UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CATHERINE A. ZULFER Plaintiff, vs. PLAYBOY ENTERPRISES, INC. and DOES 1 through 10, Inclusive, Defendants.	CASE NO. CV 12-08263-MMM (SHx) [TENTATIVE] ORDER RE: DEFENDANT PLAYBOY ENTERPRISES, INC.'S MOTION TO DISMISS PLAINTIFF'S FIRST AND SECOND CAUSES OF ACTION, AND TO STRIKE ALLEGATIONS PURSUANT TO RULES 12(b)(6) AND 12(f)

On September 25, 2012, Catherine A. Zulfer filed this action against defendant Playboy Enterprises, Inc. ("Playboy"), and certain fictitious defendants.[1] On November 2, 2012, Playboy filed a motion to dismiss plaintiff's first and second causes of action and to strike allegations from the complaint pursuant to Rules 12(b)(6) and 12(f) of the Federal Rules of Civil Procedure.[2] Zulfer opposes the motion.[3]

I. FACTUAL BACKGROUND

A. Facts Alleged in the Complaint

Catherine Zulfer was employed by Playboy for approximately thirty years in various

[1]Complaint, Docket No. 1 (Sept. 25, 2012).

[2]Motion to Dismiss Plaintiff's First and Second Causes of Action, and to Strike Allegations Pursuant to F.R.C.P. 12(b)(6) and 12(f) ("Motion"), Docket No. 7 (Nov. 2, 2012).

[3]Opposition to Playboy's Motion to Dismiss Plaintiff's First and Second Causes of Action, and to Strike Allegations Pursuant to F.R.C.P. 12(b)(6) and 12(f), Docket No. 15 (Jan. 18, 2013).

accounting positions.[4] For the last eighteen months of her employment, Zulfer served as Playboy's Senior Vice President, Corporate Controller.[5] She alleges that she received overwhelmingly positive feedback throughout the duration of her employment with Playboy.[6]

In July 2009, Scott Flanders became the new Chief Executive Officer ("CEO") of Playboy.[7] In April 2010, Christoph Pachler became Playboy's Chief Financial Officer ("CFO").[8] Zulfer reported directly to Pachler.[9] They allegedly worked together for several months with no problems.[10]

Zulfer asserts that in October 2010, Pachler instructed her to accrue one million dollars in discretionary bonuses for various corporate executives for the third quarter of 2010 without approval by Playboy's Board of Directors ("Board").[11] Pachler and Flanders were purportedly to receive the vast majority of this sum.[12]

Zulfer alleges that during the time she worked for Playboy, the Board always had to approve discretionary bonuses before they were accrued or paid.[13] She asserts she believed that accruing or paying the bonuses without Board approval would be "dishonest to shareholders and

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[4]Complaint, ¶ 1; *id.*, ¶ 10.

[5]*Id.*, ¶ 1.

[6]*Id.* ¶; *id.*, ¶ 19.

[7]*Id.*, ¶ 12.

[8]*Id.*.

[9]*Id.*

[10]*Id.*

[11]*Id.*, ¶ 13.

[12]*Id.*

[13]*Id.*

violate Playboy governance and GAAP."[14] Zulfer also contends that because Playboy suffered significant losses in 2010, she did not believe there was a legitimate basis for paying discretionary bonuses that year.[15] Zulfer alleges she had learned of accusations that Flanders had engaged in misconduct, and she was concerned that Pachler and Flanders were attempting to embezzle Playboy assets.[16] She therefore told Pachler she would not accrue the bonuses without Board approval.[17] In approximately January 2011, Pachler once more demanded that Zulfer accrue the one million dollars in bonuses without the approval of Playboy's Board.[18] Zulfer again refused.[19]

On January 14, 2011, Zulfer reported Pachler's requests that she accrue the bonuses without Board approval to Playboy's General Counsel and outside SEC counsel.[20] Almost immediately thereafter, Pachler allegedly began to retaliate against Zulfer by ostracizing her, excluding her from meetings and discussions, withholding crucial information she needed to carry out her corporate accounting responsibilities, and eliminating corporate accounting staff.[21]

This retaliation allegedly continued until Playboy terminated Zulfer on December 31, 2011.[22] Playboy deemed Zulfer's termination a "layoff."[23] Zulfer, however, contends that the

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[14] *Id.*, ¶ 14.

[15] *Id.*, ¶ 13.

[16] *Id.*, ¶ 14;

[17] *Id.*

[18] *Id.*, ¶ 15.

[19] *Id.*

[20] *Id.*, ¶ 16.

[21] *Id.*, ¶ 17.

[22] *Id.*, ¶ 19.

[23] *Id.*

"layoff" was a pretext for retaliation.[24] She alleges that her previous position of Corporate Controller was not eliminated, but instead given to one of her subordinates.[25] Zulfer also alleges that Playboy treated her differently than any other executive who had been laid off during the thirty years she worked at the company; she asserts that Playboy pressured her to sign a "retention agreement" eliminating the 62-week severance to which she was entitled pursuant to Playboy policy.[26]

B. Defendant's Request for Judicial Notice

Playboy requests that the court take judicial notice of three of its Form 8-K filings with the Securities & Exchange Commission ("SEC"). Because Rule 12(b)(6) review is confined to the complaint, the court typically does not consider material outside the pleading (e.g., facts presented in briefs, affidavits, or discovery materials). *In re American Continental Corp./Lincoln Sav. & Loan Securities Litig.*, 102 F.3d 1524, 1537 (9th Cir. 1996). It may, however, consider matters that are proper subjects of judicial notice under Rule 201 of the Federal Rules of Evidence. See, e.g., *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001).

The court can take judicial notice of public records, including SEC filings. See *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1064 n. 7 (9th Cir. 2008) ; *In re New Century*, 588 F.Supp.2d 1206, 1219 (C.D. Cal. 2008) ("It is well-established that courts may take judicial notice of SEC filings," citing *Dreiling v. Am. Express Co.*, 458 F.3d 942, 946 n. 2 (9th Cir.2006)); *Plevy v. Haggerty*, 38 F.Supp.2d 816, 821 (C.D. Cal. 1998) ("SEC filings, including 10-Ks, 10-Qs, annual reports, and Form 4s . . . are public records required by the SEC to be filed, the Court may take judicial notice of them"). The court therefore takes judicial notice of the existence and content of Playboy's 8-K filings. See *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1018 (5th Cir. 1996) ("When deciding a motion to dismiss a claim for securities fraud on the pleadings, a court may consider the contents of relevant public disclosure documents which

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[24] *Id.*

[25] *Id.*, ¶¶ 19-20.

[26] *Id.*, ¶ 19.

(1) are required to be filed with the SEC, and (2) are actually filed with the SEC. Such documents should be considered only for the purpose of determining what statements the documents contain, not to prove the truth of the documents' contents. . ."); see also *Del Puerto Water Dist. v. U.S. Bureau of Reclamation*, 271 F.Supp.2d 1224, 1234 (E.D. Cal. 2003) ("Judicial Notice is taken of the existence and authenticity of the public and quasi public documents listed").

C. Plaintiff's Request For Judicial Notice

Zulfer requests that the court take judicial notice of the Financial Accounting Standards Board ("FASB") Accounting Standards Codification 450-20-25-2 ("ASC 450"). "[J]udicial notice is appropriate for . . . accounting rules as they are 'capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.'" *In re Yahoo! Inc. Sec. Litig.*, No. C 11-02732 CRB, 2012 WL 3282819, *2 (N.D. Cal. Aug. 10, 2012) (citing *In re Asyst Techs., Inc. Deriv. Litig.*, No. 06-4669, 2008 WL 2169021, *1 n. 1 (N.D.Cal. May 23, 2008)). As a consequence, courts regularly take judicial notice of published accounting standards. See, e.g., *Backe v. Novatel Wireless, Inc.*, 642 F.Supp.2d 1169, 1179 (S.D. Cal. 2009) (taking judicial notice of accounting standards related to audit procedures for internal control); *In re Charles Schwab Corp. Sec. Litig.*, 257 F.R.D. 534, 561 n.18 (N.D. Cal. 2009) (taking judicial notice of FASB Statement of Financial Accounting Concept No. 1); *In re New Century*, 588 F.Supp.2d at 1219 (taking judicial notice of excerpts from the Statement of Financial Accounting Standards). Accordingly, the court will take judicial notice of ASC 450.

II. DISCUSSION

A. Legal Standards Governing Motions to Dismiss under Rule 12(b)(6)

A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). As stated, in deciding a Rule 12(b)(6) motion, the court generally looks only to the face of the complaint and documents attached thereto. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n. 19 (9th Cir.1990).

The court must accept all factual allegations pleaded in the complaint as true, and construe them and draw all reasonable inferences from them in favor of the nonmoving party. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("[F]aced with a Rule 12(b)(6) motion to dismiss a § 10(b) action, courts must, as with any motion to dismiss for failure to plead a claim on which relief can be granted, accept all factual allegations in the complaint as true"); see also *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996); *Mier v. Owens*, 57 F.3d 747, 750 (9th Cir. 1995). The court need not, however, accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007) ("While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"). Thus, a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); see also *Twombly*, 550 U.S. at 545 ("Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)" (citations omitted));

Moss v. United States Secret Service , 572 F.3d 962, 969 (9th Cir. 2009).

B. Plaintiff's First Cause of Action

Zulfer's first cause of action pleads a claim for violation of the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. § 1514A, *et seq.* SOX provides whistleblower protection for employees of publicly traded companies. It prohibits employers from "discharg[ing], demot[ing], suspend[ing], threaten[ing], harass[ing], or in any other manner discriminat[ing] against an employee in the terms and conditions of employment because of any lawful act done by the employee . . . to provide information . . . regarding any conduct which the employee reasonably believes constitutes a violation of [a federal fraud statute], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a)(1); *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 996 (9th Cir. 2009).

Courts use "a burden-shifting procedure [to decide SOX whistleblower claims, pursuant to] which a plaintiff is first required to make out a prima facie case of retaliatory discrimination; if the plaintiff meets this burden, the employer assumes the burden of demonstrating by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the plaintiff's protected activity." *Id.* (citing 18 U.S.C. § 1514A(b)(2); 49 U.S.C. § 41212(b)). "Regulations promulgated by the Department of Labor set forth four required elements of a prima facie case under § 1514A: (a) the employee engaged in a protected activity or conduct; (b) [t]he named person knew or suspected, actually or constructively, that the employee engaged in the protected activity; (c) [t]he employee suffered an unfavorable personnel action; and (d) [t]he circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action." *Id.* (citing 29 C.F.R. § 1980.104(b)(1)(i)-(iv) (internal quotation marks omitted)).

Zulfer alleges that Playboy violated SOX by unlawfully retaliating against her for reporting conduct that she reasonably believed violated the law.[27] She contends that she engaged in protected activity when she reported to Playboy's General Counsel and outside SEC counsel that

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[27]Complaint, ¶¶ 24-25.

Pachler had requested that she accrue bonuses without the approval of Playboy's board. Zulfer argues she reasonably believed that in asking her to accrue bonuses, Flanders and Pachler were attempting to circumvent internal controls in violation of Section 13 of the Exchange Act and SEC Rule 13a-15 promulgated under section 13 of the 1934 Act. See 15 U.S.C. § 78m(b)(5) ("No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account").

Playboy argues that Zulfer's allegations fail to make out a prima facie case of retaliatory discrimination. It disputes only the adequacy of her pleading of the first element set forth in 29 C.F.R. § 1980.104, arguing that her allegations do not show that she engaged in "protected activity" because her report to Playboy's counsel did not provide "information . . . regarding any conduct which [she could have] reasonably believe[d] constitute[d] a violation of [a federal fraud statute], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a)(1). The "reasonable belief" element of a § 1514A(a)(1) claim is met if the employee had "(1) a subjective belief that the conduct being reported violated a [law listed in § 1514A(a)(1)], and (2) this belief [was] objectively reasonable." *Van Asdale*, 577 F.3d at 1000. Playboy does not challenge Zulfer's subjective belief that accruing bonuses without board approval violated SOX. It contends, however, that her belief was objectively unreasonable.

Playboy argues that a plaintiff must have a reasonable belief that a violation of a law identified in the statute is occurring or has occurred and that a complaint regarding future action is not protected under SOX. Because Zulfer does not allege that any bonuses actually were accrued or paid prior to Board approval, Playboy asserts, she does not allege an ongoing or past violation. Playboy relies on the Fourth Circuit's decision in *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 352 (4th Cir. 2008), where the court stated that SOX "requires [a plaintiff] to have held a reasonable belief about an *existing* violation, inasmuch as the violation requirement is stated [in the statute] in the present tense: a plaintiff's complaint must be 'regarding any conduct which [she] reasonably believes constitutes a violation" of the laws listed in § 1514A(a)(1). See also *Wiest v. Lynch*, No. 10-3288, 2011 WL 2923860, *5 (E.D. Pa. July 21, 2011) ("to constitute

protected activity, the plaintiff's communication must provide information that reflects a reasonable belief of an existing violation," citing *Livingston*, 520 F.3d at 352). Playboy also cites *Walton v. Nova*, No. 3:06-CV-292, 2008 WL 1751525, *9 (E.D. Tenn. Apr. 11, 2008). There, the court cited *Livingston* in holding that plaintiff's claimed belief that her employer was violating database securities regulations was too speculative to be an objectively reasonable belief in an existing violation. It stated: "Plaintiff's complaints to Defendants regarding database security were at best potential violations of the cited statutes if the security standards were not met *and* the required disclosures and reports were not made by management." *Id.*

Zulfer argues that reporting an attempt to commit a SOX violation is protected activity, relying on *Collins v. Beazer Homes USA, Inc.*, 334 F.Supp.2d 1376, 1377 (N.D. Ga. 2004). In *Collins*, the court denied the defendant's motion for summary judgment because plaintiff had reported management's *"attempts* to circumvent the company's system of internal accounting controls"; the court held that "reasonable jurors could find by a preponderance of the evidence that Plaintiff engaged in protected activity" by reporting the attempts. *Id.* at 1377 (emphasis added). Zulfer also cites *Sylvester v. Parexel, Int'l, LLC*, 2011 WL 2517148, 32 IER Cases 497 (U.S. Dept. of Labor May 25, 2011). In *Sylvester*, the Administrative Review Board of the Department of Labor ("ARB") stated that "[a] whistleblower complaint concerning a violation *about to be committed* is protected as long as the employee reasonably believes that the violation is likely to happen." *Id.* at 508 (emphasis added). Zulfer argues that a rule requiring a completed violation to trigger SOX protection would conflict with the purpose of the statute, which is "to protect and encourage greater disclosure." *Sylvester*, 32 IER Cases at 512.

An Illinois district court addressed a similar question in *Bishop v. PCS Admin.*, No. 05 C 5683, 2006 WL 1460032 (N.D. Ill. May 23, 2006). There, the court discussed ARB decisions suggesting that protected activity can occur even in the absence of an actual violation of pertinent securities laws or regulations, if (1) an incipient violation did not ripen into an actual violation because of plaintiff's whistleblowing activity; and (2) a violation did not actually occur, but had reached the stage where it was about to be committed. *Id.* at *8 (citing *Morefield v. Exelon Servs., Inc.*, 2004-SOX-2, 2004 WL 5030303, *5-6 (Dept. of Labor Jan. 28, 2004); *Getman v.*

Sw. Secs., Inc., 2003-SOX-8 (Dept. of Labor, A.L.J. Feb. 2, 2004)). The court concluded that the word "constitute," as used in § 1514A(a)(1), "should be understood to mean an actual violation has occurred, which could include an attempt (in the criminal sense)" – i.e., "a substantial step toward the commission of the offense with the specific intent to commit that offense." *Id.* ("To the extent there is a reasonable (but incorrect) belief, it must be a reasonable belief that an actual violation has occurred or is being attempted"). The court ultimately dismissed plaintiff's SOX claim because she failed to allege a reasonable belief that an actual violation had occurred or was being attempted. *Id.* at *9.

The Ninth Circuit does not appear to have addressed this question, nor have district courts in the circuit. Having reviewed the out-of-circuit authority cited by the parties, the court adopts the approach of the *Bishop* and *Collins* courts, rather than the approach set forth in *Livingston* and *Walton*. There are several reasons for this. First, the court finds the reasoning of those decisions concerning the purpose of SOX persuasive. *Bishop*, 2006 WL 1460032 at *5 (the reasonableness test "is intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence," quoting *Collins*; 334 F.Supp.2d at 1376, and Legislative History of Title VIII of HR 3763: The Sarbanes-Oxley Act of 2002, Cong. Rec. S7418, S7420 (daily ed. July 26, 2002)); see also *Sylvester*, 32 IER Cases at 512 ("The purpose of Section 806, and the SOX in general, is to protect and encourage greater disclosure. Section 806 exists not only to expose existing fraud, i.e., conduct satisfying the elements of a fraud claim, but also to prevent potential fraud in its earliest stages. We feel the purposes of the whistleblower protection provision will be thwarted if a complainant must, to engage in protected activity, allege, prove, or approximate that the reported irregularity or misstatement satisfies securities law 'materiality' standards, was done intentionally, was relied upon by shareholders, and that shareholders suffered a loss because of the irregularity"); *In re Mallory*, 2009-SOX-00029, 2009 WL 6470454, *29 (Dept. of Labor Nov. 20, 2009) ("The SEC takes a dim view of *any effort* to falsify, directly or indirectly, any book, record, or account that is subject to the securities laws, or to circumvent internal controls" (emphasis added); *Morefield*, 2004 WL 5030303 at *2 ("it does not serve the purposes or policies of [SOX] to take too pinched

a view of this remedial statute when it comes to protecting those in an organization who can address the concerns Congress sought to correct")).

Second, the facts and posture in *Livingston* and *Walton* are distinguishable. Both were decisions on motions for summary judgment. In *Livingston*, plaintiff alleged that defendant intentionally made misrepresentations, but failed to adduce evidence of such misrepresentations or intent. 520 F.3d at 355. As a consequence, *Livingston* is of limited relevance to this motion to dismiss, in that the court must at this stage accept the facts alleged as true and construe them in favor of Zulfer. In *Walton*, plaintiff asserted that she reasonably believed defendants had violated reporting and disclosure statutes, but did not adduce evidence that there had been any security failures defendants were required to report. The court found, therefore, that plaintiff had not demonstrated a reasonable belief that defendants had as yet engaged in any misconduct. Here, in contrast, Zulfer alleges that she believed that Flanders' and Pachler's attempts to make her accrue bonuses without board approval violated SEC rules. She does not contend that "a violation was about to happen upon some future contingency." *Walton*, 2008 WL 1751525 at *9 (quoting *Livingston*, 520 F.3d at 344).

Finally, the belief that an attempt to violate a law listed in SOX itself "constitutes a violation" of that law is not, in the court's view, "objectively unreasonable." See *Collins*, 334 F.Supp.2d at 1377; *Bishop*, 2006 WL 1460032 at *8; see also *United States v. Wittig*, 575 F.3d 1085, 1104 (10th Cir. 2009) (upholding a conviction for conspiracy to circumvent internal controls even though the conspiracy did not succeed); 18 U.S.C. § 1344 (including "attempt to execute . . . a scheme or artifice . . . to defraud" is within the definition of bank fraud). The court therefore adopts the framework of the district court in *Bishop* and holds that the word "constitutes" in § 1514A(a)(1) means that an actual violation or attempt to violate has occurred.

Playboy next argues that Zulfer fails to allege that she believed Pachler or Flanders violated one of the types of fraud or securities laws listed in § 1514A(a)(1). SOX enumerates six types of violations: (1) mail fraud; (2) wire fraud; (3) bank fraud; (4) securities fraud; (5) a violation of any rule or regulation of the SEC; or (6) a violation of a provision of federal law relating to fraud against shareholders. *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009); see

also *Van Asdale*, 577 F.3d at 996-97. Zulfer asserts her complaint sufficiently alleges that she reasonably believed Playboy violated (a) SEC rules and regulations governing internal accounting controls, and (b) federal law concerning shareholder fraud.

Federal courts have consistently held that disclosures concerning perceived circumvention of internal control standards are SOX-protected disclosures. See, e.g., *Feldman v. Law Enforcement Associates Corp.*, 779 F.Supp.2d 472, 492 (E.D.N.C. 2011) ("Disclosures made by employees concerning reasonably perceived violations of SEC rules governing internal control standards can constitute protected conduct under SOX"); *Smith v. Corning, Inc.*, 496 F.Supp.2d 244, 248-50 (W.D.N.Y. 2007) (the disclosure that a company was implementing a financial reporting program that was not GAAP-compliant was protected under SOX); see also *Leznik v. Nektar Therapeutics, Inc.*, 2006 -SOX-93, 2007 WL 5596626, *6-7 (Dept. of Labor SAROX Nov. 16, 2007) ("employee disclosures about efforts to circumvent . . . internal controls are protected activities, because they address violations of SEC rules").

Playboy does not dispute that an effort to circumvent internal accounting controls constitutes a violation of the 1934 Exchange Act, 15 U.S.C. § 78m(b)(5). It asserts, however, that violations of statutory law, such as the Exchange Act, do not constitute violations of "any rule or regulation of the SEC" as that term is used in § 1514A, so that a disclosure concerning a perceived violation of § 78m(b)(5) is not SOX-protected. Playboy cites no authority for this proposition, and it is squarely contradicted by case law; federal courts regularly hold that disclosure of a perceived violation of 15 U.S.C. § 78m(b)(5) is SOX-protected as a disclosure related to a violation of a "rule or regulation of the SEC" and/or of a federal law related to shareholder fraud. See *Hemphill v. Celanese Corp.*, 430 Fed. Appx. 341, 344 n. 3 (5th Cir. June 23, 2011) (Unpub. Disp.) ("Hemphill testified in his deposition that he had a reasonable belief that the accounting issues he discovered may have constituted violations of 15 U.S.C. § 78m(b)(5). . . . Thus, viewed in a favorable light, the facts show that Hemphill engaged in protected activity"); *Sequiera v. KB Home*, 716 F.Supp.2d 539, 551-54 (S.D. Tex. 2009) (plaintiff reasonably believed that there was a legal requirement that publicly held companies should have effective internal controls in place, and his disclosure relating to company's failure

to maintain internal controls was SOX-protected, in light of the fact that "section 13 of the Securities Exchange Act of 1934 . . . states that 'No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls'"); *Collins*, 334 F.Supp.2d at 1377 (plaintiff's disclosures were protected by SOX because "they allege[d] attempts to circumvent the company's system of internal accounting controls and therefore state[d] a violation of Section 13 of the Exchange Act"); see also *Smith*, 496 F.Supp.2d at 148-49 (complaint adequately alleged SOX-protected activity because it pled that "plaintiff reasonably believed that defendant was violating 15 U.S.C. § 78m(b)(2)(B)(ii) and that he believed that § 78m(b)(2)(B)(ii) related to fraud against shareholders").

Zulfer alleges that Pachler pressured her to engage in suspect accounting practices by accruing and paying corporate executive bonuses without the approval of the Board of Directors.[28] She alleges that she believed the Board was required to approve bonuses before accrual.[29] She also asserts she believed that accruing or paying bonuses without Board approval would be dishonest to shareholders and violate Playboy's governance policies and GAAP.[30] Playboy appears to concede that Board approval is a form of internal control.[31] See 15 U.S.C. § 78m(b)(2) (requiring that securities issuers "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that (i) transactions are executed in accordance with management's general or specific authorization; [and] . . . (iii) access to assets is permitted only in accordance with management's general or specific authorization"). Zulfer's factual allegations thus adequately plead that she reasonably believed Playboy executives were attempting to circumvent internal accounting controls in violation of SEC rules and regulations.[32] If she is

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[28]*Id.* at 7; *id.*, ¶ 16.

[29]*Id.*, ¶ 13.

[30]*Id.*, ¶ 14.

[31]Reply at 12.

[32]Playboy argues that Zulfer's allegations show that Pachler and Flanders were trying to comply with internal controls rather than circumvent them, since they approached Zulfer to accrue

able to prove these allegations, Zulfer's disclosures based on her belief will be SOX-protected. *Hemphill,* 430 Fed. Appx. at 344 n. 3; *Feldman*, 779 F.Supp.2d at 492; *Sequiera*, 716 F.Supp.2d at 551-54; *Smith*, 496 F.Supp.2d at 248-50; *Collins*, 334 F.Supp.2d at 1377.

Playboy argues that Zulfer has not alleged sufficient facts to show that accrual of the bonuses prior to Board approval violates any provision of GAAP or otherwise constitutes an attempt to circumvent internal accounting controls. SOX does not, however, require a plaintiff to demonstrate that the concerns she disclosed were actually illegal. "To encourage disclosure, Congress chose statutory language which ensures that 'an employee's reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation . . . is protected.'" *Van Asdale*, 577 F.3d at 1001.

Zulfer alleges that she has a degree in accounting, was a CPA, and spent nearly three decades in Playboy's accounting department.[33] She asserts that Playboy and its outside compliance expert trained her in the company's internal controls to ensure SOX compliance.[34] She contends that she regularly communicated with Playboy's outside auditors to verify that

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the bonuses rather than accruing the bonuses themselves. Zulfer alleges that Pachler and Flanders attempted to circumvent internal controls by bypassing Board approval, however, not by bypassing her. The fact that Pachler and Flanders did not accrue the bonuses themselves does not demonstrate that her belief that they were attempting to circumvent internal controls was unreasonable.

Playboy also asserts that Zulfer could not have had a reasonable belief that Pachler and Flanders were engaged in illegal conduct because Playboy's Board approved payment of the bonuses in January 23, 2011, after which Zulfer accrued and paid the bonuses. Playboy contends that the Board's approval of the bonuses and Zulfer's accrual of them shows that her SOX claim is incurably defective and should be dismissed with prejudice. Zulfer alleges, however, that her earlier disclosures were based on a reasonable belief that Pachler and Flanders were attempting to violate SEC rules and regulations by circumventing internal controls. The fact that Playboy later complied with the internal control of Board approval and that Zulfer accrued the bonuses once they did so is consistent, not inconsistent, with her allegation that she reasonably believed Board approval was required before the accrual of bonuses.

[33]Complaint, ¶ 10.

[34]*Id.*, ¶ 12.

proper controls and accounting methods were being used.[35] These factual allegations show that Zulfer had sufficient experience in accounting, Playboy's internal controls, and SOX compliance to reach a reasonable conclusion that Pachler and Flanders were attempting to circumvent internal controls. Additionally, as noted, Playboy appears to concede that Board approval is a form of internal control.[36] The court concludes, therefore, that Zulfer's allegations are sufficient, at the pleading stage, to demonstrate the reasonableness of her belief that Pachler and Flanders were violating securities rules and regulations by attempting to circumvent internal controls. See *Sequiera*, 716 F.Supp.2d at 551 ("While Plaintiff does not have any formalized training in accounting or Sarbanes–Oxley compliance, he does have experience working at other publicly-held companies. In his former positions, he did have some exposure to those companies' practices regarding Sarbanes–Oxley and implementing internal controls. He is not an accounting expert, but a reasonable jury could find that his experience was sufficient, in this situation, for him to identify areas where he believed the company was violating securities laws related to shareholder fraud"); see also *Collins*, 334 F.Supp.2d at 1377 ("if Congress had intended to . . . have required complainants to specifically identify the code section that they believe[d] was being violated, it could have done so. It did not. Congress instead . . . adopted the 'reasonable belief' standard").

Zulfer also asserts that her allegations suffice to plead a reasonable belief that her disclosures concerned a violation of federal law governing shareholder fraud. The Ninth Circuit has held that "[t]o have an objectively reasonable belief there has been shareholder fraud, the complaining employee's theory of such fraud must at least approximate the basic elements of a claim of securities fraud." *Van Asdale*, 557 F.3d at 1001 (quoting *Day*, 555 F.3d at 55). Those elements are: (1) a material misrepresentation or omission of fact, (2) scienter, (3) connected to the purchase or sale of a security, (4) transaction and loss causation, and (5) economic loss. *Id.*

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[35] *Id.*

[36] Reply at 12.

(quoting *In re Daou Sys., Inc.*, 411 F.3d 1006, 1014 (9th Cir. 2005)).[37]

Zulfer fails to allege that she had a reasonable belief concerning the first element of a fraud claim (or an approximation of that element): a misrepresentation to shareholders. Zulfer argues that she cannot allege a misrepresentation because her protected activity prevented the misrepresentation from being made. Zulfer, however, does not allege facts that would support a plausible inference that accrual of the bonuses would have been communicated to shareholders prior to Board approval even had she complied with Pachler's and Flanders' requests. Zulfer asserts that if the bonuses had been accrued and remained on the books as of the date of the filing of Playboy's February 2011 Form 8-K, and Board approval had not been obtained, the 8-K would have contained incorrect, misleading financial information. Playboy asserts, to the contrary, that "numerous checks and balances, including Board approvals and auditor review," stood between the accrual and eventual disclosure to shareholders of Playboy's financial statements.

The court declines to consider the factual assertions in Zulfer's and Playboy's briefs, as it is restricted to considering facts alleged in the complaint and that are proper subject of judicial notice in deciding a motion to dismiss. Zulfer does not allege that the accrual of bonuses on Playboy's internal books and records would have led to the inclusion of the bonuses in published financial statements disseminated to shareholders prior to Board approval of the bonuses. Zulfer does not even allege that she *believed* the accrual requests would have resulted in the communication of a specific misrepresentation to shareholders. The court concludes, therefore, that Zulfer has failed to allege that she had a reasonable belief that Playboy had violated federal law relating to fraud against shareholders. See *Day*, 555 F.3d at 55 (affirming the entry of summary judgment for defendant on a SOX claim where the employee did not allege "that the numbers [about which] he complained were inaccurate . . . [and] were reported to shareholders"); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 479 (5th Cir. 2008) ("We find that [plaintiff's]

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[37]It is not clear whether or how the last two elements would have to be shown if an employee disclosed an attempted fraud that was never completed. The court need not reach this question, however, because Zulfer has not adequately alleged that she had a reasonable belief that the other elements of shareholder fraud were present.

general inquiries concerning . . . compliance in [defendant]'s internal financial documents, which she knew were not released to shareholders, do not constitute protected activity under SOX").

Zulfer similarly fails to allege that Pachler and Flanders intended to communicate a misrepresentation to shareholders. Scienter is "a mental state embracing intent to deceive, manipulate, or defraud." See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007). Zulfer argues that *scienter* is not required where the protected activity consists of disclosures regarding internal control violations. While it may not be necessary to plead *scienter* to show that an employee has a reasonable belief that her disclosure was related to a violation of an SEC rule or regulation, the Ninth Circuit has clearly stated that allegations of *scienter* are required to demonstrate that an employee has a reasonable belief that shareholder fraud has taken place. *Van Asdale,* 577 F.3d at 1001 ("[t]o have an objectively reasonable belief there has been shareholder fraud, the complaining employee's theory of such fraud must at least approximate the basic elements of a claim of securities fraud"); see also *SEC v. McNulty*, 137 F.3d 732, 740-41 (2d Cir. 1998) (some provisions of the Exchange Act provide for civil liability without a showing of *scienter*, but *scienter* is required to prove a claim for fraud, manipulation, or insider trading under § 10(b) or Rule 10b–5 of the Act).

Zulfer argues that even if *scienter* is required, it has been adequately pled, since she has alleged that Pachler and Flanders had an obvious motive and opportunity to try to obtain million dollar bonuses for themselves. Playboy correctly argues, however, that the Ninth Circuit requires more than allegations of motive and opportunity to plead *scienter*; rather, a plaintiff must state facts that come closer to demonstrating intent. See, e.g., *In re Rigel Pharm., Inc. Secs. Litig.*, 697 F.3d 869, 884 (9th Cir. 2012); *Rubke v. Capitol Bancorp Ltd,* 551 F.3d 1156, 1166 (9th Cir. 2009). Zulfer does not allege that Pachler and Flanders intended to deceive, manipulate, or defraud shareholders by misrepresenting facts concerning their bonuses in Playboy's financial statements or otherwise.[38] For this reason as well, therefore, Zulfer has failed to allege facts

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[38]Even if alleging motive and opportunity were sufficient to plead *scienter*, Zulfer has alleged facts suggesting only that Pachler and Flanders had the motive and opportunity to pursue

showing that she had a reasonable belief that her disclosures were related to shareholder fraud.

In sum, the court concludes that Zulfer has failed to allege that she reasonably believed that the disclosures she made were related to shareholder fraud, the fifth category of violation set forth in § 1514A. Because, however, Zulfer has adequately alleged that she reasonably believed the disclosures she made were related to the first category of § 1514 A violation – i.e., a violation of SEC rules and regulations – the court denies Playboy's motion to dismiss her first cause of action.

C. Plaintiff's Second Cause of Action

Zulfer's second cause of action pleads a claim for violation of California Labor Code § 1102.5. Zulfer alleges that Playboy violated § 1102.5 by ostracizing, humiliating, and ultimately terminating her for refusing to engage in unlawful conduct and for engaging in protected activity.

Section 1102.5(c) provides that "[a]n employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." CAL. LAB. CODE § 1102.5(c). Playboy argues that Zulfer has failed to allege that it violated any law. It contends that Zulfer's § 1102.5(c) claim is premised on her SOX claim. It asserts that because Zulfer's SOX claim fails, her § 1102.5 claim fails as well. Zulfer does not dispute that her § 1102.5(c) claim is derivative of her SOX claim. She contends that if the court declines to dismiss her SOX claim, it should also deny the motion to dismiss her § 1102.5 claim.

For the reasons stated, the court finds that Zulfer has adequately pled a SOX claim. Whether Zulfer has stated a SOX claim is not dispositive, however, as to whether she has stated a § 1102.5(c) claim. As noted, SOX does not require that plaintiff allege that the employer actually committed an illegal act. In contrast, § 1102.5(c) protects refusals to participate in activities that would actually result in violations of the law. See *Nordstrom v. US Bank, NA, Inc.*,

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bonuses for themselves without Board approval; she has not alleged facts suggesting that they had the motive and opportunity to misrepresent the bonuses to shareholders.

No. 11-CV-1554, 2011 WL 5150010, *3 n.2 (S.D. Cal. Oct. 28, 2011) ("In order to state a claim under Section 1102.5(c), the plaintiff-employee must allege that he refused to participate in conduct that would result in a violation of law"); see also *Ferretti v. Pfizer Inc.*, 855 F.Supp.2d 1017, 1025 (N.D. Cal. 2012) ("Plaintiff alleges that she not only made 'protected disclosures' . . . but that she also refused to participate in illegal activity. As a sister court has noted in discussing section 1102.5(c), the California Legislature intended 'to protect employees who refuse to act at the direction of their employer or refuse to participate in activities of an employer that would result in a violation of law,'" citing *Casissa v. First Republic Bank*, Case Nos. 09-CV-04129-CW, 2010 WL 2836896, at *2 (N.D.Cal. July 19, 2010) (quoting Act of Sept. 22, 2003, ch. 484, § 1, 2003 Cal. Legis. Serv. 484). While Zulfer's complaint alleges sufficient facts to show that she had a reasonable belief that accruing bonuses without Board approval would violate 15 U.S.C. § 78m(b)(5), she does not allege sufficient facts to show that actually accruing the bonuses would have been illegal. She does not specifically allege, for example, that Playboy in fact had internal accounting controls that would have prohibited her from accruing the bonuses prior to Board approval. Nor does she allege facts indicating that she would have been required to falsify any book, record, or account to accrue the bonuses. The complaint merely alleges that Zulfer had a reasonable belief that this would have been illegal and contrary to Playboy's past practices. The court concludes, therefore, that Zulfer has not alleged sufficient facts to state a § 1102.5(c) claim.

Zulfer argues additionally that the complaint states a § 1102.5 claim based on her reporting of a suspected violation of federal law. Section 1102.5(b) provides that "[a]n employer may not retaliate against an employee for disclosing information *to a government or law enforcement agency*, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." CAL. LAB. CODE § 1102.5(b) (emphasis added). Playboy argues that Zulfer has failed to state a claim under §1102.5(b) because she has not alleged that she reported anything to government or law enforcement. Zulfer argues, however, that California courts have recognized that an internal report may give rise to a § 1102.5(b) claim if the employer has a duty to

investigate and report the matter to a government agency. In support of this argument, Zulfer cites *Gardenhire v. Housing Authority*, 85 Cal.App.4th 236 (2000), and *Colores v. Bd. of Trustees*, 105 Cal.App.4th 1293 (2003). In both *Gardenhire* and *Colores*, however, the employee reported suspected violations of law to a government employer. The reports of suspected violations were therefore reports to a government agency – a fact emphasized by the courts in both of those cases. See *Colores*, 105 Cal.App.4th at 1313 ("First, plaintiff was employed by a governmental agency. . . . Thus, plaintiff, in contrast to an employee of a private employer, had no need to inform some other governmental agency in order to qualify as a 'whistleblower' within the meaning of [§ 1102.5]"); *Gardenhire*, 85 Cal.App.4th at 242 ("Gardenhire reported directly to the commissioners of a public agency which happened to also be her employer. The commissioners of the agency, themselves public employees and charged with the protection of the public interest, commenced an investigation. Gardenhire could not have expected there was any further need to report her suspicions to higher authorities").

Zulfer does not allege that Playboy is a government entity. *Gardenhire* and *Colores* are therefore inapposite. The court concludes, consequently, that Zulfer has failed to state a claim under § 1102.5(b). See *Green v. Ralee Eng'g Co.*, 19 Cal.4th 66, 76-77 (1998) ("Section 1102.5, subdivision (b), concerns employees who report to public agencies. It does not protect plaintiff, who reported his suspicions directly to his employer"); see also *Weingand v. Harland Fin. Solutions, Inc.*, No. C-11-3109 , 2012 WL 3537035, *4 (N.D. Cal. Aug. 14, 2012) ("[Plaintiff] merely asserts that he complained about Defendant's practices and questioned whether they were legal to his own human resources department. Such a complaint does not raise whistleblower protection under § 1102.5," citing *Green*, 19 Cal.4th at 77; *Bursese v. Paypal, Inc.*, C-06-00636RMW, 2007 WL 485984, *9 (N.D. Cal. Feb.12, 2007) ("PayPal contends, and this court agrees, that Cal. Labor Code Section 1102.5(b) does not apply to plaintiff because he only reported his concerns to a private employer, rather than a public agency")). As a result, the court grants Playboy's motion to dismiss Zulfer's second cause of action. See *Weingand,* 2012 WL 3537035 at *4 ("In this case, Plaintiff cannot make out a § 1102.5 claim because he does not allege that he reported any suspicions of unlawful activity to any government agency, nor does

he allege that he refused to do anything that would violate the law").

D. Legal Standard Governing Motions to Strike under Rule 12(f)

Under Rule 12(f) of the Federal Rules of Civil Procedure, the court may strike "any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." FED.R.CIV.PROC. 12(f). "The essential function of a Rule 12(f) motion is to 'avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial.'" *Bureerong v. Uvawas*, 922 F.Supp. 1450, 1478 (C.D. Cal. 1996) (quoting *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), overruled on other grounds, 510 U.S. 517 (1994)). "'[M]otions to strike should not be granted[, however,] unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation.'" *United States v. Wang*, 404 F.Supp.2d 1155, 1157 (N.D. Cal. 2005) (citing *Colaprico v. Sun Microsystems, Inc.*, 758 F.Supp. 1335, 1339 (N.D. Cal. 1991)). Indeed, such "motions are rarely granted . . . when the moving party can show no prejudice as a result" of the matter included in a pleading. *Garcia-Barajas v. Nestle Purina Petcare Co.*, No. 09-0025, 2009 WL 2151850, *2 n. 2 (E.D. Cal. July 16, 2009). If there is any doubt as to whether the allegations a party seeks to strike may raise an issue of fact or law, the motion should be denied. See *In re 2TheMart.com, Inc. Sec. Litig.*, 114 F.Supp.2d 955, 965 (C.D. Cal. 2000). When ruling on a Rule 12(f) motion to strike, the court must view the pleading in the light most favorable to the nonmoving party. See *RDF Media Ltd. v. Fox Borad. Co.*, 372 F.Supp.2d 556, 561 (C.D. Cal. 2005).

Pleadings are immaterial when they have "no essential or important relationship to the claim for relief or the defenses being pleaded." *Fantasy, Inc.*, 984 F.2d at 1528; see also *Hayes v. Woodford*, 444 F.Supp.2d 1127, 1132 (S.D. Cal. 2006) (citing 5 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE 2d § 1382, at 706-11 (1990)); *In re 2TheMart.com, Inc.*, 115 F.Supp.2d at 965. Pleadings are "impertinent" when they "do not pertain, and are not necessary, to the issues in question." *Fantasy, Inc.*, 984 F.2d at 15287; see also *Ghahremani v. Borders Group, Inc., Copy. L. Rep.*, No. 10-1248, 2010 WL 4008506, *2 (S.D. Cal. Oct. 6, 2010). "Scandalous" matter includes allegations that improperly cast a

"cruelly derogatory light on a party or person." *In re 2TheMart.com*, 114 F.Supp.2d at 965; 5C Wright & Miller, *supra*, §1382 at 465-69; see also *Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654, 664 (7th Cir. 1992); *SEC v. Gendarme Capital Corp.*, No. 11-0053, 2012 WL 346457, *1 (E.D. Cal. Jan. 31, 2012); 2 MOORE'S FEDERAL PRACTICE § 12.37[3] at 12–97 ("'Scandalous' generally refers to any allegation that unnecessarily reflects on the moral character of an individual or states anything in repulsive language that detracts from the dignity of the court").

E. Whether Plaintiff's Allegations Should be Stricken

Playboy moves to strike two lines in the complaint that allege sexual harassment by Flanders:

- Page 6, lines 15-16 ("Within the first year of his employment, several allegations of sexual harassment and other improprieties were made against Flanders").
- Page 7, lines 16-19 ("Moreover, by this point in time, Zulfer had already learned of facts and allegations regarding misconduct by CEO Flanders and she was reasonably suspect of his motives").

Playboy argues that the allegations are "immaterial, impertinent and scandalous."

The allegations that are the subject of Playboy's motion to strike cast Flanders' character in a derogatory light. If they provide pertinent context for Zulfer's claims, however, this is not sufficient to make the allegations "scandalous." See *Gendarme Capital Corp.*, 2012 WL 346457 at *3 (denying a motion to strike because allegations of illegal behavior did not rise to the level of "scandalous," and set forth "pertinent factual assertions against defendants"); *Martel v. Cadjew*, No. CIV S-11-0509 JAM EFB PS, 2011 WL 4386209, *2-3 (E.D. Cal. Sept. 20, 2011) (denying a motion to strike a reference to defendants as "outlaws," and statements that purportedly "denigrate[d]" defendants as "secret and sinister" because they provided pertinent context for plaintiff's claims); *Doe v. Campos*, No. 09-0544, 2010 WL 3749226, *1 (E.D. Cal. Sept. 23, 2010) (denying a motion to strike because the purportedly derogatory statements were relevant to plaintiff's claims).

Zulfer argues that the allegations concerning Flanders' purported misconduct are pertinent

because her knowledge of Flanders' misconduct bears on whether she had a reasonable belief that she was reporting financial improprieties that violated federal law. As stated, an employee must have "reasonably believed" that the conduct she reported constituted a violation of a federal fraud statute or securities rule or regulation to prevail on a SOX claim. Read in context, lines 16-19 on page 7 of the complaint provide relevant background for Zulfer's contention that she believed that Flanders was asking her to engage in illegal conduct. Paragraph 14 of Zulfer's complaint, which includes the lines Playboy seeks to strike, reads:

> "Moreover, by this point in time, Plaintiff had already learned of facts and allegations regarding misconduct by CEO Flanders and she was reasonably suspect of his motives. She was extremely concerned that CFO Pachler and/or CEO Flanders were attempting to effectively embezzle, steal or convert Playboy assets."[39]

These allegations provide pertinent context for Zulfer's claim that she believed Pachler and Flanders were attempting to circumvent internal accounting controls. See *Martel*, 2011 WL 4386209 at *2-3. The allegations are also pertinent to Zulfer's termination in violation of public policy claim. See *Collier v. Super. Ct.*, 228 Cal.App.3d 1117, 1127 (1991) ("The public policy of this state against crime in the workplace is reflected in the Penal Code sections declaring unlawful the act[ ] of embezzlement . . . . Retaliation by an employer when an employee seeks to further this well-established public policy by responsibly reporting suspicions of illegal conduct to the employer seriously impairs the public interest"). The court therefore denies the motion to strike lines 16-19 on page 7. *Gendarme Capital Corp.*, 2012 WL 346457 at *3; *Martel*, 2011 WL 4386209 at *2-3; *Campos*, 2010 WL 3749226 at *1.

Zulfer has not, however, alleged sexual harassment or discrimination claims against either Flanders or Playboy. There is no logical connection between Zulfer's allegations of harassment by Flanders and the alleged financial misconduct she reported. Compare *Dawe v. Corrections USA,* No. 07-1790, 2009 WL 2591146, *3 (E.D. Cal. Aug. 20, 2009) (denying a motion to strike

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[39]Complaint, ¶ 14.

allegations that a defendant's financial misconduct derived in part from a desire to cover up sexual misconduct). Having reviewed the complaint in its entirety, the court finds that Zulfer's allegations of sexual harassment are not relevant to the claims she is pleading, and do not pertain to any of the issues in this case. *Fantasy, Inc.*, 984 F.2d at 1528. The court concludes, consequently, that lines 15-16 of page 6 should be stricken as "immaterial, impertinent, and scandalous."

III. CONCLUSION

For the reasons stated, the court denies Playboy's motion to dismiss Zulfer's first cause of action. The court dismisses Zulfer's second cause of action without prejudice. See, e.g., *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) ("Dismissal with prejudice and without leave to amend is not appropriate unless it is clear . . . that the complaint could not be saved by amendment"). Zulfer may file an amended complaint addressing the deficiencies noted herein within twenty (20) days of the date of this order. Pursuant to the parties' January 28, 2013 stipulation, Zulfer may also add a new claim for relief under the Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78u-6.[40]

The court grants Playboy's motion to strike lines 15-16 of page 6 of the complaint. Playboy's motion to strike is otherwise denied.

DATED: February 11, 2013

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

[40]Stipulation re: Filing of First Amended Complaint, Docket No. 18 (Jan. 28, 2013).