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23 UNITED STATES DISTRICT COURT  
24 CENTRAL DISTRICT OF CALIFORNIA  
25 WESTERN DIVISION

26 IN RE BANC OF CALIFORNIA,  
27 INC. STOCKHOLDER  
28 DERIVATIVE LITIGATION

) Lead Case No. 8:19-cv-621-DMG-DFMx  
)  
) (Consolidated with Case Nos. 19-cv-  
) 1152 and 19-cv-05488)

29 This Document Relates To:  
30  
31 ALL ACTIONS.

) MEMORANDUM OF POINTS AND  
) AUTHORITIES IN SUPPORT OF  
) MOTION FOR FINAL APPROVAL OF  
) DERIVATIVE SETTLEMENT

32 ) Date: December 17, 2021  
33 ) Time: 10:00 a.m.  
34 ) Judge: Hon. Dolly M. Gee  
35 ) Ctrm: 8C, 8th Floor

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This is a shareholder derivative action on behalf of nominal defendant Banc of  
4 California, Inc. ("Banc" or the "Company"). The Settlement of this case, achieved after  
5 years of litigation, provides substantial benefits for Banc and is the product of vigorous,  
6 arm's-length negotiations among the settling Parties.<sup>1</sup> On September 27, 2021, this Court  
7 granted preliminary approval of the Settlement and held that "the proposed Settlement falls  
8 within the range of possible approval criteria, as it provides a beneficial result for [Banc]  
9 and appears to be the product of serious, informed, non-collusive negotiations." ECF No.  
10 121 at 1:16-19. Notice was disseminated in accordance with the Amended Preliminary  
11 Approval Order and, to date, no objections have been received. Through the instant  
12 Motion, Plaintiffs respectfully submit that the Settlement should be granted final approval.

13 The Settlement provides for significant corporate governance reforms ("Reforms")  
14 that directly address the alleged wrongdoing, starting with significant turnover on Banc's  
15 Board of Directors ("Board"). As background, the alleged wrongdoing—which included  
16 conflicts of interest by directors, undisclosed improper relationships by top executives, and  
17 certain directors' efforts to silence whistleblowers—stemmed from an inadequate tone at  
18 the top. Obtaining a fresh perspective at the Board level was the first step in remedying  
19 the Company's culture, and prioritizing compliance.

20 As a part of the Settlement, "Banc acknowledges that the filing and maintenance of  
21 Plaintiffs' stockholder derivative actions, and the service of Plaintiffs' litigation demands,  
22 were substantial and material factors contributing to ongoing changes to the Board  
23 composition, including the recent appointment of two independent directors . . . ." ECF No.  
24 112-1 at Ex. A, §I. Since Plaintiffs first issued their litigation demands, certain director  
25 defendants (who allegedly engaged in significant wrongdoing) have left the Board and  
26 have been replaced with independent directors. Now, nine of the ten directors are

27 \_\_\_\_\_  
28 <sup>1</sup> Unless otherwise defined, all capitalized terms used herein shall have the same meanings  
as set forth in the Amended Corrected Stipulation and Agreement of Settlement filed  
September 27, 2021, ECF No. 120 ("Stip.").

1 independent, with seven of the ten directors newly appointed since the alleged wrongdoing  
2 surfaced. This fresh tone at the top sets the stage for resetting the Company's culture and  
3 restoring investor confidence in the Company.

4 In addition to these critical Board changes, the Settlement requires that Banc adopt  
5 a new, stand-alone Whistleblower Policy, which sets forth policies and procedures for  
6 employees to submit anonymous whistleblower reports, including through an independent  
7 Whistleblower Hotline, and directs how such reports will be documented, investigated, and  
8 reported internally. The Whistleblower Policy also requires that the Company's new  
9 independent Whistleblower Hotline be conspicuously posted on the Company's intranet,  
10 and throughout the Company's facilities and breakrooms. Not only does the Whistleblower  
11 Policy substantially improve upon the Company's prior practices, some of which were set  
12 forth in its Code of Ethics ("Code"), but formalizing the policy emphasizes the Company's  
13 commitment to taking whistleblower reports seriously. Collectively, these Reforms create  
14 a stronger, more accountable Board and provide stockholders with assurance that the  
15 Company is committed to transparency, accountability, and compliance going forward.

16 Banc has expressly acknowledged that these Reforms, among others detailed herein,  
17 "confer benefits on Banc" and that Plaintiffs' "litigation and settlement efforts were a  
18 substantial and material factor in causing the Company to adopt, implement, and maintain  
19 the Reforms." *See* Stip., §VII.1.1.1. The Settlement is also firmly supported by the Board,  
20 which "in a good-faith exercise of its business judgment, has concluded that the Reforms  
21 to be implemented and maintained by Banc as a result of the Settlement confer benefits on  
22 the Company, and has approved the Settlement, and each of its terms as set forth in this  
23 Stipulation, as being in the best interests of Banc and its stockholders." *See* Stip., §VI.

24 Thus, Plaintiffs respectfully submit that the Settlement confers substantial benefits  
25 upon Banc, is fair, reasonable, and adequate, and should be granted final approval.

1 **II. BACKGROUND OF THE LITIGATION**

2 **A. The Aurelius Blog and the Board's Response**

3 On October 18, 2016, a post on SeekingAlpha.com by "Aurelius" entitled "BANC:  
4 Extensive Ties to Notorious Fraudster Jason Galanis Make Shares Un-Investible" alleged  
5 a web of improper relationships between Jason Galanis ("Galanis"), a Los Angeles  
6 financier and convicted fraudster, and Banc's then-current senior managers (the "Aurelius  
7 Blog").

8 Banc publicly responded to the Aurelius Blog the same day, stating in a press release  
9 that "[t]he Company's Board of Directors has been aware of matters relating to Jason  
10 Galanis including certain claims he had made suggesting an affiliation with members of  
11 the Company, its Board, and/or its Executive team. The Board, acting through its  
12 Disinterested Directors, immediately initiated a thorough independent investigation led by  
13 Winston & Strawn, and has received regular reports including related to regulatory and  
14 governmental communications over the past year." Banc's press release went on to  
15 discredit the allegations in the Aurelius Blog. Declaration of Willem F. Jonckheer in  
16 Support of Plaintiffs' Motion for Final Approval of Derivative Settlement and for an Award  
17 of Attorneys' Fees, Reimbursement of Expenses, and Service Awards, ("Jonckheer Decl."),  
18 ¶¶8-9 (filed concurrently herewith).

19 On or about October 27, 2016, Banc received an inquiry from its independent  
20 auditor, KPMG LLP, raising concerns about allegations of "inappropriate relationships  
21 with third parties" and "potential undisclosed related party relationships." The Board  
22 created a Special Committee to investigate those concerns. *Id.*, ¶10.

23 On January 23, 2017, Banc reported the Special Committee's conclusion that the  
24 Galanis allegations as they related to Banc were not true. The Special Committee also  
25 reported that the October 18, 2016 press release contained inaccurate statements.

26 The U.S. Securities and Exchange Commission ("SEC") also commenced an  
27 investigation, captioned *In the Matter of Banc of California*, Case No. NY-09592.  
28 Jonckheer Decl., ¶¶11-12.

1           **B. Proceedings in the Related Federal Securities Action**

2           On January 23, 2017, the securities fraud class action *In re Banc of California*  
3 *Securities Litigation*, Case No. SACV 17-00118 (C.D. Cal.) (the "Securities Action") was  
4 filed. The Securities Action alleged that Banc, former Banc Chief Executive Officer,  
5 Steven A. Sugarman, and former Banc Chief Financial Officer, James J. McKinney, made  
6 false and misleading statements to Banc investors in connection with the allegations  
7 reported in the Aurelius Blog. On May 31, 2017, the lead plaintiff in the Securities Action  
8 filed an amended complaint, which identified statements in the Company's October 18,  
9 2016 press release as false and misleading. *See generally* Securities Action ECF No. 41.  
10 On September 6, 2017, Judge Andrew J. Guilford held that the amended complaint filed in  
11 the Securities Action adequately alleged a material omission in Banc's statements to the  
12 market, and that false statements were made with scienter. *See generally* Securities Action  
13 ECF No. 68. On March 16, 2020, the Court granted final approval of the Securities Action  
14 settlement, which provided for a payment of \$19.75 million to the certified class. Securities  
15 Action ECF Nos. 612-614. The Securities Action settlement was funded by insurance  
16 proceeds, which mitigated the potential damages to Banc arising from the alleged issuance  
17 of false and misleading statements. Securities Action ECF No. 592, ¶2.2.

18           **C. Proceedings Related to this Derivative Action**

19           On September 26, 2017, plaintiff Gordon filed a stockholder derivative action in this  
20 Court captioned *Gordon v. Sznewajs, et al.*, Case No. 8:17-cv-1678 (C.D. Cal.), alleging  
21 that certain individuals—who constituted a majority of Banc's Board at the time—breached  
22 their fiduciary duties in connection with, among other things, the Board's response to the  
23 allegations made in the Aurelius Blog, and an alleged web among directors of improper  
24 relationships and conflicts of interest, as detailed in a wrongful termination lawsuit filed  
25 against Banc by former executive Jeffrey T. Seabold (the "*Gordon Demand Futility*  
26 *Action*"). Jonckheer Decl., ¶14.

27           On November 17, 2017, plaintiff Witmer sent a written demand to Banc's Board  
28 demanding the Board investigate and, if appropriate, pursue litigation relating to facts

1 substantially similar to those alleged in the *Gordon* Demand Futility Action (the "Witmer  
2 Demand"). On May 22, 2018, Donald Johnston sent a written demand to Banc's Board  
3 demanding that the Board investigate, address, remedy and commence proceedings against  
4 certain of the Company's current and former officers and directors for breach of fiduciary  
5 duties, violations of sections 10(b) and 20(a) of the Securities Exchange Act of 1934 related  
6 to the Company's internal controls and the alleged improper relationship between Banc's  
7 then current top executives, its Board, and Galanis (the "Johnston Demand"). Jonckheer  
8 Decl., ¶¶17-18.

9 By Order dated June 13, 2018, the Court granted the motion to dismiss the *Gordon*  
10 Demand Futility Action, with leave to amend. On June 22, 2018, Gordon filed a notice of  
11 voluntary dismissal of the *Gordon* Demand Futility Action. *Id.*, ¶15.

12 On July 3, 2018, Gordon sent a written demand to Banc's Board demanding that the  
13 Board commence a good faith investigation into allegations of misconduct by certain  
14 current and former officers and directors and requested the Board take appropriate steps to  
15 remedy the identified breaches of fiduciary duty and remedy Banc's weak internal controls  
16 (the "Gordon Demand"). *Id.*, ¶20.

17 On January 4, 2019, Banc responded separately to the Witmer Demand, the Johnston  
18 Demand, and the Gordon Demand, and rejected each of them (the "Rejection Letters").  
19 The Rejection Letters stated that Banc had investigated the subject matters raised in the  
20 demands and determined it would not be in the best interest of the Company to pursue the  
21 claims alleged or implement any additional remedial measures at the time. *Id.*, ¶22.

22 On April 2, 2019, Gordon filed a stockholder derivative action in this Court  
23 captioned *Gordon v. Bennett, et al.*, Case No. 8:19-cv-00621-DMG-DFM (the "*Gordon*  
24 Demand Refused Action"), alleging Defendants violated their fiduciary duties in  
25 connection with the misconduct described in the Gordon Demand and further alleging the  
26 Board's decision to reject the demand was improper under Maryland law. On June 10,  
27 2019, Johnston also filed a stockholder derivative action in the Central District, captioned  
28 *Johnston v. Sznewajs, et al.*, Case No. 8:19-cv-01152-AG-DFMx, similarly alleging

1 breaches of fiduciary duty arising from substantially the same misconduct as that alleged  
2 in the *Gordon* Demand Refused Action (the "*Johnston* Demand Refused Action"). On  
3 June 24, 2019, Witmer filed a stockholder derivative action in the Central District,  
4 captioned *Witmer v. Sugarman, et al.*, Case No. 2:19-cv-05488-AG-DFMx, also alleging  
5 misconduct substantially similar to that alleged in the *Gordon* Demand Refused Action and  
6 the *Johnston* Demand Refused Action ("*Second Witmer* Demand Refused Action").  
7 Jonckheer Decl., ¶¶24-26.

8 On September 23, 2019, the Judge Guilford entered an order approving the parties'  
9 stipulation to consolidate the *Gordon* Demand Refused Action, *Johnston* Demand Refused  
10 Action, and the *Second Witmer* Demand Refused Action (the consolidated action is  
11 referred to as the "Action") and appointing Schubert Jonckheer & Kolbe LLP and Robbins  
12 LLP as co-lead counsel. *See Gordon* Demand Refused Action, ECF Nos. 56-57. On  
13 November 22, 2019, Plaintiffs filed the Consolidated Complaint. ECF No. 65.

14 In the Consolidated Complaint,<sup>2</sup> Plaintiffs alleged that Banc's officers and directors  
15 made false and misleading statements in connection with the Galanis allegations and Banc's  
16 related disclosures. Plaintiffs further alleged that, based on Banc's own admissions in early  
17 2017, Banc's internal controls suffered from material weaknesses, which were the  
18 responsibility of the Board. Based on the allegations made in wrongful termination lawsuits  
19 filed by former executives of Banc, Plaintiffs further alleged that Banc manipulated its  
20 financial disclosures, Banc's Board and management suffered from undisclosed conflicts  
21 of interest, and that certain directors sought to push out Company whistleblowers, officers,  
22 and directors that sought to ensure compliance. *Id.*, ¶¶120-126. Plaintiffs alleged that their  
23 demands for Board action on these allegations were wrongfully refused by the Board based  
24 on an insufficient and conflicted investigation. *Id.*, ¶¶133-200.

25 On November 15, 2019, Plaintiffs collectively sent another written litigation demand  
26 to Banc regarding additional potential misconduct which had recently come to light in  
27

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28 <sup>2</sup> On September 3, 2021, the Court entered an Order Granting Plaintiff Donald Johnston's Request for Withdrawal and Johnston is no longer a plaintiff in the Action. ECF No. 115.

1 another lawsuit filed against Banc captioned *Sugarman, et al. v. Benett, et al.*, No. 19-  
2 STCV-36697 (Superior Court for the County of Los Angeles) (the "November 15, 2019  
3 Demand"). Stip., §II, p.11. The November 15, 2019 Demand requested that the Board  
4 investigate and take appropriate action to remedy, among other things, potentially improper  
5 kickbacks, undisclosed conflicts of interest, and retaliation against whistleblowers, in  
6 addition to the misconduct previously identified by Plaintiffs. Shortly thereafter, the  
7 parties commenced settlement negotiations. Jonckheer Decl., ¶¶28-29.

#### 8 **D. Settlement Efforts**

9 After the Parties agreed to explore settlement, Plaintiffs' Counsel requested from  
10 Banc and obtained Banc's confidential, internal policies reflecting its relevant internal  
11 controls and practices. Plaintiffs' Counsel thoroughly analyzed Banc's corporate  
12 governance, reviewed industry best practices for similar financial institutions, and then  
13 proposed a slate of thorough corporate governance reforms that could strengthen the  
14 Company's internal controls and form a basis for a settlement of the action. *Id.*, ¶34.

15 The Parties thereafter engaged in extensive and protracted arm's-length negotiations  
16 regarding the corporate governance reforms, which included numerous phone calls and e-  
17 mails, and several settlement proposals and counterproposals over the course of many  
18 months. As the negotiations progressed, the Parties regularly sought, and the Court  
19 granted, extensions to the proposed briefing schedule regarding responses to the  
20 Consolidated Complaint to accommodate the ongoing negotiations. *Id.*, ¶35.

21 After significant and contentious negotiations, the Parties reached agreement on the  
22 substantive corporate governance terms of the proposed Settlement, which were  
23 memorialized in a Memorandum of Understanding ("MOU") dated April 6, 2021. *Id.*, ¶36.

24 After signing the MOU, the Parties engaged in negotiations regarding the attorneys'  
25 fees and expenses to be paid to Plaintiffs' Counsel in recognition of the benefits conferred  
26 on Banc through the governance reforms, but no agreement could be reached. *Id.*, ¶37.  
27 The Parties agreed instead that Plaintiffs would file, contemporaneously herewith, a  
28

1 separate motion requesting Court approval of an award of attorneys' fee and expenses. *Id.*,  
2 ¶38.

### 3 **E. Preliminary Approval Granted and Notice to Stockholders**

4 On September 27, 2021, the Court granted preliminary approval of the Settlement,  
5 authorized the dissemination of the Notice to Banc shareholders, and set the Settlement  
6 Hearing for December 17, 2021. ECF No. 121. Consistent with the Preliminary Approval  
7 Order, on October 8, 2021, the Settlement Notice and Stipulation were filed with the SEC  
8 via Form 8-K and posted by a hyperlink on the Investor Relations section of the Company's  
9 website, and the Summary Notice was published once in *Investor's Business Daily*.  
10 Declaration of Mark McDonald Regarding Notice (Oct. 28, 2021), ECF No. 124. The  
11 Notice and Summary Notice provided that Plaintiffs' Counsel would seek an award of fees  
12 and expenses not to exceed a total of \$1.5 million. *See* ECF Nos. 122-123. As of the date  
13 of this filing, no objections have been received. Jonckheer Decl., ¶2.

### 14 **III. THE STANDARDS FOR JUDICIAL APPROVAL OF A DERIVATIVE** 15 **SETTLEMENT**

16 "There is a strong policy favoring compromises that resolve litigation, and case law  
17 in the Ninth Circuit reflects that strong policy." *In re NVIDIA Corp. Derivative Litig.*, No.  
18 C-06-06110-SBA (JCS), 2008 WL 5382544, at \*2 (N.D. Cal. Dec. 22, 2008). "Settlements  
19 of derivative actions are particularly favored because the cases are 'notoriously difficult  
20 and unpredictable.'" *Lloyd v. Gupta*, No. 15-CV-04183-MEJ, 2016 WL 3951652, at \*3  
21 (N.D. Cal. July 22, 2016).<sup>3</sup>

22 Rule 23.1 governs a district court's analysis of the fairness of a proposed settlement  
23 of a stockholder derivative action. Under Rule 23.1, a derivative action "may be settled,  
24 voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P.  
25 23.1(c). The Ninth Circuit has provided factors which may be considered in evaluating the  
26 fairness of a class action settlement, some of which are applicable to a derivative  
27 settlement:

28 <sup>3</sup> Here, as throughout, all emphasis is deemed added and citations and footnotes are deemed  
omitted unless otherwise noted.

1 The district court's ultimate determination will necessarily involve a balancing  
2 of several factors which may include, among others, some or all of the  
3 following: the strength of plaintiffs' case; the risk, expense, complexity, and  
4 likely duration of further litigation; the risk of maintaining class action status  
throughout the trial; the amount offered in settlement; the extent of discovery  
completed, and the stage of the proceedings; the experience and views of  
counsel; the presence of a governmental participant; and the reaction of the  
class members to the proposed settlement.

5 *Officers for Just. v. Civ. Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982); *see Staton v.*  
6 *Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003).

7 When considering these factors, the Court is to evaluate whether the Settlement as a  
8 whole is fair, reasonable, and adequate to those on whose behalf the suit is brought. *See*  
9 *Officers for Just.*, 688 F.2d at 625. In exercising its discretion to approve a settlement,

10 the court's intrusion upon what is otherwise a private consensual agreement  
11 negotiated between the parties to a lawsuit must be limited to the extent  
12 necessary to reach a reasoned judgment that the agreement is not the product  
13 of fraud or overreaching by, or collusion between, the negotiated parties, and  
that the settlement, taken as a whole, is fair, reasonable and adequate to all  
concerned.

14 *Id.*

#### 15 **IV. THE SETTLEMENT SHOULD BE FINALLY APPROVED**

##### 16 **A. The Settlement Confers a Substantial Benefit upon Banc**

17 "'The principal factor to be considered in determining the fairness of a settlement  
18 concluding a shareholders' derivative action is the extent of the benefit to be derived from  
19 the proposed settlement by the corporation, the real party in interest.'" *In re OSI Sys., Inc.*  
20 *Derivative Litig.*, No. CV-14-2910-MWF (MRWx), 2017 WL 5642304, at \*2 (C.D. Cal.  
21 May 2, 2017); *see also In re Apple Comput., Inc. Derivative Litig.*, No. C 06-4128 JF  
22 (HRL), 2008 WL 4820784, at \*2 (N.D. Cal. Nov. 5, 2008). Corporate governance reforms  
23 that "serve to prevent and protect [the company] from the reoccurrence of certain alleged  
24 wrongdoings" that resulted in material harm to the corporation confer a substantial benefit  
25 on the corporation that warrants settlement approval. *Unite Nat'l Ret. Fund v. Watts*, No.  
26 Civ. A. 04CV3603DMC, 2005 WL 2877899, at \*5 (D.N.J. Oct. 28, 2005); *see Mills v.*  
27 *Elec. Auto-Lite Co.*, 396 U.S. 375, 395-96 (1970) ("a corporation may receive a 'substantial  
28 benefit' from .... private stockholders' actions of this sort 'involv[ing] corporate

1 therapeutics' ... [which] furnish a benefit to all shareholders"). Indeed, "strong corporate  
2 governance is fundamental to the economic well-being and success of a corporation" and  
3 "[c]ourts have recognized that corporate governance reforms such as those achieved here  
4 provide valuable benefits to public companies." *NVIDIA*, 2008 WL 5382544, at \*3.

5 The Settlement guarantees Banc and its shareholders the substantial and immediate  
6 benefits of significant governance reforms that directly address the alleged wrongdoing  
7 and set the stage for a stronger and more independent and accountable Company going  
8 forward. The Reforms as described below will provide substantial benefits to Banc for  
9 years after the Settlement is approved.

10 **1. Credit for Two New Independent Directors and Ongoing Board**  
11 **Changes**

12 As reflected in the Settlement, "Banc acknowledges that the filing and maintenance  
13 of Plaintiffs' stockholder derivative actions, and the service of Plaintiffs' litigation  
14 demands, were substantial and material factors contributing to ongoing changes to the  
15 Board composition, including the recent appointment of two independent directors, James  
16 A. Barker and Andrew Thau." ECF No. 112-1 at Ex. A, §I. The substantial benefits  
17 conferred by these Board changes, alone, support the Court granting final approval.

18 As succinctly stated by the Delaware Court of Chancery, "getting an independent  
19 director is a substantial benefit to the corporation." Tr. at 41:14-15, *In re Tile Shop*  
20 *Holdings, Inc. S'holder Deriv. Litig.*, C.A. No. 10884-VCG (Del. Ch. Aug. 23, 2018),  
21 attached as Exhibit 1 to the Jonckheer Decl. In *Tile Shop*, when considering the plaintiffs'  
22 contested motion for attorneys' fees, the Court specifically observed that obtaining a single  
23 "independent director alone" warranted attorneys' fees of approximately one million  
24 dollars, underscoring the significance of the benefit. *Id.* at 42:8-11 ("It seemed to me that  
25 about a million dollars was a proper plaintiff firm recovery for achieving the independent  
26 director alone."); *see also* Tr. at 20:19-22, 21:11-16, *In re TerraForm Power, Inc.*  
27 *Derivative Litigation*, C.A. No. 11898-CB (consol.) (Del. Ch. Dec. 19, 2016; Dec. 30,  
28 2016), attached as Exhibit 2 to Jonckheer Decl. (awarding \$3 million in attorneys' fees for

1 achieving management and board changes, one of them "being the addition of an  
2 independent board member, which is relief that would have been difficult for the Court to  
3 judicially order and certainly is a good thing"); *In re Activision Blizzard, Inc. S'holder*  
4 *Litig.*, 124 A.3d 1025, 1071 (Del. Ch. 2015) (noting that "precedent suggests that an award  
5 of \$5-10 million could be justified" where non-monetary components of derivative  
6 settlement included two independent directors rendering board majority independent, and  
7 reduction of insiders' voting power).

8 Here, Banc recognizes that Plaintiffs' litigation efforts were substantial and material  
9 factors contributing to two new independent directors, in addition to ongoing changes to  
10 the Board. ECF No. 112-1 at Ex. A, §I. These Board changes were critical to remediating  
11 significant weaknesses at the Company and restoring investor confidence, as the prior  
12 Board was allegedly tainted by conflicts of interest, secret allegiances, and efforts to oust  
13 certain directors that sought to ensure compliance. ECF No. 65, ¶120. Even Banc  
14 acknowledged in its Annual Report filed with the SEC on Form 10-K that "the material  
15 weakness identified" in 2016 related to "an inadequate tone at the top regarding the  
16 importance of internal control over financial reporting." Banc of California, Inc., Annual  
17 Report at 192 (Form 10-K) (Mar. 1, 2017), attached as Exhibit 3 to the Jonckheer Decl.  
18 While Banc claimed it had remediated its tone at the top by the end of 2017,<sup>4</sup> a majority of  
19 the Board at that time was still comprised of directors who had allegedly engaged in  
20 significant wrongdoing and exhibited conflicted loyalties.

21 These ongoing Board changes in 2018 and 2019 were essential to creating a more  
22 independent Board that prioritized compliance. Critically, since Plaintiffs began issuing  
23 the litigation demands, defendants Benett, Karish, and Bowers have left the Board. The  
24 departure of Benett and Karish was particularly significant, as Plaintiffs allege that these  
25 directors engaged in egregious misconduct. Among other wrongdoing, the Consolidated  
26 Complaint alleges that these defendants, among others, engaged in a "power grab" and

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27  
28 <sup>4</sup> Director defendants Holoman and Brownstein left the Board in 2017, before Plaintiffs'  
litigation demands.

1 sought to push out certain whistleblowers, officers, and directors who sought to ensure  
2 compliance with disclosure and financial reporting requirements. ECF No. 65, ¶120. The  
3 November 15, 2019 Demand concerned further allegations that Bennett had engaged in  
4 improper kickbacks and undisclosed conflicts of interest, and that when this wrongdoing  
5 was directly reported internally to Karish, as a member of the Audit Committee, Karish  
6 failed to make any report or conduct any follow up. Jonckheer Decl., ¶29.

7 In addition to these "ongoing changes to the Board composition," Banc also  
8 specifically acknowledges that Plaintiffs' efforts were "substantial and material factors  
9 contributing to ... the recent appointment of ... James A. Barker and Andrew Thau." ECF  
10 No. 112-1 at Ex. A, §I. These independent directors were appointed to the Board in  
11 November 2019, just as Bennett's retirement became effective. Jonckheer Decl., ¶40. In a  
12 press release, Banc touted these directors' respective qualifications and noted that "[t]heir  
13 depth of knowledge in their respective industries complements the Board's breadth and  
14 talent and will be extremely valuable to the Board as the Company continues to execute on  
15 its strategic initiatives." *See* Banc of California, Inc., Current Report (Form 8-K) (Nov. 7,  
16 2019) & Exhibit, attached as Exhibit 4 to the Jonckheer Decl. Collectively, these Board  
17 changes confer long-term value on the Company by leaving Banc with a stronger, more  
18 accountable Board, comprised of a super-majority of independent directors of various  
19 backgrounds.<sup>5</sup>

20 Improving a Company's tone at the top and ridding the Company of conflicted  
21 directors is an invaluable benefit. "Independence is the cornerstone of accountability. It  
22 is now widely recognized that independent boards are essential to a sound governance  
23 structure." CalPERS's Governance & Sustainability Principles at 11.<sup>6</sup> Jonckheer Decl.,

24 \_\_\_\_\_  
25 <sup>5</sup> While defendants Sznewajs, Schnel, and Lashley remain on the Board, they are now three  
26 of ten directors, and the remaining seven directors were newly appointed since 2017. In  
addition, nine of the ten directors are independent.

27 <sup>6</sup> CalPERS refers to the California Public Employees' Retirement System ("CalPERS"),  
28 which is the "nation's largest defined benefit public pension fund." *Id.* at 1. CalPERS  
publishes its "views on best practices," as it believes that "fully accountable governance  
structures produce, over the long term, the best returns to shareowners." *Id.* at 1, 5.  
CalPERS publishes its Governance & Sustainability Principles, which set forth certain

1 Ex. 5. While the Board was previously comprised of a majority of supposedly  
2 "independent" directors,

3 the definitional independence of a majority of the board may not be enough  
4 in some instances. The leadership of the board must embrace independence,  
5 and it must ultimately change the way in which directors interact with  
6 management. Independence also requires a lack of conflict between the  
7 director's personal, financial, or professional interest, and the interests of  
8 shareowners.

9 *Id.* A strong, independent board is critical to ensure that independent directors are actively  
10 supervising the Company's compliance, the adequacy of its internal controls, and its risk  
11 exposure. Moreover, when the prior Board was tainted by serious conflicts and  
12 wrongdoing, as it was here, turnover is critical to reestablishing investor trust in the  
13 Company. *See* BlackRock Investment Stewardship Annual Report 2020 at 29, attached to  
14 the Jonckheer Decl. as Ex. 6 ("We expect independent directors to be free from conflicts  
15 of interest that could impair their ability to act in the interests of the company and its  
16 shareholders."); *id.* at 31 ("[D]irectors who bring a range of different perspectives and  
17 experiences to the board's work contribute to better decision-making and outcomes.").

## 18 **2. Formal Whistleblower Policy**

19 It is also undisputed that Plaintiffs' litigation and settlement efforts were a substantial  
20 and material factor in the Board's agreement to "adopt a new, stand-alone comprehensive  
21 Whistleblower Policy." Prior to the Settlement, Banc did not have a formal Whistleblower  
22 Policy. And the few reporting policies Banc had in its Code were largely ineffective, as  
23 Banc faced numerous allegations that whistleblower reports went unanswered and  
24 whistleblowers were retaliated against. In sum, Banc's whistleblower procedure was  
25 insufficient and failed.

26 The Settlement addresses these failures by encouraging employees to report  
27 violations without fear of retaliation, and by ensuring that such reports will be investigated  
28 and appropriate action taken. *See* Jonckheer Decl., Ex. 5 at 31 ("The board should ensure

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"underlying tenets that should be adopted by all companies and markets ... to establish the  
foundation for achieving long-term sustainable investment returns." *Id.* at 5.

1 that the company has in place an independent, confidential mechanism whereby an  
2 employee, supplier or other stakeholder can (without fear of retribution) raise issues of  
3 particular concern with regard to potential or suspected breaches of a company's code of  
4 ethics or local law."). Such relief is recognized as a substantial benefit. *City of Plantation*  
5 *Police Officers' Employees' Ret. Sys. v. Jeffries*, No. 2:14-CV-1380, 2014 WL 7404000, at  
6 \*6 (S.D. Ohio Dec. 30, 2014) (whistleblower policy, among additional ethics reforms,  
7 provided "a substantial benefit" to company and shareholders).

8 In order to encourage Banc's employees to report potential violations, the Company's  
9 culture had to change, starting with the tone at the top (which, at the time, was tainted by  
10 the very individuals who were alleged to have ignored whistleblowers and retaliated  
11 against them). With certain alleged wrongdoers off the Board (as discussed above), the  
12 next step was embracing the importance of whistleblowers by adopting a formal  
13 Whistleblower Policy, engaging an independent Whistleblower Hotline, and making such  
14 policies clear and conspicuous to all employees. The Whistleblower Policy achieves this  
15 by emphasizing that: (a) Banc "is committed to compliance"; (b) "the Company seeks to  
16 be proactive in preventing and detecting violations of the law"; (c) employees are  
17 encouraged to report possible violations; (d) such violations can be reported to the  
18 employees "supervisor, the General Counsel, or the Chief Internal Audit Officer," or also  
19 "through the Whistleblower Hotline"; (e) "[r]eports can be made anonymously and  
20 confidentially"; and (f) "[t]he Company will not take retaliatory action." ECF No. 112-1  
21 at Ex. B. The Whistleblower Policy also requires that "information regarding the  
22 Whistleblower Hotline [be] posted on the Company's MyBANC intranet, within the  
23 Whistleblower Hotline website, within the Company Policies & Employee Guide, and in  
24 break rooms throughout the Company's facilities." *Id.*

25 The Whistleblower Policy also addresses allegations made by Plaintiffs that  
26 whistleblower reports went unanswered. To begin, when an employee makes a  
27 whistleblower report through the hotline, an e-mail is sent to the General Counsel, who is  
28 required (if the report deals with certain alleged wrongdoing) to send a notice to the Joint

1 Audit Committee Chair and the Chief Internal Audit Officer. *Id.* The General Counsel is  
2 responsible for maintaining a log of all reports within the external service provider's  
3 system, tracking their receipt, investigation, and resolution. *Id.* The General Counsel will  
4 also prepare a periodic summary report of cases for the Audit Committee or Board. *Id.*  
5 And, where appropriate, Banc's internal or third-party auditors will be notified of  
6 whistleblower reports and the Company's investigation and conclusions regarding same.  
7 *Id.*

8 In sum, not only does the Whistleblower Policy address the alleged wrongdoing by  
9 significantly improving the Company's whistleblower controls, but adopting a formal  
10 Whistleblower Policy and engaging an independent Whistleblower Hotline (especially  
11 with a majority of new, independent directors) sets the stage for a stronger, more credible  
12 control environment. These Reforms will create long term value by encouraging internal  
13 reporting, which will allow the Company to investigate and remedy potential wrongdoing  
14 before it escalates and the Company is faced with potential regulatory action, related  
15 penalties, and/or expensive and protracted litigation. Collectively, these reforms lay the  
16 foundation for restoring investor confidence in the Company, and help capture the premium  
17 investors pay for companies with strong internal controls.

### 18 **3. Enhancements to Code of Ethics**

19 Banc has acknowledged that Plaintiffs' efforts in pursuing their litigation demands  
20 and the filing and maintenance of the stockholder derivative actions were substantial  
21 material factors contributing to Banc's decision to revise its Code of Ethics. *See* ECF No.  
22 112-1 at Ex. A. First, Banc amended its Code of Ethics to providing information regarding  
23 how to report violations through its independent Whistleblower Hotline, making this  
24 information more conspicuous to all employees. Second, Banc amended its process for  
25 reviewing and granting waivers to its Code of Ethics to make sure any such request is  
26 properly vetted and fully disclosed. *Id.* This is particularly important relief given the  
27 allegations in the Consolidated Complaint relating to improper conflicts of interest,  
28 improper personal investments and financial affairs (ECF No. 65, ¶¶120-126), all of which

1 are covered by the Code of Ethics. Had this policy been adopted prior to the alleged  
2 wrongdoing, it would have subjected defendant Benett's alleged conflicts of interest to  
3 enhanced scrutiny and likely prevented some of the alleged wrongdoing.

#### 4 **4. Mandatory Attendance at Shareholder Meetings.**

5 Requiring Board members to attend stockholder meetings is recognized as a good  
6 corporate governance practice, which provides benefits to Banc. *See, e.g., In re Big Lots,*  
7 *Inc. S'holder Litig.*, No. 2:12-CV-445, 2018 WL 11356561, at \*2 (S.D. Ohio Aug. 28,  
8 2018) (mandatory board member attendance to annual shareholder meeting part of reforms  
9 that provided substantial benefit to company); *Basaraba v. Greenberg*, No. CV 13-5061  
10 PSG (SHX), 2014 WL 12591677, at \*4 (C.D. Cal. Nov. 10, 2014) (even an "expectation[]"   
11 that board members attend the annual meeting provided "some benefit to shareholders").  
12 This reform requires directors to be present and accountable to shareholders, as directors  
13 will be able to respond directly to questions from shareholders. *See BlackRock Investment*  
14 *Stewardship Annual Report 2020, Jonckheer Decl.*, Ex. 6, at 29 ("We find that shareholder  
15 dialogue with independent board members can be effective in encouraging the adoption of  
16 corporate governance best practices.").

#### 17 **B. The Risks of Establishing Liability and Damages**

18 In assessing the fairness, reasonableness, and adequacy of a settlement, the Court  
19 should balance the benefits of the Settlement against the continuing risks of litigation. *See*  
20 *Officers for Justice*, 688 F.2d at 625. There is no question that derivative actions are  
21 complex and fraught with risk. Indeed, the Ninth Circuit, in affirming the district court's  
22 approval of a settlement in a derivative action, noted that "the odds of winning [a]  
23 derivative lawsuit [are] extremely small" because "derivative lawsuits are rarely  
24 successful." *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995); *see OSI Sys.*,  
25 2017 WL 5642304, at \*3 ("derivative lawsuits are difficult to win under any  
26 circumstances"). This case was no different.

27 Here, the alleged wrongdoing was revealed through various sources, including  
28 private actions, in which certain of the Company's internal directors and officers blamed

1 one another for certain wrongdoing. The fact pattern was complex and involved many  
2 competing interests and narratives.

3 Plaintiffs believe that the claims asserted in the action were meritorious, but liability  
4 was by no means assured. Had Plaintiffs continued to litigate, they would have faced  
5 serious legal hurdles to survive past the pleading stage. As detailed above, Plaintiff  
6 Gordon's prior derivative action was dismissed for failure to allege that demand was futile.  
7 At issue now is whether the Board wrongfully rejected Plaintiffs' litigation demands.  
8 Under Maryland law, "[t]he corporate board's decision to deny the litigation demand  
9 receives the same business judgment rule presumption as any other board decision." *In re*  
10 *Res. Cap. Corp., S'holder Derivative Litig.*, 286 F. Supp. 3d 619, 626 (S.D.N.Y. 2018). In  
11 other words, "it is presumed that corporate directors act in good faith and in the best interest  
12 of the corporation. Md. Code, Corps. & Ass'ns § 2-405.1(a)." *Evans ex rel United Dev.*  
13 *Funding IV v. Greenlaw*, No. 3:16-CV-635-M, 2018 WL 2197780, at \*4 (N.D. Tex. May  
14 14, 2018). "To overcome this presumption, the derivative plaintiff must establish that the  
15 directors did not act in good faith, in a manner reasonably believed to be in the corporation's  
16 best interests, or with the care that an ordinarily prudent person would use under similar  
17 circumstances." *Id.*

18 If Plaintiffs successfully overcame Defendants' dismissal motions, litigation would  
19 continue to be complex, with serious risks in overcoming potential defenses and in  
20 establishing liability. At the conclusion of discovery and expert reports, complex motions  
21 for summary judgment would need to be briefed and argued, and a trial would have to be  
22 held.

23 Even if Plaintiffs were successful in defeating Defendants' dispositive motions, and  
24 ultimately established liability at trial, Plaintiffs still faced challenges establishing and  
25 collecting monetary damages. Indeed, the Securities Action settlement was funded solely  
26 by insurance proceeds, which mitigated the potential damages to Banc arising from the  
27 alleged issuance of false and misleading statements. *See In re Banc of California Sec.*  
28 *Litig.*, Case No. 17-118 AG (DFMx) (C.D. Cal.), ECF No. 592, ¶2.2.

1 Faced with the risk of no recovery, the Settlement guarantees substantial benefits for  
2 Banc with the implementation of valuable corporate governance reforms that could not  
3 have been obtained if the action proceeded to trial. As the U.S. Court of Appeals for the  
4 Fifth Circuit observed:

5 Where, as here, the derivative suit is largely an attack on past corporate  
6 management practices, as well as on some present officers and directors, the  
7 dollar amount of a possible judgment, which is essentially the sole goal in the  
8 class action damage suit, is not the sole, and may well not be the most  
9 important, matter to be considered, for the effects of the suit on the functioning  
of the corporation may have a substantially greater economic impact on it,  
both long- and short-term, than the dollar amount of any likely judgment in  
its favor in the particular action.

10 *Maher v. Zapata Corp.*, 714 F.2d 436, 461 (5th Cir. 1983). Accordingly, the Settlement is  
11 likely the best possible result, and provides a substantial benefit to the Company that may  
12 not have been achieved through a trial and resulting appeals. Jonkheer Decl., ¶¶46-48.

13 **C. The Complexity, Expense, and Likely Duration of Continued Litigation**  
14 **Supports Approval of the Settlement**

15 Another factor weighing in favor of the Settlement is the complexity, expense, and  
16 likely duration of the litigation. *Officers for Just.*, 688 F.2d at 625; *Cohn v. Nelson*, 375 F.  
17 Supp. 2d 844, 859 (E.D. Mo. 2005). Shareholder derivative actions are notoriously  
18 complicated actions that involve complex legal and factual issues that can be litigated to a  
19 conclusion on the merits only at great expense over an extended period of time. *Pac.*  
20 *Enters.*, 47 F.3d at 378.

21 If not for this Settlement, the action would have been fiercely contested by the  
22 Parties. Continued litigation would be complex, costly, and of substantial duration.  
23 Document discovery would need to be completed, depositions would have to be taken,  
24 experts would need to be designated and expert discovery conducted, Defendants'  
25 anticipated motions for summary judgment would have to be briefed and argued, and a trial  
26 could occupy attorneys on both sides and the Court for weeks or months. And any  
27 judgment favorable to Plaintiffs would likely be the subject of post-trial motions and  
28

1 appeals, which would prolong the case for years with the ultimate outcome uncertain.  
2 Jonckheer Decl., ¶¶46-48.

3 The Settlement obviates this expenditure of further time and expenses, and favorably  
4 resolves the action in the best interests of Banc, permitting the Company to direct its full  
5 attention to business. Thus, the prospect of continued, protracted, expensive, and uncertain  
6 litigation strongly supports approval of the Settlement, which provides immediate and  
7 substantial benefits to Banc and its shareholders.

8 **D. The Settlement Was Negotiated by Parties with a Thorough**  
9 **Understanding of the Strengths and Weaknesses of their Positions.**

10 The stage of the proceedings and discovery is another factor which courts consider  
11 in approving a settlement. *Officers for Just.*, 688 F.2d at 625; *Boyd v. Bechtel Corp.*, 485  
12 F. Supp. 610, 617 (N.D. Cal. 1979). "This factor requires the Court to evaluate whether  
13 'the parties have sufficient information to make an informed decision about settlement.'"  
14 *OSI Sys.*, 2017 WL 5642304, at \*4. Through Plaintiffs' Counsel's substantial efforts, they  
15 were able to credibly evaluate the action and the propriety of settling at this stage.  
16 Jonckheer Decl., ¶48. Over the last few years, Plaintiffs' Counsel have conducted an  
17 extensive, ongoing investigation of the allegations asserted in the action and the November  
18 15, 2019 Demand, which included: (a) reviewing Banc's press releases, public statements,  
19 SEC filings, and securities analysts' reports and advisories about the Company;  
20 (b) reviewing related media reports about the Company; (c) consulting with an accounting  
21 expert regarding accounting practices concerning employee bonus accrual; (d) researching  
22 applicable law with respect to the claims alleged in the action and the November 15, 2019  
23 Demand, and potential defenses to those claims; (e) preparing and serving litigation  
24 demands; (f) preparing and filing derivative complaints; (g) monitoring developments in  
25 the related Securities Action, in addition to multiple related lawsuits between Banc and  
26 certain former executives and directors; and (g) negotiating this Settlement, including  
27 researching corporate governance best practices and negotiating the Reforms. Stip., §II.

28

1 Plaintiffs' Counsel's thorough investigation, which included counsel's application of  
2 their extensive experience in litigating complex derivative actions, provided Plaintiffs with  
3 a clear picture of the strengths and weaknesses of the claims. Having enough information  
4 to properly evaluate the claims and defenses, Plaintiffs have resolved the action on a highly  
5 favorable basis to Banc and its shareholders. Jonckheer Decl., ¶¶46-48.

6 **E. The Experience and Views of Counsel Favor Approval**

7 Significant weight should be attributed to the belief of experienced counsel that  
8 settlement is in the best interest of the Company. *Officers for Just.*, 688 F.2d at 625. As  
9 set forth above, the Settlement is the product of hard-fought, arm's-length negotiations by  
10 counsel with a comprehensive understanding of the relevant facts and law and the relative  
11 strengths and weaknesses of the claims and defenses. Jonckheer Decl., ¶48. As reflected  
12 by their firm resumes, Plaintiffs' Counsel are highly experienced in shareholder derivative  
13 litigation, have litigated scores of shareholder derivative actions to successful resolution,  
14 and are recognized as leaders in the field of shareholder rights litigation. *See id.*, Ex. 7;  
15 Declaration of Ashley R. Rifkin on Behalf of Robbins LLP in Support of Plaintiffs' Motion  
16 for a Fee and Expense Award, Ex. 1; Declaration of Marshall Dees on Behalf of Holzer &  
17 Holzer LLC in Support of Plaintiff's Motion for a Fee and Expense Award, Ex. A.  
18 Plaintiffs' Counsel used their expertise to effectively and efficiently prosecute the Action  
19 and obtain substantial benefits for Banc and its stockholders.

20 Similarly, Defendants are represented by esteemed law firms—including Morrison  
21 & Foerster, Sullivan & Cromwell and Jones Day—with counsel who are highly  
22 experienced in defending complex matters such as shareholder derivative lawsuits. With  
23 highly experienced counsel on both sides, the ensuing action resulted in hard-fought  
24 litigation and arm's-length settlement discussions. Thus, the quality of counsel and the  
25 significant results achieved in this Action strongly support approval of the Settlement.

1 **V. CONCLUSION**

2 Plaintiffs respectfully submit that the Settlement is fair, reasonable, and adequate,  
3 confers substantial benefits on Banc through the adoption of valuable corporate governance  
4 changes, and should be approved.

5 DATED: October 29, 2021

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