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and the State of California as a
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

ISOM DUANE DAY, on behalf of himself and others similarly situated, Plaintiff, vs. HILLSIDES, a California 501(c) not-for-profit organization, and DOES 1-50, inclusive, Defendant.	Case No.: 22STCV26039 **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR: (1) PRELIMINARY APPROVAL OF CLASS ACTION AND REPRESENTATIVE SETTLEMENT AGREEMENT (2) APPROVAL OF NOTICE TO CLASS MEMBERS AND RELATED MATERIALS; (3) APPROVAL OF CLAIMS ADMINISTRATOR; AND (4) SETTING HEARING FOR FINAL APPROVAL OF SETTLEMENT** Date: March 7, 2024 Time:9:00 a.m. Dept:17

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff ISOM DUANE DAY ("Plaintiff") seeks preliminary approval of a $700,000 non-reversionary settlement to resolve all claims brought on behalf of approximately 506 current and former employees against Defendant HILLSIDES ("Defendant"), in this class and PAGA representative action. This case was initiated on August 11, 2022, and has been actively litigated, including extensive document productions and several meet and confer conferences prior to mediation. Plaintiff alleges that Defendant is liable for: (1) failing to pay for all hours worked including overtime hours worked; (2) failing to pay wages due upon termination; (3) failing to provide rest breaks; (4) failing to provide uninterrupted meal breaks; (5) failing to reimburse for required business expenses; (6) failing to provide accurate wage statements and maintain accurate records; and (7) unlawful and unfair business practices. Plaintiff also brings a claim for PAGA penalties.

This Settlement was reached following extensive informal discovery and significant negotiations. It provides for the conditional certification of a settlement class and a non-reversionary payment of $700,000 (the "Gross Settlement Amount"), allocated as follows: (1) $25,000 for settlement of Plaintiff's PAGA claims; (2) service award to Plaintiff ISOM DUANE DAY of up to $10,000; (2) Attorneys' fees up to 33.33% of the Gross Settlement Amount ($233,310) plus attorneys' costs not to exceed $20,000; and (3) claims administration costs up to $12,500.

An objective evaluation of the Settlement confirms that the relief negotiated on behalf of the settlement class is fair, reasonable, and valuable. In addition, a prompt settlement will ensure that the settlement class receives optimum value for their claims. Accordingly, Plaintiff respectfully requests that this Court grant preliminary approval of the Settlement Agreement and schedule a final approval hearing 100 days after the preliminary approval hearing or anytime thereafter as the Court's calendar permits.

II. FACTS AND PROCEDURE

A. Background

This case was brought by Plaintiff ISOM DUANE DAY against HILLSIDES, his former employer. Plaintiff filed a class action complaint on August 11, 2022, and filed a First Amended Complaint adding a claim for PAGA on December 8, 2022. (Koulloukian Decl. ¶ 4.) Through this action, Plaintiff seeks to represent the interests of about 506 current and former hourly paid employees during the statutory period. (Koulloukian Decl. ¶ 15.)

B. Discovery and Investigation

Investigation and informal discovery undertaken by both sides was extensive. Prior to mediation, the counsel for the Parties engaged in substantial meet and confer efforts to discuss the claims and defenses. After agreeing to attend mediation, Plaintiff requested numerous documents including contracts, policy documents, and time and payroll records in effect during the class period. Class Counsel conducted significant research concerning the documents and, with the assistance of a retained expert, analyzed the time records and payroll data to determine Defendant's potential damage exposure. (Koulloukian Decl., ¶¶ 6, 7, 11, 15.) Class Counsel then used this analysis in conjunction with the anecdotal evidence provided by Plaintiff to obtain detailed discovery on both liability and damages. (Koulloukian Decl., ¶¶ 11, 15.)

C. The Parties Settled at Mediation with an Experienced Mediator

The Parties attended a full day session of private mediation on August 29, 2023, with Hon. Carl West (Ret.), a well-known expert in wage and hour mediation. The Parties were unable to reach an agreement following the day-long session. Judge West continued to facilitate settlement discussions for weeks thereafter, with the Parties finally agreeing upon a deal in principle on September 25, 2023. The Parties continued to negotiate the details of the long-form settlement utilizing the LASC model agreement for weeks thereafter. (Koulloukian Decl. ¶ 6, 9, 17.)

III. SETTLEMENT TERMS

A. The Proposed Classes

This Settlement advances the interests of approximately 506 Class Members defined as all persons who are employed or have been employed by Hillsides in the State of California as hourly, non-exempt employees at any time within the period beginning January 10, 2021, and ending on the date the Court grants preliminary approval or November 25, 2023, whichever is earlier. (Settlement ¶1.5, 1.12.)

B. Settlement Terms

The principal terms of the settlement are as follows:

1. Gross Settlement Amount

The Gross Settlement Amount shall be $700,000. (Settlement ¶1.22, 4.1.)

Payments to Participating Class Members. Payments shall be based on the number of eligible workweeks Class Members worked during the applicable period and allocated 20% as wages and 80% as penalties and interest. (Settlement ¶ 4.2.4.1) All applicable employer funded taxes shall be paid separately and outside of the Gross Settlement Amount. (Settlement ¶ 4.1.)

Attorneys' Fees and Costs. Class Counsel's Attorneys' Fees will be limited to no more than 33.33% percent of the Gross Settlement Amount (*i.e.*, $233,310). (Settlement ¶ 4.2.2.) Class Counsel's reasonable Attorneys' Costs will be limited to no more than $20,000.00. (Settlement ¶ 4.2.2.)

Incentive Awards to Named Plaintiff. Subject to Court approval, Plaintiff shall be paid an Incentive Award of up to $10,000 for the extensive risk assumed, and time and effort expended litigating this case, as well as a general release. (Settlement ¶ 4.2.1)

PAGA Payment. $25,000 shall be designated for satisfaction of claims pursuant to PAGA ("PAGA Payment"). (Settlement ¶ 4.2.5.) Seventy-five percent (75%) of the amount designated for satisfaction of the PAGA claim ($18,750) shall be paid to the LWDA, with the remaining 25% ($6,250) payable to PAGA Members based on the number of eligible workweeks worked within the PAGA Period ("PAGA Member Payment"). (Settlement ¶ 4.2.5.)

2. Administration of the Settlement to Class Members

Notice to Class Members. Notice shall be provided to each Class Member, advising them of the number of eligible workweeks and their estimated payment. (Settlement ¶ 8.4, Exhibit A.)

Procedure to Opt-Out. Class Members who wish to opt-out of the Settlement must request to be excluded by the Response Deadline, which is 45 days from the mailing of the Notice. (Settlement ¶ 8.5.)

Procedure for Objecting. Class Members who wish to object to the Settlement may submit objections to the Claims Administrator by the Response Deadline. PAGA members are a subset of the Class. The Notice advises PAGA Members that they do not have standing to object or opt-out of the Settlement. (Settlement ¶ 8.7)

3. Limited Scope of the Releases

To determine whether a settlement is fair, adequate and reasonable, a court must be provided with "basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.) It is important to consider the scope of the release to understand what the class is giving up in exchange for the settlement. Here, releases of Class Members' claims are limited to all claims alleged or that could have been alleged in the First Amended Complaint. (Settlement ¶ 6.2.) The releases negotiated by the Parties are consistent with case law and limits the class release to those claims that were asserted in or may arise out of the facts pleaded in the operative pleadings. (See *TBK Partners, Ltd. V. W. Union Corp.* (2d Cir. 1982) 675 F.2d 456, 460.) Finally, there is no Civil Code §1542 release of Class or PAGA Members' claims, except for Named Plaintiff's claims. (Settlement §6.1.1.)

This is a significant recovery on behalf of affected employees, yielding an excellent result for each individual. Based upon the totality of the evidence presented, Plaintiff is equipped to provide this Court with sufficient evidence to determine adequacy of the settlement. (*Kullar v. Foot Locker Retail, Inc*. (2008) 168 Cal. App. 4th 116, 131-33; *Reynolds v. Benefit Nat'l Bank* (7th Cir. 2002) 288 F.3d 277, 284-85.) Plaintiff provides an extensive liability and damages analysis below, as supported by additional evidence presented in the concurrently filed Declaration of Nazo Koulloukian.

IV. THE PROPOSED SETTLEMENT FULLY SATISFIES THE STANDARDS FOR PRELIMINARY APPROVAL

The reasonableness and fairness of a Settlement are presumed where, as here: (1) the settlement is reached through "arms-length bargaining;" (2) investigation and discovery are "sufficient to allow counsel and the court to act intelligently;" (3) counsel is "experienced in similar litigation;" and (4) the percentage of objectors "is small." (*Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1802.)

A. The Settlement Is Fair and Reasonable Given Maximum Potential Recovery and Discounted by the Risks of Continued Litigation

Class Counsel's evaluation of the Settlement was informed by several factors, including significant informal discovery and investigation, including: (1) determining Plaintiff's suitability as the class representative and PAGA Private Attorneys' General through interviews, background investigations, and analyses of employment records; (2) evaluating all of Plaintiff's potential claims; (3) researching similar wage and hour class actions as to the claims brought, including the nature of the positions and type of employer; (4) analyzing Defendant's labor policies and practices; (5) analyzing a sample of employee time and wage records; (6) researching settlements in similar cases; (7) conducting a discounted valuation analysis; (8) researching and drafting the mediation brief; (9) participating in a full day mediation; and (10) participating in extensive, time-consuming settlement negotiations outside of the mediation. (Koulloukian Decl. ¶14.) Following these investigations, Class Counsel believes that the Settlement is fair, reasonable, and adequate, and is in the best interests of Class and PAGA Members. (Koulloukian Decl., ¶ 10, 14, 19.)

A settling party must provide sufficient information to "enable the court to make an independent assessment of the adequacy of the settlement terms." (*Kullar, supra,* 168 Cal. App. 4th at 131-32.). "Estimates of a fair settlement figure are tempered by factors such as the risk of losing at trial, the expense of litigating the case, and the expected delay in recovery (often measured in years)." (*In re Toys R Us-Delaware, Inc.-Fair & Accurate Credit Transactions Act (FACTA) Litig.* (C.D. Cal. 2014) 295 F.R.D. 438,453.) In other words, in valuing the claims within a realistic range of outcomes, the settling plaintiff should discount the value of the settled claims for risks

such as changes in the law, the probability of success, and other factors. During Class Counsel's investigation, Defendant produced class data, contracts, and policy documents which formed the basis of Class Counsel's reasonable valuation of Defendant's realistic theoretical exposure, which Class Counsel estimates to be between $2 and $3 million. (Koulloukian Decl. ¶ 15.)

1. **Plaintiff Alleges that Defendant Failed to Pay for All Hours Worked**

Plaintiff alleges that he and his coworkers were frequently required to work off the clock. Plaintiff alleges that he and his coworkers were often contacted during non-working hours on their personal cell phones to discuss matters concerning their employment, including the care of minors at Hillsides. These calls occurred numerous times per week and could take anywhere between two minutes to an hour, depending on the topic or crisis involved. Plaintiff and his coworkers were not paid for time spent speaking to their employer during these calls. Additionally, Plaintiff alleges Hillsides had a strict policy prohibiting employees from working overtime which imposed pressure on employees to clock out promptly at the end of their shifts, regardless of whether they continued working. Plaintiff also alleges that when overtime was paid, it was sometimes not paid at the accurate regular rate of pay. Presuming 10 minutes of unpaid off-the-clock work per shift, underpaid wages amount to $605,800 for off-the-clock work and $379,286 for underpaid overtime due to alleged regular rate miscalculation. It was necessary to discount this amount given the risk that Plaintiff may be unable to prove a full 10 minutes of unpaid time per shift given the lack of records and the potential for individual issues. Accordingly, Plaintiff has determined it is appropriate to discount the realistic claim value by 50%, resulting in damages of $302,900 for off the clock wages and by 75% for Plaintiff's regular rate claim, amounting to $94,821.50. (Koulloukian Decl. ¶ 15.)

2. Plaintiff Alleges Defendant Failed to Provide Compliant Rest Periods

Plaintiff alleges that he and his coworkers missed rest periods frequently. When breaks were provided, they were often interrupted and he was not authorized or permitted to take another rest period in instances when he was required to respond to the needs of residents during rest break. Plaintiff complains of frequent rest break violations, and Plaintiff's expert identified 12 rest break premiums in the payroll data. Defendant argued that employees were permitted to take rest periods.

Defendant also pointed to individual issues surrounding the reasons breaks were missed, including the employee's desire to work straight through their break. Defendant did not maintain records of when employees took rest periods, but based on explanations from Plaintiff and other employees, if assuming a maximum possible 100% violation rate, possible damages amount to a maximum of $2,544,216. Because Plaintiff lack documentary support for this claim, and because Defendant may effectively argue that whether or not an employee chose to take a rest period, or the individual reasons why a rest period was missed is subject to individualized proof, this amount was found to be unrealistic and discounted to 10% to a more realistic damages estimate of $254,421.60. (Koulloukian Decl. ¶ 15.)

3. **Plaintiff Alleges Defendant Failed to Provide Compliant Meal Periods**

Plaintiff alleged that he and his coworkers experienced frequent meal period violations. On numerous days, his meal break was either late, short, or interrupted. Based on time and payroll data, 40.9% of shifts had a meal period violation, with a total of 46,656 meal period violations. Plaintiff's expert also identified 120 meal period premiums in the data. Maximum possible damages from meal period violations amount to $993,136. However, because Defendant argued that whether or not an employee chose to take a meal period, or the individual reasons why a meal period was missed is subject to individualized proof, and because Defendant did pay substantial meal period premiums, this amount was discounted to 50% to realistic damages estimate of $496,568. (Koulloukian Decl. ¶ 15.)

4. **Plaintiff Alleges Defendant Failed to Reimburse Business Expenses**

Labor Code §2802 requires employers to indemnify employees for necessary expenditures or losses incurred by employees in direct consequence of discharge of duties. Here, Plaintiff claims that employees were required to use their personal cell phones for work purposes throughout their shifts. Although Hillsides also provided walkie-talkies, Plaintiff alleges that Hillsides still contacted employees on their personal phones, which was more convenient than walkie-talkies, especially when they preferred text messages. Plaintiff alleges that Hillsides also contacted employees frequently when off the clock to ask questions and communicate about work-related matters. Plaintiff and his coworkers also sometimes purchased food items for underprivileged

children and at-risk youth under their care as necessary to assist with behavior incentives and crisis management. Assuming $20 per month per employee, maximum damages for unreimbursed business expenses amount to $145,040. Applying a discount to account for possible difficulties in prevailing on this claim through trial and possible appeal, given the lack of documentary evidence and need for individualized proof, this amount was discounted to 25% to a more realistic damages estimate of $36,260. (Koulloukian Decl. ¶ 15.)

5. **Wage Statement and Waiting Time Penalty Claims**

Plaintiff's wage statement and waiting time penalty claims are derivative of the unlawful acts and practices alleged above. Plaintiff alleges the statements provided to Plaintiff, Class members, and aggrieved employees have not accurately reflected actual gross wages earned, including overtime, and total hours worked. Such alleged failures allegedly caused injury to employees, by, among other things, impeding them from knowing the total hours worked and the amount of wages to which they are and were entitled, nor the penalty pay or reimbursements they were entitled to. According to Plaintiff's expert, wage statement penalties for 442 employees from 8/11/2021 to 8/29/2023 amount to a maximum of $1,052,800. (Koulloukian Decl. ¶ 15.) As this claim is derivative and therefore dependent on the success of the underlying claims, this claim is subject to substantial 90% discount to arrive at a realistic settlement value of 105,280.

Waiting time penalties for 291 terminated employees beginning 1/10/2021 amount to a maximum of $1,554,188. Similar to Plaintiffs' wage statement claim, this claim for waiting time penalties is also derivative and therefore dependent on the success of the underlying claims and thus also subject to substantial 90% discount to arrive at a realistic settlement value of $155,418. (Koulloukian Decl. ¶ 15.)

An analysis of PAGA Penalties related to the above claims follows in section C, below.

B. The Settlement Reflects Excellent Value Noting Significant Litigation Risks

Risks of Proving up Claims Underpinning Both Class and PAGA Allegations. Although Plaintiff and Class Counsel are confident that any trial would be meritorious and successful, they are not blind to the significant risk of losing such a trial, including the enormous costs, and potentially the hurdle that must be overcome on appeal: an abuse of discretion standard.

(Koulloukian Decl. ¶ 16.) Class Counsel has a thorough understanding of the practical and legal issues they would continue to face litigating this case against Defendant. Here, Plaintiff faced a number of serious challenges, and Defendant has mounted a vigorous defense.

Defendant argued that Plaintiff's claims, including his unpaid expenses and meal and rest break claims were not appropriate for class certification due to a predominance of individual issues. A number of California courts have refused to certify class claims where the claims-at-issue were highly varied or required individual analysis to determine liability. (*See, e.g.*, *Arredondo v. Delano Farms Co.* (E.D. 2014) 301 F.R.D. 493, 528 (class certification is not appropriate where evidence of unpaid work is anecdotal, variable, limited in scope, and involving few employees); *Sotelo v. Media New Grp., Inc.* (2012) 207 Cal. App. 4th 639, 652-53 (common issues did not predominate where evidence showed wide variation in hours worked, ability to take breaks, etc.); *Lockheed Martin Corp. v. Sup. Ct.* (2003) 29 Cal. 4th 1096, 1103-04 (cert. denied where liability required individual analysis).) Ultimately, had the case proceeded, Defendant would have vigorously opposed certification on the grounds that the varying reasons concerning whether it was actually necessary for an employee to use their personal device for work when Defendant provided communication devices, or whether employees missed rest or meal breaks because they chose to create challenging circumstances. Considering the strength of Plaintiff's claims and Defendant's defenses, Class Counsel determined that a recovery of $700,000 for the claims asserted in this action was fair and reasonable under the circumstances. (Koulloukian Decl. ¶15.)

Settling parties are not required to partake in a hypothetical accounting exercise: "*Kullar* does not… require any such explicit statement of [maximum] value; it requires a record which allows 'an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.'" (*Munoz v. BCI Coca-Cola Bottling Co.* (2010) 186 Cal. App. 4th 399, 409-10 [quoting *Kullar*, 168 Cal. App. 4th at p. 120].) Overall, "the most important factor" in determining "whether a settlement is fair and reasonable" is the "strength of the case for plaintiffs on the merits, balanced against the amount offered in the settlement." (*Id.* at p. 409 n.6 [quoting *Kullar*, 168 Cal. App. 4th at p. 130].) Because settlements are inherently a compromise, once the parties have

provided it with the requisite "basic information," the trial court must only "satisfy itself that the class settlement is within the 'ballpark' of reasonableness." (*Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.* (1985) 38 Cal.3d 488, 499-500.) Here, although Plaintiff and Class Counsel had confidence in their claims, a favorable outcome was not assured.

The maximum possible recovery for Plaintiff's class claims amounts to $12,707,366, including off the clock wages ($605,800), unpaid overtime ($379,286); rest break ($2,544,216), meal break ($993,136), unreimbursed expenses ($145,040), waiting time ($1,554,188) and wage statement penalties ($1,052,800). This presumes that the Court first certifies a plaintiff class for all claims asserted, and then following a trial determines that Plaintiff and the class are entitled to a full 10 minutes of unpaid time worked, and agrees that each missed meal and rest period was the fault of Defendant, including a finding of a 100% rest break violation rate. Based on the maximum possible calculations, the $700,000 recovery on behalf the Class Members represents 5.5% of the total maximum recovery. (Koulloukian Decl. ¶ 15.) However, as discussed above, the reasonable discounted settlement value utilizing the discounts discussed above amounts to a total of $1,445,669.90. The settlement reached amounts to 48.42% of the discounted realistic recovery, but without the risks and delay of continued litigation.

Class Counsel has applied reasonable discounts to the maximum damages amounts based on the likelihood of success and the benefit of securing an assured settlement payment for affected class members. (Koulloukian Decl. ¶ 15.) Generally, "unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." (*Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 526 (citation omitted).) Settlement is encouraged in class actions where possible. (*Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976) 529 F.2d 943, 950 ("It hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits which are now an ever-increasing burden to so many federal courts and which present serious problems of management and expense.")

In determining whether the amount offered in settlement is fair, courts compare the settlement amount to the parties' "estimates of the maximum amount of damages recoverable in a

successful litigation." (*In re Mego Fin. Corp. Sec. Litig.* (9th Cir. 2000) 213 F.3d 454, 459.) However, "a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." (*Id. See also, Balderas v. Massage Envy Franchising, LLC* (N.D. Cal. 2014) 2014 WL 3610945, at *5 (finding that settlement which amounted to 8% of maximum recovery "[fell] within the range of possible initial approval based on the strength of plaintiffs case and the risk and expense of continued litigation."); *In re Omnivision Techs., Inc.* (N.D. Cal. 2008) 559 F. Supp. 2d 1036, 1042 (approving settlement of 6% to 8% of estimated damages); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 256 (N.D. Cal. 2015) (approving a settlement where the gross recovery to the class was approximately 8.5% of the maximum recovery amount).

C. The Consideration Provided for the PAGA Claim Is Fair and Reasonable in Light of the Amount in Controversy Discounted by the Risks of Continued Litigation

PAGA gives the Court wide latitude to reduce civil penalties "based on the facts and circumstances of a particular case" when "to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." (Cal. Lab. Code § 2699(h).) In reducing PAGA penalties, courts have considered issues including whether the employees suffered actual injury from the violations, whether the defendant was aware of the violations, and the employer's willingness to fix the violation. (*Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th 504,528 (awarding PAGA penalties of only 0.2% of the maximum).) It is not uncommon for courts to award substantially less than the maximum amount of civil penalties. (*See, e.g., Fleming v. Covidien* (2011, C.D. Cal.) 2011 WL 756304 14 (exercising discretion to reduce maximum penalties by over 80%.) In seeking to reduce PAGA damages, Defendant would undoubtedly argue that the amount of PAGA penalties awarded is largely within the discretion of the Court. For instance, in *Carrington v. Starbucks Corp., supra*, 30 Cal. App. 5th at 517, while the plaintiff prevailed on his PAGA claim at trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the employer's good faith attempt at complying with the law. *Id.* Upon review, the Court of Appeal found such reduction to be proper. *Id.* at 539. Again, the *Carrington* decision was after plaintiff

actually prevailed at trial, and even then, the PAGA penalties were reduced by 90%. Here, Defendant has the additional argument that it paid over $20,000 in meal premium payments, in addition to incremental rest period penalty payments, to the 506 class members during the statutory period, evidencing a good faith effort to comply with the law and providing a basis for a reduction in PAGA penalties.

There are approximately 10,993 pay periods in the PAGA period. The Parties chose to allocate $25,000 of the settlement to Plaintiff's PAGA claims. (Settlement ¶3.2.5.) Because PAGA employees are a subset of the Class, allocating a greater percentage of funds to class claims results in higher payments to the affected low-wage hourly employees. The maximum possible PAGA penalties, assuming a 100% violation rate for rest breaks, wage statements, and reimbursements, as well as assuming 100% of noncompliant meal breaks were the result of Defendant's wrongdoing, amount to $5,432,900. This would also require the Court to permit stacking of PAGA penalties, permitting recovery of numerous claims each pay period. However, when accounting for the risks of losing on the merits and/or having the PAGA claim dismissed on manageability grounds, it is apparent the $5,432,900 is unrealistically high. The maximum PAGA penalties for any individual claim is $1,099,300 based on 10,993 total pay periods, at the $100/$100 rate initial violation rate, which was used to calculate damages because there is no evidence that Defendant has previously been cited for the violations alleged in this case. In light of all considerations, the Parties' allocation of $25,000 to Plaintiff's PAGA claims is reasonable. (Koulloukian Decl. ¶15, 18.)

Despite the hurdles discussed above, Plaintiff obtained a settlement fund of $700,000 for just over 500 employees, a significant achievement given the significant obstacles faced in the litigation. Plaintiff and his counsel believe that the Settlement is fair, reasonable and in the best interests of the class. (Koulloukian Decl., ¶ 10, 14, 19; Day Decl. ¶ 15.)

V. CONDITIONAL CLASS CERTIFICATION

The Parties propose that the Court conditionally certify the classes defined above, which the Parties have stipulated to for settlement purposes only. (Settlement 3.1-3.4.) The two primary requirements necessary to maintain a California class action are: (1) an ascertainable class, and (2)

a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented. (*Daar v. Yellow Cab Company* (1967) 67 Cal.2d 695, 704.) These requirements are generally more broadly expressed as follows: (1) numerosity of class members, (2) typicality of claims, (3) adequacy of representation by the named plaintiffs, and (4) the superiority and predominance of common questions of law and fact. (*Vasquez v. Sup. Ct.* (1971) 4 Cal.3d 800, 820.) Prosecution of this lawsuit as a class and representative action is appropriate and desirable as an effective and efficient manner to remedy a pervasive wrong. (*Richmond v. Dart Industries, Inc*. (1981) 29 Cal.3d 462, 477-478.) As detailed below, the requirements for class certification are clearly present.

A. Numerosity of Class Members

Defendant employed approximately 506 Class Members, clearly satisfying the numerosity requirement. (Koulloukian Decl., ¶ 13.)

B. Typicality of Claims

Class Members' claims are similar and based upon the uniform application of Defendant's alleged policies and practices concerning off-the-clock work, use of personal cellphones, and noncompliant or nonexistent meal and rest breaks. The wrongful employment practices Plaintiff complains of are common to each class and many are easily determined by review of Defendant's own records, just as Plaintiff's forensic expert did prior to mediation. The policies and practices described herein applied to all applicable Class Members, are supported by reliable evidence, and damages can be easily and accurately calculated for each Class Member. Unpaid wages, hours and dates of labor, dates of employment and final payment can, and has been, determined by Defendant's records. Traditional notions of judicial economy are clearly in Plaintiff's favor.

C. Adequacy of Representation by Named Plaintiff

Plaintiff is an adequate class representative and has been instrumental in providing critical information and evidence. Plaintiff worked for Hillsides for over 20 years in multiple positions. He provided pre-litigation information to his attorneys that helped identify and explain claims and specific common practices, and how those practices affected him and his co-workers. Plaintiff provided documents and information used in preparing for mediation and assisted in clarifying

important policies and facts. Plaintiff was available for mediation and played an active role in approving the settlement. (Koulloukian Decl., ¶¶ 10-11; Day Decl. ¶¶ 11-14). The question of adequacy of representation also "depends on whether the plaintiff's attorney qualifies to conduct the proposed litigation in the plaintiff's interest or not antagonistic to the interests of the class." (*McGee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.) Here, Class Counsel are well-regarded and accomplished lawyers who are qualified and experienced in employment-related, class-action litigation. (Koulloukian Decl. ¶¶ 20-26.) Plaintiff will vigorously, adequately, and fairly represent the interests of the classes. Because Plaintiff's claims are typical of other class members and are not based on unique circumstances, there is no antagonism between the interests of Plaintiff and the class.

D. The Superiority and Predominance of Common Questions of Law and Fact

"[C]lasswide relief remains the preferred method of resolving wage and hour claims, even those in which the facts appear to present difficult issues of proof." (*Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 384.) "Claims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment." (*Brinker Restaurant Corp. vs. Superior Court* (2012) 53 Cal. 4th 1004, 1033.) Class actions are certified when plaintiff's "theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." (*Brinker Restaurant Corp*., 53 Cal. 4th at 1021, quoting *Sav-On Drug Stores, Inc. v. Superior Court*.) Indeed, the "theory of liability" asserted here, that Defendant has "a uniform policy, and that that policy, measured against wage order requirements, allegedly violates the law—is by its nature a common question eminently suited for class treatment." (*Brinker Restaurant Corp.*, 53 Cal. 4th at 1033.)

The uniform policies and procedures Plaintiff alleges violate the law are precisely the types of claims eminently suited for class treatment. There would appear to be few questions of law which would vary from employee to employee. The only factual questions would be in the area of damages. Finally, Defendant has conditionally stipulated for purposes of settlement only. (Settlement ¶ 3, 13.1.)

VI. THE CLASS REPRESENTATIVE SERVICE AWARD IS REASONABLE AND STANDARD IN CLASS ACTIONS

The Settlement provides for a service award of up to $10,000.00 for ISOM DUANE DAY. Plaintiff spent extensive time meeting with lawyers, searching for documents, and standing by all day for mediation. The information provided by Plaintiff was instrumental in pursuing the wage and hour violations alleged in this action, and the recovery provided for in the Settlement would have been impossible to obtain without his willingness to act as class and PAGA action representative. (Koulloukian Decl. ¶10-11.) "Incentive awards are fairly typical in class actions." (*Cellphone Termination Fee Cases, supra* 186 Cal. App. 4th at 1393.) "The rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class." (*Id.* at 1394.)

The requested service award amount to a small in proportion to the Gross Settlement Amount, representing only 1.4% of the total. This is well within the range of reasonableness recognized by the courts. (*See, e.g., In re Mego Fin. Corp. Sec. Litig.* (9th Cir. 2000) 213 F.3d 454, 457, 463 (affirming enhancement awards comprising 0.57% of the settlement fund); *Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) 2009 WL 928133 at * 10 (granting final approval of a settlement providing for enhancement payments that represented 1.25% of the settlement fund); *see also Martin v. AmeriPrideSvcs., Inc.* (S.D. Cal. 2011) 2011 WL 2313604 at * 9 (awarding $148,000.00 in enhancement payments out of a settlement of $5.25 million, or 2.8% of the total settlement amount); *Smith v. Cardinal Logistics Mgmt. Corp.* (N.D. Cal. 2011) 2011 WL 3667462, at *5 (awarding enhancement payments of $15,000 to each of three named plaintiffs out of a settlement of $3.75 million, or 1.2% of the total settlement amount).)

An award of $10,000 is a relatively small amount considering the time and effort put into the litigation and compared to enhancements granted in other cases. Courts routinely grant enhancements for representatives, necessary to provide incentive to represent the class, appropriate given the benefit the class representatives help to bring about for their fellow employees. Enhancements are especially appropriate where the plaintiff's position or employment credentials

or recommendation may be at risk by reason of having prosecuted the suit and who, therefore, lends his name and efforts to the prosecution of litigation at some personal peril. (*Roberts v. Texaco* (S.D.N.Y. 1997) 979 F.Supp.185.) Clearly, obtaining recovery for the Class and PAGA Members would have been impossible without Plaintiff's active participation.

VII. ATTORNEYS' FEES AND COSTS

A. The Requested Attorneys' Fees Are Reasonable

Plaintiff's attorneys are entitled to payment of attorneys' fees and costs. (*See, Early v. Superior Court* (2000) 79 Cal. App. 4th 1420, 1427.) An attorneys' fees award is justified where the legal action has produced its benefits by way of a voluntary settlement. (*Marla P. v. Riles* (1987) 43 Cal. 3d 1281, 1290-91; *Westside Cmty. For Indep. Living, Inc. v. Obledo* (1983) 33 Cal. 3d 348, 352-53.) The Settlement Agreement provides for attorneys' fees to Class Counsel of up to 33.33% of the Gross Settlement Amount, or $233,310. (Settlement ¶ 4.2.2.) The fee is supported by the "common fund theory" where "one who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits, may require those passive beneficiaries to bear a fair share of the litigation costs." (*Serrano v. Priest* (1977) 20 Cal.3d 25, 35. *See also Quinn v. State of California* (1975) 15 Cal.3d 162, and *Samura v. Kaiser Foundation Health Plan*, Inc. (1993) 17 Cal.App.4th 1284.)

Attorney fee applications in class actions based upon a percentage of a common fund have substantial support by the Ninth Circuit Court of Appeals, as well as various state courts. (*See, e.g., Paul, Johnson, Alston & Hunt v. Graulty* (9th Cir. 1989) 886 F.2d 268; and *Washington Public Power Supply Secur. Lit. v. City of Seattle* (9th Cir. 1994) 19 F.3d 1291.) Other Federal Courts of Appeals, such as the Eleventh Circuit and the D.C. Circuit, mandate use of the percentage method. (*Camden I Condominium Ass'n v. Dunkle* (11th Cir. 1991) 946 F.2d 768, 774; *Swedish Hosp. Corp. v. Shalala* (D.C. Cir. 1993) 1 F.3d 1261, 1271.)

The requested attorneys' fees and costs here are clearly reasonable and will be fully supported by evidence at the time of final approval hearing. Class Counsel are experienced in litigating Labor Code violations in both single and class actions. The Class is represented by Nazo Koulloukian and Hilary Silvia of Koul Law Firm. Class Counsel are established, respected

attorneys with significant experience practicing employment litigation, representing entirely employee plaintiffs in both individual and class actions in Superior Courts throughout the State, in the Court of Appeal, and in various Federal courts. (Koulloukian Decl. ¶¶ 20-25.)

Class Counsel have vigorously litigated this action for the benefit of the classes and expended extensive out-of-pocket costs, including filing fees, expert fees, and mediation costs. (Koulloukian Decl. ¶ 27.) The efforts of Class Counsel have resulted in substantial benefits to the class members in the form of a substantial settlement fund established to compensate them. The percentage fee requested (33.33% of the Settlement) is reasonable given the result achieved. Class Counsel are "qualified, experienced, and generally able to conduct the proposed litigation" as required under existing law. (*Miller v. Woods* (1983) 148 Cal. App. 3d 862, 874.) In support of their Attorneys' Fee request, Class Counsel will provide evidentiary support, including lodestar method calculations at the time of final approval hearing. Finally, Class Counsel have no conflicts of interest which would interfere in any way with their duties as Class Counsel. (Koulloukian Decl. ¶30.) Finally, Class Counsel is not aware of any pending actions that would be impacted by this Settlement. (Koulloukian Decl. ¶ 31.)

VIII. CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court: (1) grant preliminary approval of the proposed settlement; (2) authorize the mailing of the proposed notice; (3) approve the proposed Claims Administrator; and (3) schedule a final approval hearing for 100 days following the hearing on preliminary approval, or as soon thereafter as the Court's calendar permits.

DATED: December 7, 2023

KOUL LAW FIRM

BY: Nazo Koulloukian, Esq.
Attorneys for Plaintiff and putative class members

PROOF OF SERVICE

Case No. 22STCV26039
Day v. Hillsides

I, IVETTE HERNANDEZ declare that I am a resident of or employed in the County of Los Angeles, California. I am over the age of 18 years and not a party to the entitled case. The name and address of my residence or business is KOUL LAW FIRM, 3435 Wilshire Blvd. Ste. 1710, Los Angeles, California 90010.

On December 7, 2023, I served the foregoing document described as:

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR:
(1) PRELIMINARY APPROVAL OF CLASS ACTION AND REPRESENTATIVE SETTLEMENT AGREEMENT
(2) APPROVAL OF NOTICE TO CLASS MEMBERS AND RELATED MATERIALS;
(3) APPROVAL OF CLAIMS ADMINISTRATOR; AND
(4) SETTING HEARING FOR FINAL APPROVAL OF SETTLEMENT

X **BY ELECTRONIC SERVICE:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the persons at the electronic service addresses listed above via third-party cloud service **CASEANYWHERE.**

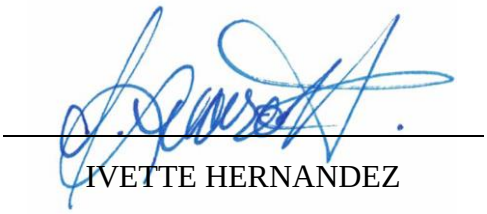
on the interested parties in this action by sending [ ] the original [or] [✓] a true copy thereof [✓] to interested parties as follows [or] [ ] as stated on the attached service list:

Kathleen Carter, Esq.
kcarter@messner.com
Peter Pierce, Esq.
ppierce@messner.com
MESSNER REEVES LLP
650 Town Center Drive, Suite 700
Costa Mesa, CA 92626
Phone: (310) 909-7440

Attorneys for Defendant HILLSIDES

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this December 7, 2023, in Los Angeles, California.



IVETTE HERNANDEZ