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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ROY D. TAYLOR, individually and on behalf of all others similarly situated

Plaintiff,

v.

FEDEX FREIGHT WEST, INC. *et al*,

Defendants.

Case No. 5:10-cv-02118 LHK

NOTICE OF MOTION AND MOTION FOR ORDER OF FINAL APPROVAL OF SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES

Date: January 26, 2012
Time: 1:30 p.m.
Courtroom: 8
Honorable Lucy H. Koh

TO ALL INTERESTED PARTIES AND TO THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on January 26, 2012 at 1:30 p.m. before this Court in Courtroom 8 of the above-entitled Court located at 280 South First Street, San Jose, California, Plaintiffs ROY D. TAYLOR, THOMAS J. WOOD, ERNEST C. HARVEY, II and ARLETHA FLUD will move this Court for an Order granting Final Approval of the Class Action Settlement

as set forth more particularly in the Stipulation of Settlement ("Stipulation") filed on July 22, 2011, as Exhibit A to the Declaration of Michael L. Carver (Doc. 97-1).

This Motion will be made pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the Court's inherent power to supervise class action litigation and the settlement of class action cases. The parties have reached a proposed Settlement that they believe to be fair, reasonable, adequate and in the best interests of all parties and Class Members, the Class Members have been notified by means reasonably calculated to give adequate notice, and provided the opportunity to opt out, object and submit claim forms.

This Motion is based on this Notice, the Memorandum of Points and Authorities in Support, including the Stipulations, Notices, and Declarations of Tony Dang, Michael L. Carver and Plaintiffs, Flud, Taylor, Harvey and Woods, and any other documents or evidence which the Court may consider at the hearing of this motion.

Dated: January 12, 2012

LAW OFFICE OF MICHAEL L. CARVER

_____/s/ Michael L. Carver_____
MICHAEL L. CARVER
Attorney for Plaintiff
ROY D. TAYLOR, et al.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF ISSUES TO BE DECIDED

The case involves claims that Defendant FedEx Freight, Inc. (formerly FedEx Freight West, collectively referred to as "FedEx Freight") owes compensation to employee-Class Members for alleged uncompensated work time, missed meal and rest periods, waiting time penalties, and penalties for inaccurately itemized wage statements.

After considerable negotiations (including three mediations) and four years of contentious litigation, the parties fashioned a settlement which they believe is fair. On September 19, 2011, the Court provisionally certified the settlement classes, granted preliminary approval of the settlement and approved the Notice of Pendency of Class Action Settlement and the Claim Form (Doc 106).

This Final Approval Hearing was set for the Court to finally determine the fairness of the settlement and consider and consider granting final approval. A Motion for Approval of Attorneys Fees, Costs and Class Representative Enhancements is filed separately

II. FACTUAL BACKGROUND

A. Facts

From June 18, 2003 to July 23, 2009, former Defendant FedEx Freight West, Inc., now known as FedEx Freight, Inc. (collectively referred to as "FedEx Freight"), operated 26 local service centers (formerly called "terminals") in California and employed 1340 Class Members who performed "line haul" driver duties. Line haul drivers typically drove trucks between the service centers. (Carver Decl."-¶2) Plaintiffs ROY D. TAYLOR, ARLETHA FLUD, THOMAS J. WOOD and EARNEST C. HARVEY, II were employed by FedEx Freight as line haul drivers, delivering freight to FedEx Freight's service centers within and outside of California. Plaintiff Flud left employment in 2005, after working for FedEx Freight West, Inc., and its predecessor Viking Freight since 1990. (Exhibit 1- Flud Decl. ¶2) The other three Plaintiffs are still employed as line haul drivers for FedEx Freight - Taylor since 2000 (Exhibit 2-Taylor Decl. ¶2); Harvey since 1999, (Exhibit 3-Decl., ¶2); and Wood since 1993. (Exhibit 4--Wood Decl., ¶2)

During the class period, Plaintiffs and line haul drivers were paid a piece rate for each

driving trip, which was based on the number of miles driven, and which Defendant contends was intended to compensate the drivers for all activities incidental to the driving trip. For other types of work, generally items that were non-regularly recurring or items and were not directly related to the driving trip, the drivers were paid an hourly rate. The drivers were exempt from overtime under state and federal law. Each driving run was assigned a set piece rate and an estimated drive time. If a driver was unusually delayed, or experienced an unusual event such as installing tire chains, a road closure, or having to drive out of his or her way because of a detour, the driver was eligible for extra pay, which was paid on an hourly basis. (Exhibit 1 – Flud Decl., ¶3; Exhibit 2-Taylor Decl., ¶3; Exhibit 3-Harvey Decl., ¶3; Exhibit 4-Wood Decl., ¶3; Carver Decl. ¶3)

Plaintiffs and some line drivers were assigned to routes that took them hundreds of miles from their home service center. When that happened, the drivers were required by federal law to stop for a mandatory period of rest before returning home the next day. These runs were known as "lay over" runs. The drivers generally took a taxi or shuttle to get to the lay over hotel, where they rested and waited, off duty, for the beginning of their next shift. Plaintiffs claim that their activities were restricted such that they should have been compensated. (Exhibit 1 – Flud Decl., ¶3; Exhibit 2—Taylor Decl., ¶3; Exhibit 3—Harvey Decl., ¶3; Exhibit 4—Wood Decl., ¶3)

After laying over, Plaintiffs and line drivers were provided with a two hour courtesy call to let them know when their next shift would start. Once the driver reported to work, they were required to conduct a pre-trip inspection before starting the day's drive. At the end of the run, the driver was required to conduct a post trip inspection. The drivers claim that they spent about 30 minutes of unpaid time per day on these inspections. FedEx Freight contends the drivers were fully compensated for the inspections through the piece rate payment. (Exhibit 1–Flud Decl., ¶3; Exhibit 2-Taylor Decl.¶3; Exhibit 3-Harvey Decl.¶3; Exhibit 4-Wood Decl.¶3) Carver Decl.¶3)

Plaintiffs alleged there was insufficient time to take meal and rest periods. In addition to their piece rate and hourly rate payments, line haul drivers were eligible for an incentive bonus payment called VPEP. Drivers were eligible for the bonus on a monthly basis depending both on their individual performance and on company-wide performance. The drivers claimed that because the bonus was measured, in part, based on whether they arrived at their destination on-

time, they were discouraged from taking the meal and rest breaks. The drivers contend that road conditions, such as weather and traffic, were not always appropriately factored into the driving run time. Defendant contends that the runs provided sufficient time for drivers to arrive at their destinations, as evidenced by the electronic time record data, which showed that more than 80% of the time the drivers arrived "on time." (Exhibit 1 – Flud Decl., ¶3; Exhibit 2—Taylor Decl., ¶3; Exhibit 3—Harvey Decl., ¶3; Exhibit 4—Wood Decl., ¶3; Carver Decl. ¶3)

B. Procedural History

This case was filed June 18, 2007, in Santa Clara County Superior Court against FedEx Freight West, Inc. In late 2007, the parties conducted initial written discovery, including 4 sets of specially prepared interrogatories and requests for production of documents served by Plaintiffs on FedEx Freight, and 4 sets of requests for production of documents and 4 sets of form interrogatories served by FedEx Freight on Plaintiffs. Each side produced initial responses and then amended responses when additional information was discovered. Plaintiffs produced more than 1,000 documents to FedEx Freight, and FedEx Freight produced nearly 7,000 documents to Plaintiffs. The named Plaintiffs were all deposed, and Plaintiffs took the depositions of FedEx Freight's "person most knowledgeable" on various subjects related to the lawsuit. (Carver Decl. ¶5)

Following initial discovery, the Parties agreed to participate in mediation with an experienced mediator, Magistrate Edward A. Infante (Ret.), which was held on October 28, 2008. However, the mediation was unsuccessful due in part to the uncertainty of class certification. (Carver Decl. ¶6)

Thereafter, the parties engaged in additional written discovery and depositions, including:

- Form Interrogatories served by Plaintiff Taylor on FedEx Freight
- Special Interrogatories, Sets 2 and 3, served by Plaintiff Taylor on FedEx Freight
- Requests for production of documents, Sets 2, 3, 4, 5, 6 and 7, served by Plaintiff Taylor on FedEx Freight
- Requests for Admissions served by FedEx Freight on each of the four representative plaintiffs

- Form Interrogatories – Employment Law, served by FedEx Freight on each of the four representative plaintiffs
- Supplemental interrogatories and document production requests served by both parties
- Depositions of:
  - Plaintiff Arletha Flud
  - Plaintiff Ernest Harvey
  - Hugh Morris for FedEx Freight
  - Declarant Gary Eggleston
  - Declarant Richard Cheek
  - Declarant Roy Cornwell
  - Declarant Alfred Hicks
  - Declarant Gary Fitch
  - Second day of deposition for Plaintiffs Taylor and Wood

(Carver Decl., ¶7)

On or about December 28, 2008, FedEx Freight West, Inc., merged into FedEx Freight East, Inc. As of that date, FedEx Freight West, Inc., ceased to exist as a legal entity. The existing company was then renamed and FedEx Freight, Inc., was created. FedEx Freight, Inc. ("FedEx") assumed all assets and liabilities of FedEx Freight West, Inc. (See Notice of Removal, para 32 [Doc 1]). In January 2009, Plaintiffs filed a First Amended Complaint to add a claim under the Private Attorneys General Act ("PAGA") per stipulation of the parties.

Plaintiffs filed a Motion for Class Certification in early 2009. FedEx Freight also filed a Motion for Non-Certification at the same time. The two motions were extensively briefed and on July 23, 2009, Plaintiffs' motion was granted, and the class was certified. The Order certifying the class was entered September 18, 2009. The class definition, as certified, was:

> "All persons who were employed by FedEx Freight West, Inc. (currently known as FedEx Freight Inc) as a "line haul driver," including pick up and delivery (P&D) drivers to the extent they performed line haul services and were paid for those services pursuant to the line haul pay plan, in California on or after June 18, 2003 through July 23, 2009 (Class period)."

(Carver Decl. ¶8)

The Class Notice was mailed to members of the class on October 23, 2009, and an opportunity to opt-out was provided. Following the opt-out period, it was determined that during

the class period of June 18, 2003 and July 23, 2009, approximately 1200 class members were employed by FedEx Freight West, Inc., including full time line haul drivers, approximately 80 "combo drivers" and approximately 683 "P&D" (Pickup and Delivery) drivers. Some drivers were in more than one category during the six-year class period. P&D drivers normally handled local deliveries and Combo Drivers generally worked in the warehouse and drove short runs between local service centers. The P&D and Combo drivers only occasionally performed line haul driver duties when they were requested to fill in, generally during busy periods of the year. It is estimated that this occurred, on average, no more than 2-4 times per year, compared to a typical 150 runs per year for a regular line haul driver. It is estimated that these "fill in" trips amount to less than 2% of the trips in the Class period. (Carver Decl. ¶9)

In April 2010, Plaintiffs filed their Second Amended Complaint, pursuant to stipulation by the parties. Plaintiffs added FedEx Freight, Inc., as a Defendant. The case was thereafter timely removed under Class Action Fairness Act "CAFA" jurisdiction. On June 17, 2010, Plaintiffs filed a Motion to Remand, which was denied on October 26, 2010. (Carver Decl., ¶10)

The parties returned to mediation on February 17, 2011, with experienced mediator Lisa Klerman. The all-day mediation was unsuccessful, in part, due to the uncertainty as to whether the action could survive a motion to decertify and whether any of the claims were subject to summary adjudication. The parties then took expert witness depositions of Charles Mahla, Paul Herbert, Michael Ward and Christina Banks. (Carver Decl., ¶11)

On March 17, 2011, the parties filed cross motions for summary adjudication. [Docs 42, 51] FedEx Freight also filed a motion to decertify the class, [Doc 48] based largely on FedEx Freight's assertion that Plaintiffs had failed to marshal common proof to support class-wide liability. On May 5, 2011, all motions were heard and denied, with FedEx Freight's motion to de-certify being denied without prejudice. The Court allowed expert discovery to reopen to allow Plaintiffs to meet their burden of proving class-wide liability through admissible evidence at trial. Plaintiffs thereafter engaged a survey expert and began the process of surveying the drivers through the use interview questions of each class member. (Carver Decl., ¶12)

Pursuant to Court Order, the parties participated in a third mediation on June 7, 2011,

again with Ms. Klerman. The all day session was successful. (Carver Decl., ¶13)

C. The Asserted Claims

Plaintiff alleges that Defendant failed to provide its line haul driver employees compensation for all work performed on inspections and time waiting at distant locations. Plaintiffs also contended they were owed money for meal and rest breaks which are mandated.

Section 11 of the applicable IWC a Wage Orders provides, in pertinent part as follows:

> "(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and employee..."

Additionally, California Labor Code Section 226.7 also requires one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

The Complaint also alleges several causes of action derivative of the uncompensated work time and meal and rest period claims. For example, California's Unfair Competition Law ("UCL") prohibits any unlawful, unfair, or fraudulent business act or practice. Bus. & Prof. Code Section 17200 et seq. By proscribing any unlawful business practice, the UCL borrows violations of other laws and treats them as unlawful practices that are independently actionable. *Schnall v. Hertz Corp.* (1st Dist. 2000), 78 Cal.App.4th 1144. Thus, Plaintiffs seek restitution of pay for time worked and meal/rest premiums based on Defendant's business practices beginning four years prior to filing the Complaint - i.e. from June 18, 2003.

Additionally, employees terminated within three years prior to the filing of the complaint and who were not compensated for all missed meal and rest periods, are also arguably entitled to receive waiting time penalties under Labor Code Section 203, of thirty (30 days) pay. Further, Labor Code Section 226(e) provides that an employee is entitled to recover statutory damages of $50 for the first pay violation and $100 for each subsequent violation, up to a maximum of $4,000, in the event of an employer's knowing and intentional failure to provide accurate itemized statements that resulted in injury. Because Labor Code 203 requires willfulness and Labor Code

Section 226 requires actual injury and a knowing and intentional violation, Defendant contended that neither was available to Plaintiff.

D. Defendant's Denial of Wrongdoing

Defendant asserted a variety of defenses and denied any wrongdoing or legal liability with regard to any and all of the claims asserted in this litigation. Defendant contended, for example, that its mileage rate included pay for pre- and post-trip inspections, and that its employee handbook instructs employees to take meal and rest breaks and that it "provides" those breaks by allotting for them in the route times. Defendant argued that its duty is limited to making meal and rest periods reasonably available to employees, not to ensure that its employees take them, and that it is particularly difficult to control the actions of long haul truckers who are often hundreds of miles from direct supervision.

Defendant's position was strengthened by the California Court of Appeals in *Brinker Restaurant Corporation v. Superior Court of San Diego County* 2008 WL 2806613 (July 22, 2008) which held in part: ". . . we conclude, as we did with regard to rest breaks, that because meal breaks need only be made available, not ensured, individual issues predominate in this case and the meal break claim is not amenable class treatment. The reason meal breaks were not taken can only be decided on a case-by-case basis." Although review has been granted and a decision is pending, the *Brinker* Court cited numerous federal District Court decisions with similar holdings, including *White v. Starbucks Corp.* (N.D.Cal.2007) 497 F.Supp.2d 1080, 1088-89 ["Accordingly, the court concludes that the California Supreme Court, if faced with this issue, would require only that an employer offer meal breaks, without forcing employers actively to ensure that workers are taking these breaks."] and *Brown v. Federal Express Corp.* (C.D.Cal.2008) 249 F.R.D. 580, 587 [meal period claim not amenable to class treatment as court would be "mired in over 5000 mini-trials" to determine if such breaks were "provided"].) Plaintiff contended that the facts in *Brinker, White and Brown* are distinguishable and successfully certified the class. If tried, Plaintiffs contended they could show a class-wide practice that Defendants did not "provide" meal and rest periods due to a combination of strict route times, and bonuses for timely delivery.

But the issue of "provide" vs. "ensure" has been awaiting a decision from the California Supreme Court during the majority of the more than years this action has been litigated.

E. Settlement Factors

Defendant and Plaintiffs desire to settle the class action and claims asserted on the terms and conditions set forth in the Settlement Agreement, for the purpose of avoiding the burden, expense, and uncertainty of continuing litigation, and for the purpose of putting to rest the controversies advanced by the litigation. Should this litigation not resolve, the parties believe that there are factual and legal issues in dispute that will undoubtedly be vigorously contested in future legal proceedings. As explained above (and in more detail below), the present class action Settlement was reached after arm's length negotiations by experienced counsel on both sides. The terms of this Settlement, as outlined below, are a fair result achieved by experienced Plaintiffs' and Defendant's counsel with the aid an of experienced mediator, Lisa Klerman, Esq, after previous efforts with retired magistrate Edward Infante were unsuccessful.

The Parties engaged in significant discovery, including depositions and written requests. Defendant's Persons Most Knowledgeable (PMK) regarding personnel practices, payroll, and meal and rest policies were deposed. Defendant provided the numbers of employees and average rates of pay from which calculations were made of possible damages exposure. (Carver Decl. ¶14)

Plaintiffs paramount hurdle was the ability to demonstrate commonality at trial, given the fact that a long list of separate routes and destinations were involved. Complicating the matter further was the fact drivers are sometimes carrying "hazardous materials", which require different treatment than regular loads with regard to truck parking. (Essentially a driver carrying a hazardous materials load is not allowed to leave the truck out of his or her sight, unless certain protections are offered.) Defendant contended that Plaintiffs would be unable to prove with commonality that Plaintiffs and Class Members were not "provided" meal and rest periods, due to varying route times and conditions. They also argued most drivers preferred to skip meals to arrive early, to have more free time to themselves, and that the time spent waiting for the return trip to begin was truly free time, which should therefore not be compensable. (Carver Decl. ¶15).

Defendant's analysis of records concluded that drivers often arrived sufficiently early in their routes to have taken a meal period. However, Plaintiffs argued that drivers were still reluctant to take them because they were unaware of road conditions, traffic, and other issues which might delay them, and cause them to lose bonuses based in part upon timely delivery. (Carver Decl. ¶15)

The parties participated in lengthy negotiations regarding the settlement (including three day-long mediation sessions and post mediation negotiations) and the Stipulation of Settlement. Based on those negotiations and a detailed knowledge of the issues in this action, Class Counsel is convinced that this settlement is in the best interest of the Class Members. Specifically, Class Counsel balanced the terms of the proposed settlement against the probable outcome of liability and the range of recovery issues at trial given the state of the law. The risks of trial and other normal perils of litigation, including various possible delays and appeals, were also carefully considered in agreeing to the proposed settlement. The amount of the settlement is reasonable.

F. The Proposed Settlement

The Stipulation of Settlement, filed as an attachment to the Declaration of Michael L. Carver in Support of the Motion for Preliminary Approval, (Doc. No. 97-1, filed July 22, 2011) fully explains the proposed settlement. The "settlement class" consists of all Class Members who do not timely opt out of the settlement and includes the following:

> **Class**: All persons who were employed by FedEx Freight West, Inc. (currently known as FedEx Freight, Inc.) as "line haul drivers" in the State of California from June 18, 2003 through July 23, 2009, including pick up and delivery (P&D) drivers and Combo drivers to they extent they performed line haul services and were pay for those services pursuant to the line haul pay plan.

The essential settlement terms are that Defendant shall pay up to a total of Five Million, Two Hundred and Fifty Thousand dollars ($5,250,000.00) ("Maximum Settlement Consideration") to settle all claims of Plaintiffs, Class Members and Class Counsel as follows:

(1) Plaintiffs' counsel request attorneys fees of up to $1,750,000.00 (33.33% of the Maximum Settlement Sum) plus reasonable costs of $120,000; (final costs are $104,996.90)

(2) Costs of administration of the settlement up to $20,000 (final cost was $16,000);

(3) Plaintiffs request that Plaintiff Roy D. Taylor be paid up to $25,000 for his work as a class representative; Plaintiffs Harvey and Wood shall receive up to $17,500 each and Plaintiff Flud shall be paid up to $10,000, or any lesser amounts as determined fair and reasonable by the Court.

(4) A payment of $20,000 shall be allocated to penalties under the Private Attorneys General Act (or "PAGA"), 75% of which shall be paid to the Labor and Workforce Development Agency and 25% of which will be shall be paid to claimants, pursuant to the requirements of Labor Code Section 2699(i).

(5) The remaining funds ("Net Settlement Fund") of approximately $3,294,003 will be available for distribution to Class Members.

a. The Net Settlement Fund shall be allocated for payment to eligible Claimants, subject to a 65% minimum payment floor. The Class Administrator will initially determine the amount attributable to all Class Members according to a points system, as described in detail in the Stipulation of Settlement (Attached to Carver Declaration (Doc 97-1) pages 12-14), allocating one point for each week the Class Member worked during the Class Period, with one additional point if the Class Member separated from employment during the Class Period, to allocate an additional claim amount for Labor Code Section 203 penalties.

b. Once the claims process has been completed, the Claims Administrator will determine whether the 65% minimum payment floor was met by dividing the total number of points attributable to Class Members who have timely submitted Claim Forms by the total number of points available to all Class Members. If the points of Class Members who submit claim forms is less than 65% of the available points, then the "payout" fund is a minimum of 65% of the Net Settlement Fund.

c. After the amount of the payout fund is established, the Claims Administrator allocates 2% of the fund for P&D (Pick-up and Delivery)/Combo Drivers and 98% of the payout fund for Line Drivers. The Claims Administrator adjusts the

amount payable per Line Driver by increasing the amount of points per Line Driver by 10% if the Class Member indicated on their Claim Form that more than 50% of their routes were layover runs. The Claims Administrator then divides the Line Driver portion (98%) of the payout fund on a pro rata basis, using the number of points assigned to each Claimant. The different values for Line Drivers vs P&D/Combo Drivers is justified because the average Line Driver drove 50 times more long haul runs that the P&D/Combo Drivers. Hence, the P&D/Combo Drivers are allocated 1/50 of the payout fund.

G. Claims Process and Notice.

In accordance with the Order of Preliminary Approval of Settlement ("Preliminary Approval Order") (Doc. No. 106, filed September 19, 2011), Defendant provided the Claims Administrator a list of all Class Members. The Claims Administrator performed an address update search using each Class Members' social security number and last known address, then mailed the Notice of Pendency of Class Action and Proposed Settlement (or "Class Notice") and a Claim Form on October 10, 2011. The Notice advised the Class Members of the settlement terms, the method for each Class Member to file a claim or "opt out", or how each Class Member may file an objection and appear at the Final Approval hearing. The claim-mailing deadline was November 28, 2011. In Mid November 2011, it was discovered that 80 Class Members were omitted from the mailing. Those Class Members were sent the Class Notice and Claim Form on November 23, 2011, with a submission postmark deadline of January 9, 2012. (Declaration of (Class Administrator) Tony Dang ¶5-10)

III. THE SETTLEMENT MEETS THE NINTH CIRCUIT STANDARD FOR APPROVAL.

A. Legal Standard

The Ninth Circuit has declared that a strong judicial policy favors settlement of class actions. *Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1276. Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome and the typical length of litigation. "There is an overriding public interest in settling and quieting litigation" that is "particularly true in class action suits." *Van Bronkhorst v. Safeco*

Corp. (9th Cir. 1976) 529 F.2d 943, 950. In approving a proposed settlement of a class action under *Federal Rule of Civil Procedure 23(e)*, the court must find that the settlement is "fair, adequate and reasonable." *In re Pac. Enters. Sec. Litig.* (9th Cir. 1995) 47 F.3d 373, 377. Nevertheless, where the "parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both the propriety of certification and the fairness of the settlement." *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 952.

Having conducted the first inquiry regarding the propriety of certification, the "court must carefully consider whether a proposed settlement is fundamentally fair, adequate, and reasonable, recognizing that "[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness..." *Id.* at 952 (quoting *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026). See also, *Fed. R. Civ. P., Rule 23(e).*

Following the fairness hearing, the court will make a final determination as to whether the parties should be allowed to settle the class action pursuant to the terms agreed upon. *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 525.

In determining whether the terms of the parties' settlement are fair, adequate, and reasonable, the court must balance several factors, including: the strength of the plaintiff's case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. *Hanlon*, supra, 150 F.3d at 1026. But see *Molski v. Gleich* (9th Cir. 2003) 318 F.3d 937, 953-954 (noting that a district court need only consider some of these factors – namely those designed to protect absentees). The district court must exercise sound discretion in approving a settlement. *Ellis v. Naval Air Rework Facility* (N.D. Cal. 1980) 87 F.R.D. 15, 18, aff'd, (9th Cir. 1981) 661 F.2d 939. However, "[w]here, as here, a proposed class settlement has been reached after meaningful discovery, after arm's length negotiation, conducted by capable counsel, it is presumptively fair." *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.* (D. Mass. 1987) 671 F.Supp. 819, 822.

B. The Settlement Is Fair, Adequate, And Reasonable

1. The Parties Can Identify The Strength And Weakness Of Their Cases

The Complaint was filed on or about June 18, 2007, and actively litigated since that time. Plaintiffs produced thousands of documents to Defendant, and Defendant produced over 7,000 documents to Plaintiffs. Plaintiffs served three sets of Special Interrogatories, and seven sets of Requests for Production, and engaged in over a dozen depositions in this case. (Carver Decl ¶5,7) The parties engaged in a motion for class certification, a motion to deny certification, cross motions for summary judgment and a motion to decertify. Counsel for both sides undertook extensive research into relevant prior litigation and applicable law necessary to assess the novel legal issues presented. (Carver Decl ¶12)

Consequently, both sides were well aware of the strengths and weaknesses of their respective cases in the absence of settlement. This litigation, therefore, has reached the stage where "the parties certainly have a clear view of the strengths and weaknesses of their cases" sufficient to support the Settlement. *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F.Supp. 610, 617.

2. The Settlement Appropriately Balances The Risk Of Litigation And The Benefit To The Settlement Class Of A Certain Recovery

Here, there is a very substantial risk that, absent this Settlement, Plaintiffs would not be able to obtain a sizeable judgment against Defendant. Although Plaintiffs' counsel believes that the case is meritorious, the reasonableness of this Settlement is compelled by the fact that the case involves areas of the law that are currently under appeal, and areas of the law on which there is no direct authority. Additionally, it involves drivers taking varying routes to 26 local service centers scattered across the state, in different climates, under different traffic and weather conditions. Because Plaintiffs' prospects of overcoming the difficulties of presenting common proof at trial was uncertain at best, Class Members have obtained a substantial benefit by

securing this Settlement.

The immediacy and certainty of a recovery is a factor for the Court to balance in determining whether the proposed settlement is fair, adequate and reasonable. Courts consistently have held that [t]he expense and possible duration of the litigation should be considered in evaluating the reasonableness of [a] settlement. *Officers for Justice v. Civil Service Com.*, (9th Cir 1982) 688 F.2d 615, 625. Therefore, the present settlement must also be balanced against the risk and expense of achieving a more favorable result at trial. *Young v. Katz* (5th Cir. 1971) 447 F.2d 431, 433.

a. Claim Valuation

A detailed analysis was included with Plaintiffs' Motion for Preliminary Approval. The analysis is summarized below.

(1) Wages

Plaintiffs contended they were not paid for pre and post-trip inspections of Defendant's trucks and trailers. Defendant contended that pay for those inspections was included in the mileage rate, and any argument to the contrary was based upon a breach of contract argument, requiring individualized inquiry. The Court found material facts in dispute and denied both Plaintiffs' and Defendant's cross motions for summary judgment on the subject. Plaintiffs' expert valued the inspection claim at $6 million, but that was based on the assumption that the jury would award the maximum available. (Carver Decl ¶16)

Plaintiffs' claimed that time spent awaiting shuttles to hotels, waiting for the room to be ready, and waiting for their return trip to begin was compensable. Plaintiffs argued that time spent beyond the mandated 10-hour rest time was compensable because drivers were not free to engage in regular free time activities, and were often hundreds of miles from home. Defendant noted that drivers were not obligated to stay in the company hotel or use hotel shuttles, and that some drivers had second cars, homes or family members to stay with at their layover location. Defendant argued that the shuttles were similar to shuttle time ruled non-compensable in *Overton v. Walt Disney Company*, (2006) 136 Cal. App. 4th 263. These claims were arguably valued at $2.7 million. However, these claims were discounted significantly due to Defendant's factual and legal

arguments that drivers were off duty, not working, during this time.

(2) Meal and Rest Breaks

Plaintiffs argued that Defendant did not provide enough time for drivers to take meal and rest periods. Defendant argued that drivers regularly arrived on time, and often arrived early by as much as an hour, precluding drivers from proving their case based on anecdotal evidence under *Morgan v. United Postal Service of Am.*, 380 F.3d 459, 466 (8th Cir. 2004) (anecdotal evidence not sufficient to defeat summary adjudication in a class action). FedEx Freight contended that continued certification of the Class for the meal and rest period violations was not appropriate. *Salazar v. Avis Budget Group*, 251 F.R.D. 529, 532 (S.D. Cal. 2008) (the make available standard precludes class treatment of meal and rest period claims.) Defendant's motion to decertify the class was denied without prejudice on May 5, 2011, potentially allowing Plaintiffs to meet their burden of proving class-wide liability through admissible evidence at trial. Plaintiffs engaged a survey expert and began the process of surveying the drivers. Plaintiffs' expert valued the claim on one violation per day, on 30% of the routes, at about $3.6 million. However, this recovery hinged on Plaintiffs' complete success at trial. (Carver Decl. ¶17)

(3) Labor Code Section 203 Penalties

At best, the Labor Code Section 203 claim was worth $1 million. The Section 203 claim was not given significant settlement value because it requires both a determination that wages are owed, and secondly, that the failure to pay them was willful on the part of the employer. The settlement provides for additional money to be paid to terminated employees. (Carver Decl. ¶17)

(4) Labor Code Section 226 Penalties

The Labor Code Section 226 claim could have been worth about $162,000. (Carver Decl. ¶17) However, the statute requires an employee to show an actual injury. *Price v. Starbucks Corp*. 192 Cal. App. 4th 1136, 1142.

(5) Unfair Competition

All the UCL cause of action added was a fourth year to the statute of limitations, which is included in the settlement calculations.

(6) Private Attorney General Act Claims

Under the Private Attorneys General Act (PAGA), Labor Code section 2699, penalties which would ordinarily be recoverable by the Labor and Workforce Development Agency (LWDA) may be recovered through a civil action brought by an aggrieved employee on behalf of other employees, for any violation of the Labor Code for which a penalty is not provided. Of the civil penalties of $100 per violation recovered, 75% go to the LWDA and 25% go to the employees.

Because Labor Code sections 203, 226 and 226.7 asserted in the Complaint, had their own penalty provisions, it was questionable whether any additional penalties were available. Therefore, the amount allocated here to PAGA penalties ($20,000.00) is reasonable. (Carver Decl., ¶17).

b. The Settlement Is Reasonable

Here, the circumstances and attendant risks favor settlement. Defendant agreed to make up to $5,250,000.00 available for claims by Class Members, attorneys' fees, costs and class representative service payments. Following the Notice and Claim submission process, it was determined that the Class Members worked 311,176 weeks in the Class Period. After converting the workweeks to points, and assessing the claims submitted, it was determined that 153,207 points were claimed or 49.22% of the available points. Even though almost half the Class Members submitted claims, the claims value was below the 65% minimum floor, which resulted in an increase in the claimed payout fund amount to the minimum floor amount. Thus, the Line Drivers submitting claims will share $2,098,279. That equates to a line driver who did not have over 50% of his runs with an overnight stay receiving about $16.97 for each week worked and a line driver who had over 50% of his runs with an overnight stay receiving about $18.67 per week. (Dang Decl., ¶11) Each Line Driver will receive about $5,918, if they worked the entire Class Period. This is a reasonable amount for disputed claims. (Carver Decl., ¶18).

The other subclass, the P&D/Combo Drivers, share in 2% of the payout fund. The points claimed by P&D/Combo Drivers result in the workweek value of $1.06 per workweek (Dang Decl., ¶11). Since P&D/Combo Drivers actually performed less than 2% of the routes, or 1/50th of the time spent by Line Drivers, this weekly amount is reasonable compared to the amounts to be

paid to Line Drivers. A P&D/Combo Driver employed the entire Class Period would receive about $336. As a result of the significant value to each Claimant, Class Counsel believes that the settlement is fair, reasonable and adequate as to the members of the class. (Carver Decl. ¶18)

3. Experience and Views of Counsel Supports Approval

Experienced counsel, operating at arm's length, has weighed the strengths of the case and examined all of the issues and risks of litigation and endorse the proposed settlement. The view of the attorneys actively conducting the litigation "is entitled to significant weight." *Ellis v. Naval Air Rework Facility* (N.D. Cal. 1980) 87 F.R.D. 15, 18, aff'd., 661 F.2d 939 (9th Cir. 1981); *Boyd v. Bechtel Corp., supra,* 485 F.Supp. at 616-17.

Plaintiffs' counsel is particularly experienced in wage and hour class actions, and supports this Settlement. Counsel is experienced and qualified to evaluate the Class claims and to evaluate settlement versus trial on a fully informed basis, and to evaluate the viability of defenses. Counsel believes this is a fair and reasonable settlement that is in the best interest of the Class, in light of the complexities of the case, the state of the law and uncertainties of class certification and litigation. The recovery for each Class Member is significant, given the risks inherent in litigation and the defenses asserted. Additionally, this case involved a particularly high level of risk, in that it attempted to recover money for time spent in a hotel room, beyond the level of government-mandated rest time, a novel area in the law. (Carver Decl. ¶19)

4. The Reaction Of The Class Members To The Proposed Settlement Supports Approval

Significantly, no Class Member has submitted any objection to the Settlement. Further, only five opt-out requests were received. Moreover, a total of 617 Class Members submitted Claim Forms, with a 49.22% participation rate. (Dang Decl. ¶8, 10) Accordingly, consideration of this factor weighs heavily in favor of the Settlement.

In determining the fairness and adequacy of a proposed settlement, the Court also should consider "the reaction of the class members to the proposed settlement." *Churchill Village, L.L.C. v. General Elec.* (9th Cir. 2004) 361 F.3d 566, 575; *Hanlon*, supra, 150 F.3d at 1026. "It

is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *National Rural Telecomm. Coop*., supra, 221 F.R.D. at 529.

The Class Members' reaction to the proposed Settlement supports this Court granting final approval.

VI. CONCLUSION.

For the reasons stated above, the Court should grant Final Approval to the settlement.

Dated: January 12, 2012

LAW OFFICES OF MICHAEL L. CARVER

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