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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

BOFI FEDERAL BANK,  
  
Plaintiff,  
  
v.  
  
CHARLES MATTHEW ERHART,  
  
Defendant.

Case No. 15-cv-02353-BAS(NLS)  
**ORDER DENYING PLAINTIFF  
BOFI FEDERAL BANK’S  
AMENDED MOTION FOR  
PRELIMINARY INJUNCTION**  
  
[ECF No. 18]

This case arises out of the fallout from a whistleblower retaliation action commenced under the Sarbanes-Oxley Act of 2002, the Dodd-Frank Wall Street Reform and Consumer Protection Act, and California state law. Plaintiff BofI Federal Bank (“BofI”) employed Defendant Charles Matthew Erhart as an internal auditor at its headquarters in San Diego, California. After Erhart discovered conduct he believed to be wrongful, he reported it to the United States Department of the Treasury’s Office of the Comptroller of the Currency—BofI’s principal regulator. He later filed an action against BofI under federal and state law whistleblower protection provisions alleging BofI retaliated against him for reporting unlawful conduct to the government. *See generally Erhart v. BofI Holding, Inc.*, No. 15-cv-02287-BAS(NLS) (S.D. Cal. filed Oct. 13, 2015) (“Whistleblower Retaliation Action”).

1 The next day, the *New York Times* published an article titled *Ex-Auditor Sues*  
2 *Bank of Internet*. The share price of BofI’s publicly-traded holding company  
3 plummeted thirty percent, and the first of several securities class action lawsuits soon  
4 followed. A few days later, BofI brought this countersuit against Erhart alleging he  
5 violated California state law and the Computer Fraud and Abuse Act by publishing  
6 BofI’s confidential information and deleting hundreds of files from his company-  
7 issued laptop. (ECF No. 1.)

8 BofI now moves for a preliminary injunction enjoining Erhart from  
9 disseminating any of its confidential information and requiring Erhart to return files  
10 he appropriated from BofI. (ECF Nos. 7, 18.) Erhart opposes. (ECF No. 27.) After  
11 hearing oral argument (ECF No. 69), the Court **DENIES** BofI’s motion for the  
12 following reasons.

13  
14 **I. BACKGROUND**<sup>1</sup>

15 **A. Confidentiality Clause**

16 BofI is a financial services company headquartered in San Diego, California.  
17 (Tolla Decl. ¶ 3, ECF No. 7-4.) On September 23, 2013, Erhart started working for  
18 BofI as an internal auditor. (Durrans Decl. ¶ 5, ECF No. 7-5; Erhart Decl. ¶ 5, ECF  
19 No. 27-4 at 103.) In this capacity, he was responsible for conducting audits of BofI’s  
20 operations under the supervision of BofI’s Vice President-Internal Audit. (Durrans  
21 Decl. ¶ 5; Ball Decl. ¶ 7, ECF No. 22.) Thus, BofI entrusted Erhart with access to  
22 information it treated as proprietary and confidential. (Tolla Decl. ¶ 6.) This  
23 information included consumer banking information, nonpublic communications  
24 between BofI and its regulators, communications between BofI’s attorneys and its  
25 agents, internal audit findings, and BofI’s employees’ personal information. (*Id.*)

26  
27 <sup>1</sup> The Court makes the following preliminary findings of fact, which are not binding on future  
28 proceedings in this case. *See, e.g., Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415,  
1423 (9th Cir. 1984) (holding a “district court is not required to make any binding findings of fact”  
at the preliminary injunction stage; rather, “it need only find probabilities that the necessary facts  
can be proved”).

1 To safeguard this information, BofI required Erhart to execute an Employee  
2 Confidentiality, Non-Disclosure and Non-Recruitment Agreement (“Confidentiality  
3 Agreement”) as a condition of his employment. (Durrans Decl. ¶ 13; Confidentiality  
4 Agreement, BofI’s App. Exs., Ex. 6, ECF No. 7-14.) This agreement forbids the  
5 unauthorized disclosure of BofI’s “Trade Secrets” and “Confidential Information.”  
6 (Confidentiality Agreement § 2.) The Confidentiality Agreement defines “Trade  
7 Secrets” by incorporating California law,<sup>2</sup> whereas “Confidential Information” is  
8 defined as information that is “proprietary and confidential in nature.” (*Id.*) For these  
9 two types of information, Erhart agreed that:

10 [A]t any time during [his] term of employment or following the  
11 termination of [his] employment with BofI, whether voluntary or  
12 involuntary, [he] shall not, except as required in the conduct of BofI’s  
13 business or as authorized in writing by BofI, use, publish or disclose any  
14 of BofI’s Trade Secrets and/or Confidential Information in any manner  
15 whatsoever.

14 (*Id.* § 2.E.)

15 Further, Erhart agreed that if his employment with BofI was terminated for any  
16 reason, he would promptly:

17 Inform BofI of and deliver to BofI all records, files, electronic data . . .  
18 and the like in [his] possession, custody or control that contain any of  
19 BofI’s Trade Secrets or Confidential Information which [Erhart]  
20 prepared, used, or came in contact with while employed by BofI . . . .

20 (*Id.* § 7.A.)

21  
22 **B. Erhart’s Departure from BofI**

23 In the course of performing his work as an internal auditor, Erhart claims he  
24 repeatedly encountered conduct he believed to be wrongful. (*See generally* Erhart  
25

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26 <sup>2</sup> California, which has adopted the Uniform Trade Secrets Act, defines a “trade secret” as  
27 “information, including a formula, pattern, compilation, program, device, method, technique, or  
28 process, that: (1) Derives independent economic value, actual or potential, from not being generally  
known to the public or to other persons who can obtain economic value from its disclosure or use;  
and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”  
Cal. Civ. Code § 3426.1(d).

1 Decl. ¶¶ 9–75.) By early 2015, approximately sixteen months after he joined BofI,  
2 Erhart believed his job was in jeopardy. (*Id.* ¶ 47.) In a recent performance evaluation,  
3 Erhart’s rating had been downgraded, with his bonus adversely affected. (*Id.* ¶ 25.)  
4 BofI identified Erhart’s practice of preserving audit findings in writing as a  
5 performance issue. (*Id.*) Erhart states BofI had repeatedly directed internal audit staff  
6 to not create written evidence of believed non-compliance and illegal conduct. (*Id.*  
7 ¶¶ 15, 24.) Later, one of BofI’s senior vice presidents walked by Erhart’s workstation  
8 and stated, in the presence of others, “If [Erhart] continues to turn over rocks,  
9 eventually he is going to find a snake and he’s going to get bit.” (*Id.* ¶ 47.) Then, on  
10 March 5, 2015, BofI’s Vice President-Internal Audit—Erhart’s supervisor—resigned  
11 abruptly. (Ball Decl. ¶ 8; Erhart Decl. ¶ 51.) The next day, Erhart “felt very unwell”  
12 and “called off sick.” (Erhart Decl. ¶ 53.) Erhart requested, and was granted by BofI,  
13 an unpaid leave of absence pursuant to the Family Medical Leave Act and the  
14 California Family Rights Act beginning on March 6, 2015. (Durrans Decl. ¶ 15.)

15 At the same time, Erhart “became extremely concerned that the Bank would  
16 try to destroy the records of wrongdoing that [he] had placed on the Bank’s  
17 computers.” (Erhart Decl. ¶ 55.) He contacted the Denver Regional Office of the  
18 United States Department of the Treasury’s Office of the Comptroller of the Currency  
19 (“OCC”) and said he was seeking whistleblower protection. (*Id.*) Meanwhile, BofI  
20 was opening up the locked file cabinets at Erhart’s workstation, going through all of  
21 the documents inside, repeatedly calling his cell phone, and preparing and attempting  
22 to deliver a termination letter to him. (*Id.* ¶¶ 56, 58, 61.)

23 Erhart provided information to the OCC by phone and brought documents in  
24 his possession to the OCC’s office in Carlsbad, California, regarding the conduct he  
25 believed to be wrongful. (Erhart Decl. ¶¶ 64–69.) Afterwards, on March 12, 2015,  
26 Erhart returned his work laptop to BofI. (*Id.* ¶ 70.)

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1           **C.     Disclosure of BofI’s Information**

2           Following its recovery of Erhart’s work laptop, BofI hired a forensic computer  
3 expert to analyze the device. (Armstrong Decl. ¶ 2, ECF No. 7-2.) According to the  
4 forensic expert, first, on March 6, 2015—the same day Erhart called the OCC seeking  
5 whistleblower protection—the laptop was used to attempt to copy approximately  
6 1208 BofI files to a removable storage device, a USB flash drive. (*Id.* ¶ 11.) Second,  
7 the USB flash drive contained a “Matt Erhart” folder with subfolders including  
8 “Work,” suggesting it contained BofI files. (*Id.* ¶ 13.) Third, the laptop shows  
9 Erhart’s personal, web-based e-mail account was used to send files stored on BofI’s  
10 electronic media to the account’s own address—presumably to preserve a copy of  
11 the files that could be accessed without the laptop. (*See id.* Ex. 3.) Data collected  
12 from the laptop also shows Erhart attempted to send messages containing BofI files  
13 to a Department of the Treasury e-mail account around the time he contacted the  
14 OCC, but he received several non-delivery notifications, or “bounce” messages, in  
15 response. (*See id.*) Fourth, the forensic analyst determined that on March 12, 2015,  
16 between 3:34 a.m. and 5:41 a.m., Erhart deleted approximately 957 files and folders  
17 from the laptop prior to returning it to BofI on that same day. (*Id.* ¶ 18.)

18           Further, during the course of discovery in this case, BofI subpoenaed Erhart’s  
19 counsel’s communications to purportedly determine “the extent of and to whom she  
20 distributed BofI’s confidential information.” (BofI’s Supp. Br. 2:15–16, ECF No. 56;  
21 *see also* Powill Decl. ¶ 2, ECF No. 56-1; Subpoena, ECF No. 43-6.) After a discovery  
22 dispute, United States Magistrate Judge Nita L. Stormes ordered Erhart’s counsel to  
23 produce a series of her communications with third parties. (ECF No. 44.) These  
24 communications reveal that on May 29, 2015, Erhart’s counsel communicated with  
25 Peter Eavis—a financial reporter for the *New York Times*. (ECF No. 56-2 at  
26 TGLF000006–07.) They continued to communicate over the course of the next  
27 several months. (*Id.* at TGLF000008–11.) Then, in August 2015, the *New York Times*  
28 published a report on BofI’s explosive growth and lending strategy. (Peter Eavis, *An*

1 *Internet Mortgage Provider Reaps the Rewards of Lending Boldly*, N.Y. Times, Aug.  
2 22, 2015, BofI’s App. Exs., Ex. 13, ECF No. 7-21.)<sup>3</sup> The article, in discussing the  
3 potential risks that BofI faces, stated:

4 In recent months there has been unrest in the division of Bank of Internet  
5 that deals with regulatory compliance. Earlier this year, a senior internal  
6 auditor, Jonathan Ball, and another employee in the division, Matt  
7 Erhart, left the bank. Mr. Ball did not respond to requests for comment.  
8 Mr. Erhart’s lawyer, Carol L. Gillam, said that she had communicated  
9 with regulators, including the Office of the Comptroller of the Currency,  
10 the bank’s primary regulator. She declined to provide details.

11 (*Id.*)

12 Later, on October 13, 2015—the date Erhart filed the Whistleblower  
13 Retaliation Action—Erhart’s counsel sent Mr. Eavis a copy of Erhart’s complaint  
14 and asked Mr. Eavis to not contact BofI until she had confirmation the pleading was  
15 successfully filed. (ECF No. 56-2 at TGLF000012–13.) BofI asserts Mr. Eavis used  
16 his advance notice of Erhart’s whistleblower retaliation allegations “to publish a  
17 scathing and highly injurious article about BofI before the markets opened the  
18 following day.” (BofI’s Supp. Br. 3:7–9; *see also* Peter Eavis, *Ex-Auditor Sues Bank*  
19 *of Internet*, N.Y. Times, Oct. 13, 2015, BofI’s App. Exs., Ex. 14, ECF No. 7-22.) A  
20 review of the *New York Times* article reveals it largely summarizes the allegations in  
21 Erhart’s complaint and includes BofI’s Chief Executive Officer’s refutation of these  
22 allegations:

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25 //

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26 <sup>3</sup> The Court grants BofI’s request for judicial notice of several newspaper articles and similar  
27 publications. *See* Fed. R. Evid. 201; *see also, e.g., Von Saher v. Norton Simon Museum of Art at*  
28 *Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) (“Courts may take judicial notice of publications  
introduced to ‘indicate what was in the public realm at the time, not whether the contents of those  
articles were in fact true.’”); *accord Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 977  
(9th Cir. 1999) (taking judicial notice “that the market was aware of the information contained in  
news articles submitted by the defendants”).

1 Bank of Internet USA has become one of the country's top-performing  
2 banks by churning out high-cost mortgages to wealthy individuals with  
3 complex finances.

4 But in a federal lawsuit filed on Tuesday, a former internal auditor of  
5 the bank contended that Bank of Internet was cutting corners as it grew  
6 at a rapid pace. The auditor, Matt Erhart, said in the suit that he was fired  
7 after revealing what he believed to be wrongdoing at the bank to federal  
8 regulators and management at Bank of Internet. The complaint, filed in  
9 federal court in the Southern District of California, said that Bank of  
10 Internet violated federal laws that seek to protect whistle-blowers.

11 . . . .

12 In an interview on Tuesday, Gregory Garrabrants, Bank of Internet's  
13 chief executive, said the allegations were groundless. "The factual  
14 inaccuracies here are numerous and substantial," he said. "Mr. Erhart  
15 has made all of these allegations in great detail to federal regulators,  
16 who have reviewed them in depth and have found them to be wholly  
17 without merit."

18 . . . .

19 Mr. Erhart's complaint seeks to paint a picture of a bank where controls  
20 often did not apply. It says that Bank of Internet's borrowers may have  
21 included foreign nationals who might have been off-limits under federal  
22 anti-money-laundering laws. The suit does not, however, name any of  
23 the borrowers that Mr. Erhart thought suspicious. And in an earlier  
24 interview, Mr. Garrabrants said the bank had passed a regulatory review  
25 of its loans to foreign nationals.

26 . . . .

27 According to the complaint, Bank of Internet was also not forthcoming  
28 with the Securities and Exchange Commission when the agency sought  
information about an account at the bank.

(Peter Eavis, *Ex-Auditor Sues Bank of Internet*, N.Y. Times, Oct. 13, 2015.)

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1           Despite BofI’s CEO’s public refutation of Erhart’s allegations, BofI Holding,  
2 Inc.’s share price plummeted thirty percent on October 14, 2015, from its closing  
3 price on October 13, 2015. (See BofI Holding, Inc. Historical Stock Prices, BofI’s  
4 App. Exs., Ex. 9, ECF No. 7-17.)<sup>4</sup> A securities class action lawsuit was filed against  
5 BofI the following day. See *Hous. Mun. Emps. Pension Sys. v. BofI Holding, Inc.*,  
6 No. 15-cv-02324-GPC(KSC) (S.D. Cal. filed Oct. 15, 2015).

7  
8           **D. Temporary Restraining Order**

9           On October 19, 2015, BofI commenced this action asserting claims against  
10 Erhart for: (1) breach of contract; (2) conversion; (3) breach of the duty of loyalty;  
11 (4) negligence; (5) fraud; (6) violation of California Penal Code Section 502; (7)  
12 violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5); and (8)  
13 unfair business practices in violation of California Business and Professions Code  
14 Section 17220. (ECF No. 1.) Several days later, the parties jointly moved for the entry  
15 of a temporary restraining order. (ECF No. 4.) While this request was pending, BofI  
16 moved for a preliminary injunction. (ECF No. 7.) On November 2, 2015, the Court  
17 granted the parties’ request and entered a temporary restraining order that required  
18 Erhart and his agents to “refrain from disclosing . . . any confidential, privileged, or  
19 proprietary information belonging to BofI . . . .” (ECF No. 10 at 2:1–3.) However,  
20 the order did not prevent Erhart from communicating with federal or state regulators  
21 or his counsel. (*Id.* at 2:24–27.) In addition, the temporary restraining order required  
22 Erhart to deliver to BofI “all BofI records and documents and any Confidential  
23

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24           <sup>4</sup> The Court grants BofI’s request for judicial notice of historical stock prices for BofI Holding, Inc.  
25 See Fed. R. Evid. 201; see also, e.g., *Metzler Investment GMBH v. Corinthian Colleges, Inc.*, 540  
26 F.3d 1049, 1064 (9th Cir. 2008) (noting the district court properly took judicial notice of the  
27 defendant’s “reported stock price history and other publicly available financial documents”); *In re*  
28 *Copper Mountain Secs. Litig.*, 311 F. Supp. 2d 857, 864 (N.D. Cal. 2014) (“Information about the  
stock price of publicly traded companies is the proper subject of judicial notice.”). BofI Holding,  
Inc. is the publicly-traded savings and loan holding company that owns BofI—a federal savings  
association. See 12 U.S.C. § 1813 (defining “savings and loan holding company” and “Federal  
savings association”).



1 Information in any form, including but not limited to documents or electronically  
2 stored information stored in any medium within his or their custody, possession, or  
3 control.” (*Id.* at 2:15–19.)

4 On November 10, 2015, the parties jointly moved to continue BofI’s motion  
5 for a preliminary injunction. (ECF No. 13.) BofI agreed to continue the motion  
6 subject to the entry of a supplemental temporary restraining order that imposed  
7 additional requirements on Erhart. (*Id.*) These requirements included that he:

- 8 1. Provide a list of all materials he (Erhart) removed from BofI,  
9 including the date the item was taken (referred to as the “Inventory”).
- 10 2. Provide a list of all individuals to whom Erhart or his agents,  
11 including counsel, has disclosed each item on the Inventory.
- 12 3. Provide a signed declaration from Erhart . . . that all items on the  
13 Inventory . . . have been returned . . . .

14 (*Id.* at 1:15–27.) The Court granted the parties’ request and entered a supplemental  
15 restraining order on November 16, 2015, with the order remaining in effect “until the  
16 Court renders a decision on BofI’s motion for preliminary injunction.” (ECF No. 17.)

17 While the parties briefed BofI’s preliminary injunction motion, they also filed  
18 a joint motion to allow BofI to take a limited deposition of Erhart. (ECF No. 14.)  
19 Judge Stormes granted the parties’ joint motion and ordered that:

20 BofI may take Erhart’s deposition . . . for the limited purpose of  
21 determining whether and to whom Erhart has disclosed confidential,  
22 privileged, or proprietary information belonging to BofI, its employees,  
its business counterparties, its customers, and/or its client[s] . . . .

23 (ECF No. 19 at 1:7–13.)

24 Before his deposition, Erhart provided a declaration to BofI pursuant to the  
25 Court’s supplemental temporary restraining order. (Erhart Decl. ¶ 81 (Jan. 19, 2016),  
26 ECF No. 27-4; *see also* Erhart Decl. ¶¶ 1–19 (Dec. 3, 2015), ECF No. 34-5  
27 (describing prior disclosures and the return of BofI’s information).) Erhart submitted  
28 to a deposition on December 6, 2015. (ECF No. 30-5.) Last, to comply with the

1 restraining order’s requirement that he return BofI’s information, Erhart surrendered  
2 two USB devices to BofI and also allowed BofI’s forensic experts to come to his  
3 home to retrieve his desktop computer and his girlfriend’s computer for analysis.  
4 (Erhart Decl. ¶¶ 81–82; *see also* Armstrong Decl. ¶ 7, ECF No. 30-1 (listing digital  
5 media provided by Erhart to BofI).)

## 6 7 **II. EVIDENTIARY OBJECTIONS**

8 Before analyzing the requirements for preliminary relief, the Court addresses  
9 the parties’ mountain of evidentiary objections. “[A] preliminary injunction is  
10 customarily granted on the basis of procedures that are less formal and evidence that  
11 is less complete than in a trial on the merits.” *Univ. of Texas v. Camenisch*, 451 U.S.  
12 390, 395 (1981). Thus, the Federal Rules of Evidence do not strictly apply to  
13 preliminary injunction proceedings. *See, e.g., id.*; *Republic of the Philippines v.*  
14 *Marcos*, 862 F.2d 1355, 1363 (9th Cir. 1988) (en banc); *Flynt Distrib. Co. v. Harvey*,  
15 734 F.2d 1389, 1394 (9th Cir. 1984).

16 This flexibility exists because “[t]he urgency of obtaining a preliminary  
17 injunction necessitates a prompt determination” and makes it difficult for a party to  
18 procure supporting evidence in a form that would be admissible at trial. *Flynt Distrib.*  
19 *Co.*, 734 F.2d at 1394; *accord Puricle, Inc. v. Church & Dwight Co.*, 568 F. Supp.  
20 2d 1144, 1147 (C.D. Cal. 2008); *Dr. Seuss Ents. v. Penguin Books USA, Inc.*, 924 F.  
21 Supp. 1559, 1562 (S.D. Cal. 1996). A district court therefore “may give even  
22 inadmissible evidence some weight, when to do so serves the purpose of preventing  
23 irreparable harm.” *Flynt Distrib. Co.*, 734 F.2d at 1394. District courts have exercised  
24 this discretion to consider a variety of evidence at the preliminary injunction stage  
25 that may otherwise be inadmissible. *See, e.g., Johnson v. Couturier*, 572 F.3d 1067,  
26 1083 (9th Cir. 2009) (concluding the district court did not abuse its discretion by  
27 considering “unverified client complaints” and the plaintiff’s counsel’s interested  
28 declaration); *Flynt Distrib. Co.*, 734 F.2d at 1394 (holding it was within the district

1 court's discretion to rely on hearsay statements); *Moose Creek, Inc. v. Abercrombie*  
2 *& Fitch Co.*, 331 F. Supp. 2d 1214, 1225 n.4 (C.D. Cal. 2004) (considering internet  
3 materials that were not individually authenticated).

4 In this case, Erhart makes numerous evidentiary objections to six declarations  
5 submitted by BofI. (ECF No. 27-1.) The grounds for the vast majority of Erhart's  
6 objections are lack of relevance, inadmissible hearsay, lack of personal knowledge  
7 or foundation, and improper expert opinion under Federal Rules of Evidence 401,  
8 602, 701, and 702. Having (i) reviewed these objections and BofI's responses (ECF  
9 No. 30-10) and (ii) considered the evidence submitted in light of the standard  
10 discussed above, the Court overrules Erhart's objections.

11 In addition, BofI submits numerous evidentiary objections to fifty-four  
12 segments of two declarations submitted by Erhart in opposition to BofI's motion.  
13 (ECF No. 30-9.) Given that the Court has referenced Erhart's December 3, 2015,  
14 declaration made in response to the Court's supplemental temporary restraining  
15 order, the Court also notes BofI's objections to eight segments of this declaration that  
16 are filed elsewhere on the docket. (*See* ECF No. 35-3.) The Court will not strictly  
17 apply the rules of evidence to Erhart's submissions because it finds the rationale for  
18 the relaxed standard discussed above is equally persuasive for evidence submitted by  
19 a defendant. *See Flynt Distrib. Co.*, 734 F.2d at 1394; *accord Rosen Entm't Sys., LP*  
20 *v. Eiger Vision*, 343 F. Supp. 2d 908, 912 (C.D. Cal. 2004) (exercising discretion to  
21 consider inadmissible evidence when considering evidentiary objections to evidence  
22 submitted in opposition to a preliminary injunction request). Most of BofI's  
23 objections are made on the same grounds as Erhart's discussed above—lack of  
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1 foundation, improper expert opinion, and inadmissible hearsay.<sup>5</sup> Having reviewed  
2 these objections and also considered Erhart’s evidence in light of the standard  
3 discussed above, the Court overrules BofI’s objections.

4  
5 **III. PRELIMINARY INJUNCTION ANALYSIS**

6 **A. Introduction**

7 Although BofI brings eight claims against Erhart, it relies on only three of them  
8 for its request for preliminary relief: (1) breach of contract, (2) breach of the duty of  
9 loyalty, and (3) conversion. BofI argues it is entitled to a preliminary injunction  
10 because Erhart appropriated hundreds of documents containing BofI’s nonpublic  
11 information. (Mot. 1:2–2:27.) Further, Erhart published some of this information in  
12 his whistleblower retaliation complaint, to the press via his attorney, and to other  
13 members of the public such as his mother and former coworkers. (*See generally*  
14 *Complaint, Whistleblower Retaliation Action, ECF No. 1; see also* BofI’s Supp. Br.  
15 2:10–4:6, Ex. 2, ECF Nos. 56, 56-2.)

16 In response, Erhart disputes that BofI has demonstrated it is entitled to a  
17 preliminary injunction on any of its three claims for one principal reason: the law  
18 protects Erhart’s conduct. (Opp’n 6:4–10:7, ECF No. 27.) In Erhart’s view, he is  
19 protected from liability for breach of the Confidentiality Agreement and BofI’s other  
20 claims because there “is a strong public policy in favor of protecting whistleblowers  
21

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22 <sup>5</sup> BofI also objects to twelve portions of Erhart’s declaration based on 12 C.F.R. § 4.37(b)(1)(i).  
23 (ECF No. 30-9.) Under 12 C.F.R. § 4.37(b)(1)(i), a person may not disclose non-public OCC  
24 information without the OCC’s consent. Here, “the cat is out of the bag” because this information  
25 has already been disclosed in Erhart’s whistleblower retaliation complaint. *See SmithKline*  
26 *Beecham Corp. v. Pentech Pharm., Inc.*, 261 F. Supp. 2d 1002, 1008 (N.D. Ill. 2003) (Posner, J.).  
27 Although Erhart may have violated 12 C.F.R. § 4.37(b)(1)(i), the Court is not convinced that BofI  
28 may now seek to exclude Erhart’s evidence on this basis. Nevertheless, the conclusion reached in  
this order is not dependent on the portions of Erhart’s evidence that BofI objects to under 12 C.F.R.  
§ 4.37(b)(1)(i). BofI does not object to Erhart’s sworn statements that on March 9, 2015, he “had a  
lengthy phone call with the OCC, lasting nearly two hours” and that on March 10, 2015, he “went  
to the OCC office in Carlsbad, turned over evidence, and then that day and the following [he]  
continued to fax documents that the OCC was unable to download and encrypt during the Carlsbad  
meeting.” (*See* Erhart Decl. ¶¶ 65, 68; *see also* ECF No. 30-9.)

1 who report fraud against the government.” (*Id.* 6:17–18.) “This policy would be  
2 thwarted if the courts permitted companies like BofI to use the *in terrorem* effect of  
3 a lawsuit like the present one to silence whistleblowers and keep company  
4 misconduct secret.” (*Id.* 7:4–6.) He also argues BofI has not carried its burden on  
5 each requirement for preliminary relief. (*Id.* 14:9–15:18.)

6 “The Supreme Court has emphasized that preliminary injunctions are ‘an  
7 extraordinary remedy never awarded as of right.’” *Garcia v. Google, Inc.*, 786 F.3d  
8 733, 740 (9th Cir. 2015) (en banc) (McKeown, J.) (quoting *Winter v. Nat. Res. Def.*  
9 *Council, Inc.*, 555 U.S. 7, 24 (2008)). The purpose of preliminary relief “is to  
10 preserve the status quo between the parties pending a resolution of a case on the  
11 merits.” *McCormack v. Hiedeman*, 694 F.3d 1004, 1019 (9th Cir. 2012) (citing *U.S.*  
12 *Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1094 (9th Cir. 2010)).

13 To obtain a preliminary injunction, BofI “must satisfy *Winter*’s four-factor  
14 test.” *See Garcia*, 786 F.3d at 740 (citing *Farris v. Seabrook*, 677 F.3d 858, 864 (9th  
15 Cir. 2012)); *accord Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y*,  
16 725 F.3d 940, 944 (9th Cir. 2013). Under this test, BofI must establish that (1) it is  
17 likely to succeed on the merits, (2) it is likely to suffer irreparable harm in the absence  
18 of preliminary relief, (3) the balance of equities tips in its favor, and (4) an injunction  
19 is in the public interest. *See Winter*, 555 U.S. at 20. “[P]laintiffs seeking a preliminary  
20 injunction face a difficult task in proving that they are entitled to this ‘extraordinary  
21 remedy.’” *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010) (quoting  
22 *Winter*, 555 U.S. at 22). The plaintiff “must demonstrate that it meets all four of the  
23 elements of the preliminary injunction test.” *DISH Network Corp. v. F.C.C.*, 653 F.3d  
24 771, 776 (9th Cir. 2011).

25 Here, the Court ultimately concludes that BofI is not entitled to preliminary  
26 relief because BofI has not met its burden of demonstrating it “is likely to suffer  
27 irreparable harm in the absence of preliminary relief.” *See Winter*, 555 U.S. at 20.  
28 Accordingly, the Court focuses on this element of *Winter*’s four-factor test.

1           **B. Likelihood of Irreparable Harm in the Absence of Preliminary**  
2           **Relief**

3           To obtain preliminary relief, BofI must demonstrate that irreparable harm is  
4 likely in the absence of an injunction. *See, e.g., Winter*, 555 U.S. at 20, 22–23.  
5 “Irreparable harm is traditionally defined as harm for which there is no adequate legal  
6 remedy, such as an award of damages.” *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d  
7 1053, 1068 (9th Cir. 2014) (citing *Rent-A-Ctr., Inc. v. Canyon Television &*  
8 *Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991)). Moreover, “[a]  
9 preliminary injunction may only be granted when the moving party has demonstrated  
10 a significant threat of irreparable injury, irrespective of the magnitude of the injury.”  
11 *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999). The court must  
12 analyze whether irreparable harm is “likely” as opposed to “merely possible”—a  
13 “showing of mere possibility of irreparable harm is not sufficient under *Winter*.” *See*  
14 *Earth Island Inst.*, 626 F.3d at 474; *see also Winter*, 555 U.S. at 22. The plaintiff  
15 must also show a “sufficient causal connection” between the alleged injury and the  
16 conduct the plaintiff seeks to enjoin such that the injunction would effectively  
17 minimize the risk of injury. *See Perfect 10, Inc. v. Google, Inc.*, 653 F3d 976, 982  
18 (9th Cir. 2011); *see also Garcia*, 786 F3d at 745 (reasoning there is a “mismatch”  
19 between the plaintiff’s substantive claim “and the dangers she hopes to remedy  
20 through an injunction”).

21           Here, BofI argues it has demonstrated a likelihood of irreparable harm in the  
22 absence of preliminary relief for several reasons. (Mot. 19:17–20:28.) First, BofI  
23 relies on a provision in the Confidentiality Agreement signed by Erhart titled  
24 “Injunctive Relief.” (*Id.* 19:21–24.) This provision provides that an employee’s  
25 unauthorized disclosure of Confidential Information would cause “immediate and  
26 irreparable harm to BofI . . . for which BofI may not have an adequate remedy at  
27 law.” (Confidentiality Agreement § 8.) Therefore, BofI argues an injunction is  
28 warranted because “Erhart admits that, pursuant to the Confidentiality Agreement he

1 signed, a breach of the agreement constitutes irreparable injury and entitles BofI to a  
2 preliminary injunction.” (Reply 9:9–13.)

3 The Court is not persuaded. A preliminary injunction is an extraordinary  
4 remedy that is proper only if the requirements for injunctive relief are satisfied. *E.g.*,  
5 *Winter*, 555 U.S. at 22. Consequently, as many courts have recognized, a provision  
6 in a confidentiality agreement providing that a party will suffer irreparable harm upon  
7 a breach is not controlling. *See, e.g., Giftango, LLC v. Rosenberg*, 925 F. Supp. 2d  
8 1128, 1140–41 (D. Or. 2013) (citing cases); *Baker’s Aid, a Div. of M. Raubvogel Co.*  
9 *v. Hussmann Foodservice Co.*, 830 F.2d 13, 16 (2d Cir. 1987) (“[T]he contractual  
10 language declaring money damages inadequate in the event of a breach does not  
11 control the question whether preliminary injunctive relief is appropriate.”); *see also*  
12 *DVD Copy Control Ass’n, Inc. v. Kaleidescape, Inc.*, 176 Cal. App. 4th 697, 726  
13 (2009) (“[A] court must reject a stipulation contemplating an equitable remedy that  
14 is contrary to law or public policy, such as where the evidence shows that an  
15 aggrieved party actually has an adequate remedy at law.”). Instead, a court “must  
16 make an independent determination of whether [irreparable] harm is present.”  
17 *Inspection Mgmt. Sys., Inc. v. Open Door Inspections, Inc.*, No. 209-CV-00023-  
18 MCE-GGH, 2009 WL 805813, at \*4 (E.D. Cal. Mar. 26, 2009). Further, even if the  
19 Confidentiality Agreement’s clause established that the type of harm BofI may suffer  
20 is irreparable, the provision would not satisfy BofI’s burden of providing evidence  
21 that there is a *likelihood* of irreparable harm occurring in the future absent  
22 preliminary relief.

23 Second, BofI argues it has satisfied the irreparable harm requirement because  
24 “[i]mmediately following Erhart’s filing of his complaint containing confidential and  
25 privileged information, and the contemporaneous disclosure to the press of the  
26 complaint containing the same confidential and privileged information, BofI’s stock,  
27 and market valuation, dropped 30%.” (Mot. 20:3–8.) “Losses due to depressed stock  
28 prices” are monetary losses and “do not constitute irreparable harm.” *E.g., Beztak*

1 *Co. v. Bank One Columbus, N.A.*, 811 F. Supp. 274, 285 (E.D. Mich. 1992); *see also*  
2 *Rent-A-Ctr.*, 944 F.2d at 597 (“[E]conomic injury alone does not support a finding of  
3 irreparable harm[.]”). Moreover, again, even if the Court considered a precipitous  
4 decline in stock price as irreparable harm, BofI has not demonstrated a likelihood of  
5 suffering this harm again in the absence of a preliminary injunction. Thus, BofI’s  
6 second argument is also unpersuasive.

7 Third, BofI notes that “at least one securities class action lawsuit expressly  
8 premised upon Erhart’s lawsuit has already been filed against BofI as a result.” (Mot.  
9 20:8–10.) “Unfortunately, this is just the beginning of the injury BofI will suffer if  
10 not granted a preliminary injunction. BofI expects that additional class action  
11 lawsuits may be filed against BofI if Erhart is permitted to continue making  
12 unauthorized disclosures of Confidential Information.” (Mot. 20:11–13.) BofI’s  
13 forecast was correct. It soon encountered a tempest of litigation—notwithstanding  
14 the Court’s temporary restraining order and Erhart’s compliance with the order. *See*  
15 *generally In re BofI Holding, Inc. S’holder Litig.*, No. 15-cv-02722-GPC(KSC) (S.D.  
16 Cal. filed Dec. 3, 2015). Yet, BofI’s argument that it may be subject to future lawsuits  
17 if the Court denies its request for preliminary relief similarly does not demonstrate  
18 irreparable harm. *See, e.g., KEE Action Sports, LLC v. Shyang Huei Indus. Co.*, No.  
19 3:14-CV-00071-HZ, 2014 WL 5780812, at \*4 (D. Or. Nov. 5, 2014) (“The cost of  
20 litigation is not irreparable harm.”); *Gilbane Bldg. Co. v. Nemours Found.*, 568 F.  
21 Supp. 1085, 1095 (D. Del. 1983) (“Gilbane’s argument that it may be subject to future  
22 lawsuits, which may result in monetary damages against Gilbane, does not satisfy the  
23 requirement that Gilbane demonstrate that it will suffer immediate irreparable  
24 harm.”).

25 Further, even if additional lawsuits constituted irreparable harm, BofI would  
26 need to demonstrate a likelihood of them being filed. To reach this point, BofI would  
27 need to first demonstrate a likelihood that Erhart will make unauthorized disclosures  
28 of its confidential information if an injunction is not issued, which, for the reasons



1 discussed below, BofI has not done. BofI would also need to demonstrate more  
2 unauthorized disclosures would likely subject it to additional litigation. Admittedly,  
3 that may be a difficult or unattractive task for BofI—all of the present lawsuits the  
4 Court is aware of are either shareholder derivative suits or securities fraud class actions.  
5 BofI’s argument inherently assumes that Erhart is in possession of more information  
6 that will lead to more accusations that BofI has violated securities laws or that its  
7 officers have breached their fiduciary duties. Consequently, because additional  
8 lawsuits do not constitute irreparable harm and BofI has not demonstrated a  
9 likelihood of them being filed, the Court rejects this third argument.

10 In its final argument in its moving papers, BofI claims “the harm that Erhart is  
11 causing BofI’s business counterparties and customers” constitutes irreparable harm.  
12 (Mot. 20:14–15.) “The taking and dissemination of confidential Bank information,  
13 including potential customer information, already has caused and, unless enjoined,  
14 will continue to cause, severe harm to BofI’s goodwill and reputation.” (*Id.* 20:21–  
15 23.) “[I]ntangible injuries such as loss of goodwill and prospective customers can  
16 qualify as irreparable harm.” *Giftango, LLC*, 925 F. Supp. 2d at 1140 (citing  
17 *Stuhlberg Int’l Sales Co., Inc. v. John D. Brush and Co.*, 240 F.3d 832, 841 (9th Cir.  
18 2001)). But the plaintiff “must proffer evidence sufficient to establish a likelihood”  
19 of this type of injury. *See Herb Reed Enters., LLC v. Fla. Entm’t Mgmt., Inc.*, 736  
20 F.3d 1239, 1251 (9th Cir. 2013); *see also Giftango, LLC*, 925 F. Supp. 2d at 1140  
21 (declining to issue an injunction on this basis where the “plaintiff provide[d] no  
22 evidence that the claimed loss of customers or goodwill [was] real and imminent, not  
23 just speculative or potential”).

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1 To support this ground, BofI highlights that Erhart “published the confidential  
2 banking information of at least one bank customer in his publicly filed complaint.  
3 Other BofI customers most likely will be irreparably injured if their confidential  
4 information is similarly released by Erhart.” (Mot. 20:17–20.)<sup>6</sup> BofI admits, however,  
5 that it “does not have evidence that, except for the single individual whose name and  
6 account balance appear in Erhart’s complaint . . . [that] Erhart released any personal  
7 identifying information of its individual customers.” (*Id.* 1:22–24.)

8 Unlike BofI’s other arguments, the Court agrees that the publishing of  
9 customers’ nonpublic information could cause irreparable harm to BofI by causing a  
10 loss of goodwill and damaging its reputation. The Court assumes, for the sake of  
11 argument, that BofI’s reputation has suffered because Erhart published confidential  
12 customer information—not simply because BofI has been accused of whistleblower  
13 retaliation and other violations of the law in a publicly-filed complaint.

14 Even so, BofI must still establish a likelihood of it suffering irreparable harm  
15 in the future if the Court denies its request for preliminary relief. BofI has not done  
16 so. There is no evidence before the Court that Erhart is likely to disclose additional  
17 nonpublic information. BofI seeks to portray Erhart as an internal auditor gone  
18 rogue—a loose cannon waiting to fire another salvo of confidential information that  
19 will damage BofI—but the present facts do not support this characterization. Erhart  
20 agreed to a temporary restraining order, provided the requested declaration to BofI,  
21 submitted to a deposition, and returned the files in his possession to drastically  
22 minimize, if not eliminate, this possibility. In fact, another motion filed by BofI  
23 suggested Erhart may even have been too cooperative. That motion, which the Court  
24 denied, sought a determination that Erhart waived the attorney-client privilege by

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25  
26 <sup>6</sup> In his whistleblower retaliation complaint, Erhart alleges he discovered that the “largest consumer  
27 account at [BofI]” belongs to the brother of BofI’s CEO. (Compl. ¶ 45, Whistleblower Retaliation  
28 Action, ECF No. 1.) Erhart alleges he “could find no evidence of how [the CEO’s brother] had  
come legally into possession of the \$4 million wired into the account.” (*Id.*) He further alleges that,  
because the CEO was the signatory on the account, Erhart was concerned that the CEO “could be  
involved in tax evasion and/or money laundering.” (*Id.*)

1 turning over too much information when he provided various electronic devices and  
2 an export of his e-mail account to BofI’s computer analysts. (See ECF Nos. 33, 69.)

3 Nevertheless, in its Reply, BofI argues “there is evidence that Erhart has not  
4 fully complied with his obligation to deliver all BofI materials that he took (such that  
5 the declaration he provided under penalty of perjury and his deposition testimony  
6 may be false).” But this claim is the type of speculation that does not satisfy BofI’s  
7 burden. The Court also finds this claim is not justified based on the record before it.

8 BofI’s claim at oral argument that Erhart is in contact with anonymous  
9 investment bloggers who are tracking public court filings involving BofI is similarly  
10 speculative. (See Aurelius, *Recent BOFI Court Filing Confirms Existence of*  
11 *Undisclosed Subpoenas and Nonpublic Government Investigations* (Nov. 15, 2015),  
12 SeekingAlpha<sup>a</sup>, [http://seekingalpha.com/article/3652296-recent-bofi-court-filing-](http://seekingalpha.com/article/3652296-recent-bofi-court-filing-confirms-existence-undisclosed-subpoenas-nonpublic-government)  
13 [confirms-existence-undisclosed-subpoenas-nonpublic-government](http://seekingalpha.com/article/3652296-recent-bofi-court-filing-confirms-existence-undisclosed-subpoenas-nonpublic-government), Towill Decl. Ex.  
14 E, ECF No. 30-8.) To illustrate, several weeks after Erhart commenced the  
15 Whistleblower Retaliation Action, an anonymous investment blogger published an  
16 article incorporating Erhart’s allegations on *SeekingAlpha*<sup>a</sup>, a crowd-sourced  
17 investment research website. (*Id.*) BofI argues the author’s explicit use of Erhart’s  
18 allegations “suggests that [the author] may have been in contact with Erhart (or  
19 Erhart’s attorney) prior to the publication of his article.” (Towill Decl. ¶ 10, ECF No.  
20 30-3.) However, the Court has another theory: the author read Erhart’s publicly-filed  
21 complaint. There is no indication that the author obtained information beyond that  
22 already in publicly-filed pleadings. This type of speculation does not satisfy BofI’s  
23 burden of demonstrating a likelihood of irreparable harm in the absence of  
24 preliminary relief.

25 Last, at oral argument, BofI argued there is a “course of conduct” on the part  
26 of Erhart that makes it “very likely that such conduct could continue to cause harm  
27 in the future.” This theory may have some appeal if the evidence indicated that Erhart  
28 has progressively disclosed more and more of BofI’s confidential information. But,

1 at best, BofI has demonstrated Erhart repeatedly disclosed largely the same  
2 allegations of perceived wrongdoing to the OCC, members of his family, his  
3 girlfriend, and colleagues. These same allegations then appeared in his whistleblower  
4 retaliation complaint. The Court finds this course of conduct does not demonstrate a  
5 likelihood that, moving forward, Erhart will suddenly disclose other information to  
6 the public, such as a trove of personal-identifying information of BofI’s customers,  
7 if the Court does not issue an injunction.<sup>7</sup> Erhart also testified that he has returned  
8 the information belonging to BofI in his possession. Accordingly, BofI has not shown  
9 there is a likelihood that Erhart will disclose additional nonpublic information absent  
10 preliminary relief.

11 In sum, BofI has not demonstrated that irreparable harm is likely to occur if its  
12 request for preliminary relief is denied. That is not to say Erhart’s past conduct is  
13 excusable or did not constitute a breach of the Confidentiality Agreement. The Court  
14 reserves for another day whether the Confidentiality Agreement is unenforceable on  
15 public policy grounds or whether Erhart’s disclosures were protected by any  
16 privilege. In addition, although Erhart may now engage in discovery with BofI and  
17 possibly discover more confidential information to support his whistleblower  
18 retaliation allegations—or defend himself in this countersuit—BofI can produce this  
19 information subject to a protective order, such as the one already in place here. (*See*

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20  
21 <sup>7</sup> The Court disagrees with BofI’s claim during oral argument that Mr. Armstrong’s supplemental  
22 declaration shows Erhart improperly disseminated BofI’s information after he filed his  
23 whistleblower retaliation complaint. Only four paragraphs of the declaration discuss conduct that  
24 occurred after the complaint was filed. (*See* Armstrong Decl. ¶¶ 12–16, ECF No. 30-1.) These  
25 paragraphs show Erhart copied BofI files from his personal desktop computer onto a USB flash  
26 drive to return them to BofI—as opposed to surrendering the desktop computer itself—and later  
27 deleted BofI files on the desktop computer prior to surrendering it for analysis. (*Id.*) In his  
28 deposition, which occurred before BofI filed Mr. Armstrong’s supplemental declaration, Erhart  
explains that he copied the BofI files onto the USB flash drive so that he could return them, and he  
later deleted “the exact same information” from his computer because he believed he “was told in  
[the Court’s] order not to possess any bank information.” (Erhart Dep. 144:23–146:13; *see also*  
ECF No. 17 at 2:25–27 (requiring Erhart to “[d]elete all references to and/or summaries of BofI’s  
Confidential Information in his possession, custody, or control”). Even if the Court did not accept  
Erhart’s explanation, however, Mr. Armstrong’s declaration does not demonstrate Erhart  
disseminated BofI’s information to anyone other than BofI’s counsel’s forensic analysts.


1 ECF No. 21.) BofI can continue to proceed on its claims and seek damages and other  
2 appropriate relief. It simply has not met its burden of demonstrating it is entitled to  
3 an extraordinary remedy. *See Winter*, 555 U.S. at 22.

4  
5 **IV. CONCLUSION**

6 For the foregoing reasons, the Court **DENIES** BofI's amended motion for a  
7 preliminary injunction (ECF No. 18). Accordingly, the Court dissolves the temporary  
8 restraining order (ECF No. 10) and the supplemental temporary restraining order  
9 (ECF No. 17).

10 **IT IS SO ORDERED.**

11  
12 **DATED: September 7, 2016**

  
**Hon. Cynthia Bashant**  
**United States District Judge**