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July 26, 2024  
Clerk of the Court  
Superior Court of CA  
County of Santa Clara  
22CV393492  
By: rwalker

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**FOR THE COUNTY OF SANTA CLARA**

BALTAZAR PEREZ, individually and on  
behalf of all others similarly situated,

Plaintiffs,

v.

BEST OVERNITE EXPRESS, INC.; and  
DOES 1 through 20, inclusive,

Defendant.

Case No. S22CV393492CV-270587

Assigned for All Purposes to:  
Judge Theodore C. Zayner  
Dept. 19

**ORDER GRANTING PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT**

Date: July 24, 2024  
Time: 1:30 p.m.  
Dept: 19

1           **I. Introduction**

2           This is a putative class and Private Attorneys General Act (“PAGA”) action arising out  
3 of various alleged wage and hour violations. The operative First Amended Complaint (“FAC”)  
4 against defendant Best Overnight Express, Inc. (“Defendant”), filed on April 12, 2022, sets forth  
5 the following causes of action: (1) Failure to Pay Minimum Wages; (2) Failure to Reimburse  
6 Business Expenses; (3) Failure to Provide Accurate Itemized Wage Statements; (4) Failure to  
7 Pay All Wages Due Upon Separation of Employment; (5) Violation of Business and  
8 Professions Code §§ 17200[] et seq.; and (6) Enforcement of Labor Code, § 2698, et seq.  
9 (“PAGA”).

10          The parties have reached a settlement. On February 9, 2024, Plaintiff filed a motion for  
11 preliminary approval of the settlement, and the motion is unopposed. On May 22, 2024, the  
12 court continued the motion for preliminary approval to July 24, 2024. In its minute order, the  
13 court explained that it found the settlement to be fair overall, but there were several areas  
14 requiring further attention. The court identified the following issues: the identification of a cy  
15 *pres* recipient; the scope of the release for the PAGA claims; the amount of settlement  
16 administration costs; and modifications to the class notice. The court also instructed Plaintiff  
17 to file a declaration in support of his request for a service award.

18          On July 10, 2024, Plaintiff, his attorneys, and the settlement administrator all filed  
19 supplemental papers in support of the motion for preliminary approval. Among these filings  
20 are an amended settlement agreement and an amended class notice. (Supplemental Declaration  
21 of Julia M. Toscano in Support of [] Motion for Preliminary Approval of Class and  
22 Representative Action Settlement (“Toscano Dec.”), Ex. 1.)

23           **II. Legal Standard**

24          Generally, “questions whether a settlement was fair and reasonable, whether notice to  
25 the class was adequate, whether certification of the class was proper, and whether the attorney  
26 fee award was proper are matters addressed to the trial court’s broad discretion.” (Wershba v.  
27 Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 234-235 (Wershba), citing Dunk v. Ford  
28 Motor Co. (1996) 48 Cal.App.4th 1794 (Dunk).)

1 In determining whether a class settlement is fair, adequate and reasonable, the trial  
2 court should consider relevant factors, such as “the strength of plaintiffs’ case,  
3 the risk, expense, complexity and likely duration of further litigation, the risk of  
4 maintaining class action status through trial, the amount offered in settlement, the  
5 extent of discovery completed and the stage of the proceedings, the experience and  
6 views of counsel, the presence of a governmental participant, and the reaction of  
7 the class members to the proposed settlement.”  
8 (Wershba, supra, 91 Cal.App.4th at pp. 244-245, citing Dunk, supra, 48 Cal.App.4th at p. 1801  
9 and Officers for Justice v. Civil Service Com’n, etc. (9th Cir. 1982) 688 F.2d 615, 624  
10 (Officers).)

11 “The list of factors is not exclusive and the court is free to engage in a balancing and  
12 weighing of factors depending on the circumstances of each case.” (Wershba, supra, 91  
13 Cal.App.4th at p. 245.) The court must examine the “proposed settlement agreement to the  
14 extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or  
15 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as  
16 a whole, is fair, reasonable and adequate to all concerned.” (Ibid., quoting Dunk, supra, 48  
17 Cal.App.4th at p. 1801 and Officers, supra, 688 F.2d at p. 625, internal quotation marks  
18 omitted.)

19 The burden is on the proponent of the settlement to show that it is fair and  
20 reasonable. However “a presumption of fairness exists where: (1) the  
21 settlement is reached through arm’s-length bargaining; (2) investigation and  
22 discovery are sufficient to allow counsel and the court to act intelligently;  
23 (3) counsel is experienced in similar litigation; and (4) the percentage of  
24 objectors is small.”

25 (Wershba, supra, 91 Cal.App.4th at p. 245, citing Dunk, supra, 48 Cal.App.4th at p. 1802.)

26 Similar to its review of class action settlements, the Court must “determine  
27 independently whether a PAGA settlement is fair and reasonable,” to protect “the interests of  
28 the public and the LWDA in the enforcement of state labor laws.” (Moniz v. Adecco USA, Inc.

(2021) 72 Cal.App.5th 56, 76-77.) It must make this assessment “in view of PAGA’s purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws.” (Id. at p. 77.)

### **III. Discussion**

#### **A. Provisions of the Settlement**

This case has been settled on behalf of the following class:

[a]ll California residents currently or formerly employed by Defendant as a nonexempt employee in the State of California at any time during the Class Period [from June 15, 2019 through June 15, 2023].

(Toscano Dec., Ex. 1 (“Settlement Agreement”), ¶¶ 1.5, 1.12.) The class includes a subset of PAGA Members who are identified as all California residents currently or formerly employed by Defendant as a non-exempt employee in the State of California at any time during the PAGA Period [from June 15, 2020 through June 15, 2023]. (Settlement Agreement, ¶¶ 1.4, 1.30.)

According to the terms of the settlement, Defendant will pay a gross, non-reversionary amount of \$450,000. (Settlement Agreement, ¶¶ 1.21, 3.1.) The gross settlement payment includes attorney fees not to exceed one-third of the gross settlement amount (currently estimated at \$150,000), litigation costs up to \$25,000, an incentive award up to \$15,000 for the class representative, settlement administration costs up to \$10,650, and PAGA allocation of \$40,000 (75 percent of which will be paid to the Labor and Workforce Development Agency (“LWDA”) and 25 percent of which will be available for PAGA Members). (Settlement Agreement, ¶¶ 3.2.1-3.2.3, 3.2.5.) Amounts not approved for use as an incentive award, attorney’s fees, litigation costs, and settlement administration costs will revert to the net settlement amount. (Settlement Agreement, ¶¶ 3.2.1-3.2.3.) Plaintiff submitted a copy of the proposed settlement to the LWDA. (Toscano Dec., ¶ 11.)

The net settlement amount will be distributed to the participating Class Members on a pro rata basis based on their number of applicable workweeks. (Settlement Agreement, ¶ 3.2.4) Similarly, the individual PAGA payments will be distributed to PAGA Members based

1 on their number of applicable pay periods worked. (Settlement Agreement, ¶ 3.2.5.1.) Funds  
2 from checks that remain uncashed 180 days after issuance will be sent to the *cy pres* chosen by  
3 the parties: St. Jude Children’s Research Hospital. (Settlement Agreement, ¶ 4.4.3.) The  
4 court approves the *cy pres* recipient.

5       Regarding the administration costs, Plaintiff has submitted a declaration from the  
6 settlement administrator, ILYM Group, Inc. (“ILYM Group”) along with his supplement  
7 briefing. (See Declaration of Lisa Mullins (“Mullins Dec.”).) The settlement administrator has  
8 provided evidence that, based in part on the number of Class Members (561), its fees  
9 associated with the administration of this settlement are \$10,650. (Mullins Dec., ¶¶ 9-10, Ex.  
10 C.) Having received this information, the court approves ILYM Group as the settlement  
11 administrator and settlement administration costs in the amount of \$10,650.

12       As part of the settlement, Plaintiff, Class Members, and PAGA Members agree to  
13 respective releases with respect to “Released Parties,” defined as Defendant and each of its  
14 former and present directors, officers, shareholders, owners, members, attorneys, insurers,  
15 predecessors, successors, assigns, subsidiaries and affiliates.” (Settlement Agreement, ¶ 1.40.)  
16 In exchange for the settlement, the class members agree to release the Released Parties from all  
17 claims that were alleged, or reasonably could have been alleged, based on the facts pleaded in  
18 the FAC occurring during the Class Period. (Settlement Agreement, ¶¶ 1.38, 6.2.)

19       PAGA Members who are not participating Class Members “are deemed to release ...  
20 the Released Parties from all claims for PAGA penalties that were alleged, or reasonably could  
21 have alleged, based on the PAGA Period facts stated in the Operative Complaint and the  
22 PAGA Period facts stated in the PAGA Notice that are pled in the Operative Complaint.  
23 (Settlement Agreement, ¶¶ 1.39, 6.3.) The court finds that the release for PAGA Members is  
24 now reasonably tailored to the operative pleading, and therefore is consistent with the appellate  
25 court’s reasoning in *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521.

## 26       **B. Fairness of the Settlement**

27       Plaintiff states that the settlement was reached through discovery, analysis, and  
28 mediation with Jill Sperber. (Declaration of Jessica L. Campbell in Support of Motion for

1 Preliminary Approval of Class Action Settlement, filed on February 9, 2024 (“Campbell  
2 Dec.”), ¶¶ 6-7, 14.) In anticipation of mediation, the parties engaged in informal discovery,  
3 and Defendant produced pay records, time sheets, hiring and termination dates, and employee  
4 handbooks and policies for all Class Members for the Class Period. (Campbell Dec., ¶ 6.)  
5 Plaintiff’s counsel provides a detailed analysis of its reasoning with respect to the maximum  
6 realistic recovery of the claims alleged in the FAC. (Campbell Dec., ¶¶ 13-20.) Defendant’s  
7 records show that there are approximately 561 Class Members who worked approximately  
8 40,000 workweeks. (Campbell Dec., ¶ 9; Settlement Agreement, ¶ 4.1.)

9 As discussed in the court’s May 22, 2024 minute order, the court finds that the  
10 settlement amount is fair despite being somewhat low as percentage of the maximum potential  
11 recovery. By the court’s calculation, the total maximum potential recovery is \$10,949,813  
12 (including maximum potential recovery of \$1,802,200 for the PAGA claim), so the gross  
13 settlement amount represents approximately 4 percent of the total maximum potential  
14 recovery. Plaintiff provides a detailed breakdown of this amount by claim. (Campbell Dec.,  
15 ¶¶ 16-20.) Thus, the proposed settlement amount is slightly below general range of  
16 percentage recoveries that California courts have found to be reasonable. (See *Cavasos v.*  
17 *Salas Concrete, Inc.* (E.D. Cal., Feb 18, 2022, No. 1:19-cv-00062-DAD-EPG) 2022 U.S.Dist.  
18 LEXIS 30201, at \*41-42 [citing cases listing range of 5 to 25-35 percent of the maximum  
19 potential exposure].)

20 Nevertheless, Plaintiff’s counsel has provided reasons why the claims were discounted  
21 as they were, including the anticipated difficulties on the merits and in proving violations on a  
22 class-wide basis. (Campbell Dec., ¶¶ 15-20.) Plaintiff’s counsel estimates that the maximum  
23 realistic recovery for the class claims is \$458,000. (Ibid.) Thus, the gross settlement amount  
24 represents approximately 98 percent of the maximum realistic recovery.

25 Therefore, the court finds the terms of the settlement to be fair. The settlement  
26 provides for some recovery for each class member and eliminates the risk and expense of  
27 further litigation.

28 **C. Incentive Award, Fees and Costs**

1 Plaintiff requests an enhancement award of \$15,000.

2 The rationale for making enhancement or incentive awards to named plaintiffs  
3 is that they should be compensated for the expense or risk they have incurred in  
4 conferring a benefit on other members of the class. An incentive award is  
5 appropriate if it is necessary to induce an individual to participate in the suit.  
6 Criteria courts may consider in determining whether to make an incentive award  
7 include: 1) the risk to the class representative in commencing suit, both financial  
8 and otherwise; 2) the notoriety and personal difficulties encountered by the class  
9 representative; 3) the amount of time and effort spent by the class representative;  
10 4) the duration of the litigation and; 5) the personal benefit (or lack thereof)  
11 enjoyed by the class representative as a result of the litigation. These “incentive  
12 awards” to class representatives must not be disproportionate to the amount of  
13 time and energy expended in pursuit of the lawsuit.

14 (Cellphone Termination Fee Cases (2010) 186 Cal.App.4th 1380, 1394-1395, quotation marks,  
15 brackets, ellipses, and citations omitted.)

16 Since the May 22, 2024 hearing on his motion for preliminary approval, Plaintiff has  
17 submitted a declaration describing his involvement in this case. (Declaration of Baltazar Perez  
18 in Support of Motion for Preliminary Approval of Class Action Settlement (“Perez Dec.”),  
19 ¶¶ 8-12, 20.) Plaintiff states that he participated in many conversations with his attorneys and  
20 contacted them regularly, spent time looking for documents, provided verified responses to  
21 written discovery, and assisted with the preparations for mediation. (Ibid.) Plaintiff estimates  
22 that he has spent approximately 40 hours of his time on this litigation. (Perez Dec., ¶ 20.)  
23 The time Plaintiff spent on this matter benefited the class because it led to the  
24 settlement now before the court. Plaintiff also undertook risk by attaching his/her name to this  
25 case because it might impact [his/her] future employment. (See Covillo v. Specialty’s Café  
26 (N.D.Cal. 2014) 2014 U.S.Dist.LEXIS 29837, at \*29 [incentive awards are particularly  
27 appropriate where a plaintiff undertakes a significant “reputational risk” in bringing an action  
28 against an employer].).

1 For the foregoing reasons, the court finds that a service award to Plaintiff is warranted.  
2 Nevertheless, the amount sought for the enhancement award is higher than the court typically  
3 awards in these types of cases. Therefore, the court approves a service award to Plaintiff in the  
4 amount of \$5,000.

5 The court also has an independent right and responsibility to review the requested  
6 attorney fees and only award so much as it determines reasonable. (See Garabedian v. Los  
7 Angeles Cellular Telephone Co. (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel  
8 will seek attorney fees up to \$150,000 (1/3 of the gross settlement amount) and litigation costs  
9 not to exceed \$25,000. Plaintiff's counsel shall submit lodestar information (including hourly  
10 rate and hours worked) prior to the final approval hearing in this matter so the court can  
11 compare the lodestar information with the requested fees. Plaintiffs' counsel shall also submit  
12 evidence of actual costs incurred.

#### 13 **D. Conditional Certification of Class**

14 Plaintiff requests that the class be conditionally certified for purposes of the settlement.  
15 Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order  
16 approving or denying certification of a provisional settlement class after [a] preliminary  
17 settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of  
18 a class "when the question is one of a common or general interest, of many persons, or when  
19 the parties are numerous, and it is impracticable to bring them all before the court . . . ." As  
20 interpreted by the California Supreme Court, section 382 requires: (1) an ascertainable class;  
21 and (2) a well-defined community of interest among the class members. (Sav-On Drug Stores,  
22 Inc. v. Superior Court (2004) 34 Cal.4th 319, 326 (Sav-On).)

23 The "community-of-interest" requirement encompasses three factors: (1) predominant  
24 questions of law or fact; (2) class representatives with claims or defenses typical of the class;  
25 and, (3) class representatives who can adequately represent the class. (Sav-On, supra, 34  
26 Cal.4th at p. 326.) "Other relevant considerations include the probability that each class  
27 member will come forward ultimately to prove his or her separate claim to a portion of the total  
28 recovery and whether the class approach would actually serve to deter and redress alleged



wrongdoing.” (Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield “substantial benefits” to both “the litigants and to the court.” (Blue Chip Stamps v. Superior Court (1976) 18 Cal.3d 381, 385.)

As explained by the California Supreme Court,

The certification question is essentially a procedural one that does not ask whether an action is legally or factually meritorious. A trial court ruling on a certification motion determines whether the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.

(Sav-On, supra, 34 Cal.4th at p. 326, internal quotation marks, ellipses, and citations omitted.)

Plaintiff states that there are approximately 561 class members, who can be identified from a review of Defendant’s records. There are common questions regarding whether class members were subjected to common practices that violated wage and hour laws. No issue has been raised regarding the typicality or adequacy of Plaintiff as class representative. Therefore, the court finds that the proposed class should be conditionally certified for settlement purposes.

#### **E. Class Notice**

The content of a class notice is subject to court approval. “If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court.” (Cal. Rules of Court, rule 3.769(f).)

The notice generally complies with the requirements for class notice. (Settlement Agreement, pp. 22-31.) It provides basic information about the settlement, including the settlement terms, and procedures to object or request exclusion. The court acknowledges that that Plaintiff has amended the class notice to include the *cy pres* recipient (at section 3.5, p. 26) and the information regarding remote appearance at the final approval hearing (at section 8, p. 30).

Accordingly, the court approves the class notice as amended.

#### **IV. Conclusion**

1 Accordingly, the motion for preliminary approval of the class and representative action  
2 settlement is GRANTED. The final approval hearing is scheduled for January 22, 2025 at 1:30  
3 p.m. in Department 19. Plaintiff shall provide a supplemental declaration with lodestar  
4 information (including hourly rate and hours worked), as well as evidence of costs incurred, no  
5 later than January 7, 2022.

6 The prevailing party shall prepare the order in accordance with California Rules of  
7 Court, rule 3.1312.

8  
9 DATED: July 26, 2024

  
\_\_\_\_\_  
Honorable Theodore C. Zayner  
JUDGE OF THE SUPERIOR COURT