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

CHARLES MATTHEW ERHART,  
Plaintiff,

v.

BOFI HOLDING, INC.,  
Defendant.

Case No. 15-cv-02287-BAS-NLS  
*consolidated with*  
15-cv-02353-BAS-NLS

**ORDER GRANTING IN PART  
BOFI’S MOTION IN LIMINE  
NO. 3 TO EXCLUDE EVIDENCE  
OF PREDICATES OF ALLEGED  
WRONGDOING THAT THE  
COURT HAS ALREADY  
REJECTED (ECF No. 218)**

And Consolidated Case

Presently before the Court is Bofi Holding, Inc.’s Motion in Limine No. 3 to Exclude Evidence of Predicates of Alleged Wrongdoing that the Court Has Already Rejected. (ECF No. 218.) Erhart opposes. (ECF No. 223.) The Court heard argument on the motion. (ECF No. 230.) For the following reasons, the Court **GRANTS IN PART** Bofi’s Motion in Limine No. 3.

**I. BACKGROUND**

The Court and the parties are familiar with the story behind these consolidated cases awaiting trial. Erhart claims the Bank violated state and federal anti-retaliation statutes by retaliating against him for reporting conduct he believed to be wrongful

1 to his supervisor and the government. Erhart’s allegations cover a broad scope of  
2 conduct.

3 At summary judgment, the Court addressed whether some of Erhart’s  
4 allegations are not actionable. (Summ. J. Order, ECF No. 192.) For four categories  
5 of allegations, the Court concluded Erhart could not recover under either his federal  
6 or state whistleblower retaliation claims. These categories are Erhart’s allegations  
7 regarding altered financial statements, improper strategic plan approval,  
8 miscalculated allowance for loan and lease losses, and altered Bank Secrecy Act QC  
9 reports. (*Id.* 10–11; 22–48; 45 n.13; 49 & n.14; 54–57; 62–63, n.23.)

10 BofI now moves to exclude evidence related to these four categories. (ECF  
11 No. 218.) The Bank also seeks to exclude evidence concerning a fifth category—  
12 high deposit concentration risk. For that category, the Court concluded Erhart could  
13 not recover under his broader, state law whistleblower retaliation claim. (Summ. J.  
14 Order 59.) The Court did not address this fifth category in the context of Erhart’s  
15 federal claims because BofI’s motion failed to challenge whether this category could  
16 support those claims. (*Id.* 49 n.15.) In addition, BofI seeks to exclude the exhibits  
17 Erhart designated concerning these five categories of allegations: “Exhibits 91-98,  
18 206, 229, 230, 268-272, and 295.” (ECF No. 218.)

## 19 **II. LEGAL STANDARD**

20 A party may use a motion in limine to exclude inadmissible or excludable  
21 evidence before it is introduced at trial. *Luce v. United States*, 469 U.S. 38, 40 n.2  
22 (1984). Only relevant evidence is admissible. Fed. R. Evid. 402. Evidence is  
23 relevant if it has any tendency to make a fact more or less probable than it would be  
24 without the evidence, and the fact is of consequence in determining the action. *Id.*  
25 401(a)–(b).

26 Relevant evidence may be excluded if its probative value is substantially  
27 outweighed by, among other things, the danger of unfair prejudice or wasting  
28 time. Fed. R. Evid. 403. The Rule 403 balancing inquiry is made on a case-by-case

1 basis, requiring an examination of the surrounding facts, circumstances, and  
2 issues. *United States v. Lloyd*, 807 F.3d 1128, 1152 (9th Cir. 2015).

### 3 **III. ANALYSIS**

4 BofI argues the evidence related to Erhart’s rejected categories is wholly  
5 irrelevant to his claims. Moreover, the Bank contends this is a classic case for Rule  
6 403 exclusion: “even if Erhart could establish some minimal probative value of  
7 evidence relating to the rejected categories, that probative value would be  
8 substantially outweighed by the likelihood that it would result in unfair prejudice,  
9 confuse the issues, mislead the jury, cause undue delay, and waste time and judicial  
10 resources.” (ECF No. 218.) Erhart briefly responds that he plans to use this evidence  
11 not for the rejected predicates, “but rather to support other predicates of wrongdoing  
12 by BofI.” (ECF No. 223.) And if the Court is concerned “about how the evidence  
13 will be used, that can readily be addressed at trial, including [by] asking Plaintiff to  
14 proffer the reasons for using the evidence.” (*Id.*)

15 Tentatively excluding any evidence related to the four categories the Court  
16 rejected for Erhart’s state and federal anti-retaliation claims is appropriate. For the  
17 reasons explained in the Court’s Summary Judgment Order, this evidence cannot  
18 support a verdict in Erhart’s favor on those claims. (*See* Summ. J. Order 10–11; 22–  
19 48; 45 n.13; 49 & n.14; 54–57; 62–63, n.23.) Erhart fails to demonstrate why this  
20 evidence is relevant to his other claims or defenses. It follows that the evidence is  
21 not “of consequence in determining the action.” *See* Fed. R. Evid. 401(b); *see also*  
22 *Multimedia Pat. Tr. v. Apple Inc.*, No. 10-CV-2618-H (KSC), 2012 WL 12868264,  
23 at \*4 (S.D. Cal. Nov. 20, 2012) (granting motion in limine to preclude parties from  
24 “presenting evidence, argument, or opinions concerning claims, patents, or issues  
25 dismissed pursuant to summary judgment rulings by the Court”).

26 Moreover, even if this evidence has some minimal relevance to supporting the  
27 remainder of Erhart’s claims, the Court finds the evidence should be excluded under  
28 Rule 403. The evidence’s probative value is substantially outweighed by the danger

1 of confusing the issues, misleading the jury, and wasting time and judicial resources.  
2 Therefore, the Court excludes without prejudice any evidence concerning altered  
3 financial statements, improper strategic plan approval, miscalculated allowance for  
4 loan and lease losses, and altered Bank Secrecy Act QC reports. (*See* Summ. J. Order  
5 10 (listing categories).) *See United States v. Bensimon*, 172 F.3d 1121, 1127 (9th  
6 Cir. 1999) (noting testimony at trial “may bring facts to the district court’s attention  
7 that it did not anticipate at the time of its initial [motion in limine] ruling”). This  
8 ruling includes any exhibits underlying these allegations.

9 The Court turns to the final category of evidence targeted by the Bank’s  
10 motion—Erhart’s allegations concerning high deposit concentration risk. Motions in  
11 limine may not be used as a disguise for a motion for summary judgment. *Elliott v.*  
12 *Versa CIC, L.P.*, 349 F. Supp. 3d 1000, 1002 (S.D. Cal. 2018) (collecting cases);  
13 *accord Petty v. Metro Gov. of Nashville & Davidson Cnty.*, 687 F3d 710, 720–21  
14 (6th Cir. 2012); *Meyer Intell. Props. Ltd. v. Bodum, Inc.*, 690 F.3d 1354, 1377 (Fed.  
15 Cir. 2012). The Court did not dispose of Erhart’s deposit concentration risk  
16 allegations on summary judgment for all his claims. (Summ. J. Order 49 n.15.)  
17 Consequently, Boff’s motion in limine is a request for summary judgment in  
18 disguise, and the Court denies the motion to exclude this evidence.

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1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court **GRANTS IN PART** Boff’s Motion in  
3 Limine No. 3 to Exclude Evidence of Predicates of Alleged Wrongdoing that the  
4 Court Has Already Rejected. (ECF No. 218.) The Court grants the request to exclude  
5 any evidence, including the designated exhibits, regarding altered financial  
6 statements, improper strategic plan approval, miscalculated allowance for loan and  
7 lease losses, and altered Bank Secrecy Act QC reports. The Court denies the request  
8 to exclude any evidence, including the designated exhibits, regarding high deposit  
9 concentration risk.

10 **IT IS SO ORDERED.**

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12 **DATED: January 11, 2022**

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

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