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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JIMMIE L. DAVIS, individually and
on behalf of others similarly situated,

Plaintiff,

v.

COX COMMUNICATIONS
CALIFORNIA, LLC,

Defendant.

Case No. 16-cv-989-BAS(BLM)

ORDER:

- (1) PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT;**
- (2) CONDITIONALLY APPROVING PROPOSED SETTLEMENT CLASS; AND**
- (3) SETTING HEARING OF FINAL APPROVAL OF SETTLEMENT**

On September 21, 2015, Plaintiff Jimmie L. Davis filed a class-action complaint against Defendant Cox Communications California, LLC (“Cox”) in San Diego Superior Court. (ECF No. 1-2.) Cox removed the case to federal court. (ECF No. 1.) The operative Complaint alleges: (1) unfair competition in violation of California Business & Professions Code §§ 17200 *et seq.*; (2) failure to pay overtime wages in violation of California Labor Code § 510; (3) failure to provide itemized wage and hour statements in violation of California Labor Code § 226; (4) failure to

1 pay wages when due in violation of California Labor Code §§ 201-203; and (5)
2 violations of the Private Attorney General’s Act (“PAGA”) in violation of California
3 Labor Code § 2698. (ECF No. 24.) Now pending before this Court is the parties’ joint
4 motion for preliminary approval of class action settlement (ECF No. 29 (“Joint
5 Motion”)), which seeks an order conditionally certifying a proposed settlement class,
6 preliminarily approving class action settlement, and setting a hearing for final
7 approval of the settlement.

8 **I. PROPOSED SETTLEMENT**

9 The proposed settlement agreement (ECF No. 29-2 (“Settlement” or
10 “Settlement Agreement”)) applies to 287 class members (“Class” or “Class
11 Members”) defined as, “all non-exempt, non-field technical employees who worked
12 for Cox in California from August 23, 2012 until January 20, 2017.” (Settlement ¶¶
13 5, 17.) The parties agree that the Class shall be provisionally certified, and that,
14 subject to the Court’s approval, Blumenthal, Nordrehaug and Bhowmik will be
15 appointed as Class Counsel. (*Id.* ¶ 6e.) Jimmie Davis will appointed Class
16 Representative. (*Id.* ¶ 6f.)

17 Cox agrees to provide a non-reversionary fund (“gross value fund”) of
18 \$275,000, from which will be deducted any Court-approved attorney’s fees (counsel
19 will request 25% of the fund or \$68,750), costs (not exceeding \$10,000),
20 enhancement award for Davis (counsel will request \$5,000), and administrative costs
21 (estimated to be \$10,000). (Settlement ¶¶ 11-13.) The parties further agree that the
22 PAGA award shall be \$4,000 and \$3000 of the gross value fund shall be allocated to
23 the state’s 75% share for the payment to the Labor Workforce Development Agency
24 (“LWDA”) to extinguish any PAGA Claims arising within the scope of the release.
25 (Settlement ¶¶ 11, 13d.) Class members will receive a portion of the remaining net
26 fund value (estimated to be at least \$178,250) based on the number of workweeks
27 they worked during the class period. (*Id.* ¶¶ 14g, 15.)

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1 Once their portion of the net class fund is calculated, class members will be
2 mailed a check and will have 180 days to cash the check. (Settlement ¶ 14g.) The
3 Class Administrator will send out a reminder to class members to cash the check 150
4 days after mailing. (*Id.*) Any uncashed check amounts will be paid to the California
5 Department of Labor Standards Enforcement Unpaid Wage Fund with an
6 identification of the Settlement class member who failed to cash the check. (*Id.* ¶
7 15c.) The amounts received shall be considered wages and are subject to legally
8 required withholding. (*Id.* ¶ 15d.) Cox will pay employer-paid withholding, payroll
9 taxes, and similar expenses outside the gross value fund. (*Id.*)

10 Plaintiff will dismiss without prejudice the meal and rest period derivative
11 claims asserted in the original complaint and agree that this Settlement is not based
12 upon any allegations underlying those meal and rest period claims. (Settlement ¶¶ 4,
13 23.) Class members will release any claims for failure to pay the proper amount of
14 overtime or derivative claims for penalties. (*Id.* ¶ 23.)

15 The parties request that the Court appoint CPT Group as the Claims
16 Administrator (“CPT”). Cox will provide CPT with the last known address of each
17 Class Member, and CPT will mail notice to each Class Member. (Settlement ¶ 17.)
18 Notice will include Cox’s calculation of each Class Member’s work weeks of
19 employment (and will provide a mechanism for Class Members to challenge this
20 calculation), as well as the resulting estimated settlement amount for each Class
21 Member. (*Id.*)

22 Class Members will be given the opportunity to object and/or opt out of the
23 Settlement. Cox reserves the right of rescission if 10% or more Class Members opt
24 out of the Settlement. (Settlement ¶ 22.)

25 **II. ANALYSIS**

26 **A. Class Certification (for Settlement Purposes Only)**

27 Here, the Parties seek to certify a class for settlement purposes only. Federal
28 Rule of Civil Procedure 23(a) provides that a class may be certified “only if (1) the

1 class is so numerous that joinder of members is impracticable; (2) there are questions
2 of law or fact common to the class; (3) the claims or defenses of the representative
3 parties are typical of the claims or defenses of the class; and (4) the representative
4 parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P.
5 23(a). In addition to meeting the Rule 23(a) requirements, a class action must fall
6 into one of the categories laid out in Rule 23(b). Fed. R. Civ. P. 23(b). The parties
7 seek to certify the class under Rule 23(b)(3). Both Rules 23(a) and 23(b) are satisfied
8 in this case.

9 **1. Rule 23(a)**

10 **a. Numerosity**

11 The numerosity requirement is generally satisfied when the class contains 40
12 or more members, a threshold exceeded in this case. *Consolidated Rail Corp. v. Town*
13 *of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); *Cleano v. Marriott Int’l, Inc.*, 242
14 F.R.D. 544, 549 (N.D. Cal. 2007). The parties represent that there are 287 Class
15 Members. (Settlement ¶ 17.) That number is large enough that individual joinder of
16 all class members would be impracticable. Rule 23(a)(1) is therefore satisfied.

17 **b. Commonality**

18 The commonality requirement requires that there be “questions of law or fact
19 common to the class.” Fed. R. Civ. P. 23(a)(2). Here, the class claims all stem from
20 Defendant’s alleged violation of California Labor Code overtime requirements.
21 Because Class Members here have the same or similar allegations, there are common
22 questions of law and fact and Rule 23(a)(2) is satisfied.

23 **c. Typicality**

24 In general, the claims of the representative parties “need not be substantially
25 identical” to those of all absent class members and need only be “reasonably co-
26 extensive” in order to qualify as typical. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
27 1020 (9th Cir. 1998). Here, the Named Plaintiff’s claims that Defendant failed to
28 properly pay him overtime pay are identical or nearly identical to those of the other

1 Class Members. Rule 23(a)(3) is therefore satisfied.

2 **d. Adequacy of Representation**

3 For the class representative to adequately and fairly protect the interests of the
4 class, two criteria must be satisfied. “First, the named representatives must appear
5 able to prosecute the action vigorously through qualified counsel, and second, the
6 representatives must not have antagonistic or conflicting interests with the unnamed
7 members of the class.” *Lerwill v. Inflight Motion Picture, Inc.*, 582 F.2d 507, 512
8 (9th Cir. 1978). Here, the Named Plaintiff has vigorously pursued the action thus far
9 and appears capable of continuing to do so. (See Bhowmit Decl. ¶ 28, ECF No. 29-
10 2.) Counsel appear qualified, competent, and experienced in class-action lawsuits.
11 (Bhowmit Decl. ¶ 29, Ex. 2.) The Named Plaintiff also has no antagonistic or
12 conflicting interests with the Class Members. Although he seeks an incentive award
13 in addition to his award as a class member, this does not necessarily mean he has a
14 conflicting interest with the remaining class members. *See In re Online DVD-Rental*
15 *Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015) (“[I]ncentive awards that are
16 intended to compensate class representatives for work undertaken on behalf of a class
17 are fairly typical in class action cases” and “do not, by themselves, create an
18 impermissible conflict between class members and their representatives[.]”). Rule
19 23(a)(4) thus appears to be satisfied.

20 **2. Rule 23(b)**

21 The parties seek to maintain their class action under Rule 23(b)(3). Under Rule
22 23(b)(3), “[p]laintiffs must also demonstrate that a class action is ‘superior to other
23 available methods for fairly and efficiently adjudicating the controversy.’” *Otsuka v.*
24 *Polo Ralph Lauren Corp.*, 251 F.R.D. 439, 448 (N.D. Cal. 2008) (citing Fed. R. Civ.
25 P. 23(b)(3)). “Where classwide litigation of common issues will reduce litigation
26 costs and promote greater efficiency, a class action may be superior to other methods
27 of litigation,” and it is superior “if no realistic alternative exists.” *Valentino v. Carter-*
28 *Wallace, Inc.*, 97 F.3d 1227, 1234-35 (9th Cir. 1996). The following factors are

1 pertinent to this analysis:

2 (A) the class members' interest in individually controlling the prosecution or
3 defense of separate actions;

4 (B) the extent and nature of any litigation concerning the controversy already
5 begun by or against class members;

6 (C) the desirability or undesirability of concentrating the litigation of the
7 claims in the particular forum; and

8 (D) the likely difficulties in managing a class action.

9 Fed. R. Civ. P. 23(b)(3).

10 In this case, the alternative to a class action would be to have the individual
11 Class Members file 287 separate lawsuits. That would be both impractical and
12 inefficient. Such individual litigation would consume judicial resources, impose
13 additional burdens and expenses on the litigants, and present a risk of inconsistent
14 rulings. Thus, the Court finds class action is superior to other methods for fairly and
15 efficiently adjudicating this controversy.

16 **B. Fairness, Reasonableness, and Adequacy of the Proposed**
17 **Settlement**

18 The Ninth Circuit maintains a "strong judicial policy" that favors the
19 settlement of class actions. *Class Plaintiffs v. City of Seattle*, 955 F.3d 1268, 1276
20 (9th Cir. 1992). However, according to Federal Rule of Civil Procedure 23(e)(2), "the
21 court may approve [a settlement that would bind class members] only after a hearing
22 and on finding that [the settlement] is fair, reasonable, and adequate." Fed. R. Civ. P.
23 23(e)(2).

24 In determining whether the proposed settlement is fair, reasonable, and
25 adequate, "a district court must consider a number of factors, including: the strength
26 of plaintiffs' case; the risk, expense, complexity, and likely duration of further
27 litigation; the amount offered in settlement; the extent of discovery completed, and
28 the stage of proceedings; the experience and views of counsel; the presence of a

1 governmental participant; and the reaction of the class members to the proposed
2 settlement.” *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003). There is no
3 governmental participant and it is premature at this point to judge the reaction of the
4 class members to the proposed settlement. Therefore, the Court considers the first
5 four of these factors below.

6 **1. Strength of Plaintiff’s Case, and Risk of Further Litigation**

7 In this case, Cox does not admit liability, denies any wrongdoing and denies
8 the Plaintiffs are entitled to any damages. (Bhowmik Decl. ¶ 11.) Cox maintains that
9 it has complied at all times with the California Labor Code and all applicable
10 California and federal laws. (*Id.*) Thus, Class Counsel faced the likelihood of
11 protracted litigation including a contested class certification motion, motion for
12 summary judgment, trial and appeal, each with its own risk and uncertainties.
13 (Bhowmik Decl. ¶ 18.)

14 Furthermore, Class Counsel recognizes that there are legislative efforts
15 underway which could make it more difficult to obtain class certification. (Bhowmik
16 Decl. ¶ 20.) Even if the Class was certified, future motions to decertify were possible.

17 Finally, Class Counsel faced the risk of losing the penalty claims. Without
18 these penalties, the amount of the overtime underpayment claim standing alone is
19 relatively small. (Bhowmik Decl. ¶ 20.) Thus, although Class Counsel believed they
20 had meritorious claims and that class certification was appropriate on all of the claims
21 asserted (Bhowmik Decl. ¶ 8), they faced risks in further litigation.

22 **2. Consideration Offered**

23 Class Counsel in this case retained an expert, DM&A, to prepare a damage
24 valuation in advance of the mediation with Cox. (Bhowmik Decl. ¶ 18.) Counsel
25 indicates that the \$275,000 gross value fund “represents roughly 100% of the alleged
26 overtime damages and penalties estimate by Plaintiff, assuming these amounts could
27 be proven in full at trial.” (Bhowmik Decl. ¶ 20.) The Settlement amount only settles
28 the overtime claims, and any other claims may be pursued on an individual basis.

1 (*Id.*) The Settlement requires no further participation from Class Members. As long
2 as they don't opt out, they will receive a check in the mail. (Bhowmik Decl. ¶ 15.)

3 Even if Plaintiff and Class Members might have received greater
4 compensation had they gone to trial, this does not mean that the settlement is
5 inadequate. *See Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir.
6 1998). “[The] very essence of a settlement is a compromise, ‘a yielding of absolutes
7 and an abandoning of highest hopes.’” *Officers for Justice v. Civil Serv. Comm'n of*
8 *the City & Cnty. of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982). Under the
9 circumstances, the Court concludes that the consideration offered in the Settlement
10 Agreement is sufficient for approval.

11 **3. Extent of Discovery Completed and Stage of Proceedings**

12 “[S]ettlement approval that takes place prior to formal class certification
13 requires a higher standard of fairness.” *Hanlon*, 150 F.3d at 1026. In this case, Class
14 Counsel represents that they have done a thorough investigation into the facts of the
15 case, propounded discovery and engaged in mediation with a mediator well-qualified
16 in wage and hour disputes. (Bhowmik Decl. ¶ 23.) Counsel reviewed thousands of
17 time punch and payroll records related to Class Members. (*Id.*) And, as discussed
18 above, Class Counsel retained a damages expert. (*Id.* ¶ 18.) Thus, the Court finds this
19 factor also supports the settlement.

20 **4. Experience and Views of Counsel**

21 Generally, “[t]he recommendations of plaintiffs’ counsel should be given a
22 presumption of reasonableness.” *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D.
23 Cal. 1979); *cf. Stull v. Baker*, 410 F. Supp. 1326, 1332 (S.D. N.Y. 1976) (holding that
24 the court should consider the recommendation of counsel, and weight it according to
25 counsel’s caliber and experience). Here, due especially to the experience and
26 knowledge of Class Counsel, their recommendations are presumed to be reasonable,
27 and this factor accordingly favors approval.

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1 **C. Fairness Hearing and Required Notice to Parties**

2 **1. Notice Requirements**

3 Under Rule 23(c)(2)(B), “the court must direct to class members the best notice
4 that is practicable under the circumstances, including individual notice to all
5 members who can be identified through reasonable effort.” Fed. R. Civ. P.
6 23(c)(2)(B). The Rule directs:

7 The notice must clearly and concisely state in plain, easily
8 understood language: (i) the nature of the action; (ii) the
9 definition of the class certified; (iii) the class claims,
10 issues, or defenses; (iv) that a class member may enter an
11 appearance through an attorney if the member so desires;
12 (v) that the court will exclude from the class any member
13 who requests exclusion; (vi) the time and manner for
14 requesting exclusion; and (vii) the time and manner for
15 requesting exclusion; and (vii) the binding effect of a class
16 judgment on members under Rule 23(c)(3).

17 Fed. R. Civ. P. 23(c)(2)(B). “[T]he mechanics of the notice process are left to the
18 discretion of the court subject only to the broad ‘reasonableness’ standards imposed
19 by due process.” *Grunin v. Int’l House of Pancakes*, 513 F.2d 114, 120 (8th Cir.
20 1975).

21 The proposed settlement agreement anticipates that the parties will retain the
22 services of a third-party Claims Administrator, CPT Group (“CPT”). Cox will
23 provide CPT with the last known address of each Class Member, and CPT will mail
24 notice to each Class Member. (Settlement ¶ 17.) Notice will include Cox’s
25 calculation of each Class Member’s work weeks of employment (and will provide a
26 mechanism for Class Members to challenge this calculation) as well as the resulting
27 estimated settlement amount for each Class Member. (*Id.*)

28 The Court has reviewed the proposed Notice as well as the notice procedures
and finds that it satisfies the requirements of Rule 23(c)(2)(b).

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1 **2. Fairness Hearing**

2 Rule 23(e)(2) requires that “[i]f the proposal would bind class members, the
3 court may approve it only after a hearing and on finding that it is fair, reasonable, and
4 adequate.” Fed. R. Civ. P. 23(e)(2). “The purpose of a fairness hearing is to provide
5 the court with sufficient evidence for it to make an informed decision relating to the
6 fairness of the proposed settlement.” *UAW v. General Motors Corp.*, 235 F.R.D. 383,
7 386 (E.D. Mich. 2006). A fairness hearing need not have all the procedures and
8 protections of a full trial; it is a forum for intervenors to voice their objections and
9 for the fairness of the settlement to be determined, and a court is within its discretion
10 to limit the hearing as necessary to meet those objectives. *UAW*, 235 F.R.D. at 386;
11 *Tenn. Ass’n of Health Maint. Org., Inc. v. Grier*, 262 F.3d 559, 567 (6th Cir. 2001).

12 Here, in their Settlement Agreement, the parties agree to a framework for Class
13 Members who either wish to opt-out or to object to the proposed Settlement.
14 (Settlement ¶ 13f.)

15
16 **III. CONCLUSION & ORDER**

17 In light of the foregoing, the Court **GRANTS** the parties’ joint motion for
18 preliminary approval of the class action settlement (ECF No. 29), and hereby
19 **ORDERS** the following:

- 20 1. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Court
21 hereby conditionally certifies a class for settlement purposes only.
- 22 2. The class shall consist of “all non-exempt, non-field technical
23 employees who worked for Cox in California from August 23, 2012
24 until January 20, 2017.”
- 25 3. The Court hereby appoints Jimmie Davis as Class Representative.
- 26 4. The Court hereby appoints Blumenthal, Nordrehaug and Bhowmik as
27 Class Counsel to represent the Class.
- 28 5. The Court appoints CPT Group as Claims Administrator.

- 1 6. Defendant is directed to provide the Claims Administrator the Class
2 Data List as specified in the Settlement Agreement no later than 10
3 business days after this order.
- 4 7. The Class Administrator is directed to mail notice to the Class 10
5 business days after receiving the Class Data List.
- 6 8. The Court hereby preliminarily approves the Settlement Agreement and
7 the terms and conditions of Settlement set forth therein, subject to
8 further consideration at a Final Approval Hearing.
- 9 9. The Court will hold a Final Approval Hearing on **August 14, 2017** at
10 **11:00 a.m.** in the Courtroom of the Honorable Cynthia Bashant, United
11 States District Court for the Southern District of California, Courtroom
12 4B (4th Floor – Schwartz), 221 West Broadway, San Diego, CA 92101,
13 for the following purposes:
 - 14 a. Finally determining whether the Class meets all applicable
15 requirements of Rule 23 of the Federal Rules of Civil Procedure
16 and whether the Class should be certified for the purposes of
17 effectuating the Settlement;
 - 18 b. finally determining whether the proposed Settlement of the case
19 on the terms and conditions provided for in the Settlement
20 Agreement is fair, reasonable, and adequate and should be
21 approved and ordered by the Court; and
 - 22 c. ruling upon such other matters as the Court may deem just and
23 appropriate.
- 24 10. Before the Fairness Hearing, Defendant shall file with the Clerk of the
25 Court proof of their compliance with the notice provisions of the Class
26 Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. § 1715.
- 27 11. In compliance with Federal Rule of Civil Procedure 23(b)(3), the Class
28 Members will be permitted to exclude themselves from the class.

- 1 12. Briefs for the Final Approval Hearing must be filed with the Clerk of
2 the Court no later than 28 days prior to the final approval hearing.
- 3 13. The Court may adjourn the Final Approval Hearing and later reconvene
4 such hearing without further notice to the Class Members.
- 5 14. Class Members who desire to object to the fairness of the settlement
6 must file written objections with the Clerk of the Court within 45
7 calendar days after the notices are mailed (“Objection Deadline”).
- 8 15. Class Members must also provide a copy of the written objections to
9 CPT Group at the address provided in the Notice.
- 10 16. All objections must include the objector’s full name, address, and
11 telephone number, along with a statement of the reasons for his or her
12 objection, whether or not he or she intends to appear at the fairness
13 hearing, and, if the objector intends to appear, whether he or she will
14 appear on his or her own behalf or through counsel.
- 15 17. All objections must be filed with the Clerk of the Court and served on
16 the parties’ counsel no later than the Objection Deadline. Objections that
17 do not contain all required information or that are received after the
18 Objection Deadline will not be considered at the Final Approval
19 Hearing.
- 20 18. Any Class Member who does not file a valid and timely objection to the
21 settlement shall be barred from seeking review of the settlement by
22 appeal or otherwise.
- 23 19. Any response by the Plaintiff to the objections of Class Members must
24 be filed with the Clerk of the Court no later than 14 calendar days after
25 the objection deadline.
- 26 20. Class Members who seek to opt out of the settlement must notify the
27 Class Administrator (CPT Group) within 45 calendar days after notices
28 are mailed that he or she seeks to be excluded from the class. The request

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for exclusion must include the Class Member’s full name, signature, address, telephone number and last four digits of his or her social security number.

21. Class Counsel shall file with the Clerk of this Court their application for attorney’s fees, costs, and expenses no later than 14 calendar days before the Objection Deadline, sufficiently in advance of the expiration of the objection period that any Class Member will have sufficient information to decide whether to object or opt out and, if applicable, to make an informed objection.

22. The meal-and-rest-period claims and derivative claims asserted in the original complaint are dismissed without prejudice and the Settlement will not be based upon any allegations underlying those meal and rest period claims.

23. The Parties are ordered to carry out the Settlement Agreement in the manner provided in the Settlement Agreement.

IT IS SO ORDERED.

DATED: April 26, 2017


Hon. Cynthia Bashant
United States District Judge