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

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

13 **ORDER REGARDING JOINT**
14 **MOTION FOR DETERMINATION**
15 **OF DISCOVERY DISPUTE NO. 5**

16 **[Doc. No. 308]**
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18 Before the Court is the parties' Joint Motion for Determination of Discovery Dispute
19 No. 5 (the "Joint Motion" or "Jt. Mot."). Doc. Nos. 308 (redacted) and 323 (under seal).
20 On November 22, 2021, the Court ordered the parties to complete all written discovery by
21 December 3, 2021, and further ordered the parties to submit a joint motion on all then-
22 remaining discovery disputes by December 10, 2021. *See* Doc. No. 293. The instant Joint
23 Motion, in which the parties raise four discrete discovery disputes, is a result of that Order.
24 The Court assumes familiarity with the case and addresses each dispute in turn below.

25 **Dispute No. 1: Plaintiff's Subpoena to CW-8**

26 The first dispute concerns plaintiff's October 21, 2021, subpoena (the "Subpoena")
27 to one of the confidential witnesses who provided information to plaintiff's counsel during
28 their prefiling investigation. Plaintiff incorporated that information into the Amended

1 Complaint (the operative complaint at the time) and attributed it to the witness identified
2 as CW-8.

3 Plaintiff relates that on April 5, 2015, its counsel provided CW-8 with draft
4 paragraphs of the information to be included in the Amended Complaint, and that upon
5 review, CW-8 left a voicemail for plaintiff’s counsel stating that “those two paragraphs ...
6 are exactly what I stated,” while at the same time expressing concerns that he could be
7 easily identified from the information and that he may face retaliation from defendant
8 Garrabrants. Jt. Mot. at 4-5. Two weeks later, on April 19, 2016, CW-8 signed a declaration
9 – used by defendants in the litigation – in which he averred that the paragraphs attributed
10 to him in the Amended Complaint “[did] not accurately reflect my opinions and
11 statements,” and “[made] false implications that [he] did not state, and that [he]
12 affirmatively denied to the investigator and the attorney.” *Id.* at 5; *see also* Doc. No. 42-4.
13 Plaintiff explains that the same information has been incorporated into the Third Amended
14 Complaint. *Id.* at 4 (citing Doc. No. 136 at ¶¶ 63, 111). Plaintiff subpoenaed CW-8 for (1)
15 communications regarding CW-8’s declaration; (2) drafts of the declaration; and (3) all
16 communications between CW-8 and defendants’ counsel.¹ *Id.* at 5.

17 Defendants’ counsel, who now also represents CW-8, timely served objections. *Id.*
18 at 5. Defendants assert that the requested documents are work product for which plaintiff
19 has not shown a substantial need.² *Id.* at 17. Defendants also assert the request is foreclosed
20 by this Court’s July 27, 2021, Order regarding communications with confidential witnesses
21 [Doc. No. 227]. *Id.* at 17.³

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24 ¹ The parties did not attach a copy of the Subpoena or any objections thereto to the Joint Motion.

25 ² The parties did not organize the legal arguments in the Joint Motion by dispute, as required by the
26 undersigned’s Chambers’ Rules. *See* Chambers Rules and Civil Pretrial Procedures for the Honorable
27 Karen S. Crawford (“Chambers’ Rules”), § VIII.E. The parties are advised that future noncompliant
28 motions may be stricken, with instructions to correct and re-file.

³ Defendants also claim the dispute is “premature,” because after serving an amended version of the
Subpoena on November 8, 2021, plaintiff’s counsel informed defense counsel on that they did not intend
to go forward with CW-8’s deposition on November 29, 2021, the date noticed in the Subpoena. Jt. Mot.

1 The Court has already held that “communications with nonparty witnesses are not
2 discoverable absent a showing of substantial need,” and that the “rule applies equally to all
3 parties.” Doc. No. 331 at 8; Doc. No. 227 at 8-11. The Court finds that plaintiff has not
4 established a substantial need for defense counsel’s communications with CW-8 during the
5 time that CW-8 was not represented by defense counsel. Plaintiff asserts that it needs
6 counsel’s communications with the witness to “fully probe” whether defendants’ counsel
7 coerced CW-8 into executing the declaration. Jt. Mot. at 9-10. This dispute is simply the
8 inverse of defendants’ previous request for plaintiff’s counsel’s communications with the
9 confidential witnesses in the hopes they would reveal a predicate for a Rule 11 motion.
10 Doc. No. 227 at 11. The Court has already made clear that it will not allow discovery of
11 counsel’s work product on the mere insinuation of misconduct. *See id.* That rule is
12 especially necessary in this case, where the parties accuse each other – with alarming
13 regularity – of all manner of litigation abuse. Plaintiff is free to question CW-8 about the
14 “reasons for his turnaround” at deposition. Jt. Mot. at 9. It does not need access to its
15 opponent’s counsel’s files to do so. Moreover, any of CW-8’s communications with
16 defense counsel after he retained them are protected by the attorney-client privilege and
17 are not discoverable regardless of need. Accordingly, the motion to compel CW-8 to
18 produce communications with defense counsel is **DENIED**.

19 The Court reaches a different conclusion regarding CW-8’s communications with
20 other witnesses or parties, and the drafts of his declaration. The Court appreciates that there
21 was a dramatic change in CW-8’s characterization of the allegations attributed to him
22 between April 5, 2016 and April 19, 2016. Communications about the declaration with
23 other witnesses or parties – which would not be privileged in any event – and drafts of the
24 declaration may bear on CW-8’s thought process and reasons for disavowing the
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27 at 16. However, plaintiff represents that it has not withdrawn the Subpoena, but merely postponed the
28 deposition to allow for judicial resolution of the instant dispute. *Id.* at 6 n.3. The Court finds the dispute
is ripe for resolution.

1 allegations in the complaint and will facilitate plaintiff's ability to explore this issue at
2 deposition. The Court finds that plaintiff has established a substantial need for these
3 documents. Accordingly, the motion to compel CW-8 to produce communications with
4 persons other than defense counsel regarding his declaration, and any drafts of his
5 declaration, is **GRANTED**.⁴

6 **Dispute No. 2: Defendants' Document Redactions**

7 Plaintiff complains that defendants have improperly redacted "entire loan numbers,"
8 borrower names and contact information, and other identifying information regarding
9 Boff's customers from 17,050 documents. Jt. Mot. at 11. Plaintiff claims that defendants'
10 redactions "directly contravene" this Court's prior discovery orders regarding the
11 production of customer or account information. *Id.* at 11-12. Plaintiff seeks an order
12 compelling defendants to produce these documents without redaction. *Id.* at 12.

13 Defendants respond that plaintiff's request is untimely, noting that the documents
14 about which plaintiff complains were produced between June 25, 2021, and September 2,
15 2021, and that pursuant to the Court's Chambers' Rules, any dispute about the documents
16 being improperly redacted should have been brought to the Court's attention by October 2,
17 2021. Jt. Mot. at 19-20. Defendants also state that even if the dispute is timely, plaintiff's
18 demand that defendants re-review and re-produce over 17,000 documents is burdensome
19 and not proportional to the needs of the case. *Id.* at 21.

20 The Court finds that this dispute is untimely. As the parties are aware, the
21 undersigned's Chambers' Rules provide that discovery disputes are to be raised "within 30
22 days of the event giving rise to the dispute." *See* Chambers' Rules, § VIII.B.2. "Counsel
23 cannot unilaterally extend the deadline." *Id.* The Court has explained that this 30-day rule
24 is intended to accommodate a robust meet-and-confer process while at the same time
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27 ⁴ The Court rejects defendants' argument that the "180-degree turn" in CW-8's testimony creates an
28 equally substantial need for defendants to obtain plaintiff's counsel's work product and notes that
defendant has already been provided with the relevant voicemail CW-8 left for plaintiff's counsel. Jt.
Mot. at 5 n.2.

1 encouraging diligence and enabling the parties to meet any applicable pretrial deadlines.
2 Doc. No. 297 at 3.

3 The Court is not persuaded by plaintiff’s argument that the 30-day deadline does not
4 apply to this dispute because it arose from defendants’ “violation of [prior] orders.” Jt. Mot.
5 at 12 n.9. The Court notes that the “prior orders” plaintiff refers to are an order specifying
6 the content of the summary loan data that the Court ordered defendants to produce and an
7 order denying defendants’ motion for a protective order to prevent plaintiff’s counsel from
8 contacting the Bank’s customers as “not ripe for judicial intervention.” *See* Doc. Nos. 206,
9 218. Even if it could plausibly be argued that defendants “violated” these orders, there is
10 no distinction in the Court’s Chambers’ Rules between discovery “violations” and
11 discovery “disputes.”

12 It is clear from the Joint Motion that plaintiff suspected defendants had improperly
13 redacted documents long before they alerted defendants of this concern on November 10,
14 2021. *See* Jt. Mot. at 11. If, as plaintiff reports, it was required to undertake the laborious
15 process of “document-by-document review and forensic analysis” to identify all 17,050
16 documents with suspicious redactions, the proper course would have been to petition the
17 Court for more time to meet and confer and pursue relief. Jt. Mot. at 11 n.7. Plaintiff’s
18 apparent decision to wait until it had compiled a 514-page spreadsheet⁵ of the “affected
19 documents” (*id.*) before broaching the subject with defendants deprived defendants of the
20 opportunity to course-correct and undermined the Court’s ability to manage its docket by
21 expeditiously addressing the dispute. Plaintiff’s motion for an order compelling the
22 production of 17,050 unredacted documents is **DENIED** as untimely. Because it finds the
23 motion untimely, the Court does not address the parties’ other arguments related to this
24 issue.

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28 ⁵ The spreadsheet and plaintiff’s November 10, 2021, letter to defendants to which the spreadsheet was
attached were lodged, unsolicited, with the undersigned’s chambers on November 18, 2021.

1 **Dispute No. 3: Defendants’ Privilege Log**

2 Plaintiff also complains that defendants have improperly asserted attorney-client
3 privilege over 1,181 documents. Jt. Mot. at 12. Plaintiff reports that the documents are
4 “facially not privileged” and that defendants “refuse” to substantiate their assertions of
5 privilege. *Id.* Plaintiff requests that the Court review “a representative sample” of the 1,181
6 documents *in camera*, and “direct that its rulings on those documents will apply to the rest
7 of the documents.” *Id.* at 13.

8 Defendants respond that plaintiff’s motion is untimely because the documents at
9 issue were identified on a privilege log produced September 7, 2021, but plaintiff did not
10 advise defendants of its concerns regarding these documents until December 1, 2021. *Id.*
11 at 22. Defendants also assert that their “privilege descriptions are proper” and that each of
12 the contested documents “falls squarely within” the attorney-client privilege as
13 communications “discussing legal advice or legal matters” or “forwarding or ... discussing
14 communications with counsel.” *Id.* at 23.

15 The Court finds that this dispute was not timely raised. As discussed above, the
16 undersigned’s Chambers’ Rules require discovery disputes to be raised within 30 days.
17 Plaintiff’s assertion that the 30-day rule does not apply to disputes about privilege logs
18 because privilege logs are “provided on a rolling basis,” *id.* at 13-14 n.10, is neither correct
19 nor supported by a plain reading of the Chambers’ Rules. And even if, as plaintiff states,
20 they were required to await the production of defendants’ ultimate privilege log (an event
21 which apparently had not occurred as of the filing of the Joint Motion, *see id.*), the solution
22 – again – would have been to petition the Court for additional time to address this dispute.
23 Plaintiff chose not to do so. The Court has repeatedly advised the parties that it will not
24 reward a party’s lack of diligence. *See* Doc. No. 293 at 5; Doc. No. 297 at 7. Plaintiff’s
25 motion for an *in-camera* review of a sample of the 1,181 documents and subsequent order
26 compelling production of any nonprivileged documents is **DENIED** as untimely. Because
27 it finds the motion untimely, the Court does not address the parties’ other arguments related
28 to this issue.

1 **Dispute No. 4: Defendants’ Interrogatory No. 23**

2 Defendant moves for an order compelling plaintiff to respond to Interrogatory No.
3 23, which seeks “the identity of the former BofI employees [p]laintiff contacted in
4 connection with its pre-lawsuit investigation.”⁶ Jt. Mot. at 24. Defendants assert that the
5 information is relevant and that their need for the information is sufficient to overcome the
6 “minimal” work product protection afforded the “mere identities of witnesses.” *Id.* Plaintiff
7 objects that the identities of witnesses its counsel *interviewed* during its prefiling
8 investigation (as opposed to the narrower universe of witnesses plaintiff included in the
9 complaint) is both irrelevant and protected work product. *Id.* at 14-15.

10 As plaintiff correctly points out, there is a difference between witnesses “contacted”
11 by plaintiff’s counsel and witnesses ““who helped form the basis of plaintiff’s allegations
12 of fraud.”” *Id.* at 14 (quoting Doc. No. 227). A request for identification of “persons
13 interviewed by counsel” implicates work product, whereas a request for identification of
14 “persons with knowledge” may not. *See, e.g., Plumbers & Pipefitters Local 572 Pension*
15 *Fund v. Cisco Systems, Inc.*, No. C01-20418JW, 2005 WL 1459555, at *4 (N.D. Cal. June
16 21, 2005) (citations omitted). Other courts addressing the same issue have likewise noted
17 this “distinction.” *See id.* (collecting cases); *see also Ferruza v. MTI Tech.*, No. SACV 00-
18 0745-DOC, 2002 WL 32344347, at *3 (C.D. Cal. June 13, 2002) (noting that “[a]lthough
19 the identity ... of witnesses that may have knowledge of any discoverable matter is not
20 protected, the identity of witnesses interviewed by opposing counsel is protected”). The
21 Court finds that defendants’ Interrogatory No. 23 seeks plaintiff’s counsel’s protected work
22 product.

23 The Court is not persuaded that defendants have a “substantial need” for the
24 information to prepare for trial and cannot obtain substantially equivalent information
25 “without undue hardship.” Fed. R. Civ. P. 26(b)(3)(A)(ii). Defendant points out that the
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28 ⁶ Neither the Interrogatory nor plaintiff’s objections thereto were attached to the Joint Motion.

1 written discovery cutoff has passed, and the parties must complete depositions “within a
2 truncated timeframe.” Jt. Mot. at 26. The Court notes, however, that the timing of
3 defendants’ discovery request was entirely within defendants’ control. Defendants cannot
4 create a substantial need for discovery simply by waiting until late in the discovery period
5 to serve their requests.

6 Moreover, the Court does not presume, as defendants do, that if plaintiff “contacted”
7 a witness but did not use that witness’s information in the Complaint, that necessarily
8 means the witness “undermine[d]” plaintiff’s allegations. *See* Jt. Mot. at 25. But even
9 assuming that were so, defendants have not explained how, during the long history of this
10 case, they have been impeded from conducting their own investigation to “identify
11 witnesses who do not support plaintiff’s claims.” *Id.* at 26. The Court is confident that,
12 after nearly seven years of litigation and over a year of exhaustive discovery efforts,
13 including defendants’ review and production of over 85,000 internal company documents
14 relevant to plaintiff’s allegations, that defendants are well equipped to identify witnesses
15 “favorable to the defense” without the need to intrude upon plaintiff’s counsel’s work
16 product. *Id.* at 25. Defendants’ motion is **DENIED**.

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1 **ORDER**

2 For the reasons stated above, the Court ORDERS as follows:

- 3 1. Plaintiff's motion to compel responses to its Subpoena to CW-8 is **GRANTED**
4 **IN PART** and **DENIED IN PART**.
5 2. Plaintiff's motion to compel production of 17,050 unredacted documents is
6 **DENIED**.
7 3. Plaintiff's motion for an *in camera* review of a representative sample of 1,181
8 documents on defendants' privilege log and order compelling production of
9 nonprivileged documents is **DENIED**.
10 4. Defendants' motion to compel responses to Interrogatory No. 23 is **DENIED**.

11 **IT IS SO ORDERED.**

12 Dated: January 14, 2022



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14 Hon. Karen S. Crawford
15 United States Magistrate Judge
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