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8 As an individual and on behalf of all others similarly situated

9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF SAN BERNARDINO**

12 LEON JOHNSON, as an individual on
behalf of himself and on behalf of all others
13 similarly situated,

14 Plaintiff,

15 v.

16 CARVANA, LLC, an Arizona limited
17 liability company; CARVANA
LOGISTICS, LLC, a Delaware limited
18 liability company; and DOES 1-100,
inclusive,

19
20 Defendants.

Case No.: CIVSB2304225

Assigned for All Purposes to:
Hon. Jessica Morgan
Dept. S-26

**MEMORANDUM OF POINTS &
AUTHORITIES IN SUPPORT OF MOTION
FOR FINAL APPROVAL OF CLASS
ACTION SETTLEMENT AND REQUEST
FOR ATTORNEY'S FEES AND COSTS**

[Filed concurrently with Notice of Motion and
Motion; Declarations of Brandon Brouillette and
Taylor Mitzner; [Proposed] Order]

Date: July 24, 2024
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Dept.: S-26

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1 **I. INTRODUCTION**

2 Plaintiff and Class Representative Leon Johnson seeks final approval of a non-reversionary
3 class action settlement resolving wage and hour claims on behalf of 315 individuals who worked
4 for Defendant Carvana, LLC/Carvana Logistics, LLC (“Defendant” or “Carvana”) as “Vehicle
5 Transporters” during the period of February 16, 2019 through December 19, 2023. The proposed
6 \$411,732.06¹ total settlement provides about \$205,823 in cash payments to the Class, with an
7 average award of about \$653, plus additional amounts payable under PAGA. The remaining
8 balance will cover a modest service award to Plaintiff, settlement administration costs, civil
9 penalties to the state, and reasonable attorney’s fees and costs. The parties and their counsel
10 finalized the settlement after extensive and difficult arms-length negotiations overseen by an
11 experienced and highly-regarded mediator. The Court conditionally certified the Class and
12 preliminarily approved the settlement on February 7, 2024. Since then, the Court-approved notice
13 form was mailed to the Class Members on March 22, 2024, and they reacted very favorably to the
14 settlement. As of the filing of this motion, there are no objections, and no class member has
15 requested exclusion.

16 Class Counsel secured an excellent settlement with Defendant after some two
17 years of investigation, litigation, and settlement negotiation and administration, all
18 without any compensation for services rendered or costs expended. The class notice duly
19 informed the class members that Class Counsel would request attorney’s fees not to
20 exceed 33.33% of the Gross Settlement Amount, along with reimbursement of no more
21 than \$12,500 for actual costs incurred litigating this matter. As of the filing of this
22 motion, *not one Class Member objected* to the proposed fee award. Consistent with the
23 Settlement and notice, Plaintiff now respectfully requests the Court award Class
24 Counsel's fees in the amount of \$135,987.24 and costs in the amount of \$10,921.08, as
25 described in the Declaration of Brandon Brouillette (“Brouillette Decl.”) filed herewith.
26 The requested attorney’s fees are well within the range of reasonableness, especially
27

28 ¹ The escalator clause in the Settlement Agreement was triggered and Defendant elected to increase the gross
settlement amount consistent with the terms of the Agreement.

1 considering the complex and risky nature of this litigation, the contingent risk assumed,
2 the two-plus year delay in payment and, when subjected to a lodestar crosscheck, results
3 in a base lodestar that is slightly higher than the actual fee request.

4 Accordingly, on behalf of himself and the Settlement Class, Plaintiff respectfully
5 requests the Court grant this motion, give full and final approval to the settlement, grant Class
6 Counsel's request for attorney's fees and costs, and enter judgment accordingly.

7 **II. FACTUAL BACKGROUND AND PROCEDURAL POSTURE**

8 Carvana, LLC and Carvana Logistics, LLC are a publicly traded company on the New
9 York Stock Exchange, trading under the ticker symbol CVNA. Defendant is in the business of
10 buying and selling used cars using its online marketplace with a fixed price, no-negotiation sales
11 strategy. Defendant is known for its car vending machines which can be seen near freeways
12 throughout Southern California and the many major metropolitan areas throughout the country.
13 [Declaration of Brandon Brouillette ("Brouillette Decl."), ¶ 4.]

14 Plaintiff Leon Johnson was employed by Defendant as a truck driver/vehicle transporter
15 from April 2021 through October 2022. Carvana paid him a weekly salary regardless of the
16 number of hours worked. Plaintiff reported to Defendant's facilities located in Los Angeles,
17 Riverside, and San Bernardino Counties, and he would report to work 15 minutes before he was
18 scheduled in order to take part in mandatory pre-shift meetings that typically lasted 15 minutes per
19 shift. Plaintiff was then tasked with driving his assigned truck to pick up and transport vehicles to
20 and from Defendant's various auto lots throughout Southern California. Plaintiff's employment
21 was governed by the Department of Transportation's Hours of Service Regulations. [Brouillette
22 Decl., ¶ 5.]

23 Plaintiff alleges he and the class were not paid properly by Carvana based on Carvana's
24 policy to pay the class members a fixed salary for an assumed 40-hour workweek, which resulted
25 in failing to pay employees minimum wages for all hours worked in excess of 40-hours per week.
26 Plaintiff also alleges the same policy resulted in inaccurate wage statements and a failure to pay all
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1 wages due on termination of employment since it resulted in a failure to properly track and pay for
2 all hours worked. [Brouillette Decl., ¶ 6.]

3 Based on these allegations, Plaintiff filed his class action complaint against Carvana on
4 August 31, 2022, alleging causes of action for (1) recovery of unpaid minimum wages and
5 liquidated damages (2) failure to furnish accurate itemized wage statements; (3) failure to
6 reimburse business expenses; and (4) unfair competition. He also alleged claims under PAGA
7 based on the same alleged Labor Code violations. [Brouillette Decl., ¶ 7; Exh. 2.]

8 Carvana has at all times denied Plaintiff's allegations and maintained its payroll policies
9 and procedures comply with California law, that it paid the class members all wages due, and that
10 it properly compensated the class members for all hours worked at the correct rates of pay.
11 Defendant also strongly contends the case cannot be maintained as any kind of class or
12 representative action, arguing determining the reasons for any off the clock work would result
13 individualized issues predominating and that a trial on a representative basis would be
14 unmanageable. [Brouillette Decl., ¶ 8.]

15 After Plaintiff filed his complaint, the Parties initiated discovery and also engaged in
16 numerous meet and confer discussions regarding discovery, potential law and motion, and potential
17 ADR. Ultimately, the Parties agreed to mediation and also agreed to an informal exchange of
18 information to facilitate meaningful settlement discussions. The Parties then retained Steve
19 Cerveris, Esq., a respected neutral with experience mediating wage and hour class actions. In
20 October 2023, the Parties participated in a mediation with Mr. Cerveris that resulted in this
21 settlement. (Brouillette Decl., ¶¶ 6-7.) The Court preliminarily approved the settlement on February
22 7, 2024. Class Notices were mailed to class members on March 22, 2024, with a sixty-day
23 window (to May 21, 2024) for class members to opt out or object to the proposed settlement.
24 [Declaration of Taylor Mitzner ("Mitzner Decl."), ¶¶ 5, 8-10.]

25 **III. THE PROPOSED SETTLEMENT TERMS**

26 Under the settlement, Carvana will pay \$411,732.06² into a common fund, the Gross
27 Settlement Amount ("GSA"). Attorney's fees of up to 33.33% of the GSA (\$135,987.24.00 is

28 ² Mitzner Decl., ¶ 13.

1 requested based on the initially escalated GSA), litigation costs of up to \$12,500 (only \$10,921.08
2 is requested), an enhancement award to Plaintiff of no more than \$10,000, settlement administration
3 costs of \$9,000, and a payment of \$40,000 for PAGA civil penalties (to divided 75% to the Labor
4 & Workforce Development Agency and 25% to the Aggrieved Employees), all will be paid from
5 the GSA. The remainder of around \$205,823.74 will be allocated pro rata among the Class Members
6 based on their total weeks worked during the Class Period. No portion of the GSA will revert to
7 Carvana. [Brouillette Decl., ¶ 11.]

8 **A. Certification of the Settlement Class**

9 The Court conditionally certified a settlement class including all current or former Vehicle
10 Transporters who are or were previously employed by Defendant Carvana, LLC/Carvana Logistics,
11 LLC during the period of February 16, 2019 through December 19, 2023. The Settlement
12 Administrator ultimately mailed class notices to 314 individuals identified as members of the
13 Class and one individual was added as a write in class member, for a total of 315 class members.
14 [Mitzner Decl., ¶¶ 5-6.] Nothing has changed to require reconsideration of the Court's
15 certification of the Settlement Class.

16 **B. The Benefit Conferred on the Settlement Class**

17 As noted, the settlement obligates Carvana to pay \$411,732.06 to resolve the claims of the
18 Settlement, inclusive of attorney's fees and costs. A minimum of approximately \$205,823 from the
19 GSA will be distributed to the Participating Class Members. This is a cash settlement that does not
20 require Participating Class Members to submit a claim form to receive their settlement share.
21 Participating Class Members will receive their settlement checks automatically via First Class U.S.
22 Mail. Twenty percent of each settlement share will be allocated to wages and the remaining eighty
23 percent will be allocated to penalties and interest, which allocation is consistent with Carvana's
24 potential liability as discussed below. Carvana will pay any and all applicable employer-side payroll
25 taxes separately and in addition to the GSA. Subject to the Court's approval, any amounts not
26 claimed (because a class member does not cash his or her settlement check) will be forwarded to
27 the California State Controller's Unclaimed Property Division. [Brouillette Decl., ¶ 13.]

1 Each Participating Class Member will receive a share of the Net Settlement Amount based
2 on his or her total weeks worked for Carvana during the Class Period while employed in vehicle
3 transporter position. Thus, each Class Member's Individual Settlement Payment will be calculated
4 using criteria typically used in determining appropriate amounts of unpaid wages and potential
5 statutory penalties under applicable law. These methods are intended to ensure each Class Member
6 receives a portion of the available settlement funds corresponding to the relative value of his or her
7 potential claims. The proposed allocation provides a reasonable way to compensate Class Members
8 based on the amount of time they worked for Carvana as an allegedly misclassified employee and
9 the number of lost hours worked and corresponding loss of pay. [Brouillette Decl., ¶ 14.]

10 The average gross award is approximately \$653, the largest award is about \$2,503 and the
11 smallest award is about \$4. The average PAGA award is about \$45, and the largest PAGA award
12 is about \$85. [Mitzner Decl., ¶¶ 15-16.]

13 **C. Settlement Administration**

14 Phoenix Settlement Administrators, as the Court-approved Settlement Administrator,
15 mailed the Notice Packet to the Class members after making all reasonable effort to ascertain
16 the best mailing address, including running each address through the National Change of
17 Address database and "skip-tracing" any Notice Packets returned as undeliverable. [Mitzner
18 Decl., ¶¶ 3-8.] The Class Notice, previously approved by the Court, duly informed Class
19 Members of the settlement terms, including the estimated relief each Class Member will
20 receive, the amounts to be requested for attorney's fees and the class representative
21 enhancement awards, and the right to opt out of or object to the settlement. [Mitzner Decl., ¶
22 5; Exh. A.] Phoenix mailed 314 Notice Packets on March 22, 2024, and one individual was a
23 write in class member. [Mitzner Decl., ¶¶ 5-6.] Ultimately, 5 Notice Packet were deemed
24 undeliverable, representing a 98.4% success rate. [Mitzner Decl., ¶ 8.] The response window
25 for opting out of or objecting to the settlement expired on May 21, 2024. [Mitzner Decl., ¶¶ 9-
26 10.] Phoenix has received zero requests for exclusion (for a 100% participation rate), and zero
27 objections to the settlement. No disputes have been submitted regarding the information used
28 to calculate class member settlement shares. [Mitzner Decl., ¶¶ 9-11.]

1 **D. Release of Claims**

2 All Participating Class Members will release Carvana from all claims alleged in the
3 operative complaint, or that could have been brought based on the factual allegations in the
4 operative complaint, including PAGA claims, during the Class Period. The release is limited to the
5 claims that were actually pleaded or could have been pleaded based on the alleged facts in the
6 operative complaint. [Brouillette Decl., ¶ 18.]

7 **E. PAGA Claims and Notice to the LWDA**

8 The Parties allocated \$40,000 from the settlement to civil penalties under PAGA, and
9 Plaintiff respectfully requests that the Court approve this amount as fair, reasonable and adequate.
10 Consistent with PAGA, \$30,000 from this amount will be paid to the LWDA as the state's share
11 of the civil penalties, and the remaining \$10,000 will be distributed to the 218 individuals
12 eligible to receive a PAGA payment. [Mitzner Decl., ¶ 16.] As required by Labor Code section
13 2699(I)(2), Plaintiff gave notice of the settlement and the final approval hearing to the LWDA via
14 its online portal. [Brouillette Decl., ¶ 12; Exh. 1.]

15 **IV. ARGUMENT**

16 The law favors settlement, particularly in class actions where substantial resources can
17 be conserved by avoiding the time, cost, and rigors of formal litigation. H. Newberg & A.
18 Conte, 4 Newberg on Class Actions (4th ed. 2002), § 11.41; Class Plaintiffs v. City of Seattle
19 (9th Cir. 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Van Bronkhorst v. Safeco
20 Corp. (9th Cir. 1976) 529 F.2d 943,950; Potter v. Pacific Coast Lumber Co. (1951) 37 Cal.2d
21 592, 602. Nevertheless, to make certain the rights of absent parties are not unjustly
22 compromised, the settlement of a class action requires court approval. Cal. Rule of Court
23 3.769; Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801; Wershba v. Apple Computer
24 (2001) 91 Cal.App.4th 224, 245. The purpose of that judicial review is to protect against fraud
25 or collusion, and to ensure fairness to absent class members. Dunk, 48 Cal.App.4th at 1800-01;
26 Newberg, at §§ 11.22, *et seq.* Review is accomplished through a two-step process intended to
27 determine whether, under the totality of circumstances, the settlement is fair, reasonable and
28 adequate. Dunk, 48 Cal.App.4th at 1801; Wershba, 91 Cal.App.4th at 245.

1 On a motion for final approval, the trial court is charged with determining whether, in
2 light of the total circumstances of the action and the response of the class members to the
3 proposed settlement, the settlement is fair, reasonable, and adequate. Dunk, 48 Cal.App.4th at
4 1801-02; Wershba, 91 Cal.App.4th at 244-45. The court has broad discretion in making that
5 determination and may consider a number of relevant factors, including: the strength of
6 plaintiff's case; the likelihood of potential recovery; the risk, expense and likely duration of
7 further litigation; the amount offered in settlement; the extent of discovery and stage of the
8 proceedings; the experience and opinion of counsel; and the reaction of class members to the
9 settlement. Id. In light of the strong judicial policy favoring the settlement of class actions,
10 courts generally apply a presumption of fairness to a proposed class action settlement when:
11 (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery
12 are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in
13 similar litigation; and (4) the percentage of objectors is small. Dunk, 48 Cal.App.4th at 1802;
14 Wershba, 91 Cal.App.4th at 245.

15 **A. The Proposed Settlement Merits Final Approval**

16 The proposed settlement of this action warrants final approval under the standards
17 summarized above. The settlement is fair, reasonable and adequate, and represents a favorable
18 resolution of highly disputed claims. Further, the settlement was overwhelmingly approved by
19 the class members, as there were no objections and no class members opted out.

20 **1. The Settlement Is the Product of Arm's-Length, Informed Negotiations**

21 The settlement is not the result of fraud or collusion. Rather, the proposed settlement
22 was reached following arm's-length negotiations presided over by Steve Cerveris, Esq., a highly
23 respected and well-known mediator with extensive experience mediating wage and hour class
24 actions. [Brouillette Decl., ¶ 7.] Moreover, Plaintiff and his counsel were well-informed about
25 the facts and the law, and counsel Zachary M. Crosner, Jamie Serb, and Brandon Brouillette have
26 years of litigation experience, including litigating wage and hour class actions. Plaintiff's counsel
27 are well-qualified to evaluate the risks and benefits of pursuing further litigation or settling the
28 matter. [Brouillette Decl., ¶¶ 29-37.] Defendant likewise was represented by highly-qualified

1 and experienced defense counsel. Both sides advocated vigorously for their clients, and nothing
2 was "left on the table."

3 **2. The Class Reacted Favorably to the Settlement**

4 The settlement was well-received by the class. As of the filing of this motion, no
5 objections have been filed, and zero Class Members requested exclusion. [Mitzner Decl., ¶¶ 9-10.]
6 As many courts recognize, class member reaction to the settlement is one of the most important
7 factors to consider in determining if final approval should be granted. Mandujano v. Basic Vegetable
8 Prods., Inc., 541 F.2d 832, 837 (9th Cir. 1976); see also In re: American Bank Note Holographics,
9 127 F.Supp.2d 418, 425 (S.D.N.Y. 2001) ("It is well-settled that the reaction of the class to the
10 settlement is perhaps the most significant factor to be weighed in considering its adequacy")
11 (internal quotation marks omitted).

12 **3. The Settlement Is Fair and Reasonable Considering the Benefits** 13 **Conferred, the Case Value, and Significant Litigation Risks**

14 The proposed settlement involves a substantial sum of money that, when distributed,
15 will confer meaningful monetary benefits on the Class Members. As described above, each
16 individual award will be based on an allocation consistent with the nature of the claims asserted
17 and will fairly and equitably allocate the available funds in relation to the degree of damage
18 each Class member incurred. While Class members who worked for only a short period of time
19 will receive relatively small sums, those with longer tenures and who worked more hours and
20 shifts throughout the class period will receive appropriately larger awards.

21 Prior to settlement, the parties engaged in extensive informal discovery to facilitate
22 settlement discussions. As a result, Plaintiff reviewed payroll records, personnel
23 policies/handbooks, meal break policies, personnel files, and a random sampling of paystubs and
24 time records produced by Carvana. Defendant provided documents and information reflecting the
25 estimated total number of workweeks and pay periods they worked, and average hourly pay rates,
26 among other relevant data. Plaintiff also had that information reviewed by a consulting expert to
27 assist with calculating potential violation rates and potential damages. Plaintiff's counsel is
28 confident they obtained sufficient information to enable them to understand the law and facts of this

1 case and make an informed decision regarding the proposed settlement and whether it is in the best
2 interests of the class. [Brouillette Decl., ¶¶ 6, 13.]

3 Using that data, Plaintiff ran various calculations and estimated Carvana’s likely maximum
4 exposure on the class claims at approximately \$2,667,500, including about \$629,400 on the
5 unpaid wage claims, about \$642,400 for wage statement violations, and approximately \$1,396,000
6 in waiting time penalties. [Brouillette Decl., ¶¶ 27-28.] Plaintiff’s counsel substantially
7 discounted the value of these claims, however, in light of the multiple and considerable risks
8 posed by proceeding with the litigation, as Defendant raised numerous defenses and vigorously
9 defended against these claims.

10 On the unpaid wage claims, Plaintiff alleged Carvana failed to pay all wages due by
11 misclassifying of Plaintiff and other vehicle transporters as exempt, which resulted in them not
12 being paid for all hours worked. Per Plaintiff, Carvana essentially assumed Plaintiff and the class
13 members worked 40 hours per week, and paid them out at an hourly rate that was equivalent to
14 their weekly salary divided by 40 hours. Since California law requires that employees be paid for
15 “all hours worked,” employers cannot “average” hours worked by the amount paid in a pay period
16 to assess whether there was a violation of the minimum wage floor. E.g., Armenta v. Osmose, Inc.
17 (2005) 135 Cal.App.4th 314. Thus, regardless of how much Plaintiff and the class members
18 earned each week for the base 40 hour salary, Plaintiff contends a minimum wage violation
19 occurred each time they worked over 40 hours per week without receiving additional
20 compensation. On the other hand, Carvana argued it accurately tracks and pays for all hours
21 worked, and that its compensation policies are legal and fully comply with California law. It also
22 noted it completely revamped its compensation policies for vehicle transporters in mid-2023 and
23 now pays them on a piece rate system based on miles driven. [Brouillette Decl., ¶ 29.]

24 For Plaintiff’s expense reimbursement claim, he argued Defendant failed to reimburse
25 Plaintiff and the other employees for expenses incurred in using their personal mobile phones and
26 data for business purposes. Carvana, however, proffered evidence that it provided class members
27 with company cell phones to use while on duty. Accordingly, Plaintiff ultimately assigned no
28 value to this claim. Similarly, no value was assigned to the claims for unpaid overtime or meal and

1 rest break violations as those claims all are preempted under federal law since the class members
2 operate under the federal Department of Transportation’s Hours of Service Regulations. 49 C.F.R.
3 §§ 395.1-13 (overtime not required for certain truck drivers); 13 Cal. Code Regs. § 1200, et seq.
4 (same); Int’l Bhd. of Teamsters, Local 2785 v. Fed. Motor Carrier Safety Admin. (9th Cir. 2021)
5 986 F.3d 841, 858 (California meal and rest break requirements preempted by federal law for
6 certain truck drivers); Garcia v. Superior Court (2022) 80 Cal.App.5th 63, 68 (same). [Brouillette
7 Decl., ¶ 30.]

8 Plaintiff also alleged derivative claims under Labor Code § 226 (alleged inaccurate wage
9 statement violations) and §§ 201-203 (waiting time penalties), both based on the failure to
10 properly record and pay for all hours worked, and these claims will rise or fall along with that
11 primary claim, in addition to being subject to “good faith” and other defenses available to
12 Defendant. E.g., Amaral v. Cintas Corp. No. 2 (2008) 163 Cal.App.4th 1157, 1203-04 (holding
13 employer did not willfully fail to pay wages under Labor Code § 203 even though the class
14 prevailed on the merits on the underlying claim for failing to pay living wages). Accordingly,
15 Plaintiff discounted the derivative claims significantly in light of these multiple potential defenses.
16 [Brouillette Decl., ¶ 31.]

17 As far as potential PAGA liability, the theoretical penalties totaled about \$700,000 should
18 Plaintiff prevail on all claims and establish violations of the multiple Labor Code sections at issue
19 for every single eligible pay period. [Brouillette Decl., ¶ 32.] As with the class claims, Plaintiff
20 discounted the potential PAGA penalties for the multi-layered defenses proffered by Defendant on
21 the merits, and further discounted these claims since the Court possesses wide discretion to reduce
22 such penalties even if Plaintiff ultimately prevailed. Lab. Code § 2899(e)(2); Fleming v. Covidien
23 (C.D. Cal. 2011) 2011 U.S. Dist. LEXIS 154590, *8-9 (court reduced the potential penalties by
24 over 82% after a bench trial); Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th 504 (after a
25 bench trial, the trial court awarded penalties of just \$5 per pay period, a 90% reduction, which
26 decision was upheld on appeal); In re Taco Bell Wage and Hour Actions (E.D. Cal. Apr. 8, 2016)
27 2016 U.S. Dist. Lexis 48557 (PAGA penalties denied after trial).

1 Accordingly, the Parties allocated \$40,000 to PAGA penalties, which amount is reasonable
2 and in line with comparable settlements in other class actions in California. Van Kempen v.
3 Matheson Tri-Gas, Inc. (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final
4 approval of \$5,000 PAGA penalty from \$370,000 settlement, or 1.4 percent of total settlement);
5 Slavkov v. First Water Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303
6 (finding a \$7,500 PAGA payment reasonable when measured against the overall settlement of
7 \$345,000 and the possible weaknesses in plaintiffs' case, or 2.2 percent of total settlement).
8 Additionally, the LWDA has been informed of the terms of the PAGA portion of the settlement,
9 and will be able to weigh in as necessary. Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3,
10 2018) 2018 U.S. Dist. LEXIS 171356, at *27 (approving settlement with PAGA penalties of 0.6%
11 where "[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has
12 not objected to the settlement").

13 Thus, Defendant raised various defenses to each of Plaintiff's claims, any one of which, if
14 successful, could have decimated Plaintiff's case. Accordingly, Plaintiff faced risky issues going
15 forward with this litigation, and given the need to secure class certification, try the case, and deal
16 with post-trial appeals, it would have taken years to realize any recovery in this action. Plaintiff's
17 counsel discounted the value of the class claims consistent with the risks discussed above, and
18 carefully weighed the likelihood of the class receiving substantially greater benefit if the litigation
19 continued. Plaintiff's counsel concluded – in light of these very real and substantial risks –
20 settlement on the proposed terms and without prolonged and costly litigation was in the best
21 interests of the class. The overall \$411,732³ recovery represents a significant percentage of
22 Defendant's potential exposure, and given these risks discussed above a total recovery for the
23 class of \$411,732, with an average award of some \$653 per class member, is a fair result within
24 the range of reasonableness considering all potential outcomes. [Brouillette Decl., ¶¶ 33-35.]

25 Importantly, the mere fact that a settlement does not provide the same recovery as might be
26 achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and
27

28 ³ The GSA initially escalated to \$407,961.72 based on the Class Data supplied by Carvana. After accounting for the
work weeks attributable to the write in class members, the GSA escalated again to \$411,732.06. [Mitzner Dec., ¶ 12.]

adequate. Wershba, 91 Cal.App.4th at 246, 250 (“even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation”); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135, 1150 (“The fact that a proposed settlement may amount to only a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved”); Lane v. Facebook, Inc. (9th Cir. 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is fundamentally fair . . . is different from the question whether the settlement is perfect in the estimation of the reviewing court”); White v. Experian Information Solutions, Inc. (C.D. Cal. 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even though it represented 99% discount off the maximum value of the claims). Importantly as well, the proposed settlement is non-reversionary and will provide benefits to the Class Members without a claims process. White, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges (3d ed. 2010) at 20, available at www.fjc.gov/sites/default/files/2012/ClassGd3.pdf (reversionary provisions and/or cumbersome claims process may indicate lack of fairness). Plaintiff and his counsel submit the settlement is within the “range of reasonableness,” and is fair and adequate for the Class.

V. PLAINTIFF’S ENHANCEMENT AWARD

Pursuant to the terms of the settlement, Plaintiff seeks a modest incentive award of \$10,000 for his service in bringing these claims on behalf of the Class. The request is reasonable given the risks he undertook on behalf of the Class Members, and by contacting and retaining counsel to pursue these claims, Plaintiff helped make this settlement possible for the absent Class Members, while shouldering the risk of being liable for Defendant’s litigation costs. Plaintiff also exposed himself to unwanted notoriety related to filing a public lawsuit (discoverable even through a simple google search) for the benefit of other employees, placing himself at risk of discrimination by future prospective employers. As set forth in more detail in his declaration filed with the preliminary approval motion, among taking many other actions

1 assisting in the successful litigation of this case, Plaintiff provided substantial factual
2 information and documents to counsel, attended numerous meetings/phone conferences with
3 counsel to discuss the case, and kept abreast of all significant developments. [Declaration of
4 Leon Johnson, ¶¶ 2-9 (submitted with the preliminary approval motion); Brouillette Decl., ¶ 25.]
5 Accordingly, the requested enhancement payments to Plaintiff is appropriate and justified as
6 part of the settlement. Staton v. Boeing (9th Cir. 2003) 327 F.3d 938, 977 (collecting cases
7 awarding class representatives service and incentive payments ranging from \$2,000 to \$25,000).

8 **VI. SETTLEMENT ADMINISTRATION COSTS**

9 The settlement provides for a payment to Phoenix for its services as the Settlement
10 Administrator. As set forth in the Declaration of Taylor Mitzner, Phoenix has performed and will
11 continue to perform its required duties through final distribution of the settlement funds and
12 incurred \$9,000 in fees and expenses. [Mitzner Decl., ¶ 18; Exh. B.] Plaintiff accordingly requests
13 the Court approve payment of \$9,000 to Phoenix from the GSA. [Brouillette Decl., ¶ 26.]

14 **VII. ATTORNEY'S FEES AND COSTS**

15 **A. The Attorney's Fees Requested Are Fair and Reasonable and Should Be** 16 **Approved**

17 This Court has discretion over the amount of attorneys' fees awarded and court
18 approval is required for Class Counsel's fees. Cal. Rule of Court 3.769; Levy v. Toyota
19 Motor Sales, U.S.A. (1992) 4 Cal.App.4th 807, 813; Lealao v. Beneficial Cal., Inc. (2000) 82
20 Cal.App.4th 19. In defining a reasonable fee, the Court should attempt to mimic the
21 marketplace for cases involving significant contingent risk, such as this one. Deposit
22 Guaranty Nat'l Bank, Jackson, Miss. v. Roper (1980) 445 U.S. 326, 338, rehg. den. 446 U.S.
23 947; Lealao, 82 Cal.App.4th at 49-50 (court should attempt "to award the fee that informed
24 private bargaining, if it were truly possible, might have reached" in determining a reasonable
25 fee, and a fee award should approximate a "range of fees freely negotiated in comparable
26 litigation"). Here, Class Counsel's request for attorney's fees and costs is reasonable and
27 justified by the work performed, the benefits obtained, and the contingent risk assumed.

28 As addressed in detail above, at the time the parties reached the tentative settlement

1 success for Plaintiff and the putative class was far from certain. Plaintiff faced a real risk that
2 some or all the claims would not be certified for class treatment, as Defendants had strong
3 arguments that its compensation policies were legal and properly compensated the class
4 members. Even if Plaintiff certified some or all of the claims and ultimately prevailed on the
5 merits, it undoubtedly would have taken several years to realize any recovery while they
6 pursued class certification, trial, and an almost certain appeal. [Brouillette Decl., ¶¶ 15-20.]

7 Nonetheless, Plaintiff succeeded and expeditiously obtained the relief she set out to
8 obtain, and the settlement provides substantial cash payments to Class Members, with an
9 average award of over \$650, and with a maximum award of over \$2,500. Importantly as well,
10 the Class Members have been overwhelmingly supportive of the Settlement – there are no
11 objections and no opt outs to the settlement. [Mitzner Decl., ¶¶ 9-10.]

12 **B. The Requested Fee Award Is Reasonable and Appropriate**

13 The United States Supreme Court has ruled the parties to a class action properly may
14 negotiate not only the settlement of the action itself but also the payment of attorney's fees.
15 Evans v. Jeff D. (1986) 475 U.S. 717, 734-35, 738, fn. 30.) In Hensley v. Eckerhart (1983)
16 461 U.S. 424, 437, the Supreme Court explained that negotiated, agreed-upon attorney's fee
17 provisions are the ideal towards which the parties should strive: "A request for attorney's fees
18 should not result in a second major litigation. Ideally, of course, litigants will settle the
19 amount of a fee." The United States Supreme Court has reemphasized this policy and further
20 stressed trial courts have "a responsibility to encourage agreement" on fees. Blum v. Stenson
21 (1984) 465 U.S. 886, 902 n.19.

22 As part of the Settlement, Carvana agreed not to object to an award of no more than
23 33.33% of the GSA for attorney's fees, and up to \$12,500 in reimbursement for litigation
24 costs and expenses. Plaintiff requests 33.33% of the initially escalated GSA (i.e., 33.33% of
25 \$407,987.24) in attorney's fees⁴ and only \$10,921.08 for litigation costs and expenses. Such a
26 fee is commensurate with what the market would provide for similar services and the Court
27

28 ⁴ The Class Notice informed the Class that class counsel sought this amount for their fees, and there were no
objections to the requested amount. [Mitzner Decl., Exh. A.]

1 therefore can most certainly enforce the agreement. As California's Court of Appeal has
2 instructed:

3 Given the unique reliance of our legal system on private litigants to enforce
4 substantive provisions of law through class and derivative actions, attorneys
5 providing the essential enforcement services must be provided incentives roughly
6 comparable to those negotiated in the private bargaining that takes place in the
legal marketplace, as it will otherwise be economic for defendants to increase
injurious behavior.

7 Lealao, 82 Cal.App.4th at 47.

8 Here, the parties did not negotiate the inclusion of attorney's fees until after extensive
9 arms-length bargaining regarding relief to the Class was completed. [Brouillette Decl.,
10 ¶ 27.] The requested fee and cost award was a product of these arms-length negotiations and
11 fairly reflects the marketplace value of the services rendered by Class Counsel in this case. As
12 a result, the fee agreed to by the parties should be approved.

13 C. **Class Counsel's Fees are Justified When Calculated as a Percentage of the**
14 **Common Fund**

15 In approving fee applications, courts typically apply either a percentage-of-recovery
16 method or the lodestar method. Laffitte v. Robert Half Int'l, Inc. (2016) 1 Cal.5th 480, 489;
17 Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 254, disapproved on other
18 grounds, Hernandez v. Restoration Hardware, Inc. (2018) 4 Cal.5th 260. The California
19 Supreme Court recently recognized the advantages and equities of calculating attorney's fees
20 using the percentage-of-the-common-fund method in another wage-and-hour case:

21 The recognized advantages of the percentage method-including relative ease of
22 calculation, alignment of incentives between counsel and the class, a better
23 approximation of market conditions in a contingency case, and the
24 encouragement it provides counsel to seek an early settlement and avoid
unnecessarily prolonging the litigation convince us the percentage method is a
valuable tool that should not be denied our trial courts.

25 Laffitte, 1 Cal.5th at 503 (citations omitted).

26 Indeed, both California and federal courts have long recognized an appropriate method
27 for determining the award of attorney's fees is based on a percentage of the total value of
28 benefits afforded to class members by the settlement. Serrano v. Priest (1977) 20 Cal.3d 25,

34; Boeing Co. v. Van Gernert (1980) 444 U.S. 472, 478; Vincent v. Hughes Air West, Inc.
(9th Cir. 1977) 557 F.2d 759, 769. Awarding a fee based on a percentage of the common fund
recovered operates to "spread litigation costs proportionately among all the beneficiaries so
that the active beneficiary does not bear the entire burden alone." Vincent, 557 F.2d at 769.

In determining a reasonable common fund fee award, courts should also consider the
fact that fees serve as an economic incentive for lawyers to bring class action litigation to
achieve increased access to the judicial system for meritorious claims and to enhance
deterrents to wrongdoing. Conte, Attorney Fee Awards (2d ed. 1993) § 104. Without
prosecution on a contingent basis and use of the class action mechanism, the courthouse door
would effectively be closed to most class members due to the relatively small size of their
individual claims in relation to the enormous time and cost associated with class action
litigation.

Here, Class Counsel seek a fee award for their successful prosecution and resolution of
this action of no more than 33.33% of the initially escalated GSA, and specifically
\$135,937.24. The percentage requested is justified for the reasons set forth further below, and
comports with fee awards calculated on a percentage-of-the-benefit basis. Indeed, review of
class action settlements shows that courts have historically awarded fees in the range of 20 to
50 percent, depending upon the circumstances of the case. In re Warner Communications Sec.
Litig. (S.D.N.Y. 1985) 618 F.Supp. 735, 749-50 (concluding that percentage fees in common
fund cases range from 20 to 50 percent); Newberg, Newberg on Class Actions (3d ed.) §
14.03, pp. 13-14 ("Usually 50% of the fund is the upper limit on a reasonable fee award from
a common fund in order to assure that the fees do not consume a disproportionate part of the
recovery obtained for the class, although somewhat larger percentages are not
unprecedented.").

D. A Lodestar Cross-Check Also Supports Class Counsel's Fee Request

To ensure the fairness of an attorney's fee award, courts frequently conduct a lodestar
cross check of counsel's fees. "A lodestar cross-check thus provides a mechanism for bringing
an objective measure of the work performed into the calculation of a reasonable attorney fee."

1 Laffitte, 1 Cal.5th at 504. Here, Class Counsel spent 116.7 hours of time on this matter,
2 resulting in a modest and very reasonable lodestar of \$88,880.00.

3 As is fully detailed in the Brouillette Declaration, Class Counsel's efforts included: (1)
4 extensive pre-lawsuit investigation of the claims of Plaintiff and the putative class, including legal
5 research, research into similar claims and claims against other employers in the same industry, and
6 attempts to locate and contact other employees of the Defendant; (2) drafting a PAGA notice
7 letter; (3) drafting the initial complaint and related documents; (4) case management, including
8 communications with defense counsel, meeting and conferring/preparing case management
9 statements, etc.; (5) lengthy discussions with defense counsel regarding settlement/mediation and
10 informal discovery needed for meaningful settlement discussions; (6) engaging in substantial
11 informal discovery, including propounding informal discovery "requests" and reviewing
12 documents and other information produced; (7) working with a consulting expert on the analysis
13 of Defendant's production; (8) drafting a mediation brief and accompanying damages model after
14 review and analysis of defendant's formal and informal discovery production; (9) attending an all-
15 day mediation; (10) negotiating and drafting the settlement agreement and related documents; (11)
16 drafting the motion for preliminary approval, and attending the hearing; (12) administration of the
17 settlement, including communications with the Settlement Administrator and settlement class
18 members; (13) drafting the motion for reconsideration as to the enhancement award, (14) final
19 approval and attorney's fees, and attending the final approval hearing; and (15) extensive
20 communications with the Plaintiff regarding case status, case investigation and document review,
21 mediation, and settlement terms. Additionally, Class Counsel will incur additional time following
22 final approval to, inter alia, respond to class member inquiries, attend to distribution of settlement
23 funds, and on the compliance hearing. [Brouillette Decl., ¶ 28, Exh. 2.]

24 In pursuing this matter, Class Counsel incurred total attorney's fees of \$88,880, and
25 the lodestar is based on an eminently reasonable number of hours worked to litigate this matter to
26 a successful conclusion (116.7 attorney hours). The requested attorney hourly rates are reasonable
27 and comport with hourly rates charged by other attorneys with similar experience in this practice
28 area in California. On a lodestar basis, the fee request of \$135,927.24 results in a multiplier of

1 1.53, which is a modest enhancement entirely in line with California law. [Brouillette Decl., ¶¶
2 28-42.] Indeed, California courts routinely approve multipliers in the in the 2-4 range to
3 compensate for the time and risk of class action cases. Chavez v. Netflix, Inc. (2008) 162
4 Cal.App.4th 43, 66 (affirming attorneys' fee award including an upward multiplier of 2.5);
5 Wershba, 91 Cal.App.4th at 255 ("Multipliers can range from 2 to 4 or even higher."); City of
6 Oakland Oakland Raiders (1988) 203 Cal.App.3d 78, 85 (affirming a multiplier of 2.34).)
7 Class Counsel submits that the requested 1.53 multiplier effectively operates to show that the
8 percentage fee request is reasonable considering the challenges presented in this contingency
9 fee matter, and appropriately compensates Class Counsel for the contingent risk assumed and
10 delay in payment during the 2+ years counsel has been representing Plaintiff. Thus, the
11 multiplier results in a fee constituting a fair return on the contingency.

12 E. **The Award is Supported By 1) the Results Achieved; 2) the Risk, 3) the Skill**
13 **Required, 4) the Contingent Nature of the Fee and 5) Awards in Similar**
14 **Cases.**

15 What has now emerged in most fee award decisions is the recognition that fee
16 determinations in both common fund and statutory fee situations are incapable of
17 mathematical precision because of the intangible factors that must be resolved in the court's
18 discretion based on the circumstances of each particular case. Conte, § 207, p. 44. In
19 determining an appropriate fee in a common fund case, a Court must decide, based on the
20 unique posture of each case, what percentage of the common fund would most reasonably
21 compensate Class Counsel given the nature of the litigation and the performance of counsel.
22 Paul, Johnson, Alston & Hunt v. Graulity (9th Cir. 1989 886 F.2d 268, 272) (the benchmark
percentage fee may be adjusted to account for the circumstances involved in a case).

23 Courts apply a five-part test in calculating a reasonable percentage fee in common
24 fund cases: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the
25 quality of work; (4) the contingent nature of the fee and the financial burden carried by the
26 plaintiffs; and (5) awards made in similar cases. Laffitte, 1 Cal.5th at 489.

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1 **1. The Results Achieved.**

2 Class Counsel obtained an excellent result in this case for the Class Members. The
3 Settlement provides real monetary benefits to the Class Members, and the Settlement is
4 particularly advantageous to the Class Member because the proceeds will be distributed
5 shortly as opposed to waiting additional years for a similar, or possibly, less favorable result.
6 Considering many individual claims would be very modest and would not be cost-effective to
7 pursue successfully, the Settlement provided them with fair compensation for their claims.
8 Moreover, the absence of any objection to either the Settlement or the attorney's fee request
9 bolsters the excellent results. Indeed, the approval of the Class is overwhelming as indicated
10 by the fact that not only one class member opted out. Additionally, the settlement amounts to
11 a substantial percentage of the maximum value of the amount the Class might have obtained if
12 it had tried the case and recovered on all theories seeking recovery of wages and penalties.
13 "It is well-settled law that a cash settlement amounting to only a fraction of the potential
14 recovery does not per se render the settlement inadequate or unfair." In re Omnivision Techs.,
15 Inc., 559 (N.D. Cal. 2008) F.Supp.2d 1036, 1042.

16 **2. Class Counsel Bore Considerable Risk.**

17 At the time of filing the complaint, Class Counsel recognized that they would have to
18 expend a substantial amount of time and advance significant costs to prosecute a statewide
19 class action suit with no guarantee of compensation or reimbursement, in the hope of
20 prevailing against a sophisticated company represented by first-rate attorneys. Despite
21 their belief in the validity of Plaintiff's claims, they also knew they faced substantial risks
22 of class certification and the ability to prove class-wide and individual damages. In light of
23 the highly uncertain nature of this suit, Class Counsel also bore the risk that Defendant would
24 dig in and attempt to bury their small firm in work. Given the small size of Class Counsel's
25 firm, not receiving any compensation for several years while simultaneously advancing
26 litigation costs posed considerable risk and difficulty. [Brouillette Decl., ¶¶ 43-44.]

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1 **3. The Skill Required and the Quality of Work.**

2 Practice in the narrow area of wage and hour litigation requires skill, knowledge and
3 experience. The issues presented in this case required more than just a general appreciation of
4 wage and hour law and class action procedure. This Settlement was possible only because
5 counsel persuaded Defendant that Plaintiff and the putative class had a realistic chance of
6 prevailing on their claims despite Defendant's contrary arguments, and that the case
7 would be pursued through class certification and trial if necessary. In successfully
8 navigating these hurdles, Class Counsel displayed appropriate skill while pursuing a risky
9 and difficult case.

10 **4. The Contingent Nature of the Fee and Risk Assumed**

11 There is a substantial difference between the risk assumed by attorneys being paid
12 by the hour and attorneys working on a contingent fee basis. The attorney being paid by
13 the hour can go to the bank with his fee. Powers v. Eichen (9th Cir. 2000) 229 F.3d 1249,
14 1256. The attorney working on a contingent basis can only log hours while working
15 without pay towards a result that will hopefully entitle him to a market fee considering
16 the risk and other factors of the undertaking. Id. at 1257. Otherwise, the contingent fee
17 attorney receives nothing. Id. In this case, Class Counsel subjected themselves to this
18 risk in this all or nothing contingent fee case wherein the necessity and financial burden
19 of private enforcement makes the requested award appropriate.

20 Counsel retained on a contingency fee basis, whether in private matters or in class
21 action litigation, is entitled to a premium beyond their standard, hourly, non-contingent
22 fee schedule to compensate for both the contingent risk assumed and the delay in
23 payment. The simple fact is that despite the most vigorous and competent of efforts,
24 success is never guaranteed. McKittrick v. Gardner (4th Cir. 1967) 378 F.2d 872, 875.
25 Indeed, if counsel is not adequately compensated for the risks inherent in difficult class
26 actions, competent attorneys will be discouraged from prosecuting similar cases.
27 Ketchum v. Moses (2001) 24 Cal.4th 1122, 1132-33; Cazares v. Saenz (1989) 208
28 Cal.App.3d 279, 287.

1 Here, the contingent fee practices of Plaintiff's counsel simply do not accommodate
2 the investment of unnecessary time in a case, and the adverse resolution of any one of several
3 difficult issues present in this matter could have doomed the entire effort. As discussed, the
4 attorney's fees in this case were not only contingent but fairly risky, and there was always a
5 distinct possibility Plaintiff's counsel would receive nothing for any number of reasons.
6 [Brouillette Decl., ¶¶ 43-44.] Accordingly, the contingent nature of the fee and the financial
7 burdens on Class Counsel also support the fee requested.

8 **5. Awards in Other Cases**

9 As discussed, the attorney's fees requested by Class Counsel are within the range of
10 fees awarded in comparable cases, as California courts regularly approve class action fee
11 awards amounting to 1/3 of a common fund, as approved by the California Supreme Court in
12 Lafitte. Additionally, review of class action settlements over the past 10 years shows that the
13 courts have historically awarded fees in the range of 20 to 50 percent, depending upon the
14 circumstances of the case. In re Warner Communications Sec. Litig. (S.D.N.Y. 1985) 618
15 F.Supp. 735, 749-50 (concluding that percentage fees in common fund cases range from 20 to
16 50 percent); Newberg, Newberg on Class Actions (3d ed.) § 14.03, pp. 13-14 ("Usually 50%
17 of the fund is the upper limit on a reasonable fee award from a common fund in order to
18 assure that the fees do not consume a disproportionate part of the recovery obtained for the
19 class, although somewhat larger percentages are not unprecedented."). Class Counsel's
20 requested fees equal to 33.33% the gross amount recovered on behalf of the class and are well
21 within the range of reasonableness under either the percentage of the recovery or the lodestar
22 method in light of the contingent risk assumed, the delay in payment, the result achieved, and
23 the overall quality of the representation.

24 **F. Class Counsel's Costs and Expenses are Reasonable**

25 Plaintiff's counsel also requests reimbursement of actual out-of-pocket expenses incurred
26 to prosecute this action. These expenses were incidental and necessary to the effective
27 representation of the employees, and Plaintiffs' counsel is permitted to recover litigation costs and
28 expenses under the common fund doctrine and the Settlement Agreement. Serrano, 20 Cal.3d at 35

(common fund doctrine permits recovery of fees and costs from the fund); Rider v. County of San Diego (1992) 11 Cal.App.4th 1410, 1424 n.6 (costs are recoverable from the common fund “[o]f necessity, and for precisely the same reasons discussed above with respect to the recovery of attorneys’ fees by ... [Plaintiffs’] attorneys”). Plaintiff’s counsel also is entitled to recover “those out-of-pocket expenses that would normally be charged to a fee-paying client.” Harris v. Marhoefer (9th Cir. 1994) 24 F.3d 16, 19.

As explained in the Brouillette Declaration, Class Counsel incurred a total of \$10,921.08 in expenses incurred in connection with this litigation. These expenses include the amounts paid for court filing fees, service of process, expert fees, postage, and mediation fees, all of which are costs normally billed to and paid by the client. These costs were reasonably incurred in the prosecution of this matter, and were necessary for the successful prosecution of the case and accordingly Plaintiff’s counsel requests reimbursement for costs in the amount of \$10,921.08. [Brouillette Decl., ¶¶ 45-46.]

VIII. CONCLUSION

For all the foregoing reasons, Plaintiff Johnson respectfully requests that the Court grant this motion and grant final approval of the proposed class action settlement and approve the payment of PAGA penalties to the State. Plaintiff further requests the Court approve payment of the Settlement Administrator’s fees and expenses, approve the requested class representative enhancement payment, approve the award of attorney’s fees and costs as requested, and enter judgment in this action. Finally, Plaintiff request the Court set a final compliance hearing for July 25, 2025, or a later date convenient for the Court.

Dated: June 25, 2024

CROSNER LEGAL, PC

By: 

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