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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
similarly situated,

13
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 PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

[Filed concurrently with Notice of Motion and
Motion; Declarations of Brandon Brouillette,
Leon Johnson, and Michael Moore; [Proposed]
Order]

Date: February 7, 2024
Time: 9:00 a.m.
Dept.: S-26

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1 **I. INTRODUCTION**

2 Plaintiff Leon Johnson hereby moves the Court for an order granting preliminary approval
3 to a proposed non-reversionary class action settlement to resolve wage and hour claims on behalf
4 of approximately 300 individuals who are or previously were employed by Defendant Carvana,
5 LLC/Carvana Logistics, LLC (“Defendant” or “Carvana”) as “Vehicle Transporters” during the
6 period of February 16, 2019 through December 19, 2023. The proposed \$400,000 settlement will
7 provide at least \$195,180 in cash payments to the class, with an average award estimated at about
8 \$650. The balance of approximately \$204,820 will cover reasonable attorney’s fees and actual
9 litigation costs, a modest enhancement award to Plaintiff, settlement administration costs, and
10 payment of civil penalties to the state. The settlement is the product of Plaintiff’s pre- and post-
11 filing investigation, discovery and a pre-mediation exchange of information, and arms-length
12 negotiations overseen by experienced mediator Steve Cerveris, Esq.

13 The proposed settlement is within the “range of reasonableness” for approval and
14 Plaintiff’s counsel believes the settlement is a fair result for the class given the substantial risks
15 inherent in this matter. Accordingly, Plaintiff requests the Court enter an order: (1) granting
16 preliminary approval to the proposed class action settlement; (2) conditionally certifying the
17 settlement class as defined below; (3) appointing Zachary M. Crosner, Jamie K. Serb, and
18 Brandon Brouillette and Crosner Legal, P.C. as Class Counsel; (4) appointing Plaintiff Leon
19 Johnson as the Class Representative; (5) appointing Phoenix Settlement Administrators as the
20 Settlement Administrator; (6) approving the form of notice to the class and the notice procedure;
21 and (7) scheduling a final fairness hearing.

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

23 Carvana, LLC and Carvana Logistics, LLC are a publicly traded company on the New
24 York Stock Exchange, trading under the ticker symbol CVNA. Defendant is in the business of
25 buying and selling used cars using its online marketplace with a fixed price, no-negotiation sales
26 strategy. Defendant is known for its car vending machines which can be seen near freeways
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1 throughout Southern California and the many major metropolitan areas throughout the country.

2 [Declaration of Brandon Brouillette (“Brouillette Decl.”), ¶ 4.]

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

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

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

23 Carvana has at all times denied Plaintiff’s allegations and maintained its payroll policies
24 and procedures comply with California law, that it paid the class members all wages due, and that
25 it properly compensated the class members for all hours worked at the correct rates of pay.
26 Defendant also strongly contends the case cannot be maintained as any kind of class or
27 representative action, arguing determining the reasons for any off the clock work would result
28

1 individualized issues predominating and that a trial on a representative basis would be
2 unmanageable. [Brouillette Decl., ¶ 8.]

3 After Plaintiff filed his complaint, the Parties began working on discovery and, after
4 lengthy discovery meet and confer sessions and discussions about the merits of the case,
5 ultimately agreed to mediate. The Parties also agreed on a protocol for an exchange of additional
6 documents and information before the mediation. Consequently, Plaintiff's counsel reviewed,
7 inter alia, personnel policies/handbooks, personnel files, compensation policies, and a random of
8 sampling paystubs and time records for about 50% of the class. [Brouillette Decl., ¶ 9.]

9 The Parties then engaged Steve Cerveris, Esq., a respected professional neutral with
10 substantial wage and hour and class action experience and, in October 2023, the Parties
11 participated in a full day mediation with Mr. Cerveris. Throughout the day, the arms-length
12 negotiations were hard-fought and adversarial as the Parties exchanged extensive information on
13 their legal and factual positions, and made numerous offers and counter-offers. By the end of the
14 day the Parties reached agreement on all major issues. [Brouillette Decl., ¶ 10.] They then
15 collaboratively drafted the Class Action and PAGA Settlement Agreement ("Settlement
16 Agreement") setting forth the full and final settlement terms now before the Court for approval,
17 and a true and correct copy of the Settlement Agreement is attached to the Brouillette Declaration
18 as Exhibit 1.

19 Finally, at mediation the Parties agreed to include in the settlement additional claims for
20 unpaid overtime wages, failure to provide meal breaks, and failure to permit and/or authorize rest
21 breaks based on the same set of operative facts as alleged in the First Amended Complaint, and
22 any and all of the claims set forth in the Plaintiff's PAGA Notice. Accordingly, via the Settlement
23 Agreement the Parties stipulate to the filing of a proposed Second Amended Complaint, which
24 will be the Operative Complaint for purposes of settlement. [Brouillette Decl., ¶ 11; Exh. 4.]

25 **III. THE PROPOSED SETTLEMENT TERMS**

26 Under the settlement, Carvana will pay \$400,000 into a common fund, the Gross Settlement
27 Amount ("GSA"). Attorney's fees of up to \$133,320.00 (33.33% of the GSA), litigation costs of up
28 to \$12,500, an enhancement award to Plaintiff of no more than \$10,000, settlement administration

1 costs of no more than \$9,000, and a payment of \$40,000 for PAGA civil penalties (to divided 75%
2 to the Labor & Workforce Development Agency and 25% to the Aggrieved Employees), all will be
3 paid from the GSA. The remainder of around \$195,180 will be allocated pro rata among the Class
4 Members based on their total weeks worked during the Class Period. No portion of the GSA will
5 revert to Carvana. [Brouillette Decl., ¶ 12.]

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

7 The settlement provides for conditional certification of a settlement class including all
8 current or former Vehicle Transporters who are or were previously employed by Defendant
9 Carvana, LLC/Carvana Logistics, LLC during the period of February 16, 2019 through December
10 19, 2023. The Settlement Class consists of approximately 300 individuals. [Brouillette Decl., ¶ 13.]

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

12 As noted, the settlement obligates Carvana to pay \$400,000 to resolve the claims of the
13 Settlement, inclusive of attorney's fees and costs. A minimum of approximately \$195,180 from the
14 GSA will be distributed to the Participating Class Members. This is a cash settlement that does not
15 require Participating Class Members to submit a claim form to receive their settlement share.
16 Participating Class Members will receive their settlement checks automatically via First Class U.S.
17 Mail. Twenty percent of each settlement share will be allocated to wages and the remaining eighty
18 percent will be allocated to penalties and interest, which allocation is consistent with Carvana's
19 potential liability as discussed below. Carvana will pay any and all applicable employer-side payroll
20 taxes separately and in addition to the GSA. Subject to the Court's approval, any amounts not
21 claimed (because a class member does not cash his or her settlement check) will be forwarded to
22 the California State Controller's Unclaimed Property Division. [Brouillette Decl., ¶ 14.]

23 Each Participating Class Member will receive a share of the Net Settlement Amount based
24 on his or her total weeks worked for Carvana during the Class Period while employed in vehicle
25 transporter position, with the allocation weighted to reflect the fact that Carvana changed its
26 compensation policies in January 2023 (Agreement, § 3.2.4). Thus, each Class Member's Individual
27 Settlement Payment will be calculated using criteria typically used in determining appropriate
28 amounts of unpaid wages and potential statutory penalties under applicable law. These methods are

1 intended to ensure each Class Member receives a portion of the available settlement funds
2 corresponding to the relative value of his or her potential claims. The proposed allocation provides
3 a reasonable way to compensate Class Members based on the amount of time they worked for
4 Carvana as an allegedly misclassified employee and the number of lost hours worked and
5 corresponding loss of pay. The average gross award is estimated to be approximately \$650.
6 [Brouillette Decl., ¶ 15.]

7 As discussed below, the overall settlement amount is reasonable in light of the considerable
8 risks associated with Plaintiff's claims, and the delay and risk posed by continuing to litigate such
9 disputed allegations. In counsel's judgment, the total value recovered for the class is substantial and
10 within the range of reasonableness.

11 **C. Settlement Administration**

12 Subject to the Court's approval, the Parties have agreed on Phoenix Settlement
13 Administrators as the Settlement Administrator. Phoenix is qualified and has significant experience
14 administering class action settlements, including numerous wage and hour matters. Phoenix's fees
15 and costs will not exceed \$9,000.00. If the Court approves less than the above amount, the difference
16 will remain in the Net Settlement Amount for distribution to the Participating Class Members.
17 [Brouillette Decl., ¶ 16; Declaration of Michael Moore, ¶¶ 2-17; Exhs. A-B.]

18 **D. The Class Notice**

19 The proposed Notice of Class Action Settlement (Exhibit A to the Settlement Agreement)
20 sets out information about this case and explains the basic settlement terms in plain language. The
21 Notice also sets forth the individualized information used to calculate Class Members' Individual
22 Settlement Payments and each Class Member's estimated settlement award. The Notice likewise
23 details the procedures for Class Members to dispute their individual information, the procedure for
24 submitting an objection to the Settlement, the procedure to request exclusion, and the fact that any
25 final judgment will bind all class members who do not opt out. Cal. Rules of Court 3.769(f) and
26 3.766(d). In sum, the Notice provides the Class Members with the information necessary to
27 evaluate the Settlement and decide to participate in, opt out of, or object to the proposed
28

1 Settlement, and meets all requirements imposed by the California Rules of Court. Coupled with
2 the notice procedure, the Notice provides the best notice practicable. [Brouillette Decl., ¶ 17.]

3 **E. Right to Correct Information, Opt Out, or Object**

4 Class Members will have sixty (60) days to dispute the information in their Notice used to
5 calculate their settlement award, and also have 60 days to submit any objections to the settlement
6 or to request exclusion. If a Class Member disputes their individual information, the Settlement
7 Administrator will review the Class Member's records and any other information submitted, and
8 make a final determination. [Brouillette Decl., ¶ 18.]

9 **F. Release of Claims**

10 All Participating Class Members will release Carvana from all claims alleged in the
11 operative complaint, or that could have been brought based on the factual allegations in the
12 operative complaint, including PAGA claims, during the Class Period. The release is limited to the
13 claims that were actually pleaded or could have been pleaded based on the alleged facts in the
14 operative complaint. [Brouillette Decl., ¶ 19.]

15 **G. Plaintiff's Enhancement Award**

16 Under the Settlement Agreement, Plaintiff seeks an incentive award of \$10,000. This
17 request is reasonable given his efforts in this case and the risks he undertook on behalf of the class
18 members. Staton v. Boeing (9th Cir. 2003) 327 F.3d 938, 977 (collecting cases awarding class
19 representatives service and incentive payments ranging from \$2,000 to \$25,000).

20 By contacting and retaining counsel to pursue these claims, Plaintiff made this settlement
21 possible for the other class members, while shouldering the risk of being liable for Defendant's
22 litigation costs. Plaintiff also exposed himself to unwanted notoriety related to filing a public
23 lawsuit (discoverable even through a simple google search) for the benefit of other employees,
24 placing him at risk of discrimination by future prospective employers. Among taking many other
25 actions assisting in the successful litigation of this case, Plaintiff provided substantial factual
26 information to his counsel, attended numerous meetings with his counsel to discuss the case, and
27 generally participated in all phases of the litigation. Accordingly, the requested enhancement
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1 payment to Plaintiff is appropriate and justified as part of the Settlement for his service and risks
2 undertaken. [Brouillette Decl., ¶ 20; Declaration of Leon Johnson, ¶¶ 2-9.]

3 **H. Attorney's Fees and Costs**

4 The terms of the Parties' settlement also allow Plaintiff's counsel to apply for an award of
5 attorney's fees of up to 33.33% of the GSA, or \$133,320.00, and reimbursement of actual costs
6 and expenses of up to \$12,500.00. In advance of the Final Approval Hearing, Plaintiff's counsel
7 will submit a request for attorney's fees and actual litigation costs per the terms of the Settlement
8 Agreement and applicable law, and will provide the Court with appropriate information and
9 evidence regarding hourly rates, tasks performed, and time expended on the case. [Brouillette
10 Decl., ¶ 21.]

11 **I. PAGA Claims and Notice to the LWDA**

12 The Parties allocated \$40,000 of the GSA to payment of civil penalties under PAGA, as
13 addressed in more detail below. As required by Labor Code section 2699(1)(2), Plaintiff gave notice
14 of the settlement and the approval hearing to the LWDA via its online portal. [Brouillette Decl., ¶
15 22; Exh. 5.]

16 **IV. ARGUMENT**

17 **A. Standard of Review for a Class Action Settlement**

18 The law favors settlement, particularly in class actions where substantial resources can be
19 conserved by avoiding the time, costs and rigors of formal litigation. H. Newberg & A. Conte, 4
20 Newberg on Class Actions (4th ed. 2002) § 11.41; Class Plaintiffs v. City of Seattle (9th Cir. 1992)
21 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Potter v. Pacific Coast Lumber Co. (1951) 37
22 Cal.2d 592, 602. Nevertheless, to ensure the rights of absent class members are not unjustly
23 compromised, settlement of a class action requires court approval. Cal. Rule of Court. 3.769;
24 Wershba v. Apple Computer (2001) 91 Cal.App.4th 224, 245; Dunk v. Ford Motor Co. (1996) 48
25 Cal.App.4th 1794, 1801. This judicial review protects against fraud or collusion, and ensures
26 fairness to the absent class members. Dunk, 48 Cal.App.4th at 1800-01. Judicial review occurs via
27 a two-step process to determine, under all the circumstances, if the proposed settlement is fair,
28 reasonable and adequate. Id. at 1801; Wershba, 91 Cal.App.4th at 245.

1 The first step is a motion for preliminary approval, through which the parties present the
2 court with the proposed settlement and seek a determination that it is sufficiently fair and reasonable
3 to warrant notice to the class and further proceedings as to its fairness and adequacy. Cal. Rule of
4 Court 3.769(c). This preliminary evaluation determines if the proposed settlement is within the
5 “range of reasonableness” and if notice should be provided to the class regarding the settlement’s
6 proposed terms and conditions, and whether a final fairness hearing should be scheduled. Wershba,
7 91 Cal.App.4th at 234-35; North County Contractors Ass’n, Inc. v. Touchstone Ins. Servs. (1994)
8 27 Cal.App.4th 1085, 1089-90. Considering the strong judicial policy favoring settlement of class
9 actions, courts generally apply a presumption of fairness to class action settlements when (1) the
10 settlement results from arms-length bargaining, (2) investigation and discovery are sufficient to
11 allow counsel and the court to act intelligently, (3) counsel is experienced in similar litigation, and
12 (4) the percentage of objectors is small. Dunk, 48 Cal.App.4th at 1802; Wershba, 91 Cal.App.4th at
13 245.

14 If the court grants preliminary approval, it then orders the class be given notice in an
15 appropriate manner, establishes a schedule and procedures for class members to request exclusion
16 or object, and sets the matter for a final fairness hearing. Typically, any motion for attorney’s fees
17 and costs is filed subsequent to preliminary approval and heard with the motion for final approval,
18 as part of the second step of the two-step approval process. Dunk, 48 Cal.App.4th at 1800; Wershba,
19 91 Cal.App.4th at 232. The proposed settlement in this matter warrants preliminary approval under
20 the liberal standard discussed above, as it is fair, reasonable and adequate under all the
21 circumstances, and represents a favorable result for the class.

22 **B. The Proposed Settlement Class Should Be Conditionally Certified**

23 The purpose of conditional class certification for purposes of settlement is to facilitate
24 provision of notice of the proposed settlement’s terms, and the date and time of the final fairness
25 hearing. In this context, courts apply lesser scrutiny than they would otherwise in the context of
26 certifying a class. Dunk, 48 Cal.App.4th at 1807, n.19; Global Minerals & Metals Corp. v.
27 Superior Court (2003) 113 Cal.App.4th 836, 839 (“[I]t is well established that trial courts should
28 use different standards to determine the propriety of a settlement class.”)

1 In the present matter, conditional certification is proper since this matter satisfies all
2 requirements for class certification under Code of Civil Procedure section 382. First, the class is
3 both sufficiently numerous, consisting of approximately 300 individuals, and ascertainable by
4 reference to Defendant's personnel and payroll records. [Brouillette Decl., ¶ 23.] Next, Plaintiff is
5 an adequate class representative, as his claims do not conflict with and are not antagonistic to the
6 claims of other class members. For these reasons, Plaintiff contends he is an adequate class
7 representative. Further, his claims are typical given he is a member of the class and his claims
8 arise from the same employment practices and course of conduct giving rise to the claims of the
9 other class members. [Brouillette Decl., ¶ 24; Johnson Decl., ¶¶ 2-9.] Lastly, his counsel is
10 experienced and adequate class counsel. [Brouillette Decl., ¶¶ 37-48.]

11 Next, common questions of law and fact predominate – particularly for purposes of a
12 settlement class – as the Class Members all were subject to the same payroll scheme and policies
13 that Plaintiff contends violates California labor law. Since the focus of the claims against Carvana
14 concerns the legality of common policies applied uniformly to the entire class, common issues
15 predominate over individualized inquiries concerning liability. For instance, Carvana's alleged
16 treatment of the class members as exempt employees either complies with California law or it
17 does not. Regardless of that determination, it will decide liability for all class members one way
18 or another. [Brouillette Decl., ¶ 25.]

19 By now it is well-settled a theory of recovery asserting the existence of a uniform policy
20 violating California law is sufficient to satisfy the requirements for class certification. Brouillette
21 v. Farmers Ins. Exch. (2013) 221 Cal.App.4th 986, 996 ("Claims alleging that a uniform policy
22 consistently applied to a group of employees is in violation of the wage and hour laws are of the
23 sort routinely, and properly, found suitable for class treatment"); Williams v. Superior Court
24 (2013) 221 Cal.App.4th 1353 ("A company-wide practice can sustain a common question of fact
25 or law that supports commonality for class certification"). Lastly, a class action is superior to
26 other means for the fair and efficient adjudication of this controversy. [Brouillette Decl., ¶ 26.]

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1 C. **The Proposed Settlement Meets the Kullar Factors and is within the Range of**
2 **Reasonableness**

3 The proposed settlement resulted from serious, arms-length negotiations facilitated by
4 respected mediator, Steve Cerveris, Esq., who has considerable experience mediating wage and hour
5 class action cases. [Brouillette Decl., ¶ 10.] Plaintiff's counsel Zachary M. Crosner, Jamie K. Serb,
6 and Brandon Brouillette of Crosner Legal, P.C. have years of experience litigating wage and hour
7 class actions. Plaintiff's counsel is well-qualified to evaluate the risks and benefits of pursuing
8 further litigation or settling the matter. [Brouillette Decl., ¶¶ 37-48.]

9 Next, California law recognizes several factors bearing on the fairness, adequacy, and
10 reasonableness of a proposed class settlement. Kullar v. Foot Locker Retail, Inc. (2008) 168
11 Cal.App.4th 116, 128. In relevant part, these factors include: 1) the amount offered in settlement 2)
12 the strength of plaintiff's case; 3) the risk, expense, complexity, and likely duration of further
13 litigation; 4) the risk of maintaining class action status throughout trial; and 5) the experience and
14 views of counsel. Id. As demonstrated below, the proposed settlement satisfies these requirements.

15 Prior to mediation, the parties engaged in formal and informal discovery to facilitate
16 settlement discussions. Thus, Plaintiff reviewed documents and information regarding Carvana's
17 payroll practices, a random sampling of pay stubs and time records for sampling of class members,
18 applicable compensation plans, etc., and information from Defendant regarding class size and
19 breakdown, work weeks/pay periods, rates of pay, and other relevant information. Plaintiff's counsel
20 are confident they obtained sufficient information to understand the law and facts of this case and
21 make an informed decision regarding the proposed settlement and whether it is fair and reasonable.
22 [Brouillette Decl., ¶¶ 9, 27.]

23 Next, the proposed settlement falls within the range of reasonableness warranting
24 preliminary approval. The proposed settlement involves a significant sum that, when distributed,
25 will confer direct monetary benefits on the class members. Each class member will be entitled to a
26 monetary payment without having to file a claim and each payment will be relative to the value of
27 his or her potential claims. Through the information exchanged and analysis undertaken, Plaintiff
28

1 weighed the risks of continued litigation against the benefits of the proposed settlement and
2 determined settlement to be the most reasonable option.

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., ¶¶ 28-29.] 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 and around
23 January 2023 and now pays them on a piece rate system based on miles driven, which fact is
24 reflected in the allocation formula. [Brouillette Decl., ¶ 30.]

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

1 value to this claim. Similarly, no value was assigned to the claims for unpaid overtime or meal and
2 rest break violations as those claims all are preempted under federal law since the class members
3 operate under the federal Department of Transportation’s Hours of Service Regulations. 49 C.F.R.
4 §§ 395.1-13 (overtime not required for certain truck drivers); 13 Cal. Code Regs. §§ 1200, et seq.
5 (same); Int’l Bhd. of Teamsters, Local 2785 v. Fed. Motor Carrier Safety Admin. (9th Cir. 2021)
6 986 F.3d 841, 858 (California meal and rest break requirements preempted by federal law for
7 certain truck drivers); Garcia v. Superior Court (2022) 80 Cal.App.5th 63, 68 (same). [Brouillette
8 Decl., ¶ 31.]

9 Plaintiff also alleged derivative claims under Labor Code § 226 (alleged inaccurate wage
10 statement violations) and §§ 201-203 (waiting time penalties), both based on the failure to
11 properly record and pay for all hours worked, and these claims will rise or fall along with that
12 primary claim, in addition to being subject to “good faith” and other defenses available to
13 Defendant. E.g., Amaral v. Cintas Corp. No. 2 (2008) 163 Cal.App.4th 1157, 1203-04 (holding
14 employer did not willfully fail to pay wages under Labor Code § 203 even though the class
15 prevailed on the merits on the underlying claim for failing to pay living wages). Accordingly,
16 Plaintiff discounted the derivative claims significantly in light of these multiple potential defenses.
17 [Brouillette Decl., ¶ 32.]

18 As far as potential PAGA liability, the theoretical penalties totaled about \$700,000 should
19 Plaintiff prevail on all claims and establish violations of the multiple Labor Code sections at issue
20 for every single eligible pay period. [Brouillette Decl., ¶ 33.] As with the class claims, Plaintiff
21 discounted the potential PAGA penalties for the multi-layered defenses proffered by Defendant on
22 the merits, and further discounted these claims since the Court possesses wide discretion to reduce
23 such penalties even if Plaintiff ultimately prevailed. Lab. Code § 2899(e)(2); Fleming v. Covidien
24 (C.D. Cal. 2011) 2011 U.S. Dist. LEXIS 154590, *8-9 (court reduced the potential penalties by
25 over 82% after a bench trial); Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th 504 (after a
26 bench trial, the trial court awarded penalties of just \$5 per pay period, a 90% reduction, which
27 decision was upheld on appeal); In re Taco Bell Wage and Hour Actions (E.D. Cal. Apr. 8, 2016)
28 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 \$400,000 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 \$400,000, with an average award of some \$650 per class member, is a fair result within
24 the range of reasonableness considering all potential outcomes. [Brouillette Decl., ¶¶ 34-36.]

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 adequate. Wershba, 91 Cal.App.4th at 246, 250 ("even if the relief afforded by the proposed
28 settlement is substantially narrower than it would be if the suits were to be successfully litigated,

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

17 **V. CONCLUSION**

18 For all the foregoing reasons, Plaintiff respectfully requests that the Court grant this motion,
19 conditionally certify the settlement class, grant preliminary approval to the proposed class action
20 settlement, and enter the [Proposed] Order filed herewith.

21
22 Dated: January 16, 2024

CROSNER LEGAL, PC

23
24 By: 

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