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8

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **FOR THE COUNTY OF NEVADA**

11  
12 CHER LEE FAACKS, individually and on  
behalf of all similarly situated individuals.

13 Plaintiff,

14 v.

15 STORAGEPRO MANAGEMENT, INC., a  
16 California corporation, and DOES 1  
through 10, inclusive,

17 Defendants.  
18

CASE NO: CU19-084121

*Assigned to the Hon. S. Robert Tic-Raskin, Dept. 6*

CLASS ACTION

**NOTICE OF UNOPPOSED MOTION AND  
UNOPPOSED MOTION FOR  
PRELIMINARY APPROVAL OF CLASS  
ACTION SETTLEMENT AND SEEKING  
LEAVE TO FILE SECOND AMENDED  
COMPLAINT**

**DATE: May 12, 2023**

**TIME: 10:00 a.m.**

**DEPT.: 6**

*Complaint Filed: September 13, 2019*

1           **PLEASE TAKE NOTICE THAT** on May 12, 2023 at 10:00 a.m., or as soon thereafter as  
2 the matter may be heard, in Department 6 of the above-entitled Court, located at 201 Church Street,  
3 Nevada City, California 95959, Plaintiff Cher Lee Faacks will and hereby does move unopposed  
4 for an Order (1) preliminarily finding that the settlement between the parties falls within the range  
5 of reasonableness and approving the proposed class action settlement in the above-captioned case,  
6 (2) conditionally certifying, for settlement purposes only, a settlement class, (3) approving the  
7 appointment of Plaintiff Cher Lee Faacks as the Class Representative, (4) approving the  
8 appointment of Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as Class  
9 Counsel, (5) approving the appointment of Phoenix Settlement Administrators as settlement  
10 administrator, (6) approving as to content and form the notice to the settlement class, and directing  
11 it be disseminated by the Settlement Administrator; (7) permitting Plaintiff to file a Second  
12 Amended Class Action Complaint; and (8) setting a final fairness and approval hearing.

13           This unopposed Motion is made pursuant to Rule 3.769 of the California Rules of Court,  
14 which provides for court approval of the settlement of a purported class action and allows the Court  
15 to preliminarily certify a class for settlement purposes only.

16           The basis for this unopposed Motion is that the proposed settlement is fair, adequate, and  
17 reasonable and in the best interests of the settlement class as a whole, and that the procedures  
18 proposed by the Parties are adequate to ensure the opportunity of class members to participate in,  
19 opt out of, or object to the settlement.

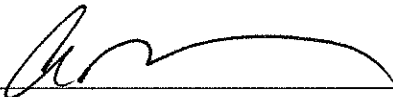
20           This Motion will be based on the Memorandum of Points and Authorities set forth herein,  
21 the Settlement Agreement and Release of Claims, the Declaration of Daniel F. Gaines, such  
22 evidence or oral argument as may be presented at the hearing, and on the complete record and file  
23 herein.

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DATED: April 10, 2023

Respectfully submitted,  
  
GAINES & GAINES,  
A Professional Law Corporation

By:   
\_\_\_\_\_  
DANIEL F. GAINES  
ALEX P. KATOFISKY  
Attorneys for Plaintiff Cheryl Lee Faacks and Proposed  
Class Counsel

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Following years of litigation and a lengthy appeal, the Parties have reached a resolution of  
4 this class action and hereby submit their Settlement Agreement and Release of Claims  
5 (“Settlement”, “Stipulation” or “Stip.”) for the Court’s approval. The Settlement is made and  
6 entered into by and between Plaintiff Cher Lee Faacks (“Plaintiff” or “Faacks”), individually and  
7 on behalf of all others similarly situated, and Defendant StoragePro Management, Inc.  
8 (“Defendant”).

9 The settlement occurred as a result of extensive arm’s-length negotiations by experienced  
10 counsel with the assistance of a respected mediator with experience in the area of employment class  
11 actions. Most importantly, the settlement will result in significant financial benefit to the  
12 participating claimants, on terms that are by any measure fair, reasonable and adequate. *See*  
13 *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801-02. The proposed settlement provides  
14 for a non-revisionary class settlement in the gross amount of \$449,050 to a settlement class of  
15 approximately 725 employees who worked no more than 50,000 workweeks during the Class  
16 Period, yielding gross payments of \$619 per employee. As detailed below, the settlement is in the  
17 best interests of the class in light of all of the facts and circumstances and the risks and delays of  
18 further litigation.

19 For the foregoing reasons, the Parties respectfully request that the Court: (a) grant  
20 preliminary approval of the settlement agreement and preliminarily find that the settlement falls  
21 within the range of reasonableness; (b) conditionally grant certification of the proposed Settlement  
22 Class, for settlement purposes only; (c) approve the appointment of Plaintiff Cher Lee Faacks as  
23 the Class Representative; (d) approve the appointment of Daniel F. Gaines and Alex P. Katofsky  
24 of Gaines & Gaines, APLC as Class Counsel; (e) approve appointment of the Settlement  
25 Administrator; (f) permit the filing of a Second Amended Complaint; (g) authorize the mailing of  
26 the proposed class action notice packet; and (h) schedule a final fairness and approval hearing.

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1 **II. BACKGROUND AND PROCEDURAL HISTORY**

2 On or about September 13, 2019, Plaintiff initiated the Action by filing a class action  
3 complaint, on behalf of herself and all other putative class members. Plaintiff filed a First Amended  
4 Complaint on or about November 5, 2019 which alleged representative claims for civil penalties  
5 pursuant to PAGA and class claims for equitable relief pursuant to Business & Professions Code  
6 section 17200, premised on underlying violations of Labor Code sections 201-202, 226(a), 226.3,  
7 226.7, 510, 512, 1194, and 2802. Plaintiff subsequently dismissed her PAGA claims without  
8 prejudice. Declaration of Daniel F. Gaines (“Gaines Decl.”) at ¶ 6.

9 Extensive law and motion practice ensued relating to the validity of an arbitration agreement  
10 entered into between the Parties. The arbitration issue culminated with the Court of Appeal of the  
11 State of California, Third Appellate District, issuing a decision in case number C092404 which  
12 upheld the trial court’s ruling that Plaintiff was not required to arbitrate her unfair competition  
13 claims brought pursuant to Business & Professions Code section 17200. Gaines Decl. at ¶ 7.

14 On August 16, 2022, following their exchange of information regarding the Settlement  
15 Class and the claims and defenses asserted by the Parties, counsel for the Parties engaged in arm’s-  
16 length negotiations with the help of mediator Brandon McKelvey, Esq., to reach the basic terms of  
17 the Settlement. Gaines Decl. at ¶ 8.

18 As part of the Court approval process for this class action settlement, Plaintiff shall file the  
19 Second Amended Complaint, attached to the Settlement as Exhibit 3, which asserts direct class  
20 action claims against Defendant – all related to and derivative of the claims alleged in the original  
21 complaint – for (1) failure to pay all wages (Labor Code § 510 and 1194); (2) failure to provide rest  
22 periods or compensation in lieu thereof (Labor Code § 226.7; IWC Wage Order 4-2001); (3) failure  
23 to provide meal periods or compensation in lieu thereof (Labor Code §§ 226.7, and 512; IWC Wage  
24 Order 4-2001); (4) knowing and intentional failure to comply with itemized employee wage  
25 statement provisions (Labor Code §§ 226(a), (e)); (5) failure to timely pay wages due at separation  
26 of employment (Labor Code §§ 201-203); (6) failure to reimburse employee business expenses  
27 (Labor Code § 2802); and (7) violation of Business and Professions Code § 17200 (the “Second  
28 Amended Complaint”). Gaines Decl. at ¶ 9.



1 Defendant denies any liability or wrongdoing of any kind associated with the claims alleged  
2 in the Action, and further denies that the Action is appropriate for class treatment for any purpose  
3 other than this settlement. Defendant contends that it has complied at all times with the California  
4 Labor Code. It is Defendant's position that, if this case were to be litigated, class certification  
5 would be inappropriate because Plaintiff is not an adequate class representative, Plaintiff's claims  
6 are not typical of putative class members, and individual issues predominate over class issues. The  
7 Action, the negotiation and execution of this Settlement Agreement, and all acts performed or  
8 documents executed pursuant to or in furtherance of the Settlement Agreement (i) shall not be used  
9 as an admission or evidence of wrongdoing on behalf of Defendant; (ii) shall not be an admission  
10 or evidence of fault on behalf of Defendant in any action before a civil, criminal, or administrative  
11 agency; and (iii) shall not be deemed to be, and may not be used as, an admission or evidence of  
12 the appropriateness of these or similar claims for class certification in the Action or with respect to  
13 any other proceeding. Gaines Decl. at ¶ 10.

14 The Class Representative contends that Defendant violated the California Labor Code and  
15 that this case is appropriate for class certification. Gaines Decl. at ¶ 11.

16 **III. INVESTIGATION AND SETTLEMENT DISCUSSIONS**

17 Class Counsel represent that they have conducted a thorough investigation into the facts  
18 and law during the prosecution of this class action case, including the exchange of extensive  
19 informal discovery and the review and verification of statistical data and other facts and information  
20 provided by Defendant. Counsel for the Parties also represent that they have investigated the  
21 applicable law as applied to the facts discovered regarding the alleged claims of Plaintiff and  
22 potential defenses thereto, and the damages claimed by Plaintiff. Gaines Decl. at ¶ 12.

23 Based on their own independent investigation and evaluation, Class Counsel are of the  
24 opinion (and will so represent to the Court) that settlement for the consideration and on the terms  
25 set forth in their Settlement Agreement is fair, reasonable, and adequate and is in the best interest  
26 of the Settlement Class in light of all known facts and circumstances, including the risk of  
27 significant delay, the risk the Settlement Class will not be certified by the Court, and the defenses  
28

1 asserted by Defendant. Defendant and its counsel also agree (and will so represent to the Court)  
2 that the settlement is fair and in the best interest of the Settlement Class. Gaines Decl. at ¶ 13.

3 The Parties agree that the settlement class described herein may be certified for settlement  
4 purposes only and that this motion for approval seeking, *inter alia*, certification of the Settlement  
5 Class is for purposes of the settlement only. If for any reason the settlement is not approved, the  
6 certification will have no force or effect and will immediately be revoked. The Parties further agree  
7 that certification for purposes of the settlement is in no way an admission that class certification is  
8 proper under the more stringent standard applied for litigation and that evidence of this limited  
9 stipulation for settlement purposes only will not be admissible for any purpose in this or any other  
10 proceeding. Gaines Decl. at ¶ 14.

11 **IV. LEGAL ANALYSIS**

12 **A. The Proposed Settlement Terms**

13 **1. The Settlement Class**

14 The Parties have agreed to a settlement class composed of all non-exempt employees  
15 employed by Defendant in California at any time between September 13, 2015 and October 15,  
16 2022. Defendant represents that this Class contains no more than 725 members who worked no  
17 more than 50,000 workweeks during the Class Period. Stip. at ¶ A(4).

18 **2. Allocations to be Paid from the Gross Settlement Amount**

19 The Parties agree to settle this Action for a Gross Settlement Amount of Four Hundred  
20 Forty-Nine Thousand Fifty U.S. Dollars (\$449,050) (the “Gross Settlement Amount”), subject to  
21 any increase based on the escalator provision in paragraph H(17) of the Settlement. The Gross  
22 Settlement Amount includes the attorneys’ fees of Class Counsel, litigation costs and expenses  
23 (which includes, without limitation, all such fees and costs incurred to date, as well as such fees  
24 and costs to be incurred in documenting the settlement, providing any notices required as part of  
25 the settlement, securing Court approval of the settlement, and obtaining judgment in the Action),  
26 the enhancement payment to the Class Representative, as approved by the Court, and all costs of  
27 administration, including, without limitation, settlement administration fees and expenses.  
28 Defendant shall pay all employer payroll tax obligations due on wage payments made from the Net

1 Settlement Sum in addition to, and separate and apart from, the Gross Settlement Amount. Stip. at  
2 ¶ C(1)(a).

3 From the Gross Settlement Amount, Defendant will not oppose Plaintiff's counsel's  
4 application to the Court for up to 40% of the Gross Settlement Amount for attorneys' fees (or  
5 \$179,620). Stip. at ¶ C(1)(e).

6 From the Gross Settlement Amount, Defendant will not oppose Plaintiff's counsel's  
7 application to the Court for up to \$20,000 in reimbursement of litigation costs and expenses. Stip.  
8 at ¶ C(1)(f).

9 From the Gross Settlement Amount, Defendant will not oppose Plaintiff's counsel's  
10 application to the Court for an Enhancement Payment to the Class Representative Cher Lee Faacks  
11 in the gross amount of \$15,000, in consideration for his efforts in instituting and participating in  
12 the Action. Stip. at ¶ C(1)(d).

13 From the Gross Settlement Amount, settlement administration fees paid to Phoenix  
14 Settlement Administrators will be no more than \$12,000. Stip. at ¶ C(1)(g).

15 The Net Settlement Sum is the Gross Settlement Amount less the amounts approved and  
16 awarded by the Court for: attorneys' fees and documented litigation costs and expenses incurred or  
17 advanced by Class Counsel, the enhancement payment to the Class Representative, and the costs  
18 of administering the settlement. Stip. at ¶ C(1)(b).

19 The Individual Settlement Payments are the portion of the Net Settlement Sum distributable  
20 to each Class Member who participates in the Settlement (i.e., who does not submit a valid request  
21 for exclusion form). The Individual Settlement Payments will be calculated by dividing the Net  
22 Settlement Sum by the total weeks worked by all participating Class Members in California in a  
23 non-exempt position during the Class Period, which will yield the applicable weekly rate. The  
24 weekly rate shall be multiplied by the number of weeks each individual participating Class Member  
25 worked for Defendant in California in a non-exempt position during the Class Period to yield their  
26 Individual Payment Amount. Each Participating Settlement Class Member who does not opt out  
27 will receive an Individual Payment Amount. Stip. at ¶ C(1)(c).

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1           **B.     Two-Step Approval Process**

2           Any settlement of class litigation must be reviewed and approved by the Court. Cal. R. Ct.  
3 3.769; Fed. R. Civ. P. 23(e).<sup>1</sup> This is done in two steps: (1) an early (preliminary) review by the  
4 trial court, and (2) a final review after notice has been distributed to the Class Members informing  
5 them of the terms of the settlement and allowing them to exclude themselves from, participate in  
6 and/or object to the settlement. The Manual for Complex Litigation (Third) § 30.41 states:

7                     Approval of class action settlements involves a two-step process.  
8                     First, counsel submit the proposed terms of settlement and the court  
9                     makes a preliminary fairness evaluation. If the preliminary  
10                    evaluation of the proposed settlement does not disclose grounds to  
11                    doubt its fairness or other obvious deficiencies, such as unduly  
12                    preferential treatment of class representatives or of segments of the  
                    class, or excessive compensation for attorneys, and appears to fall  
                    within the range of possible approval, the court should direct that  
                    notice ... be given to the class members of a formal fairness hearing,  
                    at which arguments and evidence may be presented in support of and  
                    in opposition to the settlement.

13           Thus, the preliminary approval by the trial court is simply a conditional finding that the  
14 settlement appears to be within the range of acceptable settlements. *See Wershba v. Apple*  
15 *Computer* (2001) 91 Cal.App.4th 224, 234-35. “The strength of the findings made by a judge at a  
16 preliminary hearing or conference concerning a tentative settlement proposal may vary. The court  
17 may find that the settlement proposal contains some merit, is within the range of reasonableness  
18 required for a settlement offer, or is presumptively valid subject only to any objections that may be  
19 raised at a final hearing.” 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26  
20 (4th ed. 2002).

21           The procedures for the Parties’ submission of a proposed settlement for preliminary  
22 approval by the Court also are discussed in 4 *Newberg on Class Actions*:

23                     When the parties to an action reach a monetary settlement, they will  
24                     usually prepare and execute a joint stipulation of settlement, which  
25                     is submitted to the court for preliminary approval. The stipulation  
26                     should set forth the essential terms of the agreement, including but  
                    not limited to, the amount of settlement, form of payment, manner of  
                    determining the effective date of settlement and any recapture clause.

27           <sup>1</sup> The California Supreme Court has authorized California's trial courts to use Federal Rule 23 and  
28 cases applying it for guidance in considering class issues. *See Vasquez v. Superior Court* (1971)  
4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, therefore,  
Plaintiff cites Federal Rule 23 and federal case law in addition to California law.

1 *Id.* at § 11.24.

2 Here, the Parties have reached such an agreement and have submitted the Stipulation  
3 herewith. *See* Gaines Decl., **Exhibit B**; Gaines Decl. ¶ 15.

4 **C. Procedures for Settlement Before Class Certification.**

5 Pursuant to California Rules of Court, Rule 3.769(d), parties also may, at the preliminary  
6 approval stage, request that the court provisionally approve certification of the class – conditioned  
7 upon final approval of the settlement. “[P]re-certification settlements are routinely approved if  
8 found to be fair and reasonable.” *Wershba, supra*, 91 Cal. App. 4th at 240. *Accord Dunk, supra*,  
9 48 Cal. App. 4th at 1803 (although the settlement was reached before any “adversary certification,”  
10 the court was satisfied that it was “fair, adequate and reasonable.”). *See also In re Baldwin-United*  
11 *Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478<sup>2</sup> (“many courts have employed this practice in the  
12 name of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”)

13 The strength of the findings made by a judge at a preliminary hearing  
14 or conference concerning a tentative settlement proposal . . . may be  
15 set out in conditional orders granting tentative approval to the various  
16 items submitted to the court. Three basic rulings are often  
conditionally entered at this preliminary hearing. These conditional  
rulings may approve a temporary settlement class, the proposed  
settlement, and the class counsel’s application for fees and expenses.

17 4 *Newberg on Class Actions*, at § 11.26.

18 1. **The Settlement Class Should Be Certified for Settlement Purposes**

19 It is well established that trial courts should use a lower standard for determining the  
20 propriety of certifying a settlement class, as opposed to a litigation class. *Dunk, supra*, 48 Cal.  
21 App. 4th at 1807, n. 19. The reason for this is that no trial is anticipated in a settlement class, so  
22 the case management issues inherent in determining if the class should be certified need not be  
23 confronted. *Amchem Products, Inc. v. Windsor* (1987) 521 U.S. 591, 620. The proposed  
24 Settlement Class meets all requirements for certification, as discussed below.

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28 <sup>2</sup> In determining the fairness and reasonableness of a proposed settlement, California courts may  
look to federal cases for guidance. *See Wershba*, 91 Cal. App. 4th at 239-40.

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a. **The Settlement Class is Ascertainable**

The proposed Settlement Class is ascertainable. The class definition, the size of the Class, and the means for identifying the members of the class determine whether the class is ascertainable. *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1274. In this case, the Class Members are identifiable from Defendant’s employment and payroll records. Further, the Settlement Class is sufficiently numerous to warrant certification. According to Defendant’s records, the Class comprises approximately 725 employees. Gaines Decl. ¶ 29.

b. **Questions of Law or Fact Common to Members of the Settlement Class Predominate**

The Class Members’ claims all stem from a common source: members of the Settlement Class allege that Defendant violated the same Labor Code provisions in connection with their employment. All members of the Class seek the same relief under the same California laws (related to unpaid wages due, unpaid meal and rest period premiums, failure to reimburse expenses, inaccurate or incomplete wage statements, failure to timely pay wages due during employment and upon separation, failure to reimburse expenses, and derivative claims). Under these circumstances, the commonality requirement is satisfied for purposes of certifying the Settlement Class for settlement purposes. Gaines Decl. ¶ 30.

c. **The Proposed Class Representative’s Claims Are Typical of the Class Members’ Claims**

A class representative’s claims are typical when they arise from the same event or course of conduct that gives rise to the claims of the class, and are based on the same legal theory. *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46-47. In this case, named Plaintiff and proposed Class Representative Cher Lee Faacks is a former non-exempt employee who worked for Defendant in the State of California during the Class Period. She contends that Defendant failed to pay all wages due, failed to provide meal and rest periods, failed to comply with itemized employee wage statement provisions, failed to reimburse expenses, and failed to timely pay wages due at the separation of employment, in violation of Labor Code §§ 201-203, 226, 226.7, 510, 512, 1194, and 2802, among other Labor Code provisions. She has the same claims as those that the

1 members of the Settlement Class would reasonably be expected to bring based on the course of  
2 conduct alleged herein. Gaines Decl. ¶ 31.

3 Plaintiff has also demonstrated that she will aggressively and competently assert the  
4 interests of the proposed Settlement Class; she has taken an active role in this litigation and has no  
5 apparent conflicts with other class members. Gaines Decl. ¶ 32. Furthermore, Plaintiff has retained  
6 competent counsel, experienced in litigating class action claims in the employment context. See  
7 Gaines Decl. ¶¶ 2-5.

8 **D. The Settlement Is Fair and Reasonable and Not the Result of Fraud or**  
9 **Collusion**

10 Courts presume the absence of fraud or collusion in the negotiation of a settlement unless  
11 evidence to the contrary is offered. *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447; *Mars*  
12 *Steel Corp. v. Cont'l IL Nat'l Bank & Trust Co.* (7th Cir. 1987) 834 F.2d 677, 682; *In re Chicken*  
13 *Antitrust Litig.* (N.D. Ga. 1980) 560 F. Supp. 957, 962. Courts do not substitute their judgment for  
14 that of the proponents, particularly where, as here, settlement has been reached with the  
15 participation of experienced counsel familiar with the litigation. *Nat'l Rural Telecomms. Coop. v.*  
16 *DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 528; *Hammon v. Barry* (D.D.C. 1990) 752 F.  
17 Supp. 1087, 1093; *Steinberg v. Carey* (S.D.N.Y. 1979) 470 F. Supp. 471, 478; *In re Armored Car*  
18 *Antitrust Litig.* (N.D. Ga. 1979) 472 F. Supp. 1357, 1368; *Sommers v. Abraham Lincoln Fed. Sav.*  
19 *& Loan Ass'n* (E.D. Pa. 1978) 79 F.R.D. 571, 580.

20 While the recommendations of counsel proposing the settlement are not conclusive, the  
21 Court can properly take them into account, particularly where, as here, such counsel have been  
22 involved in informal discovery and negotiations for some period of time, appear to be competent,  
23 have experience with this type of litigation, and have exchanged substantial evidence with the  
24 opposing party. See *Newberg on Class Actions, supra*, § 11.47; *In re Paine Webber Ltd. P'ships*  
25 *Litig.* (S.D.N.Y. 1997) 171 F.R.D. 104, 125 (“[s]o long as the integrity of the arm’s-length  
26 negotiation process is preserved, however, a strong initial presumption of fairness attaches to the  
27 proposed settlement . . . [citations] and ‘great weight’ is accorded to the recommendations of  
28 counsel, who are most closely acquainted with the facts of the underlying litigation”); see Gaines

1 Decl. ¶¶ 2-5, 12-14.

2 Here, the Parties' counsel have a great deal of experience in class action litigation and  
3 specialize in employment wage and hour matters. Moreover, counsel for both Parties conducted  
4 an extensive investigation of the factual allegations involved in this case. The Parties have engaged  
5 in a broad exchange of documents, data, records and other information. Each side has apprised the  
6 other, informally and at a formal mediation, of their respective factual contentions, legal theories  
7 and defenses, resulting in extensive arm's-length negotiations taking place among the Parties. *See*  
8 *Gaines Decl. ¶¶ 2-5, 12-14.*

9 1. **The Settlement Falls Within The "Ballpark" of Reasonableness**

10 The Court must make an "independent assessment of the reasonableness of the terms of the  
11 settlement" prior to granting preliminary and final approval. *Clark v. Amer. Residential Serv.'s*  
12 *LLC* (2009) 175 Cal.App.4th 785, 799; *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th  
13 116, 127-28, 130, 133. To do so requires the Parties to submit "basic information about the nature  
14 and magnitude of the claims in question and the basis for concluding that the consideration being  
15 paid for the release of those claims represents a reasonable compromise." *Clark, supra*, 175  
16 Cal.App.4th at 800. However, the Court should *not* "attempt to decide the merits of the case or to  
17 substitute its evaluation of the most appropriate settlement for that of the attorneys." *Kullar, supra*,  
18 168 Cal.App.4th at 133.

19 Plaintiff's counsel created a comprehensive damage analysis using sampling information  
20 obtained through informal discovery. This damage analysis reveals that the negotiated settlement  
21 falls within a realistic range of recovery on Class Members' claims. *Gaines Decl. ¶ 16.*

22 Plaintiff alleges that Defendant paid Plaintiff and Class Members bonuses and other forms  
23 of non-base hourly wages that were not included in their regular rate of pay for purposes of  
24 computing the proper overtime and sick pay rates, in violation of Labor Code §§ 510 and  
25 1194 California Labor Code § 510 requires the payment of premium overtime compensation based  
26 on employees' regular rate of pay. This includes all forms of bonuses and other non-base hourly  
27 wages. Here, when Plaintiff and Class Members worked overtime hours, they allege that they were  
28 paid at one and one-half times the base hourly rate of pay. Plaintiff and Class Members contend



1 that they are entitled to significant restitution as a result. Plaintiff calculates restitution for this  
2 claim at up to \$108,201 based on a time and wage sampling produced by Defendant and an analysis  
3 performed by her expert. Gaines Decl. ¶ 17.

4 Plaintiff also contends that Defendant failed to pay Plaintiff and Class Members premium  
5 wages for missed, denied and unauthorized rest periods in violation of Labor Code § 226.7 and  
6 IWC Wage Order 5-2001. Plaintiff and other Class Members allege that they were denied, and  
7 therefore unable to take, 10-minute on-the-clock rest periods for every four hours of work or major  
8 fraction thereof, but were not paid premium wages of one hour's pay for each missed, denied and  
9 unauthorized rest period. When they were able to take a rest period, Plaintiff contends that  
10 Defendant maintained a policy and practice requiring employees to remain on the company  
11 premises, a practice that would violate our Supreme Court's mandate in *Augustus v. ABM Sec.*  
12 *Serv. 's, Inc.* (2016) 5 Cal. 5th 257, 269 (holding that the rest period requirement "obligates  
13 employers to permit and authorizes employees to take off-duty rest periods. That is, during rest  
14 periods employers must relieve employees of all duties and relinquish control over how employees  
15 spend their time." Plaintiff believes that if she could prove a 25% violation rate on this claim, the  
16 damage liability would just exceed \$1,020,000. Gaines Decl. ¶ 18.

17 Plaintiff also argues that Defendant failed to permit or authorize Plaintiff and Class  
18 Members to take timely 30-minute meal periods for shifts greater than 5 hours in length, in violation  
19 of Labor Code §§ 226.7 and 512 and IWC Wage Order 5-2001. Labor Code § 512 provides that  
20 employers (like Defendant) may not employ an employee for a work period of more than 5 hours  
21 without providing a 30-minute meal period starting no later than the end of the 5<sup>th</sup> hour. Plaintiff  
22 and Class Members allege that they were routinely unable to take a proper meal period when they  
23 worked shifts in excess of 5 hours in duration and a second meal period when they worked shifts  
24 in excess of 10 hours in duration. Based on Plaintiff's expert's analysis of a wage and time data  
25 provided by Defendant through informal discovery, Defendant's meal period compliance rate  
26 exceeded 95%; as a result, this claim had minimal value, likely under \$100,000. Gaines Decl. ¶  
27 19.

28 Plaintiff and Class Members contend that they were required to incur expenses in the

1 performance of their job duties for which they were not fully reimbursed, in violation of Labor  
2 Code § 2802. Plaintiff and Class Members argue that they were required to use their personal  
3 cellphones and vehicles but were not fully reimbursed by Defendant for these expenses. This  
4 practice violates Labor Code § 2802. Plaintiff calculates restitution on this claim at \$780,284  
5 (based off \$50/month in unreimbursed cellular phone and vehicle expenses), although Defendant  
6 argued that any expenses incurred were fully reimbursed, per its written policy and uniform  
7 practices. Gaines Decl. ¶ 20.

8 Plaintiff also alleges – on a derivative basis – that Defendant issued inaccurate wage  
9 statements and failed to timely pay wages due at the separation of employment, in violation of  
10 Labor Code §§ 226(e) and 203. The maximum value of these penalty claims – which are derivative  
11 and subject to independent defenses of their own – could approach \$3,000,000. Without a  
12 settlement, however, it is unlikely that these sums would be recovered because Defendant  
13 maintained the strong position that these claims were subject to individual arbitration. Gaines Decl.  
14 ¶ 21.

15 The discount negotiated for settlement here is a reasonable compromise, particularly  
16 considering that the risk of obtaining class certification on all or any of Plaintiff's claims involves  
17 a 50% or higher hurdle, especially with respect to the meal and rest period claims and expense  
18 reimbursement claims, to which Defendant maintains strong arguments to defeat class certification  
19 (in addition to multiple defenses on the merits of the claims). Class certification is a substantial  
20 risk in any class action case. Here, while Plaintiff maintains that the requirements of class  
21 certification are met, Defendant proffers various arguments why class treatment is not appropriate,  
22 including but not limited to that individualized inquires among class members predominate over  
23 common ones. If Defendant was to defeat Plaintiff's class certification motion, there would be no  
24 class wide relief whatsoever, and most class members would likely not file individual claims.  
25 Gaines Decl. ¶ 22.

26 Plaintiff also faced the risk of a loss on the merits on her claims. It is very possible that the  
27 Court would agree with Defendant's position that its policies and practices complied with the  
28 requirements of California law or could not be certified. In such a case, the value of the majority

1 of Plaintiff's claims would be zero. Gaines Decl. ¶ 23.

2 Plaintiff faced the risk that she would not obtain a maximum damage/penalty award on all  
3 (or any of) her claims. It is possible that the Court would not impose all penalties pursuant to its  
4 discretionary power to reduce them. Gaines Decl. ¶ 24.

5 Defendant strongly contends that its policies and practices do not violate any laws. It  
6 contends that it properly provided for all meal and rest periods and fully compensated its employees  
7 for all time worked and expenses incurred. It further contends that the wage statements it provides  
8 to its employees are fully compliant with California law. Gaines Decl. ¶ 24.

9 When the costs and risks of non-certification and loss on the merits are considered,  
10 Plaintiff's counsel is of the opinion that the settlement reached is clearly a favorable one. Gaines  
11 Decl. ¶¶ 16-26.

12 The settlement for each Class Member is fair, reasonable and adequate, given the inherent  
13 risk of litigation, the risk relative to class certification and the costs of pursuing such litigation. The  
14 settlement shall finally resolve all claims of the Class Members as alleged in the Action. Gaines  
15 Decl. ¶ 27.

16 2. **Despite the Asserted Fairness of the Settlement Terms, Class Members**  
17 **May Request Exclusion From, Or Object To, The Settlement**

18 Despite the asserted fairness of the settlement terms, any potential Class Member who  
19 objects to the terms of the settlement set forth in the Stipulation of Settlement has the right to submit  
20 a request for exclusion (*i.e.*, opt out) from the settlement, pursuant to which the Class Member  
21 would otherwise retain any claim he or she may have against Defendant.

22 Moreover, Class Members who do not opt out may, upon providing proper notice to the  
23 Parties and the Court, attend the final fairness and approval hearing for the purpose of objecting to  
24 one or more of the settlement terms set forth in the Stipulation of Settlement.

25 **E. Plaintiff Should Be Permitted to File Her Second Amended Complaint**

26 In connection with this Settlement, Plaintiff shall file a Second Amended Complaint,  
27 attached to the Stipulation as **Exhibit 3**. The Parties agreed that, as part of her motion for  
28 preliminary approval, Plaintiff would concurrently seek leave to file the Second Amended

1 Complaint, the filing of which is a condition of the Stipulation.

2 To effectuate the class settlement of the Action, Defendant does not oppose the filing of the  
3 Second Amended Complaint for settlement purposes only. As part of its order preliminarily  
4 approving the settlement, Plaintiff requests that the Court approve his filing of the Second Amended  
5 Complaint, and consent that Defendant not be required to file a responsive pleading thereto.

6 **V. CONCLUSION**

7 Based on the foregoing, as part of its preliminary approval of the settlement, the Parties  
8 request that the Court enter an order:

9 1. Preliminarily finding that the settlement falls within the range of reasonableness and  
10 approving the proposed settlement;

11 2. Conditionally certifying, for settlement purposes only, the Settlement Class;

12 3. Appointing Plaintiff Cher Lee Faacks as the Class Representative;

13 4. Appointing Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines, APLC as  
14 Class Counsel;

15 5. Approving Phoenix Settlement Administrators as Settlement Administrator;

16 6. Approving as to content and form the notice to the Settlement Class, and directing  
17 it to be disseminated by the Settlement Administrator;

18 7. Permitting Plaintiff to file her Second Amended Complaint, attached to the  
19 Stipulation as **Exhibit 3**, no later than five (5) court days after notice of the entry of the Order  
20 granting this motion has been given, and consent that Defendant not be required to file a responsive  
21 pleading thereto; and

22 8. Setting the following schedule of settlement proceedings:

23 \\\

24 \\\

25 \\\

26 \\\

27 \\\

28

| <u>EVENT</u>  | <u>TIMING</u>   |
|---|---|
| Last day for Defendant shall provide to the Settlement Administrator a list of all Class Members, including their last known addresses, telephone numbers, social security numbers, and their dates of employment in a non-exempt position in California during the Class Period ("Settlement Class Information") | 20 calendar days after entry of Court's Order granting preliminary approval of Settlement     |
| Last day for Settlement Administrator to mail Notice and Exclusion Form to Class Members  | 30 calendar days after entry of Court's Order granting preliminary approval of Settlement     |
| Last day for Class Members to submit an Exclusion Form to the Settlement Administrator  | 45 calendar days after the initial mailing of the Class Notice to Class Members               |
| Last day for Class Members to submit an Objection to the Settlement Administrator   | 45 calendar days after the initial mailing of the Class Notice to Class Members               |
| Last day for Class Counsel to file and serve moving papers in support of final settlement approval and request for attorneys' fees and costs  | 10 calendar days before the final settlement approval hearing date                            |
| Last day for Class Counsel to file with the Court and serve declaration by Settlement Administrator specifying the due diligence undertaken with regard to the mailing of the Notice  | 10 calendar days before the final settlement approval hearing date                            |
| Final settlement approval hearing   | _____, 2023, at _____m. (approximately 95 days after entry of the Order granting this Motion) |

DATED: April 10, 2023

Respectfully submitted,

GAINES & GAINES,  
A Professional Law Corporation

By: 

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ALEX P. KATOFISKY  
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Class Counsel