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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

In re BofI HOLDING, INC. SECURITIES  
LITIGATION

Case No.: 15-cv-2324-GPC-KSC

**ORDER:**

**(1) REGARDING JOINT MOTION  
FOR DETERMINATION OF  
DISCOVERY DISPUTE NO. 4; and**

**(2) DENYING MOTION TO SEAL**

**[Doc. Nos. 281, 282]**

Before the Court is the parties’ Joint Motion for Determination of Discovery Dispute No. 4 (the “Joint Motion”). Doc. Nos. 281 (redacted) and 283 (under seal). Plaintiff seeks an order compelling defendants to search for and produce additional documents responsive to certain Requests for Production (“RFPs”). *See id.* The parties also move to seal the exhibits to the Joint Motion, and portions of the Joint Motion that quote or reveal the contents of those documents. Doc. No. 282. The Court heard argument on the dispute during a November 5, 2021 discovery conference. *See* Doc. No. 274. For the reasons that follow, the Court **DENIES** plaintiff’s request to compel a supplemental production from defendants. The Motion to Seal is **DENIED**.

## BACKGROUND

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2 The Court assumes the parties' familiarity with the facts of the case. Regarding the  
3 instant dispute, plaintiff seeks documents "relating to BofI's decision to pursue lawsuits  
4 against former internal auditor Charles Matthew Erhart, his mother, and his girlfriend."<sup>1</sup>  
5 Doc. No. 281 at 3. Erhart reported his suspicions that the Bank and its management were  
6 engaged in fraud to regulators, and, after being terminated from his employment, sued BofI  
7 in October 2015 for allegedly retaliating against him for his whistleblowing activities. That  
8 case, *Erhart v. BofI*, S.D. Cal. Case. No. 3:15-cv-02287-BAS-NLS (hereafter "*Erhart*"), is  
9 pending in this District and is scheduled to begin trial in February. Erhart's complaint  
10 undisputedly informed plaintiff's allegations of securities fraud herein. *See generally*  
11 *Third Amended Class Action Complaint for Violations of the Federal Securities Laws*,  
12 *Doc. No. 136* (hereafter "TAC").

13 Six days after Erhart filed suit, BofI sued him in this District for, *inter alia*, breach  
14 of contract, conversion, and computer fraud, alleging that he had failed to safeguard and  
15 improperly disclosed the Bank's confidential information. *See BofI Federal Bank v.*  
16 *Erhart*, S.D. Cal. Case No. 3:15-cv-02353-BAS-NLS (hereafter the "Countersuit").<sup>2</sup> In  
17 2016, BofI separately sued Erhart's girlfriend, Sofia Cornell, for allegedly "allow[ing]  
18 Erhart to store the confidential information he stole from BofI on her laptop," and sued  
19 Erhart's mother, Pamela Erhart, for allegedly "receiving and storing confidential  
20 information that Erhart stole from BofI on her computer." *See Doc. No. 281-1* at 138.

21 Plaintiff moves the Court to order defendants to produce two categories of  
22 documents related to the Erhart Family Lawsuits: (1) meeting minutes and other materials  
23 for BofI's Board of Directors meetings during which the lawsuits were discussed, and (2)  
24 "email communications referencing those lawsuits." *Doc. No. 281* at 3. To capture  
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27 <sup>1</sup> The Court adopts plaintiff's convention and refers to these actions collectively as the "Erhart Family  
28 Lawsuits." *See Doc. No. 281* at 3.

<sup>2</sup> The Countersuit was later consolidated with *Erhart*. *See Erhart* Docket, *Doc. No. 22*.

1 documents in the second category, plaintiff suggests that defendants run the search terms  
 2 “(Matt\* OR Erhart) AND (lawsuit OR sue OR Pamela OR mom OR mother OR girl-friend  
 3 OR Sofia OR Cornell)” through the ESI of five document custodians, including some of  
 4 the named defendants. Doc. No. 281-1 at 10. Plaintiff asserts that the request is timely,  
 5 and that these documents are relevant and responsive to previously served Requests for  
 6 Production. Doc. No. 281 at 3-7. Defendant opposes plaintiff’s request as untimely, asserts  
 7 the requested documents are irrelevant, and objects that the proposed search is overbroad,  
 8 burdensome, and likely to capture privileged documents. *Id.* at 8-11.

## 9 DISCUSSION

### 10 A. Plaintiff’s Motion to Compel Is Untimely

11 To facilitate meaningful meet and confer between the parties, while at the same time  
 12 encouraging diligence, avoiding delay, and providing the parties with finality as to their  
 13 disputes, the undersigned requires that discovery disputes be brought to the Court’s  
 14 attention within 30 days of the date the discovery responses were received. *See* Chambers’  
 15 Rules and Civil Pretrial Procedures for the Honorable Karen S. Crawford (“Chambers’  
 16 Rules”), § VIII.B. Here, the discovery requests to which the requested documents are  
 17 purportedly responsive were served on December 23, 2020 and March 12, 2021. *See* Doc.  
 18 No. 281-1 at 35, 102. Defendants’ responses were served on January 21, 2021 and March  
 19 12, 2021, respectively. *Id.* at 88, 127. The parties then engaged in protracted negotiations  
 20 regarding search terms, including several conferences with the Court and the Court’s staff,  
 21 and ultimately reported to the Court that they had reached agreement.<sup>3</sup> *See, e.g.*, Doc. Nos.  
 22 193, 200. Plaintiff did not request the supplemental responses or propose additional  
 23 document searches related to these discovery requests until September 2, 2021 – the date  
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 26 <sup>3</sup> The parties reported on May 10, 2021 that they had reached agreement on search terms for all but three  
 27 RFPs, not at issue in this dispute. *See* Doc. No. 200 (referring to ongoing negotiations for search terms  
 28 related to RFPs 9, 10 and 38); *compare* Doc. No. 281 at 3 n. 3 (stating that the instant dispute relates to  
 RFPs 3, 7, and 49-55). The Court ordered the parties to continue meeting and conferring and to bring any  
 remaining search-term related dispute to the Court’s attention by May 19, 2021. *See* Doc. No. 200. The  
 parties did not raise any further disputes related to search terms before the deadline passed.

1 by which the Court had ordered defendants to complete their document production – and  
2 did not bring the parties’ disagreement to the Court’s attention until October 18, 2021.<sup>4</sup>  
3 Accordingly, the Court finds that plaintiff’s demand for supplemental discovery responses,  
4 and subsequent request for the Court’s assistance in resolving the parties’ dispute, were  
5 untimely.

6 The Court does not find persuasive plaintiff’s position that they did not, and could  
7 not, appreciate the connection between the “nature of the purportedly stolen materials at  
8 issue in the Erhart Family Lawsuits” and Erhart’s allegations of fraud until August 2021.  
9 Doc. No. 281 at 3-4. The Court finds that this connection is readily apparent from  
10 defendants’ complaint in the Countersuit and subsequent filings, not least of which is their  
11 request for an injunction to prohibit Erhart from further disseminating confidential  
12 information that he allegedly “misuse[d] ... by causing it to be published ...in his  
13 complaint [in *Erhart*].” See Countersuit Docket, Doc. Nos. 1, 7-1 at 8. Plaintiff’s assertion  
14 that defendants’ August 2021 interrogatory responses “first confirmed that the Erhart  
15 Family Lawsuits are relevant to allegations in this case” is also belied by plaintiff’s own  
16 operative complaint, which is admittedly “premised” on “information readily obtainable  
17 on the Internet,” including the “pleadings and other documents” filed in *Erhart* and the  
18 Countersuit. See TAC at 5. Among the documents cited by plaintiff in the TAC is Erhart’s  
19 declaration from the Countersuit, in which he confirms that “[e]ach document” BofI  
20 alleged he improperly “accessed” and disclosed “was specifically related to one of the  
21 allegations of wrongdoing [he] had discussed with Mr. Ball and then reported to federal  
22 law enforcement.” See Countersuit Docket, Doc. No. 27-4; see also TAC at 32, 68 (citing  
23 Erhart’s declaration). Given the allegations in the TAC and plaintiff’s repeated citation to  
24 the Countersuit therein, the Court finds plaintiff’s assertion that it was previously unaware  
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27 <sup>4</sup> On October 18, 2021, the parties moved for an extension of time to raise this and other disputes. Doc.  
28 No. 265. The Court granted the request, but explicitly cautioned that in doing so, it “[did] not make any  
findings or rulings as to the timeliness of any dispute” referenced in the Joint Motion. Doc. No. 266 at 2.

1 that the Countersuit was related to Erhart’s allegations of fraud (and the documents that  
2 purportedly corroborated them) is not credible.

3 The Court is likewise not persuaded that plaintiff could not have understood the  
4 relationship between Erhart’s whistleblower allegations, the allegations in the TAC, and  
5 the Bank’s legal actions against his mother and girlfriend until recently. Doc. No. 281 at  
6 4. In support of its demand for additional documents from defendants, plaintiff states that  
7 deposition transcripts from the *Erhart* matter<sup>5</sup> revealed to them “that the confidential Bank  
8 information Erhart shared with his mother and girlfriend included the same materials he  
9 collected for regulators.” *Id.* Plaintiff identifies three specific items of information gleaned  
10 from recent discovery that purportedly provided crucial “additional context” that was not  
11 previously known to them: (1) that “in the course of his work as an auditor, Erhart collected  
12 certain Bank documents that he ultimately provided to regulators”; (2) that Erhart copied  
13 his mother on emails transmitting documents to regulators; and (3) that Erhart stored or  
14 accessed some of the documents he provided to regulators on his girlfriend’s computer.  
15 *See* Doc. No. 281 at 3-4. The Court shares defendants’ skepticism that these facts –  
16 particularly the first – were unknown to plaintiff until now, considering plaintiff’s heavy  
17 reliance on *Erhart* and related actions in the TAC. *See* Doc. No. 281 at 8 (“Surely plaintiff  
18 figured out the connection between the allegations in the *Erhart* action and the TAC  
19 sometime prior to Defendants’ August 2021 discovery responses.”). But, even assuming  
20 plaintiff’s ignorance was genuine, it was not excusable, because all of the above-described  
21 “additional context” was available to plaintiff through both the *Erhart* and Countersuit  
22 dockets as early as 2016.<sup>6</sup> Indeed, many of the very deposition excerpts plaintiff relies  
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25 <sup>5</sup> The District Court ordered production of the *Erhart* transcripts on September 29, 2021. Doc. No. 257.

26 <sup>6</sup> A nonexhaustive list of such available information includes the following Docket Entries from the *Erhart*  
27 case: Doc. No. 12 (Boff’s motion for spoliation sanctions, indicating that Erhart had destroyed information  
28 stored on his laptop and his girlfriend’s computer that he had already provided to regulators as a  
whistleblower); Doc. No. 18 (Erhart’s opposition to sanctions motion, describing his compilation of  
documents, together with his own “research,” that he ultimately turned over to regulators); Doc. No. 18-

1 upon in support of its motion to compel are publicly accessible.<sup>7</sup> Given plaintiff's ready  
 2 access to and close monitoring of these dockets, the Court cannot agree that plaintiff  
 3 "diligently investigated the potential relevance of the Erhart Family Lawsuits and timely  
 4 raised the issue with Defendants." Doc. No. 281 at 5.

5 During conference with the Court, plaintiff's counsel attempted to justify their  
 6 belated request that defendants search for additional documents by stating that before  
 7 receiving transcripts from depositions taken in *Erhart*, "there was a question mark as to  
 8 what needed to happen internally at the [B]ank before it could bring the lawsuits against  
 9 Mr. Erhart or his family members," but that the *Erhart* transcripts had "erased" that  
 10 question mark by "divulging" that the Bank's Board of Directors would have approved any  
 11 legal action in the Bank's name. *See* Doc. No. 274 at 21; *see also* Doc. No. 281 at 4  
 12 (plaintiff stating that its "understanding of the relevance" of the Erhart Family Lawsuits  
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 15 4 (Erhart's declaration stating, *inter alia*, that he "kept a record" of confidential information, some of  
 16 which he gave to his mother for "safekeeping," and which he stored on both his and his girlfriend's  
 17 computers); Doc. No. 18-5 (Erhart's deposition testimony describing his uploading of documents to his  
 18 personal email account, which he later provided to regulators); Doc. No. 18-6 (Erhart stating in a sworn  
 19 declaration that "Because of my well-founded fears at the time, I blind-copied my mother, Pamela Erhart,  
 20 on an email transmission to the OCC for safekeeping in the event some harm came to me. Attached to  
 21 that email, March 6, 2015, was an Internal Audit Memo dated February 12, 2015 that included the Global  
 22 Cash Card High Risk Customer Review..."); Doc. Nos. 89 and 104 (the parties' stipulations that Erhart's  
 23 and his girlfriend's depositions, taken in the lawsuit against his girlfriend, could be used in *Erhart* for all  
 24 purposes because the two actions "arose from one of the same transactions or occurrences are raised in  
 25 the Federal Action, and was based on the same facts"); and the following Docket Entries from the  
 26 Countersuit: Doc. No. 27-4 (Erhart's sworn declaration in which he acknowledges giving his mother  
 confidential information for "safekeeping," and storing whistleblower-related documents on both his and  
 his girlfriend's computers); Doc. No. 30 (briefing on Boff's motion for an injunction prohibiting Erhart  
 from further public disclosure of the information in his whistleblower complaint); Doc. No. 30-3  
 (declaration of Boff's counsel describing alleged "leak" of confidential information that parallels  
 allegations in the *Erhart* complaint and the TAC, and attached exhibits in support of same); Doc. No. 30-  
 4 (letter from the OCC to Boff's general counsel regarding confidential information contained in Erhart's  
 whistleblower complaint); Doc. No. 30-5 (Erhart's testimony that he blind-copied his mother when he  
 transmitted documents to the OCC, and that he accessed some information from his girlfriend's computer).

27 <sup>7</sup> At a minimum, the following pages of Erhart's December 6, 2015 deposition transcript, attached to the  
 28 Joint Motion and cited by plaintiff, are also publicly available on the *Erhart* and Countersuit dockets: 68,  
 93-98, 104-120, 124-127, 184, 190-193, 202-203. *See* Countersuit Docket, Doc. No. 30-5; *Erhart* Docket,  
 Doc. No. 18-5.

1 “further developed” through review of the *Erhart* transcripts). The Court notes that plaintiff  
2 requested the supplemental production of documents on September 2, 2021 – weeks before  
3 receiving the *Erhart* deposition transcripts – undermining any suggestion that the *Erhart*  
4 transcripts were essential to plaintiff’s ability to request this information from defendants.  
5 *See* Doc. No. 281-1 at 5.

6 Furthermore, as described above, there was a wealth of information available to  
7 plaintiff regarding the Erhart Family Lawsuits. If plaintiff had “question marks” about  
8 defendants’ decision-making process surrounding these lawsuits, it had ample opportunity  
9 during the parties’ lengthy search term negotiations to ensure that the parties’ agreed-to  
10 search terms would “erase” those question marks. That is the very purpose of discovery.  
11 *See Stevens v. CBS Corp.*, No. 3:11-cv-06073 RBL, 2012 WL 3763641, at \*2 (W.D. Wash.  
12 Aug. 29, 2012) (“The purpose of discovery is to obtain potentially relevant information,  
13 not simply to confirm facts already known.”). Plaintiff chose not to do so. The Court will  
14 not exercise its “broad discretion...to permit or deny discovery” in a manner that rewards  
15 plaintiff’s lack of diligence by requiring defendants to search for responsive documents  
16 anew. *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002) (citation omitted).

17 The Motion to Compel is accordingly **DENIED** as untimely. Because timeliness is  
18 “a dispositive threshold issue,” the Court does not reach the parties’ other arguments. *See*  
19 Doc. No. 257 at 5.

## 20 **B. Motion to Seal**

21 The parties move to seal excerpts of Erhart’s and defendant Garrabrants’s  
22 depositions taken in the *Erhart* matter, and portions of the Joint Motion that quote from  
23 those excerpts. Doc. No. 282. Plaintiff opposes sealing “any portion” of the documents  
24 but was required to move for sealing under the terms of the operative Protective Order  
25 [Doc. No. 173]. *See id.* at 2. Defendants ask to maintain the documents under seal and  
26 note that the District Court permitted defendants to produce the *Erhart* transcripts in  
27 accordance with the Protective Order because of the “highly sensitive information  
28 contained therein.” *Id.* at 3.

1 The right of the public “to inspect and copy ... judicial records and documents” is  
2 well established. *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir.  
3 2006) (citing *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978)). The Court  
4 starts with “a ‘strong presumption in favor of access’ is the starting point,” which the party  
5 seeking sealing “bears the burden of overcoming.” *Id. Honolulu*, 447 F.3d 1172, 1178  
6 Where, as here, the documents to be sealed are attached to a non-dispositive discovery  
7 motion, the party requesting sealing must make a “‘particularized showing’” of “‘good  
8 cause.’” *Id.* at 1180 (citation omitted).

9 It is axiomatic that the Court cannot justify sealing information that is “already  
10 publicly available.” *Id.* at 1184; *see also Todd v. Tempur-Sealy Int’l, Inc.*, No. 13-cv-  
11 04984-JST-MEJ, 2015 WL 1006534, at \*6 (N.D. Cal. Mar. 6, 2015) (finding good cause  
12 for sealing did not exist where “the same or similar information ... ha[d] been made  
13 available for public viewing”). As noted above, many of the excerpts of Erhart’s deposition  
14 that plaintiff relied upon are already publicly available, and as to those excerpts, the Motion  
15 to Seal is **DENIED**. Plaintiff shall re-file these documents consistent with the terms of this  
16 Order within 4 days of the date of this Order.

17 As to the remaining deposition excerpts, plaintiff is correct that in this Circuit,  
18 designation of a document as “Confidential” pursuant to a blanket protective order is not  
19 sufficient to establish good cause for sealing. Doc. No. 282 at 2. As the Ninth Circuit has  
20 explained, “confidential categorization of discovery documents under the [blanket]  
21 protective order was not a guarantee of confidentiality, especially in the event of a court  
22 filing” because the Court is required to “mak[e] an individualized determination” as to the  
23 sealing of “specific documents.” *Kamakana*, 447 F.3d at 1183; *see also Beckman Indus.,*  
24 *Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (noting that blanket protective orders  
25 are “by nature overinclusive” and do not require a “‘good cause’ showing under [Rule]  
26 26”); *Small v. Univ. Med. Ctr. of S. Nevada*, No. 2:13-cv-00298-APG-PAL, 2015 WL  
27 1281549, at \*3 (D. Nev. Mar. 20, 2015) (noting that “[b]lanket protective orders are entered  
28 to facilitate the exchange of discovery documents” and do not make any “findings that a



1 particular document is confidential or that a document’s disclosure would cause harm.”)  
2 (citation omitted).

3 It is also true, however, that the undersigned’s Chambers’ Rules prohibit parties from  
4 filing exhibits to discovery motions that are extraneous to the dispute. *See* Chambers’  
5 Rules, § VIII.E.1.c. (directing parties to include only “necessary and relevant exhibits” and  
6 to refrain from including meet-and-confer correspondence). The Court also specifically  
7 admonished the parties not to file excessive exhibits in connection with the instant Joint  
8 Motion. Doc. No. 274 at 23 (“Please don’t give me 40 exhibits. I just need to see the  
9 portions of the Erhart transcripts that are pertinent to the ... other information.”). This  
10 guidance has been largely ignored. The Court did not require, for example, 35 pages of  
11 excerpted testimony from Erhart’s deposition to establish that “in the course of his work  
12 as an auditor, Erhart collected certain Bank documents that he ultimately provided to  
13 regulators,” a fact the Court understands to be undisputed. *See* Doc. No. 281 at 4-5 (citing  
14 documents Bates-stamped BofI000605595-630 for this proposition). The Court also notes  
15 that given its determination that plaintiff’s Motion to Compel was untimely, it was not  
16 necessary for the Court to consider the excerpts of defendant Garrabrants’s testimony. The  
17 superfluous exhibits will accordingly be stricken from the record.

18 The Court is aware that the Joint Motion contains a direct quote from Garrabrants’s  
19 deposition, which the parties have redacted in the publicly available version of the Joint  
20 Motion. *See* Doc. No. 281 at 5. However, the Court does not find that defendants’ generic  
21 reference to “highly sensitive information” is sufficient to meet their burden to “show[]  
22 that specific prejudice or harm will result” if these two lines of testimony are not sealed.  
23 *See Anderson v. Marsh*, 312 F.R.D. 584, 594 (E.D. Cal. 2015) (noting that “party seeking  
24 protection” must make this showing to establish good cause). The Court also does not find  
25 good cause to seal the direct quote from Erhart’s deposition. *See* Doc. No. 281 at 5.  
26 Although the Court could not confirm whether the specific page cited by plaintiff was  
27 publicly filed in *Erhart* or the Countersuit, it is indisputable that Erhart’s fears for his safety  
28 and discussion of those fears with his friends and family have been extensively discussed

1 in public filings. *See, e.g., Erhart* Docket, Doc. Nos. 1, 18-4; Countersuit Docket, Doc.  
2 Nos. 27-4, 30-5. Therefore, the unredacted Joint Motion must be filed on the public docket  
3 within 4 days of the date of this Order.

4 For future discovery motions, the parties are advised that the Court follows the  
5 Circuit's established precedent and that designation of documents or testimony under the  
6 Protective Order, *standing alone*, will not be considered sufficient to demonstrate good  
7 cause for sealing. However, the Court will not abide either party using this rule as a pretext  
8 to file extraneous information on the public docket. Documents that are not germane to a  
9 dispute will be stricken. The Court also expects the parties to be aware of whether  
10 information is already publicly available, either on the docket in this matter or in related  
11 litigation, and to refrain from requesting sealed treatment for publicly available materials.

12 **ORDER**

13 For the reasons stated above, the Court hereby **ORDERS** as follows:

- 14 1. Plaintiff's motion to compel the supplemental production of documents  
15 responsive to its Requests for Production served on December 23, 2020  
16 and March 12, 2021 [Doc. No. 281] is **DENIED**.
- 17 2. The parties' Motion to Seal [Doc. No. 282] is **DENIED**.
- 18 3. Within 4 days of the date of this Order, plaintiff must file the unredacted  
19 Joint Motion, and pages 68, 93-98, 104-120, 124-127, 184, 190-193 and  
20 202-203 of the December 6, 2015 deposition of Charles Matthew Erhart  
21 taken in the *Erhart* matter, on the public docket.

22 **IT IS SO ORDERED.**

23 Dated: November 30, 2021

24 

25 Hon. Karen S. Crawford  
26 United States Magistrate Judge