

1 JAMERSON C. ALLEN (State Bar No. 132866)
Email: allenj@jacksonlewis.com
2 JOANNA L. BROOKS (State Bar No. 182986)
Email: brooks@jacksonlewis.com
3 PUNAM SARAD (State Bar No. 217091)
Email: saradp@jacksonlewis.com
4 JACKSON LEWIS LLP
199 Fremont Street, 10th Floor
5 San Francisco, CA 94105
Telephone 415.394.9400
6 Facsimile: 415.394.9401

7 Attorneys for Defendant
BASIC CHEMICAL SOLUTIONS, L.L.C.

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA—UNLIMITED JURISDICTION
10

11 TIMOTHY CRUTCHER, individually and on
12 behalf of all other similarly situated current and
former employees of BASIC CHEMICAL
13 SOLUTIONS L.L.C.,

14 Plaintiff,

15 v.

16 BASIC CHEMICAL SOLUTIONS, L.L.C., a
New Jersey company; and Does 1 through 50,
17 inclusive,

18 Defendants.
19
20
21

Case No. RG08419665

**DEFENDANT BASIC CHEMICAL
SOLUTIONS, L.L.C.’S
MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY
APPROVAL**

**ASSIGNED FOR ALL PURPOSES TO:
HONORABLE STEVEN BRICK
DEPARTMENT 17**

Date: August 12, 2009
Time: 3:00 p.m.
Dept: 17
Judge: Hon. Steven Brick

Complaint Filed: November 10, 2008
Trial Date: None Set

22
23 **I. INTRODUCTION**

24 Defendant Basic Chemical Solutions, LLC (“BCS”) submits this memorandum in support of
25 preliminary approval of the stipulated settlement in the above-captioned matter. The stipulated
26 settlement meets the requirements for preliminary approval. The negotiated settlement terms, the
27 class notice and the related claims administration deadlines are fair and reasonable. Specifically,
28 this memorandum addresses the scope of the discovery conducted and the substantial factual and

1 legal arguments supporting BCS' defenses impacting the settlement value of this action.

2
3 **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

4 BCS transports hazardous materials to clients throughout the United States and
5 internationally. Plaintiff Timothy Crutcher ("Plaintiff") is a former employee of BCS. He worked
6 for BCS as a Delivery Specialist from August 16, 2004 to September 18, 2008. Plaintiff claims
7 he and similarly situated individuals were denied meal and rest breaks while working as Delivery
8 Specialists at BCS. Notably, Plaintiff *never* complained of missed meals or rest breaks during his
9 employment. Instead, two months following his termination, he filed the present action.

10 Plaintiff's class action Complaint alleges two causes of action: (1) violation of Labor Code
11 section 226 for alleged failure to provide meal and rest breaks in accordance with California law,
12 and (2) violation of Business and Professions Code section 17200 for unfair business practices
13 due to the alleged failure to provide meal and rest breaks. On January 30, 2009, BCS filed an
14 answer to Plaintiff's Complaint denying the allegations. Among its affirmative defenses, BCS
15 asserted Plaintiff's claims were preempted by federal safety regulations pertaining to the
16 transportation of hazardous materials. BCS also asserted Plaintiff could not meet the
17 requirements for class certification.

18 On February 10, 2009, the Court held a case management conference, where again, BCS
19 asserted the federal preemption defense and stated its intention to file a motion for summary
20 judgment. The hearing on the motion for summary judgment was originally set for May 12, 2009
21 but after fully briefing the issues, the parties agreed to postpone the hearing date in order to
22 participate in a private mediation prior to the court's ruling on the motion.

23 In preparation for mediation, defense counsel engaged in an extensive analysis of
24 Plaintiff's allegations. As part of its internal investigation, defense counsel gathered and reviewed
25 all of the Plaintiff's personnel and payroll records. Defense counsel interviewed BCS managers at
26 all California locations, dispatchers, safety compliance personnel, human resources personnel and
27 payroll personnel. Defense counsel also reviewed and analyzed company policies, training
28 materials and payroll processing software.

1 In order to further prepare the case for mediation, defense counsel interviewed 40 of the
2 current 45 Delivery Specialists, or 80%, of the 50 putative Class Members. These interviews
3 were conducted over several days at each of the BCS sites in California. BCS obtained
4 declarations from all of the putative Class Members who agreed to be interviewed.

5 In addition, defense counsel gathered the payroll information for all of the putative Class
6 Members dating back four years to the beginning of the class period. Based on the voluminous
7 data obtained from BCS, defense counsel was able to determine each putative Class Members
8 wage rate for each year in the Class Period, the number of workweeks worked by each Class
9 Member during the Class Period, the total number of hours worked each work day and workweek,
10 and the estimated number of meal and rest periods each Class Member would have been entitled
11 to receive based on a strict interpretation of California's meal and rest break requirements.

12 In exchange for Plaintiffs agreement to participate in an early mediation, BCS provided
13 Plaintiff with informal discovery of relevant documents and electronic data, such as: (1) Plaintiffs
14 personnel and payroll records; (2) employee handbooks and training materials; (3) a class list
15 containing dates of employment and wage history for the entire class period; and (4) general
16 information regarding the typical schedules worked by putative class members.¹ Likewise,
17 Plaintiff produced to BCS all of the documents in his possession in support of his claims.
18 Through analysis of these records, the parties were able to prepare various models to assess
19 potential damages.

20 On May 27, 2009, the parties mediated the case with Mark S. Rudy, a mediator well-
21 known for his mediation services in California wage and hour class action litigation. The
22 mediation lasted the entire day. During the mediation, defense counsel shared with Plaintiffs
23 counsel the details of the declarations gathered from putative class members. The parties also
24 debated the hotly contested legal issues of federal preemption and class certification. The
25

26 _____
27 ¹ It should be noted that the discovery provided to Plaintiffs counsel is the *same* as what would
28 have been provided in response to written discovery demands. BCS chose to voluntarily produce
these records to reduce the time and expense associated with formal discovery or motion practice.
The Court should not misconstrue BCS' voluntarily production of information and documents as
evidence the parties failed to conduct adequate discovery.

1 substantial evidence presented in support of BCS' defenses impacted the resulting settlement
2 value. The mediation concluded with the parties' agreement to settle the case for \$375,000.

3 On June 19, 2009, the Parties executed a Joint Stipulation of Settlement. A Joint Motion
4 for Preliminary Approval of the Settlement was filed shortly thereafter on June 22, 2009 and
5 heard on July 6, 2009. At the hearing the Court requested further briefing on a few issues and
6 asked that the parties make some changes to the Settlement Agreement. Specifically, the Court
7 requested the Parties narrowly tailor the language of the Settlement Agreement to ensure it only
8 covered meal and rest period related claims, set up a Cy Pres Fund for any unclaimed settlement
9 money and highlight the non-retaliation language in the Settlement Notice to the Class. All of
10 those changes have been made to the Joint Stipulation of Settlement and Class Notice. (Brooks
11 Dec. ___, Joint Stipulation of Settlement). The Court also requested further briefing on the
12 discovery conducted in the case and the settlement value of the case. The scope of discovery and
13 the defense perspective of the settlement value are addressed herein.

14 **III. LEGAL ANALYSIS AND ARGUMENT**

15 **A. SETTLEMENTS ARE PRESUMED TO BE VALID.**

16
17 Courts have broad powers to determine whether a proposed settlement is fair under the
18 circumstances of the case. Mallick v. Superior Court (County of Marin), (1979) 89 Cal. App. 3d
19 434, 438. Courts act within their discretion in approving settlements that are fair, not collusive
20 and take into account "all the normal perils of litigation as well as the additional uncertainties
21 inherent in complex class actions." In re Beef Industry Antitrust Litigation, (5th Cir. 1979) 607
22 F.2d 167, 179. In the absence of fraud or collusion, courts presume settlement terms are fair.
23 "Where the settlement terms are fair and reasonable, the settlement is presumptively valid, subject
24 only to objections that may be raised at a final hearing." Stambaugh v. Superior Court (Pacific
25 Gas and Electric Company), (1976) 62 Cal. App. 3d 231,236. Where a settlement is reached on
26 terms that are agreeable to all parties, a court should disapprove of the settlement "*only with*
27 *considerable circumspection*." Jamison v. Butcher & Sherrerd, (E.D. Pa. 3 1975) 68 F.R.D.
28 479,481 (emphasis added).

1 Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless
2 evidence to the contrary is offered; thus there is a presumption here that the negotiations were
3 conducted in good faith. Settlement is favored, and settlement agreements are realistically
4 assessed. Stambaugh, 62 Cal. App. 3d at 236; Priddy v. Edelman, 883 F.2d 438, 447 (6th Cir.
5 1989) ("The fact that a plaintiff might have received more if the case had been fully
6 litigated is no reason not to approve the settlement.").

7
8 **B. THE COURT SHOULD GRANT PRELIMINARY APPROVAL OF THE**
9 **PROPOSED STIPULATED SETTLEMENT BASED ON THE RELEVANT**
10 **FACTORS FOR CONSIDERATION.**

11 Courts evaluate several factors in determining whether a class action settlement is fair and
12 reasonable. They include: (1) the strength of plaintiff's case; (2) the risk, expense, complexity and
13 likely duration of further litigation; (3) the risk of maintaining class action status through trial; (4)
14 the amount offered in settlement; (5) the extent of discovery completed and the stage of
15 proceedings; (6) the experience and views of counsel; and (7) the presence of a governmental
16 participant, and (8) the reaction of the class members to the proposed settlement. Clark v.
17 American Residential Services LLC et al. (2009) Cal. App. LEXIS 1091 *22. An assessment of
18 the factors impacting the settlement value in this case weighs in favor of approving the proposed
19 settlement.

20 **1. The Weakness of Plaintiff's Case Supports the Proposed**
21 **Settlement of this Case.**

22 "The most important factor is the strength of plaintiff's case." Id. citing Kullar v. Foot
23 Locker Retail, Inc. (2008) 168 Cal.App.4th 116, 127-128. The strength of plaintiff's case [or lack
24 thereof] must be balanced against the amount offered at settlement. Id.

25 Here, BCS contends it is unlikely Plaintiff would have recovered any class-wide damages
26 or penalties if the case proceeded beyond mediation. There was a substantial risk to Plaintiff that
27 BCS would have prevailed at the summary judgment stage of the proceedings. Even if the Court
28 denied the motion for summary judgment, Plaintiff would not have been able to certify a class in

1 this case because of the highly individualized inquiry necessary to determine the ability to take
2 meal and rest breaks while maintaining compliance with federal safety regulations. Finally, even
3 if a class were certified, Plaintiff would not prevail at trial. Forty (40) out of fifty (50) putative
4 Class Members squarely rejected Plaintiff's allegations. Eighty percent of the putative Class
5 Members stated they were provided with their meal and rest breaks and would have testified
6 accordingly at trial. Thus, the parties recognized the risk and expense of proceeding with the
7 litigation far outweighed the potential return on the investment.

8
9 **a. BCS Would Have Prevailed on its Motion for Summary Judgment.**

10 Federal law preempts Plaintiff's claims. The transportation of hazardous materials is
11 governed by the Federal Motor Carrier Safety Act and the Hazardous Materials Transportation
12 Act Safety and Security Reauthorization Act of 2005. See 49 U.S.C. §5101 et seq.; See also 49
13 U.S.C. § 31100. The Federal Motor Carrier Safety Regulations expound on the Federal Motor
14 Carrier Safety Act. Those Regulations are incorporated into the Hazardous Materials
15 Transportation Act. 49 C.F.R. §177.804. The Federal Motor Carrier Safety Regulations include
16 provisions which preclude drivers of vehicles containing hazardous materials from leaving their
17 vehicles "unattended" except *when the necessities of operation require the vehicle to be parked* or
18 when *the driver is performing duties which are necessary to the driver's duties as the operator*
19 of the vehicle. See 49 C.F.R. §397.5; See 49 C.F.R. §397.7 ("Parking Provisions"). The Federal
20 Motor Carrier Safety Administration, which interprets the Federal Motor Carrier Safety
21 Regulations, issued guidance explicitly stating parking vehicles containing explosives for the
22 purposes of eating a meal **is not an activity which is necessary to the operation of the vehicle**
23 **and is therefore not a legally valid reason for leaving such a vehicle unattended.** (Federal
24 Motor Carrier Safety Administration, Interpretation for Part 397: Transportation of Hazardous
25 Materials; Driving and Parking Rules).

26 While the Parking Provisions preclude drivers of vehicles containing hazardous materials
27 from leaving their vehicles unattended, California's meal and rest period laws mandate that all
28 non-exempt employees take "duty-free" meal and rest breaks. The California meal and rest period

1 laws are therefore in direct conflict with the federal Parking Provisions. Indeed, this conflict has
2 been recently recognized by the DLSE which in an opinion letter issued after this matter settled
3 stated:

4 [i]t is the opinion of the Division of Labor Standards Enforcement (DLSE or Division)
5 that a meal period provided to your client's drivers who are not able to be relieved of all
6 duty due to applicable federal regulations is not considered an off-duty meal period as
provided for under the applicable wage order.

7 (O.L. 2009.06.09, p.1).

8 The DLSE recognized that California *does allow* an employee to take an on-duty meal
9 break *in limited circumstances only if certain criteria are met*. Wage Order 9-2001 concerning
10 the transportation industry states:

11 Unless the employee is relieved of all duty during a 30 minute meal period, the meal
12 period shall be considered an "on duty" meal period and counted as time worked. An "on
13 duty" meal period shall be permitted only when the nature of the work prevents an
14 employee from being relieved of all duty and when by written agreement between the
parties an on-the-job paid meal period is agreed to. The written agreement shall state that
the *employee may, in writing, revoke the agreement at any time*.

15 Wage Order 9-2001(11)(C) (emphasis added); See also 2002 Update of the DLSE Manual, p.45-
16 4, §45.2.

17 However, while employers *may ask* employees to agree to take on duty meal periods,
18 employers are never excused from *providing employees with an option to take* duty free meal
19 periods. Even if an employee agrees to take an on duty meal period, such agreement must be
20 revocable to be valid. See Wage Order 9-2001(11)(C). The DLSE stated, ". . . the agreement must
21 expressly state that the employee may, in writing, revoke the agreement at any time, as required
22 under Wage Order 9-2001, subd. 11(C)." (O.L. 2009.06.09, p.5).

23 Thus, although BCS can provide on-duty agreements to its employees, it is unlikely BCS
24 can accommodate the revocation of such agreements without violating federal law. Because
25 Delivery Specialists will rarely be able to park their vehicles to take an off-duty meal period
26 without violating the Parking Provisions, the revocable nature of an on duty meal period
27 agreement precludes such an agreement from being a viable and legally valid option to
28 transporters of hazardous materials. This argument is not addressed by the DLSE in its June 9,

1 2009 opinion letter and therefore California offers no viable alternative to the on-duty meal
2 period agreement. Thus, there remains a direct conflict between California's meal and rest period
3 law and compliance with the Hazardous Materials Transportation Act which precludes Plaintiff's
4 claims and any class recovery.

5
6 **b. Even if the Case Survived Summary Judgment, Plaintiff
Cannot Meet the Requirements for Class Certification.**

7 Under California law, a class action may be maintained only if "the question is one of a
8 common or general interest, of many persons, or when the parties are numerous, and it is
9 impracticable to bring them all before the court" Code Civ. Proc. § 382. To meet these
10 requirements, a plaintiff must establish facts showing each of the following:

- 11 (1) An ascertainable, manageable class of Plaintiffs;
12 (2) A well-defined "community of interest" among class members; and
13 (3) Litigating the controversy as a class action is a "superior method of resolving the
dispute" which "substantially benefits the litigants and the court."

14 Daar v. Yellow Cab Company (1967) 67 Cal.2d 695, 704; Vasquez v. Superior Court (Kapp)
15 (1971) 4 Cal.3d 800, 810. Additionally, "[t]o maintain a class action, the representative plaintiff
16 must adequately represent and protect the interests of other members of the class." City of San
17 Jose v. Superior Court (Lands Unlimited), 12 Cal.3d 447, 463.

18 The crux of Plaintiff's complaint is that he (and the putative Class Members) are entitled to
19 additional compensation because they were not provided proper meal and rest breaks, and were
20 not paid appropriate penalties.

21 "[T]he community of interest requirement is not satisfied if every member of the alleged
22 class would be required to litigate numerous and substantial questions determining his or her
23 individual right to recover" City of San Jose v. Superior Court (Lands Unlimited) (1994) 12
24 Cal.3d 447, 459. Rather, where the action "will splinter into individual trials, common questions
25 do not predominate and litigation of the action in a class format is inappropriate." Hamwi v.
26 Citination-Buckeye Inv. Co. (1977) 72 Cal.App.3d 462, 471. Where, as here, individual
27 inquiries and proof are required, class certification will be denied. See, City of San Jose, 12
28 Cal.3d at 459-60 (class status denied to homeowners who sued for diminution in property values

1 caused by airport because liability depended on “a myriad of individualized evidentiary factors”).
2 Indeed, courts have recognized meal and rest period claims are often not amenable to class
3 treatment because they require individualized inquiries as to whether meal and rest periods were
4 provided, but were voluntarily not taken. (Brown v. Federal Express Corp. (C.D.Cal. 2008) ___
5 F.R.D. ___ [2008 WL 906517 at *8] (Brown) [meal period violations claim not amenable to class
6 treatment as court would be "mired in over 5000 mini-trials" to determine if such breaks were
7 provided].)

8 That type of individualized proof is *even more necessary in the context of jobs which*
9 *preclude employees from routinely taking off-duty meal and rest periods* because each shift
10 must be analyzed to determine if an off-duty meal could have been made available. Indeed, the
11 DLSE has recognized that while drivers transporting hazardous materials may not generally be
12 able to take off-duty meal periods, there may be occasions in which off-duty meal breaks are
13 available to them. (O.L. 2009.06.09, p.8). Thus, the availability of an off-duty meal break
14 inherently requires an analysis of the work performed each workday.

15 In our case, Delivery Specialists do not have a set schedule. The types of chemicals to be
16 delivered, the client locations, the number of deliveries, and the distances between deliveries
17 change on a daily basis. Although BCS Delivery Specialists typically remain with their vehicle to
18 comply with the Parking Provisions, there may be occasions where a driver makes local deliveries
19 and can return to BCS, secure the delivery vehicle and enjoy an off-duty meal period. In
20 addition, there may be occasions when a Delivery Specialist returns to work in the yard and can
21 take an off-duty meal. The same is true for rest breaks. The fluctuating nature of the job requires
22 an individualized inquiry into each workday.

23 In short, to determine damages here, the Court would necessarily need to delve into, for
24 each putative class member during each workday: what each class member’s rate of pay was and
25 at what times; how many hours that class member worked each day to determine the number of
26 meal and rest breaks required; whether the nature of the work that day required an on-duty versus
27 an off-duty meal period; the number of meal and rest breaks taken; the length of the meal and
28 rest breaks; the timing of the meal and rest breaks; what records were kept; and a variety of other

1 factors. Plainly, determining either liability or damages on a class-wide basis would be
2 completely unmanageable and therefore presumably denied by the Court. As a result, BCS
3 discounted the settlement value by the risk of the Court's denial of class certification.

4
5 **c. Even if the Class were Certified, BCS would have Prevailed**
6 **at Trial.**

7 Despite being unable to fully satisfy the requirements of a valid on-duty agreement due to
8 conflicting federal safety requirements, BCS *provides* paid on-duty meal and rest breaks to its
9 Delivery Specialists. Every putative class member interviewed confirmed this fact in a written
10 declaration. None of the putative class members interviewed agreed with Plaintiff's allegations.
11 In short, BCS believes it would have been able to defeat Plaintiff's claims at trial by showing it
12 provided meal and rest breaks to the fullest extent possible under the conflicting regulatory
13 schemes at issue in this litigation. Accordingly, there was a real and substantial risk of a
14 complete defense verdict with no recovery on behalf of the alleged class. Here again, the
15 potential risk of proceeding with the litigation far outweighed the potential recovery and
16 contributed to a decrease in the overall settlement value of the case.

17 **d. Plaintiff Concedes BCS has a Strong Defense to this Matter**
18 **which Greatly Impacted the Settlement Value of this Case.**

19 Plaintiff admits BCS made a strong showing that California meal and rest period law is
20 preempted by federal law. Specifically, Plaintiff's supplemental brief states:

21 On the other hand, Defendant's research strongly bolstered their case. In particular, BCS
22 interviewed and received declarations from most of the purported class members, who
23 state that BCS did not prevent them from taking breaks, and that to their knowledge, Mr.
24 Crutcher was likewise able to take meal and rest breaks. Of course, these declarations are
25 strong evidence not only toward attacking the propriety of a class in this case, but also for
26 disproving damages to individual class members.

27 Plaintiff's Brief, p.3:6-12.

28 In addition, in his brief, Plaintiff estimated the *maximum value* of the case was **\$2.8 million**. BCS considers Plaintiff's estimate excessive. However, if we use Plaintiff's maximum estimate as the starting point, the risks associated with continuing to litigate this matter reflect the true settlement value of this case. If BCS' motion for summary judgment was granted or class

1 certification denied, the class claims would be worthless. However, assuming there was only a
2 65% likelihood that the motion for summary judgment would be granted, the value of the case
3 would drop to \$980,000 (45% of \$2.8 million—“post-summary judgment value”). That figure would
4 be discounted even further considering the likelihood of class certification is rather low.
5 Assuming there is a 50% probability that the Class would not be certified, the post-summary
6 judgment value would drop to \$490,000 (“post-class certification value”). In addition, given that at
7 least 80% of the Class would testify that they were provided 100% of their rest breaks, the
8 likelihood of BCS prevailing at trial was high. However, even if Plaintiff had a 50% chance of
9 winning at trial, the value of the case would drop to \$245,000 (“trial value”). Since the case settled
10 for \$375,000, \$135,000 *more than the estimated trial value*, it was well within the range of
11 reasonableness based on the risk factors considered by the parties.

12
13 **2. Extensive Internal Investigation, Informal Discovery and**
14 **Exhaustive Damage Analysis Conducted by the Parties Support the**
15 **Proposed Settlement.**

16 As explained in the factual summary above, the Parties were thoroughly prepared in
17 advance of the mediation of this matter. BCS had spent several months conducting its own
18 independent investigation of the factual and legal issues presented by this case. The parties had
19 already briefed the legal issues presented in the BCS motion for summary judgment. In addition,
20 the Parties had engaged in an informal exchange of information and documents necessary to fully
21 explore the factual issues in dispute.

22 A team of defense attorneys and paralegals specializing in class action litigation worked
23 together for several months to gather facts, documents and other pertinent materials to evaluate
24 this matter. BCS utilized all of the information gathered to generate various damage models.
25 Plaintiff used this same information to prepare his own damages analysis. Both Parties attended
26 the mediation with a thorough understanding of the potential value of the case and the associated
27 risks.

28 Inherent margins of error when calculating exposure, coupled with a viable motion for
summary judgment, a hotly contested motion for class certification and Plaintiff's difficulty

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

PROOF OF SERVICE

I, _____, declare that I am employed with the law firm of Jackson Lewis LLP, whose address is 199 Fremont Street, 10th Floor, San Francisco, California 94105; I am over the age of eighteen (18) years and am not a party to this action.

On September 2, 2009, I served the attached document(s):

TITLE

in this action by placing true and correct copies thereof, enclosed in sealed envelope(s) addressed as follows:

Michael Hoffman, Esq.
Hoffman Employment Lawyers, LLP
100 Pine Street, Suite 1550
San Francisco, CA 94111
Telephone: 415.362.1111
Facsimile: 415.362.1112

- [] BY MAIL: United States Postal Service by placing sealed envelopes with the postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at San Francisco, California.
- [] BY HAND DELIVERY: I caused such envelope(s) to be delivered by Messenger Service to the above address.
- [] BY OVERNIGHT DELIVERY: I caused such envelope(s) to be delivered to the above address within 24 hours by OVERNIGHT EXPRESS service.
- [] BY FACSIMILE: I caused such documents to be transmitted by facsimile to the telephone number(s) indicated above.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 2, 2009 at San Francisco, California.

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