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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BAR MANDALEVY, individually, and  
on behalf of all others similarly situated,  
Plaintiff,

v.

BOFI HOLDING, INC., GREGORY  
GARRAGBRANTS, ANDREW J.  
MICHELETTI, ESHEL BAR-ADON and  
PAUL GRINBERG,  
Defendants.

Case No.: 3:17-CV-667-GPC-MSB

**ORDER:**

**(1) GRANTING MOTION FOR  
FINAL CERTIFICATION OF THE  
PROPOSED SETTLEMENT CLASS**

**(2) GRANTING MOTION FOR  
FINAL APPROVAL OF THE  
PROPOSED SETTLEMENT AND  
PLAN TO ALLOCATE THE  
SETTLEMENT PROCEEDS**

**(3) GRANTING FINAL APPROVAL  
OF THE NOTICE OF THE  
SETTLEMENT**

**(4) GRANTING MOTION FOR  
ATTORNEYS' FEES AND  
EXPENSES, NOTICE AND  
ADMINISTRATIVE COSTS, AND  
AWARD TO PLAINTIFF**

**[ECF Nos. 96, 97]**

1 Before the Court are two Motions: Plaintiff’s unopposed Motion for Final  
2 Approval of Class Action Settlement and Plaintiff’s unopposed Motion for Attorneys’  
3 fees and expenses, notice and administration costs, and award to Plaintiff. ECF Nos. 96,  
4 97. On September 23, 2022, the Court held a hearing on this matter. ECF No. 101. For  
5 the reasons set forth below, the Court **GRANTS** the Motion for final approval of class  
6 action settlement and **GRANTS** the Plaintiffs’ Motion for Attorneys’ fees and other costs  
7 and awards.

## 8 **I. BACKGROUND**

### 9 **A. Procedural History**

10 On April 3, 2017, Plaintiff Bar Mandalevy (“Plaintiff”) filed a putative class action  
11 complaint against Defendants BofI Holding, Inc., Gregory Garrabrants, and Andrew J.  
12 Micheletti. ECF No. 1. The Court thereafter appointed David Grigsby as Lead Plaintiff,  
13 (ECF No. 15), and Pomerantz LLP as Lead Counsel, (ECF No. 17). On February 20,  
14 2018, Lead Plaintiff filed a Class Action Amended Complaint. ECF No. 27. On July 10,  
15 2018, Lead Plaintiff filed the Second Amended Complaint (“SAC”), which is the  
16 operative complaint in this action. ECF No. 38. Among other changes, Plaintiffs added  
17 Eshel Bar-Adon and Paul J. Grinberg as Defendants in this action in the SAC. *See* SAC.

18 Plaintiff’s SAC brings two causes of action against Defendants. First, Plaintiffs  
19 allege all Defendants are liable for violations of Section 10(b) of the Exchange Act and  
20 Rule 10b-5. SAC ¶¶ 160-70. Second, Plaintiffs allege the Individual Defendants violated  
21 Section 20(a) of the Exchange Act. *Id.* ¶¶ 171-75. Plaintiff alleges that Defendants made  
22 materially false and misleading statements regarding (1) the Company’s conduct related  
23 to lending to criminals which might have exposed the Company to liability under anti-  
24 money laundering statutes, (*id.* ¶¶ 6-7); and (2) whether federal agencies, including the  
25 SEC, DOJ, and FDIC were investigating the Company, (*id.* ¶¶ 10-11).

26 On August 17, 2018, Defendants moved to dismiss Plaintiff’s SAC. ECF No. 42.  
27 The Court granted Defendants’ Motion to Dismiss on December 7, 2018, finding that  
28 Lead Plaintiff failed to plead loss causation. ECF No. 50. Plaintiff appealed the Court’s

1 order of dismissal, and the Ninth Circuit Court of Appeals reversed the Court’s order in  
2 part. *Grigsby v. BofI Holding, Inc.*, 979 F.3d 1198, 1208, 1209 (9th Cir. 2020). The Ninth  
3 Circuit found that this Court’s conclusion that records obtained through FOIA did not  
4 qualify as a corrective disclosure was reversible error. *Id.* at 1209. However, the Ninth  
5 Circuit agreed that the article in *Seeking Alpha* did not qualify as a corrective disclosure  
6 because it contained only public information. *Id.* The Ninth Circuit also noted that the  
7 district court addressed only loss causation and needed to also consider scienter on  
8 remand. *Id.*

9 The Court then ordered limited briefing on the issue of scienter. ECF No. 64. On  
10 February 3, 2021, Defendants again moved to dismiss the SAC. ECF No. 66. The motion  
11 argued that the SAC failed to plead facts that supported Plaintiff’s allegation that BofI  
12 acted with the requisite scienter when it released its March 31, 2017 press statement in  
13 which it denied knowledge of government investigations. *Id.* The Court denied  
14 Defendants’ motion to dismiss the Section 10(b) claims against BofI (“the Company”)  
15 and individual Defendants Garrabrants, Micheletti, Bar-Adon, and denied the motion as  
16 to the Section 20(a) claim in full. ECF No. 69; *Mandalevy v. BofI Holding, Inc.*, No. 17-  
17 CV-667 (GPC) (KSC), 2021 WL 794275, at \*8 (S.D. Cal. Mar. 2, 2021). In its denial, the  
18 Court found “the SAC, viewed holistically, raise[d] a strong inference that BofI  
19 intentionally made the misleading press release statement or acted with deliberate  
20 recklessness as to its falsity.” *Id.* at \*5.

21 On November 23, 2021, the Parties reached an agreement in principle to settle this  
22 action and filed a Joint Motion to Continue All Deadlines Due to Settlement with this  
23 Court on November 24, 2021. ECF No. 84. The agreement was memorialized in a  
24 memorandum of understanding (“MOU”), which was executed on December 8, 2021.  
25 ECF No. 87-3, Szydlo Decl. Ex. 1 (“Stipulation and Agreement of Settlement”) at 5. The  
26 MOU sets forth the Parties’ agreement to settle and release all claims that were asserted  
27 or could be assert in return for a \$900,000 payment from the Defendants to the Settlement  
28 Class. The MOU was formalized on January 31, 2022. ECF No. 87-3.

1 On April 15, 2022, the Court held a hearing on the Preliminary Approval of Class  
2 Settlement, (ECF No. 92), and on May 17, 2022, the Court provisionally approved  
3 certification of the settlement class; conditionally approved the proposed notice form and  
4 proof of claim form; approved lead Plaintiff's plan of allocation; and granted preliminary  
5 approval of the class action, (ECF No. 93). The Court conditionally approved the  
6 proposed notice form and proof of claim form on June 2, 2022. ECF No. 95.

### 7 **B. Negotiation and Settlement Terms**

8 Plaintiff and Defendants engaged in "vigorous arm's-length negotiations" in  
9 coming to the terms memorialized in the Settlement Agreement. ECF No. 87-1. Lead  
10 Plaintiff has agreed to settle and release the claims asserted "[b]ased upon their  
11 investigation, prosecution, and the early neutral evaluation of the case." ECF No. 87-3  
12 ("Settlement Agreement") at 6.

13 The Settlement Agreement provides for a Settlement Amount of \$900,000 "to be  
14 made into an escrow account specified by Lead Plaintiff." Settlement Agreement at 17.  
15 The Settlement Agreement provides that the total Settlement Amount will be used to pay:  
16 (a) any Taxes; (b) any Notice and Administration Costs; (c) any Litigation Expenses  
17 awarded by the Court; and (d) any attorneys' fees awarded by the Court. *Id.* In the  
18 Motion, Plaintiff's counsel estimates a gross average recovery of \$0.05 per damaged  
19 share for each Settlement Class Member (less the deduction of Court-approved fees,  
20 expenses, and costs of notice and claims administration). ECF No. 87-1 at 26.

21 Settlement Class Members may be ascertained through Defendants' records.  
22 Settlement Agreement at 21. After BofI provides "to the Claims Administrator in  
23 electronic format . . . its reasonably available lists (consisting of names and addresses) of  
24 the holders of BofI Securities during the Settlement Class Period," the Claims  
25 Administrator would mail the Notice and Proof of Claim Form to those members of the  
26 Settlement Class as may be identified through reasonable effort. Settlement Agreement at  
27 22. Each Settlement Class Member will be required to submit a Claim Form, to be  
28 reviewed by the Claims Administration. The Claim Administrator "shall determine in

1 accordance with [the Settlement Agreement] and the Plan of Allocation the extent, if any,  
2 to which each Claim shall be allowed, subject to review by the Court.” ECF No. 94-1 at  
3 24. Any Settlement Class Members who do not submit a Claim Form “shall be forever  
4 barred from receiving any distribution from the Net Settlement Fund.” *Id.* at 24. Further,  
5 “Claim Forms that do not meet the submission requirements may be rejected,” but  
6 “[p]rior to rejecting a Claim in whole or in part, the Claims Administrator shall  
7 communicate with the Claimant in writing, to give the Claimant the chance to remedy  
8 any curable deficiencies in the Claim Form submitted.” *Id.*

9         The Settlement Agreement provides that, following the Court’s entry of Judgment  
10 in this Action and the effective date of the Settlement, any Settlement Class Member who  
11 does not submit a valid Claim Form will not be entitled to receive any distribution from  
12 the Net Settlement Fund, but will be otherwise bound by the terms of the Settlement  
13 Agreement “and will be permanently barred and enjoined from bringing any action,  
14 claim, or other proceeding of any kind against Settling Defendants or the Settling  
15 Defendants’ Releasees with respect to the Released Plaintiff’s Claims.” *Id.* at 23.  
16 Payment pursuant to the Class Distribution Order “shall be final and conclusive against  
17 all Settlement Class Members.” *Id.* at 25. The Agreement also provides that “[n]o person  
18 or entity shall have any claim against Lead Plaintiff, Lead Plaintiff’s Counsel, the Claims  
19 Administrator or any other agent designated by Lead Plaintiff’s Counsel, or the  
20 Defendants’ Releasees and/or their respective counsel, arising from distributions made  
21 substantially in accordance with the [Settlement Agreement], the Plan of Allocation  
22 approved by the Court, or any order of the Court.” *Id.* at 26.

23         The Second Amended Notice Form, (ECF No. 94),<sup>1</sup> incorporates the revisions  
24 directed by the Court and discloses material information to a Settlement Class Member’s  
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27 <sup>1</sup> When Lead Plaintiff filed the motion for preliminary approval, the Proposed Notice Form was attached  
28 to the motion at ECF No. 87-5. Before the hearing on the matter, Plaintiff filed an Amended Notice  
Form, which appears at ECF No. 91-1. After the May 17, 2022 hearing, Plaintiff filed a Second  
Amended Notice Form pursuant to Court instruction at ECF No. 94-1.

1 decision whether to accept, object to, or opt out of the Settlement, including: (1) the  
2 proposed Settlement Class; (2) the terms and provisions of the Amended Stipulation,  
3 including the Settlement Among; (3) the relief to the Settlement Class and releases to  
4 Defendants and Defendants’ Releasees that the Settlement will provide; (4) the maximum  
5 award of attorney’s fees and reimbursement of reasonable expenses to Lead Counsel and  
6 the maximum amount of the award for notice and administration costs; (5) the date, time  
7 and place (to be decided by the Court) of the hearing on Final Approval of class action  
8 settlement; and (6) the procedures and deadlines for opting out of the settlement or  
9 submitting comments or objections. ECF No. 94-1.

10 The Settlement Agreement releases:

11 [A]ny and all claims, demands, rights, causes of action, and liabilities, whether  
12 based in law or equity, arising under federal, state, local, statutory or common law  
13 or any other law, rule or regulation including both known and Unknown Claims,  
14 that arise out of or relate in any way to the institution, prosecution, or settlement of  
15 claims asserted in this Action against the Defendants, including under Rule 11 of  
16 the Federal Rules of Civil Procedure or for any other fees or cost shifting. Released  
17 Defendants’ Claims do not include any claims relating to the enforcement of the  
18 Settlement, any claims between or among the Defendants and Settling Defendants’  
19 Releasees, any claims between the Defendants and Settling Defendants’ Releasees  
20 and their respective insurers, or any claims against any person or entity who or  
21 which submits a request for exclusion from the Settlement Class that is accepted by  
22 the Court.

23 ECF No. 94-1 at 17-18. With respect to the released claims, Settlement Class Members  
24 also waive rights under California Civil Code § 1542.

## 25 **II. DISCUSSION**

### 26 **A. Legal Standard**

27 The Ninth Circuit has a strong judicial policy that favors settlements in class  
28 actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). However,  
when the parties settle before class certification, the court must “peruse the proposed  
compromise to ratify both the propriety of the certification and the fairness of the  
settlement.” *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). To that end, a

1 reviewing court must engage in two, separate inquiries: (1) whether the proposed class  
2 meets the certification requirements; and (2) whether the proposed settlement is  
3 “fundamentally fair, adequate, and reasonable.” *Id.*

#### 4 **B. Final Certification of the Proposed Settlement Class under Rule 23**

5 The Court granted preliminary certification to the Settlement Class for settlement  
6 purposes in the Preliminary Order. ECF No. 93 at 22. It appears no material changes have  
7 occurred since this Court’s preliminary approval and there is no opposition to final  
8 certification. Therefore, analysis for final certification will resemble the prior analysis for  
9 preliminary certification.

10 Federal Rule of Civil Procedure (“Rule”) 23 establishes four prerequisites for class  
11 certification: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of  
12 representation. Fed. R. Civ. P. 23(a). Under Rule 23(b)(3), common questions must  
13 predominate over individual questions, and the class action device must be “superior to  
14 other available methods for fairly and efficiently adjudicating the controversy.” Fed. R.  
15 Civ. P. 23(b).

16 Plaintiff seeks certification of a Class defined as “all persons or entities who or  
17 which purchased or otherwise acquired BofI Securities during the Class Period set forth  
18 in the Second Amended Complaint, and were allegedly damaged thereby.” ECF No. 96-1  
19 at 13. Plaintiff argues that the requirements of Rule 23(a) are met such that the Class can  
20 be certified for the purposes of settlement. *Id.* at 13-14. Plaintiff states that “[n]o  
21 circumstance has arisen since the Court’s preliminary certification of the Settlement  
22 Class that should cause this Court to undo its certification.” *Id.* at 14.

#### 23 **1. Numerosity**

24 The numerosity requirement under Rule 23(a)(1) is met if “the class is so  
25 numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). “As a  
26 general matter, courts have found that numerosity is satisfied when class size exceeds 40  
27 members, but not satisfied when membership dips below 21.” *Slaven v. BP Am., Inc.*, 190  
28 F.R.D. 649, 654 (C.D. Cal. 2000). Plaintiff notes that because this Action “involve[es]

1 nationally traded stocks,” (ECF No. 96-1 at 13), this is a case where “the exact size of the  
2 proposed class is unknown, but general knowledge and common sense indicate it is large,  
3 the numerosity requirement is satisfied.” *Vinh Nguyen v. Radiant Pharm. Corp.*, 287  
4 F.R.D. 56, 569 (C.D. Cal 2012). Indeed, “[w]here several million shares of stock were  
5 purchased during the class period, courts regularly find that class members are  
6 sufficiently numerous to render joinder impracticable.” *In re Silver Wheaton Corp. Sec.*  
7 *Litig.*, No. 15 Civ. 5146 (CAS) (JEMx), 2017 WL 20139171, at \*6 (C.D. Cal. May 11,  
8 2017). Joinder of this number of plaintiffs is clearly impractical, and courts have  
9 certified classes with far fewer members. *See Immigrant Assistance Project of Los*  
10 *Angeles Cty. Fed'n of Lab. (AFL-CIO) v. I.N.S.*, 306 F.3d 842, 869 (9th Cir. 2002) (citing  
11 *Jordan v. Cty. of Los Angeles*, 669 F.2d 1311, 1319, n.10 (9th Cir. 1982)). The  
12 numerosity requirement is therefore satisfied.

## 13 **2. Commonality**

14 Rule 23(a)(2) requires the existence of “questions of law or fact common to the  
15 class.” Fed. R. Civ. P. 23(a)(2). Commonality is established if plaintiffs and class  
16 members’ claims “depend upon a common contention . . . capable of class-wide  
17 resolution—which means that determination of its truth or falsity will resolve an issue  
18 that is central to the validity of each one of the claims in one stroke.” *Wal-Mart Stores,*  
19 *Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

20 Here, Settlement Class Members are those individuals who purchased or otherwise  
21 acquired BofI securities during the relevant period of time. There are clear questions that  
22 are common to all class members, including: (1) whether the federal securities laws were  
23 violated by Defendants’ acts; (2) whether statements made by Defendants to the investing  
24 public during the Settlement Class Period misrepresented material facts about the  
25 business and operations of BofI; (3) whether Defendants caused BofI to issue false and  
26 misleading statements during the Settlement Class Period; (4) whether Defendants acted  
27 knowingly or recklessly in issuing false and misleading statements; (5) whether the prices  
28 of BofI securities during the Settlement Class Period were artificially inflated because of



1 Defendants' conduct; and (6) whether the members of the Class have sustained damages  
2 and, if so, what is the proper measure of damages. SAC ¶ 156. It is indisputable that the  
3 proposed class meets Rule 23(a)(2)'s commonality requirement. *See Jimenez v. Allstate*  
4 *Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014) (“[A] class meets Rule 23(a)(2)'s  
5 commonality requirement when the common questions it has raised are apt to drive the  
6 resolution of the litigation, no matter their number.”) (internal quotation marks and  
7 citation omitted). The Court therefore finds that the proposed class meets the  
8 commonality requirement.

### 9 **3. Typicality**

10 Rule 23(a)(3)'s typicality requirement will be satisfied when “the claims or  
11 defenses of the representative parties are typical of the claims or defenses of the class.”  
12 Fed. R. Civ. P. 23(a)(3). The named plaintiff must be a member of the class they seek to  
13 represent and must “possess the same interest and suffer the same injury” as putative  
14 class members. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (internal  
15 quotations omitted). The representative claims are typical if they are “reasonably co-  
16 extensive with those of absent class members,” though they “need not be substantially  
17 identical.” *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) (quoting *Hanlon v.*  
18 *Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)). Here, David Grigsby was  
19 appointed as Lead Plaintiff.<sup>2</sup> ECF No. 15. As described in his motion for appointment as  
20 Lead Plaintiff, Mr. Grigsby alleged he lost more than \$90,000 as a result of the alleged  
21 fraud during the Class Period. ECF No. 3-1 at 5. Mr. Grigsby's claims are typical of the  
22 putative class because he “purchased shares of BofI securities in reliance upon the  
23 materially false and misleading statements issued by [D]efendants and w[as] injured  
24 thereby,” and “suffered a substantial loss” of more than \$90,000. *Id.* at 10. Thus, Mr.

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28 <sup>2</sup> As of January 12, 2021, Mr. Grigsby is the only remaining Lead Plaintiff in this action.  
*See* ECF No. 57.

1 Grigsby's claims for damages were based upon the same allegations outlined in the  
2 Second Amended Complaint. *See* SAC ¶ 156.

#### 3 **4. Adequacy**

4 Under Rule 23(a)(4), representative parties must be able to “fairly and adequately  
5 protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). In analyzing whether Rule  
6 23(a)(4) has been met, the Court must ask two questions: “(1) do the named plaintiffs and  
7 their counsel have any conflicts of interest with other class members and (2) will the  
8 named plaintiffs and their counsel prosecute the action vigorously on behalf of the  
9 class?” *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1031 (9th Cir. 2012)  
10 (citation omitted). The adequacy of representation requirement is designed to deny  
11 certification in instances of “actual fraud, overreaching, or collusion.” *In re Bluetooth*  
12 *Headset Prods. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011) (emphasis in original).

13 It does not appear that Plaintiff has any interests that are in conflict with the  
14 Settlement Class. Plaintiff's counsel, attorneys Pomerantz LLP are experienced  
15 securities litigators who have litigated numerous securities class actions on behalf of  
16 stakeholders in district courts throughout the country. *See* ECF No. 87-9, Firm Resume  
17 (Ex. 2) at 2-10. There is no indication that Plaintiff or his counsel will not continue to  
18 prosecute this lawsuit vigorously. The Court therefore concludes the adequacy  
19 requirement is met for the purposes of conditional certification.

#### 20 **5. Predominance and Superiority**

21 Finally, to certify a class under Rule 23(b)(3), the Court must find “that the  
22 questions of law or fact common to class members predominate over any questions  
23 affecting only individual members, and that a class action is superior to other available  
24 methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

25 Predominance tests “whether proposed classes are sufficiently cohesive to warrant  
26 adjudication by representation.” *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045  
27 (2016) (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). And, for  
28 settlement purposes, a class settlement is superior to other available methods of fair

1 resolution of a controversy when the class mechanism will reduce litigation costs and  
2 promote greater efficiency. In a class action settlement, the Court need not address  
3 whether the case, if tried, would present issues of manageability under Rule 23(b)(3)(D).  
4 *Amchem*, 521 U.S. at 620.

5 Here, Defendants' liability depends on whether Defendants violated securities  
6 laws, whether they acted with the requisite scienter, and whether Defendants' conduct  
7 caused damages to Lead Plaintiff and the Settlement Class. These questions predominate  
8 over any individualized inquires that may exist as to any individual class members in this  
9 litigation. *See In re Cooper Cos. Inc. Sec. Litig.*, 254 F.R.D. 628, 641 (C.D. Cal. 2009)  
10 ("The common questions of whether misrepresentations were made and whether  
11 Defendants had the requisite scienter predominate over any individual questions of  
12 reliance and damages."). Although damages may differ among each member of the Class,  
13 liability can be determined on a classwide basis. *See id.* at 640.

14 Further, the Ninth Circuit recognizes that class actions are a superior method of  
15 prosecuting securities fraud actions. *See e.g., Blackie v. Barrack*, 524 F.2d 891, 903 (9th  
16 Cir. 1975) ("The availability of the class action to redress such frauds has been  
17 consistently upheld, in large part because of the substantial role that the deterrent effect  
18 of class actions plays in accomplishing the objectives of the securities laws."). Class  
19 actions are thought to be a particularly effective method to police against corporate  
20 wrongdoing in the securities fraud context. *See A&J Deutscher Fam. Fund v. Bullard*,  
21 No. 85 Civ. 1850, 1986 WL 14903, at \*3 (C.D. Cal. Sept. 22, 1986). Thus, the Rule  
22 23(b)(3) requirements of predominance and superiority are satisfied.

### 23 **C. Final Approval of Class Action Settlement**

24 Federal Rule of Civil Procedure 23(e) requires judicial approval for any class  
25 action settlement. Before final approval of a class action settlement, a court must find that  
26 the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e). Such an  
27 evaluation is made in the context of a "strong judicial policy that favors settlements,  
28 particularly where complex class action litigation is concerned." *In Re Syncor ERISA*

1 *Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). Any fairness determination requires the  
 2 Court to “focus[ ] primarily upon whether the particular aspects of the decree that directly  
 3 lend themselves to pursuit of self-interest by class counsel and certain members of the  
 4 class—namely attorney’s fees and the distribution of any relief, particularly monetary  
 5 relief, among class members—strictly comport with substantive and procedural standards  
 6 designed to protect the interests of class members.” *Staton*, 327 F.3d at 960. Courts  
 7 evaluate the “settlement as a whole, rather than assessing its individual components.”  
 8 *Lane v. Facebook, Inc.*, 696 F.3d 811, 818 (9th Cir. 2012).

9 Rule 23(e) requires judicial approval of class action settlements as follows:

10 (2) **Approval of the Proposal.** If the proposal would bind class members, the court may  
 11 approve it only after a hearing and only on finding that it is fair, reasonable, and adequate  
 12 after considering whether:

- 13 (A) the class representatives and class counsel have adequately represented the  
 class;
- 14 (B) the proposal was negotiated at arm’s length;
- 15 (C) the relief provided for the class is adequate, taking into account:
  - 16 (i) the costs, risks, and delay of trial and appeal;
  - 17 (ii) the effectiveness of any proposed method of distributing relief to the  
 class, including the method of processing class-member claims;
  - 18 (iii) the terms of any proposed award of attorney’s fees, including timing of  
 payment; and
  - 19 (iv) any agreement required to be identified under Rule 23(e)(3); and
- 20 (D) the proposal treats class members equitably relative to each other.

21 Fed. R. Civ. P. 23(e)(2). For the reasons that follow, the Court finds that the Settlement  
 22 Agreement reached by the Parties is likely fair, reasonable, and adequate, and GRANTS  
 23 final approval of the class action settlement.

### 24 **1. Adequacy of Representation**

25 Rule 23(e)(2)(A) requires the Court to consider whether “the class representatives  
 26 and class counsel have adequately represented the class.” Fed. R. Civ. P. 23(e)(2)(A).  
 27 This analysis is “redundant of the requirements of Rule 23(a)(4).” 4 William B.  
 28 Rubenstein, *Newberg on Class Actions* § 13:48 (5th ed. 2020); *In re GSE Bonds Antitrust*

1 *Litig.*, 414 F. Supp. 3d 686, 701 (S.D.N.Y. 2019) (noting similarity of inquiry under Rule  
2 23(a)(4) and Rule 23(e)(2)(A)).

3 The Court found above that Plaintiff and his counsel adequately represent the class  
4 for the purposes of class certification. For the same reasons, the Court finds that the  
5 adequacy of representation requirement under Rule 23(e)(2)(A) is met.

## 6 **2. Arm’s Length Negotiation**

7 Rule 23(e)(2)(B) requires the Court to consider whether “the proposal was  
8 negotiated at arm’s length.” Fed. R. Civ. P. 23(e)(2)(B). This Action was commenced in  
9 2017, and the Parties have conducted extensive discovery. Plaintiff’s counsel asserts the  
10 Settlement was reached “only through arm’s-length negotiations. . . . [And there is] no  
11 hint of collusion . . . . There is no ‘clear sailing’ agreement and the Settlement was  
12 achieved only after protracted negotiations between counsel.” ECF No. 96-1 at 25; *see*  
13 *also Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal.  
14 2004) (“A settlement following sufficient discovery and genuine arms-length negotiation  
15 is presumed fair.”). Given the length of this litigation, the Court finds it appropriate for  
16 “[g]reat weight [to be] accorded to the recommendation of counsel, who are most closely  
17 acquainted with the facts of the underlying litigation.” *Nat’l Rural Telecomms*, 221  
18 F.R.D. at 528. Thus, the Court concludes that this factor is satisfied.

## 19 **3. Adequacy of Relief Provided to the Class**

20 Rule 23(e)(2)(C) requires that the Court consider whether “the relief provided for  
21 the class is adequate, taking into account: (i) the costs, risks, and delay of trial and  
22 appeal; (ii) the effectiveness of any proposed method of distributing relief to the class,  
23 including the method of processing class-member claims; (iii) the terms of any proposed  
24 award of attorney’s fees, including timing of payment; and (iv) any agreement required to  
25 be identified under Rule 23(e)(3).” Fed. R. Civ. P. 23(e)(2)(C). The amount offered in  
26 the proposed settlement agreement is generally considered to be the most important  
27 consideration of any class settlement. *See Bayat v. Bank of the West*, No. C-13-2376  
28

1 EMC, 2015 WL 1744342, at \*4 (N.D. Cal. Apr. 15, 2015) (citing *In re HP Inkjet Printer*  
2 *Litig.*, 716 F.3d 1173, 1178–79 (9th Cir. 2013)).

3 The Parties have agreed to settle this case for \$900,000. Settlement Agreement at  
4 17. Any deductions for attorney’s fees, and costs of notice are to be deducted from the  
5 Settlement Amount, only by the Court’s approval upon motion by Lead Plaintiff. As a  
6 percentage of estimated damages, the Settlement Amount is well above the median  
7 percentage of the recovery level for investor losses in securities class action settlements.  
8 *See In re Omnivision*, 559 F. Supp. 2d at 1042 (approving 6% recovery of maximum  
9 damages) (citing *In re Heritage Bond Litig.*, No. 02-ML-1475 (DT), 2005 WL 1594403,  
10 at \*8–9 (C.D. Cal. June 10, 2005) (average recovery between 2% to 3% of maximum  
11 damages)).

12 **a. Costs, risks, and delay of trial and appeal**

13 Although Plaintiff “believes that his case is strong,” he is aware of the risks posed  
14 in continuing the action. ECF No. 96-1 at 18. “To evaluate adequacy, courts primarily  
15 consider plaintiffs’ expected recovery balanced against the value of the settlement offer.”  
16 *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007). While a  
17 settlement need not compensate class members for the maximum value of their claims,  
18 there is no fixed percentage of the potential recovery that renders a settlement amount  
19 reasonable. *See In re Baan Co. Sec. Litig.*, 284 F. Supp. 2d 62, 65 (D.D.C. 2003) (citing  
20 *In re Newbridge Networks Sec. Litig.*, 1998 WL 765724, at \*2 (D.D.C. Oct. 23, 1998)).  
21 The Court therefore must examine whether the Settlement Agreement will likely  
22 adequately compensate the class given the costs, risks, and delay of trial and appeal based  
23 on the facts of this case.

24 Here, the Settlement Amount is \$900,000. Settlement Agreement at 17. In the  
25 Motion for Preliminary Approval, Plaintiff’s counsel estimates a gross average recovery  
26 of \$0.05 per damaged share for each Settlement Class Member (less the deduction of  
27 Court-approved fees, expenses, and costs of notice and claims administration). ECF No.  
28 87 at 26. Further, “[u]nder the Settlement, Defendants will pay \$900,000, which

1 represents almost 4.5 times of the approximately \$200,000 in estimated aggregate  
2 damages under a conservative damages analysis, and almost 21% of the approximately  
3 \$4,300,000 under an aggressive (but more challenging to prove) damages analysis.” ECF  
4 No. 96-1 at 22.

5 Plaintiff notes the cost, risks, and time that will be spent should this case not be  
6 settled at this stage. For example, “Plaintiff would need to engage in fact discovery,  
7 requiring review of thousands of documents and deposing Defendants, BofI employees,  
8 and non-parties.” ECF No. 96-1 at 20. Plaintiff faces the risk that he might “lose on  
9 summary judgment” or “lose at trial.” *Id.* If the case goes before a jury, Plaintiff’s award  
10 could be reduced significantly. *Id.* And, of course, even if Plaintiff’s case survives  
11 through trial and receives a favorable jury award, Plaintiff will still likely be subject to  
12 numerous post-trial motions and an appeal. *Id.* at 21.

13 Based on these potential risks and burdens, Plaintiff contends that the settlement  
14 amount provides adequate relief to the class. Indeed, as stated above, “Lead Plaintiff  
15 estimates that the Settlement returns 4.5 times the amount of estimated damages (using the  
16 low end of damages models) or almost 21% (using the high end of damages models),”  
17 which is a greater recovery than similar class actions. ECF No. 96-1 at 22; *see e.g. In re*  
18 *Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) (approving a  
19 settlement that provided class with 6% recovery of maximum damages exposure).

20 This case presents complex issue that would need to be litigated, and it is not clear  
21 from this stage in the litigation which side would prevail. There is still class certification,  
22 summary judgment, trial, and appeal to contend with. Each side would need to bear its  
23 own costs through each stage. Legal and factual determinations on issues like scienter  
24 and loss causation would place each side at risk of rulings in the other Party’s favor. As  
25 such, the “Settlement locks in a substantial benefit to the Settlement Class.” ECF No. 96-  
26 1 at 22.

27 Accordingly, although the settlement amount is only a portion of Defendant’s  
28 maximum potential exposure according to Plaintiff’s calculations, the relief appropriately

1 accounts for the not insubstantial risk that Plaintiff and the class would recover nothing  
2 on some or all claims were this to proceed to trial. *Cf. Mejia v. Walgreen Co.*, No. 2:19-  
3 CV-00218 WBS AC, 2021 WL 1122390, at \*4–5 (E.D. Cal. Mar. 24, 2021) (finding that  
4 existence of potential defenses weighs in favor of finding reasonable the proposed  
5 settlement amount of approximately 22.37% of maximum possible recovery). The Court  
6 therefore concludes that the costs and risks of proceeding with litigation likely renders  
7 the agreed-upon settlement amount, \$900,000 or 21% of Defendant’s maximum potential  
8 liability, adequate relief for the class as a whole. *See Vicerol v. Mistras Grp., Inc.*, No.  
9 15-CV-02198, 2016 WL 5907869, at \*3, 7 (N.D. Cal. Oct. 11, 2016) (approving a  
10 California wage and hour settlement where the class received 11.6% of the estimated  
11 total liability, or approximately \$29 per work week); *Leverage v. Traeger Pellet Grills,*  
12 *LLC*, No. 16-CV-00784, 2017 WL 2797811, at \*7 (N.D. Cal. June 28, 2017) (approving a  
13 California wage and hour settlement where the class received 18% of the estimated total  
14 liability).

15 **b. Effectiveness of proposed method of distributing relief**

16 Plaintiff’s plan for distributing relief to and allocating the Settlement Amount  
17 among Settlement Class Members is detailed in the Preliminary Approval Order and  
18 Second Amended Notice. ECF No. 93; 94. Plaintiff reports that the Claims Administrator  
19 has duly followed this plan. *Id.* at 28. The Claims Administrator mailed the Notice to  
20 those able to be identified and posted the Summary Notice online via *GlobeNewswire*. *Id.*  
21 The Notice alerted class members to the settlement and directed them to a case-specific  
22 website where key document were posted. *Id.* Class members completed a claim form to  
23 calculate their claim amount. *Id.* Class Members were then able to file their claims  
24 electronically. *Id.* This is straightforward and does not require intensive labor on the part  
25 of any class member.

26 Each class member’s allocation of the Net Settlement Fund Distribution Amount  
27 will be distributed by check, and the Claims Administrator will make efforts to ensure  
28 Authorized Claimants cash their distribution checks. ECF No. 87-1 at 23. Thus, the



1 method of distributing relief is simple and effective. *See Walters v. Target Corp.*, No.  
2 3:16-CV-1678-L-MDD, 2019 WL 6696192, at \*6–7 (S.D. Cal. Dec. 6, 2019); *Valenzuela*  
3 *v. Walt Disney Parks & Resorts U.S., Inc.*, No. SACV171988JVSDFMX, 2019 WL  
4 8647819, at \*8 (C.D. Cal. Nov. 4, 2019). The Court finds that this proposed method of  
5 distributing relief is effective for the purposes of Rule 23(e).

### 6 **c. The Attorneys’ Fee Award**

7 Class Counsel seeks \$225,000 in attorneys’ fees, or 25% of total Settlement  
8 Amount, and \$138,631.36 plus interest in costs. Based on the reasoning below, the Court  
9 finds that the attorneys’ fees and costs are reasonable.

### 10 **d. Side Agreements**

11 Rule 23(e)(3) requires that the Parties “must file a statement identifying any  
12 agreement made in connection with the [settlement] proposal.” Fed. R. Civ. P. 23. Here,  
13 Plaintiff states that the Agreement allows the Defendants to terminate the Settlement if  
14 enough class members opt out. ECF No. 96-1 at 29. This type of provision is known as a  
15 “blow-up” clause in securities class actions. These provisions are common and guard  
16 against the possibility that a sufficient number of class members opt out of a class action  
17 settlement such that the Defendant’s potential future liability is not reduced in a way that  
18 renders the settlement worthwhile. *See e.g., Mondrian v. Trius Trucking, Inc.*, No. 1:19-  
19 cv-884-DAD-SKO, 2022 WL 2306963, at \*20 n.20 (E.D. Cal. June 27, 2022) (citing a  
20 number of securities class action settlements with “blow-up” clauses and their opt-out  
21 thresholds). Plaintiff states that although the existence of a blow-up clause is disclosed to  
22 class members, the exact number of shares that triggers this right for the Defendants is  
23 not disclosed to the class members. ECF No. 96-1 at 29. Because there are no valid  
24 exclusions, as stated above, the Court finds that the omission of the blow-up threshold is  
25 immaterial.

26 Further, the Manual for Complex Litigation states that the purpose of Rule 23(e)(3)  
27 is to require disclosure to a class of agreements that “might have affected the interests of  
28 class members by altering what they may be receiving or foregoing.” Manual for

1 Complex Litigation (Fourth) § 21.631 at 319 (2004). For example, a Court should note if  
2 an undisclosed side agreement “reveal[s] additional funds that might have been paid to  
3 the class that are instead paid to selected claimants or their attorneys.” *Id.* The non-  
4 disclosure of a blow-up clause threshold does not relate to what the class members will  
5 receive, or signal that there is a side agreement made solely for the benefit of the  
6 attorneys. Thus, the Agreement is not rendered invalid based on this non-disclosure  
7 alone.

#### 8 **e. Reaction of the Class**

9 The reaction of the class also supports finding the settlement is adequate. As stated  
10 elsewhere, the Claims Administer mailed or emailed 73,928 Notice and Claim Forms to  
11 potential settlement class members. ECF No. 100 at 2. The Claims Administrator also  
12 published the Summary Notice in *Globe Newswire* on June 28, 2022. *Id.* at 3. A website  
13 was also created with information on the settlement and how to submit a claim. *Id.*

14 September 2, 2022 was the deadline for objections and exclusions. *Id.* Lead  
15 Counsel states that no “valid” objections had been received as of the filing of their Reply  
16 on September 6, 2022. *Id.* One objection was made to the Plan of Allocation. *Id.* at 3 n.3.  
17 Counsel states that this is an invalid objection because the class member objected to the  
18 “application of the ‘90-day look back’ provision for calculating damages set forth in the  
19 PSLRA.” *Id.*<sup>3</sup> Counsel does not go into detail about why this objection is invalid in their  
20 papers, but at the hearing on the matter, Lead Counsel stated their belief that the PSLRA  
21 requires this method of calculating damages in securities fraud settlements. Courts in this  
22

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23  
24 <sup>3</sup> The PSLRA’s 90-day look back provision limits a class member’s damages to the  
25 difference between the purchase price and “the mean trading price of that security during  
26 the 90-day period beginning on the date on which the information correcting the  
27 misstatement or omission that is the basis for the action is disseminated to the market.”  
28 15 U.S.C. § 78(u)-4(e)(1). This prevents the possibility of class members receiving a  
windfall should a corrective disclosure drop the share price, but the price later rebounds  
despite the disclosure.

1 Circuit have found that the “90-day bounce back rule does not, on its face, apply to  
2 settlements,” and as such these courts have allowed alternative methods of calculating  
3 damages in securities fraud settlements. *See e.g., In re Veritas Software Corp. Sec. Litig.*,  
4 No. C-03-0283 MMC, 2005 WL 3096079, at \*11 (N.D. Cal. Nov. 15, 2005), *vacated on*  
5 *other grounds by In re Veritas Software Corp. Sec. Litig.*, 496 F.3d 962 (2007). However,  
6 because the PSLRA specifically sanctions the “90-day look back” method, the Court  
7 finds that this manner of calculating damages for the class members is fair and  
8 reasonable. The Court does not express an opinion on whether such method *must* be used  
9 in the settlement context.

10 Lead Counsel also states that one invalid request for exclusion has been made. *Id.*  
11 at 3. Counsel states the exclusion is invalid because the class member made a profit on  
12 their purchased shares, and as such, there is no “Recognized Loss.” *Id.* The Amended  
13 Notice clearly states that “[t]o the extent a Claimant had a market gain with respect to his,  
14 or her, or its overall transactions in BofI securities during the Settlement Class Period, the  
15 value of the Claimant’s Recognized Claim shall be zero.” ECF No. 94-1 ¶ 59. Thus, the  
16 Court agrees this request for exclusion is invalid.

#### 17 **4. Equitable Treatment of Class Members**

18 Rule 23(e)(2)(D) requires the Court to consider whether the Settlement Agreement  
19 “treats class members equitably relative to each other.” Fed. R. Civ. P. 23(e)(2)(D). In  
20 doing so, the Court determines whether the settlement “improperly grant[s] preferential  
21 treatment to class representatives or segments of the class.” *In re Tableware Antitrust*  
22 *Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). “Matters of concern could include  
23 whether the apportionment of relief among class members takes appropriate account of  
24 differences among their claims, and whether the scope of the release may affect class  
25 members in different ways that bear on the apportionment of relief.” Fed. R. Civ. P.  
26 23(e)(2)(D), advisory committee notes (2018 amendment); *see also* 4 William B.  
27 Rubenstein, *Newberg on Class Actions* § 13:56 (5th ed. 2020) (“Put simply, the court’s  
28 goal is to ensure that similarly situated class members are treated similarly and that

1 dissimilarly situated class members are not arbitrarily treated as if they were similarly  
2 situated.”).

3 **a. Equity among class members**

4 In the Second Amended Notice, Lead Plaintiff and Lead Counsel state: “assuming  
5 that all Settlement Class Members elect to participate in the Settlement, the estimated  
6 average recovery (before the deduction of any Court-approved fees, expenses and costs  
7 as described herein) per eligible share is \$0.05. ECF No. 94-1 at 4-5. Here, the Claims  
8 Administrator will determine each Authorized Claimant’s share of the Net Settlement  
9 Fund based upon the “Recognized Loss” formula. ECF No. 94-1 at 22. The Recognized  
10 Loss will be calculated for each share of the BofI common stock purchased or otherwise  
11 acquired during the Settlement Class Period, March 14, 2016 to October 24, 2017. *Id.*  
12 Plaintiff’s Recognized Loss formula is detailed in the Second Amended Notice, for each  
13 time period during which a share of BofI stock was purchased or otherwise acquired, and  
14 when it was sold. *Id.* at 24-26. For example, the Recognized Loss of a share that was  
15 purchased during the period of March 14, 2015 through October 24, 2017 has a  
16 Recognized Loss per share calculated as: “the amount of per-share price inflation on the  
17 date of purchase . . . minus the amount of per-share price inflation on the date of sale,” *id.*  
18 at 24, based on the calculations which appear in Table 1 of the Second Amended Notice,  
19 *id.* at 23.

20 A Claimant’s “Recognized Claim” under the Plan of Allocation is the sum of  
21 Recognized Losses for all shares of BofI securities during the Settlement Class Period.  
22 *Id.* at 26-27. The Net Settlement Fund will be distributed to Authorized Claimants on a  
23 pro rata basis based on the relative size of Recognized Claims. *Id.* at 27. A “Distribution  
24 Amount” will be calculated for each Authorized Claimant, which is equal to the  
25 Recognized Claim divided by the total Recognized Claims of all Authorized Claimants,  
26 multiplied by the total amount in the Net Settlement Fund. *Id.* And if any Authorized  
27 Claimant’s Distribution Amount calculates to less than \$10.00, it will not be included in  
28 the calculation and no distribution will be made to that Authorized Claimant. *Id.* Each

1 class member's Distribution Amount will be distributed by check, and the Claims  
2 Administrator will make efforts to ensure Authorized Claimants cash their distribution  
3 checks. *Id.* at 29. Any funds that remain after six months will be redistributed to  
4 Authorized Claimants who cashed their checks and would receive at least \$10.00 in re-  
5 distribution, *if* Lead Counsel and the Claims Administrator determine it would be cost-  
6 effective to engage in such re-distribution. *Id.*

7 Thus, the Plan of Allocation distributes the Settlement Fund on a pro rata basis to  
8 each class members based on their number of shares and the time period such shares were  
9 purchased. ECF No. 96-1 at 29-30. Securities class actions often distribute settlements in  
10 a similar manner. *See e.g., In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 431  
11 (E.D. Pa. 2001) (plan allocation was "even handed" where claimants received a pro rata  
12 reimbursement based on when they bought and sold their shares). Thus, the Court finds  
13 the Plan of Allocation constitutes equitable treatment of all class members.

14 **b. Equity between unnamed members and class representative**

15 The Court also considers whether any proposed service payment or incentive  
16 award for a named or lead plaintiff is equitable. Additional payments to class  
17 representatives or named plaintiffs, often referred to as incentive awards, generally do not  
18 render a settlement inequitable because such payments reflect that these plaintiffs have  
19 contributed efforts to benefit the class while bearing the risk of nonrecovery and  
20 retaliation. *See Staton*, 327 F.3d at 977. However, courts have refused to countenance  
21 settlements that provide for excessively high incentive awards or that give only *de*  
22 *minimis* relief to the rest of the class. *See id.* at 948, 978 (finding settlement inequitable  
23 where class representatives and other "active participants" were to receive up to \$50,000  
24 in incentive awards each and collectively receive more than half of the total monetary  
25 award despite representing less than 2% of the class).

26 Here, Lead Plaintiff requests an award of \$2,500. ECF No. 97-1 at 28. Lead  
27 Counsel states that Plaintiff was available to Lead Counsel and performed his duties with  
28 "attentiveness and diligence." *Id.*; *see also Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d

1 1157, 1164 (9th Cir. 2013). An award of \$2,500 represents .27% of the total settlement  
 2 amount. Other courts have awarded substantially more than this to named plaintiffs. *See*  
 3 *e.g., Clesceri v. Beach City Investigations & Protective Servs., Inc.*, No. CV-10-3873-JST  
 4 RZX, 2011 WL 320998, at \*2 (C.D. Cal. Jan. 27, 2011) (awarding up to \$3,000 for each  
 5 of the named Plaintiffs when total settlement amount was \$100,000); *Loreto v. Gen.*  
 6 *Dynamics Info. Tech., Inc.*, 2022 WL 3013029 (S.D. Cal. Feb. 2, 2022) (awarding  
 7 \$10,000 to named Plaintiff, which comprised 1% of the maximum settlement amount and  
 8 2% of net settlement amount). The Court finds this award is in line with other awards in  
 9 this Circuit and is not excessively high. For these reasons, the Court determines the  
 10 Settlement Agreement treats all class members equitably.

#### 11 **D. Notice to Class Members**

12 Before the final approval hearing, the Court is required to direct adequate notice of  
 13 the settlement be provided to all class members. Federal Rule of Civil Procedure 23  
 14 provides:

15 The Court must direct to class members the best notice that is practicable under the  
 16 circumstances, including individual notice to all members who can be identified through  
 17 reasonable effort. . . . The notice must clearly and concisely state in plain, easily  
 understood language:

- 18 (i) The nature of the action;
- 19 (ii) The definition of the class certified;
- 20 (iii) The class claims, issues, or defenses;
- 21 (iv) That a class member may enter an appearance through an attorney if the  
 member so desires;
- 22 (v) That the court will exclude from the class any member who requests  
 exclusion;
- 23 (vi) The time and manner for requesting exclusion; and
- 24 (vii) The binding effect of a class judgment on members under Rule 23(c)(3).

25 Fed. R. Civ. P. 23(c)(2)(B).

26 Strategic Claims Services (“SCS”) was selected as Claims Administrator. ECF No.  
 27 100 at 2. 50,632 Notice packets were emailed to class members and 19,244 links to the  
 28 Notice packet were emailed to class members. ECF No. 98-1 ¶¶6-7 (Bravata Decl.). Of

1 the packets mailed, 1,307 were returned as undeliverable, and USPS had forwarded  
2 addresses for nine, which SCS immediately mailed another packet. *Id.* ¶ 9. The remaining  
3 undelivered packets were “skip-traced” and 570 were re-mailed to the new address. *Id.*  
4 Since filing the Bravata Declaration, SCS has mailed an additional 673 Notice and  
5 Claims forms as well as 3,379 additional emails. ECF No. 100 at 2-3. Of these, 1,623  
6 mailed forms were returned as undeliverable. *Id.* at 3. USPS had forwarding addresses for  
7 313 and 631 were “skip-traced” and remailed. *Id.*

8 SCS also published information regarding the settlement online. ECF No. 98-1 ¶  
9 12. As of July 29, 2022, the website had received 2,525 views from 668 unique visitors.  
10 *Id.* The mailed notice and settlement website provided a deadline of September 2, 2022  
11 for written requests for exclusion. *Id.* ¶ 13. As of September 6, 2022, SCS had received  
12 no valid objections or exclusions. ECF No. 100 at 3.

13 As set forth in the Agreement, and amended based on the Court’s Order, (ECF No.  
14 95), the Second Amended Notice provided class members with all necessary information  
15 to make an informed decision. Class members were told, among other things: “(1) the  
16 amount of the Settlement; (2) why the parties propose the Settlement; (3) the estimated  
17 average recovery per damaged share; (4) the maximum amount of attorneys’ fees and  
18 expenses that Lead Counsel would seek; (5) the amount of all Notice and Administration  
19 Costs for the Claims Administrator; (6) Lead Counsel’s contact information; (7) that  
20 Settlement Class Members could object to the Settlement or exclude themselves from the  
21 Settlement Class, and the consequences thereof; and (8) the dates and deadlines for  
22 certain Settlement-related events.” ECF No. 96-1 at 32. The Court thus finds that the  
23 Second Amended Notice satisfies the requirements of Federal Rule of Civil Procedure  
24 23(c)(2)(B).

25 **E. Plaintiff’s Motion for Attorneys’ Fees, Administration Costs, and**  
26 **Incentive Award**

27 Together with its Motion for final approval, Plaintiff has also filed a Motion for  
28 Attorneys’ Fees and Expenses, Notice and Administration Costs, and Award to Plaintiff.

1 ECF No. 97-1. For the reasons below, the Court approves: (1) attorneys' fees calculated  
2 at \$225,000, plus interest, and expenses in the amount of \$138,631.36, plus interest; (2)  
3 payment to the Claims Administrator for costs incurred to date; and (3) an award of  
4 \$2,500 to Lead Plaintiff David Grigsby.

5 **i. Attorneys' Fees and Expenses**

6 Lead Counsel seeks attorneys' fees in the amount of \$225,000, plus interest, and  
7 reimbursement of expenses incurred in the amount of \$138,531.36, plus interest. "While  
8 attorneys' fees and costs may be awarded in a certified class action where so authorized  
9 by law or the parties' agreement, Fed. R. Civ. P. 23(h), courts have an independent  
10 obligation to ensure that the award, like the settlement itself, is reasonable, even if the  
11 parties have already agreed to an amount." *Bluetooth*, 654 F.3d at 941.

12 Fees can be calculated by either the lodestar method or the percentage-of-the-fund  
13 method. *Id.* at 942. Use of the percentage method in common fund cases is the most  
14 dominant because of its various advantages, including increased incentive for counsel to  
15 litigate and promotion of efficiency. *See In re Omnivision Techs., Inc.*, 559 F. Supp. 2d  
16 1036, 1046 (N.D. Cal. 2008). Further, the Private Securities Litigation Reform Act  
17 ("PSLRA") itself provides that "[t]otal attorneys' fees and expenses awarded by the court  
18 to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount"  
19 recovered for the class. 15 U.S.C. § 78u-4(a)(6). Thus, the Court agrees with Plaintiff and  
20 elects to use the percentage-of-recovery method to award the attorneys' fees.

21 At the outset, the Court notes that the Ninth Circuit recognizes 25% as the  
22 benchmark percentage for the percentage-of-recovery method. *In re Online DVD-Rental*  
23 *Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015) (citing *Bluetooth*, 654 F.3d at 942).  
24 Courts should analyze the following factors to determine if a percentage is reasonable:  
25 (1) the results achieved; (2) the risk of litigation; (3) the skill required and quality of  
26 counsel's work; (4) the contingent nature of the fee and financial burden; (5) awards  
27 made in similar cases; (6) the reaction of the class; and (7) the lodestar cross-check. *See*  
28 *Omnivision*, 559 F. Supp. 2d at 1046; *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047



1 (9th Cir. 2002). As noted by other courts, these factors intentionally track the factors used  
2 to evaluate the adequacy of a settlement. *Omnivision*, 559 F. Supp. at 1046.

3 Analysis of all of these factors support a finding that 25% of the settlement  
4 amount, or \$225,000, is a reasonable fee in this case. Because many of these factors are  
5 already discussed previously, the Court here will only provide brief commentary here.  
6 First, \$900,000 represents 4.5 times the amount of estimated damages calculated on the  
7 low end, or 21% of damages on the high end. ECF No. 97-1 at 16. As discussed, this is an  
8 achievement on behalf of the class.

9 Second, the risks associated with the litigation have been considered. Securities  
10 class actions are complex, difficult to prove, and must surmount many hurdles, including,  
11 at the outset, PSLRA's stringent pleading standards. This factor weighs in favor of the  
12 fee.

13 Third, prosecuting complex class actions takes skill and experience, and this is  
14 particularly true in securities class actions because the PSLRA makes it difficult to get  
15 past the motion to dismiss stage. *Omnivision*, 559 F. Supp. 2d at 1047. Here, Lead  
16 Counsel drafted a Second Amended Complaint and won on a Motion to Dismiss and an  
17 appeal. ECF No. 97-1 at 19. This factor supports the 25% fee.

18 The fourth factor also weighs in favor of the requested fee. Lead Counsel's fees  
19 were entirely contingent on a successful outcome, and Lead Counsel risked non-payment  
20 of 2,323 billable hours and \$138,631.36 of expenses for five years. ECF No. 97-1 at 22.  
21 This is a "substantial outlay" and thus this factor supports the requested fee.

22 As to the fifth factor, as stated above, the Ninth Circuit has recognized that 25% is  
23 the benchmark in securities class actions. Some courts in the Ninth Circuit have even  
24 awarded up to 33% of the common fund. *See e.g., Singer v. Becton Dickinson & Co.*, No.  
25 08-cv-821-IEG (BLM), 2010 WL 2196104, at \*8 (S.D. Cal. June 1, 2010) (awarding  
26 33%); *In re Banc of California Sec. Litig.*, 2020 WL 1283486, at \*1 (awarding 33%).  
27 Thus, 25% is similar to other cases.

28

1 Sixth, 50,512 Notice packets were mailed to class members and 18,830 links were  
2 emailed. ECF No. 97-1 at 25. There was also a Settlement website. *Id.* The Notice  
3 informed the class members that Lead Counsel would seek 25% of the settlement amount  
4 as well as interest and reimbursement. *Id.* Although class members were notified of their  
5 right to object to these terms, no class member has objected to the requested fees or  
6 expenses. *Id.* at 26.

7 Last, the seventh factor encourages the Court to do a lodestar cross-check on the  
8 requested percentage. Courts calculate lodestar by multiplying reasonable hourly rates by  
9 the number of hours spent. Here, Counsel states that 2,323.28 hours were spent  
10 prosecuting this case. ECF No. 97-1 at 24 (citing ECF No. 98-2 (Szydlo Decl.) ¶ 8). The  
11 Szydlo Declaration identifies an hourly rate ranging from \$335 to \$1,025 and calculates  
12 the total value at \$1,550,906.70. Szydlo Decl. ¶¶ 5-8. This is a lodestar multiplier of .14,  
13 well below the multiplier range of one to four often used to cross-check reasonableness.  
14 *See Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1265 (C.D. Cal. Sept. 30, 2016)  
15 (citing *Vizcaino*, 290 F.3d at 1052-54 (surveying multipliers in over 20 class actions and  
16 finding multipliers from one to four in over 80% of cases)). Thus, the Court concludes that  
17 the requested attorneys' fees are reasonable.

18 As to the requested expenses, "an attorney who has created a common fund for the  
19 benefit of the class is entitled to reimbursement of reasonable litigation expenses from  
20 that fund." *Ontiveros v. Zamora*, 303 F.R.D. 356, 375 (E.D. Cal. Oct. 8, 2014) (quoting  
21 *In re Heritage Bond Litig.*, 2005 WL 1594403, at \*23 (C.D. Cal. June 10, 2005)). Lead  
22 Counsel has provided a breakdown of all costs incurred pursuing this action, detailed in  
23 the Szydlo Declaration at ¶¶ 9-12. The Court agrees with Counsel that, because of the  
24 contingent nature of this action, Counsel had no incentive to accrue unnecessary or  
25 unreasonable expenses. As such, the Court finds expenses in the amount of \$138,631.36  
26 plus interest is reasonable.

## 27 ii. Notice and Administration Costs

28

1           Lead Counsel seeks \$70,987.93 for the Claims Administrator for all notice and  
2 administration costs incurred as of July 29, 2022 and additional costs incurred as of  
3 September 6, 2022, which are detailed in the Plaintiff’s Reply. ECF No. 97-1 at 27; ECF  
4 No. 100-3. No class member objects to this payment. Thus, the Court approve payment to  
5 the Claims Administrator for all costs incurred to date.

6                           **iii. Award to Lead Plaintiff**

7           For the reasons already discussed, the Court finds the \$2,500 award to the Lead  
8 Plaintiff fair and reasonable.

9                           **III. CONCLUSION**

10           Based on the above, it is hereby ORDERED:

11           1.       **Jurisdiction** - The Court has jurisdiction over the subject matter of the Action,  
12 and all matters relating to the Settlement, as well as personal jurisdiction over all of the  
13 Parties and each of the Settlement Class Members.

14  
15           2.       **Incorporation of Settlement Documents** - This Order and Judgment  
16 incorporates and makes a part hereof: (a) the Stipulation filed with the Court on January  
17 31, 2022; and (b) the Notice and the Summary Notice, both of which were filed with the  
18 Court on January 31, 2022.

19  
20           3.       **Class Certification for Settlement Purposes** - The Court hereby affirms its  
21 determinations in the Preliminary Approval Order certifying, for the purposes of the  
22 Settlement only, the Action as a class action pursuant to Rules 23(a) and (b)(3) of the  
23 Federal Rules of Civil Procedure on behalf of the Settlement Class consisting of all persons  
24 and entities who or which purchased or otherwise acquired shares of BofI Securities  
25 between March 14, 2016 and October 24, 2017, inclusive (the “Settlement Class Period”)  
26 and were allegedly damaged thereby. Excluded from the Settlement Class are Defendants,  
27 the present and former Officers and directors of BofI and any subsidiary thereof, and the  
28 Immediate Family members, legal representatives, heirs, successors or assigns of such

1 excluded persons and any entity in which any such excluded person has or had a controlling  
2 interest during the Settlement Class Period.

3  
4 4. **Adequacy of Representation** - Pursuant to Rule 23 of the Federal Rules of  
5 Civil Procedure, and for the purposes of the Settlement only, the Court hereby affirms its  
6 determinations in the Preliminary Approval Order certifying Plaintiff David Grigsby as  
7 Class Representative for the Settlement Class and appointing Lead Counsel as Class  
8 Counsel for the Settlement Class. Plaintiff and Lead Counsel have fairly and adequately  
9 represented the Settlement Class both in terms of litigating the Action and for purposes of  
10 entering into and implementing the Settlement and have satisfied the requirements of  
11 Federal Rules of Civil Procedure 23(a)(4) and 23(g), respectively.

12  
13 5. **Notice** - The Court finds that the dissemination of the Notice and the  
14 publication of the Summary Notice: (a) were implemented in accordance with the  
15 Preliminary Approval Order and the Order Approving Plaintiff's Second Amended  
16 Proposed Notice Form; (b) constituted the best notice practicable under the circumstances;  
17 (c) constituted notice that was reasonably calculated, under the circumstances, to apprise  
18 Settlement Class Members of (i) the pendency of the Action, (ii) the effect of the proposed  
19 Settlement (including the Releases to be provided thereunder), (iii) Lead Counsel's motion  
20 for an award of attorneys' fees with interest and reimbursement of Litigation Expenses and  
21 Notice and Administration Costs, (iv) their right to object to any aspect of the Settlement,  
22 the Plan of Allocation and/or Lead Counsel's motion for attorneys' fees with interest and  
23 reimbursement of Litigation Expenses and Notice and Administration Costs, (v) their right  
24 to exclude themselves from the Settlement Class, and (vi) their right to appear at the  
25 Settlement Hearing; (d) constituted due, adequate, and sufficient notice to all persons and  
26 entities entitled to receive notice of the proposed Settlement; and (e) satisfied the  
27 requirements of Rule 23 of the Federal Rules of Civil Procedure, the United States  
28 Constitution (including the Due Process Clause), the Private Securities Litigation Reform  
Act of 1995, 15 U.S.C. § 78u-4, as amended, and all other applicable law and rules.

1  
2       6.       **Final Settlement Approval and Dismissal of Claims** - Pursuant to, and in  
3 accordance with, Rule 23 of the Federal Rules of Civil Procedure, this Court hereby fully  
4 and finally approves the Settlement set forth in the Stipulation in all respects (including,  
5 without limitation: the amount of the Settlement; the Releases provided for therein; and the  
6 dismissal with prejudice of the claims asserted against Defendants in the Action), and finds  
7 that the Settlement is, in all respects, fair, reasonable and adequate to the Settlement Class.  
8 The Parties are directed to implement, perform and consummate the Settlement in  
9 accordance with the terms and provisions contained in the Stipulation.

10  
11       7.       The Action and all of the claims asserted against Defendants in the Action by  
12 Plaintiff and the other Settlement Class Members are hereby **DISMISSED WITH**  
13 **PREJUDICE**. The Parties shall bear their own costs and expenses, except as otherwise  
14 expressly provided in the Stipulation.

15  
16       8.       **Binding Effect** - The terms of the Stipulation and of this Order and Judgment  
17 shall be forever binding on Defendants, Plaintiff and all other Settlement Class Members  
18 (regardless of whether or not any individual Settlement Class Member submits a Claim  
19 Form or seeks or obtains a distribution from the Net Settlement Fund), as well as their  
20 respective successors and assigns.

21       9.       **Releases** - The Releases set forth in paragraphs 5 and 6 of the Stipulation,  
22 together with the definitions contained in paragraph 1 of the Stipulation relating thereto,  
23 are expressly incorporated herein in all respects. The Releases are effective as of the  
24 Effective Date. Accordingly, this Court orders that:

25               (a)   Without further action by anyone, and subject to paragraph 10 below,  
26 upon the Effective Date of the Settlement, Plaintiff and each of the other Settlement Class  
27 Members, on behalf of themselves, and their current and former officers, directors, agents,  
28 parents, affiliates, subsidiaries, successors, predecessors, assigns, assignees, employees,

1 attorneys, heirs, executors, and administrators in their capacities as such, shall be deemed  
2 to have, and by operation of law and of the judgment shall have, fully, finally and forever  
3 compromised, settled, released, resolved, relinquished, waived and discharged each and  
4 every Released Plaintiff's Claim against Defendants and Defendants' Releasees, shall be  
5 permanently and forever enjoined from instituting, commencing or prosecuting, in any  
6 capacity, any and all of the Released Plaintiff's Claims against any of Defendants'  
7 Releasees, and shall be deemed to permanently covenant to refrain from instituting,  
8 commencing or prosecuting, in any capacity, any and all of the Released Plaintiff's Claims  
9 against any of Defendants' Releasees. This Release shall not apply to any of the Excluded  
10 Claims, as that term is defined in paragraph 1(mm) of the Stipulation.

11 (b) Without further action by anyone, and subject to paragraph 10 below,  
12 upon the Effective Date of the Settlement, Defendants, on behalf of themselves, and their  
13 respective current and former officers, directors, agents, parents, affiliates, subsidiaries,  
14 successors, predecessors, assigns, assignees, employees, attorneys, heirs, executors, and  
15 administrators in their capacities as such, shall be deemed to have, and by operation of law  
16 and of the judgment shall have, fully, finally and forever compromised, settled, released,  
17 resolved, relinquished, waived and discharged each and every Released Defendants' Claim  
18 against Plaintiff and Plaintiff's Releasees, and shall forever be barred and enjoined from  
19 prosecuting any or all of Released Defendants' Claims against any of Plaintiff's Releasees.  
20 [This Release shall not apply to any person or entity listed on Exhibit 1 hereto.]

21 10. Notwithstanding paragraphs 9(a) - (b) above, nothing in this Order and  
22 Judgment shall bar any action by any of the Parties to enforce or effectuate the terms of the  
23 Stipulation or this Order and Judgment.

24  
25 11. **Rule 11 Findings** - The Court finds and concludes that the Plaintiff and  
26 Settling Defendants and their respective counsel have complied in all respects with the  
27 requirements of Rule 11 of the Federal Rules of Civil Procedure in connection with the  
28 institution, prosecution, defense, and settlement of the Action.

1  
2       12.    **Plan of Allocation Approval** - The Court finds and concludes that the  
3 formula for the calculation of the claims of Claimants as set forth in the Plan of Allocation  
4 submitted by Lead Counsel, as described in the Notice and in accordance with paragraph  
5 1(ii) of the Stipulation, is hereby approved as fair, reasonable and adequate. Any further  
6 orders or proceedings solely regarding the Plan of Allocation, or any appeal from any order  
7 relating thereto or reversal or modification thereof, shall be considered separate and apart  
8 from this Order and Judgment and shall not operate to terminate the Settlement or in any  
9 way disturb or affect this Order and Judgment, the finality of this Order and Judgment, or  
10 the release of the Released Claims. Any orders regarding the Plan of Allocation shall not  
11 affect or delay the Effective Date of the Settlement.

12  
13       13.    **No Admissions** - Neither this Order and Judgment, the Memorandum of  
14 Understanding, the Stipulation (whether or not consummated), including the exhibits  
15 thereto and the Plan of Allocation contained therein (or any other plan of allocation that  
16 may be approved by the Court), the negotiations leading to the execution of the  
17 Memorandum of Understanding and the Stipulation, nor any proceedings taken pursuant  
18 to or in connection with the Memorandum of Understanding, the Stipulation and/or  
19 approval of the Settlement (including any arguments proffered in connection therewith):

20           (a) shall be offered against any of Defendants or Defendants' Releasees as  
21 evidence of, or construed as, or deemed to be evidence of any presumption, concession, or  
22 admission by any of Defendants or Defendants' Releasees with respect to the truth of any  
23 fact alleged by Plaintiff or the validity of any claim that was or could have been asserted  
24 or the deficiency of any defense that has been or could have been asserted in this Action or  
25 in any other litigation, or of any liability, negligence, fault, or other wrongdoing of any  
26 kind on the part of any of Defendants or Defendants' Releasees or in any way referred to  
27 for any other reason as against any of Defendants or Defendants' Releasees, in any civil,  
28 criminal or administrative action or proceeding, other than such proceedings as may be  
necessary to effectuate the provisions of the Stipulation;

1 (b) shall be offered against any of Plaintiff's Releasees, as evidence of, or  
2 construed as, or deemed to be evidence of any presumption, concession or admission by  
3 any of Plaintiff's Releasees that any of their claims are without merit, that any of  
4 Defendants or Defendants' Releasees had meritorious defenses, or that damages  
5 recoverable under the Second Amended Complaint would not have exceeded the  
6 Settlement Amount or with respect to any liability, negligence, fault or wrongdoing of any  
7 kind, or in any way referred to for any other reason as against any of Plaintiff's Releasees,  
8 in any civil, criminal or administrative action or proceeding, other than such proceedings  
9 as may be necessary to effectuate the provisions of the Stipulation; or

10 (c) shall be construed against any of the Releasees as an admission,  
11 concession, or presumption that the consideration to be given under the Settlement  
12 represents the amount which could be or would have been recovered after trial; provided,  
13 however, that the Parties and the Releasees and their respective counsel may refer to this  
14 Order and Judgment and the Stipulation to effectuate the protections from liability granted  
15 hereunder and thereunder or otherwise to enforce the terms of the Settlement.

16  
17 14. **Retention of Jurisdiction** - Without affecting the finality of this Order and  
18 Judgment in any way, this Court retains continuing and exclusive jurisdiction over: (a) the  
19 Parties for purposes of the administration, interpretation, implementation and enforcement  
20 of the Settlement; (b) the disposition of the Settlement Fund; (c) any motion for Notice and  
21 Administration Costs in the Action that will be paid from the Settlement Fund; (d) any  
22 motion for attorneys' fees and expenses that will be paid from the Settlement Fund; (e) the  
23 Plan of Allocation; (f) any motion to approve the Class Distribution Order; and (g) the  
24 Settlement Class Members for all matters relating to the Action.

25 15. **Modification of the Agreement of Settlement** - Without further approval  
26 from the Court, the Plaintiff and Settling Defendants are hereby authorized to agree to and  
27 adopt such amendments or modifications of the Stipulation or any exhibits attached thereto  
28 to effectuate the Settlement that: (a) are not materially inconsistent with this Order and



1 Judgment; and (b) do not materially limit the rights of Settlement Class Members in  
2 connection with the Settlement. Without further order of the Court, Plaintiff and  
3 Defendants may agree to reasonable extensions of time to carry out any provisions of the  
4 Settlement.

5  
6 16. **Lead Counsel's Attorney Fees and Expenses** - The Court hereby awards  
7 Lead Counsel attorneys' fees in the amount of \$225,000 from the Settlement Fund, plus  
8 interest earned thereon, and expenses in an amount of \$138,631.36, plus interest earned  
9 thereon, for the same time period and at the same rate as that earned on the Settlement Fund  
10 until paid. The Court finds that the amount of fees awarded is fair and reasonable in light  
11 of the time and labor required, the novelty and difficulty of the case, the skill required to  
12 prosecute the case, the experience and ability of the attorneys, awards in similar cases, the  
13 contingent nature of the representation and the result obtained for the Settlement Class.  
14 Said fees shall be allocated among any other plaintiffs' counsel in a manner which, in Lead  
15 Counsel's good-faith judgment, reflects each counsel's contribution to the institution,  
16 prosecution, and resolution of the Litigation.

17  
18 17. **Notice and Administration Costs**

19 The Court hereby awards the Claims Administrator its Notice and Administration Costs  
20 incurred to date, that is, \$102,860.43. As per paragraph fourteen, above, the Court retains  
21 jurisdiction to consider a motion for distribution of additional costs incurred following this  
22 Order.

23 18. **Plaintiff's Expenses Related to Representation of the Settlement Class**

24 The Court hereby awards David Grigsby his reasonable costs and expenses directly related  
25 to his representation of the Settlement Class in the amount of \$2,500.

26  
27 19. The awarded attorneys' fees and expenses, and interest earned thereon, as well  
28 as any costs or expenses awarded pursuant to paragraphs 17 and 18, shall be paid to Lead

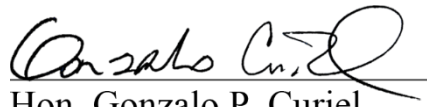
1 Counsel from the Settlement Fund immediately after the date this Order and Judgment is  
2 executed subject to the terms, conditions, and obligations of the Stipulation. Any awards  
3 of attorneys' fees and expenses, as well as any costs or expenses awarded pursuant to  
4 paragraphs 17 and 18, shall in no way affect or delay the finality of this Order and Judgment  
5 and shall not affect or delay the Effective Date of the Settlement.  
6

7       20. **Termination of Settlement** - If the Settlement is terminated as provided in  
8 the Stipulation or the Effective Date of the Settlement otherwise fails to occur, this Order  
9 and Judgment shall be vacated, rendered null and void and be of no further force and effect,  
10 except as otherwise provided by the Stipulation, and this Order and Judgment shall be  
11 without prejudice to the rights of Plaintiff, the other Settlement Class Members and  
12 Defendants, and the Parties shall revert to their respective positions in the Action as of  
13 December 8, 2021, as provided in the Stipulation.

14  
15       21. **Entry of Final Judgment** - There is no just reason to delay the entry of this  
16 Judgment as a final judgment in this Action. Accordingly, the Clerk of the Court is  
17 expressly directed to immediately enter this final judgment in this Action.

18 **IT IS SO ORDERED.**

19  
20 Dated: September 23, 2022

  
21 Hon. Gonzalo P. Curiel  
22 United States District Judge  
23  
24  
25  
26  
27  
28