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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 IN RE BofI HOLDING, INC.
12 SECURITIES LITIGATION

Case No.: 3:15-cv-02324-GPC-KSC

13 **ORDER GRANTING MOTION TO**
14 **DISMISS WITH PREJUDICE**

15 [ECF No. 144]

16 Before the Court is a motion to dismiss the Third Amended Class Action
17 Complaint (the “TAC”) filed by Defendants BofI Holding, Inc. (“BofI”), Gregory
18 Garrabrants, Andrew J. Micheletti, Paul J. Grinberg, Nicholas A. Mosich, and James S.
19 Argalas. (ECF No. 144.) The motion is fully briefed. For the reasons explained below,
20 Lead Plaintiff has failed to allege with particularity essential elements of its securities
21 fraud claims. The Court therefore GRANTS the motion to dismiss with prejudice.

22 **I. Background**

23 In this consolidated putative securities fraud class action, purchasers of BofI’s¹
24 stock assert claims against BofI and several corporate officers for violations of Sections
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27 ¹ “BofI is the holding company for BofI Federal Bank, a federally chartered savings association that
28 purportedly operates from its single location in San Diego.” (TAC, ECF No. 136 at ¶ 28.) In this ruling,
“BofI” will refer to both the holding company and its subsidiary BofI Federal Bank.

1 10(b) and 20(a) of the Securities Exchange Act of 1934. On February 1, 2016, the Court
2 appointed Houston Municipal Employees Pension System as the Lead Plaintiff (ECF No.
3 23), and on April 11, 2016, Lead Plaintiff filed a First Amended Complaint (the “FAC”)
4 (ECF No. 26). Defendants filed a motion to dismiss the FAC on the grounds that the
5 FAC (1) failed to identify false or misleading statements and (2) did not plead sufficient
6 facts giving rise to a strong inference of scienter. (ECF No. 37.) The Court granted in
7 part and denied in part. (ECF No. 64.) The Court noted that many of the
8 misrepresentations alleged in the FAC fell “short of the PSLRA’s [Private Securities
9 Litigation Reform Act] heightened standards,” but because a securities plaintiff “need
10 only plead a single materially false misrepresentation to survive a motion to dismiss,” the
11 Court’s conclusion that the FAC alleged at least some material misrepresentations meant
12 that the Court did not need to “dwell on those aspects of the Complaint” that did not meet
13 the PSLRA’s standards. (*Id.* at 15.) The Court found, however, that the FAC’s
14 allegations were insufficient to create a “strong inference of scienter on the parts of
15 Defendants Micheletti, Grinberg, Mosich, and Argalas,” and dismissed the claims against
16 those defendants without prejudice. (*Id.* at 25–27.)

17 On November 25, 2016, Lead Plaintiff filed a Second Amended Complaint (the
18 “SAC”). (ECF No. 79.) Defendants again moved to dismiss. (ECF No. 88.) Again, the
19 Court granted in part and denied in part. (ECF No. 113.) The Court first addressed
20 Defendants’ reassertion that Lead Plaintiff’s pleadings failed to identify any material
21 misrepresentations. Noting that the SAC—like the FAC—was excessive in length, the
22 Court found it helpful to delineate which of the alleged misrepresentations were
23 actionable, and which were not. The Court explained that the SAC alleged “actionable
24 fraudulent or misleading statements as to BofI’s loan underwriting practices and as to its
25 internal controls and compliance infrastructure, but [did] not sufficiently demonstrate[]
26 that Defendants’ statements about its Allowance for Loan Losses (ALL), Net
27 income/diluted price per share, Loan-to-Value Ratio (LTV), or undisclosed lending
28 partnerships are actionable under the securities laws.” (*Id.* at 9.) Noting that the SAC

1 added no new allegations of scienter on the parts of Micheletti, Grinberg, Mosich, and
2 Argalas, the Court again granted the motion to dismiss the Section 10(b) claims against
3 them. (*Id.* at 3.) The Court nonetheless found the new “control person” allegations
4 sufficient to state plausible Section 20(a) claims against all Defendants. (*Id.* at 58.)

5 On September 29, 2017, Defendants filed a motion for judgment on the pleadings
6 in which they argued Lead Plaintiff had not pled with sufficient particularity that a
7 disclosure of the falsity of Defendants’ misrepresentations caused Lead Plaintiff loss.
8 (ECF No. 123.) The Court agreed and granted the motion. (ECF No. 134.) The Court
9 explained that the corrective disclosures identified in the SAC—a complaint filed in
10 federal court against BofI and a series of articles posted on the website *Seeking Alpha*—
11 either were irrelevant to the alleged misrepresentation or did not actually reveal any fraud
12 to the market. Because that was the first time Defendants argued that Lead Plaintiff
13 failed to plead loss causation adequately, the Court granted Lead Plaintiff leave to amend.
14 (*Id.* at 21.)

15 On December 22, 2017, Lead Plaintiff filed the now-operative TAC. (ECF No.
16 136.) As Lead Plaintiff explains in its memorandum in opposition to the instant motion,
17 the TAC is intended to be responsive not only to the Court’s judgment on the pleadings
18 ruling, but also to the Court’s earlier ruling on Defendants’ motion to dismiss the SAC.
19 (*See* ECF No. 148 at 1–2 n.2.) Defendants filed the instant motion to dismiss on January
20 19, 2018. (ECF No. 144.) Defendants argue that the new alleged misrepresentations in
21 the TAC are not actionable and that the TAC again fails to plead loss causation
22 adequately. Defendants also argue that because Section 20(a) claims require a violation
23 of the securities laws, the TAC’s failure to state a claim of violation of Section 10(b)
24 requires dismissal of Lead Plaintiff’s Section 20(a) claims. (*Id.* at 25.)

25 II. Legal Standard

26 A Rule 12(b)(6) motion attacks the complaint as not containing sufficient factual
27 allegations to state a claim for relief. “To survive a motion to dismiss [under Rule
28 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to ‘state a

1 claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)
2 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While “detailed
3 factual allegations” are unnecessary, the complaint must allege more than “[t]hreadbare
4 recitals of the elements of a cause of action, supported by mere conclusory statements.”
5 *Iqbal*, 556 U.S. at 678. “In sum, for a complaint to survive a motion to dismiss, the non-
6 conclusory ‘factual content,’ and reasonable inferences from that content, must be
7 plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*,
8 572 F.3d 962, 969 (9th Cir. 2009).

9 A claim of fraud must comply with Rule 9(b), which requires the complaint to state
10 with particularity the circumstances constituting fraud. *See Fed. R. Civ. P. 9(b)*.
11 Satisfaction of this heightened standard requires delineating “the time, place, and specific
12 content of the false representations as well as the identities of the parties to the
13 misrepresentation.” *Odom v. Microsoft Corp.*, 486 F.3d 541, 553 (9th Cir. 2007)
14 (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1400 (9th Cir.
15 1986)). The complaint must also indicate “what is false or misleading about a statement,
16 and why it is false,” and “be specific enough to give defendants notice of the particular
17 misconduct that they can defend against the charge and not just deny that they have done
18 nothing wrong.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)
19 (quoting *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)). In the Ninth
20 Circuit, Rule 9(b)’s heightened pleading standard applies to all element of a securities
21 fraud claim, including loss causation. *Or. Pub. Empls. Ret. Fund v. Apollo Grp. Inc.*, 774
22 F.3d 598, 605 (9th Cir. 2014).

23 **III. Discussion**

24 The elements of Lead Plaintiff’s Section 10(b) claims, which assert a violation of
25 Rule 10b-5 (*see* TAC ¶ 274), are (1) a material misrepresentation or omission,
26 (2) scienter, (3) in connection with the purchase or sale of a security, (4) reliance,
27 (5) economic loss, and (6) loss causation. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336,
28 341–42 (2005). In addition to Rule 9(b)’s application to such claims, the Private

1 Securities Litigation Reform Act (“PSLRA”) imposes heightened pleading requirements
2 for the elements of falsity and scienter. With respect to each alleged misrepresentation,
3 the PSLRA mandates that the complaint “(1) ‘specify each statement alleged to have
4 been misleading [and] the reason or reasons why the statements is misleading,’ 15 U.S.C.
5 § 78u-4(b)(1); and (2) ‘state with particularity facts giving rise to a strong inference that
6 the defendant acted with the required state of mind,’ § 78u-4(b)(2).” *Tellabs, Inc. v.*
7 *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321 (2007). “Absent a duty to disclose, an
8 omission does not give rise to a cause of action under § 10(b) and Rule 10b-5. . . . An
9 actionable omissions claim arises only when disclosure is ‘necessary . . . to make the
10 statements made, in light of the circumstances under which they were made, not
11 misleading.’” *Retail Wholesale & Dep’t Store Union Local 338 Ret. Fund v. Hewlett-*
12 *Packard Co.*, 845 F.3d 1268, 1278 (9th Cir. 2017) (quoting 17 C.F.R. § 240.10b-5(b)).

13 As discussed in Lead Plaintiff’s memorandum in opposition, the TAC retains the
14 misrepresentations deemed actionable by the Court in its earlier ruling, but it also adds
15 new instances of alleged material misrepresentations. The TAC groups the alleged
16 misrepresentations into three categories: (1) statements regarding Bofi’s internal controls,
17 compliance infrastructure, and risk management; (2) statements regarding Bofi’s
18 underwriting standards and credit quality requirements; and (3) statements regarding
19 regulatory investigations. (ECF No. 148 at 2.) In the analysis that follows, the Court
20 describes the misrepresentations alleged,² and then assesses whether the corresponding
21 alleged corrective disclosures satisfy Rule 9(b)’s heightened pleading standard. With
22 respect to the first two categories—statements regarding internal controls and
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25 ² In its prior ruling, the Court cautioned Lead Plaintiff that the excessive length of its pleadings was
26 contrary to Federal Rule of Civil Procedure 8. (ECF No. 134 at 21.) It appears that Lead Plaintiff has
27 chosen not to heed the Court’s warning. Like its earlier iterations, the TAC spans more than one
28 hundred pages and includes numerous allegations of misrepresentations that are patently non-actionable
under Ninth Circuit case law. The line between exhaustiveness and excessiveness may be thin, but the
TAC clearly falls on the latter side of that divide. Nonetheless, the Court has made an exhaustive review
of the TAC and its attached chart organizing Lead Plaintiff’s allegations.

1 underwriting standards—the Court concludes that the allegations of loss causation are
2 inadequate to satisfy Rule 9(b). As for the third category—statements and omissions
3 regarding regulatory investigations—the Court concludes that (1) the alleged statements
4 and omissions are not actionable and (2) the allegations of loss causation are inadequate
5 to satisfy Rule 9(b).

6 Before engaging in this analysis, however, the Court finds it helpful to review its
7 previous discussion of the definition of “corrective disclosure” in this context.

8 **A. Definition of “Corrective Disclosure”**

9 To establish the element of loss causation, a plaintiff “must plausibly allege that
10 the defendant’s fraud was *revealed* to the market and *caused* the resulting losses.” *Loos*
11 *v. Immersion Corp.*, 762 F.3d 880, 887 (9th Cir. 2014) (internal quotation marks
12 omitted). “The misrepresentation need not be the sole reason for the decline in value of
13 the securities, but it must be a substantial cause.” *In re Gilead Scis. Secs. Litig.*, 536 F.3d
14 1049, 1055 (9th Cir. 2008) (internal quotation marks omitted). “This inquiry requires no
15 more than the familiar test for proximate cause”; the ultimate issue “is whether the
16 defendant’s misstatement, as opposed to some other fact, foreseeably caused the
17 plaintiff’s loss.” *Mineworkers’ Pension Scheme v. First Solar Inc.*, 881 F.3d 750, 753–54
18 (9th Cir. 2018) (quoting *Lloyd v. CBV Fin. Corp.*, 811 F.3d 1200, 1210 (9th Cir. 2016)).
19 As stated above, however, loss causation must be pleaded with particularity under Rule
20 9(b). *Apollo Grp.*, 774 F.3d at 605.

21 To prove loss causation, Lead Plaintiff points to what it asserts are “corrective
22 disclosures” of BofI’s misrepresentations and notes that a drop in BofI’s stock price
23 occurred soon after. A corrective disclosure must be relevant to the alleged
24 misrepresentation at issue; it must “relate back to the misrepresentation and not to some
25 other negative information about the company.” *Bonanno v. Cellular Biomedicine Grp.*,
26 *Inc.*, No. 15-cv-01795-WHO, 2016 WL 4585753, at *3 (N.D. Cal. Sept. 2, 2016)
27 (internal quotation marks omitted). In other words, a corrective disclosure “is a
28 disclosure that reveals the fraud, or at least some aspect of the fraud, to the market.” *In*

1 *re REMEC Inc. Secs. Litig.*, 702 F. Supp. 2d 1202, 1266–67 (S.D. Cal. 2010) (quoting
2 *Teamsters Local 617 Pension & Funds v. Apollo Grp, Inc.*, 633 F. Supp. 2d 763, 818 (D.
3 Ariz. 2009)).

4 While a corrective disclosure need not be “an outright admission of fraud to
5 survive a motion to dismiss,” the disclosure of “a mere ‘risk’ or ‘potential’ for
6 fraud . . . is insufficient to establish loss causation.” *Loos*, 762 F.3d at 888–89 (citing
7 *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1064 (9th Cir. 2008)). It
8 also need not be a singular event: a series of disclosures, when “viewed in tandem,” may
9 be adequate if “[t]he combined force of the[] statements . . . suggest that the market was
10 alerted to” the relevant misrepresentations. *Metzler*, 540 F.3d at 1063 n.6, 1064 n.8.
11 When a series of partial disclosures are alleged, the Court asks whether a full disclosure
12 of the defendant’s misrepresentation has been made by “view[ing each] together with the
13 totality of the other alleged partial disclosures.” *Lloyd*, 811 F.3d at 1210 (quoting *Pub.*
14 *Empls. Ret. Sys. of Miss. v. Amedisys, Inc.*, 769 F.3d 313, 324 (5th Cir. 2014)).

15 As the term suggests, a corrective disclosure normally must reveal some piece of
16 previously undisclosed information showing the falsity of the misrepresentation. *See In*
17 *re Novatel Wireless Secs. Litig.*, 830 F. Supp. 2d 996, 1019 (S.D. Cal. 2011) (“It stands to
18 reason then that [a] disclosure that does not reveal anything new to the market is, by
19 definition, not corrective.” (internal quotation marks omitted)); *In re Maxim Integrated*
20 *Prods., Inc. Secs. Litig.*, 639 F. Supp. 2d 1038, 1048 (N.D. Cal. 2009) (“[A] disclosure
21 that does not reveal anything new to the market is, by definition, not corrective.” (internal
22 quotation marks omitted)). If the alleged disclosure is duplicative of public information,
23 the market will already have incorporated that information into the stock price; thus, the
24 repeated discussion of the same information normally will not cause any later stock price
25 decrease. *See Bonnano*, 2016 WL 4585753, at *5 (aggregation of publicly-available
26 information “cannot constitute new information because an efficient market would easily
27 digest all public information without the need for [the aggregation] to regurgitate it first”
28 (internal quotation mark omitted)). Repeated discussion of already public information

1 *may* serve as a corrective disclosure, however, when it brings to light an implication of
2 which the market was not aware because understanding that implication required some
3 technical or scientific expertise. *See Gilead Scis.*, 536 F.3d at 1053–54. For example, a
4 discussion of public information may be adequate to serve as loss causation if it interprets
5 “complex economic data understandable only through expert analysis [that was not
6 previously] readily digestible by the marketplace.” *Amedisys*, 769 F.3d at 323. By
7 bringing to light an implication of these generally non-digestible data, such an
8 “interpretive corrective disclosure” reveals to the public for the first time information that
9 impacts the value of the stock.

10 Ultimately, “there is no requirement that the corrective disclosure take a particular
11 form or be of a particular quality It is the exposure of the fraudulent representation
12 that is the critical component of loss causation.” *In re Bristol Myers Squibb Co. Secs.*
13 *Litig.*, 586 F. Supp. 2d 148, 164 (S.D.N.Y. 2008) (internal quotation marks omitted). In
14 essence, the question is: after the disclosures identified by Plaintiff were made, did the
15 market become aware of the falsity of Defendants’ misrepresentations to the extent that it
16 devalued BofI’s stock? “If yes, Plaintiff has pled with particularity how Defendants’
17 misrepresentations caused Plaintiff harm; if no, Plaintiff’s allegations do not meet the
18 pleading requirements.” (ECF No. 134 at 8.)

19 **B. Analysis**

20 For the reasons explained below, the *Erhart* Complaint served, at most, only as a
21 partial corrective disclosure of the relevant fraud alleged in the TAC. Moreover, the
22 *Seeking Alpha* articles discussed in the TAC cannot serve as even partial corrective
23 disclosures because they relied on publicly available information, and offered no analysis
24 not generally available to the rest of the market. In response to the Court’s previous
25 ruling, the TAC adds allegations for each article stating, conclusively, that the market did
26 not appreciate the implications of the publicly available information relied upon by that
27 article. But those conclusory allegations are not sufficient to meet Rule 9(b)’s pleading
28 standard because they do not suggest any plausible reason *why* market participants would

1 not have understood the implications of the information in front of them. Finally, the
2 motion to seal filed by BofI in a different case raised, at most, speculation that the
3 Defendants' statements about government investigations were false.

4 Considering all of the alleged corrective disclosures together, the Court concludes
5 that the TAC does not identify with particularity a corrective disclosure of the
6 misrepresentations alleged.

7 **i. Internal Controls, Compliance Infrastructure, and Risk**
8 **Management**

9 The TAC alleges that BofI and its corporate officers made numerous
10 misrepresentations about the adequacy and effectiveness of BofI's internal controls,
11 compliance infrastructure, and risk management. These alleged misrepresentations were
12 made in Form 10-Ks (TAC ¶ 39), Form 10-Qs (*id.* ¶ 41), proxy statements (*id.* ¶¶ 43, 45),
13 Sarbanes-Oxley certifications (*id.* ¶¶ 46–47), Form 8-Ks (*id.* ¶ 49), and during investor
14 presentations (*id.* ¶ 50) and earnings conference calls (*id.* ¶ 51). The alleged
15 misrepresentations in this area asserted that BofI's Audit Committee was governed by
16 policies that ensured sound and effective internal controls and that management was
17 responsible for maintaining such effective internal controls. (*Id.* ¶¶ 39, 43, 45, 49.) They
18 also asserted that BofI officers had found the bank's internal controls and disclosure
19 policies to be effective, and they had reviewed bank policies for deficiencies. (*Id.* ¶¶ 41,
20 46.) Lead Plaintiff also points to statements allegedly made by Garrabrants and
21 Micheletti suggesting that BofI had robust risk management systems and had even
22 recently made significant investments in its compliance staff, including adopting new
23 systems and hiring new staff. (*Id.* ¶¶ 50, 51.) Finally, Lead Plaintiff points to BofI's
24 policy regarding related-party lending, which asserted that such loans were generally
25 made on the same terms as similarly situated borrowers who were not affiliated with
26 BofI. (*Id.* ¶¶ 53–54.) According to the TAC, these statements were false because, in
27 reality, BofI had essentially no internal controls. For example, the TAC cites statements
28 by confidential witnesses who worked at BofI and indicate that management consistently

1 overrode the actions and concerns of internal auditors, altered reports, approved loans to
2 related parties that were significantly more generous than those offered to non-affiliated
3 borrowers, and falsely responded to regulatory subpoenas and requests. (*Id.* ¶¶ 56–122.)

4 With respect to the disclosure of the falsity of these misrepresentations, the TAC
5 points to two sources: (1) a complaint filed in federal court and (2) several articles
6 published on the website *Seeking Alpha*. The Court addresses these alleged corrective
7 disclosures in turn.

8 Charles Matthew Erhart, a former BofI internal auditor, filed a complaint against
9 BofI in federal court on October 13, 2015. *Erhart v. BofI Holding, Inc.*, No. 3:15-cv-
10 02287-BAS-NLS (S.D. Cal.), ECF No. 1 (the “*Erhart Complaint*”). As recounted in the
11 TAC, the *Erhart Complaint* makes numerous accusations that BofI officials engaged in
12 serious misconduct during Erhart’s tenure at the company. (*See* TAC ¶ 124.) In its
13 previous ruling, the Court described the allegations set forth in the *Erhart Complaint*:

14 The *Erhart Complaint* alleges that BofI officers did the following while
15 Erhart served as an internal auditor at BofI: instructed him to remove or
16 shield from discovery any discussion of unlawful conduct that Erhart had
17 noted in an audit report; falsified BofI’s financial statements; failed to make
18 timely contributions to BofI’s employees’ 401k accounts without notifying
19 the Internal Revenue Service or Department of Labor; submitted to the
20 auditing office a strategic plan with forged signatures of the Board of
21 Directors; maintained a too-concentrated deposit source; instructed Erhart
22 never to put evidence of illegal conduct in writing; falsely responded to an
23 SEC subpoena requesting information about a specific account by indicating
24 that BofI had no information about that account; falsely responded to a
25 request by the Office of the Comptroller of the Currency (the “OCC”) for
26 information on bank accounts with no tax identification number by stating
27 that BofI had no such accounts; falsely told the OCC that the bank had not
28 received any correspondence or subpoenas from federal and state banking
agencies and law enforcement; made undisclosed substantial loans to foreign
nationals with serious criminal histories in violation of the Bank Secrecy
Act’s Anti-Money Laundering Rules; altered auditing reports required by the
Bank Secrecy Act’s Quality Control requirements; materially miscalculated
the bank’s allowance for loan and lease losses; created such a “nonexistent
culture of compliance” that multiple members of the auditing offices left
their jobs; removed negative findings in a Flood Disaster Protection Act

1 audit before submitting it to the OCC; “sanitized” a report later submitted to
2 the OCC describing third party customers who were involved in BofI’s
3 Global Cash Card program by removing information suggesting that the
4 customers were fake; and prevented members of the audit department from
5 using email to communicate so as to prevent the creation of a “paper trail.”
6 The complaint also alleges that BofI’s largest consumer account was listed
7 under Garrabrants’s brother’s name, and that Plaintiff suspected that the
8 money in that account came from Garrabrants’s rather than Garrabrants’s
9 brother. Finally, the complaint alleges that Erhart’s manager, John Ball,
10 abruptly resigned on March 5, 2015, “after refusing an order from CEO
11 Garrabrants to engage in what Ball reasonably viewed to be unlawful
12 conduct to cover up the Bank’s wrongdoing,” and that after Ball resigned, an
13 officer instructed the auditing department not to inform the OCC of Ball’s
14 resignation.

15 (ECF No. 134 at 9–10 (footnote and citations omitted).)³ In its previous ruling, the Court
16 concluded that the *Erhart* Complaint’s allegations were not relevant to the actionable
17 misrepresentations regarding internal controls and compliance infrastructure because they
18 did not demonstrate that “the compliance office was understaffed or had not been ‘beefed
19 up’ during the relevant period.” (*Id.* at 10–11.) Because the *Erhart* allegations were
20 irrelevant, the Court found it did not need to address “the parties’ dispute over whether
21 allegations asserted in a whistleblower complaint may serve as a partial disclosure in the
22 first place.” (*Id.* at 11 n.3.) The TAC, however, asserts new allegations of
23 misrepresentations that make the *Erhart* Complaint potentially relevant. For example,
24 Erhart’s allegations that BofI officers prevented internal auditors from discussing illegal
25 conduct in writing and altered audit reports are arguably relevant to Garrabrants and
26 Micheletti’s assertion that they confirmed the effectiveness of the Audit Committee’s
27 controls and procedures.⁴

28 ³ As the Court noted in its previous ruling, Erhart has since filed a First Amended Complaint. *See*
Erhart, No. 3:15-cv-02287-BAS-NLS, ECF No. 32. The relevant allegations in the First Amended
Complaint do not differ materially from the original.

⁴ This is not to say, however, that the new alleged misrepresentations are actionable. Because the Court
concludes that the *Erhart* Complaint and *Seeking Alpha* articles discussed in the TAC cannot serve as a

1 **a. The *Erhart* Complaint as a Corrective Disclosure**

2 The potential relevance of the *Erhart* Complaint tees up the question this Court
3 avoided in its prior ruling: whether the allegations in the *Erhart* Complaint can serve as a
4 corrective disclosure. The Court concludes that, on their own, Erhart’s allegations cannot
5 serve as a corrective disclosure. Rather, allegations in a complaint are analogous to an
6 announcement of internal or regulatory investigations into misconduct, which have been
7 held insufficient, on their own, to serve as corrective disclosures. For example, in *Loos*,
8 the Ninth Circuit held that that a company’s announcement that it was initiating an
9 internal review of its accounting practices was insufficient to serve as a corrective
10 disclosure. 762 F.3d at 890. The court explained that an investigation raises merely a
11 “risk” or “potential” of fraud, rather than a disclosure of fraud. *Id.* at 888–89. “While the
12 disclosure of an investigation is certainly an ominous event, it simply puts investors on
13 notice of a *potential* future disclosure of fraudulent conduct.” *Id.* at 890. As a result, the
14 court concluded, “any decline in a corporation’s share price following the announcement
15 of an investigation can only be attributed to market speculation about whether fraud has
16 occurred. This type of speculation cannot[, on its own,] form the basis of a viable loss
17 causation theory.” *Id.*

18 Similarly, in *Meyer v. Greene*, the Eleventh Circuit held that the SEC’s
19 announcement that it was initiating an inquiry into a company’s real estate valuation
20 practices did not, on its own, amount to a corrective disclosure. 710 F.3d 1189 (11th Cir.
21 2013). As the court explained, while an “investigation can be seen to portend an added
22 *risk* of future corrective action[, t]hat does not mean that the investigations, in and of
23 themselves, reveal to the market that a company’s previous statements were false or
24 fraudulent.” *Id.* at 1201.

25 Just like the investigations discussed above, the *Erhart* Complaint offered at most
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28 corrective disclosure, the Court need not decide whether these new allegations of misrepresentations are actionable.

1 unconfirmed accusations of fraud. To be sure, if the accusations were confirmed to be
2 true through a later disclosure, loss causation would have been established. *See Loos*,
3 762 F.3d at 890 n.3 (“We do not mean to suggest that the announcement of an
4 investigation can never form the basis of a viable loss causation theory. Like the
5 Eleventh Circuit, we merely hold that the announcement of an investigation, ‘standing
6 alone and without any subsequent disclosure of actual wrongdoing, does not reveal to the
7 market the pertinent truth of anything, and therefore does not qualify as a corrective
8 disclosure.’” (quoting *Meyer*, 710 F.3d at 1201). Indeed, that is essentially the facts of
9 *Lloyd*. There, the defendant asserted in SEC filings that it did not have serious doubts
10 about its largest borrower’s ability to repay debts, despite the defendant’s knowing that
11 the borrower was on the brink of declaring bankruptcy. *Lloyd*, 811 F.3d at 1203–04.
12 Soon after, the defendant disclosed that it had recently received a subpoena from the
13 SEC. *Id.* at 1204. Analysts began surmising that these issues related to the defendant’s
14 largest borrower. *Id.* at 1204–05. A month later, the defendant announced that the
15 borrower would not be able to pay its debts. *Id.* at 1205. The Ninth Circuit explained
16 that the defendant’s announcement about receiving the subpoena was only a *partial*
17 corrective disclosure, which was not completed until the defendant later confirmed the
18 analysts’ fears by announcing that the borrower would default on its loans. *Id.* at 1210.
19 The same applies to the *Erhart* Complaint: while it raised a risk—perhaps even a serious
20 one—that Defendants had committed fraud, the TAC must identify a subsequent
21 confirmation of that fraud to plead loss causation under Rule 9(b).

22 The Ninth Circuit’s recent decision in *Curry v. Yelp Inc.*, 875 F.3d 1219 (9th Cir.
23 2017), also supports this view. There, the defendants had “consistently stated that the
24 reviews generated on Yelp’s website were ‘firsthand’ and ‘authentic’ information from
25 contributors about local business.” *Id.* at 1222. After these comments were made, the
26 FTC disclosed that it had received “more than 2,000 complaints from businesses claiming
27 that Yelp had manipulated reviews of their services” by removing and promoting reviews
28 based on a business’s relationship with Yelp. *Id.* The Ninth Circuit held that the

1 disclosure of the FTC complaints could not serve as a corrective disclosure because they
2 were only accusations. *Id.* at 1225. According to the court, controlling precedent made
3 clear that “the element of loss causation cannot be adequately made out merely by resting
4 on a number of customer complaints and asserting that where there is smoke, there must
5 be fire.” *Id.* The same applies to allegations in Erhart’s lawsuit: they draw the market’s
6 attention to smoke, but without more, they do not reveal any fire.

7 Following the reasoning of *Loos*, *Lloyd*, and *Curry*, the Court concludes that the
8 allegations in the *Erhart* Complaint were, at most, a “partial” corrective disclosure of
9 Defendants’ misrepresentations about BofI’s internal controls. They cannot on their own
10 establish loss causation under the heightened pleading standards of Rule 9(b). If, as in
11 *Lloyd*, a later disclosure occurred that confirmed the risk identified by Erhart’s complaint,
12 the totality of those disclosures would be sufficiently corrective to establish loss
13 causation. But for the reasons explained in the next section, the TAC’s remaining
14 allegations of corrective disclosures relating to BofI’s internal controls (*Seeking Alpha*
15 articles) cannot be considered even another partial corrective disclosure. As a result, in
16 contrast to *Lloyd*, the TAC fails to allege that a later disclosure confirmed any of the
17 allegations asserted in the *Erhart* Complaint.

18 **b. *Seeking Alpha* Articles**

19 The TAC points to two *Seeking Alpha* articles and asserts that they disclosed the
20 falsity of the alleged misrepresentations relating to BofI’s internal controls. Lead
21 Plaintiff points first to an article written by an author known as “Real Talk Investments”
22 published on October 29, 2015. (TAC ¶ 131; *see* Real Talk Investments, *Buyer Beware:*
23 *More Odd Behavior From BOFI*, *Seeking Alpha* (Oct. 29, 2015),
24 <https://seekingalpha.com/article/3620436-buyer-beware-odd-behavior-bofi>.⁵) As the
25 Court explained in its previous ruling, this article notes “significant” differences between
26

27
28 ⁵ The Court takes judicial notice of the *Seeking Alpha* articles referenced in the TAC. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

1 a transcript of a conference call BofI sent to the SEC and transcripts of the same call
2 prepared by third parties. The differences noted in this article related to whether the OCC
3 was conducting an investigation into BofI; the largest deposit account at BofI; and why
4 BofI switched external auditors “some years ago.” (ECF No. 134 at 17–18.) But as the
5 Court explained in its previous ruling, this article did not disclose any new information to
6 the public because the differing transcripts were already publicly available. According to
7 the TAC, “[w]hile the BofI transcript and the webcast were both available prior to
8 October 29, the market did not appreciate the small but significant differences in the
9 two . . . until the article compared the discrepancies side-by-side.” (TAC ¶ 132.) The
10 TAC fails to identify any reason *why* the market did not appreciate the significance of the
11 difference in the transcript versions, and Lead Plaintiff offers no such explanation in its
12 briefing. As this Court explained in its previous ruling, Lead Plaintiff’s failure to offer a
13 plausible reason why the market would not have understood the implications of already
14 public information dooms Lead Plaintiff’s use of this article as a corrective disclosure.
15 “Plaintiff does not suggest that, for example, the information discussed in [this article]
16 constitute[d] ‘complex economic data understandable only through expert analysis.’”
17 (ECF No. 134 at 15 (quoting *Amedisys*, 769 F.3d at 323, and citing *In re Herbalife, Ltd.*
18 *Secs. Litig.*, No. CV 14-2850 DSF (JCGx), 2015 WL 1245191, at *3 (C.D. Cal. Mar. 16,
19 2015) (granting motion to dismiss because the complaint “provides no basis to conclude
20 that Pershing’s conclusions required expert analysis or that the underlying information
21 was not available to the public”), and *In re Blue Earth, Inc. Secs. Class Action Litig.*, No.
22 CV 14-08263-DSF (JEMx), 2015 WL 12001274, at *2 (C.D. Cal. Nov. 3, 2015).)

23 In its opposition memorandum, Lead Plaintiff contends that the Court was wrong
24 to reject the *Seeking Alpha* articles as corrective disclosures in its previous ruling because
25 “[n]umerous courts in this Circuit . . . have held that analyst reports using publicly
26 available information can indeed constitute corrective disclosures.” (ECF No. 148 at 5.)
27 The cases Lead Plaintiff cites, however, are not useful in this analysis because they fail to
28 apply Rule 9(b)’s heightened pleading standard to the allegations of corrective disclosure.

1 *See Gilead*, 536 F.3d 1049 (predating the Ninth Circuit’s holding in *Apollo Group* that
2 Rule 9(b) applied to allegations of loss causation and corrective disclosures); *In re Banc*
3 *of Cal. Secs. Litig.*, No. SACV 17-00118 AG (DFMx), 2017 WL 3972456, *9 (C.D. Cal.
4 Sept. 6, 2017) (“[T]he Court finds it inappropriate to apply a heightened pleading
5 standard for loss causation.”); *Garcia v. Hetong Guo*, No. CV-15-1862-MWF-MRWx,
6 2016 WL 102213, at *9–11 (C.D. Cal. Jan. 7, 2016) (omitting any discussion of the
7 implications of the heightened pleading standard); *In re Questcor Secs. Litig.*, No. SA CV
8 12-01623 DMG (FMOx), 2013 WL 5486762, at *21 (C.D. Cal. Oct. 1, 2013) (predating
9 *Apollo Group*). As discussed at length in the Court’s prior ruling, one of the
10 consequences of applying Rule 9(b) to allegations of a corrective disclosure based on
11 publicly available information is that the pleading must offer a plausible reason *why* the
12 market would not have understood the implications of that information offered by the
13 article’s author. (*See* ECF No. 14–17.)

14 Next, the TAC cites a January 6, 2016, article written by an author known as
15 “Aurelius.” (*See* ECF No. 123-8.) As discussed in the Court’s previous ruling, this
16 article “states that BofI’s audit committee had been ‘infected by related party loans to
17 members of the committee,’” “notes that multiple public documents indicate that
18 Grinberg served as a ‘key executive’ in a third party [Propel Tax] that received financing
19 from BofI while Grinberg was serving as BofI’s Audit Chairman,” “criticizes BofI for not
20 disclosing these deals,” “explains how Grinberg’s dual roles in BofI and [Propel Tax]
21 creates a conflict of interest,” and “suggests that the failure to disclose this information
22 indicates defects in BofI’s ‘internal audit function.’” (ECF No. 134 at 19.) As with the
23 previous article, this article was written based on public information. (ECF No. 123-8 at
24 19 (“All information for this article was derived from publicly available information.”).)
25 Yet the TAC, again, fails to indicate why the market would not have understood the
26 implications of this information. Rather, the TAC repeats the conclusions of the article.
27 (TAC ¶ 134 (“[T]he article identified the relationships between BofI and Propel Tax, as
28 well as Defendant Grinberg’s relationship with Propel Tax, which could have

1 compromised the Audit Committee and Company’s investigation of the Erhart Complaint
2 and therefore called into question the adequacy of the Company’s internal controls and
3 risk management provisions.”.) This is not an explanation of why the market would not
4 have understood the implications of the public information, but rather an explanation of
5 the implications themselves. The TAC does not suggest why other market participants
6 could not have done the same analysis and reached the same conclusion. Without more,
7 this article did not reveal anything that demonstrated the falsity of the alleged
8 misrepresentations listed above or confirm for the first time any of the allegations in
9 *Erhart Complaint*.

10 In sum, the allegations in the *Erhart Complaint* offered, at most, only partial
11 corrective disclosures of the falsity of the alleged misrepresentations discussed above.
12 Because the two *Seeking Alpha* articles cited by the TAC discussed publicly available
13 information, they did not confirm for the first time any of Erhart’s allegations. The
14 TAC’s allegations of loss causation regarding misrepresentations about BofI’s internal
15 controls are insufficient to meet the heightened pleading standards of Rule 9(b).

16 **ii. Underwriting Standards and Credit Quality Requirements**

17 In the second category of allegations, Lead Plaintiff asserts that Defendants made
18 several misrepresentations regarding BofI’s underwriting standards and credit quality.
19 The TAC identifies statements by Defendants that every BofI loan must meet the
20 underwriting criteria set forth in BofI’s lending policies and applicable regulations and
21 that BofI considered many aspects of a borrower’s credit (TAC ¶ 136); that off-balance-
22 sheet loans must meet the same credit policies as on-balance-sheet loans (*id.*); that BofI
23 creates only “full documentation loans” (*id.* ¶ 138); that BofI had no commitments to
24 purchase loans, investment securities, or any other unused lines of credit (*id.* ¶ 139); that
25 BofI did not reduce its “conservative” credit standards while achieving significant
26 portfolio growth (*id.* ¶ 141); and that its partnership with H&R Block would add
27 “strength and diversity” to its “deposit, lending and fee income businesses” and aligned
28 well with BofI’s branchless structure (*id.* ¶ 146). According to the TAC, these statements

1 were false because BofI engaged in “unsound lending practices,” its off-balance sheet
2 activities “included undisclosed lending partnerships” subjecting BofI to significant
3 credit and regulatory risk, and BofI violated banking regulations by failing to maintain an
4 adequate Customer Identification Program (“CIP”). (*Id.* ¶¶ 149–216.)

5 According to the TAC, the falsity of these misrepresentations were revealed to the
6 market by way of *Seeking Alpha* articles. First, it cites an article published on August 28,
7 2015 by the author “The Friendly Bear,” entitled “The New York Times Has Only
8 Scratched the Surface on BofI Holding . . .” (ECF No. 123-4.) As discussed in the
9 Court’s previous ruling, this article states in relevant part “that BofI’s preferred loan
10 clients are ‘home flippers and other speculators – a behavior that resulted in the failure of
11 its ‘predecessors’ Indymac and Thornburg (i.e., allowing borrower to borrow against
12 existing properties, regardless of current lien status, in order to buy additional investment
13 properties),’ and that BofI was ‘[m]aking loans to individuals who are “unsavory” in
14 nature and hardly appear credit-worthy for multi-million dollar loans.’” (ECF No. 134 at
15 12.) The article also “suggests that BofI is lending to individuals who cannot get a loan
16 at their regular bank institution, and that county records demonstrate that BofI’s on-
17 balance sheet loans ‘are sourced through mortgage brokers.’” (*Id.*) The article concludes
18 that BofI’s five-percent-interest loans are “by definition, economically irrational” and
19 that “BofI must be lending to individuals ‘with heaps of existing debt, tax liens, gambling
20 debt, an inability to put more cash at closing, or a history of bankruptcy/foreclosure.’”
21 (*Id.*) The article also describes “that the SEC’s recent response to the author’s FOIA
22 request suggested that the agency was investigating BofI and that BofI did business with
23 a mortgage company that advertised loans available to borrowers from Russia, a country
24 appearing on OFAC’s sanctions list.” (TAC ¶ 218.)

25 The TAC impliedly concedes that all the information relied upon by the author of
26 the August 28, 2015 article was publicly available, but again asserts that the article
27 “relied on information the market had failed to previously appreciate and incorporate into
28 the Company’s stock price.” (*Id.* ¶ 219.) This time, the TAC suggests a reason that the

1 market might not have understood the implications of this information. It states that the
2 author was only able to reach its conclusions because the author “pored through hundreds
3 of loans that BofI has written over the past several years,” and held “conversations with
4 mortgage brokers.” (*Id.*) But that is not a plausible reason why the market would not
5 have understood the implications of this publicly available information. The TAC offers
6 no reason to believe that the majority of other actors in the market would not have been
7 able to also “pore over” the information or hold conversations with mortgage brokers.
8 “Under an efficient market theory, it is not necessary for any specific individual to track
9 down every piece of information on every stock. One presumes that all public
10 information is incorporated into the market price no matter how far flung it may be.”
11 *Bonanno*, 2016 WL 4585753, at *5; *see also Miller v. PCM, Inc.*, No. LACV 17-3364-
12 VAP (KSx), ECF No. 42 (C.D. Cal. Jan. 3, 2018) (rejecting plaintiff’s argument that a
13 *Seeking Alpha* article was a corrective disclosure because “much of the information it
14 relayed to the public would be burdensome for the average investor to access”). In other
15 words, the presumption of market efficiency that the TAC relies upon to demonstrate
16 reliance assumes that actors in the market have already “pored over” all publicly
17 available information and drawn all reasonable inferences from that information: “[a]n
18 efficient market for good news is [also] an efficient market for bad news.” *In re Merck &*
19 *Co., Inc. Secs. Litig.*, 432 F.3d 261, 271 (3d Cir. 2005). What is important in this
20 analysis is not that it took the author a lot of time to aggregate the data, but rather that the
21 author was able to engage in some analysis that was not available to other market
22 participants. The TAC offers no plausible reason to believe that was the case here.

23 Next, the TAC cites an article published November 10, 2015, by Aurelius entitled
24 “BofI: Boiler Rooms, Bad Loans, and Off-Balance Sheet Maneuvers Underpin Poorly
25 Understood Risks.” (ECF No. 123-5.) As discussed in the Court’s previous ruling, this
26 article states: “while ‘the soundness of BofI’s mortgage lending practices have [recently]
27 been questioned, . . . [t]his writing attempts to shed light on an equally important piece of
28 the mosaic. Sourced entirely from publicly available records, this article exposes how a

1 network of boiler rooms, bad loans, and off-balance sheet maneuvers appears to have
2 boosted BofI’s reported operating results while adding greatly to it[s] risk profile.” (ECF
3 No. 134 at 12–13.) The article discusses “how BofI had ‘aggressively expanded’ into
4 commercial and industrial (“C&I”) businesses, but notes that BofI ‘offers only limited
5 disclosures’ as to its activities, especially its C&I loans.” (*Id.* at 13.) It also states “that
6 despite BofI’s perceived success, ‘[a] search of public records . . . reveals that the courts
7 has been flooded with collections and/or bankruptcy cases involving loans that BofI has
8 originated.” (*Id.*) It explains “this contradiction by stating that ‘it appears’ that lending
9 partners such as OnDeck purchase loans originated by BofI,” and also discusses “BofI’s
10 relationships with Quick Bridge, and the ‘potential existence’ of off-balance-sheet SPEs
11 [Special Purpose Entities].” (*Id.*) “The article also indicates that BofI has partnered with
12 ‘Rehab Cash Now,’ which advertises loans with no minimum credit score,” and “notes
13 that BofI has also engaged in structured settlement loans, citing recent public court
14 documents, which [Aurelius] notes ‘hardly appears sustainable.’” (*Id.*)

15 The TAC offers no reason why the market would not have drawn the same
16 conclusions from the publicly available information relied upon in the November 10,
17 2015 article. Rather, it states only that the article “identified the relationships between
18 BofI and the third-party lenders by studying those lender’s own SEC filings, rather than
19 BofI’s,” and “also analyzed how the third party lenders’ substandard underwriting
20 standards would increase the risk in BofI loan portfolio.” (TAC ¶ 221.) Again, this
21 allegation merely repeats the conclusions reached in the article; it does not suggest why
22 other market participants would not, or could not, have reached those conclusions
23 otherwise. Because the TAC does not identify any such reason (and Lead Plaintiff fails
24 to offer any such reason in its briefing), the November 10 article cannot serve as a
25 corrective disclosure.

26 Next, the TAC points to an article published on November 18, 2015, by Real Talk
27 Investments entitled “Undisclosed Executive History May Be Final Blow for BofI.”
28 Seeking Alpha (Nov. 18, 2015), <https://seekingalpha.com/article/3695396-undisclosed->

1 [executive-history-may-final-blow-bofi](#). The article “revealed that BofI had employed a
2 felon convicted of grand theft, forgery of a credit card receipt, burglary, and dealing in
3 stolen property, in violation of Section 19 of the FDIA,” and “that BofI issued two loans
4 to the individual even after he filed for bankruptcy.” (TAC ¶ 222.) According to the
5 author, the article was “based upon information reasonably available to the author and
6 obtained from public sources that the author believes are reliable.” (ECF No. 144-3.)
7 Again, however, the TAC fails to identify (and Lead Plaintiff does not explain in its
8 briefing) why the market would not have drawn this same conclusion based on the same
9 information, other than stating that the author “analyzed loan files” and “conducted
10 background checks” in writing the article. (TAC ¶ 223.) There is no reason to believe
11 that any other market actor could not have done the same thing. As Defendants argue,
12 the article engages in no formal analysis; rather, it “merely compar[es] [the employee’s
13 decades old and publicly available] mugshot picture to his LinkedIn pictures, [and]
14 compar[es] DOB data from his mugshot with DOB records from public sources that point
15 to an exact match.” (ECF No. 144-1 at 20.) In fact, the article “disclaim[ed] any
16 expertise in forensic handwriting analysis, and claims no expertise in photographic or
17 facial analysis.” (*Id.* (citation omitted).) As discussed above, the Court must assume that
18 market actors engaged in similar analysis at the time the information became publicly
19 available, unless Lead Plaintiff offers a reason to presume otherwise. Lead Plaintiff’s
20 failure to do so requires that the Court conclude this article was not a corrective
21 disclosure.

22 Next, the TAC cites an article published on November 19, 2015, by Aurelius
23 entitled “BofI: Risky Loans to Undisclosed, Off-Balance Sheet SPEs Found Disguised
24 Within Mortgage Warehouse Portfolio.” (*See* ECF No. 123-6.) According to the TAC,
25 this article “revealed” to the market BofI’s lending relationship with Center Street,
26 “which was known for fix and flip, ‘no doc’ and ‘no FICO,’ and ‘no income verification
27 loans,’” and “noted that nearly \$300 million in risky single-family lender finance loans
28 BofI made to Center Street SPEs were disguised as ‘Warehouse and other’ loans on

1 BofI’s financial statements.” (TAC ¶ 224.) According to the article, the author reached
2 this conclusion by reviewing “UCC statements obtained from California’s public
3 database.” (ECF No. 123-6 at 5.) Contrary to the TAC’s assertion, the fact that the UCC
4 statements were available to the public demonstrates that the author did not “reveal” to
5 the market the fact of BofI’s relationship with Center Street. The TAC does not identify
6 (and Lead Plaintiff does not explain in its briefing) any special analysis conducted by the
7 author of the article. Instead, the TAC asserts in conclusory fashion that the article
8 “provided detailed analysis of how BofI’s relationship with Center Street was likely to
9 increase the amount of risk in the portfolio.” (TAC ¶ 225.) This is not enough to meet
10 the particularity requirements of Rule 9(b).

11 The TAC next cites another Aurelius article published on December 8, 2015,
12 entitled “BofI Confirmed to Finance Undisclosed, Off Balance Sheet SPE to which it
13 Transfers Bad Loans.” (ECF No. 123-7.) The article “included an image of a UCC
14 Financing Statement showing BLG as the Debtor and BofI” as the secured party. (TAC ¶
15 226.) It also described how the UCC Financing Statement referred to a “Master Loan and
16 Security Agreement dated February 12, 2014” between BofI and borrower WCL
17 Holdings I, LLC. (*Id.*) “The article notes that BofI’s failure to disclose its relationship
18 with Quick Bridge or WCL may be in violation of applicable accounting standards and
19 that WCL may require consolidation.” (*Id.*) “All information for th[e] article was
20 derived from publicly available information.” (ECF No. 123-7 at 7.) As with the articles
21 above, the TAC does not identify (and Lead Plaintiff does not include in its briefing) why
22 the market would not have been reasonably able to draw the same conclusions from the
23 same information prior to the article’s publication. (*See* TAC ¶ 227 (repeating
24 conclusions of the article, but not suggesting what analysis was done to reach these
25 conclusions).) As Defendants argue, nothing in this article “suggests that the market
26 needed, much less that the [author] was qualified to offer, any legal or accounting
27 judgment about BofI’s relationship with Quick Bridge and WCL” to reach the author’s
28 conclusions. (ECF No. 144-1 at 21.)

1 Finally, the TAC points to an article published by Aurelius on February 3, 2016,
2 entitled “Why BofI Created a Phantom ‘Full Service Branch’ in the Nevada Desert.”
3 Seeking Alpha (Feb. 3, 2016), [https://seekingalpha.com/article/3859626-bofi-created-](https://seekingalpha.com/article/3859626-bofi-created-phantom-full-service-branch-nevada-desert)
4 [phantom-full-service-branch-nevada-desert](https://seekingalpha.com/article/3859626-bofi-created-phantom-full-service-branch-nevada-desert). This article reported that BofI was no longer
5 “branchless” because it had opened, according to the FDIC, a “full service” branch in
6 Nevada. (TAC ¶ 228.) The author had visited the branch and discovered that it was
7 “located in shared and tightly compacted office space housing dozens of small businesses
8 and BofI’s office was approximately 75 square feet,” and that only one person worked in
9 the branch. (*Id.*) The article concluded that, under BofI’s program management
10 agreement with H&R Block, the Nevada branch was “booking” hundreds of millions of
11 dollars as a way to take advantage of Nevada’s lax interest-rate laws. (*Id.*) Again, the
12 TAC does not provide (and Lead Plaintiff does not argue in its briefing) why the market
13 would not have reached this conclusion based on the same information other than
14 conclusively asserting “[t]he market did not appreciate that BofI was opening the Nevada
15 ‘branch’ for purposes of taking advantage of Nevada’s usury laws, and was only made
16 aware of BofI’s real motives once an individual from *Seeking Alpha* investigated the
17 branch in person and reported the true purpose behind the opening of this ‘branch.’” (*Id.*
18 ¶ 229.) There is no reason to believe, for example, that market participants could not
19 have visited the Nevada branch prior to Aurelius’s visit and reached the exact same
20 conclusion. As a result, the TAC fails to allege with particularity that this article was a
21 corrective disclosure.

22 In sum, none of the *Seeking Alpha* articles cited in the TAC served as corrective
23 disclosures of the alleged misrepresentations relating to BofI’s underwriting standards
24 and credit quality requirements.

25 **iii. Regulatory Investigations**

26 Last, the TAC offers allegations that Defendants made materially false and
27 misleading statements relating to government and regulatory investigations. The TAC
28 alleges that none of BofI’s SEC filings mentioned any government or regulatory

1 investigation. (TAC ¶ 231.) In particular, the TAC alleges that Defendants failed to
2 disclose an SEC investigation into BofI that was commenced in May 2015. (*Id.* ¶¶ 230–
3 31.) On October 29, 2015, Defendants stated in a Form 10-Q that “from time to time we
4 may be a party to other claims or litigation that arise in the ordinary course of business,
5 such as claims to enforce liens, claims involving the origination and servicing of loans,
6 and other issues related to the business of the Bank,” but that “[n]one of such matters are
7 expected to have a material adverse effect on the Company’s financial condition, results
8 of operations or business.” (*Id.* ¶ 231.) In a *New York Times* article published on August
9 22, 2015, Garrabrants stated that regulatory concerns over BofI’s loans to foreigners were
10 “beyond a nonissue.” (*Id.* ¶ 232.) During an earnings call on October 14, 2015,
11 Garrabrants responded to a question regarding the OCC’s response to Erhart’s
12 accusations of BofI by saying that “[t]here is nothing ongoing” with respect to an OCC
13 investigation, “there is no continuity to this,” that “[w]e have great regulatory relations,”
14 “[we] are under no regulatory orders, no regulatory restrictions on our business, and we
15 continue to have a great dialogue with our regulators,” and “[t]here are no regulatory
16 issues of any kind that have arisen from Mr. Erhart’s contact with the OCC.” (*Id.* ¶¶
17 233–34.)

18 According to the TAC, these statements were false because the SEC began an
19 investigation into BofI in May of 2015. (*Id.* ¶ 235.) The TAC also alleges that these
20 statements were false in light of Erhart’s allegations that when he worked at BofI there
21 were “many [ongoing] subpoenas, including from law enforcement agencies, grand
22 juries, and even from the U.S. Department of Treasury.” (*Id.* ¶ 245.) The TAC also
23 alleges that these statements were false or misleading because on October 30, 2015, BofI
24 filed a motion to seal certain filings in litigation against Erhart. Those filings included
25 documents relating to “nonpublic agency investigations,” “investigations by the OCC,”
26 “confidential government subpoenas,” and “records identifying the existence (and, in
27 some cases, the subject matter) of investigations by the OCC.” (*Id.* ¶¶ 236–37, 246.)
28 BofI’s motion contained a “declaration by a forensic investigator hired by BofI to

1 examine Erhart’s computer for confidential information,” who found documents
2 containing file names evidencing “communications with regulators,” and subpoenas. (*Id.*
3 ¶ 236; *see BofI Fed. Bank v. Erhart*, No. 3:15-cv-02353-BAS-NLS, ECF No. 8-1 (S.D.
4 Cal.)) A chart accompanying the motion indicated that some of the documents would
5 reveal the “existence and nature of confidential regulator communications.” (*Id.* ¶ 237.)
6 The TAC also cites an SEC FOIA response that indicated that it had initiated an
7 investigation into BofI on May 28, 2015, and had issued subpoenas after the Class Period
8 on February 22, 2016, and October 19, 2016. (*Id.* ¶¶ 238–39.)

9 a. Misrepresentations

10 The Court first considers whether these identified statements are actionable under
11 the heightened pleading standards of Rule 9(b) and the PSLRA. The Court concludes
12 that they are not.

13 “[A] statement is misleading if it would give a reasonable investor the impression
14 of a state of affairs that differs in a material way from the one that actually exists.”
15 *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 985 (9th Cir. 2008). In this context, a
16 misleading statement is distinguished from “puffery,” which “concerns expressions of
17 opinion, as opposed to knowingly false statements of fact.” *Apollo Grp.*, 774 F.3d at 606.
18 Such “mildly optimistic, subjective assessment hardly amounts to a securities violation.”
19 *Id.* (quoting *In re Cutera Secs. Litig.*, 610 F.3d 1103, 111 (9th Cir. 2010)). Rather, in this
20 context, a material misrepresentation is one that is “capable of objective verification.” *Id.*

21 Lead Plaintiff has not identified any duty held by Defendants to disclose the
22 existence of an SEC investigation into BofI. Rather, it argues that the failure to disclose
23 the existence of an SEC investigation rendered the statements listed above false or
24 misleading. The Court disagrees. First, BofI’s statements in its SEC filings that it did
25 not “expect” that litigation against it would “have a material adverse effect on the
26 Company’s financial condition, results of operations or business” is prototypical opinion-
27 based puffery. *See id.* (rejecting as puffery the statement “[w]e believe that our track
28 record for enrollment and revenue growth is attributable to . . .”). The truthfulness of that

1 statement would not have changed in any respect if BofI had also stated that the SEC was
2 investigating BofI's conduct.

3 Second, Garrabrants statements in the *New York Times* that regulatory inquiries
4 were "beyond a nonissue," and his statement during the conference call that there were
5 no "regulatory issues," are simply too vague to be false or misleading. Neither statement
6 clarified what the definition of an "issue" might be. A reasonable investor hearing these
7 words would have interpreted those statements to mean not that regulators had no interest
8 in BofI's conduct, but rather that regulatory interest in BofI was not, for example, a "big
9 deal." There is no way to objectively verify the truthfulness of these statements because
10 whether regulatory interest into BofI was an "issue" depends on the subjective
11 understanding of the meaning of the term "issue."

12 Next, the TAC does not indicate any reason to believe that Garrabrants's
13 conference call statements in response to a question about an OCC investigation was
14 false in light of the fact that there was an ongoing SEC investigation at the time.
15 According to the TAC, Garrabrants was asked by an analyst whether the OCC "let
16 [Garrabrants] know that there is nothing ongoing related to these concerns that [Erhart]
17 raised, that they are still investigating at this point?" (TAC ¶ 233.) Garrabrants answered
18 that he had to be "careful" about what "the OCC is doing," but that "there is nothing
19 ongoing," "there is no continuity to this," and that BofI had "great regulatory relations,"
20 was under no "regulatory orders" or "regulatory restrictions on our business," and that
21 BofI had "great dialogue with our regulators." (*Id.*) The fact that an SEC investigation
22 might have been ongoing at this time does not render false the statements that there was
23 nothing ongoing, or there was no "continuity," with respect to the OCC. The SEC and
24 OCC are separate regulatory bodies. As for the statements regarding "regulatory orders"
25 or "restrictions," the TAC does not allege that the SEC's investigation at the time of the
26 conference call included any "orders" or "restrictions." And the remaining statements—
27 that BofI had "great regulatory relations" and enjoyed a "great dialogue" with
28 regulators—are too vague to hold any objective meaning. *Cutera*, 610 F.3d at 1111

1 (rejecting as too vague the statement that “we believe our employee relations are good”).

2 In sum, the TAC does not allege that Defendants made any actionable
3 misrepresentations regarding regulatory investigations into BofI. But even if these
4 statements were actionable, Lead Plaintiff’s claims fail because—for the reasons
5 explained immediately below—the corresponding allegations of loss causation do not
6 satisfy Rule 9(b)’s requirements.

7 **b. Loss Causation/Corrective Disclosures**

8 The TAC points to three events as corrective disclosures of the falsity of the
9 statements. First, the TAC cites The Friendly Bear’s article, discussed above, published
10 on *Seeking Alpha* on August 28, 2015. (*Id.* ¶ 242.) The author noted in that article that in
11 responding to a recent FOIA request submitted by the author, the SEC invoked FOIA’s
12 law enforcement exemption protecting “records compiled for law enforcement purposes,
13 the release of which could reasonably be expected to interfere with enforcement
14 activities.” (*Id.*) This response was different from the SEC’s responses to the author’s
15 previous FOIA requests, which had stated that the SEC possessed no records responsive
16 to the author’s inquiry. (*Id.* ¶ 243.) Second, the TAC points to the *Erhart* Complaint,
17 which in relevant part alleged that during Erhart’s time at BofI he “saw a BSA
18 spreadsheet that identified many subpoenas, including from law enforcement agencies,
19 grand juries, and even from the U.S. Department of Treasury,” and that BofI received
20 many subpoenas. (*Id.* ¶ 245.) Third, the TAC cites BofI’s filing of the motion to seal,
21 discussed above. (*Id.* ¶ 246.)

22 The listed corrective disclosures are insufficient to show loss causation. The
23 Friendly Bear’s article cannot serve as a corrective disclosure of the falsity of any of the
24 statements above for two reasons. First, as with the other *Seeking Alpha* articles, the
25 information discussed was publicly available. Lead Plaintiff offers no reason to believe
26 that other market participants could not have also requested information from the SEC
27 about any investigations into BofI and received the same response. Nor did the article’s
28 author engage in any specialized analysis. Any other market participant could have made

1 the same inference based on the SEC’s response. Second, even if the article revealed
2 new information to the market, it did not *disclose* the SEC investigation referenced in the
3 TAC. Instead, it merely showed that the SEC was considering an investigation into BofI.
4 Because The Friendly Bear’s article did not identify the contents of any SEC
5 investigation, the SEC’s response suggested at most a risk that Garrabrants’s statement
6 that there were no regulatory “issues” resulting from Erhart’s contacts with the OCC was
7 false. As discussed above, the disclosure of the possibility of a statement’s falsity cannot
8 itself serve as a corrective disclosure. *Loos*, 762 F.3d at 888–89.

9 Even considering The Friendly Bear’s article in conjunction with the other two
10 alleged disclosures, no actual corrective disclosure occurred. The *Erhart* Complaint’s
11 assertion that BofI “frequently” received regulatory subpoenas did not disclose the
12 existence of the SEC investigation at issue here. Similarly, the motion to seal filed by
13 BofI in its action against Erhart suggested, at most, that regulators had issued subpoenas
14 to BofI at *some point*. The motion did not indicate whether the documents sought to be
15 sealed were relevant to Erhart’s interactions with the OCC. BofI’s assertion in the
16 motion to seal—that subpoenas had been issued to BofI at some point while Erhart
17 worked there—therefore did not disclose, or confirm, the falsity of any of the statements
18 listed above. *See Metzler*, 540 F.3d at 1064 (holding a disappointing earnings
19 announcement was not sufficiently tied to specific wrongdoing to produce the inference
20 that the market “realized” the fraud once the earnings announcement was released).

21 In sum, the TAC’s allegations of loss causation with respect to alleged
22 misrepresentations about regulatory investigations do not meet Rule 9(b)’s pleading
23 standard.

24 **IV. Section 20(a) Claims**

25 Lead Plaintiff makes clear that its Section 20(a) claims are derivative of its Section
26 10(b) claims. (ECF No. 148 at 21.) Because the Court concludes that the TAC fails to
27 state a claim for a violation of Section 10(b), the Section 20(a) claims also fail. *See*
28 *Curry*, 875 F.3d at 1228.

