly
15 reported to Williams “that a mere four customers accounted for approximately 25%
16 of total deposits, and nine customers accounted for approximately 40% of total
17 deposits” at the Bank. (*Id.* ¶ 23.) In doing so, Erhart “was aware that other banks
18 had gotten into trouble with regulators for deposit concentration levels lower than
19 this.” (*Id.*) SVP Tolla, however, later commented on Erhart's e-mail to Williams
20 and instructed Erhart “not to put his concerns in writing.” (*Id.* ¶ 24.) Management
21 had previously chastised Erhart for stating in an internal audit report that he
22 believed BofI was violating the law. (*Id.* ¶¶ 13–16.)

23 About a month later, Erhart received his performance review from SVP
24 Tolla. (FAC ¶ 25.) His rating was downgraded, with SVP Tolla specifically
25 referencing Erhart's practice of putting findings into writing. (*Id.*) Erhart's bonus
26 was also adversely affected. (*Id.*)

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2. SEC Subpoena

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2 On December 12, 2014, the Securities and Exchange Commission (“SEC”)
3 “served a subpoena on BofI, requesting account identifying information for a
4 certain investment advisory firm with initials ETIA LLC.” (FAC ¶ 26.) BofI
5 “responded to the SEC that it did not have any information regarding ETIA.” (*Id.*)
6 In early January 2015, Erhart “became aware of the SEC subpoena, and knew that
7 the Bank did indeed have a loan file containing information regarding ETIA.” (*Id.* ¶
8 27.) He also became aware “that a file had been created in response to the SEC
9 subpoena, containing the information located regarding ETIA.” (*Id.*) “In the course
10 of investigating why the file was not turned over to the SEC in response to its
11 subpoena, [Erhart] learned from a Bank employee . . . that she had informed the
12 Bank’s legal department of the existence of the file on or about December 17, 2014,
13 before the Bank sent its response to the SEC denying the existence of any such
14 files.” (*Id.*) Shortly thereafter, VP Ball informed Erhart that Chief Lending Officer
15 Brian Swanson was upset that Erhart interviewed an employee about the issue and
16 said that Erhart “should cease performing his duties to the extent they involved
17 interviewing ‘his’ employees.” (*Id.* ¶ 28.) Erhart then “placed a call to the SEC to
18 be sure it was aware of the situation regarding the ETIA subpoena.” (*Id.* ¶ 29.)

19 In February 2015, Erhart “submitted two whistleblower tips to the SEC, one
20 regarding the ETIA subpoena issue, and another regarding a suspicious loan
21 customer, whom [Erhart] suspected of operating as an unregistered
22 broker/investment advisor. He submitted them through his work computer, and
23 BofI had knowledge of his whistleblowing.” (FAC ¶ 31.) Later, in 2016, federal
24 law enforcement officials would arrest “the Founder and Chief Operating Officer of
25 Florida-based Elm Tree Investment Advisors LLC (ETIA) on charges that they
26 engaged in a scheme to defraud investors out of more than \$17 million.” (*Id.* ¶
27 31A.)
28

3. BofI's CEO's Personal Accounts

1
2 In early 2015, Erhart participated in a review of personal deposit accounts
3 held by senior management. (FAC ¶ 44.) Erhart allegedly discovered that Chief
4 Executive Officer (“CEO”) Gregory Garrabrants “was depositing third-party checks
5 for structured settlement annuity payments into a personal account, including nearly
6 \$100,000 in checks made payable to third parties.” (*Id.*) Erhart also learned that
7 CEO Garrabrants’s depositing of third-party checks “had previously been raised to
8 the Audit Committee before [Erhart] started working at the Bank, and that
9 restrictions were imposed on [CEO Garrabrants].” (*Id.*)

10 In addition, Erhart allegedly discovered the “largest consumer account at the
11 Bank” had a taxpayer identification number belonging to CEO Garrabrants’s
12 brother. (FAC ¶ 45.) “The account had a balance of approximately \$4 million, and
13 the CEO was the signer on the account.” (*Id.*) Erhart alleges that because the CEO’s
14 brother “was a minor league baseball player earning poverty wages, [Erhart] could
15 find no evidence of how he had come legally into possession of the \$4 million
16 wired into the account.” (*Id.*) Based on the foregoing, Erhart was concerned about
17 whether CEO Garrabrants “could be involved in tax evasion and/or money
18 laundering.” (*Id.*)

19 Erhart alleges he believed this conduct and the other actions described in his
20 allegations violated various federal laws, including the Dodd–Frank Act, fraud
21 statutes, and “rules and regulations promulgated by the Securities and Exchange
22 Commission.” (FAC ¶ 74A.) He also claims he believed that “because BofI was
23 regulated by so many different federal agencies, and because its stock was publicly
24 traded, that additional federal statutes, rules, and regulations were likely being
25 violated, including without limitation, Rule 10b-5.” (*Id.*) These beliefs were based
26 on the circumstances, including “guidance and instruction he received from” his
27 manager, VP Ball. (*Id.*)

28

1 **C. Turmoil in the Internal Audit Department**

2 By early 2015, approximately sixteen months after he joined BofI, Erhart
3 believed his job was in jeopardy. (*See* FAC ¶ 47.) On or about January 27, 2015,
4 SVP Tolla walked by Erhart’s desk and stated, in the presence of others, “If
5 [Erhart] continues to turn over rocks, eventually he is going to find a snake and he’s
6 going to get bit.” (*Id.*) Erhart viewed this statement “as a direct and serious threat,
7 and became concerned for his personal safety as well as for his job.” (*Id.*)

8 Around this time, the United States Department of the Treasury’s Office of
9 the Comptroller of the Currency (“OCC”), BofI Federal Bank’s principal regulator,
10 was examining BofI on-site at its headquarters in San Diego. (FAC ¶ 49.) During
11 this examination, SVP Tolla told all of the members of the internal audit
12 department “that they would no longer be permitted to use Microsoft Outlook to
13 communicate.” (*Id.*) Erhart alleges SVP Tolla gave this directive because he “did
14 not want a paper trail regarding Bank improprieties.” (*Id.*) Erhart informed the
15 OCC’s examiner of this directive. (*Id.*)

16 Then, in late February 2015, VP Ball informed the internal audit department
17 that a “meeting would be held to discuss major findings that needed to be presented
18 to the Bank’s Audit Committee.” (FAC ¶ 50.) This action was significant because
19 VP Ball “felt that the level of wrongdoing at the Bank had become so egregious that
20 the staff had no choice but to bring it up to the Audit Committee.” (*Id.*) VP Ball
21 allegedly planned to present memos documenting the wrongdoing from internal
22 audit staff, including Erhart, to the Audit Committee. (*Id.*)

23 Yet, on March 5, 2015, VP Ball resigned abruptly “after refusing an order”
24 from CEO Garrabrants to engage in what he “viewed to be unlawful conduct to
25 cover up the Bank’s wrongdoing.” (FAC ¶ 51.) SVP Tolla told members of the
26 audit department not to inform the OCC that VP Ball had resigned. (*Id.*) Erhart and
27 a coworker had already informed the OCC, however. (*Id.*)

28

1 **D. Alleged Whistleblowing to the OCC**

2 After VP Ball’s sudden resignation, Erhart “felt very unwell and on the
3 following day, March 6, 2015, he called off sick.” (FAC ¶ 53.) He asked a
4 coworker to relay his illness to SVP Tolla—as no one had yet replaced VP Ball as
5 Erhart’s direct manager. (*Id.*) At 7:30 a.m. on that same day, Erhart’s coworker
6 informed him that SVP Tolla said he was to attend a mandatory call with the OCC,
7 despite his illness. (*Id.* ¶ 54.) She also informed Erhart that SVP Tolla had accessed
8 VP Ball’s e-mail account and found an internal audit memo Erhart had co-authored
9 regarding believed wrongdoing involving a vendor that distributed cash cards to
10 customers. (*Id.*) Erhart “became extremely concerned that the Bank would try to
11 destroy the records of wrongdoing that [he] had placed on the Bank’s computers.”
12 (*Id.* ¶ 55.) He called the OCC’s Denver Regional Office and said he was seeking
13 whistleblower protection, and an appointment to speak with the OCC was
14 confirmed for the next business day. (*Id.*)

15 Meanwhile, SVP Tolla was calling Erhart on his cell phone, and a coworker
16 informed Erhart that his work computer had been “opened up.” (FAC ¶ 56.) Erhart
17 also allegedly received a text message stating: “Tolla is going crazy over here bro.
18 Going through balls computer too. Fyi.” (*Id.*) Erhart then e-mailed the OCC a copy
19 of the internal audit memo regarding cash card customers and disclosed that CEO
20 Garrabrants and SVP Tolla had discovered the memo and that he feared upper
21 management had accessed his work laptop remotely. (*Id.* ¶ 57.)

22 Minutes later, Erhart received a phone call from a coworker that SVP Tolla
23 had arranged for the locked file cabinets at Erhart’s desk to be opened up and “was
24 going through all the documents.” (FAC ¶ 58.) SVP Tolla located Erhart’s review
25 of CEO Garrabrants’s personal accounts. (*Id.*) He continued to call Erhart’s mobile
26 phone repeatedly throughout that day. (*Id.*)

27 Erhart allegedly later learned that on the same day, Friday, March 6, 2015,
28 BofI had prepared a letter terminating him and had attempted to deliver it to him.

1 (FAC ¶ 61.) Erhart claims BofI also “intended to and may have informed local
2 police authorities” that it wanted Erhart’s “apartment searched and his computer
3 seized and for him to be arrested.” (*Id.*) Erhart “was extremely fearful.” (*Id.*) The
4 police did not arrive, but Erhart alleges BofI sent someone to his residence “on that
5 day to attempt to deliver the termination letter and recover [his] work laptop.” (*Id.*)
6 On Saturday, Erhart was informed that CEO Garrabrants had “grilled” a coworker
7 “for nearly an hour” about the investigation into his personal accounts and that they
8 “had an all hands yesterday where [SVP Tolla] and [CEO Garrabrants] spoke about
9 [Erhart] and [VP Ball]. It was terrible.” (*Id.* ¶ 60.)

10 By early Monday morning, March 9, 2015, Erhart alleges he learned SVP
11 Tolla was falsely claiming that BofI had not heard from Erhart for forty-eight
12 hours—a basis for termination. (FAC ¶ 63.) Erhart sent an e-mail to SVP Tolla and
13 several others reminding them “that he had called off sick Friday,” would remain
14 out for the day, and “was seeking an appointment with his physician to discuss a
15 medical leave of absence.” (*Id.*) He also stated, “I am in no mental state to discuss
16 anything on the phone.” (*Id.*)

17 That same morning, an attorney with the OCC confirmed to Erhart “that his
18 communications with the OCC would be covered under the applicable
19 whistleblower statute.” (FAC ¶ 64.) Erhart had a lengthy phone call with the OCC
20 that afternoon, and he was directed to bring any documents he had to the OCC’s
21 office in Carlsbad, California, the following morning. (*Id.* ¶ 65.) At the same time, a
22 BofI employee was sending text messages to Erhart in an attempt to arrange the
23 delivery of an envelope to Erhart—presumably containing his termination letter—
24 and to recover his laptop. (*Id.*) Erhart alleges “it was highly unusual for the Bank to
25 demand return of the work laptop of an employee who was out sick.” (*Id.* ¶ 67.)
26 “Rather, the Bank had decided to terminate [Erhart] and feared his disclosures to
27 regulators, and wanted to seize the evidence before it could be turned over to
28 regulators.” (*Id.*)

1 The next morning, Erhart provided files to the OCC at its office in Carlsbad.
2 (FAC ¶ 68.) An OCC attorney confirmed receipt of these items the next day and
3 told Erhart “that the Bank had informed the OCC that it was going to call the San
4 Diego police to go to [Erhart]’s residence and seize his computer.” (*Id.* ¶ 69.)
5 Therefore, Erhart alleges BofI “was obviously well aware” of his whistleblowing
6 activities. (*Id.*)

7 Erhart ultimately returned his laptop to BofI on March 12, 2015. (FAC ¶ 70.)
8 BofI’s Chief Legal Officer “ordered him to come to a conference room to speak,”
9 but Erhart “reiterated he was in no mental state to speak to management.” (*Id.*) That
10 same day, a BofI employee called Erhart and told him that an employee had
11 processed Erhart’s termination paperwork the previous week—presumably on the
12 Friday Erhart sought whistleblower protection. (*Id.*)

13 **E. Aftermath**

14 On March 14, 2015, a BofI employee told Erhart that SVP Tolla was
15 informing employees that Erhart “was responsible for a negative article about BofI
16 on the Seeking Alpha website published December 2, 2014.” (FAC ¶ 71.) SVP
17 Tolla previously called Erhart “Seeking Alpha” “to his face.” (*Id.*) Erhart, however,
18 was not responsible for the article. (*Id.*) Erhart also alleges that two coworkers
19 informed him that SVP Tolla stated at an “All Hands Meeting” of members of
20 BofI’s audit and compliance department that “any information [Erhart] provided to
21 the OCC could not be considered credible because of [Erhart]’s psychiatric medical
22 leave.” (*Id.* ¶ 73.) SVP Tolla and CEO Garrabrants allegedly told this same group
23 of employees that Erhart’s “whistleblowing activities were ‘malicious.’” (*Id.* ¶ 74.)
24 CEO Garrabrants also told the employees he was going to “bury the BofI
25 whistleblower.” (*Id.*)

26 Further, Erhart alleges that in the past year, BofI, “through SVP Tolla, CEO
27 Garrabrants, and others, has continued to widely publish false and defamatory
28 statements about [Erhart], claiming that he has colluded and/or collaborated with

1 ‘short sellers’ of BofI’s stock, and that he was a dishonest and incompetent
2 employee.” (FAC ¶ 74B.) Because of this conduct and “the notoriety of this case,”
3 Erhart claims he has “been unable to retain employment.” (*Id.*)

4 Based on the foregoing allegations, Erhart brings various claims against BofI,
5 including two claims for whistleblower retaliation under federal law. (FAC ¶¶ 76–
6 163.) BofI moves under Federal Rule of Civil Procedure 12(b)(6) to dismiss
7 Erhart’s federal retaliation claims and four of his state law causes of action. (ECF
8 No. 35.) BofI also requests the Court strike numerous allegations from Erhart’s
9 First Amended Complaint under Federal Rule of Civil Procedure 12(f). (*Id.*)

10 **II. MOTION TO DISMISS**

11 **A. Legal Standard**

12 A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil
13 Procedure “tests the legal sufficiency” of the claims asserted in the complaint.
14 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The court must accept all
15 factual allegations pleaded in the complaint as true and must construe them and
16 draw all reasonable inferences from them in favor of the nonmoving party. *Cahill v.*
17 *Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). To avoid a Rule
18 12(b)(6) dismissal, a complaint need not contain detailed factual allegations; rather,
19 it must plead “enough facts to state a claim to relief that is plausible on its face.”
20 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial
21 plausibility when the plaintiff pleads factual content that allows the court to draw
22 the reasonable inference that the defendant is liable for the misconduct alleged.”
23 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).
24 “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s
25 liability, it ‘stops short of the line between possibility and plausibility of entitlement
26 to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at 557).

27 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to
28 relief” requires more than labels and conclusions, and a formulaic recitation of the

1 elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (alteration in
2 original) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A court need not
3 accept “legal conclusions” as true. *Iqbal*, 556 U.S. at 678. Despite the deference the
4 court must pay to the plaintiff’s allegations, it is not proper for the court to assume
5 that “the [plaintiff] can prove facts that it has not alleged or that the defendants have
6 violated the . . . law[] in ways that have not been alleged.” *Assoc. Gen. Contractors*
7 *of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

8 As a general rule, a court freely grants leave to amend a complaint that has
9 been dismissed. Fed. R. Civ. P. 15(a); *Schreiber Distrib. Co. v. Serv-Well Furniture*
10 *Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). However, leave to amend may be denied
11 when “the court determines that the allegation of other facts consistent with the
12 challenged pleading could not possibly cure the deficiency.” *Schreiber Distrib. Co.*,
13 806 F.2d at 1401 (citing *Bonanno v. Thomas*, 309 F.2d 320, 322 (9th Cir. 1962)).

14 **B. Analysis**

15 **1. Sarbanes–Oxley Whistleblower Retaliation**

16 BofI seeks to dismiss Erhart’s first claim for whistleblower retaliation under
17 Sarbanes–Oxley. Congress enacted the Sarbanes–Oxley Act of 2002, Pub. L. No.
18 107-204, 116 Stat. 745, to “safeguard investors in public companies and restore
19 trust in the financial markets following the collapse of Enron Corporation.” *Lawson*
20 *v. FMR LLC*, 134 S. Ct. 1158, 1161 (2014) (citing S.Rep. No. 107-146, at 2–11
21 (2002)). In seeking to prevent corporate fraud, Congress was particularly concerned
22 with the “abundant evidence that Enron had succeeded in perpetuating its massive
23 shareholder fraud in large part due to a ‘corporate code of silence.’” *Id.* at 1162
24 (citing S.Rep. No. 107-146, at 2, 4–5 (2002)). This code of silence discouraged
25 employees from reporting fraudulent behavior, and employees who attempted to
26 report misconduct faced retaliation. *Id.* (citing S.Rep. No. 107-146, at 2, 5, 10
27 (2002)).

28

1 To address this issue, Section 806 of Sarbanes–Oxley added a new
2 whistleblower protection provision to Title 18 of the United States Code, 18 U.S.C.
3 § 1514A. *Lawson*, 134 S. Ct. at 1163. This provision, as amended, provides:

4
5 No [publicly-traded] company . . . may discharge . . . or in any other
6 manner discriminate against an employee in the terms and conditions
7 of employment because of any lawful act done by the employee—

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

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

17 (B) any Member of Congress or any committee of
18 Congress; or

19 (C) a person with supervisory authority over the
20 employee

21 18 U.S.C. § 1514A.

22 Whistleblower retaliation claims under Sarbanes–Oxley “are governed by a
23 burden-shifting procedure under which the plaintiff is first required to establish a
24 prima facie case of retaliatory discrimination.” *Tides v. Boeing Co.*, 644 F.3d 809,
25 813–14 (9th Cir. 2011) (citing 18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. §
26 42121(b)(2)(B)(i)). To make a prima-facie showing, the plaintiff must show that (1)
27 the plaintiff engaged in protected activity; (2) the plaintiff’s employer knew,
28 actually or constructively, of the protected activity; (3) the plaintiff suffered an
unfavorable personnel action; and (4) the circumstances raise an inference that the
protected activity was a contributing factor in the unfavorable action. *Id.* at 814

1 (citing *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 996 (9th Cir. 2009)); *see also*
2 29 C.F.R. § 1980.104(e)(2)(i)–(iv). If the plaintiff makes this showing, then “the
3 employer assumes the burden of demonstrating by clear and convincing evidence
4 that it would have taken the same adverse employment action in the absence of the
5 plaintiff’s protected activity.” *Van Asdale*, 577 F.3d at 996.

6 **i. Protected Activity**

7 First, Erhart must allege that he engaged in protected activity under
8 Sarbanes–Oxley. *See, e.g., Tides*, 644 F.3d at 814; 29 C.F.R. § 1980.104(e)(2)(i).
9 As seen above, the anti-retaliation statute protects an employee who “provides[s]
10 information . . . regarding any conduct which the employee reasonably believes
11 constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank
12 fraud], or 1348 [securities or commodities fraud], any rule or regulation of the
13 Securities and Exchange Commission, or any provision of Federal law relating to
14 fraud against shareholders” 18 U.S.C. § 1514A.

15 In the Court’s order on Boff’s first motion to dismiss, the Court considered at
16 length which standard to apply to determine whether Erhart alleges he engaged in
17 protected activity. (ECF No. 22 at 17:15–22:3.) The Court ultimately adopted the
18 Department of Labor’s Administrative Review Board’s “reasonable belief”
19 standard from *Sylvester v. Parexel International LLC*, ARB Case No. 07-123, 2011
20 WL 2165854 (ARB May 25, 2011) (en banc). (*Id.* at 22:2–3.)³

21 To allege protected activity under this standard, an employee “need only
22 show that he or she ‘reasonably believes’ that the conduct complained of” is a
23 violation of the laws enumerated in 18 U.S.C. § 1514A. *Rhinehimer v. U.S.*
24 *Bancorp Invs., Inc.*, 787 F.3d 797, 811 (6th Cir. 2015) (quoting *Nielsen v. AECOM*
25

26 ³ The Ninth Circuit has since recognized in an unpublished opinion that the
27 Administrative Review Board’s standard for protected activity has shifted to the “reasonable
28 belief” standard used by this Court in its prior order. *See Rocheleau v. Microsemi Corp., Inc.*, 680
F. App’x 533, 535 n.2 (9th Cir. 2017). The Ninth Circuit, however, declined to address whether it
would adopt this standard in lieu of the old standard because the plaintiff’s claim failed “under
either standard.” *Id.*

1 *Tech. Corp.*, 762 F.3d 214, 220–21 (2d Cir. 2014)). As the term “reasonably
2 believes” indicates, this standard “involves both a subjective component and an
3 objective component.” *Id.* “The subjective component is satisfied if the employee
4 actually believed that the conduct complained of constituted a violation of relevant
5 law.” *Id.* As for the objective component, it “is evaluated based on the knowledge
6 available to a reasonable person in the same factual circumstances with the same
7 training and experience as the aggrieved employee.” *Id.* (quoting *Harp v. Charter*
8 *Commc’ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009)); *see also Nielsen*, 762 F.3d at
9 221 (“That is to say, a plaintiff ‘must show not only that he believed that the
10 conduct constituted a violation, but also that a reasonable person in his position
11 would have believed that the conduct constituted a violation.’”). This reasonable
12 person standard recognizes that “[m]any employees are unlikely to be trained to
13 recognize legally actionable conduct by their employers.” *Nielsen*, 762 F.3d at 221.
14 Accordingly, “the inquiry into whether an employee had a reasonable belief is
15 necessarily fact-dependent, varying with the circumstances of the case.”
16 *Rhinehimer*, 787 F.3d at 811.

17 It also follows from this standard that a plaintiff “need not prove a violation
18 of the substantive laws listed in [18 U.S.C. § 1514A]” to engage in protected
19 activity. *See Sylvester*, 2011 WL 2165854, at *18. The plaintiff, therefore, “can
20 have an objectively reasonable belief of a violation” even if the plaintiff “fails to
21 allege, prove, or approximate specific elements of fraud, which would be required
22 under a fraud claim against the defrauder directly.” *Id.*; *see also Van Asdale*, 577
23 F.3d at 1001 (“To encourage disclosure, Congress chose statutory language which
24 ensures that ‘an employee’s reasonable but mistaken belief that an employer
25 engaged in conduct that constitutes a violation of one of the six enumerated
26 categories is protected.’” (quoting *Allen v. Admin. Review Bd.*, 514 F.3d 468, 477
27 (5th Cir. 2008))).
28

1 The Court previously dismissed Erhart’s Sarbanes–Oxley claim because it
2 determined the subjective component of the reasonable belief standard was not
3 satisfied. (ECF No. 22 at 23:26–26:13.) This conclusion was based on Erhart’s
4 failure to allege anywhere in his initial Complaint that he believed the alleged
5 wrongdoing violated the laws enumerated in § 1514A. (*Id.* at 25:6–11 (“But again,
6 to satisfy the subjective component of the reasonable belief standard, Erhart must
7 allege he ‘actually believed that the conduct complained of constituted a violation
8 of relevant law.’” (quoting *Rhinehimer*, 787 F.3d at 811)). Erhart corrects this
9 deficiency in his First Amended Complaint. He alleges he believed, at the time, that
10 the wrongdoing he discovered “constituted a violation of federal fraud statutes and
11 regulations, including without limitation, the mail fraud, wire fraud, bank fraud, and
12 securities fraud statutes.” (*See* FAC ¶ 91A; *see also id.* ¶ 74A.)

13 BoFI argues that Erhart still fails to allege protected activity under Sarbanes–
14 Oxley. (Mot. 11:6–16:10.) Although Erhart’s lengthy pleading is imperfect, and at
15 times imprecise, the Court disagrees. Erhart sufficiently pleads he reported at least
16 some conduct that could constitute a reasonable belief of a violation of the laws
17 enumerated in Sarbanes–Oxley’s anti-retaliation provision.

18 For instance, BoFI is a federally-insured bank, and one of the laws
19 enumerated in Sarbanes–Oxley’s whistleblower retaliation provision, 18 U.S.C. §
20 1514A, is bank fraud, 18 U.S.C. § 1344. “The essential elements of bank fraud
21 under 18 U.S.C. § 1344(1) are: ‘(1) that the defendant knowingly executed or
22 attempted to execute a scheme to defraud a financial institution; (2) that the
23 defendant did so with the intent to defraud; and (3) that the financial institution was
24 insured by the FDIC [Federal Deposit Insurance Corporation].’” *United States v.*
25 *Rizk*, 660 F.3d 1125, 1135 (9th Cir. 2011) (alteration in original) (quoting *United*
26 *States v. Warshak*, 631 F.3d 266, 312 (6th Cir. 2010)). An “[i]ntent to defraud may
27 be established by circumstantial evidence.” *Id.* (citing *United States v. Sullivan*, 522
28 F.3d 967, 974 (9th Cir. 2008)).

1 The district court’s decision at the summary judgment phase in *Guitron v.*
2 *Wells Fargo Bank, N.A.* demonstrates an application of Sarbanes–Oxley’s
3 whistleblower provision in the context of potential bank fraud. No. C 10-3461 CW,
4 2012 WL 2708517 (N.D. Cal. July 6, 2012). There, one of the plaintiffs, Guitron,
5 was a teller at a branch of Wells Fargo Bank. *Id.* at *1. She “repeatedly complained
6 to branch management about certain activities of other bankers within [her]
7 branch.” *Id.* at *2. These activities involved, among other things, bankers allegedly
8 opening and closing accounts “without the customer’s permission or knowledge”
9 and misleading customers about the terms of accounts. *Id.* She knew these activities
10 were against the bank’s sales practices, but she was not sure if they were illegal. *See*
11 *id.* (“[S]omebody is getting financial gain for committing these activities. So it
12 could be; it could not be. It just depends on the specifics.” (quoting Guitron’s
13 deposition)). The court found Guitron established a genuine issue of material fact as
14 to whether her complaints related to bank fraud. *Id.* at *14. It reasoned that Guitron
15 “reported that her colleagues were engaging in practices such as opening and
16 closing accounts without customer permission . . . , which would allow them to
17 obtain otherwise unearned bonuses from Wells Fargo, thereby defrauding it.” *Id.*
18 Thus, “[f]rom the evidence presented, a jury could conclude that Guitron’s beliefs
19 were objectively reasonable.” *Id.* The court also found an issue of fact existed as to
20 whether the subjective belief component was satisfied, making summary judgment
21 based on a failure to engage in protected activity inappropriate. *See id.* at *14.

22 In this case, Erhart alleges BofI—through its AnFed Bank division—operates
23 a business that purchases the income streams from lottery winnings and structured
24 settlements. (FAC ¶ 11.) The Bank employs a “team of callers who cold-call
25 prospects with the goal of purchasing the income streams from these individuals,
26 offering them a lump sum in lieu of the periodic payments they are receiving.”
27 (*Id.* ¶ 12.) Relatedly, as described above, Erhart claims he conducted an audit of
28 BofI’s senior management’s personal deposit accounts at the Bank. (*Id.* ¶ 44.)

1 Erhart “discovered that CEO Gregory Garrabrants was depositing third-party
2 checks for structured settlement annuity payments into a personal account,
3 including nearly \$100,000 in checks made payable to third parties.” (*Id.*) Erhart
4 documented “this work in an Audit Department file on his work computer.” (*Id.* ¶
5 45.) When CEO Garrabrants later discovered Erhart’s work, he “grilled” one of
6 Erhart’s coworkers “for nearly an hour about why Internal Audit was looking at his
7 accounts.” (*Id.* ¶ 60.)

8 Erhart claims he reported this conduct—as well as the other instances of
9 believed wrongdoing he describes—“to appropriate government agencies as a
10 whistleblower in April 2015.” (FAC ¶ 46.) Erhart also “had a lengthy phone call
11 with the OCC, lasting nearly two hours,” on March 10, 2015, and he turned over
12 documents to the OCC on March 11, 2015, to support his whistleblower
13 allegations. (*Id.* ¶¶ 65, 68–69.)

14 When all inferences are drawn in his favor, Erhart sufficiently alleges that he
15 engaged in protected activity under Sarbanes–Oxley. From Erhart’s perspective in
16 early 2015—or from anyone else’s for that matter—it is challenging to discern what
17 proper purpose a CEO would have for depositing “nearly \$100,000 in checks made
18 payable to third parties” into his personal deposit account. (FAC ¶ 44.) Upon
19 discovering this conduct, a reasonable person in Erhart’s position could believe that
20 CEO Garrabrants was engaged in a scheme where he deposited checks made
21 payable from BofI to third-parties into his personal account for his own benefit—
22 thereby possibly defrauding the Bank. (*See id.* ¶¶ 12, 44, 72A.) *See Guitron*, 2012
23 WL 2708517, at *2, 4; *see also Rizk*, 660 F.3d at 1135 (providing an “[i]ntent to
24 defraud may be established by circumstantial evidence”). Erhart also alleges that he
25 subjectively believed this conduct was a violation of the laws enumerated in 18
26 U.S.C. § 1514A. Accordingly, when the Court accepts Erhart’s allegations as true
27 and construes and draws all reasonable inferences from the allegations in his favor,
28

1 the Court finds Erhart alleges he engaged in protected activity under Sarbanes–
2 Oxley.

3 **ii. Knowledge of Protected Activity**

4 Second, Erhart must allege that BofI “knew or suspected that [he] engaged in
5 the protected activity.” 29 CFR § 1980.104(e)(2)(ii); *see also Tides*, 644 F.3d at
6 814. This requirement is satisfied. Erhart alleges he reported much of the conduct
7 he discovered to members of BofI’s management team—particularly VP Ball.
8 Some of Erhart’s discoveries also made their way directly to SVP Tolla. As for
9 Erhart’s “two whistleblower tips to the SEC,” he alleges that “BofI had knowledge
10 of his whistleblowing.” (*Id.* ¶ 31.)

11 Further, the events that allegedly transpired around the time Erhart called off
12 sick from work indicate BofI, at the minimum, “suspected that [he] engaged in the
13 protected activity.” *See* 29 CFR § 1980.104(e)(2)(ii). These circumstances include
14 BofI accessing Erhart’s work computer, BofI “going through all the documents” in
15 Erhart’s locked file cabinets, SVP Tolla locating Erhart’s review of CEO
16 Garrabrants’s personal accounts, BofI preparing a letter terminating Erhart, BofI’s
17 alleged statements to the OCC about Erhart, and BofI’s general counsel demanding
18 that Erhart “come to a conference room to speak” when he returned his work
19 laptop. (*See* FAC ¶¶ 56–74.) If these allegations are true, a factfinder could draw
20 the inference that BofI suspected or knew Erhart engaged in protected activity.
21 Accordingly, Erhart’s pleading meets the second element of a *prima facie* case for
22 whistleblower retaliation under Sarbanes–Oxley.

23 **iii. Adverse Action**

24 Third, Erhart’s pleading must demonstrate that he suffered “an adverse
25 action.” *See* 29 C.F.R. § 1980.104(e)(2)(iii); *see also Tides*, 644 F.3d at 814 (noting
26 “the plaintiff must show that: . . . (3) he suffered an unfavorable personnel action”).
27 Sarbanes–Oxley broadly defines what constitutes prohibited discrimination in 18
28 U.S.C. § 1514A. It provides that the employer may not “discharge, demote,

1 suspend, threaten, harass, or in any other manner discriminate against an employee
2 in the terms and conditions of employment” because of the employee’s protected
3 activity. 18 U.S.C. § 1514A; *see also* 29 C.F.R. § 1980.104 (defining retaliatory
4 acts to also include “intimidating . . . , restraining, coercing, blacklisting or
5 disciplining” the employee).

6 Consistent with § 1514A’s text, the Administrative Review Board has
7 adopted an expansive view of “adverse action.” *E.g., Menendez v. Haliburton, Inc.*,
8 ARB Case Nos. 09-002, 09-003, 2011 WL 4915750 (ARB Sept. 13, 2011). The
9 Board has reasoned that in “explicitly proscribing non-tangible activity,” § 1514A
10 “bespeaks a clear congressional intent to prohibit a very broad spectrum of adverse
11 action against [Sarbanes–Oxley] whistleblowers.” *Id.* at *9. Thus, the Board has
12 defined “adverse actions” as referring to “unfavorable employment actions that are
13 more than trivial, either as a single event or in combination with other deliberate
14 employer actions alleged.” *Id.*

15 The Administrative Review Board has also used the Supreme Court’s
16 standard for Title VII discrimination from *Burlington Northern & Santa Fe*
17 *Railway Co. v. White*, 548 U.S. 53 (2006), as a “helpful interpretive tool.”
18 *Menendez*, 2011 WL 4915750, at *9. Under this standard, adverse action means
19 actions that are “harmful to the point that they could well dissuade a reasonable
20 worker from making or supporting a charge of discrimination.” *Burlington*, 548
21 U.S. at 57. Thus, actions “that would deter a reasonable employee from engaging in
22 protected activity would be actionable under Section [1514A] as well.” *Menendez*,
23 2011 WL 4915750, at *13.

24 Erhart’s allegations satisfy the adverse action requirement. He alleges BofI
25 officially discharged him on June 9, 2015. (FAC ¶ 72.) In addition, setting aside
26 Erhart’s discharge, Erhart’s pleading contains various other allegations of
27 discriminatory conduct. Viewing these allegations in the light most favorable to
28 Erhart, they show his performance rating was downgraded and his was bonus was

1 adversely affected, (*id.* ¶ 25), he was threatened, (*id.* ¶ 47), and he was harassed,
2 (*see id.* ¶¶ 54, 56, 59, 63, 66, 70–71). Upon learning Erhart was communicating
3 with the OCC, BofI also allegedly engaged in conduct that may be viewed as the
4 Bank attempting to intimidate Erhart or discourage him from sharing any more
5 information with the government. (*See id.* ¶ 73 (“SVP Tolla stated, at an ‘All Hands
6 Meeting’ of members of Audit and Compliance that any information [Erhart]
7 provided to the OCC could not be considered credible because of [Erhart]’s
8 ‘psychiatric medical leave.’”); *id.* ¶ 74 (“SVP Tolla and CEO Gregory Garrabrants
9 told this same group of employees that [Erhart]’s whistleblowing activities were
10 ‘malicious’ Garrabrants also told Bank employees that he was going to ‘bury
11 the BofI whistleblower.”)). A factfinder could draw the reasonable inference that
12 management expected that the threats and derogatory statements they made at an
13 “All Hands Meeting” of Erhart’s coworkers would be shared with him. And they
14 were. These are actions that could have a chilling effect on protected activity, are
15 unfavorable, and are more than trivial. *Cf. Thomas v. Union Pac. R.R. Co.*, 203 F.
16 Supp. 3d 1111, 1120–22 (D. Or. 2016) (interpreting similar anti-retaliation
17 language under the Federal Rail Safety Act and concluding a genuine issue of fact
18 existed as to whether employee suffered an adverse action before termination where
19 she was subjected to intimidating and harassing interviews, surveillance by other
20 employees, increased testing for job-compliance, and discipline for absenteeism).
21 Thus, Erhart sufficiently pleads he suffered an adverse action.

22 **iv. Contributing Factor in the Adverse Action**

23 Last, Erhart must plead facts demonstrating “the circumstances raise an
24 inference that the protected activity was a contributing factor in the unfavorable
25 action.” *See, e.g., Tides*, 644 F.3d at 814; *see also* 29 C.F.R. § 1980.104(e)(2)(iv).
26 The Ninth Circuit has “held that ‘causation can be inferred from timing alone where
27 an adverse employment action follows on the heels of protected activity.’” *Van*
28 *Asdale*, 577 F.3d at 1003 (quoting *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d

1 1054, 1065 (9th Cir. 2002)). It also has “made clear that ‘a specified time period
2 cannot be a mechanically applied criterion,’ and . . . cautioned against analyzing
3 temporal proximity ‘without regard to its factual setting.’” *Id.* (quoting *Coszalter v.*
4 *City of Salem*, 320 F.3d 968, 977–78 (9th Cir. 2003)).

5 For example, in *Van Asdale*, after the two plaintiffs disclosed believed
6 wrongdoing, the employer terminated one of the plaintiffs two and a half months
7 later and the other plaintiff several weeks thereafter. 577 F.3d at 1003. The Ninth
8 Circuit held “a reasonable fact finder could find that the [plaintiffs’] alleged
9 disclosures were a contributing factor in their terminations where, among other
10 things, both [plaintiffs] were removed from their positions within weeks of their
11 alleged protected conduct.” *Id.*; *see also Yartzoff v. Thomas*, 809 F.2d 1371, 1376
12 (9th Cir. 1987) (holding for a Title VII retaliation claim that causation could be
13 inferred where the first adverse employment action occurred less than three months
14 after the plaintiff’s protected activity).

15 Erhart’s allegations fulfill this final requirement. BofI’s alleged retaliatory
16 conduct occurred within close temporal proximity to Erhart’s purported
17 whistleblowing activities. Causation, therefore, can be inferred from the timing
18 alone. *See Van Asdale*, 577 F.3d at 1003. In addition, accepting Erhart’s allegations
19 as true, there is a litany of circumstantial evidence to support this final requirement,
20 including poorly-veiled threats to Erhart and an attempt to abruptly terminate him
21 after he called in sick. Consequently, the alleged circumstances “raise an inference
22 that the protected activity was a contributing factor in the unfavorable action.” *See*
23 *Tides*, 644 F.3d at 814; *see also* 29 C.F.R. § 1980.104(e)(2)(iv).

24 Accordingly, Erhart states a prima facie case against BofI for whistleblower
25 retaliation under Sarbanes–Oxley. He pleads sufficient facts that allow the Court
26 “to draw the reasonable inference that [BofI] is liable for the misconduct alleged.”
27 *See Iqbal*, 556 U.S. at 678. Thus, the Court will not dismiss this claim.

28

2. Dodd–Frank Whistleblower Retaliation

BofI also moves to dismiss Erhart’s whistleblower retaliation claim brought under the Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). “Like Sarbanes–Oxley, [Dodd–Frank] was passed in the wake of a financial scandal—the subprime mortgage bubble and subsequent market collapse of 2008.” *Somers v. Digital Realty Tr. Inc.*, 850 F.3d 1045, 1048 (9th Cir. 2017). Dodd–Frank “provided new incentives and employment protections for whistleblowers by adding Section 21F to the Securities Exchange Act of 1934.” *Id.* The Act defines a “whistleblower” as “any individual who provides . . . information relating to a violation of the Securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.” 15 U.S.C. § 78u-6(a)(6). To protect whistleblowers from retaliation, Section 21F provides:

No employer may discharge . . . or in any other manner discriminate against, a whistleblower in the terms and conditions of employment . . . because of any lawful act done by the whistleblower:

(i) in providing information to the [SEC] in accordance with this section; [or]

. . .

(iii) in making disclosures that are required or protected under the Sarbanes–Oxley Act of 2002

Id. § 78u-6(h)(1)(A). Accordingly, in addition to protecting reports made to the SEC, Dodd–Frank’s anti-retaliation provision incorporates protection for those disclosures made under Sarbanes–Oxley’s analogous provision. *Id.*; *see also* 17 C.F.R. § 240.21F-2 (interpreting 15 U.S.C. § 78u-6(a)(6)).

Despite that Dodd–Frank incorporates Sarbanes–Oxley disclosures, there is a split of authority as to whether Dodd–Frank protects Sarbanes–Oxley disclosures that are not made directly to the SEC. *Compare Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 621 (5th Cir. 2013) (holding Dodd–Frank protects only

1 disclosures made to the SEC), with *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155
2 (2d Cir. 2015) (applying *Chevron* deference to the SEC’s contrary interpretation of
3 Dodd–Frank’s anti-retaliation provision in 17 C.F.R. § 240.21F-2). In 2017, the
4 Ninth Circuit adopted the broader interpretation of Dodd–Frank’s anti-retaliation
5 provision. *Somers*, 850 F.3d. at 1050, *cert. granted*, 137 S. Ct. 2300 (2017).
6 Consequently, in this circuit, Dodd–Frank incorporates protection for Sarbanes–
7 Oxley disclosures that are not made directly to the SEC. *See id.* at 1047, 1050–51.

8 Here, the Court has already determined Erhart sufficiently alleges that he
9 engaged in protected activity under Sarbanes–Oxley. Because Dodd–Frank also
10 prohibits BofI from retaliating against Erhart for engaging in this purported
11 conduct, he has stated a plausible claim for whistleblower retaliation under Dodd–
12 Frank as well. *See Somers*, 850 F.3d at 1045.⁴ The Court therefore denies BofI’s
13 request to dismiss Erhart’s second claim for retaliation under Dodd–Frank.

14 3. Violation of the Confidentiality of Medical Information Act

15 In his fourth claim, Erhart alleges BofI violated California’s Confidentiality
16 of Medical Information Act (“CMIA”), Cal. Civ. Code §§ 56–56.37, when SVP
17 Tolla informed coworkers that Erhart’s whistleblowing allegations were not
18 credible because of his “psychiatric medical leave.” (FAC ¶¶ 73, 106–11.) BofI
19 argues this claim is subject to dismissal because Erhart does not allege BofI
20 disclosed “medical information” within the meaning of the CMIA. (Mot. 19:3–8.)

21 The CMIA “is intended to protect the confidentiality of individually
22 identifiable medical information obtained from a patient by a health care provider,
23

24 ⁴ The Court recognizes the possibility that even under the narrower interpretation of
25 Dodd–Frank, Erhart may have a claim for retaliation based on his “two whistleblower tips”
26 submitted directly to the SEC. (*See* FAC ¶ 31.) To proceed on this basis, Erhart would need to
27 demonstrate that he possessed “a reasonable belief that the information [he] was providing
28 relate[d] to a possible securities law violation (or, where applicable, to a possible violation of the
provisions set forth in 18 U.S.C. § 1514A(a)) that ha[d] occurred, [was] ongoing, or [was] about
to occur.” *See* 17 C.F.R. § 240.21F-2. However, in light of Erhart stating a claim under the
broader interpretation of Dodd–Frank adopted by the Ninth Circuit in *Somers*, the Court need not
further explore the viability of this theory at the motion to dismiss phase.

1 while at the same time setting forth limited circumstances in which the release of
2 such information to specified entities or individuals is permissible.” *Brown v.*
3 *Mortensen*, 51 Cal. 4th 1052, 1070 (2011) (citing *Loder v. City of Glendale*, 14 Cal.
4 4th 846, 859 (1997); *Heller v. Norcal Mutual Ins. Co.*, 8 Cal. 4th 30, 38 (1994)). To
5 further this purpose, the CMIA contains a series of provisions regarding the use and
6 disclosure of medical information by employers. *See* Cal. Civ. Code §§ 56.20–
7 56.245. One of these provisions, California Civil Code § 56.20(c), provides that
8 “[n]o employer shall use, disclose, or knowingly permit its employees or agents to
9 use or disclose medical information which the employer possesses pertaining to its
10 employees” unless the employee first signs an appropriate authorization or one of
11 several statutory exceptions applies.

12 Relevant to this prohibition, the CMIA defines “medical information” as
13 “any individually identifiable information, *in electronic or physical form*, in
14 possession of or derived *from a provider of health care*, health care service plan,
15 pharmaceutical company, or contractor regarding a patient’s medical history,
16 mental or physical condition, or treatment.” Cal. Civ. Code § 56.05(j) (emphasis
17 added). Further, a “patient” is defined as “any natural person . . . who received
18 health care services from a provider of healthcare and to whom medical information
19 pertains.” *Id.* § 56.05(k).

20 To illustrate, an employer violated the CMIA when it misused information
21 contained in two psychiatrists’ written evaluations regarding an employee’s alcohol
22 consumption and anger toward a colleague. *Pettus v. Cole*, 49 Cal. App. 4th 402,
23 451–52 (1996). Although the CMIA permitted the employer to use the employee’s
24 medical information “for determining [the employee’s] eligibility for paid and
25 unpaid leave from work for medical reasons,” its use of this information to also
26 ultimately terminate the employee violated the CMIA. *Id.* at 452.

27 Here, the Court agrees that Erhart has not stated a plausible claim under the
28 CMIA. Erhart alleges he “called off sick” and informed BofI “he was seeking an

1 appointment with his physician to discuss a medical leave of absence.” (FAC ¶ 63.)
2 He also alleges he submitted “paperwork” for his leave of absence. (*Id.* ¶ 72.) There
3 is no allegation, however, that Erhart “received health care services from a provider
4 of healthcare.” *See* Cal. Civ. Code § 56.05(k). There is similarly no specific
5 allegation that BofI received any “medical information” regarding Erhart under the
6 CMIA—e.g., medical records, a medical certification, or other information in
7 “electronic or physical form . . . derived from a provider of health care.” *See id.* §
8 56.05(j). Without factual allegations establishing that BofI received “medical
9 information” under the CMIA, Erhart fails to state a claim that BofI improperly
10 used or disclosed this information. *See id.* § 56.20(c).

11 Accordingly, Erhart’s fourth claim for violation of the CMIA is subject to
12 dismissal. That said, because it is possible that BofI received and somehow
13 improperly disclosed Erhart’s medical information, the Court will grant Erhart
14 leave to amend this claim. *See* Fed. R. Civ. P. 15(a); *see also, e.g., Cafasso, U.S. ex*
15 *rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011).

16 **4. Breach of the Implied Covenant of Good Faith and Fair** 17 **Dealing**

18 Erhart’s seventh claim asserts that BofI breached the implied covenant of
19 good faith and fair dealing by terminating him without good cause. (FAC ¶ 133.)
20 BofI moves to dismiss this claim on the basis that Erhart has not sufficiently alleged
21 that an agreement existed between the parties that would allow him to pursue an
22 implied covenant claim. (Mot. 19:12–28.)

23 “The law implies in every contract a covenant of good faith and fair
24 dealing.” *Koehrer v. Superior Court*, 181 Cal. App. 3d 1155, 1169 (1986). “[T]he
25 obligations imposed by the implied covenant of good faith and fair dealing are not
26 those set out in the terms of the contract itself, but rather are obligations imposed by
27 law governing the manner in which the contractual obligations must be
28 discharged—fairly and in good faith.” *Inter-Mark USA, Inc. v. Intuit, Inc.*, No. C-

1 07-04178 JCS, 2008 WL 552482, at *7 (N.D. Cal. Feb. 27, 2008) (citing
2 *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 573 (1973)). Specifically, this implied
3 covenant ensures that “neither party will do anything which injures the right of the
4 other to receive the benefits of the agreement.” *See Brown v. Superior Court*, 34
5 Cal. 2d 559, 564 (1949). It serves only “to protect the express covenants or
6 promises of the contract, not to protect some general public policy interest not
7 directly tied to the contract’s purpose.” *See Carma Developers Inc. v. Marathon*
8 *Dev. Cal., Inc.*, 2 Cal. 4th 342, 373 (1992). Consequently, “the scope of conduct
9 prohibited by the covenant of good faith is circumscribed by the purposes and
10 express terms of the contract,” and the covenant cannot contradict the contract’s
11 express terms. *See id.* at 373–74 (quoting *Foley v. Interactive Data Corp.*, 47 Cal.
12 3d 654, 690 (1988)).

13 In the employment context, these limitations on the implied covenant of good
14 faith and fair dealing mean that the covenant “cannot supply limitations on
15 termination rights to which the parties have not actually agreed.” *Guz v. Bechtel*
16 *Nat’l, Inc.*, 24 Cal. 4th 317, 342 (2000). “[California] Labor Code section 2922
17 establishes the presumption that an employer may terminate its employees at will,
18 for any or no reason. A fortiori, the employer may act peremptorily, arbitrarily, or
19 inconsistently, without providing specific protections such as prior warning, fair
20 procedures, objective evaluation, or preferential reassignment.” *Id.* at 350.
21 “Precisely because employment at will allows the employer freedom to terminate
22 the relationship as it chooses, the employer does not frustrate the employee’s
23 contractual rights [in violation of the covenant of good faith and fair dealing]
24 merely by doing so.” *See id.* (emphasis omitted).

25 Here, Erhart claims the parties agreed “that [he] would be able to perform the
26 duties of an internal auditor in accordance with federal and state regulations and
27 commonly understood business practices, without fear of losing his job, being
28 threatened physically and otherwise, and without having his performance

1 evaluation downgraded and bonus reduced because he spoke up about unlawful and
2 improper practices at the Bank.” (FAC ¶ 130.) Yet, Erhart does not actually allege
3 that the parties’ agreement altered Erhart’s at-will employment by providing he
4 could be terminated only for good cause. (*See id.*)

5 The Court finds that Erhart’s First Amended Complaint lacks sufficient
6 factual allegations to state a plausible claim for breach of the implied covenant of
7 good faith and fair dealing. Under California Labor Code § 2922, Erhart’s
8 employment with BofI was presumed to be at-will. Erhart does not plead sufficient
9 facts to overcome this presumption.⁵ And because he does not defeat this
10 presumption, BofI had the right to terminate Erhart for any or no reason. *See Guz*,
11 24 Cal. 4th at 350. Thus, the Bank could not have violated the covenant of good
12 faith and fair dealing arising out of the parties’ purported agreement by terminating
13 him without good cause. *See Cal. Lab. Code § 2922; Guz*, 24 Cal. 4th at 349–50
14 (providing the covenant “cannot impose substantive duties or limits on the
15 contracting parties beyond those incorporated in the specific terms of their
16 agreement”). This conclusion does not mean that Erhart’s alleged termination was
17 lawful under California state law. Rather, it means Erhart will need to look beyond
18 California state contract law to attempt to obtain redress for BofI’s alleged conduct.

19 Accordingly, Erhart’s claim for breach of the implied covenant of good faith
20 and fair dealing is not plausible. The Court will therefore grant BofI’s motion to
21

22 ⁵ In addition to not alleging an express contract that overcomes the presumption of at-will
23 employment, Erhart does not demonstrate an implied contract modifying BofI’s termination
24 rights existed. An employee who cannot identify an express contract limiting the employer’s
25 termination rights may be able to rely upon an implied agreement to this effect. *Guz*, 24 Cal. 4th
26 at 336. California courts apply a series of factors to determine whether this type of implied
27 contract exists. *See Shue v. Optimer Pharm., Inc.*, No. 16–cv–02566–BEN, 2017 WL 3316259, at
28 *7 (S.D. Cal. Aug. 1, 2017) (listing factors). Erhart does not detail any factual allegations about
BofI’s employment policies or procedures or the norms within the financial industry that support
an inference that BofI’s termination rights were limited by an implied contract. He also does not
allege BofI made him any representations or assurances of continued employment—his
whistleblower retaliation allegations indicate the opposite is true. Thus, Erhart cannot rely on an
implied contract theory to support his claim.

1 dismiss Erhart’s seventh cause of action with leave to amend. *See* Fed. R. Civ. P.
2 15(a); *Cafasso*, 637 F.3d at 1058.

3 **5. Intentional Infliction of Emotional Distress**

4 Erhart’s eighth claim seeks relief for intentional infliction of emotional
5 distress. (FAC ¶ 135–38.) BofI argues this claim is barred by the exclusive remedy
6 provisions of California’s Workers’ Compensation Act. (Mot. 20:5–27.)

7 “California’s Workers’ Compensation Act provides an employee’s exclusive
8 remedy against his or her employer for injuries arising out of and in the course of
9 employment.” *Wright v. State*, 233 Cal. App. 4th 1218, 1229 (2015) (citation
10 omitted); *accord* Cal. Lab. Code § 3602(a). Therefore, under this exclusive remedy
11 rule, the workers’ compensation scheme generally preempts claims based on
12 physical or emotional injuries sustained in the course of employment. *Yau v. Santa*
13 *Margarita Ford, Inc.*, 229 Cal. App. 4th 144, 161 (2014). Claims for intentional
14 infliction of emotional distress are not excluded. *Id.* These claims “fall[] within the
15 exclusive province of workers’ compensation” so long as the conduct “occurred ‘at
16 the worksite, in the normal course of the employer-employee relationship.’” *Id.* at
17 162 (quoting *Miklosy v. Regents of Univ. of Cal.*, 44 Cal. 4th 876, 902 (2008)); *see*
18 *also Langevin v. Fed. Exp. Corp.*, No. CV 14-08105 MMM FFMX, 2015 WL
19 1006367, at *8 (C.D. Cal. Mar. 6, 2015) (“Under California law, workers’
20 compensation provides the exclusive remedy for an intentional infliction of
21 emotional distress claim that is based solely on alleged personnel activity.”).

22 The exclusive remedy rule is not absolute, however, for several reasons.
23 First, the rule does not prohibit a claim where the employer’s conduct “contravenes
24 fundamental public policy.” *Miklosy*, 44 Cal. 4th at 902. Although this exception
25 appears broad, the California Supreme Court has clarified that it “is aimed at
26 permitting a *Tameny* action to proceed despite the workers’ compensation exclusive
27 remedy rule.” *Id.* at 902–03. A *Tameny* action is a common law tort claim for
28 wrongful discharge in violation of public policy recognized in *Tameny v. Atlantic*

1 *Richfield Co.*, 27 Cal. 3d 167 (1980). Thus, the “public policy” exception to the
2 exclusive remedy rule allows the employee to allege a *Tameny* action, but it does
3 not allow the employee to also assert a distinct claim for intentional infliction of
4 emotional distress. *Miklosy*, 44 Cal. 4th at 903; *Yau*, 229 Cal. App. 4th at 161–62.

5 Another exception to the exclusive remedy rule is if the employer’s conduct
6 “exceeds the risks inherent in the employment relationship.” *Miklosy*, 44 Cal. 4th at
7 903 (quoting *Livitsanos v. Superior Court*, 2 Cal. 4th 744, 754 (1992)). Stated
8 differently, for the exclusive remedy rule to bar a plaintiff’s claim, the employer’s
9 conduct must be within the normal risks of the employment relationship. *E.g.*,
10 *Shoemaker v. Myers*, 52 Cal. 3d 1, 18 (1990). “There is no bright line test in
11 determining what behavior is part of the employment relationship or reasonably
12 encompassed within the compensation bargain.” *Onelum v. Best Buy Stores L.P.*,
13 948 F. Supp. 2d 1048, 1055 (C.D. Cal. 2013) (quoting *Calero v. Unisys Corp.*, 271
14 F. Supp. 2d 1172, 1181 (N.D. Cal. 2003)). “Rather, the critical issue is whether the
15 alleged acts, bereft of their motivation, ‘can ever be viewed as a normal aspect of
16 the employer relationship.’” *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins.*
17 *Fund*, 24 Cal. 4th 800, 822 (2001) (quoting *Fermino v. Fedco, Inc.*, 7 Cal. 4th 701,
18 718 (1994)).⁶

19 Further, the California Supreme Court has held whistleblower retaliation is a
20 risk inherent in the employment relationship. *Shoemaker*, 52 Cal. 3d at 25; *Miklosy*,
21 44 Cal. 4th at 903. In *Shoemaker*, the whistleblower’s supervisors “threatened,
22 intimidated and harassed him on account of his complaints.” 52 Cal. 3d at 8. He
23 was later “interrogated” and ultimately terminated. *Id.* One of the defendants made
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25
26 ⁶ The exclusive remedy rule also cannot be used to bar a federal statute’s private right of
27 action that “is unaffected by the availability of remedies under state workers’ compensation law.”
28 *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 646–47 (1990). Erhart’s federal whistleblower
retaliation claims fit this exception. *See id.* Similarly, claims based on state statutes where the
state legislature has provided “an additional remedy to those already granted under other
provisions of the law” are not barred. *See Shoemaker*, 52 Cal. 3d at 22. Erhart’s third claim under
California Labor Code § 1102.5 for whistleblower retaliation falls under this exception. *See id.*

1 a statement “to the effect that he knew the termination would not be upheld, but ‘he
2 just wanted to cause [the plaintiff] as much grief as possible.” *Id.* at 25. The court
3 held that “[t]he kinds of conduct at issue (e.g., discipline or criticism) are a normal
4 part of the employment relationship. Even if such conduct may be characterized as
5 intentional, unfair or outrageous, it is nevertheless covered by the by workers’
6 compensation exclusivity provisions.” *Id.* Therefore, the court affirmed the
7 appellate court’s dismissal of the plaintiff’s intentional infliction of emotional
8 distress claim, which was distinct from his *Tameny* and statutory whistleblower
9 retaliation claims. *Id.* at 26; *see also Cole v. Fair Oaks Fire Prot. Dist.*, 43 Cal. 3d
10 148, 151–53, 161–62 (1987) (upholding dismissal of intentional infliction of
11 emotional distress claim as barred by the workers’ compensation scheme where the
12 employee alleged he was falsely accused of misconduct, subjected to a “kangaroo”
13 disciplinary proceeding, demoted, assigned “humiliating and menial duties,” and
14 forced to retire).

15 In this case, the Court finds Erhart’s claim for intentional infliction of
16 emotional distress does not escape the reach of the exclusive remedy rule. First, the
17 exception for conduct that contravenes fundamental public policy is inapplicable.
18 As explained above, that exception is designed to allow a *Tameny* action for
19 wrongful discharge in violation of public policy. *Miklosy*, 44 Cal. 4th at 903; *Yau*,
20 229 Cal. App. 4th at 161–62. Erhart alleges a *Tameny* action against BofI as his
21 fifth claim, which is not challenged in BofI’s motion. (*See* FAC ¶¶ 112–24.)
22 Although the public policy exception allows Erhart’s fifth claim to proceed in spite
23 of the exclusive remedy rule, it does not save his claim for intentional infliction of
24 emotional distress.

25 In addition, in light of the California Supreme Court cases mentioned above,
26 Erhart does not plead conduct that exceeds the risks inherent in the employment
27 relationship. Erhart alleges that “he was officially fired on June 9, 2015.” (FAC ¶
28 72.) Thus, the alleged threats, harassment, and other retaliatory acts he suffered

1 before and up to this point occurred during the course of his employment. Boff’s
 2 alleged retaliatory conduct “may be characterized as intentional, unfair or
 3 outrageous,” but “it is nevertheless covered by the by the workers’ compensation
 4 exclusivity provisions.” *See Shoemaker*, 52 Cal. 3d at 25; *see also Miklosy*, 44 Cal.
 5 4th at 903 (“As to the exception for conduct that ‘exceeds the risks inherent in the
 6 employment relationship,’ it might seem at first blush to apply here—based on the
 7 argument that whistleblower retaliation is not a risk inherent in the employment
 8 relationship—but we rejected this same argument in [*Shoemaker*].”). Hence, Boff’s
 9 alleged conduct does not exceed the risks inherent in the employment relationship.⁷

10 Accordingly, Erhart’s intentional infliction of emotional distress claim lacks
 11 plausibility because it is barred by the exclusive remedy rule under California’s
 12 Workers’ Compensation Act. The Court will dismiss this claim with leave to
 13 amend. *See Fed. R. Civ. P. 15(a); Cafasso*, 637 F.3d at 1058.

14 6. Defamation

15 Erhart’s ninth cause of action seeks relief for defamation. (FAC ¶¶ 139–57.)
 16 BoffI moves to dismiss, arguing that Erhart fails to state his claim with the required
 17 specificity. (Mot. 22:17–24.)

18 Defamation “is an invasion of the interest in reputation” and “involves the
 19 intentional publication of a statement of fact which is false, unprivileged, and has a
 20 natural tendency to injure or which causes special damage.” *Ringler Assocs., Inc. v.*
 21 *Maryland Cas. Co.*, 80 Cal. App. 4th 1165, 1179 (2000) (citing Cal. Civ. Code
 22

23 ⁷ Some of Erhart’s allegations mention defamatory statements, including statements
 24 purportedly made after BoffI terminated him. (FAC ¶ 74b.) BoffI’s alleged statements “after
 25 [Erhart] was terminated . . . can, by no stretch, be deemed to have occurred in the course and
 26 scope of [his] employment.” *See Davaris v. Cubaleski*, 12 Cal. App. 4th 1583, 1591 (1993).
 27 Further, statements made during the employment relationship that “have no other purpose than to
 28 damage [Erhart]’s reputation are neither a ‘normal part of the employment relationship’ nor a risk
 of employment within the exclusivity provision of the Workers’ Compensation Act.” *See id.*
 (quoting *Howland v. Balma*, 143 Cal. App. 3d 899, 905 (1983)). But the proper cause of action to
 seek redress for these alleged statements is defamation. *See id.* at 1591–92; *Howland*, 143 Cal.
 App. 3d at 904–05. Because Erhart pleads a defamation claim, the Court addresses BoffI’s alleged
 statements within the contours of that claim.

1 §§ 45, 46). “It is an essential element of defamation that the publication be of a
2 false statement of fact rather than opinion.” *Id.* at 1181 (emphasis omitted). “The
3 dispositive question for the court is whether a reasonable factfinder could conclude
4 that the published statements imply a provably false factual assertion.” *Moyer v.*
5 *Amador Valley J. Union High Sch. Dist.*, 225 Cal. App. 3d 720, 724 (1990). Courts
6 analyze this issue using a “‘totality of circumstances’ test—a review of the meaning
7 of the language in context and its susceptibility to being proved true or false.” *See*
8 *id.* at 125.

9 “Under California law, the defamatory statement must be specifically
10 identified, and the plaintiff must plead the substance of the statement. Even under
11 the liberal federal pleading standards, general allegations of the defamatory
12 statements that do not identify the substance of what was said are insufficient.”
13 *Norsat Int’l v. B.I.P. Corp.*, No. 12–cv–674–WQH, 2013 WL 5530771, at *5 (S.D.
14 Cal. Oct. 3, 2013) (quoting *Scott v. Solano Cty. Health & Soc. Servs. Dep’t*, 459 F.
15 Supp. 2d 959, 973 (E.D. Cal. 2006)). Nevertheless, “[l]ess particularity is required
16 when it appears that [the] defendant has superior knowledge of the facts, so long as
17 the pleading gives notice of the issues sufficient to enable preparation of a defense.”
18 *See Okun v. Superior Court*, 29 Cal. 3d 442, 458 (1981).

19 Further, the plaintiff must allege the statement was published. *See Ringler*
20 *Assocs.*, 80 Cal. App. 4th at 1179. Publication is defined as “a [written or oral]
21 communication to some third person who understands both the defamatory meaning
22 of the statement and its application to the person to whom reference is made.” *Id.*;
23 *see also* Restatement (Second) of Torts § 577. “Publication need not be to the
24 public or a large group; communication to a single individual is sufficient.” *Ringler*
25 *Assocs.*, 80 Cal. App. 4th at 1179.

26 Liability may also be based on self-publication of the defamatory statement.
27 “Generally, when a plaintiff voluntarily discloses the contents of a [defamatory]
28 communication to others, the originator of the defamatory statement is not liable for

1 the consequent damage.” *See Reese v. Barton Healthcare Sys.*, 693 F. Supp. 2d
2 1170, 1189 (E.D. Cal. 2010). Under the self-publication exception, a defendant may
3 be liable for a plaintiff’s foreseeable self-publication where: “[1] the person
4 defamed [is] operating under a strong compulsion to republish the defamatory
5 statement; and [2] the circumstances which create the strong compulsion are known
6 to the originator of the defamatory statement at the time he communicates it to the
7 person defamed.” *See id.* (alterations in original) (quoting *McKinney v. County of*
8 *Santa Clara*, 110 Cal. App. 3d 787, 796 (1980)).

9 BofI’s primary contention is that “Erhart fails to allege the substance of the
10 allegedly defamatory statement(s), the identity of the person(s) who allegedly made
11 the statement(s), the identity of any person(s) who heard or received the statement,
12 or even when the statement(s) was made.” (*See Mot.* 22:17–20.) The Court finds
13 that this argument runs counter to the pleadings.

14 Erhart specifically alleges that in March 2015, SVP Tolla told BofI
15 employees that Erhart was responsible for a negative article about BofI published
16 on the Seeking Alpha website, and SVP Tolla had previously implied the same by
17 calling Erhart “Seeking Alpha” in February 2015. (FAC ¶ 71.) Erhart similarly
18 alleges that BofI’s agents and employees, including SVP Tolla and CEO
19 Garrabrants, have widely published claims that Erhart “colluded and/or
20 collaborated with ‘short sellers’ of BofI’s stock.” (*Id.* ¶ 74B.) These allegations
21 support a claim for defamation. BofI’s alleged statement that Erhart caused the
22 publication of a negative article about his employer is “a provably false factual
23 assertion.” *See Moyer*, 225 Cal. App. 3d at 724. While BofI attempts to argue that
24 Erhart is required to explain the defamatory nature of this statement, (*see Reply*
25 11:21–23, ECF No. 37), the evident implication is that Erhart acted
26 unprofessionally by liaising with the Seeking Alpha website to disclose negative
27 information about his employer. Such an implication “has a natural tendency to
28 injure” someone employed as an internal auditor—a profession that requires

1 integrity and confidentiality. *See Ringler Assocs.*, 80 Cal. App. 4th at 1179. Further,
2 Boff's alleged statement that Erhart "colluded and/or collaborated with 'short
3 sellers' of Boff's stock," (FAC ¶ 74B), is also provably false and raises the same
4 concern about Erhart's adherence to professional standards.

5 As to the publication requirement, Erhart alleges that Boff's statement that he
6 was responsible for a negative article was made to third-parties. (FAC ¶ 71.) Erhart
7 also alleges Boff was aware that he would be under significant pressure to disclose
8 the contents of the alleged defamatory statements described in his pleading to
9 various other third-parties, including prospective employers. (*Id.* ¶ 148.) Given the
10 nature of the financial industry and the requirements of the auditing profession,
11 Erhart plausibly alleges that he felt compelled to disclose and explain the
12 circumstances of Boff's statements to prospective employers. *Cf. Webber v. Nike*
13 *USA, Inc.*, No. 12-cv-00974-BEN, 2012 WL 4845549, at *7 (S.D. Cal. Oct. 9,
14 2012) (denying a motion to dismiss where the plaintiff alleged prospective
15 employers would learn of the reason for his termination and that he was therefore
16 compelled to explain the reason to potential employers). Under this strong
17 compulsion to disclose, Erhart contends that he in fact did republish the alleged
18 defamatory statements to third persons. (*See* FAC ¶ 148.)

19 Accordingly, accepting Erhart's allegations as true, the Court finds that he
20 pleads sufficient facts to state a claim for defamation. Thus, the Court will not
21 dismiss Erhart's ninth cause of action.

22 **III. MOTION TO STRIKE**

23 **A. Legal Standard**

24 Rule 12(f) of the Federal Rules of Civil Procedure provides that a court may
25 strike from a pleading "an insufficient defense or any redundant, immaterial,
26 impertinent, or scandalous matter." "[T]he function of a 12(f) motion to strike is to
27 avoid the expenditure of time and money that must arise from litigating spurious
28 issues by dispensing with those issues prior to trial." *Sidney-Vinstein v. A.H. Robins*

1 Co., 697 F.2d 880, 885 (9th Cir. 1983). “When considering a motion to strike, the
2 court ‘must view the pleading in a light most favorable to the pleading party.’” *U.S.*
3 *ex rel. Pecanic v. Sumitomo Elec. Interconnect Prod., Inc.*, No. 12-cv-0602-
4 L(NLS), 2013 WL 774177, at *9 (S.D. Cal. Feb. 28, 2013) (citing *In re*
5 *2TheMart.com, Inc.*, 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000)).

6 “Motions to strike are generally regarded with disfavor because of the limited
7 importance of pleading in federal practice, and because they are often used as a
8 delaying tactic.” *Neilson v. Union Bank of Cal.*, 290 F. Supp. 2d 1101, 1152 (C.D.
9 Cal. 2003). “[The] motion . . . should not be granted unless the matter to be stricken
10 clearly could have no possible bearing on the subject of the litigation. If there is any
11 doubt . . . the court should deny the motion.” *Platte Anchor Bolt, Inc. v. IHI, Inc.*,
12 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004) (citations omitted). Thus, allegations
13 that provide background information, historical material, “or other matter of an
14 evidentiary nature will not be stricken unless unduly prejudicial to defendant.” *In re*
15 *Facebook PPC Advert. Litig.*, 709 F. Supp. 2d 762, 773 (N.D. Cal. 2010).

16 **B. Analysis**

17 In addition to moving to dismiss six of Erhart’s claims, BofI requests the
18 Court strike numerous allegations from his First Amended Complaint. (Mot. 23:1–
19 25:17.) BofI groups these allegations into three categories. (*Id.*) The Court will
20 consider each category in turn.

21 **1. Allegations Regarding Believed Wrongdoing**

22 The first category is a selection of Erhart’s allegations in which he describes
23 the perceived wrongdoing he discovered at BofI. (*See* Mot. 23:1–21.) BofI claims
24 these allegations are immaterial because Erhart fails to allege he reported the
25 alleged conduct to the government or other appropriate recipient. (*Id.* 23:15–21.)
26 Thus, BofI requests the Court strike all of these allegations. (*Id.*)

27 BofI’s request is meritless. Erhart does in fact allege he reported the
28 perceived wrongdoing at issue. He claims he “reported each of these matters to

1 appropriate government agencies as a whistleblower in April 2015.” (FAC ¶ 45.)
2 Moreover, even if the First Amended Complaint lacked this specific allegation, the
3 Court would still deny BofI’s request. The allegations BofI seeks to strike provide
4 support for not only Erhart’s federal whistleblower retaliation claims, but also his
5 amalgam of state law causes of action. Hence, the Bank fails to demonstrate these
6 allegations “could have no possible bearing on the subject of the litigation.” *See*
7 *Platte Anchor Bolt*, 352 F. Supp. at 1057. BofI also does not establish these
8 allegations are “unduly prejudicial.” *See In re Facebook PPC Advert. Litig.*, 709 F.
9 Supp. 2d at 773; *cf. Pecanic*, 2013 WL 774177, at *10 (S.D. Cal. Feb. 28, 2013)
10 (striking allegations regarding catastrophic commercial airplane crash as unduly
11 prejudicial where there was no claim that the defendants’ products were used in the
12 aircraft). Therefore, striking these allegations under Rule 12(f) is not appropriate.

13 **2. Allegations Regarding Exhaustion of Administrative** 14 **Remedies**

15 The second category of allegations BofI seeks to expunge overlaps with the
16 first. (*See* Mot. 25:2–8.) This time, BofI requests the Court strike a selection of
17 Erhart’s factual allegations regarding his discovery of wrongdoing because the
18 Bank claims Erhart failed to exhaust his administrative remedies under Sarbanes–
19 Oxley. (*Id.* 24:1–8.) Although Erhart alleges he did indeed exhaust his
20 administrative remedies, (FAC ¶ 8), BofI invites the Court to take judicial notice of
21 Erhart’s administrative complaint filed with the Department of Labor and determine
22 which of his present allegations were not included in his administrative filing, (Mot.
23 25:2–8).

24 The Court declines BofI’s invitation to carve up Erhart’s amended pleading
25 based on what he included in his administrative complaint. The Bank’s motion
26 overlooks the fact that Erhart is not simply bringing a claim under Sarbanes–Oxley.
27 He has nine other claims. Although Sarbanes–Oxley may require Erhart to exhaust
28 his administrative remedies before bringing a whistleblower retaliation claim,

1 Dodd–Frank does not. *Compare* 18 U.S.C. § 1514A(b)(2)(D), *with* 15 U.S.C. §
2 78u-6(h)(1)(B)(i); *see also Somers*, 119 F. Supp. 3d at 1095. The same is true for
3 Erhart’s whistleblower retaliation claim under California Labor Code § 1102.5. *See*
4 Cal. Lab. Code § 98.7(g); *Satyadi v. W. Contra Costa Healthcare Dist.*, 232 Cal.
5 App. 4th 1022, 1033 (2014). Consequently, even if Erhart failed to fully exhaust his
6 administrative remedies under Sarbanes–Oxley, the allegations BofI seeks to
7 remove from his pleading are appropriately included to support Erhart’s other
8 claims. In other words, BofI once again fails to demonstrate these allegations
9 “could have no possible bearing on the subject of the litigation.” *See Platte Anchor*
10 *Bolt*, 352 F. Supp. at 1057. Thus, the Court will not strike them.

11 3. Allegations Regarding Confidential Information

12 Last, BofI targets twenty-six paragraphs of allegations where it claims
13 Erhart—by including these allegations in his pleading—“has violated the privacy,
14 confidentiality and attorney-client privilege rights of BofI’s employees, clients, and
15 business counterparties.” (Mot. 25:13–15.) The Bank asks the Court to strike these
16 allegations from Erhart’s pleading as impertinent. (*Id.* 25:9–17.)

17 The Court will not do so for two reasons. First, given that many of Erhart’s
18 allegations were reported in *The New York Times*, his pleading has existed in the
19 public record for months, and the Court has discussed his allegations in its orders,
20 “the cat is out of the bag.” *See SmithKline Beecham Corp. v. Pentech Pharm., Inc.*,
21 261 F. Supp. 2d 1002, 1008 (N.D. Ill. 2003) (Posner, J.). It would be a waste of
22 judicial resources to now analyze twenty-six paragraphs of allegations to determine
23 if they should be stricken because Erhart did indeed violate some privilege or right
24 of privacy. *See Neilson*, 290 F. Supp. 2d at 1152 (“Motions to strike are generally
25 regarded with disfavor[.]”).

26 In addition, this Court has already determined Erhart was “permitted to
27 disclose BofI’s information in his complaint if doing so was ‘reasonably necessary’
28 to pursue his retaliation claim.” (ECF No. 40.) *See Cafasso*, 637 F.3d at 1062; *see*

1 *also Ruhe v. Masimo Corp.*, 929 F. Supp. 2d 1033, 1039 (C.D. Cal. 2012) (noting in
2 a False Claims Act case that the publication of confidential documents in the
3 relator’s complaint “was not wrongful, even in light of nondisclosure agreements,
4 given ‘the strong public policy in favor of protecting whistleblowers who report
5 fraud against the government’”); *cf. Wadler v. Bio-Rad Labs., Inc.*, 212 F. Supp. 3d
6 829, 849 (N.D. Cal. 2016) (concluding former general counsel was permitted to
7 rely on privileged communications and confidential information that was
8 “reasonably necessary” to his claims and defenses in his whistleblower retaliation
9 action). This determination cannot be made in the context of a Rule 12(f) motion to
10 strike. Thus, when Erhart’s amended pleading is construed in his favor, BofI has
11 not shown these allegations “clearly could have no possible bearing on the subject
12 of the litigation.” *See Platte Anchor Bolt*, 352 F. Supp. 2d at 1057. Accordingly, the
13 Court will not strike the final category of allegations identified by BofI. *See id.* at
14 1057 (“If there is any doubt whether the portion to be stricken might bear on an
15 issue in the litigation, the court should deny the motion.”).

16 In sum, because striking any of the three categories of allegations identified
17 by BofI is not warranted, the Court is unpersuaded by the Bank’s motion to strike.

18 **IV. CONCLUSION**

19 In light of the foregoing, the Court **GRANTS IN PART** and **DENIES IN**
20 **PART** BofI’s motion to dismiss and strike allegations from Erhart’s First Amended
21 Complaint (ECF No. 35). Specifically, the Court denies BofI’s request to dismiss
22 Erhart’s claims for whistleblower retaliation under Sarbanes–Oxley, whistleblower
23 retaliation under Dodd–Frank, and defamation. The Court, however, grants BofI’s
24 motion to dismiss Erhart’s claims for violation of California’s Confidentiality of
25 Medical Information Act, breach of the implied covenant of good faith and fair
26 dealing, and intentional infliction of emotional distress. The Court dismisses these
27 claims with leave to amend. In addition, the Court denies BofI’s motion to strike
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1 allegations from Erhart's pleading. If Erhart chooses to file a Second Amended
2 Complaint, he must do so no later than September 29, 2017.

3 **IT IS SO ORDERED.**

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5 **DATED: September 11, 2017**


6 **Hon. Cynthia Bashant**
7 **United States District Judge**

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