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

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

13 **ORDER REGARDING THRESHOLD**
14 **DISCOVERY ISSUES AND**
15 **DENYING AS MOOT JOINT**
16 **MOTION FOR EXTENSION OF**
17 **TIME TO RAISE DISCOVERY**
18 **DISPUTES**

[Doc. No. 181]

19 Before the Court is the parties' Joint Motion for Extension of Time to Raise
20 Discovery Disputes ("Joint Motion" or "Jt. Mot."). Doc. No. 181. In the Joint Motion, the
21 parties request the Court's guidance on four "threshold" discovery issues. Jt. Mot. at 2.
22 The parties "agree that resolution of these threshold issues will allow them to promptly
23 clarify and resolve their remaining disputes" regarding defendants' responses to plaintiffs'
24 First Set of Requests for Production (the "RFPs"). *Id.* at 3. Counsel for the parties
25 conferred with the Court's staff regarding these issues on February 23, 2021, and, at the
26 Court's request, subsequently lodged copies of the relevant discovery requests and
27 responses thereto. Having considered the discovery requests, the arguments of counsel,
28 and the relevant law, the Court issues the following Order.

1 **1. The Relevant Time Period for Discovery (Threshold Issue 1)**

2 The parties' first dispute concerns the relevant time period for discovery. Jt. Mot. at
3 2. Plaintiffs' Third Amended Complaint ("TAC") – the operative pleading – purports to
4 state claims on behalf of a class of investors who purchased BofI securities during the
5 period September 4, 2013 to February 3, 2016. Doc. No. 136 at 5, 93. Plaintiffs' RFPs
6 seek documents for the period July 1, 2012 through September 30, 2016, but the parties
7 report that through conferrals this has been narrowed to April 1, 2013 to June 30, 2016.
8 Defendants seek a further limitation, proposing to produce documents from the period July
9 1, 2013 to December 31, 2015. Defendants' position is premised on their understanding
10 that the Ninth Circuit's opinion reversing dismissal of the TAC effectively truncated the
11 class period at October 13, 2015, the date on which the whistleblower complaint in *Erhart*
12 *v. BofI Holding, Inc.* ("*Erhart*"), which plaintiffs allege as a corrective disclosure, was
13 filed. *See In re BofI Holding, Inc. Sec. Litig.*, 977 F.3d 781 (9th Cir. 2020).

14 As an initial matter, the Court has carefully reviewed the Ninth Circuit's opinion and
15 finds no pronouncement therein on the appropriate length of the class period. Plaintiffs'
16 motion for class certification has not yet been filed, let alone ruled upon. The impact of
17 the Ninth Circuit's opinion, and whether it forecloses a class period that extends beyond
18 the filing of the *Erhart* action, are matters to be adjudicated by the District Court at a later
19 point in the litigation. The Court declines defendants' invitation to preempt those rulings
20 in the context of a discovery dispute.

21 The Court further rejects defendants' argument that plaintiffs are entitled to
22 discovery only for the quarters in which the alleged misleading statements and corrective
23 disclosures were made. Facts outside of this arbitrary period may be highly relevant to the
24 issues of scienter, knowledge, and falsity, among others. *See, e.g., In re Toyota Motor*
25 *Corp. Sec. Litig.*, No. CV 10–922 DSF (AJWx), 2012 WL 3791716, at *4 (C.D. Cal. Mar.
26 12, 2012) (noting that "[i]t is beyond dispute that discovery is not limited to the class
27 period" and collecting cases). Plaintiffs have made a good-faith effort to narrow the
28 temporal scope of their RFPs, and a discovery period of approximately five months before,

1 and five months after, a three-year class period is not unreasonable. If defendants' assertion
2 that there is unlikely to be any material information pre- or post-dating the class period is
3 true, that will be reflected in the discovery produced. Accordingly, the Court finds that the
4 appropriate time period for discovery in this matter is April 1, 2013 to June 30, 2016.

5 **2. Topics for Discovery (Threshold Issues 3 and 4)**

6 Defendants also object to producing documents and information related to the topics
7 of underwriting standards and credit quality *in toto*, and regarding internal controls,
8 compliance infrastructure, and risk management deficiencies to the extent they do not relate
9 to acts "alleged in the *Erhart* complaint and reprinted in the TAC." *Jt. Mot.* at 3.
10 Defendants assert that following the Ninth Circuit's disposition, the *Erhart* complaint is
11 the sole corrective disclosure and that only those misstatements and fraudulent acts that it
12 revealed to the market are at issue in the case. Defendants further argue that the scope of
13 discovery must be limited to the allegations made in the TAC, to prevent plaintiffs from
14 conducting a wide-ranging examination of defendants' business in the hopes of revealing
15 other wrongdoing unrelated to the alleged fraud.

16 The Court disagrees. "Discovery is not limited to the issues raised only in the
17 pleadings" but is "construed broadly" to allow the parties to "define and clarify the
18 issues." *Hampton v. City of San Diego*, 147 F.R.D. 227, 229 (S.D. Cal. 1993) (citing
19 *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)); *see also Shaw v. Experian*
20 *Info. Sols., Inc.*, 306 F.R.D. 293, 296 (S.D. Cal. 2015) ("There is no requirement that the
21 information sought directly relate to a particular issue in the case."). Plaintiffs have alleged
22 that defendants engaged in a wrongful course of risky lending practices and disregard of
23 the Company's internal controls. *See generally* Doc. No. 136. As such, the Court finds
24 that plaintiffs are entitled to discovery regarding internal controls, compliance
25 infrastructure and risk management deficiencies irrespective of whether specific instances
26 of wrongdoing are alleged in both the *Erhart* complaint and the TAC. *See Heartland*
27 *Payment Sys., Inc. v. Mercury Payment Sys. LLC*, No. 14-cv-00437-CW (MEJ); 2015 WL
28 6459690, at *2 (N.D. Cal. Oct. 27, 2015) (declining to limit the scope of discovery based

1 on premature loss causation arguments). Furthermore, given plaintiffs’ allegations, the
2 Court finds the topics of underwriting standards or credit quality are comfortably within
3 Rule 26’s broad scope. *See Lofton v. Verizon Wireless (VAW)*, 308 F.R.D. 276, 280 (N.D.
4 Cal. 2015) (noting that relevance is “construed liberally” and that discovery should be
5 permitted “unless the information sought has no conceivable bearing on the case”) (citation
6 omitted).

7 As before, the Court declines to treat the parties’ discovery dispute as an opportunity
8 to pronounce upon the merits of plaintiffs’ claims. As the District Court explained at the
9 December 11, 2020 hearing, “the plaintiffs have survived the challenges to earlier operative
10 pleadings. We know this case is going to move forward ... [even if] [w]e may not be sure
11 with respect to what the entire universe of allegations are.” Doc. No. 170 at 8. Further,
12 even assuming that the Ninth Circuit’s opinion controls the scope of discovery here, that
13 would not change the Court’s disposition. The Court observes that the Ninth Circuit held
14 the *Erhart* complaint was “a potential corrective disclosure” as to both the underwriting-
15 standards statements and the internal-controls statements. *See In re BofI Sec. Litig.*, 977
16 F.3d at 798; *see also id.* at 786-87 (describing the “two categories of misstatements”); 793
17 (finding that “Erhart’s lawsuit disclosed facts that, if true, rendered false BofI’s prior
18 statements about underwriting standards, internal controls, and compliance
19 infrastructure”). The Ninth Circuit also explained that corrective disclosures “need not
20 precisely mirror the earlier misrepresentation,” and encouraged a “flexible approach to
21 evaluating corrective disclosures.” *Id.* at 790, 795; *see also id.* at 791 n.3.

22 For these reasons, the Court finds the *Erhart* complaint does not define the
23 boundaries of discovery in this matter. Defendants shall produce information concerning
24 underwriting standards, credit quality, internal controls, compliance infrastructure, and risk
25 management deficiencies as requested in plaintiffs’ RFPs. Defendants’ concerns regarding
26 the overbreadth of these topics may be addressed through the use of carefully crafted search
27 terms and the selection of appropriate custodians.

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1 **3. Discovery from *Erhart v. BofI Holding, Inc.* (Threshold Issue 2)**

2 Plaintiffs’ RFPs No. 1 and 2 seek the production of all documents produced by
3 parties and nonparties in the *Erhart* action, as well as copies of all deposition transcripts
4 and videotapes from that matter. Defendants object on the basis that not all of the
5 information produced in discovery in *Erhart* is relevant to this case, and also state that the
6 *Erhart* discovery was produced pursuant to a protective order which prohibits the sharing
7 of information outside of the litigation.

8 Defendants’ objections are well taken. The “scope of discovery,” while broad, “is
9 not unlimited.” *Cabell v. Zorro Prods.*, 294 F.R.D. 604, 607 (W.D. Wash. 2013). The
10 Court finds plaintiffs have not met their burden of demonstrating the relevance of *all*
11 discovery exchanged in *Erhart* to this case. *See Hancock v. Aetna Life Ins. Co.*, 321 F.R.D.
12 383, 390 (W.D. Wash. 2017) (noting that party seeking discovery “bears the burden” of
13 demonstrating relevance). To the extent documents produced in *Erhart* are relevant, they
14 would presumably be responsive to one of plaintiffs’ 45 other document requests. And,
15 since plaintiffs acknowledge that the *Erhart* discovery is not intended to supplant their
16 ability to request documents or depose witnesses in this matter, the Court is also not
17 persuaded that the wholesale production of discovery from *Erhart* would achieve any
18 efficiency or conserve the parties’ resources.

19 For these reasons, the Court finds defendants are not obligated to produce discovery
20 from the *Erhart* action. However, where documents produced by defendants in *Erhart* are
21 otherwise responsive to plaintiffs’ RFPs, the Court sees no reason those documents cannot
22 be produced expeditiously. Defendants shall produce such documents to plaintiffs *within*
23 *30 days of the date of this Order.*

24 **4. Deadline to Raise Further Disputes**

25 The parties describe the above disputes as “threshold” issues and indicate they
26 continue to meet and confer regarding specific RFPs and responses. *Jt. Mot.* at 3. The
27 Court therefore clarifies that the foregoing rulings are without prejudice to the parties’
28 ability to raise disputes regarding specific document requests that are not otherwise

1 addressed by this Order. The parties are hereby ordered to continue to meet and confer in
2 good faith. Any dispute regarding plaintiffs' First Set of RFPs and defendants' responses
3 thereto that is not resolved through further good faith conferral, including any disputes
4 regarding search terms, custodians or other parameters of defendants' search for and
5 collection of relevant ESI, must be brought to the Court's attention *no later than March*
6 *26, 2021*. The parties are instructed to review and comply with the undersigned's
7 Chambers' Rules with respect to raising any such further disputes. The Joint Motion for
8 an Extension of Time [Doc. No. 181] is **DENIED AS MOOT**.

9 **IT IS SO ORDERED.**

10 Dated: February 26, 2021



Hon. Karen S. Crawford
United States Magistrate Judge