

1 FRANK M. PITRE (SBN 100077)
STUART G. GROSS (SBN 251019)
2 **COTCHETT, PITRE & McCARTHY**
San Francisco Airport Office Center
3 840 Malcolm Road, Suite 200
Burlingame, CA 94010
4 Telephone: (650) 697-6000
Facsimile: (650) 697-0577
5 fpitre@cpmlegal.com; sgross@cpmlegal.com

6 WILLIAM M. AUDET (SBN 117456)
AUDET & PARTNERS LLP
7 221 Main Street, Suite 1460
San Francisco, CA 94105
8 Telephone: (415) 568-2555
Facsimile: (415) 568-2556
9 waudet@audetlaw.com

10 *Attorneys for Plaintiffs and the Class*

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **IN AND FOR THE COUNTY OF SAN FRANCISCO**
13

14	JOHN TARANTINO; STEVEN F. FITZ,	)	CASE NO. CGC-07-469379
	dba FITZ-BUSKIRK, INC.; JOHN)	
15	ATKINSON; SEAN M. HODGES; ERNIE	)	PLAINTIFFS' MEMORANDUM OF
	KOEPF; SAU A. PHANG; KIU A. PHANG	)	POINTS AND AUTHORITIES IN
16	SIN; NICK RELOBA; JOHN P.	)	SUPPORT OF PLAINTIFFS' MOTION
	TARANTINO and others similarly	)	FOR PRELIMINARY APPROVAL OF
17	situated,	)	THE FINFISH CLASS SETTLEMENT
18	Plaintiffs,)	
19	v.	)	Date: January 25, 2011
		)	Time: 3:00 p.m.
20	HANJIN SHIPPING CO., LTD.; REGAL	)	Dept: 305
	STONE, LTD.; FLEET MANAGEMENT,	)	Hon. John E. Munter
21	LTD.; JOHN J. COTA; and DOES 2-100,)	
22	Defendants.	)	Date Action Filed: November 20, 2007
		)	Trial Date: February 14, 2010

TABLE OF CONTENTS

Page(s)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I.	<u>INTRODUCTION</u>	1
II.	<u>SUMMARY OF FACTS UNDERLYING CLASS CLAIMS</u>	4
A.	<u>Facts Common To All Class Members Claims</u>	5
1.	<u>Facts Concerning The CBOS' Potential Toxic Impact Bay Area Marine Life</u>	5
2.	<u>Facts Concerning Wrongful Conduct By Defendants</u>	6
B.	<u>Facts Specific To Claims Of Particular Constituent Subclass Members</u>	6
1.	<u>Commercial Herring Fishermen Subclass</u>	7
a.	<u>San Francisco Bay Herring Fishery</u>	7
b.	<u>Facts Concerning Past Damages</u>	8
c.	<u>Facts Concerning Future Damages</u>	8
2.	<u>Commercial Hook & Line Halibut Fishermen Subclass</u>	9
a.	<u>Greater San Francisco Bay Hook & Line Halibut Fishery</u>	9
b.	<u>Facts Concerning Past Damages</u>	10
c.	<u>Facts Concerning Future Damages</u>	10
3.	<u>Commercial Hook & Line Surfperch Subclass</u>	11
a.	<u>Greater San Francisco Bay Hook & Line Surfperch Fishery</u>	11
b.	<u>Facts Concerning Past Damages</u>	11
c.	<u>Facts Concerning Future Damages</u>	12
4.	<u>Commercial Live Bait Providers Subclass</u>	12
a.	<u>Central San Francisco Live Bait Fishery</u>	12
b.	<u>Facts Concerning Past Damages</u>	13
c.	<u>Facts Concerning Future Damages</u>	14
5.	<u>Commercial Nearshore (Rockfish) Fishermen Subclass</u>	14
a.	<u>Greater Nearshore/Rockfish Fishery</u>	14
b.	<u>Facts Concerning Past Damages Claims</u>	15

1		c.	<u>Facts Concerning Future Damages Claims</u>	15
2	6.		<u>Commercial Near Offshore (Trawl/Scottish Seine) Fishermen</u>	16
3		a.	<u>Gulf Of The Farallones Near Offshore Fishery</u>	16
4		b.	<u>Facts Concerning Past Damages Claims</u>	16
5		c.	<u>Facts Concerning Future Damages Claims</u>	17
6	7.		<u>Commercial Sport Fishing Charter Boat Subclass</u>	17
7		a.	<u>Central San Francisco Bay Sport Charter Fishery</u>	17
8		b.	<u>Facts Concerning Past Damages Claims</u>	18
9		b.	<u>Facts Concerning Future Damages Claims</u>	19
10	III.		<u>PROCEDURAL BACKGROUND</u>	19
11		A.	<u>Litigation History</u>	19
12		B.	<u>Settlement Negotiations</u>	23
13		C.	<u>Discovery And Investigation By Class Counsel</u>	29
14	III.		<u>MATERIAL TERMS OF THE FINFISH SETTLEMENT</u>	32
15		A.	<u>The Finfish Settlement Class</u>	32
16		B.	<u>Consideration To Settlement Class Members</u>	36
17		1.	<u>Commercial Herring Fishermen Subclass</u>	36
18		2.	<u>Commercial Hook & Line Halibut Fishermen Subclass</u>	38
19		3.	<u>Commercial Hook & Line Surfperch Fishermen Subclass</u>	38
20		4.	<u>Commercial Live Bait Providers Subclass</u>	38
21		5.	<u>Commercial Nearshore (Rockfish) Fishermen Subclass</u>	38
22		6.	<u>Commercial Near-Offshore (Trawl/Scottish Seine) Fishermen</u> <u>Subclass</u>	39
23		7.	<u>Commercial Sport Fishing Charter Boat Operator Subclass</u>	39
24		8.	<u>Mutually Exclusive Subclass Settlement Fund Combinations-</u> <u>Election Requirement</u>	39
25				
26		C.	<u>Settlement Administration</u>	40
27		D.	<u>Class Representative Stipends, Attorneys' Fees And Costs</u>	40
28		E.	<u>Release</u>	41

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

F. Settlement Notice 42

G. Blow-Up, And Reversion Provisions 43

IV. SETTLEMENT EASILY MEETS PRELIMINARY APPROVAL CRITERIA 44

A. The Class Action Settlement Approval Process And Standard Of Review At The Preliminary Approval Stage 44

B. The Settlement Provides an Excellent Result for Class Members In Light Of Strengths And Weakness Of Class Members' Claims 47

1. Strengths And Weaknesses Of The Case As A Whole 48

a. Difficulties Proving Future Damages 48

i. Stigma-Based Analysis 49

ii. Habit Damage Based Analysis 50

iii. Time-Of-The-Spill Toxic Insult Based Analysis 50

b. Difficulties Prevailing On Any Punitive Damages Claims 52

c. Difficulties Prevailing On Monitoring Claims 54

2. Strengths And Weakness Of Specific To Each Constituent Subclass 55

a. Commercial Herring Fishermen Subclass 55

b. Commercial Live Bait Providers Subclass 57

c. Sport Charter Fishing Boat Operator Subclass 59

d. Commercial Near Offshore (Trawl/Scottish Seine) Fishermen Subclass 60

e. Commercial Hook & Line Halibut Subclass And Commercial Hook & Line Surfperch 62

f. Commercial Nearshore (Rockfish) Fishermen Subclass 63

2. The Settlement Is the Product of Serious, Informed, and Arm's-Length Negotiations 63

3. Class Counsel Engage In Substantial Discover And Investigation Of Facts Underlying Finfish Settlement Class Members' Claims 64

V. PROVISIONAL CERTIFICATION OF THE FINFISH SETTLEMENT CLASS AND THE NOT YET CERTIFIED CONSTITUENT SUBCLASSES IS APPROPRIATE .. 66

A. Standard For Class Certification 68

1 B. The Finfish Settlement Class And Constituent Subclasses Are Easily
2 Ascertainable And Sufficiently Numerous 68

3 C. A Well Defined Community Of Interest Exists Amongst Finfish
4 Settlement Class Members 69

5 1. Common Issues of Law and Fact Predominate Over Individual
6 Issues 69

7 2. Plaintiffs' Claims Are Typical 71

8 3. Plaintiffs Will Adequately Represent And Protect The Interests Of
9 The Class 71

10 D. A Class Action Is The Superior Method To Efficiently Resolve This
11 Dispute 72

12 VI. THE PROPOSED CLASS NOTICE IS CONSTITUTIONALLY SOUND AND
13 APPROPRIATE 73

14 A. The Proposed Notice Plan Satisfies Due Process 73

15 B. The Proposed Long-Form And Summary Notices Are Accurate And
16 Informative 74

17 VII. CONCLUSION 74

18

19

20

21

22

23

24

25

26

27

28

TABLE OF AUTHORITIES

Page(s)

CASES

Bowles v. Sup. Ct. (Nickles)
(1955) 44 Cal.2d 574 69

Cartt v. Sup. Ct.
(1975) 50 Cal.App.3d 960 73

Clark v. Residential Serv. LLC
(2009) 175 Cal.App.4th 785 46

Class Plaintiffs v. City of Seattle
(9th Cir. 1992) 955 F.2d 1268 45

Classen v. Weller
(1983) 145 Cal.App.3d 27 71

Clausen v. M/V New Carissa
(D. Or. 2001) 171 F. Supp. 2d 1127 53

Clothesrigger, Inc. v. GTE Corp.
(1987) 191 Cal.App.3d 605 69

Daar v. Yellow Cab Co.
(1967) 67 Cal.2d 695 44, 68, 72

Eisen v. Carlisle & Jacquelin
(1974) 417 U.S. 156 73

Exxon Shipping Co. v. Baker
(2008) 554 U.S. 471 54

Gintis v. Bouchard Transp. Co.
(1st Cir. Feb. 23, 2010) No. 09-1717, 2010 U.S. App. LEXIS 3644 69, 70, 72

Harper v. 24 Hour Fitness, Inc.
(2008) 167 Cal.App.4th 966 68

Hicks v. Kaufman & Broad Home Corp.
(2001) 89 Cal.App.4th 908 68

In re Microsoft I-V Cases
(2006) 135 Cal. App. 4th 706 45, 46

Kullar v. Foot Locker Retail, Inc.
(2008) 168 Cal.App.4th 116 45, 47

Linder v. Thrifty Oil Co.
(2000) 23 Cal.4th 429 68

1	<i>Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles</i>	
	(2010) 186 Cal.App.4th 399	45-47
2	<i>Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp.</i>	
3	(E.D. Pa. 1970) 323 F.Supp.364	46
4	<i>Richmond v. Dart Industries</i>	
	(1981) 29 Cal.3d 462	71
5	<i>Rose v. City of Hayward</i>	
6	(1981) 126 Cal.App.3d 926	69
7	<i>Sav-On Drug Stores, Inc. v. Superior Court</i>	
	(2004) 34 Cal.4th 319	70
8	<i>Simons v. Horowitz</i>	
9	(1984) 151 Cal.App.3d 834	71
10	<i>South Port Marine LLC v. Gulf Oil Partnership</i>	
	(1st Cir. 2000) 234 F.3d 58	53
11	<i>Vasquez v. Superior Court</i>	
12	(1971) 4 Cal.3d 800	44, 72
13	<u>STATUTES, RULES AND CODES</u>	
14	33 U.S.C.	
15	§ 2718	53
16	California Rule of Court	
17	Rule 3.769	44, 74
18	Civil Code	
19	§ 3283	49
20	Government Code	
21	§ 8670.56.5	48, 53
22		
23	<u>OTHER AUTHORITIES</u>	
24	3 Newberg on Class Actions (4th ed. 2010)	
25	§ 8.21	74
26	§ 8.39	74
27	4 Conte & Newberg, Newberg on Class Actions (4th ed. 2002)	
28	§ 11.25	46

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

§ 11.41 45

6 Witkin Summary of Cal. Law (10th Ed. 2005)

§ 1607 54

Manual for Complex Litigation 4th (Fed. Judicial Center 2004)

§§ 21.632 - 21,634 44, 46, 47

1 **I. INTRODUCTION**

2 Plaintiffs John Tarantino, Steven F. Fitz, dba Fitz-Buskirk, Inc., Sau A. Phang; Kiu A.
3 Phang Sin, Nick Reloba, John P. Tarantino, Ernie Koepf, John Atkinson, and Sean Hodges
4 (“Plaintiffs”) have reached a class-wide settlement (“Finfish Settlement” or “Settlement”) with
5 Defendants Fleet Management Ltd. and Regal Stone Limited (“Settling Defendants,” together
6 with Plaintiffs, “Parties”), which, subject to this Court’s approval will resolve all remaining
7 claims in the above captioned action against all the named Defendants and certain other related
8 persons (“Released Parties”), which arise out of the Cosco Busan oil spill of November 7, 2007
9 (“CBOS” or “Spill”). If approved, the Finfish Settlement will resolve, specifically the claims
10 (“Finfish Claims”) of participants in commercial finfish fisheries (“Constituent Fisheries) of the
11 San Francisco Bay and surrounding ocean areas (“Bay Area”). In combination, with the class-
12 wide settlement of claims of participants in the Bay Area’s Dungeness crab fishery (“Dungeness
13 Crab Settlement”), which was granted final approval by the Honorable Samuel Conti in the
14 parallel action *Loretz v. Regal Stone, Ltd., et al.*, No. 07-5800-SC (N.D. Cal.) (“*Loretz*”) on
15 September 3, 2010, the Finfish Settlement will result in the conclusion of over three years of
16 vigorous hard fought litigation by the Bay Area’s commercial fishermen, and do so on terms that
17 are fair and adequate. The proposed settlement is memorialized in a Settlement Agreement dated
18 November 16, 2010 (“Finfish Settlement Agreement” or “Settlement Agreement” or
19 “Agreement”), a true and correct copy of which is attached as Exhibit A to the accompanying
20 Declaration Of Stuart G. Gross In Support Of Motion For Preliminary Approval Of Finfish Class
21 Action Settlement (“Gross Dec.”).^{1/}

22 Under the Settlement, Settling Defendants will pay \$3,650,000 into a fund (“Settlement
23 Fund”), which will be used solely to pay Awards to approximately 120 San Francisco Bay
24 commercial finfish fishermen (“Finfish Settlement Class” or “Class”), subject only to certain
25 conditional reversionary rights of Settling Defendants triggered in the event of opt-outs by Class
26 members. No portion of the Settlement Fund will be used to pay the costs of administering the

27 _____
28 ¹ All defined terms used herein shall have the meanings assigned to them in the Finfish Settlement Agreement, unless otherwise specifically defined herein.

1 Settlement, reimburse the litigation costs incurred by Class Counsel in pursuit of this action, or to
2 pay any attorneys' fees to Class Counsel. Rather, Settling Defendants have agreed to pay the
3 reasonable cost of the Settlement's administration, and the Agreement provides for Class
4 Counsel to make an application to the Court for an order requiring Settling Defendants to
5 separately reimburse Class Counsel's costs and pay their attorneys' fees, which Settling
6 Defendants are free (and expected) to oppose.

7 This arrangement not only greatly benefits Class members, it is also a testament to the
8 vigorous, arm's length (and lengthy) negotiation process by which the Agreement was reached.
9 Indeed, the settlement negotiations that ultimately resulted in the Agreement, began in the
10 summer of 2008 and did not finally conclude in a signed Agreement until December of 2010.
11 During this period, not only did the Parties engage in numerous in-person negotiations sessions
12 (with and without a mediator) and substantive phone and email based negotiations, but also in
13 the vigorous litigation of their respective cases. Indeed, both this Court and Judge Conti in the
14 parallel *Loretz* action have presided over substantial motion practice by Plaintiffs, including a
15 successful motion to certify the Commercial Herring Fishermen Subclass, one of the Constituent
16 Subclasses whose claims are sought to be resolved through this Settlement. Moreover, Class
17 Counsel, during this period, utilized a multiplicity of discovery and investigatory methods to
18 gather the necessary facts to understand and resolve Class members claims, either through
19 settlement or trial if necessary. It appeared likely at several points that these claims would have
20 to be tried and Class Counsel was fully prepared and willing to do that.

21 Ultimately, however, Class Counsel and the Settling Defendants were able to reach a
22 compromise that, based on work that Class Counsel performed to understand the facts underlying
23 Class members' claims and Class Counsels' substantial experience, Class Counsel are convinced
24 is very fair and quite adequate in light of the strengths and weaknesses of Class members claims.
25 As discussed below, the long-term impact of the Spill on the marine life of the Bay Area, and
26 thus the Class members that depend on that marine life for their livelihoods, will not be as severe
27 as feared. The consideration provided through the Settlement to Class members accounts for any
28 uncompensated past damages suffered by Class members and the present uncertainty regarding

1 the ultimate long-term effects of the Spill on the Bay Area’s marine life, which (thankfully)
2 appears unlikely to be severe, and does so very fairly.

3 A critical component of the manner in which the Finfish Settlement accomplishes this is
4 through its provision for certification of six additional subclasses, which upon approval of the
5 Settlement, will, together with the Commercial Herring Fishermen Subclass (“Herring
6 Subclass”), make up the Finfish Settlement Class: (1) the Commercial Hook & Line Halibut
7 Fishermen Subclass (“Halibut Subclass”); (2) the Commercial Hook & Line Surfperch
8 Fishermen Subclass (“Surfperch Subclass”); (3) the Commercial Live Bait Providers Subclass
9 (“Bait Subclass”); (4) the Commercial Nearshore (Rockfish) Fishermen Subclass (“Rockfish
10 Subclass”); (5) the Commercial Near Offshore (Trawl/Scottish Seine) Fishermen Subclass
11 (“Offshore Subclass”); and (6) the Commercial Sport Fishing Charter Boat Subclass (“Sport
12 Charter Subclass,” collectively with other subclasses, “Constituent Subclasses” or “Subclasses”).
13 Each of these Constituent Subclasses is represented by one or more of the Plaintiffs, all of whom
14 were actively involved in the crafting of the Settlement.

15 This arrangement, which is coupled with the creation of subclass specific settlement
16 funds (“Subclass Settlement Funds), allows for the fair allocation of the Settlement Fund
17 between members of Constituent Subclasses according to the relative strengths and weakness of
18 each Constituent Subclass members’ cases, eliminating “apples to oranges” evaluation problems
19 that would have arisen without subclassing. The arrangement, in combination with certain
20 conditional blow-up rights granted to Settling Defendants, also provides substantial benefit in the
21 event that prerequisites for exercise of such rights are met: allowing for the Settlement to remain
22 in effect for members of the other unaffected Constituent Subclasses.

23 Accordingly, the Plaintiffs respectfully request through the instant motion an Order by the
24 Court:

- 25 1. Granting preliminary approval of the Settlement as within the range of
26 reasonableness to justify provision of notice thereof to members of the Class;
- 27 2. Provisionally certifying the Settlement Class and Constituent Subclasses, on an
28 opt-out basis and for settlement purposes only;

- 1 3. Appointing the named Plaintiffs as the Finfish Settlement Class Representatives;
- 2 4. Appointing counsel for Plaintiffs and the Commercial Herring Fishermen
- 3 Subclass, Frank M. Pitre of Cotchett, Pitre & McCarthy (“CPM”) and William M. Audet or Adet
- 4 & Partners LLP (“Audet Law”), as Class Counsel;
- 5 4. Approving the [Proposed] Notice Of Pendency And Proposed Settlement of Class
- 6 Action (“Notice”), substantially in the form attached to the Settlement Agreement as Exhibits 2
- 7 and 3, and directing that the Class Notice be provided in accordance with the terms of the
- 8 Agreement;
- 9 5. Finding that the proposed form and method of notice to the Class constitutes the
- 10 best notice practicable under the circumstances and sufficient to provide notice to all Class
- 11 members in compliance with the requirements of the Code of Civil Procedure, the United States
- 12 Constitution, and all other applicable law; and
- 13 6. Scheduling a fairness hearing on whether:
- 14 (a) the Settlement Agreement should be granted final approval;
- 15 (b) Class Counsel’s application for an award of attorneys’ fees,
- 16 reimbursement of costs, and incentive awards to the named
- 17 Plaintiffs should be granted, and in what amounts.

18 **II. SUMMARY OF FACTS UNDERLYING CLASS CLAIMS**

19 Certain fundamental facts underlie the claims of all Class members, while other facts are

20 specific to the claims of members of particular Constituent Subclasses. Roughly speaking,

21 underlying all Class members’ claims are fundament facts regarding the spilled oil’s potential

22 toxicity to the Bay Area’s marine life and facts concerning Defendants’ conduct on which Class

23 members’ punitive damages claims are premised. Specific to the claims of members of each of

24 the particular Constituent Subclass are facts concerning the associated Constituent Fishery and

25 the impact of the CBOS thereon.

26 ///

27 ///

1 **A. Facts Common To All Class Members Claims**

2 **1. Facts Concerning The CBOS' Potential Toxic Impact Bay Area**
3 **Marine Life**

4 The principal remaining compensatory claims of Class members arise out of the potential
5 long-term impact of the CBOS on the Bay Area fish stocks associated with each of Constituent
6 Fisheries (collectively “Relevant Fish Stocks”) and the future economic damages such impacts
7 would cause Class members. *Id.*, ¶ 26. As discussed below, adequately proving these long-term
8 impacts before they have actually manifested themselves (not to mention proving Class
9 members’ future economic damages resulting therefrom), would require proof of a number of
10 facts specific to each Subclass. However, common and fundamental to any such effort would be
11 proof of the spilled oil’s toxicity to marine life.

12 In recognition of this, the consortium of California State and Federal agencies
13 (collectively “Trustees”) tasked with conducting the Natural Resource Damage Assessment
14 (“NRDA”) associated with the CBOS, determined that the most practicable manner in which to
15 assess the Spill’s toxicity to all the Bay Area’s marine life and potential long-term impacts
16 thereon, was through assessment of the CBOS’ impact on a single species, Pacific herring. *Id.*,
17 ¶ 27. In explaining this choice, the Trustees referred to Pacific herring in its role as a test subject
18 as a “surrogate” or “proxy” for the Bay Area’s other marine species potentially impacted by the
19 Spill. Accordingly, virtually all of the data and analysis of the Spill’s potential toxicity to the
20 Bay Area’s marine life, whether produced by the Trustees or Defendants, specifically relates the
21 Spill’s toxicity to herring. *Id.*, ¶ 28. Given the cost-prohibitive nature of conducting on their
22 own a process analogous to the NRDA process, which has already cost in the tens of millions of
23 dollars, all Class members, as a practical matter, are required to use these data and analyses as
24 bases on which to make their long-term impact claims. *Id.*, ¶ 29.

25 Two significant reports have been produced by the Trustees based on this work, which
26 while not yet publically released, were acquired by Class Counsel along with related data and
27 secondary reports through various methods. *Id.*, ¶ 30. Though much disputed by Settling
28 Defendants, critical to Class members’ long-term impact claims are findings in these reports of:

1 (1) a higher rate of mutations and mortality among fish embryos of herring eggs laid on oiled
2 beaches compared to non-oiled beaches, and (2) evidence suggesting that these mutations and
3 increased mortality were caused when certain chemicals in the spilled oil referred to as
4 “polyaromatic compounds” or “PACs” were uptaken into the translucent herring embryos and
5 those embryos were subsequently exposed to sunlight, a phenomenon known as “phototoxicity”
6 or “photo-enhanced toxicity.” *Id.*, ¶ 31.

7 **2. Facts Concerning Wrongful Conduct By Defendants**

8 The other principal claim remaining for all Class members is a claim for punitive
9 damages, which by its nature would be proved through common facts regarding Defendants’
10 alleged wrongful conduct in connection with the Spill. Both Defendant Cota and Defendant
11 Fleet have pled guilty to federal criminal charges arising out of their conduct in connection with
12 the Spill; and reports by both the United States Coast Guard and the National Transportation
13 Safety Bureau, as well as the sentencing reports associated with Cota’s and Fleet’s guilty pleas
14 and related documents, detail conduct by Defendants that contributed to causing the Spill and
15 hindered the government’s efforts to investigate the cause of the Spill. *Id.*, ¶ 32. These facts are
16 outlined in some detail in Plaintiffs’ Memorandum of Points and Authorities In Support Of
17 Plaintiffs’ Motion For Class Certification filed on April 12, 2010 (“Motion For Class
18 Certification”) and supporting documents filed therewith. Any claim for punitive damages by
19 Class members against Defendants would be substantially premised on these and related facts.

20 **B. Facts Specific To Claims Of Particular Constituent Subclass Members**

21 While proof of the above common facts would be necessary for the claims of all Class
22 members, they would not be sufficient. Underlying the claims of each Subclass are also facts
23 regarding the particular associated fishery Constituent Fishery, any facts supporting claims by
24 Subclass members that they suffered past damages from the Spill that have not yet been
25 compensated, and any facts that, in combination with common facts regarding the Spill’s
26 potential long-term impact would support a claim that the particular Relevant Fish Stock is
27 reasonably likely to exhibit a long-term population level injury resulting from the Spill.

1 1. Commercial Herring Fishermen Subclass

2 a. San Francisco Bay Herring Fishery

3 Class Counsel estimates that there are approximately 50 persons in the Commercial
4 Herring Fishermen Subclass certified by the Court on August 6, 2009. Gross Dec., ¶ 33.² These
5 persons depend on the San Francisco Bay commercial herring fishery, a limited entry roe fishery
6 which generally runs from December until April (“San Francisco Bay Herring Fishery”). *Id.*,
7 ¶ 34.

8 The fishery requires substantial capital investment in order to participate in it as a
9 harvester. First, as a limited entry fishery, there are a limited number of permits in existence,
10 most of which are held by persons that do not themselves harvest herring using the permit, but
11 rather lease the permit (if they can) to a harvester, who are also known to purchase the permits.
12 *Id.*, ¶ 36. In past years, the price to lease or purchase such permits was quite high, reaching as
13 much as \$70,000 for the purchase of a permit; however, in recent years the price has dropped
14 substantially as catches and demand have decreased, with some permit holders simply giving up
15 the permits rather than paying the price of renewing them. Second, as a trawl fishery,
16 participants are required to utilize larger traditional commercial fishing boats equipped with
17 equipment to place and pull nets, which are both expensive in-and-of-themselves and require
18 substantial amounts of fuel to operate. Moreover, these larger boats and trawl operations require
19 the hiring a crew. *Id.*, ¶ 37.

20 On the other hand, commercial herring fishing can be quite lucrative. In years in which
21 both the number of fish available for harvest is high and the price received for such fish is high,
22 such fishing can be quite lucrative. However, in recent years (prior to the spill) in which fishing
23 for herring in San Francisco Bay was allowed, the fishery has been far less lucrative for all
24 involved. *Id.*, ¶ 38.

25
26
27 ² The Court has appointed Ernie Koepf, Sean Hodges, and John Atkinson as Subclass
28 Representatives of the Commercial Herring Fishermen Subclass. Messrs. Koepf, Hodges and
Atkinson gave Class Counsel substantial assistance in their work on behalf of the Commercial
Herring Fishermen Subclass, including that reflected in the Settlement. *Id.*, ¶ 33.

1 Each summer, the California Department of Fish and Game (“CDFG”) establishes a
2 maximum quota in tons that can be caught in the entire fishery in the upcoming season. *Id.*, ¶ 39.

3 **b. Facts Concerning Past Damages**

4 The official ban on commercial fishing in the Bay Area following the CBOS lasted from
5 November 13, 2007 to November 29, 2007 (“Official Fishing Ban”). The San Francisco Bay
6 Herring Fishery was *de facto* closed for the month of December 2007 because of the lack of
7 buyers, but opened the following January. *Id.*, ¶ 40. The bulk of the Commercial Herring
8 Fishermen Subclass members who could make a claim that they suffered an economic injury as a
9 result of the *de facto* closure of the Herring Fishery in December 2007, filed a claim with and
10 were compensated through a claims process established by the Settling Defendants (“Closure
11 Claims Process”). *Id.*, ¶ 41. The CDFG opened the Herring Fishery for the 2008/09 season, but
12 closed the fishery for the 2009/10 season, citing among the reasons for its decision concerns
13 regarding the effect that the CBOS may have had on the Bay’s herring stock. *Id.*, ¶ 42. Among
14 the other concerns raised by CDFG were the low numbers of herring observed spawning in the
15 Bay in the 2008/09 and the low numbers of herring observed spawning in the Bay in recent
16 previous seasons. These observations are known as “biomass assessments.” *Id.*, ¶ 43.

17 **c. Facts Concerning Future Damages**

18 As discussed above, the Trustees have identified evidence (disputed by Defendants) that
19 larvae hatched from eggs laid on oiled beaches during the 2007/08 season suffered very high
20 rates of mortality and that such mortality was the result of exposure to the spilled oil. This
21 evidence provides the foundation for the strongest long-term impact claim of any Subclass.

22 However, this evidence (even if Defendants’ significant challenges to it were defeated)
23 would not be sufficient in-and-of-itself to show a long-term impact on the San Francisco Bay
24 herring stock on which a future damages claim by the Subclass could be based. Rather, it would
25 still need to be shown that a sufficiently large portion of the herring spawned in 2007/08 were
26 exposed to the oil that, in context with other factors, it is reasonably certain that the losses of
27 spawn in 2007/08 would cause a long-term reduction in stock size.

1 Supporting this conclusion is evidence (again disputed by Defendants) that the CBOS
2 oiled a large proportion of the Bay Area beaches on which herring laid their eggs in the 2007/08
3 season. *Id.*, ¶ 44. This evidence supports an argument that there existed an exposure pathway
4 between the oil and large proportion of the spawn population.

5 Another fact that supports this conclusion is the low biomass mass numbers from seasons
6 proceeding the Spill. The San Francisco Bay Herring Fishery depends on fish from multiple
7 “year classes,” meaning that the fish harvested in a particular season were spawned in various
8 past years in the Bay and have returned to spawn themselves the year that they are caught. Low
9 biomass numbers from previous seasons supports the argument that a substantial injury to the
10 2007/08 year class will have a long-term population level impact on the stock, as there will be
11 fewer fish from other year classes to the place of the missing 2007/08 year class fish (the oil spill
12 class). *Id.*, ¶ 45.

13 Challenging this conclusion were the results of the 2009/10 biomass assessment, which
14 recorded a substantially higher total biomass of herring than had been recorded in recent years,
15 including a substantial number of two-year old fish, i.e. fish of the 2007/08 year class. There are
16 grounds to question the reliability of the 2009/10 biomass assessment; however, many of those
17 grounds would also apply the biomass assessment of previous years. *Id.*, ¶ 46.

18 **2. Commercial Hook & Line Halibut Fishermen Subclass**

19 **a. Greater San Francisco Bay Hook & Line Halibut Fishery**

20 Class Counsel estimates there are approximately 15 to 20 persons that would qualify for
21 membership in the Halibut Subclass. *Id.*, ¶ 47.^{3/} These persons fish for California halibut using
22 hook and line, as opposed to nets, in the Greater San Francisco Bay Hook & Line Halibut
23 Fishery. *Id.*, ¶ 48.

24 No special permit is required in order to participate in the fishery, and the capital
25 investment required for participation is relatively low compared to other fisheries, as participants

26 _____
27 ³ Plaintiff Nick Reloba is longtime San Francisco Bay commercial hook and line halibut
28 fisherman. Mr. Reloba gave Class Counsel substantial assistance in the work done by Class
Counsels on behalf of the proposed Commercial Hook & Line Halibut Fishermen Subclass,
including that reflected in the Settlement. *Id.*, ¶ 47.

1 generally use Boston Whalers or similar open hull boats, and all use hook and line gear.
2 Recorded revenues for participants in the fishery are also low relative to other fisheries. *Id.*,
3 ¶ 49.^{4/}

4 **b. Facts Concerning Past Damages**

5 Many of the areas in which members of the Subclass fish were oiled. However, the
6 season for halibut in the San Francisco Bay Hook & Line Halibut Fishery is primarily in the late
7 summer and early fall. Thus, the Official Fishing Ban did not affect the fishery. *Id.*, ¶ 50.
8 Further, though the CDFG does not conduct annual biomass assessments of the San Francisco
9 Bay California halibut stock, evidence suggests that in recent years, including those following the
10 CBOS, halibut stocks in the fishery have been at historic highs. *Id.*, ¶ 51.

11 **c. Facts Concerning Future Damages**

12 Halibut lay their eggs through a broadcast method, with fertilization occurring while the
13 eggs are in the water column. Such eggs are predominantly found in the water column near
14 shore, particular in bays and estuaries, and once fertilized, the resulting larvae generally remain
15 in the water column near shore for several months. This would arguably place such larvae in the
16 path of the CBOS; however, the bulk of halibut spawning activities occurs between February and
17 August, well after there was no visible spilled oil in the water column. *Id.*, ¶ 52.

18 Included in the diet of sub-adult and adult halibut are Pacific herring and Northern
19 anchovies, regarding which the best case for a long-term population level impact from the Spill
20 can be made. *Id.*, ¶ 53.

21 As mentioned, evidence suggests that recent past seasons, including those following the
22 Spill halibut stock levels have been at historic highs. However, there is also evidence that this is
23 the result of very strong spawns in certain seasons prior to the Spill. *Id.*, ¶ 51.

24

25

26

27

28 ⁴ This may be, in part, due the possibility that some participants in the fishery conduct some portion of their business on a cash basis.

1 **3. Commercial Hook & Line Surfperch Subclass**

2 **a. Greater San Francisco Bay Hook & Line Surfperch Fishery**

3 Class Counsel estimates there are approximately 5-10 persons that would qualify for
4 membership in the Commercial Hook & Line Halibut Subclass. *Id.*, ¶ 54.^{5/} These persons fish
5 for various species of surfperch using hook and line, as opposed to nets, in the Greater San
6 Francisco Bay Hook & Line Surfperch Fishery. *Id.*, ¶ 55. Many of the same persons that
7 participate in the Greater San Francisco Bay Hook & Line Surfperch Fishery during the winter,
8 participate in the Greater San Francisco Bay Hook & Line Halibut Fishery in the late spring and
9 summer months. *Id.*, ¶ 56.

10 No special permit is required in order to participate in the fishery, and the capital
11 investment required for participation is relatively low compared to other fisheries, as participants
12 generally use Boston Whalers or similar open hull boats, and all use hook and line gear.
13 Recorded revenues for participants in the fishery are also low relative to other fisheries. *Id.*,
14 ¶ 57^{6/}

15 **b. Facts Concerning Past Damages**

16 Many of the areas in which Subclass members fish were oiled; however, the season for
17 surfperch in the Greater San Francisco Bay Hook & Line Surfperch Fishery is primarily in the
18 winter beginning late December or January. *Id.*, ¶ 58. Accordingly, Class Counsel has not
19 identified substantial evidence that the Official Fishing Ban substantially affected Subclass
20 members. *Id.*, ¶ 59. Class Counsel has also not identified substantial evidence that there was any
21 *de facto* closure of the fishery following the Spill or that the Spill had a substantial stigma effect
22 on the price received by Subclass members in the months following the spill. *Id.*, ¶ 60.
23
24

25 ⁵ Plaintiff Nick Reloba is longtime San Francisco Bay commercial hook and line surfperch
26 fisherman. Mr. Reloba gave Class Counsel substantial assistance in the work done by Class
27 Counsels on behalf of the proposed Commercial Hook & Line Surfperch Fishermen Subclass,
including that reflected in the Settlement. *Id.*, ¶ 54.

28 ⁶ This may be, in part, due the possibility that some participants in the fishery conduct
some portion of their business on a cash basis.

1 **c. Facts Concerning Future Damages**

2 Surfperch frequently mate and give birth in shallow areas of bays and estuaries; thus,
3 there is likely some overlap between the location of such activities by fish pursued by
4 Commercial Hook & Line Surfperch Subclass members and areas in which the oil from the
5 CBOS went. *Id.*, ¶ 61. However, unlike herring, halibut or anchovies, surfperch give birth to
6 their live, in some cases, sexually mature fish. *Id.*, ¶ 62. Moreover, birthing generally occurs in
7 spring and summer. Surfperch generally eat small crustaceans. *Id.*

8 The CDFG does not conduct annual biomass assessments of surfperch in the Greater San
9 Francisco Bay Hook & Line Surfperch Fishery, and it is difficult to identify reliable information
10 regarding populations of surfperch in those areas currently or historically. *Id.*, ¶ 63.
11 Furthermore, the term “surfperch” encompasses several different species making assessment of
12 surfperch stock strength additionally complicated and burdensome. *Id.*, ¶ 64. This is further
13 complicated by the fact that CDFG do not distinguish between species of surfperch in records
14 kept regarding commercial landings of the fish. *Id.*

15 **4. Commercial Live Bait Providers Subclass**

16 **a. Central San Francisco Live Bait Fishery**

17 Class Counsel estimates that there are approximately five persons in the Commercial Live
18 Bait Providers Subclass. *Id.*, ¶ 65.⁷ These persons either commercially fish for small finfish
19 species, predominantly Northern anchovies but other species as well, in Central San Francisco
20 Bay, using purse seine nets, and/or sell such fish live for bait through in-Bay located receivers.
21 *Id.*, ¶ 66. The principal customers of Subclass members are sport fishing charter boat operators.
22 *Id.*, ¶ 67.

23 No special permit is required in order to participate in the fishery; however, the capital
24 investment required for participation is relatively high compared to other fisheries. *Id.*, ¶ 68. As
25 a trawl fishery, harvesters are required to utilize larger traditional commercial fishing boats

26 _____
27 ⁷ Plaintiffs John T. Tarantino and John P. Tarantino are longtime San Francisco Bay
28 commercial live bait harvesters and sellers. Messrs. Tarantino gave Class Counsel substantial
assistance in the work done by Class Counsels on behalf of the Commercial Live Bait Provider
Subclass, including that reflected in the Settlement. *Id.*, ¶ 65.

1 equipped to place and pull nets; these boats are both expensive in-and-of-themselves and require
2 substantial amounts of fuel to operate. *Id.*, ¶ 69. Sellers, in turn, are required to maintain
3 receivers in locations within the Central San Francisco Bay, into which the bait fish are received
4 and from which the fish are sold. *Id.* Such locations are frequently rented, and the receivers
5 require maintenance and their operation often requires the hiring of employees. *Id.*

6 **b. Facts Concerning Past Damages**

7 The season for the Commercial Live Bait Providers Subclass is late spring and summer,
8 when their main customers, sport fishermen and sport fishing charter boat operators, are most
9 active. *Id.*, ¶ 70. Accordingly, there is little evidence that participants in the fishery were
10 substantially affected by the Official Fishing Ban. *Id.*, ¶ 71. However, there is evidence that
11 customer levels for sport charter boat operators decreased in the summer following the CBOS.
12 Such evidence would support a claim that Subclass members' business derivatively suffered
13 because of the lingering stigma caused by the Spill, and they suffered economic damages as a
14 result. *Id.*, ¶ 72.

15 In the summer of 2009, there is also anecdotal evidence of a large drop off in Northern
16 anchovy stock levels in San Francisco Bay. *Id.*, ¶ 75. Northern anchovies are closely related to
17 Pacific herring, and follow a similar pattern of returning to bays and estuaries where they were
18 born to spawn. *Id.*, ¶ 74. However, while Pacific herring lay their eggs on beaches and other
19 shore strata, Northern anchovies broadcast their eggs in the water column. *Id.* Once laid, the
20 eggs and the resulting larvae remain near the surface of the water. *Id.* Northern anchovies spawn
21 throughout the year, but spawning activity is concentrated in the late winter and early spring. *Id.*
22 This pattern of activity likely placed Northern anchovy eggs and larvae in the path of the CBOS.
23 *Id.* These facts, in combination with evidence of the spilled oil's toxicity to larval herring
24 exposed to it would support a claim that the Spill was responsible for a drop-off in Northern
25 anchovy stock levels in San Francisco Bay following the Spill. *Id.*, ¶ 75.

26 However, complicating proof of this claim would be factors related to the absence of
27 good reliable data regarding Northern anchovy stock levels in the Central San Francisco Bay.
28 *Id.*, ¶ 76. The CDFG does not conduct annual biomass assessments of Northern Anchovies in

1 the Central San Francisco Bay, and there is little other reliable evidence regarding such stock
2 levels, current or historical. *Id.*, ¶ 77. Indeed, as live bait fishery in which fish are caught and
3 sold not for human consumption, participants are not required to record their landings with
4 CDFG; thus, official landing records as source of information do not exist. *Id.*, ¶ 78.

5 **c. Facts Concerning Future Damages**

6 The facts immediately discussed above regarding Northern anchovies biological
7 similarities to Pacific herring, potential exposure pathways between the spilled oil and Northern
8 anchovies, and anecdotal evidence of a fall in Northern anchovy stock levels two years after the
9 Spill would also potentially support a claim for future damages by Subclass members. *Id.*, ¶ 79.
10 However, the lack of good historical evidence regarding such stock levels, also discussed above,
11 has an even more complicating effect on any future damages claim by Subclass members as it
12 does on their past damages claim. Without such historical data, constructing a reliable model
13 that could predict a future drop in population levels to the required degree of certainty would be
14 very difficult. Moreover, Class Counsel is not aware of evidence of a similar drop off in
15 Northern anchovy stock levels in the summer of 2010. *Id.*, ¶¶ 80-81.

16 **5. Commercial Nearshore (Rockfish) Fishermen Subclass**

17 **a. Greater Nearshore/Rockfish Fishery**

18 Class Counsel estimates there approximately ten persons that would qualify for
19 membership in the Commercial Nearshore (Rockfish) Fishermen Subclass. *Id.*, ¶ 82.⁸ These
20 persons fish for various species of rockfish and other nearshore fish species for which a CDFG
21 North Central Coast Nearshore Fishery Permit or CDFG North Central Coast Deeper Nearshore
22 Fishery Permit is required, in the Greater San Francisco Bay Nearshore/Rockfish Fishery,
23 surfperch using hook and line, as opposed to nets. *Id.*, ¶ 83.

24
25
26
27 ⁸ Plaintiffs Sau A. Phang and Kiu A. Phang Sin are longtime participants in the Greater
28 San Francisco Bay Nearshore/Rockfish Fishery. Mr. and Mrs. Phang gave Class Counsel
substantial assistance in the work done by Class Counsels on behalf of the proposed Commercial
Nearshore (Rockfish) Fishermen Subclass, including that reflected in the Settlement. *Id.*, ¶ 82.

1 The capital investment required for participation is relatively low compared to other
2 fisheries, as participants generally use Boston Whalers or similar open hull boats, and all use
3 hook and line gear. *Id.*, ¶ 84. Recorded revenues for participants in the fishery are the lowest of
4 any Constituent Fishery. *Id.*, ¶ 85.⁹

5 **b. Facts Concerning Past Damages Claims**

6 Many of the areas in which Subclass members fish were oiled, and the season for the
7 Greater San Francisco Bay Nearshore/Rockfish Fishery is predominantly during the late fall and
8 early winter. *Id.*, ¶ 86. Accordingly, there was a closure of the fishery resulting from the CBOS
9 from the Official Fishing Ban. *Id.*, ¶ 87. There is also evidence supporting a *de facto* closure of
10 the fishery in the months following the spill, during which anecdotal evidence suggests buyers
11 were unwilling to purchase fish caught in the fishery. *Id.* However, Class Counsel has had
12 difficulty gathering reliable evidence in support of this, as the traditional buyers of the fish
13 caught from the fishery have not been willing to provide information on the subject. *Id.*, ¶ 88.

14 According to information provided by to Class Counsel by Settling Defendants, only a
15 single Commercial Nearshore (Rockfish) Fishermen Subclass member filed was compensated for
16 through the Closure Claim Process. *Id.*, ¶ 89.

17 **c. Facts Concerning Future Damages Claims**

18 Commercial Nearshore (Rockfish) Subclass members pursue a number of different
19 species making generalizations regarding such species spawning activities difficult. *Id.*, ¶ 90.
20 However, with some exception, most of these fishes spawn and give birth in nearshore areas in
21 which there is evidences of oiling. *Id.*, ¶ 91. Some of these species lay eggs that could have been
22 exposed to the spilled oil, but the majority of these species give birth to live young. *Id.*, ¶ 92.
23 This latter fact would make it difficult to prove with the required level of certainty that there was
24 an exposure pathway between the spilled oil and these species during a stage in their life cycles at
25 which they would be susceptible to toxic effects of the spilled oil identified in larval herring. *Id.*,
26 ¶ 93.

27 _____
28 ⁹ This may be, in part, due the possibility that some participants in the fishery conduct
some portion of their business on a cash basis.

1 Proof of a long-term population level impact from the spill on the stock is also made
2 difficult by the absence of any annual biomass assessment done by the CDFG of
3 nearshore/rockfish stocks in the Greater San Francisco Bay and the fact that Subclass members
4 pursue a multitude of species. *Id.*, ¶ 94. This latter fact also complicates translating any such
5 long-term impact on the stock into future economic damages of Subclass members. *Id.*

6 **6. Commercial Near Offshore (Trawl/Scottish Seine) Fishermen**

7 **a. Gulf Of The Farallones Near Offshore Fishery**

8 Class Counsel estimates that there are approximately 10-15 persons in the Commercial
9 Near Offshore (Trawl/Scottish Seine) Fishermen Subclass. *Id.*, ¶ 95.^{10/} Subclass members
10 commercially fish for various ground fish species in the areas along the continental shelf defined
11 as the Gulf Of The Farallones Near Offshore Fishery, using small gear trawl or Scottish seine
12 nets. *Id.*, ¶ 96.

13 The fishery is highly regulated, and the capital investment required for participation in it
14 is very high compared to other fisheries. *Id.*, ¶ 97. As an offshore trawl fishery, harvesters are
15 required to utilize much larger traditional commercial fishing boats, equipped to place and pull
16 nets; these boats are both expensive in-and-of-themselves and require substantial amounts of fuel
17 to operate and a significant crew. *Id.*, ¶ 98. In turn, however, revenues from these operations are
18 relatively high. *Id.*

19 **b. Facts Concerning Past Damages Claims**

20 The season for the Commercial Near Offshore (Trawl/Scottish Seine) Fishermen Subclass
21 is mainly during the winter. *Id.*, ¶ 99. However, there does not appear to be substantial evidence
22 that the Official Fishing Ban or any stigma effect of the Spill affected Subclass members in the
23 months following the Spill. *Id.*, ¶ 100.

24
25
26
27 ¹⁰ Plaintiff Steven F. Fitz, dba Fitz-Buskirk, Inc., is a longtime Gulf Of The Farallones Near
28 Offshore Fishery participant. Mr. Fitz gave Class Counsel substantial assistance in the work
done by Class Counsels on behalf of the proposed Commercial Near Offshore (Trawl/Scottish
Seine) Fishermen Subclass, including that reflected in the Settlement. *Id.*, ¶ 95.

1 This group is further divided into those that operate boats that are large enough to require
2 a Certificate of Inspection by the Coast Guard (“COI” Boats) and those below the threshold,
3 which are commonly referred to as “6-pack” boat operators. Operators of COI Boats have the
4 capacity to handle several dozen passengers and are generally moored, while 6-pack boats, as the
5 name suggests, have the capacity for approximately half a dozen passengers and can be moored
6 or placed on a trailer. Gross Dec., ¶ 108.

7 Commercial Sport Fishing Charter Boat Subclass members traditionally carry passengers
8 desiring to fish for either salmon offshore (particularly the larger COI Boats) or to fish for
9 predominantly halibut within the Bay. *Id.*, ¶ 109. However, with the closure of the recreational
10 salmon fishery in 2007, 2008, and 2009, and its abbreviation in 2010, all members of the
11 subclass have been almost exclusively limited to pursuing halibut within the Bay. *Id.*, ¶ 110.
12 Accurately assessing the current or historical value of this fishery, and any changes thereto that
13 could be traced to the CBOS, is made difficult by the cash basis on which some portion of this
14 business appears to have been historically conducted. *Id.*, ¶ 111.

15 **b. Facts Concerning Past Damages Claims**

16 The season for Commercial Sport Fishing Charter Boat Subclass members consists of the
17 late spring, summer, extending into the fall depending on the fishing. *Id.*, ¶ 112. Some persons
18 that provide commercial sport fishing charter services in the Central San Francisco Bay were
19 prevented from conducting their business as a result of the Official Fishing Ban and were
20 compensated through the Closure Claims Process for the economic damages they suffered
21 therefrom. *Id.*, ¶ 113. It appears that most, if not all, such persons are among the group of
22 individuals that are excluded from the Commercial Sport Fishing Charter Boat Subclass. *Id.*,
23 ¶ 114.

24 There is also evidence the stigma created by the CBOS, in combination with the lack of a
25 salmon fishery (a fact which forced fishermen to seek species in the Bay to which additional
26 stigma may have attached) dissuaded some potential customers from engaging the services of
27 Subclass members in the first summer following the Spill. *Id.*, ¶ 115.

1 *Ltd., et al.*), No. 07-5800-SC, alleging various claims under California State and federal law
2 against Settling Defendants and others.

3 November 20, 2007: CPM filed the instant action on behalf of a putative class of San
4 Francisco Bay commercial fishermen in this Court, alleging exclusively California State law
5 claims against Settling Defendants and others.

6 November/December 2007: Soon after CPM filed the instant action, CPM and Audet
7 Law reached an informal arrangement to coordinate litigation on behalf of the overlapping
8 putative classes named in the complaints filed in each action, with the goal of utilizing both to
9 achieve the best possible results on behalf of putative class members, while avoiding unnecessary
10 duplication of labor on their behalf.

11 January 17, 2008: Audet Law, in collaboration with CPM, filed a Motion For An Order
12 To Show Cause Why A Protective Order To Supervise Or Otherwise Limit Communications
13 With Putative Class Members Should Not Issue (“OSC Motion”). Through the motion Class
14 Counsel sought an order clarifying the rights of putative class members to participated in the
15 Closure Claims Process without prejudice to their rights to pursue claims as part of the classes
16 defined in the instant action and Loretz. At a hearing on the OSC Motion held on February 22,
17 2008, Judge Conti granted from the bench substantially all of the relief sought by Class Counsel.
18 On April 25, 2008, Judge Conti issued a formal written order on the subject.

19 February 1, 2008: Plaintiffs filed their First Amended Complaint (“FAC”) in the instant
20 action. The principal amendment was the addition of four new Plaintiffs, Ernie Koepf, Sean
21 Hodges, Sau Phang and Kiu Phang Sin, who had approached CPM after the filing of the original
22 complaint seeking inclusion as plaintiffs in the instant suit. Through these additions, Class
23 Counsel increased representation among plaintiffs of representatives from the San Francisco Bay
24 Herring Fishery, Central San Francisco Bay Live Bait Fishery, Central San Francisco Bay Sport
25 Charter Fishery, and Greater San Francisco Bay Nearshore/Rockfish Fishery. Defendants Cota
26 and Hanjin Shipping Co. Ltd. (“Hanjin”) answered the FAC on March 6, 2008; and Settling
27 Defendants Fleet and Regal answered the FAC on April 8, 2008. On March 27, 2008, Plaintiffs
28 filed an Application for Complex Designation of the instant action.

1 April 15, 2009: After failure of negotiations with Settling Defendants to stipulate to
2 certification of provisional settlement class of San Francisco Bay commercial herring fishermen
3 as part of ongoing settlement negotiations discussed elsewhere herein, Plaintiffs filed a Motion
4 To Determine The Existence Of And Certify A Commercial Herring Fishermen Subclass
5 (“Herring Certification Motion”).

6 April 22, 2009: Plaintiffs’ Application for Complex designation of the instant action was
7 granted.

8 May 22, 2009: The first case management conference before this Court in the instant
9 action was held and Plaintiffs’ Herring Certification Motion was re-calendared for August 6,
10 2009.

11 August 6, 2009: The Court held a hearing on Plaintiffs’ Certification Motion and issued
12 an order granting the motion, and certifying the Commercial Herring Fishermen Subclass. The
13 Order *inter alia* appointed Plaintiffs Ernie Koepf, John Atkinson, and Sean Hodges as
14 representatives of the subclass and set the deadline for opting out of the class at seventy-five days
15 after notice of the order was transmitted to putative subclass members, to wit: November 4,
16 2009.

17 January 29, 2010: Class Counsel filed a Motion For Leave To Intervene on behalf of two
18 elderly, Italian-speaking, members of the Commercial Herring Fishermen Subclass who
19 mistakenly excluded themselves from the subclass. On February 25, 2010, the court held a
20 hearing and granted the motion.

21 March 23, 2010: Plaintiffs filed a Second Amended Complaint (“SAC”) in the instant
22 action. The principal amendment was the addition of two new Plaintiffs, John P. Tarantino and
23 Nick Reloba, who had approached CPM after the filing of the original complaint seeking
24 inclusion as plaintiffs in the instant suit. Through these additions, Class Counsel increased
25 representation among plaintiffs of representatives from the Greater San Francisco Bay Hook &
26 Line Halibut Fishery; the Greater San Francisco Bay Hook & Line Surfperch Fishery and the
27 Central San Francisco Bay Live Bait Fishery. Defendants Hanjin, Fleet and Regal, and Cota
28 answered the FAC, respectively, on April 16, 2010, April 27, 2010, and April 29, 2010.

1 April 9, 2010: Audet Law, in collaboration with CPM, filed a Motion For Preliminary
2 Approval Of The Class Settlement Of Commercial Dungeness Crab Claims (“Dungeness Crab
3 Settlement”). As discussed elsewhere herein, the Dungeness Crab Settlement was negotiated by
4 Class Counsel with counsel for Settling Defendants to resolve, on a class-wide basis, the
5 Dungeness Crab Claims stated in both *Loretz* and the instant action. Accordingly, Plaintiffs John
6 T. Tarantino, Steve Fitz, John Atkinson and Sean Hodges intervened, by stipulation, in *Loretz*,
7 and the motion for preliminary approval of the Dungeness Crab Settlement sought their
8 appointment as Dungeness Crab Settlement Subclass Representatives, along with their
9 counterparts in *Loretz*, Allen Loretz. The motion further sought the appointment of Audet Law
10 and CPM as class counsel on behalf of the proposed settlement subclass. Simultaneous with the
11 filing for preliminary approval of the Dungeness Crab Settlement in *Loretz*, the Parties filed a
12 stipulation that upon entry of an order in *Loretz* granting final approval of the Dungeness Crab
13 Settlement, the non-Dungeness Crab Claims stated in *Loretz* would be dismissed and pursued
14 solely through the instant action.

15 April 12, 2010: Plaintiffs filed a Motion for Class Certification in this action, which
16 sought certification of a litigation class substantially similar to the proposed Finfish Settlement
17 Class and certification of subclasses substantially similar to the Constituent Subclasses that are
18 sought to be certified here (“Litigation Class Certification Motion”).

19 June 21, 2010: By stipulation of the Parties at a case management conference held in
20 this Court, Plaintiffs withdrew their Litigation Class Certification Motion in light of an
21 agreement in principle to resolve the instant action on terms substantially similar to those
22 memorialized in the Settlement Agreement.

23 September 3, 2010: Judge Samuel Conti granted final approval to the Dungeness Crab
24 Settlement, resolving, on a class-wide basis, the Dungeness Crab Claims brought in *Loretz* and
25 the instant action. By the stipulation discussed above, upon entry of the Order, the remaining
26 non-Dungeness crab claims in the *Loretz* action were dismissed to be pursued solely in the
27 instant case.

1 December 9, 2010: The Court set the instant motion to be heard on January 25, 2011 at
2 3:00 PM.

3 **B. Settlement Negotiations**

4 Simultaneous with the vigorous litigation of the instant action and *Loretz* outlined above,
5 Class Counsel engaged in contentious and hard fought settlement negotiations with counsel of
6 Settling Defendants. *Id.*, ¶ 147. While these negotiations first began approximately two and half
7 years ago, a final signed Finfish Settlement Agreement took until December 8, 2010 to achieve.
8 *Id.*, ¶ 148.

9 Critical among the factors that prevented the Parties from easily or quickly reaching a
10 resolution were very significant disagreements between the Parties regarding the potential long-
11 term impact of the Spill on the various Relevant Fish Stocks and the manner in which such
12 impacts should be translated into future damages of Class Members. *Id.*, ¶ 149. As a result, the
13 Finfish Settlement was only achieved after numerous in-person meetings, several of which were
14 overseen by the respected mediator, Roger Hawkins, and many of which involved presentation
15 by the Parties of competing expert analyses of the likely enviro-toxicological effect of the Spill
16 on the marine life of the San Francisco Bay and surrounding ocean areas, the manner in which
17 such impact could express itself in the long-term health of the Relevant Fish Stocks, and how
18 such impacts could translate into economic losses for putative class members, as well as how the
19 impact of any shorter term effects of the Spill on putative class members should be calculated
20 economically. *Id.*, ¶ 150. Below is an outline of the negotiation process by which these
21 obstacles were overcome and a Settlement achieved that Class Counsel believes is very fair.

22 On July 10, 2008, the first in-person meeting between Class Counsel and counsel for
23 Settling Defendants was held to discuss the possibility of resolving the instant action and *Loretz*.
24 *Id.*, ¶ 151. Much of the meeting was taken up by a discussion of the Closure Claims Process,
25 Defendants taking the position that through this process the Settling Defendants would, or had
26 already, fully compensated all putative class members for any losses arising out of the Spill. *Id.*,
27 Given the timing of the Spill, which occurred one week before the opening of the San Francisco
28 Bay Area Dungeness Crab season and resulted in closure of the fishery during the period that is

1 traditionally the most profitable of the year for its participants, the large majority of claims (in
2 terms of both numbers of claimants and total compensation paid) addressed through the Closure
3 Claims Process were those of commercial Dungeness crab fishermen. *Id.*, ¶ 152. Moreover, by
4 its nature, claims compensated through the Closure Claims Process were limited to claims for
5 *short-term* losses arising out of the closure of Bay area commercial fisheries that resulted from
6 the Spill. *Id.*, ¶ 153. Accordingly and in light of the absence at the time of adequate information
7 on which Class Counsel could intelligently evaluate the potential long-term impact of the Spill
8 on not only the commercial Dungeness crab fishery but also the Bay Area's other commercial
9 fisheries (i.e. the fisheries referred to herein as the Constituent Fisheries), Class Counsel
10 indicated that they could not negotiate a final class-wide settlement, without further information,
11 and were not willing to resolve the case solely through deference to the Closure Claims Process.
12 *Id.*, ¶ 154.

13 Over the next several months, Class Counsel and counsel for Settling Defendants
14 engaged in an informal information exchange with the goal of providing Class Counsel sufficient
15 information to evaluate certain claims. *Id.*, ¶ 155.^{13/} Class Counsel substantially supplemented
16 this information with the results of their own independent investigation, which focused on
17 gathering publically available information regarding all of the various Constituent Fisheries, their
18 historical economics, as well as information regarding analogous fisheries in other areas of the
19 Western United States and information regarding the toxicity of CBOS that had been developed
20 by non-governmental sources.^{14/} *Id.*, ¶ 156. Class Counsel analyzed this data with the extensive
21
22
23

24 ¹³ Class Counsel deferred to this preference in part based on their calculation that, if they
25 were to refuse this courtesy to Defendant Fleet, it was very likely to make a motion for a stay of
discovery, on which it was likely to succeed.

26 ¹⁴ Very little of the data generated by the Trustees or their analysis based thereon was
27 publically available at the time, and indeed much of it is not yet public. As discussed elsewhere
28 herein, Class Counsel propounded a Freedom of Information Act ("FOIA") request on the
National Oceanic Atmospheric Administration ("NOAA") in the spring of 2009 to gain access to
such data and analyses.

1 assistance of experts from the Research Group of Corvallis, Oregon, including Dr. Hans Radke, a
2 professional natural resource economist with over 35 years in the field, Shannon Davis, a
3 statistician and research specialist with over 30 years of experience in natural resource
4 management and economics, and James T. Golden, a fisheries biologist with over 40 years
5 experience. *Id.*, ¶ 157.

6 On December 12, 2008, Class Counsel and counsel for Settling Defendants engaged in a
7 full-day mediation session before the respected mediator Roger Hawkins. *Id.*, ¶ 158. In advance
8 of the mediation, the Parties submitted formal mediation briefs, which highlighted the very
9 substantial distance that existed between their respective positions. *Id.*, ¶ 159. Not surprising,
10 the mediation was contentious and yielded no agreement, preliminary or otherwise. *Id.*

11 Nonetheless, the Parties committed themselves to participate in the mediation process in
12 good faith and, accordingly, scheduled another mediation session for January 15, 2009, which
13 was followed by a third mediation on February 18, 2009. *Id.*, ¶ 160.

14 Around this time Class Counsel retained two additional experts: Edward Ueber, who for
15 24 years served as the Manager of the Gulf of the Farallones National Marine Sanctuary, the
16 Cordell Bank National Marine Sanctuary and the Northern Sector of NOAA's Monterey Bay
17 National Marine Sanctuary, is currently Ocean Superintendent to the National Park Service
18 Western Region, and was NOAA's representative (and thus the federal government's chief
19 representative) among the trustees responsible for evaluating the Cape Mohican spill of 1996 that
20 resulted in the spill of approximately 40,000 gallons of bunker fuel (similar to that spilled in the
21 CBOS) near Fishermen's Wharf in San Francisco; and Dr. Jeffrey Short, who is one of the
22 world's foremost experts on the envirototoxicological impact of oil spill pollution on marine life
23 and includes among his experience leading the work conducted by the State of Alaska to analysis
24 the envirototoxicological impact of the Exxon Valdez oil spill on the marine life of Prince William
25 Sound and surrounding ocean areas. *Id.*, ¶ 161.

26 Around the same time, based on Class Counsel's investigation, Class Counsel were
27 informed of the potential existence of non-public data and analyses collected and prepared by the
28 Trustees, which indicated that while the likelihood of the Spill having a long-term impact on the

1 Bay area's Dungeness crab stock was not great (or at least would be very difficult to prove) there
2 was a substantially greater likelihood that the Spill would have an impact on certain finfish
3 stocks, especially Pacific herring. *Id.*, ¶ 162. Based thereon and in consultation with their
4 experts, Class Counsel made the decision to prioritize resolving Dungeness Crab Claims on a
5 class-wide basis in these mediation sessions, while gathering and analyzing additional
6 information regarding the potential long-term impact of the CBOS on any the Bay Area's finfish
7 fisheries. *Id.*, ¶ 163.

8 Accordingly, at the February 18, 2009 mediation session, the Parties reached an
9 agreement in principle to settle on a class-wide basis just Dungeness Crab Claims made in the
10 instant action and *Loretz*. *Id.*, ¶ 164. A memorandum of understanding was signed by the parties
11 in October of 2009, and a final settlement agreement was signed in March of 2010. *Id.*, ¶ 165.
12 As discussed elsewhere herein, Judge Samuel Conti granted final approval to the Dungeness
13 Crab Settlement on September 3, 2010.

14 During this period, Class Counsel took a dual approach in their pursuit of the finfish
15 claims of putative class members. Class Counsel kept lines of communication open with counsel
16 for Settling Defendants regarding the possibility of resolving these claims through settlement,
17 while simultaneously vigorously pursuing resolution of the claims through litigation. Thus, for
18 example, counsel for Settling Defendants agreed to informally provide Class Counsel, in context
19 of ongoing negotiations, certain documents concerning the work done by the Trustees and
20 Settling Defendants to analyze the envirototoxicological impact of the CBOS on the Bay's Pacific
21 herring stock and other marine life (as well as specific pieces of data underlying such analyses
22 identified by Class Counsel's experts). *Id.*, ¶¶ 167-169. Class Counsel also successfully sought
23 the documents and data directly from NOAA through a FOIA request. *Id.*, ¶ 169. Class Counsel
24 also served formal discovery demands, using documents procured through its own investigation
25 to verify the completeness of Settling Defendants' response thereto. *Id.*, ¶ 170.^{15/}

27 ¹⁵ A further example of this approach was Class Counsel's decision to first explore with
28 Settling Defendants the possibility of stipulating to certification of commercial herring fishermen
subclass, before ultimately filing their successful motion therefor.

1 Settlement negotiations regarding possible resolution of Finfish Claims resumed in March
2 of 2010. By this point, Class Counsel had gathered a substantial amount of additional data
3 regarding the potential long-term impact of the CBOS of the Bay's finfish stocks, with an
4 emphasis on its potential impact on the Bay's Pacific herring stocks, which preliminary Trustee
5 reports and Class Counsel's experts had identified as the most at risk from such impacts. *Id.*,
6 ¶ 172. Class Counsel worked intensely with their experts over the last several months to analyze
7 this data and translate it into economic damages calculations for each of the Constituent
8 Subclasses. *Id.*, ¶ 173. Assisting Class Counsel in this analysis were three additions to their
9 expert team: Dr. Harold Geiger, an expert biometrician with decades of experience leading future
10 fish population modeling for the Alaska Department of Fish & Game, Dr. James Wilen, Director
11 of the Center for Natural Resource Policy Analysis at the University of California, Davis, and
12 widely recognized at the preeminent authority on fisheries-related natural resource economics,
13 and Dr. Wilen's colleague at UC, Davis, Dr. Douglas Larson, an eminent natural resource
14 economist in his own right. *Id.*, ¶ 174.

15 Between March 2010 and June 2010, Class Counsel and counsel for Settling Defendants
16 had over eight person meetings, the vast majority were all-day sessions overseen by the mediator
17 Roger Hawkins. *Id.*, ¶ 175. The first of these sessions involved detailed presentations by both
18 sides of the results of their respective experts' analyses and numerous exchanges of information.
19 *Id.*, ¶ 176. In these sessions, the distance between the parties' positions was yawning, and, at
20 several points, it did not seem likely that the distance would be able to bridged in the context of
21 settlement negotiations. *Id.*, ¶ 177.

22 Indeed, greatly complicating the situation for Class Counsel was the release in April of
23 2010 of preliminary data by the CDFG suggesting that the winter spawn in San Francisco Bay of
24 Pacific herring was not only relatively strong compared to recent previous season but that there
25 were a substantial number of two year old fish among the spawners. *Id.*, ¶ 178. As discussed
26 elsewhere herein, these data created substantial difficulties for Class Counsel, given the manner
27 in which their experts were required to approach the creation of models on which to predict long-
28

1 term future impacts from the Spill on not only the San Francisco Bay herring stock but the
2 Relevant Fish Stocks as well. *Id.*

3 Settling Defendants were also aware of these data and understood the difficulties the data
4 created for Class Members in proving their future damages claims. Class Counsel, nonetheless,
5 stood firm in their position that if the Defendants wanted a release from these Constituent
6 Subclasses they would be required pay them substantial consideration, and that Class Counsel
7 was prepared to continue pursuing these claims if they were not resolved. *Id.*, ¶ 181.

8 Class Counsel's sincerity regarding this latter point was communicated to Settling
9 Defendants, in part, by, simultaneously with settlement negotiations, filing a motion to certify a
10 litigation class and the non-herring Constituent Subclasses, and aggressively pursuing discovery
11 propounded on the Settling Defendants and third parties. As Plaintiffs' memorandum in support
12 of its motion to certify the class made clear, the case that Plaintiffs intended to present at trial
13 would not be limited to evidence regarding the impact of the CBOS, but would also include
14 evidence going to the conduct of Defendants Fleet and Cota preceding and following the
15 allission.

16 Ultimately, in early June 2010, Class Counsel and Settling Defendants reached an
17 agreement in principle on a settlement figure of \$3.65 million, with Settling Defendants covering
18 the costs of notice and settlement administration, and Class Counsel applying separately to the
19 Court for an award of fees and costs. *Id.*, ¶ 182. At no point during the negotiations that
20 proceeded this agreement was there any discussion regarding payment by the Settling Defendants
21 of attorneys' fees or costs to Class Counsel as part of the settlement; rather, Class Counsel and
22 counsel for Settling Defendants engaged in settlement negotiations with the mutual
23 understanding that Class Counsel would apply separately to the Court for an award of attorneys'
24 fees and costs and that the entirety of the common fund would be paid to class members.^{16/} *Id.*,
25

26 ¹⁶ This understanding was premised on the fact that this was the manner in which Class
27 Counsel's attorneys' fees and costs were handled in the context of the Dungeness crab
28 settlement. *Id.*, ¶ 183. Only at one point was the possibility of reaching a negotiated settlement
regarding Class Counsel's attorneys' fees and costs associated with the Finfish Settlement
substantively discussed. *Id.* On September 1, 2010 (almost three months after an agreement on
the principal terms of the Finfish Settlement had been reached), a half day mediation was held

1 ¶ 183. Over the next six months, Class Counsel and Settling Defendants spent countless hours
2 in substantive phone negotiations and the exchange of redlined draft agreements before a final
3 signed settlement agreement was achieved on December 8, 2010. *Id.*, ¶ 184. While collegial,
4 these negotiations remained contentious, especially concerning certain provision, such as, those
5 concerning the operation of Settling Defendants potential blow-up rights and reversionary
6 interests, the scope of the release, and the definitions of the non-herring Constituent subclasses.
7 *Id.*, ¶ 187.

8 In summary, the negotiations through which the Settlement was achieved were arms-
9 length, contentious, hard-fought, lengthy, and involved numerous exchanges of information and
10 competing expert analyses thereof. *Id.*, ¶ 186. The Parties began the negotiations at positions
11 very far from one another, and, at several points, it appeared unlikely that a negotiated resolution
12 would be achieved. *Id.*, ¶ 187. Far from the product of collusion, the Settlement represents a
13 fair and hard fought compromise reached between experienced, well-qualified counsel, after
14 literally years of litigation, in which resolution through trial by a jury often looked like the most
15 likely result. *Id.* ¶ 188.

16 **C. Discovery And Investigation By Class Counsel**

17 As various parts of the above descriptions make clear, Class Counsel has conducted
18 extensive discovery and investigation concerning the facts underlying the claims of each of the
19 Constituent Subclasses, and agreed to the instant Settlement only after such efforts provided
20 them with sufficient facts on which to assess the strengths and weaknesses of these claims.

21 These facts fell within five basic categories: (1) facts concerning the likely
22 envirototoxicological impact of the oil from CBOS on San Francisco Bay marine life, including
23 studies done by the Trustees on this question and the raw data underlying those studies, as well as
24 basic information produced by the Trustees and others based on which exposure pathways
25 between the spilled oil and the Relevant Fish Stocks could potentially be established; (2) facts

26 _____
27 before Judge Eugene Lynch to discuss whether an agreement could be reached regarding the
28 payment of Class Counsel's attorneys' fees and costs, related to both the Dungeness Crab
Settlement and the Finfish Settlement. *Id.* The mediation was unsuccessful, and the issue was
not raised again. *Id.*

1 concerning the biology of Relevant Fish Stocks, including, in particular, facts that would indicate
2 a potential pathway of exposure between the particular fish stock and the spilled oil, and/or
3 dependence, as food stuffs, of the stock on other potentially impacted fish stocks; (3) facts
4 supporting any claims by Class Members that they had already suffered economic damages
5 because of the Spill for which they had not yet received compensation; (4) the economics of
6 particular fisheries, both historical and current, based on which any claims for future or past
7 damages would be based; and (4) facts regarding Defendants' conduct that resulted in the CBOS
8 and their conduct following the spill, on which any punitive damages claims by Class Members
9 would be based. *Id.*, ¶ 190.

10 Class Counsel employed a number methods to gather these facts, nimbly drawing on a
11 variety of sources of information. For example, in order to ensure that Class Counsel had all of
12 the most relevant and data and analyses produced in the NRDA process by the Trustees and
13 Settling Defendants concerning the potential envirototoxicological impact of the Spill on Bay Area
14 marine life, Plaintiffs utilized informal information requests made of Settling Defendants in the
15 context settlement negotiations, FOIA requests served on NOAA and PRA requests served DFG
16 and the UC Davis Bodega Bay Marine Lab, informal investigatory resources, as well as formal
17 discovery demands propounded on Settling Defendants. *Id.*, ¶ 191. This triangulating approach
18 freed Class Counsel from dependence on any single source for evidence concerning this critical
19 subject and allowed Class Counsel to quickly and efficiently identify the most relevant evidence
20 in this regard for analysis by their experts. *Id.* It further provided bases on which Class Counsel
21 could independently verify the completeness of the information produced by any source as well
22 as the context in which it was created. *Id.*, ¶ 192. Thus, for example, when the Settling
23 Defendants produced documents and interrogatory responses on this subject in early 2010, Class
24 Counsel was able to identify from certain gaps in the production that were subsequently remedied
25 by the parties after receiving guidance by the Court. *Id.*

26 In order to gather facts regarding each of the Constituent Fisheries, Class Counsel
27 similarly utilized a multi-pronged approach, so that they could gain to the best extent practicable
28 a solid understanding of each fishery's current and historical economics, the geographic areas in

1 which participants in each are active, the number and identity of participants in it, and the
2 particular fish species on which the fishery was based. *Id.*, ¶ 193. While for certain fisheries, in
3 particular the San Francisco Bay Herring Fishery, a substantial amount of historical data has been
4 compiled by CDFG in regards to both Relevant Fish Stock and the economics of the fishery that
5 is publically available, for most of the other Constituent Fisheries that is not the case. *Id.*, ¶ 194.
6 Thus, to fill in these gaps, Class Counsel engaged in extensive interviews with each of the
7 Plaintiffs, other Class members, and third parties such as local fish wholesalers. Indeed, Class
8 Counsel would estimate they have personally spoken with at least 50 of the approximately 120
9 Class members, in person and by phone, in the case of some individuals on multiple occasions
10 for a total of several hours. *Id.*, ¶ 195. Class Counsel also requested compilations of many of
11 these persons historical landing records from CDFG, which Class Counsel and their experts
12 extensively reviewed and analyzed along with other business records that these persons provided
13 directly to Class Counsel. *Id.*, ¶ 196. Finally, Class Counsel supplemented the vast information
14 regarding the biology of the various finfish species relevant to each Subclass' claims provided to
15 Class Counsel by their experts and the Plaintiffs, with scientific literature published on the
16 subject by the CDFG and others. *Id.*, ¶ 197.

17 Class Counsel employed consultants in three fields to assist Class Counsel in analyzing
18 these facts: (1) envirototoxicology; (2) natural resource population biodynamics; and (3) natural
19 resource economists. *Id.*, ¶ 198. Together these consultants were able to provide Class Counsel
20 an understanding of (1) the spilled oil could have impacted the marine species exposed to it; (2)
21 how that exposure could translate into long-term losses in stock size for the various species on
22 which the Constituent Fisheries depend; and (3) how such long-term losses as well as other
23 previously experienced impacts could translate into economic losses for Settlement Class
24 members. *Id.*, ¶ 198. These consultants were also instrumental in guiding the investigation
25 conducted by Class Counsel on these issues, in furthering mediation with Settling Defendants,
26 and providing information Settlement Class members on which they could properly assess their
27 options. *Id.*, ¶ 199.

28

1 On issues concerning Defendants' conduct preceding and following the CBOS, Class
2 Counsel employed formal discovery methods, including interrogatories and depositions of the
3 Captain and various crew of the MV Cosco Busan at the time of the Spill. *Id.*, ¶ 200. Class
4 Counsel also took advantage of materials produced by the USCG and the NTSB in the course of
5 their respective investigations into the Spill and which were made available in the context of the
6 federal criminal prosecution of Defendants Fleet and Cota. *Id.*, ¶ 201. Based on this work, Class
7 Counsel amassed a substantial understanding of the potential bases on which any punitive
8 damages claims by Class members would be based. *Id.*, ¶ 202.

9 **III. MATERIAL TERMS OF THE FINFISH SETTLEMENT**

10 **A. The Finfish Settlement Class**

11 The Settlement Agreement provides for the certification of a Finfish Settlement Class, the
12 membership of which is defined entirely by reference to membership in one or more of the
13 Constituent Subclasses. With the exception of the Commercial Herring Fishermen Subclass,
14 which was certified by the Court on August 6, 2009, certification for the purposes of settlement
15 only is sought for each of these Constituent Subclass.

16 Specifically, the Settlement Agreement defines the "Finfish Settlement Class" as:
17 "subject to the Subclass Blowup Provision, all members of the Constituent Subclasses. Excluded
18 from the Finfish Settlement Class are: (1) Defendants and their subsidiaries and affiliates; (2)
19 governmental entities; and (3) the Judge to whom the Action is assigned and any immediate
20 family members thereof." Agreement, p. 10.

21 The Settlement Agreement defines "Constituent Subclasses" as: "the subclasses that
22 collectively constitute the Finfish Settlement Class, to wit: (1) Commercial Herring Fishermen
23 Subclass; (2) Commercial Hook & Line Halibut Fishermen Subclass; (3) Commercial Hook &
24 Line Surfperch Fishermen Subclass; (4) Commercial Live Bait Providers Subclass; (5)
25 Commercial Nearshore (Rockfish) Fishermen Subclass; (6) Commercial Near-Offshore
26 (Trawl/Scottish Seine) Fishermen Subclass; and (7) Commercial Sport Fishing Charter Boat
27 Operator Subclass." *Id.*, p. 9.

1 The Settlement Agreement defines each of these Constituent Subclasses as follows:

2 • “Commercial Herring Fishermen Subclass” means the subclass certified by the Court on
3 August 6, 2009, to whit all Persons that, as of August 6, 2009: (a) held current permits
4 from the California Department of Fish and Game to commercially fish for Pacific
5 herring (*Clupea pallasii*) in the San Francisco Bay Herring Fishery; (b) were current
6 lessors of California Department of Fish and Game permits entitling them to
7 commercially fish for Pacific herring (*Clupea pallasii*) in the San Francisco Bay Herring
8 Fishery and were actively engaged in commercial fishing for Pacific herring (*Clupea*
9 *pallasii*) in the San Francisco Bay Herring Fishery; or (c) have worked as a crew person
10 on a boat engaged in commercial fishing for Pacific herring (*Clupea pallasii*) in the San
11 Francisco Bay Herring Fishery for any two seasons in the last five seasons, beginning
12 with the 2004/05 season.” *Id.*, p. 6.

13 • “Commercial Hook & Line Halibut Fishermen Subclass” means all individuals and
14 entities to which was registered a commercial fishing vessel engaged in the commercial
15 fishing of California halibut (*Paralichthys californicus*) using hook & line, in the Greater
16 San Francisco Bay Hook & Line Halibut Fishery, during 2007 or 2008.” *Id.*, p. 7.

17 • “Commercial Hook & Line Surfperch Fishermen Subclass’ all individuals and entities
18 to which was registered a commercial fishing vessel engaged in the commercial fishing of
19 one or more species in the surfperch family (*Embiotocidae*) using hook & line, in the
20 Greater San Francisco Bay Hook & Line Surfperch Fishery, during 2007 or 2008.” *Id.*

21 • “Commercial Live Bait Providers Subclass’ means all individuals and entities who
22 owned a business in the Central San Francisco Bay engaged in the harvesting and/or
23 selling, via in-Bay located receivers, live bait harvested in the Central San Francisco Bay
24 using a purse-seine net, during 2007, 2008 or 2009.” *Id.*

25 • “Commercial Nearshore (Rockfish) Fishermen Subclass” means all individuals and
26 entities to which was registered a commercial fishing vessel engaged in the commercial
27 fishing of one or more fish species for which a CDFG North Central Coast Nearshore
28 Fishery Permit or CDFG North Central Coast Deeper Nearshore Fishery Permit is

1 required, in the Greater San Francisco Bay Nearshore/Rockfish Fishery, during 2007 or
2 2008.” *Id.*, p. 8

3 • “‘Commercial Near Offshore (Trawl/Scottish Seine) Fishermen Subclass’ means all
4 individuals and entities to which was registered a commercial fishing vessel engaged in
5 the commercial fishing of finfish using trawl gear with a footrope of a diameter of less
6 than eight (8) inches or Scottish seine gear in the Gulf of the Farallones Near Offshore
7 Fishery, during 2007 or 2008.” *Id.*

8 • “‘Commercial Sport Fishing Charter Boat Operator Subclass’ means all individuals and
9 entities to which was registered a commercial vessel used for the business of providing
10 conveyance to sport fishermen desiring to fish in the San Francisco Bay and/or
11 surrounding ocean areas, from any port or marina in the Central San Francisco Bay during
12 2007 or 2008, excluding individuals Gordon Hough, Harry Garabedian, Joe Nazar, Craig
13 Stone, Dale Walters, James Robertson, Steve Talmadge, and Erik Anfinson.” *Id.*

14 As the language of the foregoing definitions make clear, a person qualifies for
15 membership in a particular Constituent Subclass through proof of participation in the particular
16 fishery associated with the subclass, *i.e.*, the relevant Constituent Fisheries. With the exception
17 of the Commercial Herring Fishermen Subclass and Live Bait Providers Subclass, the relevant
18 years of such participation, in terms of qualifying for class membership, is 2007 and 2008, the
19 year of the CBOS and the following year. These years were chosen as qualifying years for most
20 Subclasses based on Class Counsel’s determination that persons who were engaged in
21 commercial fishing in either the season immediately before or after the CBOS would have the
22 strongest claim for long-term damages claims arising out of the CBOS as well as more
23 immediate not-yet compensated short-term damages. Gross Dec., ¶ 190. In the case of the
24 Commercial Herring Fishermen Subclass, the definition reflects the Court’s previous
25 certification of the Subclass on August 6, 2009. In the case of the Live Bait Provider Subclass,
26 2009 was added as qualifying year in recognition that those persons participating in this fishery
27 during 2009 would also potentially have damages claims based on the apparent fall-off in
28 Northern anchovy populations that year. *Id.*

1 The decision to create Subclass definitions premised on participation in particular Bay
2 Area fisheries was based on the recognition that the extent to, and manner in which, the CBOS
3 could be claimed by a Class member to have caused him or her economic damages, or will cause
4 him or her economic damages in the future, differed substantially depending on which
5 Constituent Fisheries the Class member was a participant in. *Id.*, ¶ 193. Thus, the relative
6 strength of a Settlement Class Member’s claim, if litigated, differed substantially, depending on
7 which fishery the person participate in. *Id.*

8 Moreover, by subclassing, the Parties avoided the “apples to oranges” problem that would
9 have otherwise arisen in calculating particular Settlement Class Members’ payments from the
10 Settlement Fund. As discussed below, the Settlement provides for the creation of Subclass
11 specific Subclass Settlement Funds and for those funds to be allocated among members of a
12 particular Subclass based in substantial part on members’ relative level of historical catch
13 success in the particular associated fishery. This serves several purposes including ensuring that
14 those Settlement Class Members that have the greatest level of historical success in a particular
15 Constituent Fishery, and thus the strongest claims for prevented earnings as a result of the Spill,
16 receive the largest portion of the Settlement Fund allocated to that subclass. *Id.*, ¶ 193. If the
17 Settlement Class was not broken up into different subclasses, this kind of relative comparison
18 would be impossible.

19 Finally, it should be noted that reflecting the reality of commercial fishing in the San
20 Francisco Bay area in which many persons participate in different commercial fisheries
21 depending on the season, it is anticipated that a number of Class members will qualify for
22 membership in more than one Constituent Subclasses. *Id.*, ¶ 195. In most cases, such persons
23 will be allowed to collected consideration from each of the Subclass Settlement Funds associated
24 with the Constituent Subclasses for which they qualify. This properly reflects the fact all of the
25 Constituent Fisheries are seasonal, and many Class Members, accordingly, participate in various
26 Constituent Fisheries depending on the season. *Id.* However, Class Counsel, in consultation
27 with various Plaintiffs, determined that Class members should be required to elect between
28 certain combinations of Subclass Settlement Funds that were associated with Constituent

1 Fisheries, whose seasons were simultaneous, and in which a certain level of *casual* overlap
2 between the fisheries occurred. *Id.* These are referred to as “Mutually Exclusive Subclass
3 Settlement Fund Combinations.” Agreement, p. 27, § VI. Because qualification for Constituent
4 Subclasses is based mainly on a person’s fishing records, as is a person’s relative entitlement to
5 amounts of compensation from a Subclass Settlement Fund, it was determined that without this
6 provision, certain smaller funds could be cannibalized by persons who are not regular
7 participants in the associated Constituent Fishery and are already being compensated out larger
8 Subclass Settlement Funds associated with fisheries in which they are regular participants. *Id.*^{17/}

9 **B. Consideration To Settlement Class Members**

10 Within fifteen Business Days of a Final Order and Judgment Approving the Finfish
11 Settlement, Settling Defendants will pay three million six hundred and fifty thousand dollars
12 (\$3.65 million) into an interest-bearing escrow account established by the Claims Administrator
13 (“Settlement Fund”). Settlement Agreement, p. 19, § IV(A). The Settlement Fund will then be
14 further divided into separate Subclass Settlement Funds as follows.^{18/}

15 **1. Commercial Herring Fishermen Subclass**

16 Two million eight hundred thousand dollars (\$2.8 million) of the Finfish Settlement Fund
17 will be allocated to pay the claims of Commercial Herring Fishermen Subclass Members
18 (“Herring Settlement Fund”). *Id.*, p. 20, § V(A). The Herring Settlement Fund will then be
19 allocated among Commercial Herring Fishermen Subclass Members as follows. All of the
20 following payments are cumulative.

21 Every Commercial Herring Fishermen Subclass Member who timely files a valid claim
22 shall receive a payment of four thousand five hundred dollars. *Id.*, p. 20, § V(A) (1). Every

24 ¹⁷ For example, it is not unusual for a Sport Fishing Charter Provider, when he or she does
25 not have customers, to fish himself or herself for halibut and sell it to a wholesale buyer. Gross
26 Dec., ¶ 47. Under the Settlement, such a person would be required to elect whether he or she
wanted to collect as a member of the Commercial Hook & Line Halibut Fishermen Subclass or
as a member of the Sport Fishing Charter Provider Subclass. Agreement, p. 27, § VI(A)(2).

27 ¹⁸ The proposed long form notice, which is attached as Exhibit 2 to the Settlement
28 Agreement, provides descriptions of the formulas by which members of each Subclass would be
compensated along with various hypothetical circumstances to aid Class members in determining
what they are likely to be paid under Settlement according to these fomulas.

1 Subclass member who meets the qualification for participation in the subclass as a crewmember
2 will receive a payment of five hundred dollars. *Id.*, p. 20, § V(A)(2). Every Subclass member
3 who held one or more “Odd”, “Even”, or “DH” Limited Entry San Francisco Bay Commercial
4 Herring Permit as of August 6, 2009 will receive a payment of sixteen thousand dollars for each
5 such permit. *Id.*, p. 20, § V(A)(3)(a). Every Subclass member who held one or more “CH”
6 Limited Entry San Francisco Bay Commercial Herring Permit as of August 6, 2009 will receive a
7 payment of thirty-two thousand dollars for each such permit. *Id.*, p. 20, § V(A)(3)(b).

8 Every Subclass member that can provide proof of commercial landings of herring from
9 the San Francisco Bay Herring Fishery in any season beginning with the 2002/2003 season
10 through and including the 2008/2009 season, will receive a proportional share of \$1,627,500,
11 referred to as a “Harvester Payment.” *Id.*, p. 21, § V(A)(4). Such persons’ Harvester Payments
12 are calculated based on their average percentage share of the quota in the San Francisco Herring
13 Fishery during their best six of those designated seasons. *Id.*

14 Any funds left over in the Herring Settlement Fund after all of the foregoing payments
15 have been made, will be distributed first to those Subclass members who: (1) qualified for
16 membership in the Subclass based on both their participation in the fishery as a crewmember and
17 their possession of San Francisco Bay Limited Entry Commercial Herring Permit; or (2) held
18 either a CH permit or more than one “odd”, “even” or “DH” permit. *Id.*, p. 22, § V(A)(5).
19 Persons in category number 1 will receive one “Remainder Share.” *Id.* Persons in category
20 number 2 will receive one Remainder Share for each additional permit they hold, a CH permit
21 being deemed to be two permits, as it is commonly understood to be in the fishery. *Id.* Any
22 funds remaining in the Herring Settlement fund will be distributed to holders of Remainder
23 Shares, pro-rata according to the number of shares they person holds, up to a maximum of four
24 thousand five hundred dollars per share. *Id.* If there are any funds left in the Herring Settlement
25 Fund after this distribution is made, those funds will be distributed equally among all
26 Commercial Herring Fishermen Subclass Members. *Id.*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

2. Commercial Hook & Line Halibut Fishermen Subclass

One hundred forty nine thousand six hundred dollars of the Finfish Settlement Fund will be allocated to pay the claims of Commercial Hook & Line Halibut Fishermen Subclass Members who timely file a Claim (“Halibut Settlement Fund”). *Id.*, p. 23, § V(B). The Halibut Settlement Fund will be allocated among Commercial Hook & Line Halibut Fishermen Subclass Members who timely file a Claim according to their relative catch history in the Greater San Francisco Bay Hook & Line Halibut Fishery, based on each Subclass member’s best six years between and including 2003 through 2009. *Id.*

3. Commercial Hook & Line Surfperch Fishermen Subclass

Fifty-one thousand dollars of the Finfish Settlement Fund will be allocated to pay the claims of Commercial Hook & Line Surfperch Fishermen Subclass Members who timely file a Claim (“Surfperch Settlement Fund”). *Id.*, p. 23, § V(C). The Surfperch Settlement Fund will be allocated among Commercial Hook & Line Surfperch Fishermen Subclass Members who timely file a Claim according to their relative catch history in the Greater San Francisco Bay Hook & Line Surfperch Fishery, based on each Subclass member’s best six years between and including 2003 through 2009. *Id.*

4. Commercial Live Bait Providers Subclass

Two hundred and ninety-two thousand dollars of the Finfish Settlement Fund shall be allocated to pay the claims of Commercial Live Bait Providers Subclass Members who timely file a Claim (“Bait Settlement Fund”). *Id.*, p. 24, § V(D). The Bait Settlement Fund will be allocated in equal shares to each qualifying Commercial Live Bait Providers Subclass Member who timely files a Claim. *Id.*

5. Commercial Nearshore (Rockfish) Fishermen Subclass

Forty-seven thousand four hundred dollars of the Finfish Settlement Fund shall be allocated to pay the claims of Commercial Nearshore (Rockfish) Fishermen Subclass Members who timely file a Claim (“Nearshore (Rockfish) Settlement Fund”). *Id.*, p. 24, § V(E). The Nearshore (Rockfish) Settlement Fund will be allocated among Commercial Nearshore (Rockfish) Fishermen Subclass Members who timely file a Claim according to their relative

1 catch history in the Greater San Francisco Nearshore (Rockfish) Fishery, based on each Subclass
2 member's best six years between and including 2003 through 2009, subject to an off-set of half
3 the amount that any such person received through the Closure Claims Process. *Id.*

4 **6. Commercial Near-Offshore (Trawl/Scottish Seine) Fishermen**
5 **Subclass**

6 Seventy-three thousand dollars of the Finfish Settlement Fund shall be allocated to pay
7 the claims of Commercial Near-Offshore (Trawl/Scottish Seine) Fishermen Subclass Members
8 who timely file a Claim ("Near-Offshore (Trawl/Scottish Seine) Settlement Fund"). *Id.*, p. 24, §
9 V(F). The Near-Offshore (Trawl/Scottish Seine) Settlement Fund will be allocated among
10 Commercial Near-Offshore (Trawl/Scottish Seine) Fishermen Subclass Members who timely file
11 a Claim according to their relative catch history in the Gulf of the Farallones Near Offshore
12 Fishery, based on each Subclass member's best six years between and including 2003 through
13 2009. *Id.*

14 **7. Commercial Sport Fishing Charter Boat Operator Subclass**

15 Two hundred and thirty-seven thousand dollars of the Finfish Settlement Fund shall be
16 allocated to pay the claims of Commercial Sport Fishing Charter Boat Operator Subclass
17 Members who timely file a Claim ("Sport Fishing Settlement Fund"). *Id.*, p. 24, § V(F)
18 Thirty-six thousand five hundred dollars of the Sport Fishing Settlement Fund will be allocated
19 to the Six-Pack Fund. *Id.* Commercial Sport Fishing Charter Boat Operator Subclass Members
20 who qualify as Six-Pack Boat Operators and timely file a Claim will share equally in the COI
21 Fund. *Id.* Two hundred and one thousand dollars of the Sport Fishing Settlement Fund will be
22 allocated to COI Fund. *Id.* Commercial Sport Fishing Charter Boat Operator Subclass Members
23 that qualify as COI Boat Operators and timely file a Claim will share equally in the COI Fund.
24 *Id.*

25 **8. Mutually Exclusive Subclass Settlement Fund Combinations-Election**
26 **Requirement**

27 As a general matter, if a Finfish Settlement Class Member qualifies for membership in
28 any Constituent Subclass, he or she is eligible to collect consideration from all of the associated

1 Subclass Settlement Funds according to the criteria described above. There are two exceptions to
2 this general rule.

3 The Settlement provides that, notwithstanding a Finfish Settlement Class Member's
4 qualification for membership in each of the associated Constituent Subclasses, he or she may
5 only collect an Award from one of the following Subclass Settlement Funds: (a) the Herring
6 Settlement Fund; (b) the Surfperch Settlement Fund; and (c) the Nearshore (Rockfish) Settlement
7 Fund. *Id.*, p. 26, § VI(A)(1). A similar prohibition applies to collecting an Award from: (a) the
8 Halibut Settlement Fund; and (b) the Sport Fishing Settlement Fund. *Id.*, p. 27, § VI(A)(2).
9 Finfish Settlement Class Members are required to elect from which of these funds they want to
10 collect an award. *Id.*, p. 27, § VI(B).

11 **C. Settlement Administration**

12 The Settlement will be administered by an independent Claims Administrator. Settlement
13 Agreement, p. 39, § XII(C). The Claims Administrator shall administer the processing an
14 payments of claims by Settlement Class members, including the calculation of Class Members'
15 payments according to the formulas described in the Settlement Agreement and summarized
16 above. *Id.* Class Members will have sixty days to submit their Claims Forms and the required
17 supporting records. *Id.*, p. 38, § XII(A).^{19/} All reasonable Claims Administration Expenses and
18 all Notice Expenses for the Notice Program described in the Agreement shall be paid solely by
19 the Settling Defendants separate from the consideration paid to Settlement Class Members. *Id.*,
20 p. 20, § IV(B).

21 **D. Class Representative Stipends, Attorneys' Fees And Costs**

22 The Settlement Agreement provides for Settling Defendants to pay to each Finfish
23 Settlement Class Representative who is still serving in his/her or its capacity as a Finfish
24 Settlement Class Representative at the time that the Court grants final approval of this Settlement
25 and who has not already received a stipend for his work as a Dungeness Crab Settlement Class
26

27 ¹⁹ In the event that a Settlement Class Member's request for the required records is still
28 pending before the CDFG, he or she will be instructed on the Claims Form to submit his or her
claim, indicating that such a request has been made and is pending. *Id.*

1 Representative the sum of \$7,500, as a stipend for their work on behalf of the Finfish Settlement
2 Class. *Id.*, p. 44, § XV(D).^{20/} This amount shall be in addition to the relief to which the Finfish
3 Settlement Class Representatives are entitled under the Settlement. *Id.* Given the extraordinary
4 assistance that the Finfish Settlement Class Representatives have given Class Counsel in their
5 pursuit of the claims of all of the various San Francisco Bay Area fishermen who they represent
6 in this litigation, this stipend is well-deserved. Gross Dec., ¶ 206.^{21/}

7 Class Counsel will make a motion for an order compelling Settling Defendants to
8 reimburse Class Counsel's costs expended in prosecuting Class members' claims, including
9 expert witness fees, and pay Class Counsels' attorneys' fees separately from the consideration
10 paid to Settlement Class members. *Id.*, p. 44, § XV(A). Settling Defendants will have an
11 opportunity to oppose that application, *id.*, and are expected to do so.

12 **E. Release**

13 The Settlement Agreement provides for a release that was carefully tailored only release
14 claims for which compensation is being paid.

15 The Settlement agreement defines "Released Finfish Claims" as follows:
16 [S]ubject to the exclusions stated in this paragraph, any and all liens, claims, suits,
17 actions, or causes of action for damages, equitable relief, declaratory judgment,
18 economic losses business losses, loss of profits, earning capacity, loss of
19 enjoyment, loss of subsistence, damages to natural resources, business
20 interruption, personal distress, personal or financial impact, punitive damages,
21 consequences that a Releasing Party, or any one of them, ever had, now has, or
22 hereafter can, shall, or may have, directly, representatively, derivatively, or in any
23 other capacity against Released Parties, on account of or arising from the alleged
24 oil pollution arising from the CBOS and its effect, if any, upon the Releasing
25 Party's activities as a commercial herring fisherman, a commercial hook and line
26 halibut fisherman, a commercial hook and line surfperch fisherman, a commercial
27 live bait provider, a commercial nearshore (rockfish) fisherman, a commercial
28 near offshore (Small Gauge Trawl Gear/Scottish Seine) fisherman, and/or a

23 ²⁰ As discussed *supra*, Plaintiffs John T. Tarantino, Sean Hodges, John Atkinson, and Steve
24 Fitz intervened in support of approval of the Dungeness Crab Settlement, were named lead
25 representatives of the Dungeness Crab Settlement Class, along with Allen Loretz. These
26 Plaintiffs received a Class Representative Stipend as lead representatives of the Dungeness Crab
27 Settlement Class, and so are not eligible to receive a Class Representative Stipend pursuant to
28 Finfish Settlement.

27 ²¹ Indeed, without the assistance of each of the Finfish Settlement Class Representatives,
28 Class Counsel would have lacked knowledge of the fundamental facts regarding each of the
Constituent Fisheries. *Id.*, ¶ 33, 47, 54, 65, 82, 95, 106, 206. Without these facts, Class Counsel
could have neither successfully litigated nor settled the claims of participants in these fisheries.

1 commercial sport fishing charter boat operator in the San Francisco Bay and
2 surrounding ocean areas. Released Finfish Claims specifically includes any
3 claims of Releasing Parties against Release Parties based on latent, unknown or
4 future damages to the Constituent Fisheries which may not yet have manifested
5 themselves and which may negatively impact any Constituent Fishery in the San
6 Francisco Bay and surrounding ocean areas at any future time and/or the
7 Releasing Party's income in the future from any Constituent Fishery. Specifically
8 excluded from Released Finfish Claims are any and all claims that Releasing
9 Parties or any other Person may have on account of or arising from any loss of, or
10 damage to, real or personal property.

11 *Id.*, p. 14.

12 Critical in this release are the following two parts. First, the release only releases the
13 Release Parties from liability arising out of Class members' activities in the Constituent
14 Fisheries. Given the formulas by which Finfish Settlement Class Members are to be
15 compensated under the Settlement Agreement, discussed above, if a Finfish Settlement Class
16 Member is an active participant in a Constituent Fishery, he or she, subject to a limited election
17 requirement will receive compensation related thereto. No compensation, no release. The
18 second is the carve out of damages arising out "from any loss of, or damage to, real or personal
19 property." *Id.*, p. 14. As this and other provisions of the Release clearly reflect, this Settlement
20 is intended to resolve the claims of San Francisco Bay Area commercial fishermen arising out of
21 any affects that the CBOS may have had, or will have, on the fisheries on which they depend for
22 their livelihood. Accordingly, the only claims released through the Settlement are those that are
23 related thereto and no others.

24 **F. Settlement Notice**

25 The Finfish Settlement provides for both long-form and short-form notices, as well as the
26 establishment of a settlement information website by the claims administrator. Agreement, §§
27 XII(E), XIII, pp 39-40; Ex. 1; Ex. 2.

28 The long-form notice will be available on the settlement information website and sent
directly to every Finfish Settlement Class Member whose contact information is in possession of
Class Counsel, Settling Defendants or HMMS. *Id.*, § XIII(B). Class Counsel estimates that the
latter initial mailing will result in direct notice being sent to approximately 95% of the members
in the most numerous subclass, the Commercial Herring Fishermen Subclass, as well as a similar

1 percentage of the Sport Charter Fishing Boat Operator Subclass members and Live Bait Provider
2 Subclass members. Gross Dec., ¶ 207. The long-form notice contains a detailed description of
3 the Settlement, its terms, as well as how to object to, or opt-out of, the settlement. *Id.*, Ex. 2.
4 Included in the long-form notice's description of the Settlement's terms are descriptions of the
5 formulas by which Awards to be paid to members of each of the Constituent Subclasses will be
6 calculated. *Id.* Ex. 2 at pp. 8-14. These descriptions, in turn, include hypothetical examples to
7 assist Finfish Settlement Class Members calculate what they are likely to receive under the
8 Settlement. *Id.*^{22/}

9 The short-form notice provides Finfish Settlement Class Members with basic information
10 regarding the Settlement, including, in particular, relevant dates and the scale of the
11 compensation that they could potentially receive through the Settlement, who qualifies for
12 compensation under the Settlement, and directions how to get more detailed information. *Id.*,
13 Ex. 1

14 **G. Blow-Up, And Reversion Provisions**

15 Finally, reflecting the hard-fought and contentious nature of the negotiations that
16 produced the Settlement, the Settlement Agreement provides Settling Defendants certain
17 conditional rights in the event that putative Finfish Settlement Class Members opt-out of the
18 settlement.

19 First, reflecting the very substantial compensation that each Finfish Settlement Class
20 Member will be entitled to under the Settlement, the Settlement provides Settling Defendants a
21 reversionary right to any compensation that a putative Finfish Settlement Class Member would
22 have been entitled to if he or she chooses to opt-out. *Id.*, § VIII, pp. 30-32.

23 Second, the Settlement provides that in the event either (a) thirty percent of the total
24 number of members in a particular Constituent Subclass opt-out of the Settlement or (b) a

25
26 ²² A Finfish Settlement Class Member is further assisted in determining what he or she is
27 likely to receive under the Settlement by the combination of the fact that, for most Subclasses, a
28 member's share of the applicable Subclass Settlement Fund is based mainly on the member's
historic catch rates as compared to those of others in the fishery and the insular nature of the
Constituent Fisheries, in which most participants have a good idea their relative rate of catch
success vis-a-vis the other participants. *Id.*, ¶ 195.

1 sufficient number of members in a particular Constituent Subclass opt-out of the Settlement such
2 that, together, those members' total share of the associated Subclass Settlement Fund would
3 equal or exceed fifteen percent of the entire Subclass Settlement Fund, Settling Defendants have
4 the right (but not the obligation) to blow-up the settlement for that particular subclass. *Id.*, pp. 27-
5 30, § VII. In the event that either of these criterium is reached and Settling Defendants choose to
6 exercise their blow-up rights, Settling Defendants will be entitled to a reversion of 95% of
7 associated Subclass Settlement Fund, unless the remaining 5% would equal more than \$50,000,
8 in which case Settling Defendants are entitled to a reversion of all but \$50,000 of the associated
9 Subclass Settlement Fund, and the associated Constituent Subclass will be decertified. *Id.*, pp.
10 29-30, § VII(B). Exercise of such blow-up rights by Settling Defendants would not have any
11 effect on the certification of the other Constituent Subclasses and would result in a net *increase*
12 in the compensation paid to the members of the other Constituent Subclasses, as the Settlement
13 agreement provides for any funds remaining in an affected Subclass Settlement Fund to be
14 distributed pro-rata among members of the other Constituent Subclasses. *Id.*

15 **IV. SETTLEMENT EASILY MEETS PRELIMINARY APPROVAL CRITERIA**

16 **A. The Class Action Settlement Approval Process And Standard Of Review At** 17 **The Preliminary Approval Stage**

18 California Rule of Court 3.769 embodies the well established rule that a class action may
19 not be settled without the Court's approval. Where, as here, the parties propose to resolve class
20 action litigation through a class-wide settlement, they must obtain the Court's approval of the
21 proposed settlement pursuant to a three-step process set forth in the California Rules of Court,
22 rule 3.769(c)-(g) (which also corresponds to the procedure described in the Manual for Complex
23 Litigation 4th (Fed. Judicial Center 2004) ("Manual") §§ 21.632 - 21,634, pp. 320-322).^{23/} The
24 three steps are:

25
26
27 ²³ Where there is no contrary California authority on point, California courts generally
28 accept federal precedent under Rule 23 of the Federal Rules of Civil Procedure as instructive.
See, e.g., *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821; *Daar v. Yellow Cab Co.* (1967)
67 Cal.2d 695, 708-709.

- 1 1. Preliminary approval of the proposed settlement at an informal hearing (together
2 with settlement class certification, where applicable);
- 3 2. Dissemination of mailed and/or published notice of the settlement to all affected
4 Class members; and
- 5 3. A “fairness hearing,” or final approval hearing, at which Class members may be
6 heard regarding the settlement, and at which evidence and argument concerning
7 the fairness, adequacy, and reasonableness of the settlement is presented.

8 *Id.* This three-step process functions to safeguard class members’ procedural due process rights
9 and enables a court to fulfill its role as the guardian of the class’ interests.

10 As a matter of public policy, courts both encourage the use of the class action device, *see*,
11 *e.g.*, *Vasquez*, 4 Cal.3d at 807, and favor settlement over continued litigation — particularly in
12 complex cases like this one. *See Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268,
13 1276 (“strong judicial policy . . . favors settlements, particularly where complex class action
14 litigation is concerned”), *cert. denied* (1992) 506 U.S. 953; 4 Conte & Newberg, *Newberg on*
15 *Class Actions* (4th ed. 2002) (“Newberg”) § 11.41, fn. 1, p. 87 (citing cases).

16 Informed by these policies, a court’s ultimate decision to approve or reject a proposed
17 settlement is committed to the its sound discretion. *See Munoz v. BCI Coca-Cola Bottling Co.*
18 *Of Los Angeles* (2010) 186 Cal.App.4th 399, 409; *Kullar v. Foot Locker Retail, Inc.* (2008) 168
19 Cal.App.4th 116, 130, 129.

20 In exercising its discretion, that court should consider relevant factors, which may
21 include, but are not limited to the strength of the plaintiffs’ case, the risk, expense,
22 complexity and duration of further litigation as a class action, the amount offered
23 in settlement, the extent of discovery completed and the stage of the proceedings,
24 the experience and views of counsel, the presence of a governmental participant,
25 and the reaction of class members to the proposed settlement. At the same time,
the trial court should give due regard to what is otherwise a private consensual
agreement between the parties. Such regard limits its inquiry to the extent
necessary to reach 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 all concerned.

26 *In re Microsoft I-V Cases* (2006) 135 Cal. App. 4th 706, 723 (internal quotations omitted).

27 In a series of recent rulings, the Court of Appeal has confirmed that, in conducting this analysis,
28 a court should consider “evidence of fairness and adequacy,” so that it may “independently

1 satisfy itself that the consideration being received for the release of the class members' claims is
2 reasonable in light of the strengths and weaknesses of the claims and the risks of the particular
3 litigation." *Kullar*, 168 Cal.App.4th at 129-130; *see also Munoz*, 186 Cal.App.4th at 409; *Clark*
4 *v. Residential Serv. LLC* (2009) 175 Cal.App.4th 785, 799-800.²⁴

5 Such consideration of evidence, however, is more appropriately conducted at the final
6 approval stage, once the has received any objections or comments in support of the proposed
7 settlement submitted by class members. Manual, § 21.633, p. 322 ("The fairness hearing notice
8 should alert the class that hearing will provide class members an opportunity to present their
9 views on the proposed settlement and to hear arguments and evidence for against the terms.").
10 The purpose of a court's preliminary evaluation of a proposed class-wide settlement, on the other
11 hand, is to determine whether the proposed settlement is sufficiently within the range of
12 reasonableness to justify provision of notice to class members and the scheduling of a formal
13 fairness hearing at which such evidence can be considered. *See* 4 Newberg § 11.25, p9. 38-39.
14 Preliminary approval confirms the worthwhileness of incurring the expense of sending notice to
15 the class members so that "the proposed settlement . . . may be submitted to members of the
16 prospective class for their acceptance or rejection." *Philadelphia Housing Auth. v. American*
17 *Radiator & Standard Sanitary Corp.* (E.D. Pa. 1970) 323 F.Supp.364, 372. Thus, as summarized
18 by Newberg, the criteria to be applied the preliminary stage is as follows:

19 If the preliminary evaluation of the proposed settlement does not disclose grounds
20 to doubt its fairness or other obvious deficiencies, such as unduly preferential
21 treatment of class representatives or of segments of the class, or excessive
22 compensation for attorneys, and appears to fall within the range of possible
approval, the court should direct that notice under Rule 23(e) be given to the class
members of a formal fairness hearing, at which arguments and evidence may be
presented in support of and in opposition to the settlement.

23 4 Newberg § 11.25, pp. 38-39 (quoting Manual for Complex Litigation (3d ed.), § 30.41).

24
25
26 ²⁴ In a footnote to this holding, the *Munoz* court noted further: "Indeed, the standard list of
27 factors a trial court should consider in determining whether a settlement is fair and reasonable
28 does not expressly included specification of the maximum amount of recoverable damages.
(*Kular*, *supra* 168 Cal.App.4th at p. 128), and *Kullar* is clear that the most important factor 'is
the strength of the case for plaintiffs on the merits, balance against the amount offered in
settlement.'" *Munoz*, 186 Cal.App.4th at 409, n. 6 (quoting *Kullar*, 168 Cal.App.4th at 130).

1 Accordingly, it is at the *final approval* stage that the a court should consider, along with
2 any comments in support or objections to the settlement submitted by class members, “evidence
3 of fairness and adequacy,” *Kular*, 168 Cal.App.4th at 129-130, and, in doing so, ensure there
4 exists “a record which allows an understanding of the amount that is in controversy and the
5 realistic range of outcomes of the litigation.” *Munoz*, 186 Cal.App.4th at 409 (internal quotation
6 omitted).^{25/} At the *preliminary approval* stage, on the other hand, it is appropriate for the motion
7 for preliminary approval to be supported through a declaration by class counsel that describes
8 facts sufficient on which the court can determine whether the proposed settlement falls within the
9 range of reasonableness to justify provision of notice and scheduling a hearing on final approval.
10 *see* Manual, § 21.632, p. 320-321 (At the preliminary approval stage, “counsel submit the
11 proposed terms of the settlement and the judge makes a preliminary fairness evaluation. In some
12 cases, this initial evaluation can be made on the basis of information already known,
13 supplemented by briefs, motions or informal presentations by parties.”); *accord* *Munoz*, 186
14 Cal.App.4th at 404 (describing the minimal declaration submitted by class counsel as the sole
15 support for the motion for preliminary approval of the settlement ultimately granted final
16 approval by the trial court; a decision which the Court of Appeals affirmed).

17 **B. The Settlement Provides an Excellent Result for Class Members In Light Of**
18 **Strengths And Weakness Of Class Members’ Claims**

19 The Settlement provides for Finfish Settlement Class members to potentially receive
20 thousands of dollars in compensation in exchange for releasing claims that, if pursued at trial
21 based on presently known facts, would be very difficult to prove, fairly allocating the Settlement
22 Fund in a manner reflects the relative strengths an weakness of each Class member’s claims
23 based on those facts. In exchange, the Settling Defendants will receive repose, confident in the
24 knowledge that should latent effects of the Spill manifest themselves in the future, causing

25 ²⁵ Thus, accordingly, the Court of Appeal, in *Munoz*, found that the trial court’s decision on
26 final approval to approve the class-wide settlement was justified based on evidence submitted by
27 the settling defendant in opposition to an objection received by a class member during the notice
28 period that followed preliminary approval. *See* 186 Cal.App.4th at 405 (describing the evidence
submitted by the settling defendant in opposition to an objection), 409 (citing that evidence as a
basis for its conclusion that there was “no doubt the trial court had an understanding of the
amount in controversy.”) (internal quotation omitted).

1 injuries to any or all of the Constituent Fisheries, they will not be called back to account for those
2 injuries.

3 In short and as discussed in more detail below, based on a careful, painstaking, and costly
4 analyses conducted, with the assistance of a multi-disciplinary team of experts, it is Class
5 Counsel's reasoned conclusion that while there remains a fundamental uncertainty as to the
6 Spill's ultimate long-term impact on the Bay Area's marine life it does not now appear that it will
7 be as severe as many had once feared. *Id.*, ¶ 21. In light of these facts, the desire of the
8 Plaintiffs, other members of the Class, and Defendants for resolution now despite this
9 fundamental uncertainty, the Settlement represents a very fair result.

10 Below is summarized the strengths and weaknesses of the case as a whole, as well as the
11 strengths and weaknesses specific to each of the Constituent Subclasses' cases

12 **1. Strengths And Weaknesses Of The Case As A Whole**

13 The case as a whole has two main strengths. First, the Settling Defendants are subject to
14 strict liability for certain damages that resulted from the Spill. *See* Gov't Code § 8670.56.5.
15 Second, as outlined in the Plaintiffs' Litigation Class Certification Motion, Defendants' Fleet and
16 Cota have both pled guilty to certain federal criminal charges arising out of their conduct
17 proceeding and following the Spill, conduct which could provide a substantial basis for the
18 punitive damages claims made by Class members.

19 However, there are three major weakness in the case that would provide substantial
20 obstacles to Finfish Settlement Class Members's success at trial. The first weakness is the
21 difficulties that all of the Finfish Settlement Class Members would face in meeting their burden
22 of proving future damages suffered as a result of the Spill. The second weakness is the legal
23 obstacles that Finfish Settlement Class Members would face in pursuit of any punitive damages
24 claims against Defendants. The third weakness is the obstacles created by this Court's previous
25 decision on the question of monitoring in a related case.

26 **a. Difficulties Proving Future Damages**

27 As discussed in more detail in the Constituent Subclass specific sections below, with
28 certain exceptions, it would be impracticable for most Finfish Settlement Class Members to

1 prove that they suffered any substantial past economic damages as a result of the Spill for which
2 they did not already receive compensation through the Closure Claims Process. Thus, the basis
3 for the great bulk of Finfish Settlement Class Members' claims are future economic damages
4 resulting from the potential long-term impact of the Spill on relevant future fish stocks. Proving
5 that Finfish Settlement Class Members are reasonably certain to suffer such future damages in
6 the future, as required under Civ. Code § 3283, would be difficult based on presently known
7 facts.

8 In reaching this conclusion, Class Counsel explored using three different ways of proving
9 such future damages on behalf of Finfish Settlement Class Members: (i) proving that the Spill
10 was reasonably certain to cause a long-term stigma to be attached to fish caught in the Bay Area;
11 (ii) proving that the Spill was reasonably certain to cause long-lasting damage to the habitat on
12 which the relevant fish stocks depend; and (iii) proving that the Spill caused injuries to Relevant
13 Fish Stocks at the time of the Spill that are reasonably certain to manifest themselves in long-
14 term reduction in the sizes of those fish stocks. Based on the presently known facts and in
15 consultation with their expert team, Class Counsel ultimately chose to last option as the method
16 with the greatest likelihood of success; however, pursuit of each of these options as method of
17 proof, including that chosen, present substantial difficulties.

18 **i. Stigma-Based Analysis**

19 One of the first methods of proving future (as well as past) damages explored by Class
20 Counsel was through proof that the Spill caused a stigma to be attached to the relevant Bay Area
21 fish stocks and, as a result, and that stigma would have a long-term depressing affect on prices of
22 such fish in the marketplace. *Id.*, ¶ 22. However, it was difficult for Class Counsel to identify
23 evidence of such a stigma existing even one year after the Spill, and, in fact, Class Counsel
24 identified some evidence, such as the prices that Class Members received for fish caught
25 following the Spill that supported a contrary conclusion. *Gross Dec.*, ¶ 22. Thus, Class Counsel
26 concluded after consultation with their experts, that this would not likely be fruitful method of
27 proving damages (future or past) for Class members. *Id.*, ¶ 22.

1 individuals must be shown to have accumulated enough of the contaminants involved to cause
2 toxic effects. *Id.*, ¶ 198. Third, the damage must be shown to affect enough individuals to
3 materially reduce the capacity of the population to sustain itself. *Id.*, ¶ 198..

4 As discussed in Class Counsel’s Litigation Class Certification Motion, certain data, and
5 analyses thereof, produced by Trustees as part of the NRDA process, which Class Counsel was
6 able to procure and have analyzed by their own experts,²⁷ supported the conclusion that: (1) there
7 existed an exposure pathway between, at least, the Bay’s Pacific herring stock and the spilled oil;
8 and (2) the exposure had had toxic effects on those Pacific herring that had been exposed.
9 Furthermore, certain facts recognized by the Trustees and cited as a basis for their decision to
10 examine the effect of the Spill on Pacific herring as “proxy” or “surrogate” for its effect on other
11 marine species in Bay Area, suggested that any long-term effects identified in the Bay Area’s
12 Pacific herring stock could be extrapolated to the other relevant fish stocks. *Id.*, ¶ 27.

13 In order to satisfy this third element, at a cost of many tens of thousands of dollars, Class
14 Counsel’s experts created a model that (1) showed the spilled oil came in contact with a large
15 percentage of the herring spawned in the 2007-08 season (something which Settling Defendants
16 strongly disputed); and (2) using a combination of what is referred to as a “stock recruit analysis”
17 and what is referred to as an “age structured analysis,” showed how a loss of that percentage of
18 total herring spawned in the 2007-08 season, viewed in context with previous years’ week spawn
19 numbers, would result in substantial long-term losses in Bay Area herring stock. *Id.*, ¶ 42.

20 While far from perfect, Class Counsel was reasonably confident that they would be able to
21 successfully employ this model to prove that Spill would have a long-term impact on at least the
22 San Francisco Bay herring stock (and with further work other Relevant Fish Stocks) with the
23 required level of certainty, and, with the assistance of their natural resource economic experts,
24

25 ²⁷ As discussed elsewhere herein, Class Counsel procured the bulk of this information
26 through a FOIA request submitted to NOAA in the spring of 2009. *Id.*, ¶ 191. Class
27 Counsel was then able to supplement this information with a key report in the winter of
28 2009 that Class Counsel procured through their independent investigation. *Id.*, ¶¶ 190-
198. Finally, Class Counsel received in the spring of 2010 a very large volume of relevant
data in this regard from Settling Defendants in response to formal discovery demands. *Id.*,
¶¶ 170-175.

1 would be able based on such proof and data regarding the economics of each Constituent Fishery,
2 to prove with the required level of certainty that Class members would suffer future economic
3 damages. *Id.*, ¶¶ 193-195; 198.

4 Class Counsel's ability to depend on this method of proof was called into question in the
5 winter of 2009/10, when reports suggested that not only were the number of herring returning to
6 San Francisco Bay to spawn that season substantially larger than in recent years, but also that a
7 large number the returning fish were of two year olds. *Id.*, ¶¶ 44-46. One of the fundamental
8 baseline conclusions of the model created by Class Counsel's experts was that exposure to the
9 spilled oil would cause large losses in the 2007/08 year class as they marched through the fishery.
10 *Id.* The fact that there were substantial numbers of two-year old fish, i.e. members of the
11 2007/08 year class, returning to the Bay two years after the Spill cut directly against that
12 conclusion. *Id.* Moreover, the size of the spawn as whole would have made difficult the
13 argument that the effects of exposure to the Spill had affected enough individuals to materially
14 reduce the capacity of the population to sustain itself. *Id.*

15
16 Finally, it should be noted that regardless which of the above approaches was taken to
17 prove future impact on relevant fish stocks, Finfish Settlement Class Members would still have
18 been required to prove with reasonable certainty that such impacts would translate into future
19 financial injury for them as commercial fishermen that depend on such stocks. As mentioned
20 elsewhere herein, Class Counsel engage among the world's foremost (if not the foremost)
21 fisheries resource economists to assist them in this analysis. *Id.*, ¶¶ 157, 174, 191-194. However
22 even with this expert assistance, such a translation would not have been simple, especially given
23 factors specific to certain Constituent Fisheries, including, for example, the informal nature of
24 record keeping and negative pricing and/or population trends manifest prior to the Spill. *Id.*, ¶¶
25 191-194.

26 **b. Difficulties Prevailing On Any Punitive Damages Claims**

27 In addition to the difficulties inherent in the pursuit of any claim for punitive damages,
28 Finfish Settlement Class Members would face additional legal obstacles to pursuit of their

1 punitive damages claims against Defendants at trial. Indeed, throughout this matter, Defendants
2 have contended that Plaintiffs are not entitled to recover punitive damages under applicable state
3 or federal law.

4 Defendants have consistently argued that the Oil Pollution Act of 1990 (“OPA 90”) and
5 general maritime law do not permit the recovery of punitive damages. Specifically Defendants
6 argue, citing *South Port Marine LLC v. Gulf Oil Partnership* (1st Cir. 2000) 234 F.3d 58;
7 *Clausen v. M/V New Carissa* (D. Or. 2001) 171 F. Supp. 2d 1127, that OPA 90 preempts the
8 availability of punitive damages under general maritime and admiralty law.

9 Defendants have also consistently contended that punitive damages are not available
10 under the Lempert-Keene-Seastrand Act. In support, the Defendants have pointed to the absence
11 of any provision for such damages in the text of the action as well as the act’s prohibition against
12 double recovery: “damages shall not be awarded pursuant to this section to an injured party for
13 any loss or injury for which the party is or has been awarded damages under any other provision
14 or principle of law.” Gov’t Code § 8670.56.5(g). According to Defendants, Defendant Fleet has
15 already been “punished” for its role in the CBOS by the United States through its successful
16 criminal prosecution of Fleet. Thus, Defendants would argue that because Defendant Fleet has
17 already paid criminal penalties to the government and would have, in all likelihood, already paid
18 additional civil penalties to the various federal, state and local governments under various
19 settlements with such entities that are nearing finalization, an award of punitive damages to Class
20 Members would contravene Lempert-Keene’s prohibition against double recovery.

21 Defendants further contend that Class Members are not entitled to seek punitive damages
22 under any other California statute or common law, notwithstanding the following language Cal.
23 Gov’t Code § 8670.56.5(g): “This section does not prohibit a person from bringing an action for
24 damages caused by oil or by exploration, under any other provision or principle of law,
25 including, but not limited to, common law.” According to Defendants, awarding Class Members
26 punitive damages under some other non-Lempert-Keene California State statutory law or
27 common law, would be in direct conflict with provisions of OPA 90. Specifically, Defendants
28 contend that the savings clause included in OPA 90, found at 33 U.S.C. § 2718, requires

1 affirmative action by a state legislature in order “to impose” additional liability by state statute. In
2 other words, Defendants contend that the savings clause is forward looking only and does not
3 insulate from preemption any State law already in effect at the time of OPA 90’s enactment.
4 Accordingly, Defendants contend that because the California Legislature did not specifically
5 provide for the award punitive damages when it enacted the Lempert-Keene-Seastrand Act, such
6 damages are not available.

7 Plaintiffs have never stated claims under OPA 90 or federal maritime common law and
8 have overcome OPA 90-based preemption arguments made by Defendants in opposition to
9 Plaintiffs’ successful Commercial Herring Fishermen Subclass Certification Motion. Moreover,
10 contrary authority exists to the proposition that punitive damages are not available under federal
11 maritime common law, *see Exxon Shipping Co. v. Baker* (2008) 554 U.S. 471, 515, and Plaintiffs
12 strongly disagree with Defendants’ contentions above. However, this Court has not yet directly
13 addressed these contentions, and Class Members would face the risk, if they chose to pursue their
14 cases to trial, that the Court would find in favor of Defendants on the availability of punitive
15 damages. Further, in light of the absence any reported decision by any court on many of the
16 issues raised by Defendants’ contentions above, and it is almost certain that any decision by this
17 Court on the issue of availability of punitive damages would be appealed by the losing party.

18 Finally, “it is settled in California that punitive damages cannot be awarded unless *actual*
19 damages were suffered, the theory being that they are in addition to compensatory damages.” 6
20 Witkin Summary of Cal. Law (10th Ed. 2005) § 1607. Thus, all Class Members would face the
21 risk, if they pursued their claims to trial, that, if they could not prove actual damages, they would
22 also not be entitled to pursue any punitive damages claim.

23 **c. Difficulties Prevailing On Monitoring Claims**

24 The third difficulty that all Class Members would face if they were to pursue their claims
25 to trial is in regards to the claim for environmental monitoring stated in the SAC. In a related
26 case, this Court has found that such a claim could not be maintained by subsistence fishermen.
27 Class Counsel believe that there are legally significant differences exist between situation of
28 *commercial* fishermen and *subsistence* fishermen that provide a basis for argument that the

1 former have standing to make a monitoring claim, notwithstanding the Court's findings regarding
2 the latter's standing. However, there is a substantial risk that the Court would disagree.

3 **2. Strengths And Weakness Of Specific To Each Constituent Subclass**^{28/}

4 **a. Commercial Herring Fishermen Subclass**

5 The Finfish Settlement Class Members with the strongest cases against the Defendants
6 are members of the Commercial Herring Fishermen Subclass, and, in particular those
7 Commercial Herring Fishermen Subclass Members who own commercial fishing vessels on
8 which they have recent substantial catch history in the San Francisco Bay Herring Fishery
9 ("Herring Harvesters"). The reasons for this are several.

10 First, the CDFG's decision to close the San Francisco Bay Herring Fishery for the
11 2009/10 season provides these Class Members, especially the Herring Harvesters, with the best
12 foundation of any Constituent Subclass for the existence of past damages resulting from the
13 Spill, which in turn provides these Class Members the best potential for satisfying the actual
14 damages prerequisite for a punitive damages claim.

15 Second, the Trustees' decision to study the Spill's impact on the Bay's Pacific herring
16 stock, to the exclusion of other species, and the fact that the resulting study has so far produced
17 data and analyses based on which a strong argument can be made that at least some part of the
18 stock was exposed to the spilled oil and that such exposure had toxic effects on the exposed
19 individuals, provides Commercial Herring Fishermen the best foundation of any Constituent
20 Subclass to make an argument that the Spill is reasonably certain to cause them future damages.

21 Third, among the Constituent Fisheries, the San Francisco Bay Herring Fishery is one of
22 the historically most valuable, both by participant and in terms of the fishery as a whole.

23 Fourth, the San Francisco Bay Herring Fishery is a limited entry fishery for which there
24 are a finite number of permits available. This has resulted in the creation of a market for these
25 permits, both in terms of sale and lease. For those Commercial Herring Fishermen Subclass
26
27

28 ²⁸ See Gross Dec., ¶¶ 33, *passim*.

1 members to whom are registered such a permit, this provides a potential basis for claiming both
2 past and future damages that does not exist for members of other Constituent Subclasses.

3 Fifth, and likely among the reasons for the choice by Trustees to use the Bay's herring
4 stock as their study-subject, the San Francisco herring stock is by far the most studied of any of
5 the Relevant Fish Stocks; thus, there is exponentially more historical, biological, and economic
6 information concerning the San Francisco Bay herring stock and San Francisco Herring Fishery
7 than is available regarding any other Relevant Fish Stock or Constituent Subclass. This makes
8 proof of any damages claim on behalf of the Commercial Herring Fishermen Subclass
9 substantially easier than proof of a damages claim on behalf of any other Constituent Subclass.

10 On the other hand, members of this subclass also would face some unique challenges if
11 they sought to pursue their claims at trial.

12 First, while the CDFG cited concerns related to the Spill among the reasons for its
13 decision to close the San Francisco Herring Fishery for the 2009/10 season, the CDFG also
14 discussed other concerns, including historically low stock numbers in past years, especially
15 during the 2008/09 season. It is all but certain that Defendants would cite this fact as a basis on
16 which to argue that subclass members could not prove that the Spill was a legally sufficient cause
17 of the closure and thus could not state a claim for any damages that suffered as resulted of that
18 closure. Further, it would be difficult for Subclass members that qualify for membership in the
19 Subclass as crewpersons or absentee permit holders to prove with the required level of certainty
20 that but for the closure they would have earned anything, in light of the fact that in many seasons
21 prior, few Herring Harvesters participated in the fishery and thus few leased permits or hired a
22 crewpersons.

23 Second, as discussed above, while data and analyses from the Trustees' study of the Spills
24 impact on the Bay's herring stock provide a solid basis for establishing two of three elements of a
25 population-level long-term impact model created by Class Counsel's experts, the 2009/10 winter
26 spawn data could, if not shown to be inaccurate, make proving that the Spill will have a
27 substantial future impact on the San Francisco Bay herring stock, with the required level of
28 certainty, difficult.

1 Third, while the San Francisco Bay herring fishery is *historically* one of the most
2 valuable in the Bay Area, Defendants would be able to point to evidence in support of an
3 argument that in *recent* years the fishery has been substantially less valuable, both as a whole and
4 per participant.. Specifically, wholesale prices in recent years are substantially off their historical
5 highs as are catch levels.

6 Fourth, as a product of these same facts, the historical market for San Francisco Bay
7 herring permits has substantially shrunk, in terms of opportunities for lease or sale. This would
8 make proving with the required level of certainty that subclass members who owned such
9 permits suffered, or will suffer, any substantial economic damage based on the effect the Spill
10 had on their permits' values.

11 Finally, many crewmembers, because of the nature of the business, would have difficulty
12 producing documentation sufficient to substantiate any claimed earning history. This could make
13 difficult proving that they suffered, or will suffer, any damage from the Spill.

14 **b. Commercial Live Bait Providers Subclass**

15 Commercial Live Bait Providers Subclass members have the next strongest case for
16 several reasons.

17 First, the principal species utilized by members of the Subclass, Northern anchovies, have
18 close biological similarities to Pacific herring. Moreover, the manner and time of year in which
19 Northern anchovies spawn provides a good basis on which prove that Northern anchovies
20 spawned in 2007/08 came into contact with the spilled oil, i.e. that there was a pathway for
21 exposure. In combination, these factors make evidence of the Spill's impact on Pacific herring,
22 discussed above, more easily translateable to impact on this species than any species on which
23 another non-herring Constituent Subclass depends.

24 Second, there is evidence that two years after the Spill, in the summer of 2009, there was
25 significant drop-off in the Bay's Northern anchovy stock levels.. This could form not only the
26 foundation for past damages claims by Subclass members arising out of the lack of the fish
27 during that period, but also future damages claims by them. As discussed above, the most
28 promising future impact model identified by Class Counsel has an age-structured stock

1 recruitment analysis component. Using this model, a drop in the Bay's Northern anchovy stock
2 level in the summer of 2009, if it could be adequately proven, would support an argument that
3 the Spill had long-term population level impacts on the Bay's Northern anchovy stock, especially
4 if it could be shown that one of the main causes for those low stock levels was an absence of fish
5 from the year class of the Spill.

6 Third, the fishery, is relatively lucrative for its participants and requires its participants to
7 make substantial capital investments. Thus, if a population-level impact from the Spill on the
8 Bay's Northern anchovy stock could be adequately proven, this fact would assist translating those
9 impacts into economic damages for the fishery's participants.

10 Commercial Live Bait Providers, however, would also face substantial obstacles if they
11 chose to pursue their claims at trial.

12 The most fundamental obstacle is a significant lack of official records regarding the
13 fishery. Because the Northern anchovies caught and sold are not intended for human
14 consumption, California State law does not require that such landings of Northern anchovies be
15 officially recorded. This has two serious consequences. First, it means there are no official
16 landing records at even a Subclass member level based on which historical or present Northern
17 anchovy population in the Bay levels could be extrapolated, making it much more difficult to
18 prove that the Spill had an impact on those population levels than it would be for another fishery.
19 Thus, for example, it is difficult to locate evidence of the 2009 drop in Northern anchovy levels
20 in the Bay that is not anecdotal.

21 The lack of official catch records also makes it more difficult for individual subclass
22 members to prove their damages. Whereas in most fisheries, individual participants have official
23 historical records of their catch success based on which an argument for future earning capacity
24 can be based, participants in the Central San Francisco Bay Live Bait fishery would have to
25 identify other evidence based on which this could be shown, which is further complicated by
26 cash nature in which some of the business may be done.

1 Second, as discussed elsewhere herein, proving that the Spill had, or will have,
2 population level long-term impacts on either the Bay's Northern anchovy or California halibut
3 stocks would be difficult.

4 Third, unlike members of other Constituent Subclasses which depend directly fish species
5 that may could potentially be proven to have suffered population level long-term impacts from
6 the Spill, Commercial Sport Charter Boat Operator Subclass members depend only indirectly on
7 those species. Thus while members of other Constituent Subclasses could potentially argue that
8 any drop in population levels of relevant fish stocks directly affects them by reducing the number
9 of fish they are able to catch and sell; members of this subclass would have to prove that such
10 drops in population levels reduces the number of customers they have or the price that such
11 customers are willing to pay. This could be difficult to prove. For example, as discussed below,
12 California halibut stock levels in the summer of 2008, the season that saw a drop in customer
13 levels of the Commercial Sport Charter Boat Subclass members because of the stigma from the
14 Spill, were actually at historic highs.

15 Finally, two factors would make proving economic damages difficult for many of the
16 subclass members. First, a substantial portion of the business may have historically been
17 conducted in cash, making proof of earning capacity difficult for many Subclass members.
18 Second, while COI boat operators make substantial revenues from their activities in the fishery
19 and have significant capital investments, 6-pack boat operators do not and have not, making
20 proof of substantial economic damages by these persons difficult.

21 d. **Commercial Near Offshore (Trawl/Scottish Seine) Fishermen**
22 **Subclass**

23 The claims of Commercial Near Offshore (Trawl/Scottish Seine) Fishermen Subclass
24 members have a few strengths but also some very substantial weaknesses.

25 The main strength of their claims is the fact that, as an offshore trawl fishery, the fishery
26 is high value both in terms of revenue and capital investment. This would facilitate translation
27 into substantial economic damages any proven substantial impact the Spill on any of the relevant
28 fish stocks.

1 Another strength is that some of the species sought by subclass members, especially sand
2 dabs, migrate nearshore to spawn, potentially creating provable pathways for exposure between
3 the spilled oil and spawning fish.

4 The final strength is evidence that the most recent past season for subclass members was
5 among the worst in recent history.

6 The weaknesses of subclass members claims arise from a number of factors.

7 First, the fishery is not only high value but also high volume; thus, one would likely have
8 to prove a very substantial population level impact on applicable species in order to prove that
9 participants in the fishery suffered any economic damages therefrom.

10 Second, the fishery seeks multiple species of fish. This makes doing the relevant
11 population level analyses of the Spill's impact more complicated, expensive and burdensome: for
12 example, in the case of some of these species establishing an exposure pathway with the spilled
13 oil could be difficult.

14 A third (and more generally confounding fact) is that as an offshore fishery, there are a
15 greater number of extraneous factors that must be accounted for when attempting to conduct a
16 population level analysis of the relevant species.

17 A fourth difficulty is the absence of easily segregateable historical data regarding catch
18 levels for the fishery, as most of the available CDFG data is organized by port and includes
19 landings from far offshore boats. This further complicates any population level impact analyses.

20 Finally, a fifth difficulty is recent regulatory changes affecting the fishery that have
21 resulted in substantial reduction in catches in recent years. This would make more difficult
22 translating any evidence of population level decline into economic damages for fishery
23 participants.

24 ///

25 ///

26

27

28

1 e. **Commercial Hook & Line Halibut Subclass And Commercial**
2 **Hook & Line Surfperch**

3 The claims of both Commercial Hook & Line Halibut Subclass members and
4 Commercial Hook & Line Surfperch Subclass members, on balance, have substantially fewer
5 strengths than they do weaknesses.

6 On the positive side of the ledger, California halibut and surfperch each have certain
7 spawning behaviors that could facilitate using a model showing that the Spill had a long-term
8 population impact on the Bay's Pacific herring stock to prove that it is reasonably certain that the
9 Spill had a similar impact on the Bay's California halibut and surfperch stocks.

10 Further, among the significant food sources of California halibut and (but not surfperch)
11 are Pacific herring and Northern anchovies, facilitating extrapolation from results showing a
12 long-term population level impact on these stocks to long-term population level impacts on the
13 Bay's California halibut stock. Finally, both California halibut and surfperch inhabit areas, and
14 are fished in areas in the Bay, know to have been oiled during the Spill.

15 On negative side of the ledger, however, are several factors. First, neither fishery is
16 particularly high-value, either in terms of the revenues that it generates for its participants or the
17 capital investment required for participation, making proof of substantial economic damages for
18 members of either subclass difficult. Second, and further frustrating proof of such damages is the
19 potential that a substantial amount of business done in each fishery is in cash.

20 A third factor, specific to members of the Commercial Hook & Line Halibut Subclass, is
21 the fact population levels of California halibut following the Spill have been at historic highs. It
22 is likely that this has to do with strong spawns that occurred previous to the Spill; however, it
23 makes difficult an argument that the Spill had a population-level impact on the Bay's California
24 halibut stock.

25 A fourth factor, specific to members of the Commercial Hook & Line Halibut Subclass, is
26 that the term "surfperch" actually includes a number of different species. This makes gathering
27 and analyzing the necessary data on which to create a model showing that the Spill had, or will
28

1 have, long-term population level impacts on the fishery substantially more difficult and
2 complicated, as must be done for a number of different species.

3 **f. Commercial Nearshore (Rockfish) Fishermen Subclass**

4 The Commercial Nearshore (Rockfish) Fishermen Subclass members' claims have many
5 of the same or similar strengths and weakness as the claims of the Commercial Hook & Line
6 Halibut Fishermen Subclass and the Commercial Hook & Line Surfperch Fishermen Subclass, as
7 well as some unique a unique strength and a unique weakness.

8 The main strength of these subclass members' claims is the overlap between oiled areas
9 and those in which the they fish and where the relevant fish species live. There is also anecdotal
10 evidence that subclass members' catch rates have been less in these areas since the Spill.

11 The weakness of these subclass members' claims, however, are several.

12 First, not only do subclass members seek multiple species of fish complicating and
13 making more expensive and burdensome conducting the required population level analyses,
14 most of these species give birth to fully developed fish, rather than eggs or larvae. This fact both
15 makes it very difficult to use evidence of the Spill's population level impact on Pacific herring as
16 proxy for impact on these species and makes it very difficult to prove an exposure pathway
17 between spawn of these species and toxins in the spilled oil.

18 Second, the fishery is not high value fishery, either in terms of revenue or capital
19 investment, making proof of any substantial economic damages difficult.

20 Third and also complicating such proof, is the possibility that a substantial level of cash-
21 based activity in the fishery.

22 **2. The Settlement Is the Product of Serious, Informed, and Arm's-
23 Length Negotiations**

24 As made powerfully clear by the description of the settlement negotiation *supra* (as well
25 as the extent of compensation that Finfish Settlement Class Members will receive through the
26 Settlement, notwithstanding the strengths and weaknesses of their claims), the Finfish Settlement
27 was the product of hard-fought, arms-length, and lengthy negotiation process, which several
28 times appeared not likely to succeed. As described in detail elsewhere herein, this Settlement is

1 the product of three years of worth of negotiations, in which numerous in-person mediation
2 sessions and un-mediated meetings occurred, as well as almost countless substantive phone
3 conversations and email exchanges. On numerous occasions, the parties presented one another
4 with very different, but well supported, analyses of the Spill's impact of Class Members,
5 including detailed presentations based on each side's experts' analyses.

6 These negotiations, moreover, occurred in the context of vigorous litigation of the case by
7 Class Counsel and their very real and well-understood intention to take the case to trial if a
8 satisfactory resolution could not be reached through settlement.

9 Finally, the issue of payment of Class Counsel's attorneys' fees and costs has always been
10 kept separate from negotiations regarding the compensation to be paid to Finfish Settlement
11 Class Members. In fact, negotiations regarding compensation to be paid to Class members have
12 all occurred in the context of an implicit understanding that, as done in the context of the
13 Dungeness Crab Settlement, Class Counsel would apply separately to the Court for an award of
14 attorneys' fees and costs. Indeed, the only attempt to reach a negotiated agreement on the issue
15 occurred approximately three months after the parties had agreed upon the substantive terms of
16 the Settlement. The attempt consisted of a single half day mediation that ended without success.
17 Accordingly, as had been the expectation of both sides from earliest stages of negotiations that
18 ultimately led to the Finfish Settlement Agreement, Class Counsel will make a separate
19 application for award of fees and costs, which Settling Defendants are free (and expected) to
20 oppose.

21 Thus, there are no grounds whatsoever to suspect that the Settlement is anything other
22 than a hard fought, arm's length compromise of a vigorously litigated case.

23 **3. Class Counsel Engage In Substantial Discover And Investigation Of**
24 **Facts Underlying Finfish Settlement Class Members' Claims**

25 Finally, as is evident in the detailed descriptions above of the various strengths and
26 weakness of the each Constituent Subclass, Class Counsel engaged in very substantial discovery
27 of the facts underlying the claims of each Constituent Subclass and extensively analyzed those
28 facts.

1 As discussed elsewhere herein, the critical issues in all of these claims was proving that
2 Class Members suffered, or were reasonably certain to suffer, damages and that the Spill was the
3 cause of those damages. Accordingly, Class Counsel focused their discovery and investigatory
4 efforts on gathering evidence based on which these elements of Class Members claims could be
5 proven, much of driven by the needs of Plaintiffs' experts' analyses. This evidence fell into
6 categories including: (1) evidence based on which the spilled oil's toxicity to marine life could be
7 analyzed; (2) evidence based on which potential exposure pathways between the spilled oil and
8 relevant fish stocks could be identified, including, on the one hand, evidence probative of where
9 the oil went when spilled and how long it remained there, and on the other hand, the biology of
10 the relevant fish stocks, particularly, how, when, and where they engaged in spawning activities
11 in the Bay; (3) evidence based on which could be created a historical but-for baseline of the
12 health of each of the relevant fish stocks; (4) evidence based on which results of the analyses of
13 the Spill's impact on Pacific herring could be extrapolated to prove the Spill's impact on other
14 relevant fish species; (5) evidence probative of any damage caused by the Spill or the resulting
15 cleanup effort on the habitat of the relevant fish species (6) evidence concerning the economics
16 (historical and present) of each Constituent Fishery, both as a whole and by participant; and (7)
17 evidence probative of any already manifest impact on each of the Constituent Fisheries, including
18 impacts that could be termed "stigma-based" and impacts that could be termed "toxicity based."

19 As discussed, Class Counsel gathered this evidence using a number of different methods,
20 including but not limited to: utilization of FOIA and PRA requests and other means to gain
21 access to non-public information created by the Trustees as part of the NRDA process; serving
22 formal discovery demands Defendants; researching publically available compilations of fishery
23 and fish species data, much of it produced by the CDFG regarding the Constituent Fisheries and
24 relevant fish stocks but also that produced by other institutions regarding analogous fisheries
25 stocks in other areas of the West coast; identification and procurement of Spill impact data and
26 analyses produced by non-Defendant/non-Trustee sources; extensive interviews with participants
27 in the Constituent Fisheries and collection of their records of participation in those fisheries.
28 Based on these efforts Class Counsel was able to make a reasoned evaluation of the strengths and

1 weakness that members of each Constituent Subclass faced in attempting to prove that they had
2 or would suffer economic damages as a result of the Spill.

3 Secondarily, Class Counsel focused their discovery and investigatory efforts on gathering
4 evidence supportive of Class Members' punitive damages claims. This included utilization of
5 formal discovery methods, including participation in the depositions of the Captain and various
6 crewmembers of the Cosco Busan, at which counsel for Defendant Cota and the United States
7 attorney introduced as exhibits numerous significant documents probative of substantial
8 wrongdoing before and after the Spill by the crew of the Cosco Busan. Class Counsel further
9 closely reviewed the numerous reports created by federal government agencies regarding the
10 events leading up to the Spill and which followed it, as well as the substantive filings in the
11 successful criminal cases brought by the United States against Cota and Fleet. Based on this
12 investigation, Class Counsel understood well the facts underlying the punitive damages claims of
13 Class Members and was well positioned to gather further evidence probative of such facts in the
14 event that these claims were not resolved through..^{29/}

15 **V. PROVISIONAL CERTIFICATION OF THE FINFISH SETTLEMENT CLASS**
16 **AND THE NOT YET CERTIFIED CONSTITUENT SUBCLASSES IS**
17 **APPROPRIATE**

18 Provisional certification of the Finfish Settlement Class and the non-herring Constituent
19 Subclasses that have not yet been certified is appropriate.

20 As discussed herein, the Settlement contemplates certification of a Finfish Settlement
21 Class, the membership of which is defined through membership in any of the following
22 Constituent Subclasses: (1) the Commercial Herring Fishermen Subclass; (2) a Commercial
23 Hook & Line Halibut Subclass; (2) a Commercial Hook & Line Surfperch Subclass; (3) a
24 Commercial Live Bait Providers Subclass; (4) a Commercial Nearshore (Rockfish) Fishermen
25 Subclass; (5) a Commercial Near Offshore (Trawl/Scottish Seine) Fishermen Subclass; and (6) a
26 Commercial Sport Fishing Charter Boat Subclass. While the Commercial Herring Fishermen

27 ²⁹ Indeed, in the late spring of 2010 before it appeared likely that settlement would be
28 reached, Class Counsel had begun to prepare to seek the testimony of various persons abroad
whom Class Counsel believed had knowledge concerning these facts.

1 Subclass was certified by the Court on August 6, 2009, the remaining Constituent Subclasses
2 have not yet been certified; thus the Settlement further contemplates the certification of these
3 subclasses as well.

4 Certifying the Finfish Settlement Class and these yet uncertified Constituent Subclasses is
5 appropriate on a number of grounds; indeed, the same fundamental questions of law and fact that
6 the Court found predominated in the claims of the Commercial Herring Fishermen Subclass
7 members predominate in the claims of *all* Finfish Settlement Class members, and the reasoning
8 on which the Court concluded that class treatment was the superior means of resolving the
9 claims of Commercial Herring Fishermen Subclass members compel the same conclusion as to
10 resolution of the claims of *all* the Finfish Settlement Class members.

11 Moreover, combining certification of the omnibus settlement class with the certification
12 of a total of seven Constituent Subclasses, including the already certified Commercial Herring
13 Fishermen Subclass, provides a structure by which a secondary level of commonality amongst
14 Class Members that exists at the fishery-specific level can be recognized and accounted for. This
15 is particularly important, here, in which calculation of various Class members' potential damages
16 and the relative strengths and weakness of each Class member's claim for such damages is
17 required.

18 In short, all Finfish Settlement Class members are, primarily, Bay Area commercial
19 fishermen. Accordingly, all are similarly situated vis-a-vis certain fundamental questions,
20 including but not limited to foundational questions concerning the envirototoxicity of CBOS on the
21 Bay's marine life, Defendants' liability for the injuries caused by the impact of such toxicity, and
22 Defendants liability for punitive damages flowing from their conduct in connection with the
23 Spill, all of which require expensive and complicated common proof and are properly resolved
24 collectively. Indeed, very similar considerations underlie the decision by the Trustees to assess
25 the potential long-term impact of the CBOS on the Bay Area' marine life through examination of
26 the CBOS' potential long-term impact on Pacific herring, as a "proxy" or "surrogate" for
27 assessment of the CBOS' potential long-term impact on each of the potentially affected marine
28 species, which would be impracticable to do individually.

1 However, secondarily, each Finfish Settlement Class member is a participants in one or
2 more particular Constituent Fishery, in which the consequences of the Spills' effects were, and/or
3 may be, manifested in unique ways. Thus, once the fundamental questions common to all Class
4 members are resolved, more specific questions, such as the appropriate measure of Class member
5 damages, that relate to particular Constituent Fisheries can be resolved on a subclass basis. The
6 proposed settlement class/subclass structure reflects and accommodates this multi-dimensional
7 commonality.

8 **A. Standard For Class Certification**

9 In order for a class to be certified: (1) the class must be ascertainable, and (2) there must
10 exist a well-defined community of interest among the class members. *Daar v. Yellow Cab Co.*
11 (1967) 67 Cal.2d 695, 704. "The community of interest requirement involves three factors: (1)
12 predominant common questions of law or fact; (2) class representatives with claims or defenses
13 typical of the class; and (3) class representatives who can adequately represent the class." *Linder*
14 *v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 (internal quotations omitted).

15 **B. The Finfish Settlement Class And Constituent Subclasses Are Easily**
16 **Ascertainable And Sufficiently Numerous**

17 Membership in the Finfish Settlement Class is defined through membership in one or
18 more of the Constituent Subclasses. In turn, membership in each Constituent Subclass is defined
19 through precise, well-explained and objective criteria based on participation in the associated
20 Constituent Fishery. The requirement of ascertainability is met when a class definition
21 "identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient
22 to allow a member of that group to identify himself as having a right to recover based on the
23 description." *Harper v. 24 Hour Fitness, Inc.* (2008) 167 Cal.App.4th 966, 977 (internal
24 quotations omitted). This is best accomplished by "defining the class through objective
25 characteristics and common transactional facts, which makes the ultimate identification of class
26 members possible when identification becomes necessary." *Hicks v. Kaufman & Broad Home*
27 *Corp.* (2001) 89 Cal.App.4th 908, 915. The Constituent Subclass definitions, and thus the
28 Finfish Settlement Class definition, easily meet this standard.

1 As to numerosity, Class Counsel estimates based on their investigation conducted in the
2 context of settlement negotiations that there are approximately 120 persons that potentially
3 qualify for membership in the Finfish Settlement Class. *See Clothesrigger, Inc. v. GTE Corp.*
4 (1987) 191 Cal.App.3d 605, 617 (plaintiffs are not required at the class certification stage to
5 identify the precise number of potential class members). Gross Dec., ¶ 205.^{30/} This well exceeds
6 the numbers that have been found sufficient. *See, e.g., Bowles v. Sup. Ct. (Nickles)* (1955) 44
7 Cal.2d 574, 587 (certifying a class of ten persons). Moreover, whether a proposed class meets
8 the numerosity requirement is not determined by “[n]umbers alone,” but takes substantially into
9 account “[c]onsiderations of equity,” in particular whether it is practical or realistic that
10 individual class member would bring their claims individually without certification. *Rose v. City*
11 *of Hayward* (1981) 126 Cal.App.3d 926, 934. Here, as discussed below, resolution of many of
12 the common questions that predominate in the claims of Finfish Settlement Class Members
13 would require complicated and expensive methods of proof, making it neither practical nor
14 realistic to believe that many members of the Class would pursue these claims individually
15 without certification. *Accord Gintis v. Bouchard Transp. Co.* (1st Cir. Feb. 23, 2010) No.
16 09-1717, 2010 U.S. App. LEXIS 3644, *8.

17 **C. A Well Defined Community Of Interest Exists Amongst Finfish Settlement**
18 **Class Members**

19 **1. Common Issues of Law and Fact Predominate Over Individual Issues**

20 Fundamental common questions of law and predominate amongst the claims of all
21 Finfish Settlement Class members going to issues of the envirototoxicity of the spilled oil to the
22 Bay Area’s marine life and the extent of its dispersal in the Bay Area as well as Defendants’
23 liability for damages suffered by Class Members as a result of the Spill and punitive damages
24 arising out of their conduct in connection with the Spill. Common questions going to the

25 ³⁰ As discussed elsewhere herein, Class Counsel estimates that the following numbers of
26 persons would qualify for membership in each of the following Constituent Subclasses:
27 Commercial Halibut Hook & Line Fishermen - approximately 15-20; Sport Charter Fishing Boat
28 - approximately 15-20; Commercial Nearshore (Rockfish) Fishermen - approximately 10;
Commercial Surfperch Hook & Line Fishermen - approximately 5-10; Commercial Near Off-
Shore Trawl Fishermen - approximately 10-15; Commercial Live Bait Provider - approximately
5; Commercial Herring Fishermen Subclass - approximately 50.

1 particular impact of the Spill on each Constituent Fishery and its participants secondarily
2 predominate amongst the claims of members of each of the Constituent Subclasses.

3 As the Supreme Court has instructed, in determining whether common questions
4 predominate, a court should compare the costs and benefits of adjudicating the plaintiffs' claims
5 in a class action with the costs and benefits of proceeding by numerous separate actions. *Sav-On*
6 *Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 339 n 10. Here, it would be
7 impracticable not only for each *member* of the Finfish Settlement Class to individually undertake
8 the expensive and complicated work necessary to prove their claims, it would also be
9 impracticable to undertake this work separately on behalf of each of the Constituent Subclasses
10 in isolation from one another. Indeed, the Trustees, which included representatives from
11 numerous State and federal agencies and whose work is funded by the Settling Defendants,
12 reached an analogous conclusion in deciding to examine the Spill's long-term impact on a single
13 proxy species for all the Bay's marine life.

14 Retired Supreme Court Justice David Souter, sitting by designation, recently recognized
15 an analogous reality in a case involving multiple alleged victims of an oil spill in Massachusetts.
16 Justice Souter found that any individualized questions among class members claims going to
17 issues of damages and other issues were overwhelmed by the reality that resolution of the
18 proposed class members' claims would require presentation of substantial "common evidence,"
19 including "expert testimony," and would as well as "repetitious resolution" of the same
20 objections by defendants. *Gintis* 2010 U.S. App. LEXIS 3644 at * 4. Indeed, Justice Souter
21 recognized that "there [was] a real question whether the putative class members could sensibly
22 litigate on their own for these amounts of damages, especially with the prospect of expert
23 testimony required." 2010 U.S. App. LEXIS 3644 at *9. Similarly here, it is highly questionable
24 whether the claims of some of the smaller Constituent Subclasses especially could be sensibly
25 litigated in isolation from the claims of the other subclasses, let alone whether each member of
26 the Finfish Settlement Class could sensibly litigate their claims individually.

27 **2. Plaintiffs' Claims Are Typical**

1 The Plaintiffs together reflect the mosaic out of which a picture of the Bay Area's
2 commercial finfish fishery is constructed. Thus, together, the claims of the Plaintiffs are easily
3 typical both of the claims of other members of the Finfish Settlement Class, as a whole, and of
4 the claims of other members of each of the Constituent Subclasses with which the Plaintiffs are
5 respectively associated. To show typicality, a named plaintiff's interest in the action need only
6 be similar to that of the other members of the proposed class, not identical. *Richmond v. Dart*
7 *Industries* (1981) 29 Cal. 3d 462, 473-75; *Classen v. Weller* (1983) 145 Cal.App.3d 27, 45-46.
8 Here, Plaintiffs, like each other member of the Finfish Settlement Class, seek from the
9 Defendants, under the same legal theories and based on the same basic proof, compensation for
10 any economic damages they have suffered or will suffer as a result of the Spills's impact on each
11 of the Constituent Fisheries in which they participate, as well as punitive damages arising out of
12 any wrongful conduct by Defendants in connection with the Spill. Accordingly, Plaintiffs'
13 interest in the action and that of other members of the Finfish Settlement Class are very similar if
14 not the same.

15 **3. Plaintiffs Will Adequately Represent And Protect The Interests Of**
16 **The Class**

17 The Plaintiffs have, and will continue, to adequately represent and protect the interest of
18 the Finfish Settlement class as a whole as well as the particular interests of the specific
19 Constituent Subclass with which they are associated. To meet the standard of adequacy, a class
20 representative, through qualified counsel, must be capable of, and motivated to "vigorously and
21 tenaciously" protect the interests of the class members and not have interests antagonistic with
22 those other class members. *Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 846. Here,
23 Plaintiffs have retained counsel skilled in the prosecution of mass tort class actions, including
24 those based on environmental pollution, who have vigorously pursued this action for well over
25 three years, in the process gaining substantial understanding of the complex and technical facts
26 that underlie this particular case. *See* Gross Dec., ¶¶ 3-6, 203-204; Declaration of William
27 Audet. The Plaintiffs themselves, as long and well-established participants, in each of the
28 Constituent Fisheries they represent are very well-qualified to represent the interests of other

1 participants in those fisheries. Indeed, throughout both the litigation and negotiation process
2 each of the Plaintiffs has played an integral role assisting Class Counsel understand the
3 particularities of each Constituent Fishery and have played active roles as advocates for the
4 interests of other members of those fisheries. Gross Dec., ¶¶ 33, 48, 54, 65, 82, 95, 106. Thus,
5 the adequacy leg of the certification standard is easily met here.

6 **D. A Class Action Is The Superior Method To Efficiently Resolve This Dispute**

7 Finally, a class action is by far the superior method for the fair and efficient adjudication
8 of Finfish Settlement Class members' claims. The superiority of class litigation, in general, is
9 grounded in meaningful access to the court system and the deterrence of unfair and illegal
10 conduct. *Vasquez v. Super. Ct.* (1971) 4 Cal.3d 800, 807-808; *Daar*, 67 Cal.2d at 715. As this
11 Court recognized in its decision to certify the Commercial Herring Fishermen Subclass but which
12 applies with equal force to the claims of Finfish Settlement Class as a whole, "any attempt to
13 prove plaintiffs' claims will likely require extensive and complicated discovery including the use
14 of experts, and each individual plaintiff could not be expected to shoulder such a financial burden
15 by himself or herself." Transcript 8/6/09 at 34:18-34:21; *accord Gintis*, 2010 U.S. App. LEXIS
16 3644 at *9. Indeed, Class Counsel has advanced a total of tens of thousands of dollars in expert
17 witness fees and many thousand and many thousands of dollars in their successful multi-flanked
18 effort to gathering the evidence necessary for those experts to conduct their analyses. Gross
19 Dec., ¶ 202. Finally, the proposed structure of Constituent Subclasses and separate Subclass
20 Settlement Funds, with formulas for allocation particular to each one, ensures the orderly,
21 manageable, and fair resolution of each of the Finfish Settlement Class members' claims.

22
23
24 Accordingly, Plaintiffs respectfully submit that the Finfish Settlement Class should be
25 provisionally certified along with those of the Constituent Subclasses that have not yet been
26 certified already.

1 **VI. THE PROPOSED CLASS NOTICE IS CONSTITUTIONALLY SOUND AND**
2 **APPROPRIATE**

3 **A. The Proposed Notice Plan Satisfies Due Process**

4 California law vests the Court with broad discretion in fashioning an appropriate notice
5 program. *See Cartt v. Sup. Ct.* (1975) 50 Cal.App.3d 960, 973-74. There is no statutory or due
6 process requirement that all Class Members receive actual notice by mail or other means; rather,
7 “individual notice must be provided to those Class Members who are identifiable through
8 reasonable effort.” *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 175-76. As the Court of
9 Appeals has explained, “[t]he notice given should have a reasonable chance of reaching a
10 substantial percentage of the Class Members” *Cartt*, 50 Cal. App. 3d at 974. What
11 constitutes “reasonable efforts” and a “substantial percentage” depends upon the circumstances
12 of each case, and such efforts and their cost must be proportional to the magnitude of the claims.
13 *See id.* at 967 (“[n]either due process nor the integrity of the class action process demands . . .
14 useless and wasteful procedures”). Moreover, “[h]istorically, due process has not required actual
15 notice to parties who cannot reasonably be identified,” and court’s commonly recognize that
16 publication notice for such persons is often best reasonably practicable method. Manual §
17 21.311, 287, fn. 882; *see also Eisen*, 417 U.S. at pp. 175-77.

18 Here, those Finfish Settlement Class Members whose contact information can be
19 identified in the records of Class Counsel, Settling Defendants, or HMMS will receive direct
20 notice by first-class mail. *See* Agreement, § XIII (B)(1), p. 40. Additionally, a summary notice
21 will be distributed through publication in appropriately target periodicals. *Id.*, § XIII(B)(2), p.
22 40.^{31/} Finally, the Claims administrator will maintain a settlement information website on Class
23 members will be able to access both summary and detailed information regarding the terms of the
24 Settlement and will be able to electronically submit their claims for compensation under it. *Id.*, §
25 XII(E), p. 39.

26 _____
27 ³¹ The Parties intend to submit to the Court an agreed upon proposed publication notice plan
28 within one week of the date of this order. The proposed plan will included an agreed upon
proposed Claims Administrator whose responsibilities will include administration of the notice
program.

1 **B. The Proposed Long-Form And Summary Notices Are Accurate And**
2 **Informative**

3 The proposed long-form and summary notices are accurate and informative. The long-
4 form notice provides detailed information concerning the meaning and nature of the Action; the
5 terms and provisions of the Settlement Agreement; the relief the Settlement Agreement will
6 provide, including in particular a detailed description of the manner in which the various
7 Subclass Settlement Funds will be allocated, with numerous hypothetical examples that Class
8 members can use to approximate what they are likely to receive under the Settlement; the manner
9 in which Class Counsel will seek to payment of their attorneys' fees and reimbursement of their
10 costs; the date, time and place of the final approval hearing; and the procedure and deadlines for
11 opting out of the Settlement Agreement or for submitting comments in support of and objections
12 thereto. *Id.*, Ex. 2. The short form notice provides a summary of this information directing
13 Finfish Settlement Class members to several sources for more detailed information. Ex. 1.

14 Both notices, which reflect the input of, and were approved by, both Class Counsel and
15 counsel for Settling Defendants, also fulfills the requirement of neutrality in class notices. *See* 3
16 Newberg § 8.39, p. 284. The notices make clear that the Settlement does not constitute an
17 admission of liability by the Defendants, and recognize that this Court has not ruled on the merits
18 of the action. They also states that the final settlement approval decision has yet to be made.
19 Accordingly, the Notice complies with the standards of fairness, completeness, and neutrality
20 required of a combined settlement-certification class notice disseminated under authority of the
21 Court. *See* Rule of Court 3.769(f); 3 Newberg, § 8.21, pp. 229-232, § 8.39, pp. 282-286.

22 **VII. CONCLUSION**

23 For the reasons discussed above, Plaintiffs, respectfully request that the Court grant
24 preliminary approval of the Settlement Agreement, approve the notice substantially as submitted,
25 provisionally certify the Finfish Settlement Class, provisionally certify those Constituent
26 Subclasses not yet certified, approve and enter the proposed Preliminary Approval Order, and
27 schedule a hearing on final approval, so that members of the proposed Finfish Settlement Class
28

1 may consider and comment upon what Class Counsel firmly believes is a fair and adequate
2 settlement.

3
4 Dated: January 04, 2011

**COTCHETT, PITRE & McCARTHY
AUDET & PARTNERS LLP**

5
6 By: 

7 **STUART G. GROSS**
8 *Attorneys for Plaintiffs and Class*

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28