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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF ALAMEDA – UNLIMITED JURISDICTION
9

10 TIMOTHY CRUTCHER, individually and)
on behalf of all other similarly situated)
11 current and former employees of BASIC)
CHEMICAL SOLUTIONS L.L.C.,)
12
13 Plaintiff,)
14
15 vs.)
16 BASIC CHEMICAL SOLUTIONS L.L.C.,)
a New Jersey company; and Does 1)
17 through 50, inclusive,)
18
19 Defendants.)

CASE NO: RG08419665
**ASSIGNED FOR ALL PURPOSES TO:
HONORABLE STEVEN BRICK
DEPARTMENT 17**
**SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF PLAINTIFF'S MOTION
FOR PRELIMINARILY APPROVING
THE SETTLEMENT OF THIS ACTION,
APPROVING THE FORM OF NOTICE
TO THE CLASS, AND SETTING A
FINAL APPROVAL HEARING IN
RESPONSE TO ORDER TO SHOW
CAUSE**
Reservation No: 959613
Date: September 3, 2009
Time: 3:00 p.m.
Dept: 17
Complaint Filed: November 1, 2008

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1 **I. MEMORANDUM OF POINTS AND AUTHORITIES**

2 **A. INTRODUCTION**

3 Plaintiff Timothy Crutcher (“Named Plaintiff” or “Mr. Crutcher”) and Defendant Basic
4 Chemical Solutions L.L.C. (“Defendant” or “BCS”), jointly “the Parties,” moved for preliminary
5 approval of the proposed class settlement (“Settlement”) on July 6, 2009. After a hearing, the
6 matter was continued to August 12, 2009. The Parties submit this supplemental memorandum in
7 support of Plaintiff’s motion for approval. Specifically, this memorandum and attached exhibits
8 address certain deficiencies and unclear points in the original moving papers, including: 1)
9 discovery completed before the settlement was reached, 2) changes to the Proposed Class Notice,
10 *see* Ex. 1 [Revised Proposed Class Notice]), and 3) changes to the Stipulation of Settlement. *See*
11 Ex. A [Revised Stipulation of Settlement (“Revised Settlement”)].

12 **B. DISCOVERY AND BASIS FOR SETTLEMENT**

13 *1. Discovery Undertaken by the Parties*

14 Before the Parties attended mediation they engaged in significant review of documents to
15 inform their decision to settle. In particular, BCS produced about 150 pages of payroll records,
16 employee handbooks, and other documents relevant to the case. *See* Ex. B [BCS Document
17 Production]. The Parties used this production as the foundation for their settlement negotiations,
18 in particular regarding damages calculations. Also important were frequent interviews with Mr.
19 Crutcher, who answered a variety of questions regarding his work, including his training, how he
20 spent his time on the job, and what he was told about taking breaks. As well, BCS’s counsel
21 interviewed and obtained declarations from the vast majority of the class members regarding
22 their ability to take meal and rest breaks.

23 From this informal discovery, the Parties determined several issues vital to arriving at the
24 settlement. The parties established a precise number of class members based on BCS’s payroll
25 records. This was relevant not only to establishing numerosity, but also to calculating estimated
26 damages, as discussed below. BCS also provided Plaintiffs with pay rates and dates of
27 employment for all of the class members, which were relevant primarily for calculating damages,
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1 but also as evidence that common questions predominate in the case. Perhaps most importantly,
2 BCS's document production also included Mr. Crutcher's own payroll records, which allowed
3 Plaintiffs to determine the estimated number of missed meal and rest periods at issue based on
4 the number of workweeks and shift length data. These records also spoke to the fact that Mr.
5 Crutcher worked similar hours as the average class member.

6 On the other hand, Defendant's investigation strongly bolstered their case. In particular,
7 BCS interviewed and received declarations from 80% of the purported class members, who state
8 that BCS did not prevent them from taking breaks, and that to their knowledge, Mr. Crutcher was
9 likewise able to take meal and rest breaks. Of course, these declarations are strong evidence not
10 only toward attacking the propriety of a class in this case, but also for disproving damages to
11 individual class members.

12 Based on this information, the Parties believed they made a rational evaluation of the
13 merits of their respective cases. All of this information, of course, is overshadowed by the
14 unresolved preemption issue, which also played a major factor in terms of the Parties'
15 willingness to settle the case.

16 *2. Maximum Theoretical Recovery*

17 At absolute most, Plaintiff estimates the Class would have been able to recover about
18 \$2.8 million. This estimate is based on BCS's alleged violations of the meal and rest period
19 provisions of the Labor Code as described in the complaint. BCS vigorously disputes that the
20 Class could recover this amount but took this estimate into consideration during mediation and in
21 entering into the Settlement. The damages estimate is primarily derived from an assumption that
22 putative class members were denied both meal and rest breaks for every shift worked, which was
23 calculated based on review of the following records:

- 24 1) a list of all impacted "Delivery Specialists" that constitute the putative class;
- 25 2) Dates of employment for the Delivery Specialists;
- 26 3) Pay rates and dates of raises for each Delivery Specialist.
- 27 4) Complete pay history for Mr. Crutcher. *See* Ex. B [BCS Document Production].
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1 Mr. Crutcher's records were used to determine the number of pay periods at issue
2 throughout the Class Period. Plaintiff assumed that all Delivery Specialists were paid on the
3 same day, on the same bi-weekly schedule, and that this schedule continued on after Mr.
4 Crutcher's termination in November, 2008. Finally, BCS's counsel represented in an email that
5 the company generally scheduled Delivery Specialists for a four day week, 10 hours per day.
6 Based on the facts: 1) that Delivery Specialists were paid bi-weekly and 2) that they worked
7 four meal period eligible shifts per week, on average, Plaintiff assumed Delivery Specialists
8 were missing eight meal periods and eight rest periods per pay period.

9 Plaintiffs base damages calculations on Cal. Lab. Code § 512(a), 226.7, and 8 Cal. C.
10 Regs. §11010 ¶ 11. (An employer who fails to provide meal or rest periods as required by an
11 applicable Wage Order must pay the employee *one additional hour of pay* at the employee's
12 regular rate of pay for each work day that the meal or rest period was not provided.)

13 Accordingly, Plaintiff's damage analysis assumed a worst case scenario, that Delivery
14 Specialists are entitled to two hour's pay for each meal and rest period missed for each shift
15 worked. Although the statute of limitations on the Labor Code is three years (Cal. Civ. Code §
16 338(a)), Plaintiffs' corresponding claim under Bus. & Prof. Code § 17208 extends this limitation
17 to four years. Thus, Plaintiffs generally assumed each Delivery Specialist's damages were equal
18 to two missed hours of work, eight times per pay period, for four years. However, this formula
19 was not constant. We adjusted calculations for each employee to account for 1) different rates of
20 pay during the Class Period for each employee, and 2) different tenures for each employee.

21 In addition, California Labor Code § 201 requires employers to pay employees whose
22 employment is discharged their final wages immediately upon discharge. Labor Code § 202
23 separately requires employers to pay employees who voluntarily quit their employment all wages
24 due within 72 hours. Labor Code § 203 provides that an employer who willfully fails to pay all
25 wages due a terminating employee, as required under either Labor Code § 201 or 202, shall be
26 subject to a penalty equivalent to one day's wages for each day the payment is late, up to 30
27 calendar days. The money owed Delivery Specialists for their missed meal and rest periods was
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1 a wage. *See Murphy v. Kenneth Cole Productions* (2007)40 Cal.4th 1094, 1114. Based on
2 BCS’s records, five of the impacted Delivery Specialists left BCS during the class period, and all
3 of these occurred over 30 days before the complaint was filed. Ex. B [Payroll Records].
4 Accordingly, these five employees have a claim for an additional 30 days’ pay for BCS’s failure
5 to pay full wages upon termination.

6 *3. Risks of Litigation, and Why the Settlement Amount Is Justified*

7 Despite this maximum theoretical recovery, there are a variety of reasons why a) that
8 amount is likely not recoverable, and b) the settlement amount is a fair resolution in light of the
9 practical realities of litigation.

10 The settlement amount of \$375,000, or about 15% of the theoretical maximum, is fair
11 given the risks of litigation. Before attending mediation, BCS filed a motion for summary
12 judgment based on its argument that the Labor Code’s meal and rest provisions are preempted by
13 Federal Hazardous Materials and Motor Carrier Safety laws. This is a novel issue of law, and
14 despite significant research by both sides, there is no controlling precedent on this particular
15 issue. Accordingly, Class Counsel was willing to settle for significantly less than the estimated
16 maximum given the risk of a complete defense ruling early in the case.

17 Likewise, the settlement amount accounts for the fact that BCS’s preemption argument
18 was particularly strong regarding rest periods. As described in the Parties’ summary judgment
19 papers, while the meal break provisions of the Labor Code provide for a way for employers to
20 comply with both the Labor Code and the Federal Laws, by providing “opt-out” agreements,
21 there is no such provision regarding rest periods. For this reason, Class Counsel assume that
22 even if the meal break provisions are not preempted, it is likely that the rest break provisions are
23 preempted, which would reduce the maximum possible recovery by almost half.

24 Further, even assuming that BCS’s summary judgment motion was completely denied,
25 BCS obtained declarations from many of the impacted class members indicating that they were
26 able to take meal and rest breaks. These declarations would be evidence that class treatment is
27 inappropriate, as it points to the predominance of individual questions of fact. Such evidence
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1 would also severely impact the Class’s ability to prove BCS prevented its Delivery Specialists
2 from taking breaks. And, even if the Class could prove BCS had violated the meal and rest
3 provisions of the Labor Code on a class-wide basis, these declarations would serve as strong
4 evidence for BCS during the remedial phases of any trial. In sum, Plaintiff recognizes that
5 continuing this litigation presents serious risks, and believes that the present settlement amount is
6 proper based on those risks. From BCS’s perspective, despite its strong position regarding class
7 treatment, liability, and the viability of the case given the preemption issue, settlement generally,
8 and this settlement in particular, represents a fair treatment of the case, eliminates all risks, and is
9 an efficient and economical resolution of the case.

10 The individual payment amount each class member will receive, even after all
11 deductions, will be substantial. There are x putative class members. The Parties presently
12 estimate the average class member, who was employed during all or most of the class period,
13 encompassing about forty (40) members of the class, will receive approximately \$4800, or about
14 one month’s pay as their portion of the settlement fund, calculated as follows: (Insert
15 calculation). This represents a substantial recovery on behalf of the class. Although not a term
16 of settlement, BCS will also voluntarily implement an on-duty meal agreement and revised meal
17 and rest break policy, as well as training to ensure compliance. The filing of this action will
18 bring value to the class on an ongoing basis.

19
20 *4. Propriety of Class Treatment*

21 Generally under California law, two basic requirements must exist to sustain a
22 class action: “The first is existence of an *ascertainable class*, and the second is a *well-defined*
23 *community of interest* in the questions of law and fact involved.” *Vasquez v. Sup.Ct. (Karp)*
24 (1971) 4 Cal. 3d 800, 809. In *Sav-On*, the California Supreme Court further defined the standard
25 courts must use to determine if class certification is appropriate:

26 “Code of Civil Procedure section 382 authorizes class actions “when the question
27 is one of a common or general interest, of many persons, or when the parties are
28 numerous and it is impracticable to bring them all before the court . . .” The party
seeking certification has the burden to establish the existence of both an
ascertainable class and a well-defined community of interest among class

1 members. The “community of interest” requirement embodies three factors: (1)
2 predominant common questions of law or fact; (2) class representatives with
3 claims or defenses typical of the class; and (3) class representatives who can
4 adequately represent the class. *Sav-On*, 34 Cal. 4th at 326 (citations omitted).”

5 The instant case is amenable to class treatment.

6 The class is easily ascertainable and adequately numerous, as evidenced by BCS’s
7 production of a list of fifty Delivery Specialists employed from November 10, 2004 to
8 November 10, 2008, the time the case was filed. Additional Delivery Specialists employed after
9 the time of filing and before the date of preliminary approval of the settlement, the end of the
10 class period, would only strengthen the argument that the class meets numerosity requirements.
11 *See 1 Newberg on Class Actions* § 3:5 at 246-47 (4th Ed. 2002) (“A class as few as 40 members,”
12 however, “should raise a presumption that joinder is impracticable”).

13 Likewise, common questions of law and fact predominate in this case. Primarily, the
14 case will revolve around 1) whether BCS had a duty to provide meal and rest periods to its
15 Delivery Specialists, and 2) whether it prevented the Delivery Specialists from taking those
16 breaks. Because the proposed class’s claims all spring from a common source – i.e. whether
17 BCS had a policy of preventing its Delivery Specialists from taking breaks – each class member
18 would be asking the same legal and factual questions.

19 Mr. Crutcher would also adequately represent the class, as he makes the same claims,
20 does not have separate causes of action, is not subject to any unique defenses, and would be
21 entitled to the same kinds and amounts of remedies as any other class member. Finally, Mr.
22 Crutcher’s claims are typical of the class. That is, he is similarly situated, as a Delivery
23 Specialist that worked through most of the class period, as most other class members, and does
24 not have any specific issues or conflicts that give him a different motivation to litigate the case.

25 Of course, if Mr. Crutcher brought a class certification motion, BCS would dispute that
26 the requirements of class certification are met in this case. However, for purposes of settlement,
27 the facts discovered to date demonstrate that resolving Mr. Crutcher’s claims in a class procedure
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1 will a) best protect the rights of all Delivery Specialists, and b) resolve all of the issues in an
2 efficient and economical way, both for the Court and for the parties.

3 **C. REVISIONS TO THE PROPOSED CLASS NOTICE**

4 The parties have revised the Notice of Pendency of Class Action in a variety of ways.
5 Rather than listing each change, the Revised Notice is attached as Exhibit 1. In sum: 1) the
6 language was revised to remove “legalese” and to make the terms more understandable for non-
7 lawyers; 2) the compensation terms, including the total amount, deductions, calculations of each
8 class member’s share, attorneys’ fees, etc., are more prevalent and bolded; 3) the anti-retaliation
9 provision was expanded, clarified, and moved to the first page; 4) the release provisions are
10 clarified, and include BCS’s right of withdrawal if 10% of the class opts out.

11 **D. REVISIONS TO THE STIPULATION OF SETTLEMENT**

12 *1. Release Provisions*

13 The Parties revised the release provisions set forth in paragraph 31 of the stipulation to
14 clarify the class period that the released claims are limited solely to the meal and rest period and
15 unfair business practice claims alleged in the Complaint. In particular, the Parties made three
16 changes.

17 First, the previous stipulation was ambiguous regarding the end date for the class period.
18 It read: “Released claims [shall mean] any and all [claims] related to the allegations in the
19 Complaint from November 10, 2004 through final approval of settlement. . . .” It has been
20 revised to read: “Released claims [shall mean] any and all [claims] related to the allegations in
21 the Complaint from November 10, 2004 through the date of an order from the Court
22 preliminarily approving the settlement.” Ex. A [Revised Settlement] at ¶ 31.

23 Second, the language regarding the cause of action for unfair business practices was
24 unclear. It read: “[Released Claims include] any and all claims for unfair business practices
25 relating to the above categories pursuant to Business and Professions Code section 17200.” It
26 has been revised to read “[Released Claims include] any claim that the alleged violations of Cal.
27 Lab. Code §§ 203, 226.7, and 512, and related IWC Wage Orders for meal and rest period
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1 violations constitute unfair business practices pursuant to Business and Professions Code section
2 17200.” See Ex. A [Revised Settlement] at ¶ 31.

3 Third and finally, the section of the release regarding Cal. Civ. Code § 1542 previously
4 read: “Plaintiff and all Settlement Class Members expressly waive and relinquish to the fullest
5 extent possible the provisions, rights and benefits of California Civil Code Section 1542 and any
6 other similar statute.” It has been revised to read: “Plaintiff and all Settlement Class Members
7 expressly waive and relinquish to the fullest extent possible the provisions, rights and benefits of
8 California Civil Code Section 1542 and any other similar statute regarding the facts giving rise to
9 the meal and rest period violations alleged in this case.” See Ex. A [Revised Settlement] at ¶ 31.

10
11 *2. Remaining Funds/ Cy Pres*

12 The parties have agreed that if, after all distributions to class members have been made,
13 there is money that goes undistributed, that money will be disbursed to Arriba Juntos. See Ex. A
14 [Revised Settlement] at ¶¶ 58, 66.

15 **E. OTHER ISSUES PERTINENT TO PRELIMINARY APPROVAL**

16 *1. No Individual Case*

17 Plaintiff’s application for approval and supporting papers omitted the fact that Mr.
18 Crutcher did not at any time pursue an individual case against BCS, nor did he receive any
19 compensation for any claims, or for not bringing any claims.

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21 Respectfully Submitted,

22 DATED: August 10, 2009

HOFFMAN EMPLOYMENT LAWYERS

Michael Hoffman

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25 _____
Michael Hoffman
Attorney for Plaintiff Timothy Crutcher