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13
14 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

15
16 FOR THE COUNTY OF LOS ANGELES

17 MONTE BEARD and RIGOBERTO
18 ROSALES, on behalf of themselves and all
19 others similarly situated,

20
21 Plaintiffs,

22
23 v.

24 CATALINA CHANNEL EXPRESS, INC., a
25 California corporation; and DOES 1 to 10
26 inclusive,

27
28 Defendants.

Case No. BC620021

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' UNOPPOSED MOTION FOR
FINAL APPROVAL OF CLASS ACTION
SETTLEMENT AND ATTORNEYS' FEES
AND COSTS**

Action Filed: May 11, 2016
Trial Date: None

Date: August 20, 2019
Time: 10:00 AM
Dept.: 12
Before: Hon. Carolyn Kuhl

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County of Los Angeles

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By: Isaac Lovo, Deputy

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4 Newberg § 11.25	11
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Manual for Complex Litigation (4th ed. 2004) § 21.61	11, 18

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1 **I. INTRODUCTION AND SUMMARY OF TERMS**

2 Plaintiffs Monte Beard and Rigoberto Rosales (“Named Plaintiffs” or “Class
3 Representatives”) move for final approval of the class action settlement (“Settlement”) with
4 Defendant Catalina Channel Express, Inc., (“Catalina” or “Defendant”). The \$259,000 class and
5 Private Attorneys General Act (“PAGA”) settlement provides substantial monetary benefit to Class
6 Members and PAGA Recipients. This is particularly so in light of the \$658,856 Defendant previously
7 paid to 178 class members in direct settlements, plus attorneys’ fees and costs to be paid related to
8 those settlements.

9 On May 7, 2019, the Court granted preliminary approval of the Settlement, and authorized
10 notice to the class and PAGA Recipients. The Court’s instructions have been successfully carried out.

11 The essential terms of the Settlement are as follows:

12 **The Settlement Class and PAGA Recipients:** the settlement covers current and former
13 employees of Catalina who worked onboard the company’s ferry boats between May 11, 2012 and
14 March 10, 2016 (Class Members) and/or March 13, 2015 to March 10, 2015 (PAGA Recipients).

15 There are two groups of Catalina employees who will receive compensation from this settlement:

16 **Class Members:** “Class Members” are all current and former employees of Catalina Express
17 and its affiliated entities who were employed as a Captain, Second Operator, Deckhand, or
18 Cabin Attendant in California at any time from May 11, 2012 through March 10, 2016 and
19 who have not signed a Direct Settlement with Catalina Express.

20 **PAGA Recipients:** “PAGA Recipients” are all current and former employees of Catalina
21 Express and its affiliated entities who were employed as a Captain, Second Operator,
22 Deckhand, or Cabin Attendant in California at any time from May 13, 2015 through March 10,
23 2016.

24 **Settlement Fund:** The gross amount of the Class Settlement Fund is \$259,000, plus the
25 employer’s share of any payroll taxes on wage items. This sum is *in addition* to \$660,052 that
26 Catalina has already paid to 178 Captains, Second Operators, Deckhands, and Cabin Attendants in
27 exchange for individual release agreements offered to these employees as a direct result of this
28 litigation, and a further \$224,000 it will pay as “catalyst fees” and expenses to Plaintiffs’ counsel for

1 securing the direct settlements. Thus, if this settlement is approved, the settlement payments of the
2 putative class and PAGA Recipients in total will equal \$1,143,052.¹

3 The full amount of the Class Settlement Fund will be paid into a Qualified Settlement Fund
4 (“QSF”) within ten (10) business days of the Court entering its order granting final approval.

5 **Class Representative Service Payments:** Plaintiffs request the Court approve class
6 representative service awards in the amount of \$10,000 for each of the two Named Plaintiffs. These
7 amounts were presented to the Court at preliminary approval and were disclosed in the class notice;
8 no Class Member has objected.

9 **Class Counsel’s Fees and Expenses:** Plaintiffs request that the Court approve their attorneys’
10 fees and costs in the amount of \$60,000, or 23.16% of the available Class Settlement Fund, plus
11 litigation expenses of \$19,000. These amounts were presented to the Court at preliminary approval
12 and were disclosed in the class notice; no Class Member has objected.

13 **Penalty Payments to the State:** The parties have designated \$25,000 of the Class Settlement
14 Fund to resolve claims under PAGA. Thus, under Labor Code Section 2699(i), 75% (\$18,750) of the
15 penalty payment will be paid to the Labor Workforce Development Agency (“LWDA”). The
16 remaining 25% (\$6,250), will be available for distribution to PAGA Recipients.

17 **Net Settlement Amount to Class Members:** The Net Settlement Fund—the amount that will
18 remain of the Settlement for payment to Class Members after deduction of attorneys’ fees and costs,
19 Named Plaintiffs’ service awards, notice and settlement administration expenses, and PAGA payment
20 allocation (to both the LWDA and PAGA Recipients)—will total approximately \$128,500. This is in
21 addition to the \$6,250 that will be available for the PAGA Recipients, many of whom are also Class
22 Members. No portion of the Settlement will revert to Defendant.

23 **Settlement Administration:** Settlement administration costs are to be paid out of the
24 Settlement Fund. The Court approved and appointed Simpluris, Inc. (“Simpluris”) as the Settlement
25 Administrator, and Plaintiffs now seek approval of payment of the administration costs, totaling
26 \$6,500 at completion, as documented in the Simpluris declaration filed with this motion.²

27
28 ¹ \$259,000 (proposed settlement) + \$224,000 (catalyst payment) + \$660,052 (previously paid).

² Declaration of Mary Butler Regarding Notice and Settlement Administration (“Butler Decl.”), ¶ 18.

1 **Class Notice:** The Settlement Administrator sent Class Members and PAGA Recipients the
2 Notice of Class Action Settlement (“Notice”) that was approved by the Court. All returned Notices
3 from the mailing were either forwarded to the forwarding address or were re-mailed after Simpluris
4 did a “skip trace” search for a new address. The Notice provided Class Members and PAGA
5 Recipients with an estimated settlement payment and Class Members had the opportunity to submit
6 evidence to correct any errors in Defendant’s records used to calculate Class Members’ “seatime
7 units” and job classification (the two factors used to determine payout amount).

8 **Allocation of Settlement Awards for Tax Purposes:** For tax purposes, the Individual
9 Settlement Share paid to Class Members will be allocated as follows: fifty percent (50%) as wages (to
10 be reported on an IRS Form W-2), and fifty percent (50%) as interest and penalties (to be reported on
11 an IRS Form 1099). Each Individual payment to PAGA Recipients will be considered one hundred
12 percent (100%) penalties (to be reported on an IRS Form 1099), and will be paid without reduction
13 for any taxes or withholdings.

14 **Scope of the Release:** The release contemplated by the proposed Settlement corresponds to
15 the operative claims in the First Amended Complaint (“FAC”), releasing claims asserted or that could
16 have been asserted based on the facts alleged in the FAC (i.e., those related to meal period and/or rest
17 break violations). The release of claims is limited to claims that accrued before March 10, 2016.

18 **II. FACTUAL BACKGROUND PRIOR TO PRELIMINARY APPROVAL**

19 **A. Factual Allegations**

20 Catalina provides passenger ferry service from the Long Beach, Dana Point, and San Pedro
21 areas to and from points on Catalina Island. FAC ¶¶ 16-17. Plaintiffs filed the FAC on behalf of a
22 putative class of “[a]ll persons who were employed in the positions of Captain, Second Operator,
23 Deckhand, and Cabin Attendant” (collectively, “Boat Crew”) at Catalina from April 30, 2012, to
24 March 10, 2016. *Id.*, ¶ 25. Each member of the Boat Crew had specific duties. For example, Cabin
25 Attendants sold food and beverages to passengers while the boat was occupied and ensured the galley
26 area was clean and stocked with the necessary goods; Deckhands handled luggage and vessel lines,
27 cleaned the boat before each departure, stocked supplies, and patrolled the boat to monitor passengers
28

1 and provide assistance as needed; Captains were responsible for operating the vessel, instructing the
2 crew and passengers, and completing documentation as required by Coast Guard regulations and/or
3 Catalina policies; and Second Operators assisted with the Captain's duties and occasionally relieved
4 the Captain in operating the vessel.

5 Plaintiffs allege that Catalina did not schedule any meal or rest breaks for Boat Crews during
6 the putative class period, nor did it require them to clock in and out for meal periods. Prior to making
7 a number of schedule changes effective March 11, 2016 (the end of the class period), Catalina also did
8 not schedule its ferry crossings in a manner as to provide sufficient time for off-duty meal and rest
9 periods in between runs. Further, Boat Crews could not take meal or rest breaks while underway
10 (between the mainland and Catalina Island) because among other duties, they were responsible for the
11 safe operation of the vessel and the comfort, safety, and satisfaction of the passengers on board. Boat
12 Crews also had a significant number of duties to perform during the limited time the vessels were
13 docked in between runs. Additionally, Captains could and did make requests of any member of the
14 Boat Crew at any time, in their discretion, and Crew members were supposed to fulfil those requests
15 as long as they were part of their job duties, regardless of whether they were underway or docked at
16 port.

17 Catalina's operations are also governed by the U.S. Coast Guard. Each Catalina vessel has a
18 Certificate of Inspection ("COI") issued by the Coast Guard that sets forth the minimum approved
19 staffing level for the vessel. Coast Guard regulations specify that "no vessel may be operated unless it
20 has *in its service* and on board the complement required by the [COI]." 46 C.F.R. § 15.515(a)
21 (emphasis added). In verified discovery responses, Catalina admitted that, "If compliance with United
22 States Coast Guard Regulations would require employees to return to duty during a meal period [or a
23 rest break], Catalina Express is required to comply with those regulations."³ Plaintiffs allege that
24 Catalina chose to staff its vessels at, or near, the minimum COI levels and required Boat Crews to
25 remain alert and always "on duty" to both satisfy customer demand and meet the COI requirements
26 while also minimizing its labor costs.

27 _____
28 ³ Catalina Channel Express, Inc.'s Suppl. Resp. to Spec. Interrog. No. 15.

1 **1. *Claims and Defenses***

2 Plaintiffs' FAC alleges that Defendant failed to provide off-duty meal periods and rest breaks
3 as required by Labor Code § 226.7 and IWC wage order No. 9. Plaintiffs also allege that Defendant
4 failed to furnish accurate wage statements, failed to keep accurate payroll records, and violated unfair
5 competition law.

6 Defendant denies these allegations, and further contends that the direct releases are
7 enforceable and preclude the signatory Boat Crew employees from being included in the putative
8 class or as "aggrieved employees" under PAGA. Defendant will also contest class certification,
9 should this matter not be resolved through this Settlement. Defendant generally denies that it engaged
10 in any misconduct in connection with regard to the relevant wage-and-hour laws.

11 Plaintiffs believe they would overcome Defendant's opposition to class certification and
12 defenses. However, Plaintiffs acknowledge that there is risk that they would not prevail one (or more)
13 of these defenses and class certification, justifying compromise on the claims.

14 **2. *Procedural Background***

15 Plaintiffs filed this case on May 11, 2016. The complaint sought to recover (a) meal and rest
16 period compensation; (b) penalties for failure to provide accurate wage statements; and (c) restitution
17 pursuant to California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200-17208. Plaintiffs,
18 on behalf of themselves and a class of similarly situated Captains, Second Operators, Deckhands, and
19 Cabin Attendants in California, sought monetary damages, penalties, interest, attorneys' fees and
20 costs of this lawsuit, with an alleged liability period ending on March 10, 2016. The matter was
21 initially assigned to Judge Elihu Berle in Department 323. Plaintiffs filed their FAC on June 16, 2016,
22 adding claims for penalties under PAGA.

23 Throughout this litigation, Defendant vigorously contested the appropriateness of class
24 certification, asserting defenses including, but not limited to: (1) many of the class members had
25 released their claims in this action as a result of the direct settlement agreements; (2) Defendant had a
26 facially compliant meal and rest period policy and Class Members were authorized by their Captains
27 to take their meal and rest periods; (3) there was ample time during the course of the workday for
28

1 Class Members to take meal periods and 10-minute rest breaks, off-duty; and (4) none of the Class
2 Members were actually injured by inaccurate pay statements, and therefore liability would not attach.⁴

3 Plaintiffs served their first round of discovery on June 30, 2016, including 25 Special
4 Interrogatories and 38 Requests for Production of Documents. Defendant responded on August 4 and
5 11, 2016, providing only objections. Also on August 4, 2016, Judge Berle scheduled an initial Status
6 Conference for August 30, 2016, and ordered a stay of the proceedings.⁵

7 Following the stay and initial Status Conference, the parties met and conferred regarding
8 various dates for the proceedings, including Defendant's date to file a responsive pleading and
9 respond to Plaintiffs' initial discovery. The parties also discussed the parameters of a *Belaire- West*
10 notice to facilitate the production of class contact information, with that notice ultimately sent in
11 November 2016 following further meet and confer.⁶

12 In October 2016, the parties agreed to attend early mediation with Judge Peter Lichtman
13 (Ret.). Due to conflicting schedules, the mediation was set for February 28, 2017. The parties then
14 agreed to limit discovery to facilitate settlement discussions, focusing production of documents and
15 data on what the parties needed to evaluate the case for resolution.⁷ This matter was reassigned to this
16 department (then Dept. 309) on February 6, 2017.

17 The parties' February 28, 2017 mediation was not successful. Following a further status
18 conference, the parties commenced significant discovery, including voluminous document production
19 by both sides and the depositions of the named Plaintiffs and certain company witnesses (one of
20 which was a four-day Person Most Qualified deposition). Most of this discovery was conducted
21 between March 2017 and October 2017.⁸

22 The parties also actively met and conferred over Defendant's discovery responses and
23 document production for most of 2017. Many disputed issues were the subject of these meet and
24 confer efforts, including Plaintiffs' right to class-wide discovery and the sampling of certain
25

26 ⁴ Declaration of David P. Pogrel in Support of Plaintiffs' Motion for Final Approval ("Pogrel Decl."), ¶¶ 11-12.

27 ⁵ *Id.*, ¶¶ 18-19.

28 ⁶ *Id.*, ¶ 20.

⁷ *Id.*, ¶ 21.

⁸ *Id.*, ¶ 23.

1 documents and records held by Defendant, access to electronically stored information (“ESI”) and
2 related search terms, and the redaction of documents produced by Defendant. While the parties were
3 ultimately able to resolve a number of these disputes without court intervention, the parties also
4 needed to attend three Informal Discovery Conferences (“IDC”) throughout the case when they
5 reached impasse on various discovery matters.⁹

6 Between May 2017 and April 2018, while other discovery was ongoing, Plaintiffs’ counsel
7 conducted significant outreach efforts to the class to investigate the claims, discuss the litigation, and
8 gather declarations in support of class certification.¹⁰

9 In December 2017, Plaintiffs’ counsel learned that the Defendant was attempting to solicit
10 release agreements from putative class members, under which the employees would purport to release
11 their claims in this action, in addition to other claims through the present day, pursuant to a general
12 release.¹¹ Upon learning of this development, Plaintiffs conducted further investigation to discover the
13 scope of Defendant’s release campaign and the circumstances under which the releases were being
14 presented to putative class members. In January 2018, Plaintiffs served discovery regarding the
15 settlement agreements and requested copies of all agreements distributed and signed by putative class
16 members at that time, and informed Defendant that Plaintiffs would likely be challenging the validity
17 of any signed release agreements or other efforts to cause class members to arguably waive claims
18 without notice or court approval.¹²

19 Between December 2017 and March 2018, Plaintiffs’ counsel and their staff spoke with many
20 putative class members regarding Defendant’s effort to seek release agreements from their workers.
21 During these communications, Plaintiffs continued to investigate the claims, discuss the litigation, and
22 gather declarations in support of class certification.¹³

23 In March 2018, Plaintiffs suggested that the parties attempt to resolve this litigation in a
24 second mediation. Defendant agreed, and the parties scheduled a mediation with Judge Carl West
25

26 ⁹ *Id.*, ¶ 24.

27 ¹⁰ *Id.*, ¶ 25.

28 ¹¹ *Id.*, ¶ 26.

¹² *Id.*

¹³ *Id.*, ¶ 27.

1 (Ret.) for May 11, 2018. Prior to this second mediation, Defendant informed Plaintiffs that it was only
2 interested in discussing settlement of the claims for Class Members who did not sign settlement
3 agreements, and only for the period ending March 10, 2016. Defendant declined to discuss any further
4 compensation or payment for Class Members who signed individual settlement agreements, and did
5 not want to consider resolution of claims potentially arising between March 11, 2016 and the
6 present.¹⁴ Defendant also produced data, informally and confidentially, regarding the number of Class
7 Members who signed individual settlement agreements, the consideration it paid in exchange for
8 those agreements, and the tenure dates and number of “Seatime Units” (four-plus hour workdays)
9 worked by all Class Members who did not sign individual settlement agreements.¹⁵ Plaintiffs intended
10 to use this data to project Defendant’s potential exposure for the claims at issue in this action.¹⁶

11 In further preparation for the mediation, Plaintiffs continued their interviews with Class
12 Members and other witnesses and gathered several witness statements—both signed and in draft
13 form—by the time of the mediation in May 2018.¹⁷

14 The parties and their counsel participated in the second full day mediation session with Judge
15 West on May 11, 2018. By that time, Defendant had secured signed release agreements from 178 Boat
16 Crew employees in exchange for direct settlements, paying a total of \$660,052 in consideration.
17 Catalina’s view was that all 178 of these individuals forever released all of their claims in this case,
18 including any claims under PAGA. At the conclusion of the second mediation, the parties reached a
19 settlement in principle and executed a Memorandum of Understanding.¹⁸

20 Plaintiffs prepared draft Settlement Agreement and Notice documents and sent them to
21 Defendant’s counsel for approval on May 17 and 21, 2018. Further negotiations followed regarding
22 the terms of the long-form settlement agreement and notice document. These negotiations, and all
23 disputed issues, were resolved in late August 2018 and resulted in a signed settlement agreement and
24 proposed class notice and estimated share form.¹⁹

25 _____
26 ¹⁴ *Id.*, ¶ 29.

27 ¹⁵ *Id.*

28 ¹⁶ *Id.*

¹⁷ *Id.*, ¶ 30.

¹⁸ *Id.*, ¶ 31.

¹⁹ *Id.*, ¶ 32.

1 Plaintiffs filed their Motion for Preliminary Approval of the Class Action Settlement on
2 September 18, 2018.²⁰ The Court initially scheduled the hearing for November 29, 2018, but then
3 continued the hearing to February 1, 2019 and then to March 14, 2019. In response to concerns raised
4 by the Court at the March 14th Preliminary Approval Hearing, the parties revised some aspects of the
5 Settlement and, on April 10, 2019, Plaintiffs filed a Stipulation and [Proposed] Order Re Preliminary
6 Approval (“Stipulation re Settlement Revisions”) that described the agreed-upon changes in the
7 settlement and a revised proposed notice to the Court.²¹ The Court entered its order granting
8 Preliminary Approval of the Settlement on May 7, 2019.²²

9 **III. PRELIMINARY APPROVAL AND NOTICE PERIOD**

10 **A. The Court Grants Preliminary Approval**

11 In its Order granting Plaintiffs’ Motion for Preliminary Approval, the Court, among other
12 things: (1) approved distribution of a class notice; (2) set a 45-day period for class members to opt
13 out, or object, to the settlement; and (3) scheduled the final approval hearing for August 20, 2019.
14 The Court also determined that the settlement was within the range of reasonableness of a settlement
15 that could ultimately be given final approval, appeared to be the product of non-collusive, arm’s-
16 length negotiations between well-informed counsel, and thus was presumptively valid, and that, on a
17 preliminary basis, the \$259,000, with payments for plaintiffs’ service awards, counsels’ fees and
18 costs, administration expenses and PAGA Penalties appeared to be fair and reasonable to all Class
19 Members and PAGA Recipients.

20 **B. The Notice Process**

21 The Settlement Administrator, Simpluris, distributed the class notice by mail on May 24,
22 2019, to the last known addresses of the 91 Class Members and 131 PAGA Recipients, via first class
23 mail.²³ It detailed all of the terms of the proposed Settlement, and also included details about (1) the
24 “Seatime Units” worked and the Job Classification for each Class Member and the number of PAGA-
25 eligible Pay Periods, based on Defendant’s records (the data that is the basis for their individual

26 ²⁰ *Id.*, ¶ 33.

27 ²¹ *Id.*, ¶ 35.

28 ²² *Id.*, ¶ 36.

²³ Butler Decl, ¶¶ 7-9 (of the 91 Class Members, 28 are also PAGA Recipients).

1 settlement amounts) and (2) an individualized estimated payment for each Class Member and PAGA
2 Recipient.

3 23 notices from the initial mailing were returned with bad addresses.²⁴ However, by
4 performing a skip-trace on these addresses by using a comprehensive database and through direct
5 contact with Class Members, the Settlement Administrator was able to find new addresses for many
6 undeliverables, ultimately finding working new addresses for all but three (3) Class Members/PAGA
7 Recipients.²⁵ The aggregate value of the estimate payment to these three missing individuals was
8 only \$54.07.²⁶

9 **C. There are No Objections or Opt Outs**

10 No Class member has filed an objection or elected to opt out of the settlement.²⁷

11 **IV. LEGAL STANDARD AND PROCEDURES FOR FINAL APPROVAL**

12 Court approval is required for the settlement of a class action. *See* Cal. Civ. Code § 1781(f);
13 Cal. Rule of Court 3.769. The court has broad discretion in reviewing a proposed class settlement for
14 approval. *Wershba v. Apple Computers, Inc.*, 91 Cal. App. 4th 224, 234-35 (2001). Approval of a
15 class action settlement may be reversed only upon a strong showing of clear abuse of discretion. *Id.*;
16 *see also Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 127-128 (2008). Plaintiffs now ask
17 the Court to make a final determination whether the proposed settlement set forth in the Settlement
18 Agreement and Stipulation re Settlement Revisions is fair, reasonable, and adequate. *See Officers for*
19 *Justice v. Civil Serv. Comm’n of the City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir.
20 1982); Manual for Complex Litigation (4th ed. 2004) (hereinafter “Manual”), § 21.61 at 308. Final
21 approval is warranted when “the interests of the class are better served by the settlement than by
22 further litigation.” Manual § 21.61 at 309. The law favors settlement, particularly in class actions and
23 other complex cases where substantial resources can be conserved by avoiding the time, cost, and
24 rigors of formal litigation. *See Neary v. Regents of Univ. of Cal.*, 3 Cal. 4th 273, 277-81 (1992);
25 *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 52 (2000); 4 Newberg on Class Actions (4th ed.

26 _____
27 ²⁴ Butler Decl, ¶ 10.

28 ²⁵ *Id.*

²⁶ *Id.*

²⁷ Butler Decl, ¶¶ 16-17.

2002) (hereinafter “4 Newberg”) (citing cases).

The Court must make a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to the Class. See Manual § 21.61 at 309. However, the Court’s role is “limited to approving the proposed settlement, disapproving it, or imposing conditions on it. The judge cannot rewrite the agreement.” *Id.* “Due regard should be given to what is otherwise a private consensual agreement between the parties.” *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996).

The Manual describes the following three-step settlement approval procedure: (1) preliminary approval of the proposed settlement; (2) dissemination of notice of the settlement to all affected class members; and (3) a “formal fairness hearing,” or final settlement approval hearing. Manual § 21.632-634 at 320-22. This procedure has been adopted by the California courts as it properly safeguards class members’ due process rights and enables the court to fulfill its role as the guardian of the class’ interests.

V. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT

A. The Class Received Adequate Notice of the Class Action Settlement

In this case, the first two steps of the settlement approval process have been completed. First, this Court granted preliminary approval of the Settlement. In doing so, the Court determined that the Settlement was within the range of possible final approval and ordered that notice regarding the Settlement terms and proposed scheduling of the formal final fairness hearing should also be distributed to the class. See May 7, 2019 Order Granting Preliminary Approval; see also *Wershba*, 91 Cal. App. 4th at 234-35; 4 Newberg, § 11.25. Second, the Settlement Administrator disseminated the Class Notice in accordance with the Court’s preliminary approval order.

The Notice, the content and form of which was Court-approved, fairly and clearly described (1) the proposed Settlement terms; (2) the amounts requested for Plaintiffs’ service awards and attorneys’ fees and costs; (3) the manner in which Class Members could object to the settlement; and

(4) the manner in which Class Members could opt out of the Settlement.²⁸ Further, the Notice provided the estimated amount each Class Member and PAGA Recipient would receive and information for Class Members seeking to challenge Defendant's records of their Seaside Units or Job Classification used to calculate this amounts. Using Class Member contact information provided by Defendant, as well as standard follow-up address search and re-mailing methods, the settlement administrator mailed the Notice, employing the best practicable means to disseminate notice of the Settlement terms and date and time of the final approval hearing to all Class Members.²⁹ Rules of Court 3.769(f); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) ("best practicable" notice provides a description of the litigation and explanation of the right to opt out or object).

Therefore, the Court may proceed to determine the fairness, adequacy, and reasonableness of the Settlement, and order its final approval, secure in the knowledge that all absent Class Members and PAGA Recipients have been given ample opportunity to participate fully in the share determination, exclusion, and approval processes.

B. The Settlement Terms are Presumptively Fair, Reasonable, and Adequate Based on the Process that Produced the Settlement and the Absence of Objections

A court should presume a class settlement is fair where "(1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." *Dunk*, 48 Cal. App. 4th at 1802; *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1146 (2000). All of these factors are present in this case. As described in detail in the preliminary approval papers, the settlement negotiations were thorough and occurred at arm's length, Class Counsel engaged in fact investigation, discovery and extensive litigation prior to settlement, the parties exchanged data and informal discovery regarding the Class' potential recovery, and Class Counsel are experienced in this type of litigation. Following notice, there are no objectors or opt outs. The Settlement is thus presumptively fair.

²⁸ Butler Decl., ¶ 6, Ex. A.

²⁹ Butler Decl., ¶¶ 6-10.

1 **C. The Settlement Terms Provide Benefits to the Class that are Demonstrably Fair,**
2 **Reasonable, and Adequate in Relation to the Potential Benefits and Risks of**
3 **Further Litigation**

4 The Court should grant final approval of the Settlement in this case, because of the following
5 factors that evidence the fairness, reasonableness, and adequacy of the Settlement: (1) the value of the
6 settlement; (2) the risks inherent in continued litigation; (3) the extent of discovery completed and the
7 stage of the proceedings when settlement was reached; (4) the complexity, expense, and likely
8 duration of the litigation in the absence of settlement; (5) the experience and views of class counsel;
9 and (6) the reaction of the class members. *See Wershba*, 91 Cal. App. 4th at 244-45; *Dunk*, 48 Cal.
App. 4th at 1801.

10 **1. The Value of the Settlement Favors Final Approval**

11 The Settlement provides a significant monetary recovery, which warrants final approval. If
12 the Court grants Plaintiffs' motion, the Net Settlement Amount that will be distributed to the class is
13 estimated to be \$128,500, after attorneys' fees and costs, costs of administration, PAGA penalties, and
14 Class Representatives' service awards are deducted from the Settlement fund.³⁰ This fund will be
15 distributed to 91 Class Members, with an average settlement amount of approximately \$607;³¹ this is
16 equal to approximately \$12 for each four-plus hour workday. The highest award will be over
17 \$10,000.³² The distribution formula will result in settlement shares that represent about 58.8% of the
18 maximum verdict value of wages owed.³³

19 Class Counsel have provided the Court with sufficient information regarding the amount in
20 controversy and potential outcomes of the case, including a detailed description of Plaintiffs' claims
21 and Defendant's defenses and potential exposure, in Plaintiffs' preliminary approval motion papers
22 and supplemental papers on preliminary approval.³⁴ The Court therefore has the information it needs
23 to evaluate the sufficiency of the Settlement. *See Kullar*, 168 Cal. App. 4th at 129-130, 132 (trial
24 court should have sufficient information about the potential value of the case and litigation issues to

25 ³⁰ Butler Decl., ¶ 12.

26 ³¹ Butler Decl., ¶ 13-14.

27 ³² *Id.*

28 ³³ *See* Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and Conditional Class
Certification (filed September 6, 2018) ("Preliminary Approval Motion"), pp. 15-16.

³⁴ *See* Preliminary Approval Motion, pp. 15-16; Declaration of David P Pogrel in Support of Preliminary
Approval ("Pogrel Preliminary Approval Decl."), ¶¶ 33-35, 39.

1 independently review the reasonableness of the settlement).

2 The parties negotiated the Settlement after two years of litigation, extensive discovery, and
3 informal exchanges of information and data. Based on that information, as well as communication
4 with the class representatives and putative Class Members, Plaintiffs were able to calculate a reliable
5 estimate of the amount of Defendant's maximum exposure for all of the substantive claims, as well as
6 the potential maximum value of discretionary PAGA penalties.³⁵ The total Settlement amount,
7 including the payments for the prior releases and associated catalyst payment, represents about 58.8%
8 of Plaintiffs' Counsel's best estimate of the maximum verdict value of the Class' potential recovery of
9 all owed wages.³⁶

10 In addition to its many defenses on class certification and liability, Catalina has never agreed
11 that Plaintiffs' damages calculations are accurate or reliable. Rather, Catalina consistently contended
12 that any award by this Court or a jury would have only been a fraction of the potential exposure
13 calculated by Plaintiffs for the claims.

14 **2. The Settlement Avoids the Risks Inherent in Continued Litigation**

15 Defendant has consistently denied liability, and asserted both legal and factual grounds from
16 defending this action on the merits, as well as disputing class certification and Plaintiffs' claimed
17 damages. Class Counsel believes that Class Members' and PAGA Recipients' claims are meritorious
18 and that they would establish substantial damages at trial. But, it is clear that, absent settlement,
19 Plaintiffs would have to conduct additional discovery for, and obtain, class certification, establish
20 class-wide liability, and then prove up various complex issues regarding damages. Specifically,
21 Plaintiffs would face: Defendant's challenges to class certification; Defendant's assertion that more
22 than two-thirds of potential Class Members have released any claims they may have in this action, and
23 more would do so before class certification and trial; and numerous disputes over legal and factual
24 issues on the merits. The Settlement, by contrast, provides substantial relief while avoiding the risks
25 of potentially protracted litigation. It is therefore consistent with the "overriding public interest in
26 settling and quieting litigation" that is "particularly true in class action suits." *Von Bronkhorst v.*

27 ³⁵ Pogrel Preliminary Approval Decl. ¶¶ 33-35.

28 ³⁶ Preliminary Approval Motion, p. 16.

1 *Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *see also* 4 Newberg § 11.41 (citing cases). Because
2 the Settlement provides such relief, without the attendant risks and delay of continued litigation, it
3 warrants this Court's final approval.

4 **3. *Plaintiffs and Class Counsel Conducted a Thorough Investigation Prior to***
5 ***Entering Settlement, and Were Assisted by an Experienced Mediator***

6 Class Counsel conducted a thorough investigation into the facts of the action. The Settlement
7 was reached following two years of litigation and discovery; informal exchanges of information and
8 data prior to mediation; communication with the class representatives and putative class members;
9 detailed mediation briefs from Plaintiffs, which included a damages model; two full days of mediation
10 with two experienced mediators and former judges in this Court; and further direct negotiations.³⁷
11 Thus, prior to entering into the Settlement, Plaintiffs and counsel thoroughly evaluated the documents,
12 potential witnesses' information, and damages data regarding the strengths and weaknesses of the
13 case against Defendant, and at mediation Plaintiffs had the benefit of the Mediators' assessments of
14 the strengths and weaknesses of their claims on behalf of the Class. The detailed and lengthy
15 exchanges during the negotiations that followed provided Plaintiffs with still more important
16 information. Plaintiffs' diligence in evaluating and settling the Class claims is a factor warranting
17 final approval.

18 **4. *Class Counsel's Experience and Views Support Final Approval***

19 Class Counsel had successfully represented plaintiffs in many wage and hour class actions,
20 including cases like this one alleging violations of California meal and rest period laws.³⁸ They
21 believe the Settlement is fair, reasonable, and adequate, and in the best interest of the Class as a
22 whole, and also believe it is an excellent result for the Class, as explained in more detail in the
23 preliminary approval papers. The endorsement of qualified and well-informed counsel regarding the
24 settlement as fair is entitled to significant weight in the approval process. *See Dunk*, 48 Cal. App. 4th
25 at 1802.

26
27
28 ³⁷ Pogrel Decl., ¶ 14-32.

³⁸ Pogrel Decl., ¶ 10-12.

1 **5. Class Members’ Positive Reaction to the Settlement Favors Final Approval**

2 Finally, the Court may look to the reaction of the Class Members to help it determine if the
3 settlement is fair, adequate, and reasonable. In this case, the response is uniformly positive. Since the
4 Notice of the Class Action Settlement was disseminated giving Class Members all of the details of the
5 proposed resolution, and listing Class Members’ estimated settlement shares, there have been no
6 objections submitted by any Class Member and no Class Member has opted out.³⁹ This response
7 strongly indicates acceptance of the Settlement’s terms by Class Members, and further supports court
8 approval of the Settlement.

9 **D. Settlement of the PAGA Claim Warrants Approval**

10 The settlement of a PAGA claim requires court approval. Cal. Lab. Code § 2699 (l)(2). The
11 Court also has discretion to award a lesser amount than the maximum civil penalty based on “the facts
12 and circumstances of a particular case,” and if awarding a greater amount “would result in an award
13 that is unjust, arbitrary and oppressive, or confiscatory.” *Id.* at § 2699 (e). Although PAGA actions
14 may be brought as class actions, a plaintiff may maintain a representative suit under PAGA without
15 satisfying class action requirements. *See Arias v. Superior Court* 46 Cal. 4th 969, 984-87 (2009). A
16 PAGA action is “fundamentally a law enforcement action designed to protect the public and penalize
17 the employer for past illegal conduct.” *Franco v. Athens Disposal Co., Inc.* 171 Cal. App. 4th 1277,
18 1300 (2009) (abrogated by *Iskanian v. CLS Transportation Los Angeles, LLC* 59 Cal. 4th 348 (2014)
19 on other grounds). As such, “[u]nlike a class action seeking damages or injunctive relief for injured
20 employees, the purpose of PAGA is to incentivize private parties to recover civil penalties for the
21 government that otherwise may not have been assessed and collected by overburdened state
22 enforcement agencies.” *Ochoa-Hernandez v. Cjaders Foods, Inc.* (N.D. Cal., Apr. 2, 2010, No. C 08-
23 2073 MHP) 2010 WL 1340777, at *4.

24 Here, Plaintiffs’ PAGA claim is brought “on behalf of themselves and ... similarly situated
25 Captains, Second Operators, Deckhands, and Cabin Attendants employed by Catalina in California.”
26 (FAC ¶ 58.) Plaintiffs gave written notice to the LWDA by certified mail on May 13, 2016. (*Id.* at ¶
27

28 ³⁹ Butler Decl., ¶¶ 16-17.

65.) PAGA claims for civil penalties are subject to a one-year statute of limitations. Cal. Civil Code § 340 (a). Accordingly, the Settlement Agreement releases PAGA claims from May 13, 2015, through to March 10, 2016. The settlement allocates \$25,000 to penalties under PAGA, which will be distributed as follows pursuant to Labor Code § 2699 (i): 75% (\$18,750) to the LWDA, and 25% (\$6,250) to PAGA Recipients, who are the aggrieved employees who worked during the PAGA liability period. Plaintiffs’ counsel will provide a copy of the proposed Settlement Agreement to the LWDA concurrently with the filing of this motion. *Id.* at § 2699 (l)(2) (“The proposed settlement shall be submitted to the [LWDA] at the same time that it is submitted to the court.”).

Plaintiffs allocated the PAGA portion of the settlement based on the following factors: (1) the settlement is a compromise which does not fully compensate Class Members for all unpaid meal and rest breaks; (2) the PAGA claim was not a significant driving factor in the prosecution or settlement of this Class Action; and (3) the actual value of the PAGA claim is highly uncertain due to the Direct Releases and the Courts’ discretionary authority to award less than full penalties. While Plaintiffs maintain that the Direct Release signers still have operative PAGA claims because PAGA settlements must be court-approved, Defendant would argue that almost all of the eligible PAGA Recipients have waived their PAGA claims, or at least their standing to pursue them, by signing the Direct Releases.⁴⁰

The distribution of the funds allocated for the PAGA settlement will be allocated to the PAGA Recipients on a pro rata basis. That is, each PAGA Recipient’s share shall be based on the number of pay periods she or he worked during the May 13, 2015 to March 10, 2016 potential PAGA liability period.

Under these circumstances, the allocation of \$25,000—9.7 % of the Settlement Fund—to settle Plaintiffs’ representative claims under PAGA is fair and adequate in all respects, and is similar—or more than—amounts courts have approved in other cases, while still achieving the LWDA’s enforcement objectives under PAGA. *See, e.g., Nordstrom Com. Cases*, 186 Cal. App. 4th

⁴⁰ The California Court of Appeal recently held that “where an employee has brought both individual claims and a PAGA claim in a single lawsuit, and then settles and dismisses the individual employment causes of action with prejudice, the employee is no longer an ‘aggrieved employee’ as that term is defined in the PAGA, and therefore that particular plaintiff no longer maintains standing under PAGA.” *Kim v. Reins Internat. California, Inc.* 18 Cal. App. 5th 1052, 1056 (2017). This case is pending review by the California Supreme Court.

576, 589 (2010) (affirming settlement allocating \$0 of \$6.4 million settlement to PAGA penalties); *Garcia v. Gordon Trucking*, No. 1:10-cv-0324-AWI-SKO, 2012 WL 5364575, at *3 (E.D. Cal. Oct. 31, 2012) (approving PAGA settlement of \$10,000 out of \$3.7 million common-fund settlement); *Chu v. Wells Fargo Investments, LLC*, No. C 05-4526 MHP, C 06-7924 MHP, 2011 WL 672645, at *1 (N.D. Cal. Feb. 16, 2011) (approving PAGA settlement of \$7,500 to the LWDA out of \$6.9 million common-fund settlement). The PAGA settlement should therefore be approved. *See Whitaker v. Space Exploration Technologies Corp.*, No. BC578922 (Cal. Sup. Ct., June 14, 2017), 2017 WL 2628405, at *2 (approving PAGA portion of settlement because plaintiffs met all statutory requirements, among them 75% penalty allocation to LWDA and 25% allocation to allegedly aggrieved employees).

E. The Class Representative Service Payments Are Reasonable

The proposed class representative service award payments for Plaintiffs Beard and Rosales are intended to recognize their initiative, risks, and efforts on behalf of the Settlement Class. Courts routinely approve class representative service payments, a.k.a. incentive awards, to compensate named plaintiffs for the services they provide and the risks they incur during class action litigation. *See In re Cellphone Fee Termination Cases*, 186 Cal. App. 4th 1380, 1393 (2010); *see also Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 726 (2004) (upholding “service payments” to named plaintiffs for efforts in bringing the case); *Manual for Complex Litigation*, § 21.62, fn. 971 (noting that such awards “may sometimes be warranted for time spent meeting with class members, monitoring cases, or responding to discovery”).

The “criteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation; and 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.” *In re Cellphone Fee Termination Cases*, 186 Cal. App. 4th at 1394-95 (quoting *Van Vranken v. Atlantic Richfield*

1 *Company*, 901 F. Supp. at 299 (1995)). All of the above factors support the service awards requested
2 here.

3 In the present case, the factors justifying a service award are based on information provided in
4 Plaintiffs' and Plaintiffs' Counsel's declarations filed herewith.⁴¹ Beard and Rosales came forward
5 and initiated this action on behalf of the class, have actively participated throughout the litigation, and
6 have shouldered all of the burden and risk. Despite being very concerned about potential retaliation,
7 particularly as they were both current employees when they filed suit, they decided to pursue the
8 litigation because it was important to assert their rights on behalf of themselves and other Boat Crew
9 members.

10 Both Plaintiffs Beard and Rosales spent substantial time—between 81 and 96 hours for Beard,
11 and 66 and 76 hours for Rosales—participating in interviews, meetings, and telephone consultations
12 with Class Counsel; locating information, gathering and sending documents; responding to written
13 discovery requests; preparing for and attending multiple depositions, as well as being deposed for two
14 days each; and preparing for and attending both mediations.⁴²

15 The Named Plaintiffs also incurred significant personal risks by suing Catalina, their current
16 employer during the litigation and a major employer in the maritime industry in the Long Beach area.
17 *See Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1073 (9th Cir. 2000) ("fear of
18 employer reprisals will frequently chill employees' willingness to challenge employers' violations of
19 their rights"); *see also Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2004). Beard and Rosales
20 worked for Defendant throughout the class period and the litigation; Plaintiff Rosales was recently
21 fired by the company and believes that he was subject to retaliation.⁴³ Beard also recently separated
22 under circumstances that he believes are related to his participation as a Plaintiff in this litigation.⁴⁴
23 *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("[I]t needs no argument to show
24

25 ⁴¹ Pogrel Decl., ¶¶ 43-47. Declaration of Monte Beard in Support of Plaintiffs' Motion for Final Approval of
26 Class Action ("Beard Decl."); Declaration of Rodrigo Rosales in Support of Plaintiffs' Motion for Final
27 Approval of Class Action ("Rosales Decl.").

⁴² Pogrel Decl., ¶¶ 43-47; Beard Decl, ¶¶ 4-20; Rosales Decl. ¶¶ 4-19.

⁴³ Rosales Decl. ¶ 6.

⁴⁴ Beard Decl, ¶ 6.

1 that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept
2 substandard conditions.”).

3 As Plaintiffs’ names and their position in this lawsuit are readily apparent from internet
4 searches or reference to the court’s website, they risk retaliation from future employers for the
5 indefinite future.⁴⁵ Moreover, payment of the incentive awards from the class fund advances the
6 public policies of the statutory schemes of Plaintiffs’ claims by promoting the enforcement of wage
7 and hour protections. Furthermore, as a result of this lawsuit and Plaintiffs’ willingness to come
8 forward, Defendant has already paid approximately \$660,000 to 178 Boat Crew employees.

9 Finally, the requested awards are reasonable in relation to the Settlement Awards the
10 remainder of the Settlement Class will receive and the amount putative class members received
11 overall; the proposed enhancements of \$10,000 amount to only 3.8% of the total Settlement Fund for
12 the 91 Class Members and PAGA Recipients, and only 0.8% of the total \$1,143,052 settlement
13 amount accounting for the payments for Direct Releases and the catalyst attorney fees and costs that
14 will be paid for securing these release payments. These proposed service awards are significantly
15 different than those disapproved in *Clark v. American Residential Services, LLC*, 175 Cal. App. 4th
16 785, 805 (2009), where the court ruled that “[a]n enhancement that gives the named Plaintiffs at least 44
17 times the average payout to a class member simply cannot be justified.” Accordingly, the payments to
18 the representative Plaintiffs are appropriate and justified as part of the overall Settlement. *Id.*

19 **F. The Requested Attorneys’ Fees and Costs are Reasonable**

20 Plaintiffs and Class Counsel are entitled to recover their attorneys’ fees and costs for their
21 wage & hour claims. See Labor Code § 218.5; Code Civ. Proc. § 1021.5 (a). The amount of fees—
22 \$60,000 or 23.16% of the Settlement Fund—agreed upon in the Settlement Agreement and Stipulation
23 re Settlement Revisions here, for which final approval is now sought, is fair, reasonable, and
24 consistent with awards by many courts in similar cases. The amount remains fair and reasonable also
25 when the Court considers that Defendant will directly, and separately, pay Plaintiffs’ counsel \$19,000
26 in litigation expenses and \$205,000 in “catalyst” fees in recognition of the service provided and result
27

28 ⁴⁵ Pogrel Decl., ¶ 44.

1 obtained for the putative class members who signed releases. Accordingly, Plaintiffs’ request for fees
2 and litigation expenses should be approved.

3 **1. Litigation Expenses**

4 Class Counsel has presented a detailed accounting of their costs showing actual costs through
5 June 30, 2019.⁴⁶ Counsel has incurred \$40,154 in expenses related to the litigation, excluding the
6 costs the Plaintiffs will incur to prepare and file this motion and travel to the Final Approval
7 Hearing.⁴⁷ If all elements of the settlement are approved, Class Counsel will receive \$19,000 for
8 litigation expenses as part of the “catalyst” payment, leaving over \$20,000 unreimbursed. The
9 amount for which Class Counsel seek approval here—\$19,000—amounts to less than the balance of
10 expenses incurred; Class Counsel waive their entitlement to any expenses in excess of \$19,000.

11 Counsel has reasonably incurred these costs during the course of litigating this case and will
12 continue to incur the additional expenses throughout the settlement approval, payment, and reporting
13 process. Plaintiffs have incurred expenses for common and routinely reimbursed types of litigation
14 expenses, including filing and process serving fees; travel expenses; copying; legal research charges;
15 and mediator’s charges.

16 **2. Attorneys’ Fees**

17 The California Supreme Court affirmed that attorneys’ fees in the settlement of a class action
18 that creates a common fund may be awarded on the percentage of the fund method, with or without a
19 lodestar/multiplier cross check. *See Laffitte v. Robert Half Int’l Inc.*, 1 Cal. 5th 480 (Aug. 11, 2016);
20 *see also Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 30 (2000). Plaintiff requests an award of
21 attorneys’ fees, payable from the Settlement Fund on a percentage-of-the-benefit or common fund
22 basis, equal to 23.16% of the Settlement Fund. The Class Notice explicitly set forth the details of the
23 counsel’s fee request and no Class Member objected to the request.

24 Reasonableness is the touchstone for a court’s review of fee request as part of a class action
25 settlement, whether the request is based on a common fund or lodestar/multiplier method. *Laffitte*, 1
26 Cal. 5th at 504 (“[t]he choice of a fee calculation method is generally one within the discretion of the
27

28 ⁴⁶ Pogrel Decl., ¶ 42, Ex. 4.

⁴⁷ *Id.*

trial court, the goal under either the percentage or lodestar approach being the award of a reasonable fee to compensate counsel for their efforts.”) The reasonableness inquiry includes consideration of its fairness to the parties involved, including absent class members. *See Robbins v. Alibrandi*, 127 Cal. App. 4th 438, 449-451 (2005); *Apple Computer, Inc. v. Super. Ct.*, 126 Cal. App. 4th 1253, 1269-1270 (2005). The amount of fees sought here meets this standard based on well-established principles and precedents in similar types of cases.

3. *The Common Fund Approach is Warranted in this Case*

An award of attorneys’ fees can be calculated as a percentage of a common fund. *See Laffitte*, 1 Cal. 5th at 503 (“when class action litigation establishes a monetary fund...the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created”); *see also Wershba*, 91 Cal. App. 4th at 254. Courts in California and elsewhere have recognized the “common fund” doctrine, which establishes that attorneys who create a common fund or benefit for a group of persons may be awarded their fees and costs out of the fund. *Apple Computer*, 126 Cal. App. 4th at 1270 (whether calculated as percentage of common fund or fee-shifting statutes using lodestar, “ultimate goal is the award of a reasonable fee to compensate counsel for their efforts irrespective of the method of calculation”); *Wershba*, 91 Cal. App. 4th at 254 (recognizing both the “percentage of recovery” and “lodestar/ multiplier” methods).

The common fund doctrine rests on the commonsense notion that attorneys should normally be paid by their clients, and that unless attorneys’ fees are paid out of the common fund, those who benefitted from the fund without contributing would be unjustly enriched while the client who created the fund faces the possibility of receiving no benefit because his recovery might be consumed by expenses. *The Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Quinn v. State of Cal.*, 15 Cal.3d 162, 167 (1995); *Neal v. County of Stanislaus*, 141 Cal. App. 3d 534, 538 (1983). The California Supreme Court has recognized that the common fund doctrine has been applied “consistently in California when an action brought by one party creates a fund in which other persons are entitled to share.” *City and County of San Francisco v. Sweet*, 12 Cal. 4th 105, 110 (1995).

In addition to spreading the litigation costs among all beneficiaries, awards of common fund

1 fees are essential to furthering the important societal goal of attracting competent counsel to handle
2 these often complex contingency cases, “who will be more willing to undertake and diligently
3 prosecute proper litigation for the protection or recovery of the fund if [the attorneys are] assured that
4 [they] will be promptly and directly compensated should [their] efforts be successful.” *Melendres v.*
5 *City of L.A.*, 45 Cal. App. 3d 267, 273 (1975) (quoting *Estate of Stauffer*, 53 Cal. 2d 124, 132 (1959)).
6 Indeed, there has been a “ground swell of support for mandating the percentage-of-the-fund approach
7 in common fund cases.” *Id.* at 27; *Laffitte*, 1 Cal. 5th at 503 (“we join the overwhelming majority of
8 federal and state courts in holding that when class action litigation establishes a monetary fund for the
9 benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out
10 of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate
11 percentage of the fund created.”).

12 Class Counsel has undertaken representation at their own expense, with compensation
13 contingent on providing a benefit to the class. Class Members will now substantially benefit by the
14 terms of the Settlement. Because there is a defined and clearly traceable monetary benefit to the class,
15 the Court can base an award of attorneys’ fees on the class members’ benefit, using a common fund
16 approach to compensate Counsel. The requested fee is fair compensation for obtaining an excellent
17 result for the Class and, in doing so, undertaking complex, risky, expensive, and time-consuming
18 litigation on a contingent basis.

19 **4. The Percentage Requested by Class Counsel is Reasonable**

20 The traditional method for calculating a common fund fee is to award a percentage of the
21 total fund. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984); *Six (6) Mex. Workers v. Ariz.*
22 *Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Melendres*, 45 Cal. App. 3d at 278. The
23 percentage-of-the-fund method is appropriate for a number of well-recognized reasons. One of the
24 most important is that the percentage method accomplishes fee spreading in a manner that comports
25 with the legal marketplace, where counsel’s success is frequently measured in terms of the results
26 counsel have achieved. *See Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269 (D.C. Cir. 1993) (in
27 common fund cases “the monetary amount of the victory is often the true measure of [counsel’s]
28

1 success”). By assessing the amount of the fee in terms of the amount of the benefit conferred on the
2 class, the percentage method “more accurately reflects the economics of litigation practice” which,
3 “given the uncertainties and hazards of litigation, must necessarily be result oriented.” *Id.* (internal
4 quotation marks and citation omitted).

5 Further, when clients do not pay an ongoing hourly fee to their counsel, they typically do
6 what the Named Plaintiffs did in this case—negotiate a contingency-fee agreement in which
7 counsel’s fee is based on a percentage of any recovery. The percentage-of-the-fund approach
8 mirrors this aspect of the market and, accordingly, reflects the fee that would have been negotiated
9 by the class members in advance, had such negotiations been feasible, given the prospective
10 uncertainties and anticipated risks and burdens of the litigation. *See, e.g., Matter of Cont’l Ill. Sec.*
11 *Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (in common fund case, the object “is to give the lawyer
12 what he would have gotten in the way of a fee in an arm’s length negotiation, had one been
13 feasible”); *Paul, Johnson, Alston & Hunt v. Graulity*, 886 F.2d 268, 271 (9th Cir. 1989) (“it is well
14 settled that the lawyer who creates a common fund is allowed an extra reward, beyond that which
15 he has arranged with his client, so that he might share the wealth of those upon whom he has
16 conferred a benefit”).

17 Furthermore, the 23.16% fee requested here is well below the range customarily approved by
18 California courts in comparable wage and hour class actions. *See, e.g., Laffitte*, 1 Cal.5th at 504-06
19 (affirming a one-third fee award); *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, n.11 (2008)
20 (“studies show that . . . fee awards in class actions average around one-third of the recovery”); *Cicero*
21 *v. DirecTV, Inc.*, EDCV 07-1182, 2010 WL 2991486, at *6 (C.D. Cal. July 27, 2010) (“courts usually
22 award attorneys’ fees in the 30-40% range in wage and hour class actions that result in recovery of a
23 common fun[d] under \$10 million.”); Eisenberg & Miller, *Attorney Fees in Class Action Settlements:*
24 *An Empirical Study*, J. of Empirical Legal Studies, Vol. 1, Issue 1, 27-78, March 2004, at 35
25 (independent studies of class action litigation nationwide have come to a similar conclusion that a
26 one-third fee is consistent with market rates); *see also Martin v. AmeriPride Servs., Inc.*, 08CV440-
27 MMA JMA, 2011 WL 2313604, at *8 (S.D. Cal. June 9, 2011) (“courts may award attorney’s fees in
28

1 the 30–40% range in wage and hour class actions that result in recovery of a common fund under
2 \$10 million”).

3 **5. The Fee Request is Reasonable and Appropriate Under the**
4 **Lodestar/Multiplier Approach**

5 Class Counsel also submit here a summary of the attorneys’ billable hours to allow the Court
6 to conduct a lodestar cross-check of the proposed percentage-based common fund award, and/or
7 examine the proposed fee amount on the basis of the lodestar plus (or minus) adjustments.⁴⁸ *Laffitte*,
8 1 Cal. 5th at 503-06 (lodestar cross check is permissible to confirm reasonableness of fee request, but
9 not required).

10 As the California Supreme Court explained in *Ketchum v. Moses*, 24 Cal. 4th 112 (2001), “fee
11 awards should be fully compensatory” and also “adjusted in some manner to reflect the fact that the
12 fair market value of legal services provided on [the fair market value] basis is greater than the
13 equivalent noncontingent hourly rate.” *Id.* at 1132-33. Thus, attorneys’ fee awards often include
14 significant lodestar enhancements through the application of multipliers. Factors that can justify a
15 multiplier to class counsel include the complexity of issues in a case, the contingent nature of the
16 litigation, and the amount at stake and results obtained by Class Counsel. *See, Lealao*, 82 Cal. App.
17 4th at 45-46. While Plaintiffs here request fees under the percentage-of-the-fund approach and submit
18 that request is reasonable in this case, Class Counsel respectfully suggests that all these factors are
19 present here and that a lodestar cross check confirms the reasonableness of the fee requested.

20 **a. Class Counsel’s Lodestar is Supported by Billing Records**

21 Class Counsel’s declaration describes their firm’s billing procedures and work performed.⁴⁹
22 The contemporaneous record summary and declaration of counsel provide ample support for Class
23 Counsel’s lodestar. *See Laffitte*, 1 Cal. 5th at 505 (“trial courts conducting lodestar cross-checks have
24 generally not been required to closely scrutinize each claimed attorney-hour, but have instead used
25 information on attorney time spent to ‘focus on the general question of whether the fee award
26 appropriately reflects the degree of time and effort expended by the attorneys.’”).

27 ⁴⁸ Pogrel Decl., ¶¶ 37-41.

28 ⁴⁹ Pogrel Decl., ¶ 37 (billing procedures) and 14-36 (summary of work performed). Counsel can be prepared to
present full billing records for the Court’s review *in camera*, if the Court so requests.

1 **b. The Proposed Multiplier is Negative**

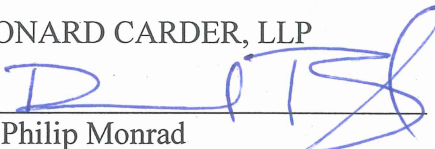
2 Class Counsel worked a total of 1,137 attorney hours and 170 paralegal/law clerk hours from
3 the inception of this case through June 30, 2019, as detailed in their summary of billable hours.⁵⁰ The
4 total value of counsel's time, calculated based on prevailing rates in the local marketplace was
5 \$715,102 as of June 30, 2019,⁵¹ and does not include time required to prepare this motion; travel to,
6 and attend the hearing; oversee the payment distribution process; respond to further Class Member
7 inquiries; and subsequent reporting on the administration of the settlement. Even when adding the
8 catalyst fee to be paid directly in addition to the \$60,000, the resulting capped fee request of
9 \$265,000⁵² will result in counsel recovering approximately 37%⁵³ of its anticipated lodestar, a
10 negative multiplier for Class Counsel.

11 **VI. CONCLUSION**

12 For all of the foregoing reasons, Plaintiffs respectfully request that this Court: (1) grant final
13 approval for the Settlement as fair, adequate, and reasonable; (2) approve the request for payment of
14 \$6,500 in administration costs to Simpluris; (3) approve Class Counsels' request for an award of
15 \$60,000 for attorneys' fees and \$19,000 for litigation expenses; and (4) approve the request for a
16 \$10,000 service award to each Plaintiffs. Finally, Plaintiffs request that the Court approve the
17 Settlement subject to the Court's retaining continuing and exclusive jurisdiction to enforce the
18 Settlement Agreement reached between the parties.

19 DATED: July 29, 2019

LEONARD CARDER, LLP

20 By: 

Philip Monrad

David Pogrel

21 Nicole Teixeira

22 *Attorneys for Plaintiffs and the settlement class*

23
24
25
26 ⁵⁰ Pogrel Decl., ¶¶ 38-39.

27 ⁵¹ Pogrel Decl., ¶¶ 40-41.

28 ⁵² \$205,000 (catalyst fee) + \$60,000 (fee request) = \$265,000.

⁵³ Percentage recovery calculated as follows = \$265,000 / \$715,102 = 37%.