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16 UNITED STATES DISTRICT COURT  
 17 SOUTHERN DISTRICT OF CALIFORNIA

18 IN RE:  
 19 BofI HOLDING, INC.  
 20 SECURITIES LITIGATION.

Case No. 3:15-cv-02324-GPC-KSC

**NOTICE OF MOTION AND MOTION  
 FOR ATTORNEYS' FEES AND  
 EXPENSES, AND CLASS  
 REPRESENTATIVE SERVICE  
 AWARD**

Hon. Gonzalo Paul Curiel  
 Courtroom 2D (2nd Floor–Annex)

Date: October 7, 2022  
 Time: 1:30 p.m.

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 NOTICE IS HEREBY GIVEN that on October 7, 2022, at 1:30 p.m. in  
3 Courtroom 2D of the above-entitled Court, located at 221 West Broadway, San  
4 Diego, California, 92101, Lead Plaintiff and Class Representative Houston  
5 Municipal Employees Pension System will move this Court, pursuant to Federal  
6 Rule of Civil Procedure 23 and 15 U.S.C. § 78u-4, for an Order (1) awarding Class  
7 Counsel \$3,525,000 in reasonable attorney’s fees, (2) awarding Class Counsel  
8 \$1,258,225.85 for reimbursement of reasonably incurred litigation expenses, and  
9 (3) awarding the Lead Plaintiff and Class Representative a reasonable service award  
10 of \$15,000.

11 This Motion is supported by the accompanying memorandum of points and  
12 authorities; the accompanying Declaration of Daniel P. Chiplock in Support of  
13 Motion for Attorneys’ Fees and Expenses, and Class Representative Service  
14 Award; the accompanying Declaration of Erin Perales in Support of Service Award  
15 to Houston Municipal Employees Pension System (attached as Exhibit 5 to the  
16 Chiplock Declaration); the Declaration of Katherine Lubin Benson in Support of  
17 Motion for Preliminary Approval of Class Action Settlement (ECF No. 370-2); and  
18 any other matters properly before the Court.

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Dated: July 25, 2022

LIEFF CABRASER HEIMANN &  
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By: s/ Daniel P. Chiplock  
Daniel P. Chiplock

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 16 *Employees Pension System and Class Counsel*

17 UNITED STATES DISTRICT COURT  
 18 SOUTHERN DISTRICT OF CALIFORNIA

19 IN RE:  
 20 BofI HOLDING, INC. SECURITIES  
 21 LITIGATION.

Case No. 3:15-cv-02324-GPC-KSC

**PLAINTIFF’S MEMORANDUM OF  
 POINTS AND AUTHORITIES IN  
 SUPPORT OF MOTION FOR  
 ATTORNEYS’ FEES AND  
 EXPENSES, AND CLASS  
 REPRESENTATIVE SERVICE  
 AWARD**

Hon. Gonzalo Paul Curiel  
 Courtroom 2D (2nd Floor–Annex)

Date: October 7, 2022  
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## INTRODUCTION

1  
2 After over six years of vigorous litigation, Court-appointed Lead Plaintiff  
3 and Class Representative Houston Municipal Employees Pension System  
4 (“Plaintiff” or “HMEPS”), through its counsel, Lief Cabraser Heimann &  
5 Bernstein LLP (“Class Counsel” or “Lief Cabraser”), reached a proposed  
6 Settlement<sup>1</sup> that will create a \$14.1 million non-reversionary cash fund (the  
7 “Settlement Fund”) to compensate Class members. In recognition of their  
8 extensive work to achieve this outstanding result, Plaintiff and Class Counsel  
9 respectfully move the Court to award Class Counsel attorneys’ fees in the amount  
10 of 25 percent of the Settlement Fund (\$3,525,000) and reimbursement of  
11 \$1,258,225.85 in litigation expenses, and to award HMEPS a service award of  
12 \$15,000 for time it spent prosecuting this action on behalf of the Class. These  
13 amounts are well-supported by the result obtained in this action and controlling  
14 case law.

15 Class Counsel’s request for 25 percent of the Settlement Fund, equivalent to  
16 the Ninth Circuit’s “benchmark” rate, is presumptively reasonable. *Fischel v.*  
17 *Equitable Life Assur. Soc’y of U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002). The  
18 request also satisfies the other factors considered by courts in this Circuit assessing  
19 fee requests. The Class’s recovery is outstanding, representing a larger share of  
20 total estimated damages than in similar securities class action settlements. The  
21 litigation lasted six years and involved extensive efforts from Class Counsel, among  
22 them serial pleadings challenges, an appeal to the Ninth Circuit and petition for writ  
23 of certiorari to the Supreme Court, class certification, and more than a year of  
24 intensive fact discovery with numerous contested discovery disputes, all of which  
25 Class Counsel handled without compensation. The requested fee is further  
26 supported by a lodestar cross-check: Class Counsel spent 26,755.2 hours litigating

27 <sup>1</sup> Unless otherwise indicated, capitalized terms herein have the same meanings as  
28 defined in the Stipulation and Agreement of Settlement, ECF No. 370-3 (the  
“Settlement”).

1 this matter, resulting in a total lodestar of \$14,073,537.50, with a negative (or  
 2 fractional) multiplier of 0.25. The requested expense reimbursement of  
 3 \$1,258,225.85 is also entirely reasonable for a case actively litigated for over six  
 4 years.

5 Plaintiff requests a \$15,000 service award to reimburse it for time it spent  
 6 prosecuting this case, and for achieving a significant recovery for the Class.

## 7 ARGUMENT

### 8 **I. The Requested Attorneys' Fees Are Reasonable and Appropriate.**

9 Under both the Federal Rules of Civil Procedure and the Private Securities  
 10 Litigation Reform Act ("PSLRA"), courts may award reasonable attorneys' fees to  
 11 class counsel. Fed. R. Civ. P. 23(h); 15 U.S.C. § 78u-4(a)(6); *see also Boeing Co.*  
 12 *v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[A] litigant or a lawyer who recovers a  
 13 common fund for the benefit of persons other than himself or his client is entitled to  
 14 a reasonable attorney's fee from the fund as a whole."). "Because the benefit to the  
 15 class is easily quantified in common-fund settlements," courts may "award  
 16 attorneys a percentage of the common fund in lieu of the often more time-  
 17 consuming task of calculating the lodestar." *In re Bluetooth Headset Prods. Liab.*  
 18 *Litig.*, 654 F.3d 935, 942 (9th Cir. 2011). Under this percentage-of-the-fund  
 19 approach, the Ninth Circuit instructs that "[t]wenty-five percent is the 'benchmark'  
 20 that district courts should award in common fund cases." *In re Pac. Enters. Sec.*  
 21 *Litig.*, 47 F.3d 373, 379 (9th Cir. 1995); *accord Bluetooth*, 654 F.3d at 942.

22 Here, Class Counsel requests a benchmark fee award—*i.e.*, \$3,525,000, or 25  
 23 percent of the \$14.1 million Settlement Fund—"which is prima facie support for  
 24 the reasonableness of the fees requested." *Pataky v. Brigantine, Inc.*, 2019 WL  
 25 183583, at \*6 (S.D. Cal. Jan. 14, 2019) (Curiel, J.). The reasonableness of the  
 26 requested fees is further supported by the circumstances of this litigation, and  
 27 confirmed by a lodestar cross-check.

1           **A. The Requested Benchmark Fee Award Is Eminently Reasonable in**  
 2           **Light of the Circumstances.**

3           The Ninth Circuit instructs that the 25 percent benchmark rate is a “starting  
 4 point for analysis,” and may be adjusted upward or downward based on: (1) the  
 5 results achieved; (2) the effort, experience, and skill of counsel; (3) whether and to  
 6 what extent the case was risky for counsel; (4) the contingent nature of the fee and  
 7 the burden counsel experienced while litigating the case; and (5) awards made in  
 8 similar cases. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048–50 (9th Cir.  
 9 2002); *see also Khoja v. Orexigen Therapeutics, Inc.*, 2021 WL 5632673, at \*8  
 10 (S.D. Cal. Nov. 30, 2021); *Beaver v. Tarsadia Hotels*, 2017 WL 4310707, at \*10  
 11 (S.D. Cal. Sept. 28, 2017) (Curiel, J.). Each of these additional factors strongly  
 12 supports Class Counsel’s requested fee.

13                   **1. Class Counsel Achieved an Outstanding Result.**

14           The first and “most important factor” in evaluating a request for attorneys’  
 15 fees is the “overall result and benefit to the class from the litigation.” *Stemple v.*  
 16 *QC Holdings, Inc.*, 2016 WL 11783383, at \*3 (S.D. Cal. Nov. 7, 2016) (citing *In re*  
 17 *Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008)). The \$14.1  
 18 million Settlement Fund provides substantial relief to the Class after more than six  
 19 years of hard-fought litigation. This recovery represents between 8.9% and 10.4%  
 20 of the total estimated damages of \$135.3 to \$158.5 million. *See* Decl. of Steven P.  
 21 Feinstein (ECF No. 370-4) ¶¶ 29, 33.<sup>2</sup> As the Court recognized in preliminarily  
 22 approving the settlement, this recovery is “well above the median percentage of the  
 23 recovery level for investor losses in securities class action settlements” of 4.9% for  
 24 cases with estimated damages of \$75 to 149 million, and 4.0% for cases with  
 25 estimated damages of \$150 to 249 million.<sup>3</sup> ECF No. 378 at 11; *see also Vataj v.*

26                   <sup>2</sup> These estimates assume between 4.7 million and 5.9 million damaged shares, and  
 27 up to \$18.7 million in total damages to BofI option holders. Feinstein Decl. (ECF  
 28 No. 370-4) ¶¶ 29, 33.

<sup>3</sup> Laarni T. Bulan & Laura E. Simmons, CORNERSTONE RSCH., *Securities Class*  
*Footnote continued on next page*  
 MEMO. OF POINTS & AUTHORITIES ISO MOT. FOR  
 FEES AND EXPENSES, AND SERVICE AWARD  
 CASE NO. 3:15-CV-02324-GPC-KSC

1 *Johnson*, 2021 WL 1550478, at \*9 (N.D. Cal. Apr. 20, 2021) (2% of damages was  
 2 “consistent with the typical recovery in securities class action settlements”);  
 3 *Command Fin. Planning, Inc.*, 2009 WL 839841, at \*5 (S.D. Cal. Mar. 30, 2009)  
 4 (same, for recovery representing “approximately 7% of the estimated damages”).  
 5 Accordingly, this recovery “weighs in favor of an attorneys’ fees award of twenty-  
 6 five percent.” *Brown v. China Integrated Energy Inc.*, 2016 WL 11757878, at \*11  
 7 (C.D. Cal. July 22, 2016); *see also Mauss v. NuVasive, Inc.*, 2018 WL 6421623, at  
 8 \*6 (S.D. Cal. Dec. 6, 2018) (above-median securities class action recovery  
 9 supported “upward adjustment from the 25 percent benchmark to a fee of 30  
 10 percent of the common fund”). The per-share recovery is also significant:  
 11 approximately \$2.84 per affected share of BofI Common Stock, and \$27.14 per  
 12 affected contract of BofI Call Options and BofI Put Options (or \$0.27 per affected  
 13 share). ECF No. 379-1 (Amended Notice) ¶ 3.<sup>4</sup> This outstanding result supports  
 14 Class Counsel’s fee request.

15 **2. Class Counsel Vigorously Litigated This Case Using Its**  
 16 **Considerable Skill and Experience.**

17 The “skill required to prosecute and manage this litigation, as well as [Class]  
 18 Counsel’s overall performance” also support the requested fee. *Brown*, 2016 WL  
 19 11757878, at \*11. Complex securities class actions, in particular, “require unique  
 20 legal skills and abilities.” *Id.* (alteration adopted). For over six years, Plaintiff and  
 21 Class Counsel have expended “an immense amount of effort prosecuting this case”

22 *Footnote continued from previous page*  
 23 *Action Settlements—2021 Review and Analysis 6* (2022),  
 24 [https://www.cornerstone.com/wp-content/uploads/2022/03/Securities-Class-Action-](https://www.cornerstone.com/wp-content/uploads/2022/03/Securities-Class-Action-Settlements-2021-Review-and-Analysis.pdf)  
 25 [Settlements-2021-Review-and-Analysis.pdf](https://www.cornerstone.com/wp-content/uploads/2022/03/Securities-Class-Action-Settlements-2021-Review-and-Analysis.pdf) (the “Cornerstone Report”). The  
 26 Cornerstone Report’s calculation of these median recovery rates compares  
 settlement amounts to so-called “simplified tiered damages,” which “uses  
 simplifying assumptions to estimate per-share damages and trading behavior” and  
 “is not intended to represent actual economic losses borne by shareholders.” *Id.*  
 at 5.

27 <sup>4</sup> These figures are based on Plaintiff’s damages expert’s estimates and do not  
 28 account for Court-approved deductions for Class Counsel’s fees and expenses,  
 HMEPS’s service award, or payments to the Claims Administrator. ECF No. 370-4  
 (Decl. of Steven P. Feinstein) ¶¶ 29, 33.

1 ECF No. 380 at 3:13–14, displaying considerable skill and experience in the face of  
2 numerous challenges. Indeed, this Court has already recognized Class Counsel’s  
3 expertise and work in the case—in February 2016, when it appointed Lieff Cabraser  
4 as Lead Counsel (ECF No. 23 at 5); in August 2021, when it appointed Lieff  
5 Cabraser as Class Counsel (ECF No. 247 at 7); and in June 2022, when it  
6 preliminarily approved the Settlement (ECF No. 378 at 9). *See also* ECF No. 380  
7 at 12:1–5 (recognizing Class Counsel as among “the top lawyers in this field of  
8 securities class action[s]”). Class Counsel’s expertise and vigorous pursuit of the  
9 action was on display during each stage of this case.

10 ***Fact Investigation, Pleadings Challenges & Appeal.*** Following  
11 appointment of HMEPS as Lead Plaintiff, Class Counsel conducted an extensive  
12 pre-filing investigation of the relevant facts, which included interviews with  
13 numerous former Bank employees whose personal accounts buttressed many of  
14 Plaintiff’s core factual allegations. That investigation culminated in a 142-page  
15 Consolidated Amended Complaint (ECF No. 26), filed on April 11, 2016. Decl. of  
16 Katherine L. Benson (ECF No. 370-2) (“Benson Decl.”) ¶ 5.

17 Over the course of four separate rounds of highly contested pleadings  
18 challenges spanning two years, Class Counsel zealously fought to address several  
19 complex issues of securities law. Class Counsel briefed and largely overcame two  
20 motions to dismiss Plaintiff’s claims for failure to plead falsity and scienter.  
21 *See* ECF Nos. 64, 113. Thereafter, Class Counsel vigorously opposed two motions  
22 challenging whether Plaintiff sufficiently alleged loss causation. *See* ECF Nos.  
23 134, 156. After the Court dismissed this action, Class Counsel succeeded before  
24 the Ninth Circuit, which reversed in part this Court’s order. *In re BofI Holding,*  
25 *Inc. Sec. Litig.*, 977 F.3d 781 (9th Cir. 2020). And after Defendants’ petition for  
26 rehearing en banc was denied, *In re BofI Holding, Inc. Sec. Litig.*, No. 18-55415  
27 (9th Cir. Nov. 16, 2020), ECF No. 43, Class Counsel, with the assistance of  
28 additional counsel, prevailed in opposing a petition for writ of certiorari to the U.S.



1 Supreme Court, *BofI Holding, Inc. v. Houston Mun. Emps. Pension Sys.*, 142 S. Ct.  
2 71 (2021).<sup>5</sup>

3 **Discovery.** Discovery in the case was voluminous and hard-fought. Class  
4 Counsel sought, reviewed, and analyzed over 90,000 documents totaling over  
5 650,000 pages to establish the case theory for trial and prepare for depositions.  
6 Benson Decl. ¶¶ 9–11, 14–15. Class Counsel deposed three key witnesses,  
7 defended depositions of two HMEPS witnesses as well as Plaintiff’s damages  
8 expert, and participated in three other depositions. *See id.* ¶ 16.

9 Class Counsel demonstrated their “experience[] and resolve” throughout the  
10 lengthy and vigorous discovery process. *See Moyle v. Liberty Mut. Ret. Benefit*  
11 *Plan*, 2018 WL 1141499, at \*6 (S.D. Cal. Mar. 2, 2018) (Curiel, J.). As the Court  
12 aptly observed at the preliminary approval hearing, “the discovery that has been  
13 conducted . . . is considerable,” and “no one can dispute that this case has been  
14 vigorously litigated.” ECF No. 380 at 3:19–25. In total, the parties raised at least  
15 *seventy-seven* distinct discovery disputes for judicial determination (including  
16 several disputes that required further relief from this Court), which affected the  
17 scope of discovery as a whole, and nearly every facet of BofI’s business during the  
18 relevant time period for discovery. *See* Benson Decl. ¶¶ 17–25. Disputes  
19 concerned, *inter alia*, the relevant time period for discovery; whether information  
20 relating to the Bank’s underwriting standards and credit quality was discoverable  
21 and if so, the scope of that discovery; and whether testimony from the Erhart Action  
22 was discoverable. *See, e.g.*, ECF Nos. 182, 183, 196. Class Counsel prevailed in  
23 each of those disputes, including several that required appeal to this Court for  
24 resolution following Judge Crawford’s orders. *See e.g.*, ECF Nos. 183, 214, 343,  
25 344, 354. Questions of privilege, in particular the claimed bank examination  
26 privilege, were also hotly contested. ECF Nos. 250, 292, 361.

27 <sup>5</sup> For the Supreme Court petition, Class Counsel retained the services of a separate  
28 law firm with Supreme Court experience, and advanced that firm’s fees. Those fees  
are included in Class Counsel’s request for expenses, discussed *infra*.



1           ***Class Certification.*** Plaintiff also successfully certified a Class of investors.  
2 In doing so, Class Counsel retained a damages expert to prepare an expert report  
3 (and advanced that expert’s fee), defended the expert at a deposition, and briefed  
4 the issue, including responding to Defendants’ argument that the predominance  
5 requirement was not met under *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). *See*  
6 ECF No. 211 (Defendants’ opposition); ECF No. 247 (Order certifying Class);  
7 Benson Decl. ¶¶ 26–27.

8           ***Mediation and Settlement.*** As a result of Class Counsel’s efforts, Plaintiff  
9 was well-informed of the strengths and weaknesses of its claims as it considered  
10 settlement. The parties worked with a third-party neutral, the Honorable Daniel  
11 Weinstein (Ret.) of JAMS, to explore potential resolution of this action. Benson  
12 Decl. ¶ 28. After preparing and submitting a mediation brief, participating in a  
13 mediation session on January 13, 2022 (alongside representatives from HMEPS),  
14 and engaging in continued communications with Defendants, Class Counsel  
15 ultimately helped facilitate a resolution of this action, and then spent several weeks  
16 negotiating the terms of the Settlement with defense counsel. *See id.* ¶¶ 28–33.

17           ***Preliminary Approval.*** In support of preliminary approval of the Settlement,  
18 Class Counsel worked with the Claims Administrator to prepare a proposed notice  
19 of Settlement to the Class and documentation for submission of Class member  
20 claims, and retained an expert to provide an estimate of total damages in a  
21 declaration so that the Court had additional information with which to evaluate the  
22 Settlement. Class Counsel submitted these materials, along with a detailed  
23 schedule for final approval and claims administration, to the Court along with  
24 preliminary approval briefing. *See* ECF No. 370.

25           The successful resolution of this case—resulting in a \$14.1 million common  
26 fund for settlement claims, fees, and expenses—would not have been possible  
27 without the effort, experience, and skill of Class Counsel. The fact that Class  
28 Counsel was able to navigate around these many hurdles and arrive at a substantial

1 recovery for the Class further supports the fee request. *See Khoja*, 2021 WL  
2 5632673, at \*9.

3 **3. Class Counsel Faced Serious Substantive and Procedural**  
4 **Risks Throughout This Litigation.**

5 Class Counsel faced significant and complex risks in this litigation. *In re*  
6 *Pac. Enters. Sec. Litig.*, 47 F.3d at 379; *see also Brown*, 2016 WL 11757878, at \*11  
7 (“The risk that further litigation might result in no recovery is a ‘significant  
8 factor.’”). The risk of litigation is particularly relevant in securities class actions,  
9 which “are often long, hard-fought, complicated, and extremely difficult to win.”  
10 *In re Extreme Networks, Inc. Sec. Litig.*, 2019 WL 3290770, at \*8 (N.D. Cal. July  
11 22, 2019). Indeed, there are “inherent uncertainties of trying securities fraud cases  
12 and the demanding pleading standards of the PSLRA.” *Hefler v. Wells Fargo &*  
13 *Co.*, 2018 WL 6619983, at \*13 (N.D. Cal. Dec. 18, 2018).

14 “From the outset, Class Counsel litigated this case in the face of  
15 extraordinary risk of non-payment by taking the case on a pure contingency basis  
16 and risked receiving zero compensation for their years of work and out-of-pocket  
17 costs.” *Beaver*, 2017 WL 4310707, at \*10. At the pleadings stage, Class Counsel  
18 was required to plead facts sufficient to support key elements of Plaintiff’s  
19 securities fraud claims. This included conducting an extensive pre-filing  
20 investigation to ensure Plaintiff could allege sufficient facts to show Defendants  
21 knowingly misled investors, and that investors were harmed upon learning the  
22 truth. The risk of no recovery almost materialized before any discovery could be  
23 taken, after the case was dismissed and required appellate review. Class Counsel  
24 also confronted Defendants’ resistance to discovery, and fought extensively to  
25 ensure Plaintiff had the documents, testimony, and other information necessary to  
26 prove its claims at trial. Years into the case, Class Counsel continued to devote  
27 significant resources to its investigation meant to identify key witnesses, despite the  
28 ongoing risk of non-recovery. Class Counsel also certified a Class of investors—an

1 important procedural milestone that many securities class cases never achieve—in  
 2 the face of Defendants’ novel legal arguments. That Class Counsel’s efforts  
 3 prevailed in the face of these challenges and risks—ensuring significant recovery  
 4 for the Class after six years of litigation—supports the requested fee.

5 Indeed, the risk Class Counsel assumed in taking the case remained  
 6 “substantial” (ECF No. 378 at 13) for the remainder of the case, as there were  
 7 several “storm clouds on the horizon” (ECF No. 248 at 3:8–9) (in the words of this  
 8 Court) at summary judgment and trial. Plaintiff would have confronted  
 9 Defendants’ renewed challenges to crucial elements of the securities fraud claim,  
 10 including whether statements relating to underwriting standards and credit quality  
 11 were actionable (ECF No. 170 at 5:18–6:21, 8:4–15), whether Plaintiff could prove  
 12 loss causation at trial (ECF No. 248 at 3:8–18), and whether and to what extent  
 13 Plaintiff could prove class-wide damages (ECF No. 180 at 62). The risk that Class  
 14 Counsel might not recover anything for the Class—and therefore not be paid for its  
 15 many years of work—would have continued at trial. The key elements of falsity  
 16 and scienter would have to be proven in large part through witness testimony  
 17 (including confidential witnesses). As the Court noted at preliminary approval, this  
 18 task would be complicated by the fact that witnesses would be asked to testify  
 19 about events that occurred seven to eight years ago. ECF No. 380 at 4:2–9  
 20 (discussing the “prospect or possibility that witnesses’[] memories can dim”).

21 The uncertainties inherent in this complex securities fraud class action, and  
 22 the fact that Class Counsel pursued this challenging case for years without any  
 23 payment, support awarding Class Counsel its requested fee.

24 **4. Class Counsel Devoted More Than \$14 Million in Lodestar**  
 25 **on a Contingency Basis.**

26 Loeff Cabraser expended 26,755.2 hours of work (totaling \$14,073,537.50 in  
 27 lodestar) since 2015, entirely on contingency. *See* Decl. of Daniel P. Chiplock  
 28 (“Chiplock Decl.”) ¶¶ 12–14, Exs. 1–2; *Moyle*, 2018 WL 1141499, at \*10 (“It is

1 well-established that attorneys who take on the risk of a contingency case should be  
 2 compensated for the risk they assume.”); *Destefano v. Zynga, Inc.*, 2016 WL  
 3 537946, at \*18 (N.D. Cal. Feb. 11, 2016) (“[W]hen counsel takes on a contingency  
 4 fee case and the litigation is protracted, the risk of non-payment after years of  
 5 litigation justifies a significant fee award.”). By litigating the case for six years,  
 6 Class Counsel passed up opportunities to work on other cases in order to devote the  
 7 appropriate time and resources needed to handle this matter. *See Vizcaino*, 290  
 8 F.3d at 1050; *In re Heritage Bond Litig.*, 2005 WL 1594403, at \*21 (C.D. Cal. June  
 9 10, 2005). Accordingly, the “significant financial burden and the amount of time”  
 10 devoted to this action warrant approval of the benchmark fee request. *Brown*, 2016  
 11 WL 11757878, at \*11.

12 **5. Class Counsel’s Benchmark Fee Request Is Entirely**  
 13 **Consistent with Awards Made in Similar Cases.**

14 Finally, Class Counsel’s benchmark fee request of 25% of the Settlement  
 15 Fund is firmly in line with awards in similar complex and class action litigation.  
 16 *See Khoja*, 2021 WL 5632673, at \*9 (“[A]ttorneys’ fee awards from settlements  
 17 involving a common fund . . . frequently exceed the 25 percent benchmark”);  
 18 *Pataky*, 2019 WL 183583, at \*6–7 (Curiel, J.) (adopting benchmark rate as  
 19 presumptively reasonable in complex class action). Courts in this Circuit routinely  
 20 award attorneys’ fees at the 25 percent benchmark rate in securities fraud class  
 21 actions. *See, e.g., Vataj*, 2021 WL 5161927, at \*10; *Wong v. Arlo Techs., Inc.*,  
 22 2021 WL 1531171, at \*11 (N.D. Cal. Apr. 19, 2021); *In re Illumina, Inc. Sec.*  
 23 *Litig.*, 2021 WL 1017295, at \*6–8 (S.D. Cal. Mar. 17, 2021); *Vancouver Alumni*  
 24 *Asset Holdings Inc. v. Daimler AG*, 2020 WL 10758101, at \*1–2 (C.D. Cal. Dec.  
 25 22, 2020); *In re Regulus Therapeutics Inc. Sec. Litig.*, 2020 WL 6381898, at \*7  
 26 (S.D. Cal. Oct. 30, 2020); *Destefano*, 2016 WL 537946, at \*16; *In re Wireless*  
 27 *Facilities, Inc. Sec. Litig.*, 2009 WL 10740561, at \*13 (S.D. Cal. Jan. 13, 2009); *In*  
 28 *re Daou Sys., Inc., Sec. Litig.*, 2008 WL 2899726, at \*1–2 (S.D. Cal. July 24,

1 2008).<sup>6</sup> Plaintiff’s request is also consistent with a recent study from NERA  
 2 Economic Consulting, which found that the median attorneys’ fees award in  
 3 securities cases with a settlement value of \$10 to 25 million was 27.5%—above the  
 4 benchmark rate.<sup>7</sup>

5 **B. A Lodestar Cross-Check Confirms the Reasonableness of Class**  
 6 **Counsel’s Fee Request.**

7 A lodestar cross-check confirms Class Counsel’s request for \$3,525,000 is  
 8 more than reasonable. *See Vizcaino*, 290 F.3d at 1050 n.5 (courts can apply the  
 9 lodestar method as “a cross-check on the reasonableness of a percentage figure.”).  
 10 In examining Class Counsel’s lodestar, the Court “need not exhaustively catalogue  
 11 and review counsel’s hours, but can instead focus on the general question of  
 12 whether the fee award appropriately reflects the degree of time and effort expended  
 13 by the attorneys.” *Moyle*, 2018 WL 1141499, at \*11 (internal quotation marks  
 14 omitted). Here, Class Counsel’s lodestar of \$14,073,537.50 results in a negative (or  
 15 fractional) lodestar multiplier of 0.25—well below “the Ninth Circuit’s  
 16 presumptively acceptable range of 1.0–4.0.” *Dyer v. Wells Fargo Bank, N.A.*, 303  
 17 F.R.D. 326, 334 (N.D. Cal. 2014) (citing *Vizcaino*, 290 F.3d at 1051 & n.6; *see also*  
 18 *Mauss*, 2018 WL 6421623, at \*6 n.7 (negative multiplier of 0.27 “is well below the  
 19 range of normal”).

20 “The lodestar calculation begins with the multiplication of the number of  
 21 hours reasonably expended by a reasonable hourly rate.” *Hanlon v. Chrysler Corp.*,  
 22 150 F.3d 1011, 1029 (9th Cir. 1998); *accord Moyle*, 2018 WL 1141499, at \*11.

23 \_\_\_\_\_  
 24 <sup>6</sup> Indeed, even larger percentage fee awards are routinely granted. *See, e.g., In re*  
 25 *Pac. Enters. Sec. Litig.*, 47 F.3d at 379 (affirming 33 $\frac{1}{3}$ -percent fee award); *In re*  
 26 *Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (affirming 33 $\frac{1}{3}$ -  
 percent fee award); *Kendall v. Odonate Therapeutics, Inc.*, 2022 WL 1997530, at  
 \*6–7 (S.D. Cal. June 6, 2022) (33 $\frac{1}{3}$  percent fee award).

27 <sup>7</sup> Janeen McIntosh & Svetlana Starykh, NERA Economic Consulting, *Recent*  
 28 *Trends in Securities Class Action Litigation: 2021 Full-Year Review* 27 (Jan. 25,  
 2022), [https://www.nera.com/content/dam/nera/publications/2022/PUB\\_2021\\_Full-  
 Year\\_Trends\\_012022.pdf](https://www.nera.com/content/dam/nera/publications/2022/PUB_2021_Full-Year_Trends_012022.pdf).

1 After careful, line-by-line audit, Class Counsel submit 26,755.2 hours of time as the  
2 basis for a cross-check.

3 These hours were reasonably expended in pursuing this years-long case.  
4 Class Counsel took all reasonable efforts to maximize efficiency, including by  
5 assigning work to appropriately skilled personnel, avoiding duplication, and  
6 ensuring clear and continuous communication among the litigation team. These  
7 efforts are documented in the accompanying Declaration of Daniel P. Chiplock,  
8 which describes “the number of hours spent on various categories of activities  
9 related to the action by each biller, together with hourly billing rate information,” as  
10 this Court’s Civil Chambers Rules require.<sup>8</sup> See Chiplock Decl. ¶¶ 6–15, Exs. 1–2;  
11 see also Hon. Gonzalo P. Curiel, *Civil Pretrial & Trial Procedures*, at 11. As  
12 described in the Chiplock Declaration, Class Counsel’s partners and associates took  
13 on work commensurate with their level of experience and skill. For example,  
14 senior partners led strategy and oversaw major case developments, handled  
15 depositions and hearings, and led settlement discussions. Junior partners and  
16 associates were heavily involved in investigating claims, drafting pleadings and  
17 briefs, and coordinating discovery, including discovery hearings. See Chiplock  
18 Decl. ¶¶ 17–26. Review of the voluminous document production in this case was  
19 handled on a day-to-day basis by staff and contract attorneys, who later spent  
20 considerable time preparing for depositions that were set to commence just as a  
21 Settlement was reached, including identifying key documents and drafting witness  
22 memos. See *id.* ¶ 27.

23 Class Counsel’s hourly rates are also reasonable. A reasonable hourly rate

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24 <sup>8</sup> Class Counsel’s lodestar is calculated using current positions and hourly rates, “a  
25 well established method of ensuring that “[a]ttorneys in common fund cases [are]  
26 compensated for any delay in payment.” *Hefler*, 2018 WL 6619983, at \*14 n.17  
27 (alterations in original) (quoting *Fischel v. Equitable Life Assurance Soc’y of U.S.*,  
28 307 F.3d 997, 1010 (9th Cir. 2002)). For employees who have left Lieff Cabraser,  
their rate as of the time of their departure is reflected. Chiplock Decl. ¶ 10. In  
addition, several attorneys were advanced to partner during the pendency of the  
case; their time billed as associates is reflected with their last associate rate. *Id.*



1 must be “in line with those prevailing in the community for similar services by  
 2 lawyers of reasonably comparable skill, experience, and reputation”—*i.e.*, “that in  
 3 which the district court sits.” *Brown v. 22nd Dist. Agric. Ass’n*, 2017 WL 2172239,  
 4 at \*13 (S.D. Cal. May 17, 2017) (citing *Blum v. Stenson*, 465 U.S. 886, 895–96  
 5 (1984); *Schwarz v. Sec’y of Health & Human Serv.*, 73 F.3d 895, 906 (9th Cir.  
 6 1995)). Class Counsel’s current hourly rates range from \$555 to \$1,150 for  
 7 partners, from \$395 to \$535 for associates, \$415 for staff and contract attorneys,  
 8 and from \$385 to \$510 for paralegals and other professional staff. Chiplock Decl.,  
 9 Exs. 1–2; *see also id.* ¶ 11. Courts in this District have recently approved fee  
 10 requests based on similar rates. *See, e.g., Illumina*, 2021 WL 1017295, at \*7  
 11 (approving hourly rates of “\$850 to \$1,025 for partners, . . . \$350 to \$650 for  
 12 associates,” \$350 to \$475 for staff attorneys, and \$265 for paralegals);<sup>9</sup> *Herring*  
 13 *Networks, Inc. v. Maddow*, 2021 WL 409724, at \*7–8 (S.D. Cal. Feb. 5, 2021)  
 14 (approving “reasonable rates in San Diego” of \$1,050 to \$1,150 for partners, \$470  
 15 to \$720 for associates, and \$265 to \$280 for paralegals); *Mauss*, 2018 WL 6421623,  
 16 at \*6 & n.7 (approving hourly rates of \$700 to \$925 for partners, \$350 to \$705 for  
 17 associates, \$550 to \$625 for staff attorneys, and \$275 to \$305 for staff);<sup>10</sup> *Ceron de*  
 18 *Orozco v. Flagship Facility Servs., Inc.*, 2020 WL 7426139, at \*6 (S.D. Cal. Dec.  
 19 18, 2020) (approving hourly rates of \$725 to \$840 for partners, \$360 to \$675 for  
 20 associates, and \$240 to \$265 for paralegals).<sup>11</sup> Further, courts regularly find Loeff  
 21 Cabraser’s hourly rates are reasonable for lodestar cross-check purposes. *See, e.g.,*  
 22 *In re Bank of N.Y. Mellon ADR FX Litig.*, No. 16-CV-212 (S.D.N.Y. June 17,  
 23 2019), ECF No. 161 (Order at 2);<sup>12</sup> *In re Bank of N.Y. Mellon Corp. Forex*

24 \_\_\_\_\_  
 25 <sup>9</sup> *See also* Suppl. Decl. at 4, *Illumina*, No. 3:16-cv-3044 (S.D. Cal. Mar. 2, 2020),  
 ECF No., 105-2 (setting forth hourly rates).

26 <sup>10</sup> *See also* Decl. at 23, *Mauss*, No. 3:13-cv-02005 (S.D. Cal. Oct. 8, 2018), ECF  
 No. 254-1 (setting forth hourly rates).

27 <sup>11</sup> *See also* Decl. at 19, *Ceron de Orozco*, No. 3:18-cv-02397 (S.D. Cal. Nov. 23,  
 2020), ECF No. 47-2 (setting forth hourly rates).

28 <sup>12</sup> *See also* Decl. at 151, *In re Bank of N.Y. Mellon ADR FX Litig.*, No. 1:16-cv-



1 *Transactions Litig.*, No. 12-MD-2335 (S.D.N.Y. Sept. 24, 2015), ECF No. 637  
 2 (Order at 3);<sup>13</sup> *Pulmonary Assocs. of Charleston PLLC v. Greenway Health, LLC*,  
 3 No. 3:19-cv-167 (N.D. Ga. Dec. 2, 2021), ECF No. 137 (Order at 8);<sup>14</sup> *In re*  
 4 *Volkswagen “Clean Diesel” Mktg., Sales Practices & Prods. Liab. Litig.*, 2017 WL  
 5 1047834, at \*5 (N.D. Cal. Mar. 17, 2017); *In re Intuit Data Litig.*, 2019 WL  
 6 2166236, at \*2 (N.D. Cal. May 15, 2019);<sup>15</sup> *Campbell v. Facebook, Inc.*, No. 13-cv-  
 7 5996 (N.D. Cal. Aug. 18, 2017), ECF No. 253 (Order at 6);<sup>16</sup> *Allagas v. BP Solar*  
 8 *Int’l, Inc.*, 2016 WL 9114162, at \*2 (N.D. Cal. Dec. 22, 2016).<sup>17</sup>

9 Comparing Class Counsel’s \$14,073,537.50 lodestar to the requested  
 10 \$3,525,000 fee award results in a lodestar multiplier of 0.25, or only *one fourth* of  
 11 the total claimed lodestar. Fractional multipliers “provide[] a strong indication of  
 12 the reasonableness of” the requested fee. *Khoja*, 2021 WL 5632673, at \*10 (citing  
 13 *In re Regulus Therapeutics Sec. Litig.*, 2020 WL 6381898, at \*8 (S.D. Cal. Oct. 30,  
 14 2020)); *see also In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 955 (9th  
 15 Cir. 2015) (affirming fee award where “the lodestar amount was *three times* the  
 16 benchmark”); *Loomis v. Slendertone Distrib., Inc.*, 2021 WL 873340, at \*10 (S.D.  
 17 Cal. Mar. 9, 2021); *Moyle*, 2018 WL 1141499, at \*11.

18 Given the reasonable rate and hours that Class Counsel spent on this case, as  
 19 well as the very favorable comparison between the resulting lodestar and the  
 20 requested fee award, the lodestar cross-check further supports Class Counsel’s

21 

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*Footnote continued from previous page*

22 00212 (S.D.N.Y. Apr. 29, 2019), ECF No. 155-4 (setting forth hourly rates).

23 <sup>13</sup> *See also* Decl. at 124, *In re Bank of N.Y. Mellon Corp. Forex Transactions Litig.*,  
 No. 1:12-md-02335 (S.D.N.Y. Aug. 17, 2015), ECF No. 622-1 (setting forth hourly  
 24 rates)

25 <sup>14</sup> *See also* Decl. at 24–25, *Greenway*, No. 3:19-cv-167 (N.D. Ga. Sept. 23, 2021),  
 ECF No. 126-2 (setting forth hourly rates).

26 <sup>15</sup> *See also* Decl. at 21, *Intuit*, No. 5:15-cv-01778 (N.D. Cal. Dec. 17, 2018), ECF  
 No. 185 (setting forth hourly rates).

27 <sup>16</sup> *See also* Decl. at 22, *Campbell*, No. 4:13-cv-05996 (N.D. Cal. May 26, 2017),  
 ECF No. 238-1 (setting forth hourly rates).

28 <sup>17</sup> *See also* Decl. at 137, *Allagas*, No. 3:14-cv-00560 (N.D. Cal. Nov. 3, 2016), ECF  
 No. 187-1 (setting forth hourly rates).

1 request for \$3,525,000, or 25% of the Settlement Fund.

2 **II. Class Counsel’s Litigation Expenses Are Reasonable and Should Be**  
3 **Reimbursed.**

4 Class Counsel’s request to be reimbursed for litigation expenses of  
5 \$1,258,225.85 is also reasonable. *Mauss*, 2018 WL 6421623, at \*7; *see also Moyle*,  
6 2018 WL 1141499, at \*11. Class Counsel’s expenses in this case through June 16,  
7 2022 include, *inter alia*:

- 8 • \$556,538.19 for expert witnesses and consultants, including class  
9 certification and damages experts;
- 10 • \$287,535.76 in payments of fees paid to three law firms that were  
11 retained to (i) ethically handle BofI documents produced to Plaintiff by  
12 a confidential witness while privilege issues were litigated, (ii) assist in  
13 preparation of Plaintiff’s opposition to writ of certiorari to the U.S.  
14 Supreme Court, and (iii) provide separate counsel for former BofI  
15 employees acting as confidential witnesses;
- 16 • \$111,821.65 in payments of fees to independent investigators who  
17 performed research relating to Plaintiff’s factual allegations, including  
18 through interviews of former BofI employees;
- 19 • \$74,486.57 for distribution of notice to the Class following class  
20 certification;
- 21 • \$34,996.85 for deposition-related expenses and hearing transcripts;
- 22 • \$46,133.16 for travel; and
- 23 • \$29,407.00 for mediation.

24 *See* Chiplock Decl. ¶¶ 29–32; Ex. 4 (summarizing all expenses). Reimbursement of  
25 these expenses from common settlement funds is appropriate. *See, e.g., In re*  
26 *HeartWare Int’l, Inc. Sec. Litig.*, No. 1:16-cv-00520 (S.D.N.Y. Apr. 12, 2019), ECF  
27 No. 85 (Order at 2) (legal fees for independent counsel for third-party witnesses);<sup>18</sup>

28 <sup>18</sup> *See also* Decl. at 42, *HeartWare*, No. 1:16-cv-00520 (S.D.N.Y. Mar. 8, 2019),  
*Footnote continued on next page*

1 *Hatamian v. Advanced Micro Devices, Inc.*, No. 4:14-cv-00226 (N.D. Cal. Jan. 23,  
 2 2018), ECF No. 364 (Order at 2–3) (same);<sup>19</sup> *In re Media Vision Tech. Sec. Litig.*,  
 3 913 F. Supp. 1362, 1366–72 (N.D. Cal. 1996) (expert/consultant fees, photocopies,  
 4 postage, telephone, travel, messenger services, computerized legal research,  
 5 deposition costs, filing and court fees).

6 These expenses were reasonably necessary for the continued prosecution and  
 7 resolution of this litigation, and were incurred for the benefit of the Class with no  
 8 guarantee of recovery. Accordingly, the Court should approve reimbursement of  
 9 these expenses.

10 **III. The Requested Service Award Is Reasonable.**

11 Finally, Plaintiff requests a service award of \$15,000 to compensate HMEPS  
 12 for the time and effort spent pursuing this matter and achieving recovery for the  
 13 Class. Service awards “are ‘fairly typical’ and are ‘intended to compensate class  
 14 representatives for work done on behalf of the class, to make up for financial or  
 15 reputational risk undertaken in bringing the action, and, sometimes, to recognize  
 16 their willingness to act as a private attorney general.’” *Khoja*, 2021 WL 5632673,  
 17 at \*10 (quoting *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 958–59 (9th Cir.  
 18 2009)). The PSLRA also authorizes “the award of reasonable costs and expenses  
 19 (including lost wages) directly relating to the representation of the class to any  
 20 representative party serving on behalf of a class.” 15 U.S.C. § 78u-4(a)(4). The  
 21 requested service award is warranted here, where HMEPS expended “significant  
 22 time and effort on the litigation and face[d] the risk of retaliation or other personal  
 23 risks; where the class overall has greatly benefitted from [HMEPS’s] efforts; and  
 24 where the incentive awards represent an insignificant percentage of the overall

25 *Footnote continued from previous page*

26 ECF No. 79 (“attorneys’ fees for retention of a law firm that acted as independent  
 27 counsel for a former HeartWare employee whose statements were included in the  
 28 Complaint”).

<sup>19</sup> See also Decl. at 40, *Hatamian*, No. 4:14-cv-00226 (N.D. Cal. Jan. 23, 2018),  
 ECF No. 351 (“independent counsel for the confidential witnesses in the case”).

1 recovery.” *In re Wells Fargo & Co. S’holder Derivative Litig.*, 445 F. Supp. 3d  
2 508, 534 (N.D. Cal. 2020) (\$25,000 service awards); *see, e.g., Illumina*, 2021 WL  
3 1017295, at \*8 (\$25,000 service award); *Hose v. Wash. Inventory Serv., Inc.*, 2020  
4 WL 3606404, at \*11 (S.D. Cal. July 2, 2020) (\$20,000 service award); *Low v.*  
5 *Trump Univ., LLC*, 246 F. Supp. 3d 1296, 1316 (S.D. Cal. 2017) (Curiel, J.)  
6 (\$15,000 service awards).

7 As set forth in the Declaration of Erin Perales (Chiplock Decl., Ex. 5)  
8 (“Perales Decl.”), HMEPS’s General Counsel, HMEPS contributed significant  
9 effort and time towards achieving this outstanding result for the Class. As Court-  
10 appointed Lead Plaintiff and Class Representative, HMEPS closely monitored and  
11 actively participated in all stages of the case for over six years, including reviewing  
12 and providing feedback on pleadings and motions before this Court and the Ninth  
13 Circuit. Perales Decl. ¶ 6. During discovery, HMEPS (with Class Counsel’s  
14 assistance) responded to 145 discovery requests from Defendants, searching for and  
15 producing 889 pages of documentation regarding its internal practices and its  
16 investments in BofI. *Id.* ¶ 6.d; Benson Decl. ¶ 36. Two HMEPS employees (Chief  
17 Investment Officer Gregory Brunt and former Executive Director Rhonda Smith)  
18 sat for deposition in June 2021 (Mr. Brunt in both his personal and representative  
19 capacity). Perales Decl. ¶ 6.d.

20 HMEPS’s legal department was intimately involved in settlement discussions  
21 throughout the case. Early on, Ms. Perales traveled from Houston to San Diego to  
22 attend the court-ordered Early Neutral Evaluation conference with Judge Crawford  
23 in October 2017 in person. Perales Decl. ¶ 6.g. Later, Rachel Feibus, Assistant  
24 General Counsel at HMEPS, attended the Zoom mediation with Defendants and the  
25 mediator Judge Daniel Weinstein in January 2022, and Ms. Perales oversaw  
26 remaining negotiations with Defendants which resulted in the February 2022  
27 agreement in principle. *Id.* Ms. Perales and Ms. Feibus conferred with Class  
28 Counsel on the settlement terms and the proposed agreement, and Ms. Perales

1 attended the preliminary approval hearing by telephone in June 2022. *Id.* ¶ 6.g–6.h.  
2 In total, HMEPS employees (including Ms. Perales, Ms. Feibus, Mr. Brunt, and Ms.  
3 Smith) expended approximately 158 hours at a reasonable hourly rate of \$150,  
4 which more than supports the modest request for a \$15,000 service award to  
5 compensate it for time and effort spent serving this important role. *Id.* ¶ 8.

6 Moreover, as this Court recognized in its order granting preliminary  
7 approval, this requested amount “represents a small portion [0.1 percent] of the  
8 Settlement Fund and is reasonable under the circumstances.” ECF No. 378 at 17;  
9 *see, e.g., Abdullah v. U.S. Sec. Assocs.*, 2017 WL 11630767, at \*11 (C.D. Cal. Dec.  
10 4, 2017) (\$15,000 service award from a \$21 million settlement fund); *Aguilar v.*  
11 *Wawona Frozen Foods*, 2017 WL 2214936, at \*8 (E.D. Cal. May 19, 2017)  
12 (\$15,000 in total service awards from a \$4.5 million settlement fund). Accordingly,  
13 the Court should approve the request service award.

14 **CONCLUSION**

15 For the reasons set forth above, Plaintiff respectfully request that the Court  
16 approve (1) an attorneys’ fee award of \$3,525,000, (2) reimbursement of  
17 \$1,258,225.85 in out-of-pocket litigation expenses, and (3) a service award of  
18 \$15,000 for HMEPS.

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1 Dated: July 25, 2022

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