No. _____

IN THE

Supreme Court of the United States

BOFI FEDERAL BANK

Applicant,

v.

CHARLES MATTHEW ERHART

Respondent.

Application for Extension of Time to File Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPLICATION TO THE HONORABLE JUSTICE ELENA KAGAN AS CIRCUIT JUSTICE

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CORPORATE DISCLOSURE STATEMENT

BofI Federal Bank, which has since rebranded as Axos Bank, is a wholly owned subsidiary of Axos Financial, Inc. ("Axos"), which is a publicly traded company (NYSE: AX). Axos has no parent company. BlackRock, Inc. and Vanguard Group, Inc., both publicly held companies, each own more than ten percent of Axos' stock.

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

1. Pursuant to Supreme Court Rules 13.5, 22, and 30, Applicant BofI Federal Bank respectfully requests a 59-day extension of time, up to and including July 25, 2025, to file a petition for a writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit, seeking review of that court's decision in *Erhart v. BofI Federal Bank*, 2025 U.S. App. LEXIS 2719, Case No. 23-3065 (9th Cir. Feb. 6, 2025), S.D. Cal. Case No. 3:15-cv-02287-BAS-NLS. A copy of the court's opinion is attached as Appendix A. Applicant timely sought rehearing on February 20, 2025. The Ninth Circuit denied the rehearing petition and issued an amended opinion on February 24, 2025. A copy of that order is attached as Appendix B. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1), and the time to file a petition for a writ of certiorari will otherwise expire on May 27, 2025. This Application for Extension of Time is timely because it has been filed on May 1, 2025, more than ten days prior to the date on which the time for filing the petition is to expire.

2. Applicant has good cause for an extension of time.

a. First, and most notably, Applicant's counsel of record, who has been Applicant's lead partner on this matter since its inception, lost her home and all her personal belongings in the wildfires that raged across Los Angeles County in January 2025, and she remains displaced. Her home was one of the 5,546 homes that were completely destroyed in what was named the Palisades fire.[1] As a result, she continues to deal with the arduous process of addressing the aftermath of the catastrophe on a daily basis, including locating housing and meeting on site with insurers and governmental entities on demand in order to meet deadlines.

b. Second, counsel for Applicant has a number of competing professional commitments over the coming months. For example, counsel of record is also lead trial counsel in a related case between Respondent Charles Matthew Erhart

[1] *See* Greene, Sean et al., *Mapping the damage from the Eaton and Palisades fires*, L.A. TIMES (Jan. 16, 2025), https://www.latimes.com/california/story/2025-01-16/mapping-los-angeles-damage-from-the-eaton-and-palisades-fires-altadena-pasadena.

and Applicant's Chief Executive Officer, which until recently was set to go to trial on April 28. While the trial in that matter has recently been continued for many of the same reasons described herein, several pre-trial deadlines remain in place, including the filing of motions in limine on May 13 and responses on May 22. Counsel of record also has several upcoming prior engagements and filings, including:

- Closing arguments in a case pending in the Delaware Court of Chancery scheduled for May 8;
- Motion to dismiss briefing in a case pending in the U.S. District Court for the District of Nevada due May 9;
- Motion to dismiss briefing in a case pending in the U.S. District Court for the Southern District of California due May 30; and
- Motion to dismiss briefing in a case pending in the U.S. District Court for the Central District of California due June 6.

c. This case presents important and nuanced questions of statutory interpretation regarding the whistleblower protection provision of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A, the burden-shifting framework set forth

in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b)(2)(B), and the meaning and impact of this Court's decision in *Murray v. UBS Securities, LLC*, 601 U.S. 23 (2024). The Ninth Circuit's opinion in this case is in direct conflict with *Murray*. In light of counsel for Applicant's personal tragedy and professional commitments described above, an extension of time will enable counsel to effectively and properly prepare and present a petition that facilitates this Court's efficient review of these important issues.

WHEREFORE, for the foregoing reasons, Applicant respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari for 59 days, up to and including July 25, 2025.

Dated: May 1, 2025

Respectfully submitted,

By 

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APPENDIX A

NOT FOR PUBLICATION

FILED

FEB 6 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES MATTHEW ERHART, Plaintiff - Appellee, v. BOFI FEDERAL BANK, Defendant - Appellant.	No. 23-3065 D.C. No. 3:15-cv-02287-BAS-NLS MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Cynthia A. Bashant, District Judge, Presiding

Argued and Submitted January 15, 2025
Pasadena, California

Before: GOULD, FRIEDLAND, and BENNETT, Circuit Judges.

BofI Federal Bank appeals the district court's denial of its renewed motion for judgment as a matter of law or for a new trial after a jury awarded Charles Matthew Erhart $1 million for his federal and state law claims of retaliation and $500,000 for his defamation claim. We review the denial of a renewed motion for judgment as a matter of law de novo, and we review for abuse of discretion the

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

denial of a motion for a new trial and remittitur. *See Bell v. Williams*, 108 F.4th 809, 818, 830 (9th Cir. 2024). We affirm.

1. "Judgment as a matter of law is proper only when 'the evidence permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict.'" *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 455 (9th Cir. 2018) (quoting *Josephs v. Pac. Bell*, 443 F.3d 1050, 1062 (9th Cir. 2006)). In reviewing BofI's motion, we must view all evidence in the light most favorable to Erhart, draw all reasonable inferences in Erhart's favor, and disregard all evidence favorable to BofI that the jury was not required to believe. *Bell*, 108 F.4th at 818.

BofI argues that it is entitled to judgment as a matter of law on its same-action affirmative defense. *See* 49 U.S.C. § 42121(b)(2)(B)(ii); *Murray v. UBS Sec., LLC*, 601 U.S. 23, 38 (2024) (describing the burden-shifting framework under the Sarbanes-Oxley Act of 2002 ("SOX") used to determine "whether the employer would have 'retain[ed] an otherwise identical employee' who had not engaged in the protected activity" (alteration in original) (quoting *Bostock v. Clayton County*, 590 U.S. 644, 660 (2020))).[1] We disagree. The jury reasonably

[1] Both parties agree that the same burden-shifting framework applies to Erhart's state law claims. *See Lawson v. PPG Architectural Finishes, Inc.*, 12 Cal. 5th 703, 715 (2022) (noting that section 1102.5 claims contain a "nearly identical burden-shifting framework" to SOX claims); *Grant-Burton v. Covenant Care, Inc.*, 122 Cal. Rptr. 2d 204, 219 (Ct. App. 2002) (outlining a similar burden-shifting framework for wrongful termination in violation of public policy claims).

concluded that BofI did not meet its burden. The jury heard evidence that after BofI learned of Erhart's protected activity, BofI departed from its usual policies in handling his medical leave. BofI argues that it would have fired any employee that failed to return to work, citing its written policies. But BofI did not present any evidence that it had enforced those policies in practice by terminating other employees who similarly failed to return to work after their medical leave ended. Given the evidence that BofI treated Erhart's medical leave dissimilarly from other employees, the jury was not required to credit BofI's assertion that it would have terminated Erhart for job abandonment even in the absence of his whistleblowing activity.

2. BofI also challenges the jury's damages award for Erhart's retaliation claims, arguing that Erhart failed to show any injury tied to his termination and that the jury's $1 million award was grossly excessive. We reject both arguments.

First, there was sufficient evidence for a reasonable jury to find that Erhart suffered emotional distress and reputational harm from BofI's retaliatory conduct. *See Bell*, 108 F.4th at 834 ("[T]estimony alone can support compensatory damages for emotional distress and pain and suffering."). Erhart testified that he experienced several physical symptoms that he "attribute[d] to [BofI's] conduct," including difficulty breathing and sleeping, and vomiting. Erhart's mother testified that before "he lost his job," Erhart "was just very happy-go-lucky" and "very

confident," but that after his termination, he "just is not the same" and "doesn't carry the same confidence." Erhart also testified generally about his reputational harm and perceived impacts on his career from BofI's conduct.

Whether the testimony at trial supports the jury's $1 million award presents a closer issue, but we conclude that the district court did not abuse its discretion in denying remittitur. "The jury's verdict must be upheld unless the amount is 'grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork.'" *Id.* at 830-31 (quoting *Harper v. City of Los Angeles*, 533 F.3d 1010, 1028 (9th Cir. 2008)).[2] In determining whether an award is grossly excessive, the "foremost priority" is the evidence presented at trial, though we may also consider awards in comparable cases. *Id.* at 832. Here, the evidence at trial—including Erhart's testimony of his physical symptoms and his mother's testimony of his changed personality—is sufficient to support the jury's $1 million award, and comparable cases reinforce that result. *See Passantino v.*

[2] Because the jury awarded damages for both state and federal claims, we also look to state law in considering the allowable damages. *See Gasperini v. Ctr. for Humans., Inc.*, 518 U.S. 415, 437 (1996) ("[W]hen [state] substantive law governs a claim for relief, [state] law and decisions guide the allowable damages."); *see also Mason & Dixon Intermodal, Inc. v. Lapmaster Int'l LLC*, 632 F.3d 1056, 1060 (9th Cir. 2011). California courts, like federal courts, entrust the jury "with vast discretion in determining the amount of damages to be awarded" and reverse only "where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice[.]" *Bertero v. Nat'l Gen. Corp.*, 13 Cal. 3d 43, 64 (1974) (quotation marks omitted).

Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 504, 513 (9th Cir. 2000) (affirming the jury's $1 million award for emotional distress resulting from retaliation where the plaintiff testified that "she experienced substantial anxiety," along with "rashes, stomach problems, and other symptoms"); *Briley v. City of W. Covina*, 281 Cal. Rptr. 3d 59, 79-81 (Ct. App. 2021) (remitting a jury's award for noneconomic damages from retaliatory termination to $1 million where the plaintiff testified that his termination was "pretty devastating" and that he suffered "sleep-related issues").

3. BofI also argues that it is entitled to judgment as a matter of law or a new trial on Erhart's defamation claim because he did not present any evidence of harm from the defamatory statements about his competence. BofI forfeited this argument by failing to raise it in its Rule 50(a) motion. *See EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009) ("[A] party cannot properly 'raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its preverdict Rule 50(a) motion.'" (quoting *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir.2003))). And even if the argument were preserved, there was substantial evidence supporting the jury's finding that Erhart suffered reputational harm from BofI's CEO Gregory Garrabrants's statements that Erhart was incompetent.

4. Lastly, the district court did not abuse its discretion in admitting evidence

of BofI's lawsuits against Erhart's mother and former girlfriend. That evidence was relevant to BofI's retaliatory intent because the jury could infer from BofI's lawsuits that BofI harbored animus toward Erhart. *See Coszalter v. City of Salem*, 320 F.3d 968, 978 (9th Cir. 2003) (explaining that "[w]hether an adverse employment action is intended to be retaliatory is a question of fact that must be decided in the light of the . . . surrounding circumstances" and noting that "[t]here is no set time beyond which acts cannot support an inference of retaliation").

The evidence of Erhart's emotional distress caused by those lawsuits, however, was not relevant. Nevertheless, "it is more probable than not that the jury would have reached the same verdict even if the evidence had not been admitted." *Jules Jordan Video, Inc. v. 144942 Canada Inc.*, 617 F.3d 1146, 1159 (9th Cir. 2010) (alteration omitted) (quoting *Obrey v. Johnson*, 400 F.3d 691, 701 (9th Cir 2005)). The jury was instructed several times that it could not award Erhart damages for any emotional distress caused by BofI's separate lawsuits. *See CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 841 (2009) (per curiam) ("[J]uries are presumed to follow the court's instructions."). BofI argues that the jury must have disregarded its instructions because the only evidence of Erhart's injury for his retaliation claims was his distress from the lawsuits against his mother and former girlfriend. But there was sufficient evidence to support the jury's award without considering the improper evidence.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 24 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CHARLES MATTHEW ERHART,

Plaintiff - Appellee,

v.

BOFI FEDERAL BANK,

Defendant - Appellant.

No. 23-3065

D.C. No.
3:15-cv-02287-BAS-NLS
Southern District of California,
San Diego

ORDER

Before: GOULD, FRIEDLAND, and BENNETT, Circuit Judges.

The first sentence ending with "burden" on page 3, paragraph 1 of the Memorandum Disposition filed on February 6, 2025 is amended to add a footnote that reads: "To the extent that BofI argues in its petition for rehearing that *Murray* changed the burden-shifting framework after the district court denied BofI's renewed motion for judgment as a matter of law or for a new trial, that argument is forfeited. BofI never argued prior to its petition for rehearing that *Murray* required a different instruction to the jury on BofI's same-action affirmative defense. Because BofI forfeited any argument that the jury was improperly instructed, we do not consider whether a different burden-shifting standard should have applied. And under the instructions the jury did receive, there was sufficient evidence to support the jury's rejection of BofI's same-action affirmative defense."

With that amendment, the panel unanimously votes to deny the petition for panel rehearing.

The petition for rehearing is **DENIED**. No further petitions may be filed.

CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I, Polly Towill, a member of the Supreme Court Bar, hereby certify that one true and correct copy of the attached Application for Extension of Time to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was served on May 1, 2025, via electronic mail and by Federal Express mail on:

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Dated: May 1, 2025

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