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11
12 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
13 **FOR THE COUNTY OF CONTRA COSTA**

14
15 NATHAN COZZITORTO, RENA
COZZITORTO, AND MICHAEL
16 COZZITORTO SR., individually and d/b/a/
COZZ'S AUTO BODY & SERVICE INC.; on
17 behalf of themselves and all others similarly
situated;

18 Plaintiffs,

19 vs.

20 AMERICAN AUTOMOBILE ASSOCIATION
OF NORTHERN CALIFORNIA, NEVADA &
21 UTAH, a California nonprofit mutual benefit
corporation, f/k/a CALIFORNIA STATE
22 AUTOMOBILE ASSOCIATION; and DOES 1
through 50.

23 Defendants.

24 AND RELATED CROSS-ACTION.
25
26
27
28

Case No. C13-02656

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' UNOPPOSED MOTION
FOR PRELIMINARY APPROVAL OF
SETTLEMENT**

Hearing Date: November 29, 2018

Time: 9:00 a.m.

Judge: Hon. Edward G. Weil

Department: 39

**MEMORANDUM OF POINTS AND AUTHORITIES ISO PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF SETTLEMENT; Case No. C13-02656**

TABLE OF CONTENTS

1

2 I. INTRODUCTION 1

3 II. FACTUAL BACKGROUND..... 2

4 A. The Litigation of this Action..... 2

5 1. The Complaints and Cross-Complaints 2

6 2. Class Certification and Discovery 3

7 3. Class Notice and Class Membership..... 4

8 4. Summary Judgment and Trial..... 5

9 B. Overview of Settlement Negotiations..... 6

10 III. THE SETTLEMENT 6

11 A. Monetary Relief for Class Members..... 6

12 1. Cash Payment and Distribution 6

13 B. Anticipated Fee, Expense, and Incentive Awards 9

14 C. Release of Claims 9

15 IV. THE SETTLEMENT WARRANTS PRELIMINARY APPROVAL 9

16 A. The Settlement Was Reached Via Arm’s-Length Bargaining..... 10

17 B. The Settlement Was Negotiated After Substantial Investigation and Vigorous

18 Litigation by Counsel with Extensive Experience in Complex and Class Action

19 Litigation..... 11

20 C. The Strength of Plaintiffs’ Claims Weighs in Favor of Preliminary Approval 12

21 D. The Risk, Expense, Complexity, and Likely Duration of the Action Weigh in Favor of

22 Preliminarily Approving the Settlement 13

23 E. The Settlement Is in The Best Interests of Class Members 13

24 V. THE NOTICE PROGRAM SATISFIES CALIFORNIA LAW AND DUE PROCESS 14

25 VI. CONCLUSION..... 16

26 APPENDIX A..... 17

27

28

TABLE OF AUTHORITIES

Page(s)

Cases

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(2000) 85 Cal.App.4th 113512, 13

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(1991) 226 Cal.App.3d 15899

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(1996) 48 Cal.App.4th 17949, 10, 11

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(1933) 219 Cal. 32212

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(2014) 228 Cal.App.4th 8110, 12

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Other Authorities

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1 **I. INTRODUCTION**

2 Plaintiffs Nathan Cozzitorto, Rena Cozzitorto, Michael Cozzitorto, Sr., and Cozz’s Auto
3 Body & Service, Inc. (“Plaintiffs”) submit this memorandum in support of their unopposed
4 motion for preliminary approval of the proposed settlement set forth in the Settlement
5 Agreement and Release of Claims attached as Exhibit 1 to the Biehl declaration, submitted
6 herewith (“Settlement Agreement” or “Settlement”).¹

7 The proposed Settlement resolves claims for all classes that have been certified in this
8 action and whose claims remain through summary judgment: The Breach of Contract Class and
9 the 17200 Class. The Settlement also resolves cross-claims asserted against Plaintiffs.

10 The Settlement achieves cash payments for all eligible Class members — current and
11 former contract stations and current and former contract station owners and employees — and
12 mitigates the risk, length, and expense of trial and appeals. The Settlement provides for a non-
13 reversionary payment by Defendant American Automobile of Northern California, Nevada, and
14 Utah (“AAA NCNU”) of four million three hundred thousand dollars (\$4,300,000) cash. The
15 parties reached the Settlement as a result of extensive arm’s-length negotiations with the
16 assistance of an independent mediator. As detailed herein and in the Declaration of Stephanie D.
17 Biehl, the Settlement is fair, reasonable, and adequate, and warrants preliminary approval.

18 Accordingly, Plaintiffs, on behalf of the Parties, respectfully request that the Court enter
19 an order in substantially the same form as the [Proposed] Order Preliminarily Approving
20 Settlement and Providing for Notice attached as Exhibit 2 to Biehl Declaration, which: (1)
21 preliminarily approves the proposed Settlement as fair, reasonable, and adequate; (2) directs that
22 notice be provided to Class Members through the methods discussed herein; and (3) schedules a
23 hearing at which the Court will consider final approval of the Settlement, the application for an
24 award of attorneys’ fees and expenses, and entry of Judgment (the “Final Approval Hearing”).

25 _____
26
27 ¹ The Stipulation is attached as Exhibit 1 to the Declaration of Stephanie D. Biehl in
28 Support of Plaintiffs’ Unopposed Motion for Preliminary Approval of Proposed Settlement
 (“Biehl Decl.”), filed concurrently herewith. Except as otherwise noted, all capitalized terms
 herein have the same meaning as defined in the Stipulation.

1 **II. FACTUAL BACKGROUND**

2 **A. The Litigation of this Action**

3 Through almost five years of litigation, the Parties have investigated, researched, briefed,
4 and argued nearly every motion possible related to facts and issues in this case. As a result, the
5 Parties have a comprehensive understanding of the strengths and risks of their respective claims
6 and defenses. In general, the case concerns allegations by Plaintiffs that AAA NCNU
7 misclassified individuals who perform its emergency road services and that AAA NCNU
8 breached the contracts it has with the contract stations that provide AAA emergency road
9 service. An overview of pertinent case events is below.

10 1. The Complaints and Cross-Complaints

11 On December 19, 2013, Plaintiffs filed their initial Complaint, asserting class action
12 claims against AAA NCNU on behalf of a putative class of emergency road service providers
13 and asserted causes of action for: 1) violation of California Labor Code section 2802; and 2)
14 violation of California Business and Professions Code section 17200 *et seq.* Biehl Decl. ¶ 3.

15 With AAA NCNU’s consent, on February 13, 2014, Plaintiffs filed the First Amended
16 Complaint (“FAC”) on behalf of two separate putative classes: 1) an Independent Contractor
17 Class and 2) a Breach of Contract Class. Biehl Decl. ¶ 4. The FAC alleged the same causes of
18 action as the original complaint and added breach of contract claims and a claim for breach of
19 the implied covenant of good faith and fair dealing. *Id.* AAA NCNU demurred to the FAC,
20 which was overruled in part and sustained in part. *Id.*

21 On May 9, 2014, Plaintiffs filed their operative Second Amended Complaint (“SAC”)
22 against AAA NCNU on behalf of two separate putative classes: 1) the Independent Contractor
23 Class, defined as “All persons who currently perform, or have performed, emergency road
24 service for AAA NCNU in the State of California and who were misclassified as independent
25 contractors by AAA NCNU”; and 2) the Breach of Contract Class, defined as “All AAA NCNU
26 Contract Stations that were signatories to the Emergency Road Service Contract Station
27 Agreement and that performed emergency road services for AAA NCNU in the State of
28 California under the terms of the Emergency Road Service Contract Station Agreement. Biehl

1 Decl. ¶ 5. The SAC alleges causes of action for: 1) violation of California Labor Code section
2 2802, on behalf of Nathan Cozzitorto², Rena Cozzitorto, Michael Cozzitorto, Sr. and the
3 Independent Contractor Class; 2) violation of California Business and Professions Code section
4 17200 et seq., on behalf of Plaintiffs, the Independent Contractor Class and the putative Breach
5 of Contract Class; and 3) breach of contract, on behalf of Cozz’s Auto Body & Service Inc. and
6 the Breach of Contract Class. *Id.* ¶ 6. On May 9, 2014, AAA NCNU answered the SAC,
7 denying all allegations and asserting myriad affirmative defenses. *Id.* ¶ 7.

8 Also on May 19, 2014, AAA NCNU filed a cross-complaint against Plaintiff Cozz’s
9 Auto Body & Service, Inc. (“Cozz’s”) alleging declaratory relief and breach of contract. On July
10 21, 2014, AAA NCNU amended its Cross Complaint. Biehl Decl. ¶ 7. Plaintiffs answered on
11 September 24, 2014. Biehl Decl. ¶ 8. On December 1, 2015, AAA NCNU filed its operative
12 Second Amended Answer and its operative Second Amended Cross Complaint. Biehl Decl. ¶ 9.
13 The Second Amended Cross Complaint alleges: 1) declaratory relief against Plaintiffs; 2)
14 contractual indemnity against Plaintiffs; 3) equitable indemnity against Cozz’s Auto Body &
15 Service Inc.; 4) declaratory relief under Labor Code section 2860 against Nathan Cozzitorto,
16 Rena Cozzitorto and Michael Cozzitorto, Sr.; 5) declaratory relief under Labor Code section
17 2861 against Nathan Cozzitorto, Rena Cozzitorto and Michael Cozzitorto, Sr.; 6) conversion
18 against Cozz’s Auto Body & Service Inc., Rena Cozzitorto and Michael Cozzitorto, Sr.; and 7)
19 violation of Business and Professions Code section 17200 et seq. against Plaintiffs. *Id.* Plaintiffs
20 answered the Second Amended Cross Complaint on December 20, 2015. Biehl Decl. ¶ 10.

21 2. Class Certification and Discovery

22 In early 2016, the parties began the extensive class certification process. On March 4,
23 2016, Plaintiffs filed their motion for class certification. Biehl Decl. ¶ 11. After full briefing, the
24 Court held the first of two class certification hearings, which lasted the majority of the day. The
25 Court then ordered further briefing on class certification, and the Parties returned for the second

26
27
28 ² Plaintiffs subsequently dismissed Nathan Cozzitorto’s Lab. Code § 2802 claim.

1 class certification hearing on September 9, 2016. On November 23, 2016, the Court issued its
2 order granting Plaintiffs' class certification motion in full and certified the following classes:

3 The 17200 Class: All persons from December 13, 2009 up to and through the time
4 of judgment (the "Class Period") who performed emergency road service (as a
5 driver, dispatcher, fleet mechanic, administrator, or manager/supervisor) for AAA
6 NCNU in the State of California for at least an average of 30 hours per week or
7 more but who were not classified as employees by AAA NCNU.;

8 The Owner Subclass: All persons from December 13, 2009 up to and through the
9 time of judgment (the "Class Period") who own or owned a contract station which
10 contracted with AAA NCNU to provide emergency road services, and who
11 performed emergency road service (as a driver, dispatcher, fleet mechanic,
12 administrator, or manager/supervisor) for AAA NCNU in the State of California for
13 at least an average of 30 hours per week or more but who were not classified as
14 employees by AAA NCNU.; and

15 The Breach of Contract Class: All contract stations in the State of California which
16 contracted with AAA NCNU to provide emergency road service from December
17 13, 2009 up to and through the time of judgment.

18 Biehl Decl. ¶ 12.

19 The parties engaged in substantial discovery both before and after class certification.
20 Plaintiffs and Class Counsel (i) reviewed over 135,000 documents; (ii) served and responded to
21 1,915 written discovery requests; (iii) prepared for, conducted, and defended over 45 party and
22 non-party depositions; and (vi) retained and consulted with organizational control, employment,
23 benefits, and damages experts regarding the information obtained in discovery. Biehl Decl. ¶ 13.

24 3. Class Notice and Class Membership

25 Between January 2017 and November 2017, Plaintiffs created a comprehensive notice
26 plan to inform Class Members that their respective classes had been certified and that they had a
27 right to opt-out of the class. Biehl Decl. ¶ 14. Also during this time, the Court held several
28 hearings regarding the notice plan, where the Parties submitted briefs and argument regarding an
appropriate notice plan. *Id.* Part of the notice plan was obtaining contact information for as
many Class Members as possible. *Id.* Resultantly, the Court ordered that that contract stations
were required to produce contact information for their employees (potential 17200 Class
Members), and some Contract Stations and their Owners were thereafter excluded from the Class
Members for failing to do so and for failing to respond to the Court's related order to show

1 cause. Biehl Decl. ¶ 14. On November 20, 2017, the class notices were published and
2 distributed to pursuant to the notice plan. The deadline to opt-out was December 20, 2017, and
3 some Class Members excluded themselves. Biehl Decl. ¶ 15.

4 4. Summary Judgment and Trial

5 On February 13, 2018, the Court entered an Order concerning the dispositive motions
6 filed by the Parties. Biehl Decl. ¶ 16. Regarding Plaintiffs' motion for summary judgment as to
7 AAA NCNU's Second Amended Cross Complaint, the Court granted summary adjudication of
8 AAA NCNU's cross-claims for contractual indemnity and declaratory relief regarding
9 contractual indemnity, and denied the motion in all other respects. *Id.*

10 The Court denied AAA NCNU's motion for summary adjudication as to its Second
11 Amended Cross Complaint, and Plaintiffs' motion for summary adjudication as to AAA
12 NCNU's Second Amended Answer. Biehl Decl. ¶ 17. The Court granted AAA NCNU's motion
13 for summary adjudication as to one of three breaches of contract alleged and the Breach of
14 Contract Class' claim for violation of California Business and Professions Code § 17200 et seq.,
15 and denied the motion in all other respects. Biehl Decl. ¶ 18. Finally, the Court granted AAA
16 NCNU's motion for summary adjudication of the Owner Subclass's Labor Code § 2802 claim
17 (rendering the Owner Subclass moot), and the Court otherwise denied the motion. Biehl Decl. ¶
18 19.

19 Following summary judgment, some Breach of Contract Class Members and owners
20 (members of the 17200 Class) were excluded for failure to provide the required employee
21 contact information, some contract stations were excluded from the Breach of Contract Class
22 because their initial contracts with AAA NCNU (arising after the filing of this action) contained
23 arbitration provisions, and some Class Members were excluded from their respective classes
24 because they settled and released their claims in this case. Biehl Decl. ¶ 20.

25 On August 1, 2018, the Court entered an Order adopting the Parties' Joint Stipulation to
26 Modify Class Definitions, modifying the Breach of Contract Class definition as follows:
27
28

1 All contract stations in the State of California which contracted with AAA
2 NCNU to provide emergency road service from January 1, 2011 up to and
through November 20, 2017.

3 Biehl Decl. ¶ 21. The Court further modified the definition of the 17200 Class as follows:

4 All persons from December 13, 2009 up to and through November 20, 2017 (the
5 “Class Period”) who performed emergency road service (as a driver, dispatcher,
6 fleet mechanic, administrator or manager/supervisor) for AAA NCNU in the State
of California for at least an average of 30 hours per week or more but who were
not classified as employees by AAA NCNU.

7 Biehl Decl. ¶ 21.

8 **B. Overview of Settlement Negotiations**

9 Prior to the class certification hearing, the Parties mediated with Mark S. Rudy, a
10 renowned employment attorney and mediator. Biehl Decl. ¶ 22. Before the July 14, 2016
11 mediation session with Mr. Rudy, Plaintiffs sent a detailed settlement demand to AAA NCNU,
12 and the Parties prepared extensive mediation briefs. *Id.* After nearly a full day with Mr. Rudy
13 and subsequent settlement communications, the Parties were unable to resolve the case before
14 class certification and summary judgment orders were issued. *Id.*

15 On October 3, 2018, the Parties mediated before the Hon. Richard Kramer (Ret.),
16 formerly the complex division judge in the Superior Court for the State of California, County of
17 San Francisco, and who has substantial experience presiding over complex class actions. Biehl
18 Decl. ¶ 23. Prior to the mediation, AAA NCNU produced additional documentary evidence
19 relevant to Plaintiffs’ remaining claims. *Id.* During the 13-hour mediation, the Parties reached
20 the basic terms of a settlement, negotiated the terms of a binding Memorandum of
21 Understanding, and agreed to prepare the formal Settlement Agreement (Biehl Decl., Ex. 1). *Id.*

22 **III. THE SETTLEMENT**

23 **A. Monetary Relief for Class Members**

24 1. Cash Payment and Distribution

25 The Settlement requires AAA NCNU to pay four million three hundred thousand dollars
26 (\$4,300,000) cash (“Gross Settlement Amount”). Biehl Decl. ¶ Ex. 1 at p. 9. Part of the Gross
27 Settlement Amount will be used to pay the settlement administration costs and any fees and
28

1 expenses approved by the Court. Biehl Decl. ¶ 27, Ex. 1 at p. 11. The remainder (“Net
2 Settlement Amount”) will be distributed to Breach of Contract Class Members and 17200 Class
3 Members. Biehl Decl. ¶ 27, Ex. 1 at p. 11.

4 Distribution to the Breach of Contract Class Members will follow direct mail and email
5 notice to the remaining Class Members. Biehl Decl. ¶ 28, Ex. 1 at p. 12. Each Breach of
6 Contract Class Member’s Settlement Share will be its pro-rata amount of damage events.
7 Specifically, for each Class Member, AAA NCNU will provide the total number of 1T and On-
8 the-Go events (the two remaining damage claims for the Breach of Contract Class) during the
9 Class Period and the total number of 1T events and On-the-Go events during the Class Period for
10 all Breach of Contract Class Members eligible to participate in the settlement. The amount in
11 dollars of each Class Member’s recovery will be the fraction of each Class Member’s total
12 events divided by the entire Class’ total events, then multiplied by the Net Settlement amount for
13 the Breach of Contract Class. Biehl Decl. ¶ 28, Ex. 1 at 12. No claims process is necessary for
14 the Breach of Contract Class because the parties have identified the Class Members and will
15 know the amounts to be distributed to the Class Members before final approval. Biehl Decl.
16 ¶ 30. Each Class Member will receive notice of the specific number of 1T and On-the-Go events
17 that will be used to calculate its distribution and will be advised that they can dispute that
18 number with specific documentation by a certain deadline. *Id.* Up to one million three hundred
19 thousand dollars (\$1,300,000) will be allocated to the Breach of Contract Class. Biehl Decl. ¶ 31
20 Ex. 1 at pp. 9-10. After 180 days, an uncashed check will escheat to the State of California. *Id.*
21 at p. 13.

22 The 17200 Class distribution will follow direct mail and e-mail notice to Class Members
23 for whom the Parties have contact information as well as publication and online notice to the
24 public. Biehl Decl. ¶ 33, Ex. 1 at pp. 12-13. Each 17200 Class Member’s Settlement Share will
25 be calculated based on their pro-rata portion of the Net Settlement Amount, which will be
26 determined by the number of Weeks Worked by the individual Class Member. Biehl Decl. ¶ 33,
27 Ex. 1 at p. 13. For purposes of the Settlement, the Parties presume that each Class Member
28 worked 20 weeks during the Class Period. If the Class Member worked more than 20 weeks, he

1 or she will have to further aver to that under penalty of perjury and provide additional
2 information, including the Contract Station information, dates of employment, positions held,
3 and number of Weeks Worked to calculate his or her pro-rata share. Biehl Decl. ¶ 34, Ex. 1 at
4 pp. 12-13. To receive their distribution, 17200 Class Members will complete a Claim Form
5 (Biehl Decl., Ex. 1 at Ex. D) and return it by mail or will complete the Claim Form online at the
6 Class Action Website. Biehl Decl. ¶ 35, Ex. 1 at p. 13; *Id.*, Ex. D. The Claim Form will require
7 the Class Member to aver under penalty of perjury that he or she is a Class Member (*i.e.*, worked
8 an average of 30 hours per week providing AAA emergency road service but was not classified
9 as an employee of AAA NCNU), and to the number of Weeks Worked and the additional
10 information above if the Class Member worked more than 20 weeks. Biehl Decl. ¶ 35, Ex. 1 at
11 p. 13; *Id.*, Ex. D.

12 Because the Parties do not know the precise identification of Class Members nor the
13 Weeks Worked, this claims process is necessary. For Class Members who have been given
14 direct notice (individuals for whom their contract stations previously provided their contact
15 information to the Settlement Administrator) but do not submit a claim, their Settlement Shares
16 will be distributed to a *cy pres* award. Biehl Decl. ¶ 36. The Parties have agreed that the
17 recipients of the *cy pres* award will be the following non-profit organizations: Public Justice and
18 California Rural Legal Assistance. *Id.* The Parties have agreed to distribute the *cy pres* award
19 evenly between the two organizations, subject to Court approval. *Id.* The Parties agreed to a *cy*
20 *pres* to avoid a windfall redistribution to Class Members who will already receive their
21 respective portions of the Settlement based on Weeks Worked. *Id.* The Parties will also likely
22 be unable to locate each Class Member previously identified by the Contract Stations, as many
23 Class Members do not work for towing companies or remain in the towing industry for very
24 long. *Id.* The Parties further expect that despite best efforts, not all 17200 Class Members will
25 receive direct notice, and some Class Members may not wish to submit a Claim. *Id.*

26 Up to three million dollars (\$3,000,000) will be allocated to the 17200 Class. Biehl Decl.
27 ¶ 37, Ex. 1 at p. 10. The Settlement Administrator will follow the procedures set by the State of
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1 California Department of Industrial Relations with respect to any uncashed checks distributed to
2 17200 Class claimants. *Id.* at p. 10.

3 **B. Anticipated Fee, Expense, and Incentive Awards**

4 Class Counsel intends to apply for an award of attorneys' fees of \$750,000
5 (approximately 17% of the total Gross Settlement Amount) and up to \$530,000 in expenses.
6 Biehl Decl. ¶ 38. Class Counsel also intend to seek approval of incentive awards for the Class
7 Representatives of \$7,500 per Plaintiff and to be paid out of the Gross Settlement Amount. *Id.*

8 **C. Release of Claims**

9 The Settlement includes mutual releases of the Parties for all claims and cross-claims and
10 includes releases from Breach of Contract Class Members and 17200 Class Members against
11 AAA NCNU. Biehl Decl. ¶ 39. The releases encompass all claims or causes of action that have
12 been pled or could have been pled in any version of the Complaint based on facts or claims
13 alleged therein. Biehl Decl. Ex. 1 at pp. 19-23.

14 **IV. THE SETTLEMENT WARRANTS PRELIMINARY APPROVAL**

15 California has a well-established and strong public policy favoring compromises of
16 complex, class action litigation. *See Hamilton v. Oakland Sch. Dist.* (1933) 219 Cal. 322, 329
17 (“It is the policy of the law to discourage litigation and to favor compromises”); *Bell v. Am. Title*
18 *Ins. Co.* (1991) 226 Cal.App.3d 1589, 1607.

19 In determining the fairness of a proposed settlement for preliminary approval, the Court
20 “should consider relevant factors, such as the strength of plaintiffs’ case, the risk, expense,
21 complexity and likely duration of further litigation, the risk of maintaining class action status
22 through trial, the amount offered in settlement, the extent of discovery completed and the stage
23 of the proceedings, the experience and views of counsel, the presence of a governmental
24 participant, and the reaction ... to the proposed settlement.” *Dunk v. Ford Motor Co.* (1996) 48
25 Cal.App.4th 1794, 1801; *see also Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th
26 1110, 1117–18. This list “is not exhaustive and should be tailored to each case.” *Dunk*, 48
27 Cal.App.4th at 1801. A settlement is entitled to an “initial presumption” of fairness under *Dunk*
28 where (as here) the Court has “basic information about the nature and magnitude of the claims

1 in question and the basis for concluding that the consideration being paid for the release of those
2 claims represents a reasonable compromise.” *Luckey v. Superior Court* (2014) 228 Cal.App.4th
3 81, 94 n.13.

4 At the preliminary approval stage, the sole issue before the court is whether the proposed
5 settlement is within a range of what might be found fair, reasonable, and adequate, so that notice
6 of the proposed settlement can be given to class members and a date set for a final hearing to
7 consider final settlement approval. *See* Manual for Complex Litigation §21.632; §21.633; §13;
8 §14 (4th ed. 2016). Thus, preliminary approval does not require the court to answer the ultimate
9 question of whether a proposed settlement is fair, reasonable, and adequate. *Dunk*, 48
10 Cal.App.4th at 1801. Rather, this determination is made only after notice of the settlement has
11 been given to class members and after they have been given the opportunity to comment on the
12 settlement. *See* Manual for Complex Litigation §§21.633, 21.634.

13 As detailed below, consideration of the *Dunk* factors warrants preliminary approval of the
14 Settlement. Notably, under *Dunk*, the Settlement is entitled to a “presumption of fairness”
15 because: (i) “the settlement [was] reached through arm’s-length bargaining”; (ii) “investigation
16 and discovery are sufficient to allow counsel and the court to act intelligently”; and (iii) “counsel
17 is experienced in similar litigation” and thus, their view that the Settlement is in the best interests
18 of Class Members is permits significant deference. *See* 48 Cal.App.4th at 1802; *see also Zepeda*
19 *v. PayPal, Inc.* (N.D. Cal. Mar. 24, 2017) 2017 WL 1113293, at *16 (where counsel “have
20 significant experience ... handling complex litigation, the Court accords weight to their
21 opinion”).

22 **A. The Settlement Was Reached Via Arm’s-Length Bargaining**

23 The Settlement is the product of difficult and vigorous arm’s-length negotiations between
24 the parties, who were represented by highly-experienced attorneys. Biehl Decl. ¶ 40. The
25 ultimate resolution of the case was based on two separate mediations with experienced mediators
26 after extensive settlement communications regarding each. *See* Biehl Decl. ¶¶ 22-23. Further,
27 Class Counsel has significant experience in complex and class action litigation and has
28 negotiated numerous settlements of complex cases and class actions. Biehl Decl. ¶ 41, Exs. 3-4.

1 Moreover, the most recent negotiations were conducted with the assistance of an independent
2 mediator, the Hon. Richard Kramer. *See* Biehl Decl. ¶ 23. In *Dunk*, the Court of Appeal noted
3 in support of its conclusion that a settlement was fair and reasonable, that “[t]he independent
4 mediator, a retired superior court judge and appellate justice with substantial experience and
5 respect in the legal community,” had recommended the settlement. Here, the Settlement has a
6 similar stamp-of-approval, as Judge Kramer was diligently involved in the mediation process and
7 was a factor in the parties reaching the Settlement after a 13-hour mediation session. *See id.*

8 **B. The Settlement Was Negotiated After Substantial Investigation and Vigorous**
9 **Litigation by Counsel with Extensive Experience in Complex and Class**
10 **Action Litigation**

11 Here, Class Counsel has concluded that the Settlement is well-advised and in the best
12 interests of Class Members. Biehl Decl. ¶ 42. In reaching this determination, Class Counsel
13 engaged in substantial investigation, analysis, and prosecution of the claims and defenses
14 asserted in the Action, including: (i) analyzing and drafting complaints against AAA NCNU; (ii)
15 engaging in extensive motion practice (briefing over 40 motions), including successfully
16 defeating AAA NCNU’s demurrers, class certification challenges, and motions for summary
17 judgment; (iii) reviewing over 135,000 documents; (iv) serving and responding to 1,915 written
18 discovery requests; (v) conducting and defending over 45 party and non-party depositions; (vi)
19 retaining and consulting with organizational control, employment, employee benefits, and
20 damages experts; and (vii) participating in comprehensive, arm’s-length negotiations with
21 Defendants and their representatives. *Id.*

22 Indeed, as documented in the Settlement, it was only reached after years of extensive
23 litigation, two separate mediations, comprehensive settlement communications following
24 Plaintiffs’ review of the entire documentary record in the Action and depositions of key
25 witnesses and various Class Members. Biehl Decl. ¶ 43. Thus, in recommending that the Court
26 preliminarily approve the Settlement, Class Counsel has undertaken substantial efforts to ensure
27 that they are fully advised of the claims and defenses in the case. *Id.*

28 Further, the Settlement negotiations were conducted by highly qualified counsel
experienced in complex and class action litigation. Biehl Decl. ¶¶ 40-44. Based on their

1 litigation experience and nearly five years of factual and legal research and evaluation garnered
2 through relentless prosecution (and AAA NCNU's vigorous defense), Class Counsel submit that
3 the Settlement provides benefit to Class Members. *See* Biehl Decl. ¶¶ 41-46. *Nat'l Rural*
4 *Telecomm'ns Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 528 (“‘Great weight’ is
5 accorded to the recommendation of counsel, who are most closely acquainted with the facts
6 underlying litigation.”) (quoting *In re Painwebber Ltd. P’ships Litig.*, 171 F.R.D. 104, 125
7 (S.D.N.Y. 1997); *7-Eleven*, 85 Cal.App.4th at 1152. These factors favor preliminary approval of
8 the Settlement.

9 **C. The Strength of Plaintiffs’ Claims Weighs in Favor of Preliminary Approval**

10 The law is well-settled that the merits of the underlying claims “are not a basis for
11 upsetting the settlement of a class action.” *7-Eleven*, 85 Cal.App.4th at 1150. As such, “the
12 settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits.”
13 *Id.* at 1145. Here, Plaintiffs’ claims have merit and also pose risk for AAA NCNU. Biehl Decl.
14 ¶¶ 46-47. During the litigation, AAA NCNU vigorously defended the claims with the assistance
15 of experienced employment and class action counsel. Biehl Decl. ¶ 44. While Plaintiffs
16 continue to believe their claims have merit, Plaintiffs also recognize that further litigation, trial,
17 and guaranteed appeal of the complex issues presented would be accompanied by great expense,
18 delay, and uncertainty for the Parties and Class Members. Biehl Decl. ¶ 45. Moreover, while
19 Plaintiffs would have preferred a different result, they and Class Counsel are not blinded to the
20 fact that this case now has substantially less value than it did when originally brought. *Id.* This
21 is principally due to the loss of Plaintiffs’ largest monetary claim at summary judgment and to
22 AAA NCNU’s settling with a number of Class Members before the Classes were certified. *Id.*
23 Having presided over this action and given the Court’s familiarity with Plaintiffs’ counsel and
24 their efforts in this litigation, the Court may properly determine “that the consideration being
25 received for the release of the class members’ claims is reasonable in light of the strengths and
26 weaknesses of the claims and the risks of the particular litigation.” *See Luckey*, 228 Cal.App.4th
27 at 94, n.13 (citation omitted).

1 **D. The Risk, Expense, Complexity, and Likely Duration of the Action Weigh in**
2 **Favor of Preliminarily Approving the Settlement**

3 The proposed Settlement provides for the payment of \$4,300,000 million by AAA
4 NCNU, which will be distributed to members of the Breach of Contract Class and the 17200
5 Class. *See* Biehl Decl. Ex. 1. Without the settlement achieved here, continued litigation and trial
6 would involve complex legal and factual issues and would extend over months, if not years, as
7 each party would certainly appeal the judgment. Biehl Decl. ¶ 46. Even if Plaintiffs were
8 successful and prevailed at trial, complex legal issues regarding preservation of the class (to
9 which a motion for decertification was pending before settlement), the legal test for employment
10 (which is currently in flux), and the myriad issues that could be appealed would sit idly awaiting
11 determination and would further delay final resolution of this action. *Id.* Likewise, this would
12 cause all parties to incur additional expense, time, and uncertainty. *Id.* In light of the complexity
13 of the legal issues and the duration of the trial and appellate process, there was also a risk that the
14 action would result in judgment for AAA NCNU, and Class Members might never have obtained
15 *any* recovery. *Id.* The Settlement eliminates these and other risks of continued litigation. Thus,
16 this factor supports preliminary approval of the settlement. *See, e.g., Frame*, 2002 WL
17 34520817 at *11 (approving global settlement and attorneys’ fee award to counsel whose
18 “combined efforts achieved remarkable results despite the risks involved” where counsel
19 “coordinated the information gathering by the many investors, ... and catalyzed the dialogue that
20 ultimately led to this settlement”).

21 **E. The Settlement Is in The Best Interests of Class Members**

22 A court considering an application for settlement approval should not decide the merits of
23 the underlying case when approving a settlement for the parties. *See 7-Eleven Owners*, 85
24 Cal.App.4th at 1145. Instead, the court should review the settlement terms to confirm that the
25 presumption of fairness cannot be overcome as to the specific settlement at hand. *Id.* Here, the
26 Settlement provides for a \$4,300,000 cash payment to Class Members. Biehl Decl. Ex. 1 at p. 9.
27 This represents reasonable recovery for the Classes. Indeed, as documented in the Settlement
28 and Biehl Declaration, it was only achieved after Plaintiffs spent years investigating and

1 analyzing the complex claims, poured over nearly 2,000 written discovery requests and over
2 135,000 documents, took and defend over 45 depositions, successfully briefed over 40 motions
3 (including class certification that required multiple hearings and rounds of briefing and five
4 summary judgment motions), and engaged in two, separate mediations. Biehl Decl. ¶ 42. In
5 sum, Class Counsel has undertaken substantial efforts to ensure the Settlement is in the best
6 interests of both Breach of Contract Class Members and 17200 Class Members. Biehl Decl. ¶
7 42.

8 The Breach of Contract Class settlement is nearly equal to Plaintiffs' calculation of actual
9 damages for all Class Members, accounting for AAA NCNU's offset defense, and is greater than
10 the amount AAA NCNU has consistently contended that the Breach of Contract Class would be
11 entitled to. Biehl Decl. ¶ 47. Further, while the exact amount of each 17200 Class Member's
12 Settlement Share will differ, the payments to the Class Members is consistent with Plaintiffs'
13 damages expert's methodology for calculating the value of benefits to which Class Members
14 may have been entitled to (based on Weeks Worked). *Id.* The 17200 Class allocation (up to
15 \$3,000,000) also achieves cash compensation for claims that could have resulted in no recovery
16 at all for Class Members because at the time of the Parties' mediation, Plaintiffs were
17 imminently facing a pending motion for decertification and an anticipated motion that could
18 mooted Plaintiffs' 17200 claims for value of benefits as legally unviable. Biehl Decl. ¶ 49; *see*
19 *also id.*, Ex. 1

20 **V. THE NOTICE PROGRAM SATISFIES CALIFORNIA LAW AND DUE**
21 **PROCESS**

22 California Rule of Court 3.769 provides that “notice of the final approval hearing must
23 be given ... in the manner specified by the court.” Cal. R. Ct. 3.769(f); *see also Litwin v.*
24 *iRenew Bio Energy Solutions, LLC* (2014) 226 Cal.App.4th 877, 883. “The notice must contain
25 an explanation of the proposed settlement and procedures ... to [file] written objections to it and
26 [] to appear at the settlement hearing and state any objections to the proposed settlement.” *Id.*
27 The proposed Notices attached as Exhibits A-C to the Settlement Agreement (Biehl Decl., Ex. 1)
28 includes all the information required by Rule 3.769 and that is otherwise necessary for Class

1 Members to make an informed evaluation of the proposed Settlement, including: (i) an
2 explanation of the nature of the action and the claims asserted; (ii) the Settlement consideration,
3 including the amount of the monetary payment and the scope of the releases that the Parties will
4 obtain; (iii) the Parties' reasons for proposing the Settlement; (iv) that Class Counsel intends to
5 apply for an award of attorneys' fees in an amount not to exceed 20% of the Gross Settlement
6 Amount, for expenses not to exceed \$ 530,000, and for Incentive Awards for the Class
7 Representatives not to exceed \$7,500; (v) how to appear at the Final Approval Hearing and the
8 procedure for objecting to the Settlement; (vi) how 17200 Class Members can make a claim for
9 their share of the Settlement; (vii) the deadlines for Settlement-related events; and (viii) the
10 binding effect that a final judgment approving the Settlement will have on Class members.

11 The elements of the proposed Notices comport with applicable law and due process. See Cal.
12 Rules of Ct., rule 3.769(f). Additionally, the Notices convey that it is unnecessary for objectors
13 to appear at the settlement hearing in order to have their written objections considered. See
14 Litwin, 226 Cal.App.4th at 883-884. Biehl Decl., Exs. A-C. Further, the Notices indicate that
15 the application for attorneys' fees will be presented for approval at the Final Approval Hearing,
16 and although the exact maximum figures appear in the Notices, Class Counsel intends to file
17 their motion attorneys' fees/expenses and Incentive Awards before Class Members are required
18 to file objections to the proposed settlement. Biehl Decl., Exs. A-C.

19 The Parties also believe that the proposed method of providing Notice is adequate. The
20 Settlement Notices will be distributed directly to Breach of Contract Class Members and 17200
21 Class Members via mail and e-mail to Class Members for which the parties have contact
22 information. Biehl Decl. ¶ 49; *see also id.*, Ex. 1. The Notices will be published in newspapers,
23 online at the Class Action website, and can be e-mailed to members of two trade organizations:
24 the California Tow Truck Association and the United Coalition for Motor Club Safety. Biehl
25 Decl. ¶ 49. These methods of notice parallel those approved by the Hon. Barry P. Goode at the
26 class certification stage. *Id.* Finally, the Parties do not expect the settlement administration costs
27 (including notice distribution, claims handling, tax and escheatment services, and all related
28

1 labor) to exceed \$158,000, which is a conservative estimate at this time. Biehl Decl. ¶ __, Ex. 1
2 at p. 11.

3 **VI. CONCLUSION**

4 Plaintiffs respectfully request that the Court enter an order in substantially the same form
5 as the [Proposed] Order Preliminarily Approving Settlement and Providing for Notice (Exhibit 2
6 to Biehl Declaration), which: (1) preliminarily approves the proposed Settlement as fair,
7 reasonable, and adequate; (2) directs that notice be provided to Class Members through various
8 methods; and (3) schedules the Final Approval Hearing. Relatedly, plaintiffs request that the
9 court establish the schedule appended to this memorandum as Appendix A.

10
11 Dated: December 7, 2018

Respectfully submitted,

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Class Counsel

APPENDIX A³

Date by which Notice shall be published, posted, or otherwise provided to current Class Members (“Notice Date”).	January 21, 2019 [35 days after the entry of the [Proposed] Order Preliminary Approving Class Action Settlement and Providing for Notice]
Date by Which Class Counsel shall file Motion for Attorneys’ Fees and Expenses and Request for Incentive Awards to Plaintiffs.	January 21, 2019 [35 days after the entry of the [Proposed] Order Preliminary Approving Class Action Settlement and Providing for Notice]
Date by which Class Members must file with the Court and serve on the Settlement Administrator any objection to the proposed settlement, including Class Counsel’s request for attorneys’ fees, expenses, and incentive awards.	February 20, 2019 [30 days after the Notice Date]
Date by which 17200 Class Members must submit Claim Forms to the Settlement Administrator and which Breach of Contract Class Members must submit documentation if they contest the total number of 1T and On-the-Go events depicted in their Notices.	March 7, 2019 [45 days after the Notice Date]
Date by which the Motion for Final Approval of Settlement must be filed.	April 17, 2018 [16 court days prior to the Final Approval Hearing]
Date by which a notice of appearance by any Class Member who intends to appear at the Final Approval Hearing and object or comment on the proposed Settlement or application for an award of attorneys’ fees and expenses, or incentive awards shall be filed.	April 25, 2018 [14 days prior to the Final Approval Hearing]
Date by which reply papers shall be filed in support of the motion for final approval and any fees and expenses application and/or concerning any written objection or notice of appearance filed by a Class Member.	May 2, 2019 [7 days prior to the Final Approval Hearing]
Date of Final Approval Hearing.	May 9, 2019

³ This schedule anticipates that the Court will enter the Preliminary Approval Order by the Monday following the hearing on this motion (December 17) but provides the calculation of days for each deadline should the Order not be entered until a later date.