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8 UNITED STATES DISTRICT COURT
 9 EASTERN DISTRICT OF CALIFORNIA

10 * * *

11 JULIAN SMOTHERS, an individual, ASA
 12 DHADDA, an individual;

13 Plaintiffs,

14 vs.

15 NORTHSTAR ALARM SERVICES, LLC, a
 16 Utah corporation; and Does 1–50, inclusive,

17 Defendants.

Case No. 2:17-CV-00548-KJM-KJN

CLASS ACTION

**NOTICE OF MOTION AND MOTION
 FOR: 1) FINAL APPROVAL OF JOINT
 STIPULATION FOR CLASS
 SETTLEMENT; AND 2)
 CERTIFICATION OF FLSA
 COLLECTIVE; SUPPORTING
 MEMORANDUM OF POINTS AND
 AUTHORITIES**

Date: December 20, 2019
 Time: 10:00 a.m.
 Courtroom: 3

Judge: Hon. Kimberly J. Mueller

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on December 20, 2019 at 10:00 a.m. in Courtroom 3 of
3 the above-entitled Court located at 501 I Street, Sacramento, California 95814, Plaintiffs
4 JULIAN SMOTHERS and ASA DHADDA (hereinafter “Plaintiffs”) will and hereby do move
5 for an Order granting Certification and Final Approval of the Joint Stipulation for Class
6 Settlement (hereinafter “the Settlement”) by and between the Parties in this matter. Specifically,
7 the Parties request an Order granting:

8 1. Certification of the FLSA Group for as being fair, adequate and reasonable and in
9 the best interests of the FLSA Group Members as a whole; and

10 2. Final approval of the Settlement as being fair, adequate, reasonable and in the best
11 interests of the California Class as a whole

12 This Motion is made pursuant to Rule 23 of the Federal Rules of Civil Procedure and 29
13 U.S.C. 216(b), commonly referred to as the Fair Labor Standards Act, which provides for court
14 approval of the settlement of a purported class or collective action, respectively, and allows the
15 court to conditionally certify a class or collective action for settlement purposes. This Motion is
16 also made pursuant to California Labor Code section 2699, which requires court approval for
17 settlement of any claims based on the California Private Attorneys General Act of 2004. The
18 basis of this Motion is that the notice procedure ordered by this Court and as stipulated by the
19 Settlement having been carried out, the standards for certification being met for settlement
20 purposes, and the favorable response of the Settlement Class Members to the Settlement support
21 the conclusion that the Settlement is fair, adequate and reasonable and final approval should be
22 granted.

23 This Motion will be based on the following Memorandum of Points and Authorities and
24 Evidence, the documents on file in this matter, the Declarations of Jared Hague, Julian Smothers,
25 Asa Dhadda and Elizabeth Kruckenberg in support of this Motion and upon such other oral or
26 documentary argument or evidence as may be submitted at or before the hearing of this Motion

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1 Pursuant to the Court's Standing Order, the undersigned certifies that the Parties have
2 extensively met and conferred with respect to the subject of the instant Motion and the terms of
3 the proposed Settlement.

4

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Dated: November 22, 2019

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SUTTON HAGUE LAW CORPORATION
A Nevada Professional Corporation

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By: /s/ S. Brett Sutton
S. BRETT SUTTON
Attorneys for Plaintiff

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1	I. INTRODUCTION.....	1
2	II. LEGAL BASIS FOR CLASS SETTLEMENT	3
3	A. BACKGROUND AND SUMMARY OF THE CASE.....	3
4	III. SUMMARY OF THE SETTLEMENT	4
5	A. THE SETTLEMENT CLASS	4
6	B. DETAILS OF THE SETTLEMENT FUND	4
7	1. Gross Settlement Amounts.....	4
8	2. California Class Settlement Fund.....	5
9	3. FLSA Group Settlement Fund	5
10	4. Calculation and Distribution of Individual Settlement Payments.....	6
11	5. Additional Consideration.	7
12	C. RELEASE.....	7
13	IV. ADMINISTRATION OF THE SETTLEMENT AND THE CLASS RESPONSE	8
14	A. THE NOTICE PROCESS WAS DILIGENTLY EXECUTED	8
15	B. THE CLASS RESPONDED FAVORABLY TO THE SETTLEMENT	9
16	V. LEGAL STANDARDS AND ANALYSIS	10
17	A. STRENGTH OF PLAINTIFFS’ CASE AND AMOUNT OBTAINED THROUGH	
18	SETTLEMENT	11
19	B. RISK, EXPENSE, COMPLEXITY AND LIKELY DURATION OF FURTHER	
20	LITIGATION	12
21	C. RISK OF MAINTAINING CLASS STATUS	13
22	D. EXTENT OF DISCOVERY AND STAGE OF THE PROCEEDINGS.....	14
23	E. EXPERIENCE AND VIEWS OF COUNSEL.....	14
24	F. REACTION OF THE CLASS.....	15
25	G. ABSENCE OF ANY COLLUSION BETWEEN THE PARTIES	15
26	VI. THE PROPOSED PAYMENT TO THE SETTLEMENT ADMINISTRATOR IS FAIR	
27	AND REASONABLE	16
28		

1 VII. PLAINTIFFS HAVE DUTIFULLY CARRIED OUT THEIR RESPONSIBILITIES AS
2 CLASS REPRESENTATIVES 17
3 VIII. CONCLUSION AND SUMMARY OF REMAINING DEADLINES..... 17
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
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28

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7 2011)..... 12

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1 **I. INTRODUCTION**

2 Plaintiffs Julian Smothers and Asa Dhadda (collectively “Plaintiffs”), by this Motion for
3 Final Approval of Joint Stipulation for Class Settlement and Certification of FLSA Collective
4 (“Motion”), submit their Joint Stipulation for Class Settlement (“the Settlement”) between
5 themselves and Defendant Northstar Alarm Services, LLC (“Defendant”) (collectively “the
6 Parties”) to this Court. The Settlement establishes a Gross Settlement Amount of \$1.8 Million
7 available to resolve the claims of 94 putative class members in California and 285 individuals
8 nationwide through a hybrid Rule 23 opt-out and FLSA opt-in settlement.

9 On or about January 22, 2019, following approximately two years of intense litigation
10 and settlement negotiations between the Parties, this Court preliminarily approved the subject
11 Settlement amount as being fair and reasonable, preliminarily certified the Settlement Class for
12 settlement purposes, and appointed Plaintiffs as Class Representatives and Plaintiffs’ Counsel as
13 Class Counsel. (ECF No. 55). On or about August 12, 2019, the Court approved Plaintiffs’ notice
14 plan and ordered notice of the proposed Settlement to be given to the Settlement Class. (ECF No.
15 70).

16 As set forth in the accompanying declarations, the Class Notice Plan was carried out
17 according to the Court’s orders and the Settlement, and the Settlement Class Members’ response
18 has been overwhelmingly positive. In particular:

- 19 • **None of the Settlement Class Members objected to the Settlement;**
- 20 • **Not a single member of the California Class opted out of the Settlement;**
- 21 • **Over 59% of the FLSA Group Members submitted a Claim Form; and**
- 22 • **The Settlement Class Members claimed over 83% of the Net Settlement**
23 **Amount.**

24 The Settlement further represents a considerable monetary recovery on behalf of the
25 Settlement Class Members, with the average Settlement Class Member estimated to receive over
26 \$4,398.55, the highest California Class individual settlement totaling \$31,675.02 and the highest
27 FLSA Group individual settlement totaling \$16,243.17. As previously described in Plaintiffs’
28 Motion for Preliminary Approval, while the valuable monetary consideration obtained by the

1 Settlement Class Members should not be overshadowed, Plaintiffs also negotiated critical non-
2 monetary benefits on behalf of the Settlement Class in the form of changes to Defendant's
3 compensation practices that will yield tangible benefits to current and future employees of
4 Defendant, including but not limited to changes in the way Defendant will compensate Alarm
5 and Lead Alarm Installation Technicians and changes to Defendant's meal and rest period
6 policies for Alarm and Lead Alarm Installation Technicians who perform work for Defendant in
7 California. These changes underscore Plaintiffs' dedication to the absent Settlement Class
8 Members, as Plaintiffs no longer work for Defendant and will not directly benefit from these
9 changes, but nevertheless sought to negotiate for such changes on behalf of current and future
10 employees.

11 None of the Settlement Class Members disputed the estimated amount of their individual
12 settlement shares. Class Counsel received inquiries from various Settlement Class Members
13 regarding the mechanics of class actions generally and the timing of potential disbursement of
14 class funds, and all three individuals expressed enthusiasm and gratitude for the pending
15 Settlement. Class Counsel has no reason to believe that any Settlement Class Members will
16 object to the Settlement between now and the anticipated December 20, 2019 Final Approval
17 Hearing, or appear at the Hearing.

18 In evaluating the overall fairness of the Settlement, this Court must weigh certain factors,
19 including the following: the strength of the plaintiff's case; the risk, expense, complexity, and
20 likely duration of further litigation; the risk of maintaining class action status throughout trial;
21 the amount offered in settlement; the extent of discovery completed; the experience and views of
22 counsel; and the reaction of the Class Members to the proposed settlement. For the reasons
23 mentioned above and described herein in greater detail each of these factors favors final approval
24 of the Settlement. Accordingly, Plaintiffs respectfully request that the Court grant final approval
25 of the Settlement according to its terms. For ease of reference, an executed copy of the
26 Settlement is attached to the Declaration of Jared Hague ("Hague Decl.") as Exhibit "1," filed
27 concurrently herewith.

28 ///

1 **II. LEGAL BASIS FOR CLASS SETTLEMENT**

2 **A. BACKGROUND AND SUMMARY OF THE CASE**

3 Plaintiffs worked for Defendant at various locations in the United States, including
4 California, as non-exempt Alarm Installation Technicians and/or Lead Installation Technicians
5 during the time period. These Technicians are referred to herein as “Settlement Class Members”
6 or “the Settlement Class.” Plaintiffs, on behalf of themselves and other current and former
7 similarly-situated employees of Defendant, brought various claims against Defendant for
8 violations of the California Labor Code and the Fair Labor Standards Act (“FLSA”), which are
9 detailed in the operative Second Amended Complaint. (ECF No. 72).

10 As described in detail in Plaintiffs’ underlying motions for preliminary approval, the
11 Parties have aggressively litigated this matter and expended significant time and resources
12 towards the resolution of this case. Plaintiffs undertook extensive formal and informal discovery
13 efforts, including depositions, and prepared and filed a Motion for Preliminary Certification of
14 Collective Action for their claims under the FLSA. (ECF No. 33).

15 However, the Parties also recognize the risks inherent in class action litigation and the
16 implications of a case that could go on for several more years. Thus, the Parties participated in
17 arms-length mediation with the assistance of Hon. Jeffrey Winikow (Ret.), a former judge and
18 experienced wage and hour class action mediator. These litigation and settlement efforts resulted
19 in the instant Settlement. As described in greater detail herein, the Settlement Class is generally
20 divided into two groups: 1) those Settlement Class Members who have claims against Defendant
21 under the provisions of the California Labor Code; and 2) those Settlement Class Members who
22 have claims against Defendant under the FLSA.

23 Plaintiffs originally moved for preliminary approval of the Settlement on or about
24 February 23, 2018. (ECF No. 39). Over the course of the hearing on that motion and the Court’s
25 review of the papers in support of the motion, the Court ultimately granted in part and denied in
26 part, the motion. (ECF No. 55). While the Parties believed the Settlement as constituted at the
27 time to be in the best interest of the putative settlement class, the Parties thereafter diligently
28 worked to amend the Settlement in an effort to address the Court’s concerns, with particular

1 focus on the notice mechanisms to the two above-reference groups. The Court preliminarily
2 approved the Settlement and the Parties' proposed notice plan on or about August 12, 2019.
3 (ECF No. 70).

4 **III. SUMMARY OF THE SETTLEMENT**

5 **A. THE SETTLEMENT CLASS**

6 The Settlement Class is comprised of all the individuals within the California Class and
7 the FLSA Group, defined as follows:

8 **California Class:** All current and former non-exempt Alarm Installation Technicians and
9 Lead Alarm Installation Technicians who performed compensable work for Defendant in
10 the State of California at any time from February 3, 2013 through December 31, 2017,
11 who do not timely opt out of the California Class and the Settlement. Defendant
represents by its execution of the Settlement that there are 94 individuals who fall within
the definition of the California Class as defined by the Settlement.

12 **FLSA Group:** All current and former non-exempt Alarm Installation Technicians and
13 Lead Alarm Installation Technicians who performed compensable work for Defendant in
14 the United States at any time from February 3, 2014 through December 31 2017, who
15 affirmatively opt in to the FLSA Group and the Settlement by timely returning to the
16 Settlement Administrator the Court-approved opt-in form. Defendant represents by its
17 execution of the Settlement that there are 285 individuals who potentially fall within the
18 definition of the FLSA Group as defined by the Settlement.

19 (Settlement at I.3.) Given that there is overlap in membership between the California Class and
20 the FLSA Group, there are 303 total individuals in the Settlement Class as defined.

21 Because none of the California Class Members opted-out of the Settlement, all 94
22 individuals in that group are considered to be participating Settlement Class Members. Only
23 those 146 individuals of the FLSA Group who submitted a valid Claim Form are considered to
24 be participating members of the FLSA Group. The Settlement will not prejudice current or
25 former employees of Defendant who do not fall within these definitions.

26 **B. DETAILS OF THE SETTLEMENT FUND**

27 **1. Gross Settlement Amounts**

28 The Settlement provides for a maximum Gross Settlement Amount of \$1,800,000. This
maximum amount is inclusive of all payments to participating Settlement Class Members, Class
Counsel's attorneys' fees and expenses, Plaintiffs' proposed enhancement awards, costs of

1 administration, and an allocation to the California Labor and Workforce Development Agency
2 (“LWDA”) pursuant to Plaintiffs’ claims under the Private Attorneys’ General Act (“PAGA”).
3 (Settlement at VII.1.). These amounts are allocated to the California Class and FLSA Group,
4 respectively, as described below. Defendant’s share of any applicable taxes shall be paid by
5 Defendant separately from the Settlement. (*Id.* at I.45.).

6 **2. California Class Settlement Fund**

7 Of the \$1,800,000 maximum settlement amount, the Settlement allocates \$800,000 as the
8 California Class Gross Settlement Amount. (Settlement at I.10.). This includes the following
9 allocations: (1) attorney fees in an amount not to exceed one-fourth (1/4) of the California Class
10 Gross Settlement, or \$200,000; (2) attorney costs not to exceed \$8,888.89; (3) Settlement
11 Administrator expenses not to exceed \$22,222.22; (4) Enhancement Awards to the Named
12 Plaintiffs as Class Representatives not to exceed \$8,888.89, to be split equally between them;
13 and (5) an allocation of \$37,500 to the LWDA for Plaintiffs’ claims under the PAGA. (*Id.* at
14 I.11-15.). These amounts result in a California Class Net Settlement Amount of not less than
15 \$522,500. (*Id.* at I.16.). This amount is fully non-reversionary, meaning that the entirety of
16 California Class Gross Settlement Amount will be distributed, with any difference between fees,
17 costs, enhancement awards or administrative expenses allocated and granted being distributed to
18 the California Class Members. (*Id.* at IV.2-7.).

19 **3. FLSA Group Settlement Fund**

20 Of the \$1,800,000 maximum settlement amount, the Settlement allocates \$1,000,000 as
21 the potential FLSA Gross Settlement Amount. (*Id.* at I.25.). This includes the following
22 allocations: (1) attorney fees not to exceed one-fourth (1/4) of the FLSA Actual Gross
23 Participation Amount, or \$250,000; (2) attorney costs not to exceed \$11,111.11; (3) Settlement
24 Administrator expenses not to exceed \$27,777.78; and (4) Enhancement Awards to the Named
25 Plaintiffs as Class Representatives not to exceed \$11,111.11, to be split equally between them.
26 (*Id.* at I.25-29.). These amounts result in an FLSA Potential Net Settlement Amount of \$700,000.
27 (*Id.* at I.30.).

28 ///

1 **4. Calculation and Distribution of Individual Settlement Payments**

2 Upon final approval, and the determination of fee award and costs to Class Counsel, the
3 Enhancement Awards to Named Plaintiffs, and the administration fees to the Settlement
4 Administrator, the Settlement Administrator will recalculate the final individual shares of each
5 Settlement Class Members. Because the Settlement Class Members were informed of their
6 estimated potential individual settlement awards based on the maximum possible deductions
7 from the above-described gross settlement amounts, and because Class Counsel’s fees and costs,
8 and the costs of the Settlement Administrator are lower than the maximum allocations for those
9 amounts, the recalculated individual settlement awards will always be higher, never lower, than
10 what was reported to the Settlement Class Members by the Court-ordered notice¹. In any event,
11 none of the Class Members disputed their estimated individual settlement shares. (Declaration of
12 Elizabeth Kruckenberg (“Kruckenberg Decl.”) at ¶18).

13 If the Court finally approves the Settlement, the Administrator will mail settlement
14 checks to all participating Settlement Class Members. The Settlement Class Members will have
15 an initial seventy-five (75) day window after mailing to negotiate their checks. (Settlement at
16 VII.9.). If a check is returned to the Settlement Administrator, the Settlement Administrator will
17 make all reasonable efforts to contact the Class Member, including by telephone and by
18 performing a skip trace search for the Class Member’s updated contact information, and to re-
19 mail it to the Class Member at the Class Member’s updated address. (*Id.*). If any check to a Class
20 Member is not cashed within seventy-five (75) days after it is mailed or re-mailed, whichever is
21 later, the Settlement Administrator will send the Class Member a letter informing them that,
22 unless the check is cashed within thirty (30) days of the date of the letter, the check will expire
23 and become non-negotiable and offering to replace the check if it was lost or misplaced, but not
24 cashed. (*Id.*). If a Class Member’s check remains uncashed by the expiration of the thirty (30)
25 day period after this notice, the Settlement Administrator will void the check and send the

26 _____
27 ¹ See Declaration of Brett Sutton in support of Motion for Attorneys’ Fees and Costs at ¶22 (ECF
28 No. 76-1); See Declaration of Elizabeth Kruckenberg at ¶16 (filed concurrently herewith).

1 corresponding funds to the California State Controller’s Unclaimed Property Fund. (*Id.*). Those
2 Settlement Class Members who fail to cash the check will nevertheless be subject to the release
3 of claims associated with participation in the Settlement. (*Id.*).

4 **5. Additional Consideration.**

5 As mentioned, Defendant also agrees that it will undertake significant changes to its
6 workplace policies and practices as part of this Settlement. In this manner, the Settlement yields
7 a benefit that goes well-beyond the monetary consideration obtained by Plaintiffs.

8 **C. RELEASE**

9 The Court preliminarily approved the following definition of “Released Claims” in the
10 Settlement:

11 “Released Claims” shall mean any and all claims, demands, rights, debts,
12 obligations, costs, expenses, wages, liquidated damages, statutory damages,
13 penalties (including civil and statutory), liabilities, and/or causes of action of any
14 nature and description whatsoever, whether known or unknown, at law or in
15 equity, whether under federal, state or local law (including without limitation any
16 statute, ordinance, regulation, common law, constitution, or other source of law),
17 which were asserted in the Action or could have been asserted against the
18 Released Parties arising out of the facts and circumstances alleged in the
19 Complaint. Released Claims include, without limitation, any and all claims for
20 wages, overtime, damages, costs, penalties, liquidated damages, punitive
21 damages, interest, attorney fees, litigation costs, restitution, injunctive relief,
22 equitable relief, or other relief based on alleged violation of the California Labor
23 Code; of California Business & Professions Code Section 17200 et seq. (“Section
24 17200”) based on the California Labor Code; of the wage orders of the California
25 Industrial Welfare Commission; or of the Fair Labor Standards Act. Release
26 Claims include, without limitation, claims alleging the failure to provide timely,
27 off-duty meal breaks and/or rest breaks; the failure to promptly pay all wages due
28 and owing at the time of the employee’s separation from employment; the failure
to provide accurate itemized wage statements; the failure to keep accurate payroll
records; the failure to pay any regular, overtime, or other wages; or the failure to
pay California or federal minimum wage. Released Claims include, without
limitation, claims for interest, attorney fees, or litigation costs arising from
prosecution of any Released Claims, and any and all alleged violations of
California Labor Code provisions giving rise to PAGA penalties. Released Claims
include, without limitation, any Fair Labor Standards Act (“FLSA”) claims of any
Settlement Class Member that arises from or is based on allegations that were or

1 could have been asserted in the Action. It is understood and agreed that the
2 Settlement will not release any person, party or entity from claims, if any, by
3 Settlement Class Members for workers compensation, unemployment, wrongful
4 termination, or disability benefits of any nature.

5 (Settlement at I.38.). None of the Settlement Class Members objected to the scope of the release.
6 Only those Settlement Class Members in the FLSA Group who opt-in to the Settlement release
7 their claims under federal law. Settlement at IX.1., X.1.).

8 **IV. ADMINISTRATION OF THE SETTLEMENT AND THE CLASS RESPONSE**

9 **A. THE NOTICE PROCESS WAS DILIGENTLY EXECUTED**

10 On or about August 12, 2019, the Court appointed Phoenix Settlement Administrators
11 (“Settlement Administrator”) to administer the Settlement and perform the duties identified in
12 the Settlement. (ECF No. 70).

13 On or about August 19, 2019, Settlement Administrator received a data file from
14 Defendant that contained the names, social security numbers, last known mailing addresses, last-
15 known telephone numbers, last-known email addresses, applicable work week information, and a
16 list of the amounts that could be claimed by each Settlement Class Member. (Kruckenberg Decl.
17 at ¶4). On or about September 3, 2019, Settlement Administrator conducted a National Change
18 of Address (NCOA) search in an attempt to update the class list of addresses as accurately as
19 possible. A search of this database provides updated addresses for any individual who has moved
20 in the previous four (4) years and notified the U.S. Postal Service of their change of address. (*Id.*
21 at ¶5).

22 On September 3, 2019, Settlement Administrator sent the Class Notice to all three
23 hundred three (303) Settlement Class Members via U.S. first class mail. (*Id.* at ¶6). Settlement
24 Administrator also sent an electronic copy of the Class Notice to those Settlement Class
25 Members for whom the Settlement Administrator received an email address from Defendant.
26 (*Id.*). The Class Notice to the FLSA Group Members included a form that the potential FLSA
27 Group Members were required to timely submit with all requested information to affirmatively
28 indicate their consent to participate in the Settlement and to be bound by the terms set forth
therein. (*Id.*). The Class Notice to the California Class included a form that the California Class

1 Members could use for the purpose of excluding themselves from the California Class, in
2 addition to any other writing that the California Class Members could use for that purpose. (*Id.*).

3 The pleadings, a copy of the Settlement, a copy of the Order granting preliminary
4 approval to the Settlement, and copies of the Class Notice, opt-in and opt-out forms were also
5 posted at <http://www.phoenixclassaction.com/smothers-v-northstar-alarm-services-llc/> for
6 Settlement Class Members to review and/or download. (*Id.* at ¶7).

7 As of November 21, 2019, thirty-eight (38) Class Notices were returned to Settlement
8 Administrator (*Id.* at ¶8). One (1) was returned with a forwarding address and a Class Notice was
9 re-mailed to the forwarding address. (*Id.*). For the other thirty-seven (37) Class Notices returned
10 from the Post Office without a forwarding address, PSA attempted to locate a current mailing
11 address using TransUnion TLOxp, one of the most comprehensive address databases available
12 for skip tracing. (*Id.*). Of the thirty-seven (37) Class Notices that were skip traced, thirty-seven
13 (37) updated addresses were obtained and the Class Notice was promptly re-mailed to those
14 Class Members via first class mail. (*Id.*). Out of the thirty-eight (38) total Class Notices that were
15 re-mailed, only five (5) Class Notices are considered undeliverable, since the re-mailed Class
16 Notice was returned a second time and an updated address could not be obtained. (*Id.* at ¶9).

17 In addition to the Class Notice mailing, PSA conducted a weekly telephonic campaign for
18 all FLSA Group Members for whom PSA was able to locate a possible phone number, mailed
19 weekly reminder postcards to FLSA Group Members, and engaged in a search for Class
20 Members via social media websites to locate and communicate with FLSA Group Members and
21 inform them of the relevant deadlines associated with Settlement. (*Id.* at ¶10).

22 **B. THE CLASS RESPONDED FAVORABLY TO THE SETTLEMENT**

23 As mentioned above, the response to the Settlement was overwhelmingly positive. None
24 of the California Class Members opted-out of the Settlement or objected to any aspect of the
25 Settlement. (*Id.* at ¶¶11-12).

26 The extensive efforts undertaken by Plaintiffs to ensure the notice to and participation of
27 the FLSA Group Members through a mail, phone and email/social media campaign were
28 undeniably successful. Of the two hundred eighty-three (283) FLSA Group Claim Forms that are

1 assumed to have been received by the FLSA Group Class Members, the Settlement
2 Administrator has received as of November 21, 2019, one hundred sixty-two (162) Claim Forms,
3 resulting in a 57.24% response rate. This rate is roughly double the average response rate of
4 other FLSA settlements approved by this Court or this and other District Courts in California.
5 *See, e.g. Khanna v. Intercon Security Systems, Inc.*, 2014 WL 1379861 at *9 (E.D. Cal. 2014)
6 (approving settlement with a 30% response rate); *Four in One Co., Inc. v. S.K. Foods, L.P.*, 2014
7 WL 4078232 at *6 (E.D. Cal. 2014) (approving settlement with a 27.5% response rate);
8 *Rodriguez v. Danell Custom Harvesting, LLC*, 327 F.R.D. 375 at 389 (E.D. Cal. 2018) (37%
9 response rate weighed in favor of approval); *Tarlecki v. bebe Stores, Inc.*, 2009 WL 3720872 at
10 *2 (N.D. Cal. 2009) (approving settlement with an 18% response rate, noting that transitory
11 nature of wage and hour settlement class can affect the response rate and make providing notice
12 difficult). None of the FLSA Group Class Members objected to any aspect of the Settlement.
13 (Kruckenberg Decl. at ¶14).

14 **V. LEGAL STANDARDS AND ANALYSIS**

15 The law favors the compromise and settlement of class action suits, particularly in class
16 actions and other complex cases where substantial resources can be conserved by avoiding the
17 time, cost and rigors of formal litigation. *See Officers for Justice v. Civil Service Com'n of City*
18 *and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982); *Churchill Village, LLC v. Gen.*
19 *Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
20 1027 (9th Cir. 1998) (endorsing the trial court's "proper deference to the private consensual
21 decision of the parties" when approving a settlement). Settlement of complex cases contributes
22 greatly to the efficient utilization of scarce judicial resources and achieves the speedy resolution
23 of justice. *In re Corrugated Container Anti-Trust Lit. II*, 659 F.2d 1322, 1325 (5th Cir. 1981).

24 Although the instant Settlement entailed both conditional collective certification under 29
25 U.S.C. 216(b) and the two-stage approval of class action under FRCP 23(e), under either
26 statutory approval process the court cannot simply accept the parties' resolution but must also
27 satisfy itself that the proposed settlement is "fundamentally fair, adequate, and reasonable."
28 *Hanlon, supra* at 1026. Under Rule 23, the courts balance a number of factors in this analysis,

1 including the strength of the plaintiffs’ case; the risk, expense, complexity, and likely duration of
2 further litigation; the risk of maintaining class action status throughout trial; the amount offered
3 in settlement; the extent of discovery completed and the stage of the proceedings; the experience
4 and views of counsel; the presence of a government participant; and the reaction of the class
5 members to the proposed settlement. *Id.*; *Adoma v. Univ. of Phoenix*, 913 F.Supp.2d 964, 975
6 (E.D. Cal. 2012); *Khanna, supra* at *6 (citing *Wershba v. Apple Computers, Inc.*, 91 Cal.App.4th
7 224, 245 (6th App. Dist. 2001) (stating a settlement is presumed to be fair when it was reached
8 through arm’s-length bargaining, investigation and discovery are sufficient to inform counsel’s
9 and the court’s views, counsel is experienced in similar litigation, and the percentage of objectors
10 is small)).

11 Before approving a settlement of an FLSA action, the court undertakes a similar inquiry.
12 *Khanna, supra* at *6 (citing *Lewis v. Vision Value, LLC*, 2012 WL 2930867 at *2 (E.D. Cal.
13 2012). As there is no set of factors for evaluating an FLSA collective action settlement, some
14 courts adopt the factors for approving a class action settlement even though some will not apply
15 “because of the inherent differences between class actions and FLSA actions...” *Id.* (citing
16 *Almodova v. City & Cnty. Of Honolulu*, 2010 WL 1372298 at *4 (D. Haw. 2010),
17 *recommendation adopted by* 2010 WL 1644971 (D. Haw. 2010); *Clesceri v. Beach City*
18 *Investigations & Protective Servs., Inc.*, 2011 WL 320998 at *4 (C.D. Cal. 2011) (finding FLSA
19 requirements satisfied when Rule 23 standard is met). Here, application of the Rule 23 criteria
20 justifies final approval of both the California Class and the FLSA Group components of the
21 Settlement.

22 **A. STRENGTH OF PLAINTIFFS’ CASE AND AMOUNT OBTAINED**
23 **THROUGH SETTLEMENT**

24 “An important consideration in judging the reasonableness of a settlement is the strength
25 of the plaintiffs’ case on the merits balanced against the amount offered in the settlement.” *Nat’l*
26 *Rural Telecommunications Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004).
27 However, “the Court need not reach an ultimate conclusion about the merits of the dispute now,
28 ‘for it is the very uncertainty of outcome in litigation and avoidance of wastefulness and

1 expensive litigation that induce consensual settlements.” *Bellinghausen v. Tractor Supply*
2 *Company*, 306 F.R.D. 245 at 255 (N.D. Cal. 2015) (citing *Officers for Justice, supra* at 625).
3 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon,*
4 *supra* at 1026.

5 Here, as part of the preliminary approval process, this Court reviewed the claims, the
6 facts, and the maximum potential recovery scenarios for the California Class and the FLSA
7 Group along with the defenses to those claims, in detail. (*See* ECF No. 55 at 20:15 – 21:18).
8 Without repeating in full the analysis set forth in the preliminary approval briefing, Plaintiffs
9 estimated the California Class’ maximum potential recovery at \$1,914,000, more than a quarter
10 of which consisted of liquidated damages requiring a showing of willfulness on the part of
11 Defendant that was largely unsupported by the evidence despite diligent discovery efforts. (ECF
12 No. 39-2 at ¶¶22, 24-26). Of the remaining approximately \$1.4 million in potential exposure,
13 compromise was justified on the basis of the applicable legal defenses and problems of proof
14 associated with a lack of time records. (*Id.*).

15 With respect to the FLSA Group, Plaintiffs’ estimated the maximum potential liability for
16 minimum wage and overtime claims to be \$772,000, although the Defendant’s arguments against
17 liability are stronger due to employers’ ability to average payable compensation across a
18 workweek under the FLSA. (*Id.* at ¶23) (see also *Douglas v. Xerox Business Services, LLC*, 875
19 F.2d 884 (9th Cir. 2017)). Assessing the maximum potential exposure of approximately \$2.7
20 million versus the gross maximum settlement value of \$1.8 million in light of applicable
21 defenses and evidentiary issues supports the conclusion that the overall settlement amount is
22 reasonable based on the strength of Plaintiffs’ case.

23 **B. RISK, EXPENSE, COMPLEXITY AND LIKELY DURATION OF**
24 **FURTHER LITIGATION**

25 “Approval of settlement is ‘preferable to lengthy and expensive litigation with uncertain
26 results.’” *Khanna, supra* at *7 (citing *Morales v. Stevco, Inc.*, 2011 WL 5511767 at *10 (E.D.
27 Cal. 2011) (quoting *Nat’l Rural Telecommunications Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523,

1 529 (C.D. Cal. 2004) (“[U]nless the settlement is clearly inadequate, its acceptance and approval
2 are preferable to lengthy and expensive litigation with uncertain results.”).

3 Here, if the Settlement were to be rejected, the Parties would have to engage in further
4 litigation, including the issue of whether a class should be certified and, if certified, discovery on
5 damages issues. The time and expense of continued litigation, including any appeals that could
6 be filed on motions that were pending with this Court as of the time the Parties reached the
7 Settlement, could easily result in additional years of litigation that could result in the Settlement
8 Class Members receiving substantially less than they stand to recover under the Settlement, or
9 nothing at all. On the other hand, the proposed Settlement provides for an immediate recovery
10 for the Class. One thing that is abundantly clear, however, is that the absence of time records in
11 this case would result, absent settlement, in extensive expert witness participation, substantial
12 discovery costs to all Parties, and a multitude of discovery issues that would require the Court’s
13 participation and resources. Accordingly, the high risk, expense, and complex nature of a lengthy
14 class action trial also support final approval of this Settlement.

15 **C. RISK OF MAINTAINING CLASS STATUS**

16 While there is little definitive evidence of class certification rates in District Courts
17 within California, in 2010, the Administrative Office of the Courts (Office of Court Research)
18 produced a report on Class Certification in California from a state perspective. The report noted
19 a certification rate of 5% in class action cases. (See [http://www.courts.ca.gov/documents/
20 classaction-certification.pdf](http://www.courts.ca.gov/documents/classaction-certification.pdf) [last viewed on November 22, 2019] at p. 15, Table 9.) Few would
21 argue that certification has become easier since 2010, particularly in light of the United States
22 Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) and the
23 California Supreme Court’s decision in *Duran v. U.S. Bank National Ass’n*, 59 Cal. 4th 1 (Cal.
24 2014). While Plaintiffs’ believe that they would have prevailed in certifying their claims in this
25 case, they acknowledge the risk that the Court may not have certified all of their claims, and the
26 inherent difficulty in maintaining certification throughout a lengthy and contentious class
27 discovery period. See, e.g. *In re: Autozone, Inc.*, 2016 WL 4208200 (N.D. Cal. 2016) (granting
28 employer’s motion to decertify rest period claims after three and a half years of discovery).

1 Comparing the significant benefits of the Settlement and the immediacy of those benefits
2 against the risk of a decertification motion that could unravel the class strongly supports final
3 approval of the Settlement.

4 **D. EXTENT OF DISCOVERY AND STAGE OF THE PROCEEDINGS**

5 “In the context of class action settlement, ‘formal discovery is not a necessary ticket to
6 the bargaining table’ where the parties have sufficient information to make an informed decision
7 about settlement.” *Khanna, supra* at *8 (citing *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234,
8 1239 (9th Cir.1998) (quoting *In re Chicken Antitrust Litig.*, 669 F.2d 228, 241 (5th Cir.1982))
9 (citation and internal quotation omitted).

10 Here, both parties engaged in significant formal and informal discovery and investigative
11 efforts, to assess the relative merits of Plaintiffs’ claims and Defendant’s defenses. Plaintiff
12 deposed Jason Dumas, Defendant’s Director of “Blue Ops,” the division responsible for anything
13 to do with the Technicians who comprise the Settlement Class, and a former regional manager of
14 Defendant. (ECF No. 39-2 at ¶4). Plaintiff also engaged in substantial formal discovery efforts
15 resulting in the production of several of the documents previously submitted in conjunction with
16 Plaintiffs’ Motion for Preliminary Approval. (*Id.* at ¶¶5-10). Plaintiffs filed a Motion for
17 Conditional Certification of Collective Action based on these discovery efforts. (ECF No. 33).
18 The Parties also engaged in an informal exchange of information preliminary to mediation,
19 resulting in an extensive sample of employee pay records, hire and termination dates, and
20 workweek information. (*Id.* at ¶21). The fruits of these efforts allowed both Plaintiffs and
21 Defendant to “have a clear view of the strengths and weaknesses of their cases.” *In re Warner*
22 *Communications Sec Litig.*, 618 F.Supp 735, 745 (S.D.N.Y. 1985) *aff’d* 798 F.2d 35 (2d Cir.
23 1986). This factor weighs in favor of final approval.

24 **E. EXPERIENCE AND VIEWS OF COUNSEL**

25 As corroborated by the declarations on file in this matter, Plaintiffs’ Counsel focuses their
26 practice almost exclusively on employment law issues, including wage-and-hour issues, and is
27 very experienced in prosecuting wage and hour class actions of this type in both state and federal
28 court. (ECF No. 39-1 at ¶¶3-13; ECF No. 39-2 at ¶¶12-13). The experience of Plaintiffs’ Counsel

1 in the area of wage-and-hour class actions assisted in the determination that the proposed
2 Settlement is fair to the Settlement Class, and favors final approval of the Settlement. *Barbosa v.*
3 *Cargill Meat Solutions Corp.*, 2013 WL 3340939 at *14 (E.D. Cal. 2013).

4 **F. REACTION OF THE CLASS**

5 The reaction of the Class to the Settlement may be fairly characterized as
6 overwhelmingly positive. First and foremost, the absence of any objector strongly supports the
7 fairness, reasonableness and adequacy of the Settlement. *Nat'l Rural Telecommunications Coop.*,
8 *supra* at 529 (stating “the absence of a large number of objections to a proposed class action
9 settlement raises a strong presumption the terms of a proposed class settlement action are
10 favorable to the class members.”) Applied here, not only is there an absence of “a large number”
11 of objections, **there were no objections.**

12 The fairness of the Settlement is further buttressed by the fact that not a single member of
13 the California Class opted-out of the Settlement.

14 On the FLSA Group side of the Settlement, over 59% of the FLSA Group Members
15 submitted Claim Forms accepted by Parties. Courts have held that a low response rate is
16 essentially neutral in evaluating settlement fairness. See *Touhey v. United States*, 2011 WL
17 3179036 at *7–8 (C.D. Cal. 2011) (finding a 2 percent response rate did not render settlement
18 unfair); *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188 at *14 (E.D. Mich. 2011) (finding
19 settlement fair even when only 1 percent responded to notices when that 1 percent represented 46
20 percent of defendant's total sales). If response rates as low as 1% does not doom a proposed
21 settlement, then a response rate of over 59% should be construed as overwhelming support for a
22 settlement. As mentioned above, even in view of settlements approved in this District, the
23 response rate in this case is approximately double the average response rate of other opt-in cases.
24 The Settlement Class’ strong approval of the Settlement supports final approval.

25 **G. ABSENCE OF ANY COLLUSION BETWEEN THE PARTIES**

26 Courts respect the integrity of counsel and presume the absence of fraud or collusion in
27 the negotiation of settlements, unless there is evidence to the contrary. See *Newberg, supra*, at §
28 11:51, p. 158. That the settlement was reached during an outside mediation supports the

1 conclusion that the settlement was not collusive. *Lusby v. Gamestop Inc.*, 297 F.R.D. 400 at 413
2 (N.D. Cal. 2013).

3 Applied here, this Settlement is the product intensive, arms-length negotiations that took
4 place over the course of months and culminated in mediation with the aid of an experienced
5 mediator and former judge, Hon. Jeffrey Winikow (Ret.) (ECF No. 39-2 at ¶¶18-20).
6 Accordingly, “[t]here is likewise every reason to conclude that settlement negotiations were
7 vigorously conducted at arms’ length and without any suggestion of undue influence.” *In re*
8 *Wash. Public Power Supply System Sec. Litig.*, 720 F. Supp.1379, 1392 (D.Ariz. 1989).
9 Therefore, this factor as well favors final approval of the Settlement. The multiple hearings
10 during which the Court has scrutinized the Settlement and the result changes to the Settlement
11 also support the absence of collusion through and including this stage of the proceedings.

12 **VI. THE PROPOSED PAYMENT TO THE SETTLEMENT ADMINISTRATOR IS**
13 **FAIR AND REASONABLE**

14 The \$30,000 amount requested for payment to the Settlement Administrator is fair and
15 reasonable in light of the amount and scope of work performed, and the work still to be
16 performed between now and the anticipated December 20, 2019 Final Approval Hearing. The
17 Declaration of Elizabeth Kruckenberg demonstrates that the Settlement Administrator carried out
18 its duties promptly and competently, and in full accordance with the terms of the Settlement.
19 (Kruckenberg Decl. at ¶¶4-10). The high response rate of the FLSA Group also demonstrates the
20 competency and diligence with which the notice campaign was carried out.

21 As the Court is aware and as discussed at hearing with the Court, the Parties allocated
22 \$50,000 to administration costs to prepare for the contingency that the response rate of the FLSA
23 Group would be typically low, requiring the Parties and the Settlement Administrator to identify
24 other actions to be taken in addition to those already contemplated to ensure adequate notice to
25 the Settlement Class. The strong and steady response rate of the FLSA Group, coupled with the
26 fact that the more than 57% of the FLSA Group who submitted Claim Forms ultimately claimed
27 approximately three-fourths of the available net settlement amount, obviated the need for
28 additional notice efforts. (Compare Kruckenberg Decl. at ¶13 with Settlement at I.30. (FLSA

1 Group claimed approximately \$510,000 of the available \$700,000 FLSA Potential Net
2 Settlement Amount). The difference between the amounts allocated for administration versus the
3 amount requested by the Settlement Administrator does not revert to the Defendant, but will
4 instead increase the net settlement amounts available to the Settlement Class Members.
5 (Settlement at VI.1.).

6 Therefore, the Settlement Administrator's costs of \$30,000 are reasonable and should be
7 approved.

8 **VII. PLAINTIFFS HAVE DUTIFULLY CARRIED OUT THEIR RESPONSIBILITIES**
9 **AS CLASS REPRESENTATIVES**

10 As indicated through preliminary approval of the Settlement, and now confirmed through
11 the deadline for Settlement Class Members to respond to the Settlement, the Named Plaintiffs,
12 acting as Court-appointed Class Representatives, have adequately and responsibly carried out
13 their obligations in advancing the interests of the class against their own self-interest and
14 avoiding any potential conflicts between themselves and the Settlement Class that could
15 potentially compromise their standing as Class Representatives. (See Declaration of Asa Dhadda
16 and Declaration of Julian Smothers filed concurrently herewith). This factor further supports
17 final certification of the Settlement Class and justifies their receipt of the Enhancement Award
18 contemplated by the Settlement, also discussed in Plaintiffs' Motion for Attorneys' Fees, Costs
19 and Enhancement Award. (ECF No. 76).

20 **VIII. CONCLUSION AND SUMMARY OF REMAINING DEADLINES**

21 Based on the foregoing, the various factors for analysis in determining whether the
22 Settlement is fair and reasonable to the California Class and the FLSA Group strongly weigh in
23 favor of approval. Therefore, Plaintiffs respectfully request that the Court issue an Order
24 granting final approval to the Settlement.

25 With respect to remaining items to be submitted prior to the December 20, 2019 Final
26 Approval Hearing, the Settlement provides that not later than fourteen (14) days after the Notice
27 Period ends, the Settlement Administrator will file with the Court, and serve on Class Counsel
28 and Defense Counsel, the opt-in forms returned by FLSA Group Members. (Settlement at VI.2.).

1 The deadline to submit opt-in forms was November 18, 2019. Therefore, all opt-in forms
2 received will be submitted not later than December 2, 2019.

3 The Settlement also provides that fourteen (14) days prior to the Final Approval Hearing,
4 the Settlement Administrator will compile and deliver to Class Counsel and Defense Counsel a
5 report with information regarding: (a) the final Individual Settlement Amounts of each Class
6 Member; (b) the final number of Opt-Outs; and (c) the final number of potential FLSA Group
7 Members who timely opted in to the Settlement. (Settlement at VI.2.). On November 22, 2019,
8 the deadline for filing the instant Motion, the Settlement Administrator received additional
9 timely Claim Forms, as well as two untimely Claim Forms. (Kruckenberg Decl. at ¶13; Hague
10 Decl. at ¶5). As of the filing of this Motion, Defendant's position is that it will not accept the
11 untimely Claim Forms. (Hague Decl. at ¶5). It is also possible that additional timely or untimely
12 Claim Forms could be received over the next few days. Based on the December 20, 2019 Final
13 Approval Hearing, the Settlement Administrator will provide the aforementioned final report not
14 later than December 6, 2019.

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1 As also discussed in Plaintiffs' Motion for Attorneys' Fees, Costs and Enhancement
2 Award, Plaintiffs will file a supplemental brief reflecting the final amount of attorneys' fees
3 sought, which in turn is partially dependent upon the aggregate amount of the Claim Forms
4 accepted in the case². (Settlement at VII.5(d)). Therefore, Class Counsel will file such
5 supplemental papers in conjunction with the filing of the Settlement Administrator's final report
6 on December 6, 2019.

7
8 Dated: November 22, 2019

SUTTON HAGUE LAW CORPORATION
A Nevada Professional Corporation

9
10 By: /s/ S. Brett Sutton
11 S. BRETT SUTTON
12 Attorneys for Plaintiffs
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23 _____
24 ² As detailed in Plaintiffs' Motion for Attorneys' Fees, the final amount of fees requested by
25 Plaintiffs' supplemental filing will not exceed the maximum fees allowable under the Settlement
26 that was disclosed to the Settlement Class in the Class Notice and also described in the Motion
27 for Attorneys' Fees that is posted on the class website. (ECF No. 76). The supplemental filing
28 will clarify an amount of attorneys' fees sought that is less than the amount allowed under the
Settlement, such that no Settlement Class Member's right to object to the Settlement on the basis
of the attorney fee award is prejudiced.