

1 Richard M. Heimann (Cal. Bar No. 063607)  
 rheimann@lchb.com  
 2 Katherine Lubin Benson (Cal. Bar No. 259826)  
 kbenson@lchb.com  
 3 Michael K. Sheen (Cal. Bar No. 288284)  
 msheen@lchb.com  
 4 Nicholas R. Hartmann (Cal. Bar No. 301049)  
 nhartmann@lchb.com  
 5 LIEFF CABRASER HEIMANN &  
 BERNSTEIN, LLP  
 6 275 Battery Street, 29th Floor  
 San Francisco, CA 94111-3339  
 7 Telephone: (415) 956-1000  
 Facsimile: (415) 956-1008  
 8

9 Daniel P. Chiplock (admitted *pro hac vice*)  
 dchiplock@lchb.com  
 10 Michael J. Miarmi (admitted *pro hac vice*)  
 mmiarmi@lchb.com  
 11 Gabriel Panek (admitted *pro hac vice*)  
 gpanek@lchb.com  
 12 LIEFF CABRASER HEIMANN &  
 BERNSTEIN, LLP  
 250 Hudson Street, 8th Floor  
 13 New York, NY 10013-1413  
 Telephone: (212) 355-9500  
 14 Facsimile: (212) 355-9592

15 *Counsel for Lead Plaintiff Houston Municipal*  
 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  
 LITIGATION.

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

**DECLARATION OF KATHERINE  
 LUBIN BENSON IN SUPPORT OF  
 MOTION FOR PRELIMINARY  
 APPROVAL OF CLASS ACTION  
 SETTLEMENT**

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

Date: June 3, 2022  
 Time: 1:30 p.m.

1 I, Katherine Lubin Benson, declare as follows:

2 1. I am an attorney duly licensed to practice law in the State of California  
3 and am admitted to practice in this Court. I am a partner at the law firm Lieff  
4 Cabraser Heimann & Bernstein, LLP (“Lieff Cabraser”), which serves as counsel  
5 for Court-appointed Lead Plaintiff Houston Municipal Employees Pension System  
6 (“Plaintiff” or “HMEPS”) and as Class Counsel in the above-captioned action. I  
7 submit this declaration in support of Plaintiff’s Motion for Preliminary Approval of  
8 Class Action Settlement.

9 2. After over six years of vigorously contested litigation, Plaintiff and  
10 Defendants BofI Holding, Inc. (“BofI” or the “Bank”), Gregory Garrabrants, James  
11 Argalas, Paul J. Grinberg, Andrew J. Micheletti, and Nicholas A. Mosich have  
12 reached a settlement to resolve this securities class action. Under the proposed  
13 settlement, BofI’s insurers will, on behalf of Defendants, create a \$14.1 million  
14 cash fund to compensate Class members who were damaged by Defendants’  
15 alleged misstatements regarding the Bank’s underwriting standards and internal  
16 controls. This is a significant recovery for the Class.

17 3. The proposed settlement is fair, reasonable, and adequate. Plaintiff  
18 and Class Counsel vigorously prosecuted this action on behalf of the Class and  
19 developed a deep understanding of the strengths and weaknesses of the action.  
20 Plaintiff’s claims survived three challenges to the pleadings and prevailed on appeal  
21 to the Ninth Circuit; Plaintiff (over Defendants’ opposition) successfully obtained  
22 certification of a Rule 23(b)(3) class; and the parties engaged in over a year of  
23 discovery. Notwithstanding its confidence in the merits of its claims, Plaintiff  
24 recognizes the challenge of proving at trial that Defendants covered up BofI’s risky  
25 lending practices and deficient internal controls thereby causing damage to the  
26 Bank’s shareholders. The Settlement—which is the product of extensive, arms’-  
27 length negotiations with the assistance of experienced mediator Hon. Daniel P.  
28 Weinstein (Ret.)—ensures substantial and meaningful relief for Class members.

1 **I. BACKGROUND OF THE ACTION**

2 **A. The Pleadings and Appeal**

3 4. Following the filing of the Erhart Complaint,<sup>1</sup> several investors  
4 commenced proposed class actions. *See* ECF No. 1. This Court consolidated the  
5 actions and appointed HMEPS and lead plaintiff and Lieff Cabraser as lead counsel.  
6 ECF No. 23.

7 5. Plaintiff and Class Counsel extensively investigated the nature of the  
8 claims in this action, including by speaking with numerous former Bank employees  
9 who served as confidential witnesses (“CWs”) in the complaints. On April 11,  
10 2016, Plaintiff filed its consolidated amended complaint (“CAC”). ECF No. 26.

11 6. Over the next two years, the parties engaged in four separate rounds of  
12 highly contested pleadings challenges: two rounds of motions to dismiss pursuant  
13 to Rule 12(b)(6), which were granted in part and denied in part; a motion for  
14 judgment on the pleadings under Rule 12(c), which was granted in full with leave  
15 to re-plead, after which Plaintiff filed the Third Amended Complaint; and a final  
16 motion to dismiss pursuant to Rule 12(b)(6), which the Court granted with  
17 prejudice. Following that order, the Court entered judgment in Defendants’ favor.  
18 ECF No. 157. Plaintiff appealed. ECF No. 158.

19 7. Over the ensuing eight months, the parties briefed the appeal, and a  
20 panel of the Ninth Circuit heard oral argument on January 7, 2020. On October 8,  
21 2020, the Ninth Circuit issued its opinion, reversing and remanding in part. *In re*  
22 *BofI Holding, Inc. Sec. Litig.*, 977 F.3d 781 (9th Cir. 2020). The appellate court  
23 held Plaintiff had “adequately pleaded a viable claim under § 10(b) and Rule 10b-5  
24 for the two categories of misstatements the district court found actionable, with the  
25 Erhart lawsuit serving as a potential corrective disclosure.” *Id.* at 798. The Erhart  
26 Complaint “disclosed facts that, if true, rendered false BofI’s prior statements about

27 \_\_\_\_\_  
28 <sup>1</sup> *Erhart v. BofI Holding, Inc.*, No. 3:15-cv-2287-BAS-NLS (S.D. Cal. Oct. 13, 2015) (ECF No. 1).

1 its underwriting standards, internal controls, and compliance infrastructure.” *Id.* at  
2 793. The Ninth Circuit separately affirmed the Court’s conclusions that the *Seeking*  
3 *Alpha* articles did not constitute corrective disclosures, and that Plaintiff failed to  
4 allege the falsity of alleged misstatements concerning government and regulatory  
5 investigations. *Id.* at 794–98.

6 **B. The Parties Engaged In Discovery.**

7 8. Between December 2020 and February 2022, the parties exchanged  
8 voluminous discovery and vigorously litigated a substantial number of issues.

9 **1. Plaintiff’s Written Discovery From Defendants**

10 9. On December 23, 2020, Plaintiff served its first set of requests for  
11 production of documents, which contained forty-seven individual document  
12 requests. Thereafter, Plaintiff served seven subsequent sets of requests for  
13 production, five sets of interrogatories, and one set of requests for admission. In  
14 total, Plaintiff propounded 106 document requests, 21 interrogatories, and 2  
15 requests for admission.

16 10. Over the course of discovery, in response to Plaintiff’s discovery  
17 requests, Defendants produced 89,041 documents totaling 633,885 pages.

18 11. Plaintiff’s review and analysis of Defendants’ documents was aided by  
19 use of technology-assisted review (“TAR”) process. Using artificial intelligence to  
20 analyze Defendants’ documents, TAR allowed Plaintiff to conserve resources and  
21 maximize efficiency by identifying and isolating the documents most relevant to  
22 Plaintiff’s case. The TAR process began with manual review of a subset of  
23 documents, which attorneys previously identified through a manual review as  
24 highly relevant. This so-called “seed set” of documents was then fed into the TAR  
25 program. The program developed an algorithm (based on classifying, categorizing,  
26 and identifying patterns within the text of a document) to conduct an automated  
27 review of other documents in the production to identify the most relevant ones for  
28 priority review by attorneys. As Plaintiff’s counsel continued to manually review

1 and code new documents, the results of that review were fed back into the TAR  
2 program, which recalibrated its learning process on a continuous basis.

3 **2. Defendants' Written Discovery from Plaintiff**

4 12. Beginning on February 26, 2021, Defendants served a total of 145  
5 document requests, 24 interrogatories, and 1 request for admission.

6 13. Over the course of discovery, in response to Defendants' discovery  
7 requests, Plaintiff produced 47 documents totaling 892 pages.

8 **3. Third-Party Discovery**

9 14. On May 28, 2021, Plaintiff issued document subpoenas on the  
10 following third parties: (i) BDO USA, LLP; (ii) Crowe, LLP; (iii) Center Street  
11 Lending; (iv) OnDeck Capital; (v) PropelTax/Propel Financial; and (vi) Quick  
12 Bridge Funding LLC. Over the course of discovery, these entities collectively  
13 produced 2,037 documents totaling 23,043 pages.

14 15. In addition, the parties issued several document and deposition  
15 subpoenas to individual witnesses. Over the course of discovery, those witnesses  
16 collectively produced 78 documents totaling 176 pages.

17 **4. Deposition Discovery**

18 16. The parties' extensive document discovery efforts were supplemented  
19 by deposition testimony from several key witnesses. Plaintiff deposed three  
20 witnesses, and Defendants deposed six witnesses. Key deponents included:  
21 Gregory Brunt, Chief Investment Officer at HMEPS; Rhonda Smith, former  
22 Executive Director at HMEPS (pursuant to Rule 30(b)(6)); Peter Neumeier, an  
23 investment manager for HMEPS; Jan Durrans, EVP and Chief of Staff and Chief  
24 Performance Officer at BofI; and Ron Pitters, Chief Information Officer at BofI  
25 (pursuant to Rule 30(b)(6)). At the time they reached a settlement in principle of  
26 the claims in this action, the parties had scheduled twenty-one additional  
27 depositions which were set to occur between March 2, 2022 and April 15, 2022.  
28

1           **C.    The Parties Vigorously Litigated Numerous Discovery Disputes.**

2           17.    Throughout the discovery process, the parties met and conferred  
3 regarding numerous issues and, when appropriate, brought disputes to Judge  
4 Crawford’s attention in accordance with her Chambers Rules. In every instance,  
5 the parties presented their argument orally or in writing to Judge Crawford and/or  
6 her law clerk.

7           18.    The parties raised at least seventy-seven distinct discovery disputes for  
8 judicial determination. In addressing these disputes, the parties spent countless  
9 hours meeting and conferring to narrow the scope of their disputes, conferring with  
10 Judge Crawford’s law clerk regarding these disputes, and appearing before Judge  
11 Crawford for oral argument. The parties’ disputes covered nearly every facet of  
12 discovery.

13           19.    On February 22, 2021, the parties identified and brought to the Court’s  
14 attention four threshold disputes for judicial determination: (i) the relevant time  
15 period for discovery; (ii) whether Defendants must produce discovery from the  
16 Erhart Action; (iii) whether Defendants must produce information relating to  
17 underwriting standards and credit quality; and (iv) whether Defendants must  
18 produce documents all of the internal control, compliance infrastructure, and risk  
19 management deficiencies alleged in the TAC. *See* ECF No. 181. On February 26,  
20 2021, Judge Crawford issued an order regarding these threshold disputes. ECF No.  
21 182.

22           20.    Defendants objected to certain aspects of Judge Crawford’s February  
23 26 order. ECF No. 183. On May 6, 2021, Judge Curiel issued an order overruling  
24 Defendants’ objections. ECF No. 196.

25           21.    In addition, the parties raised several disputes that affected discovery  
26 as a whole, including the appropriate number and identity of document custodians,  
27 search terms, and the assertions of the attorney-client privilege, work product  
28

1 doctrine, and the bank examination privilege. *See, e.g.*, ECF Nos. 193, 250, 292,  
2 296, 308, 338.

3 22. Plaintiff raised many specific issues including, among other things,  
4 requests to compel documents and information relating to: (i) loans issued by the  
5 Bank during the relevant period; (ii) BofI's policies and practices concerning  
6 internal controls, underwriting, and human resources; (iii) personnel files for key  
7 witnesses; and (iv) deposition testimony from the Erhart Action and related actions.  
8 *See, e.g.*, ECF Nos. 189, 206, 218, 236, 257, 274, 292, 297, 300, 301, 312, 340,  
9 361.

10 23. In addition, on at least two occasions, the parties raised disputes  
11 arising from Plaintiff's deposition subpoenas to third-party witnesses. *See, e.g.*,  
12 ECF Nos. 308, 315, 316, 331, 338, 344.

13 24. On multiple occasions, the parties sought further relief from this Court  
14 by objecting to Judge Crawford's discovery rulings. *See, e.g.*, ECF Nos. 183, 214,  
15 343, 344, 354. Three such objections were pending before this Court at the time  
16 when the parties reached a settlement in principle. *See* ECF Nos. 343, 344, 354.

17 25. From September through December 2021, the parties held nine  
18 biweekly telephonic discovery conferences before Judge Crawford. These  
19 conferences required preparation by counsel. The conferences effectively assisted  
20 the parties in mediating disputes that would have otherwise required formal court  
21 intervention. The parties also appeared before Judge Crawford where individual  
22 disputes required it, including for an all-day in-person conference on December 20,  
23 2021.

24 **D. Plaintiff Successfully Certified a Class.**

25 26. Plaintiff moved to certify a class of investors on May 28, 2021. ECF  
26 No. 205. Defendants opposed, asserting that the predominance element was not  
27 satisfied because Plaintiff had not met the requirements of *Comcast Corp. v.*  
28 *Behrend*, 569 U.S. 27 (2013). ECF No. 211. Plaintiff replied on July 23, 2021.

1 ECF No. 226. The parties exchanged expert reports in connection with the class  
2 certification motion, and Defendants deposed Plaintiff's expert. After a hearing  
3 (ECF No. 245), the Court granted Plaintiff's motion and certified a Class consisting  
4 of all persons and entities that, during the period from September 4, 2013 through  
5 October 13, 2015, inclusive, purchased or otherwise acquired shares of the publicly  
6 traded common stock of BofI, as well as purchasers of BofI call options and sellers  
7 of BofI put options, and were damaged thereby. ECF No. 247. The Court also  
8 appointed HMEPS as Class Representative, and Lief Cabraser as Class Counsel.  
9 *Id.*

10 27. The Court approved Plaintiff's proposed notice plan and directed  
11 notice to the Class on December 21, 2021. ECF No. 324. The notice period  
12 concluded on March 21, 2022. In total, nine requests for exclusion were received,  
13 only one of which constitutes a valid timely request. ECF No. 368 (Declaration of  
14 Luiggy Segura) ¶ 18.

15 **II. MEDIATION AND SETTLEMENT**

16 **A. Mediation with Judge Daniel Weinstein (Ret.)**

17 28. In late 2021, the Parties retained the Honorable Daniel Weinstein  
18 (Ret.) of JAMS, as a third-party neutral. The parties held a mediation session by  
19 Zoom with Judge Weinstein on January 13, 2022, which was attended by  
20 representatives from HMEPS, Defendants, and their insurers, in addition to counsel  
21 for all parties. Following the mediation session, the parties continued to  
22 communicate through Judge Weinstein about a potential resolution of the action.

23 29. On February 23, 2022, the parties reached an agreement in principle to  
24 settle all claims in the matter. The parties notified the Court of the settlement that  
25 evening. ECF No. 365. Thereafter and in furtherance of that agreement in  
26 principle, the parties negotiated and signed a Term Sheet reflecting the material  
27 terms of the agreement, which was executed on February 28, 2022, and then  
28 modified by written agreement on March 7, 2022.

1           **B.    The Stipulation and Agreement of Settlement**

2           30.    On April 13, 2022, the parties executed the Stipulation and Agreement  
3 of Settlement (the “Settlement”).

4           31.    The Settlement defines the Class as “the Class certified in this Action  
5 on August 24, 2021.” Settlement ¶ 1.7. On that date, the Court certified a Class  
6 consisting of “all persons and entities that, during the Class Period, purchased or  
7 otherwise acquired shares of the publicly traded common stock of BofI, as well as  
8 purchasers of BofI call options and sellers of BofI put options, and were damaged  
9 thereby.” ECF No. 247 at 3, 21. Excluded from the Class are Defendants and the  
10 officers and directors of the Company at all relevant times, as well as members of  
11 their immediate families and their legal representatives, heirs, successors or assigns,  
12 and any entity in which Defendants have or had a controlling interest. Settlement  
13 ¶ 1.7.

14           32.    The Settlement provides for a payment of \$14.1 million to a common  
15 Settlement Fund on behalf of the already-certified Class. Settlement ¶¶ 1.30, 4. In  
16 return for this payment, Lead Plaintiff and Class Members will release all claims  
17 that have been or could have been asserted against Defendants, relating to the facts,  
18 events, and transactions alleged in this action. Settlement ¶ 1.25. No portion of the  
19 \$14.1 million Settlement Fund will revert to Defendants. After deduction of notice-  
20 related costs and any Court-approved award of attorneys’ fees, reimbursement of  
21 litigation expenses, and service award to HMEPS as class representative, the  
22 Settlement funds will be distributed on a *pro rata* bases to all Class Members, as set  
23 forth in the proposed Plan of Allocation. Settlement ¶¶ 1.20, 1.23; Ex. A-1 to  
24 Stipulation of Settlement (Plan of Allocation in Notice).

25           33.    Based on my and my firm’s experience and knowledge about the facts  
26 and issues in this case, I believe that the Settlement reached in this litigation  
27 represents an excellent result that is in the best interests of the Class Members. I  
28

1 reach this conclusion after considering both the amount of the Settlement Fund and  
2 the risk, expense, complexity, and likely duration of continued litigation.

3 **III. PLAINTIFF’S AND CLASS COUNSEL’S ANTICIPATED MOTION**  
4 **FOR ATTORNEYS’ FEES, REIMBURSEMENT OF LITIGATION**  
5 **EXPENSES, AND SERVICE AWARD**

6 34. Following entry of an order granting Plaintiff’s Motion for Preliminary  
7 Approval and directing notice of the Settlement to the Class, Class Counsel will  
8 move the Court for an award of reasonable attorneys’ fees of no more than 25%  
9 percent of the Settlement Fund (\$3,525,000). Through March 25, 2022, Class  
10 Counsel’s unaudited lodestar is approximately \$13.9 million covering  
11 approximately 26,661 hours of work at Class Counsel’s 2022 rates. The lodestar  
12 will be further audited prior to submission of the motion for attorneys’ fees.

13 35. Class Counsel will also seek reimbursement of no more than \$1.4  
14 million in reasonably incurred litigation expenses, which includes, among other  
15 things, expert witness costs, investigation costs, class notice costs, and the hourly  
16 fee for the law firm that acted as independent counsel for several former BofI  
17 employees in this Action and the Erhart action. The litigation expenses will be  
18 subject to audit.

19 36. Plaintiff will request a service award of up to \$15,000 to compensate it  
20 for time spent pursuing the matter on behalf of the Class. HMEPS has been an  
21 exemplary representative of the Class in the over six years since it was appointed  
22 Lead Plaintiff. During that time, HMEPS oversaw Class Counsel’s work on the  
23 pleadings, appeal, and class certification, attended the Early Neutral Evaluation  
24 meeting with Judge Crawford in 2017, participated in discovery including  
25 producing documents and producing two HMEPS employees to sit for deposition,  
26 and participated in the settlement negotiations, including the mediation.

27 37. Plaintiff and Class Counsel will substantiate these requests in their  
28 anticipated Motion for an Award of Attorneys’ Fees, Reimbursement of Litigation  
Expenses, and Lead Plaintiff’s Service Award.

1 I declare under penalty of perjury under the laws of the United States of  
2 America that the foregoing is true and correct.

3 Executed on this 14th day of April, 2022 at San Francisco, California.

4 Dated: April 14, 2022

LIEFF CABRASER HEIMANN &  
BERNSTEIN, LLP

5  
6 By: s/ Katherine Lubin Benson  
Katherine Lubin Benson

7 Richard M. Heimann (Cal. Bar No. 063607)  
rheimann@lchb.com

8 Katherine Lubin Benson (Cal. Bar No.  
259826)

9 kbenson@lchb.com

10 Michael K. Sheen (Cal. Bar No. 288284)  
msheen@lchb.com

11 Nicholas R. Hartmann (Cal. Bar No. 301049)  
nhartmann@lchb.com

12 275 Battery Street, 29th Floor  
San Francisco, CA 94111-3339

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16 Michael J. Miarmi (admitted *pro hac vice*)  
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17 Gabriel Panek (admitted *pro hac vice*)  
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18 250 Hudson Street, 8th Floor  
New York, NY 10013-1413

19 Telephone: (212) 355-9500

20 Facsimile: (212) 355-9592

21 *Counsel for Lead Plaintiff Houston Municipal*  
22 *Employees Pension System and Class Counsel*

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