UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 14-02521 JGB (SPx)**	Date	February 8, 2018
Title	***Lawrence Weinstein v. Mortgage Contracting Services, LLC***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: Order (1) GRANTING Preliminary Approval of Class Settlement, and (2) VACATING the February 12, 2018 Hearing (IN CHAMBERS)

Before the Court is Plaintiff Lawrence Weinstein's ("Plaintiff") unopposed motion for preliminary approval of class action settlement. ("Motion," Dkt. No. 81.) After considering all papers filed in support of the Motion, the Court GRANTS the Motion. The Court hereby VACATES the February 12, 2018 hearing.

I. PROCEDURAL BACKGROUND

On February 4, 2014, Plaintiff filed a complaint in the Superior Court of the County of San Bernardino on behalf of himself and others similarly situated. ("Complaint," Dkt. 6-1.) On December 8, 2014, Defendant Mortgage Contracting Services, LLC ("Defendant" or "MCS") removed this action to this Court. (Dkt. No. 1.) On January 11, 2016, Plaintiff moved to certify the class (Dkt. No. 26), which Defendant opposed. (Dkt. No. 32.) The Court has yet to hear arguments or rule on the motion for class certification. On May 17, 2016, Defendant filed a motion for summary judgment. (Dkt. No. 41.) The Court denied the motion for summary judgment on November 17, 2016. (Dkt. No. 65.) On January 15, 2018, Plaintiff filed this Motion. To date, Defendant has not opposed.

II. LEGAL STANDARD

A court may certify a class if the plaintiff demonstrates the class meets the requirements of Federal Rules of Civil Procedure 23(a) and at least one of the requirements of Rule 23(b)[1]. See Fed. R. Civ. P. 23; see also Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996). Rule 23(a) contains four prerequisites to class certification: (1) the class must be so numerous that joinder is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims of the class representative must be typical of the other class members; and (4) the representative parties must fairly and adequately protect the interests of the class. See Fed. R. Civ. P. 23(a). Rule 23(b) requires one of the following: (1) prosecuting the claims of class members separately would create a risk of inconsistent or prejudicial outcomes; (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive or declaratory relief benefitting the whole class is appropriate; or (3) common questions of law or fact predominate so that a class action is superior to another method of adjudication. Fed. R. Civ. P. 23(b). Courts have added to the federal rules a prerequisite that the class be ascertainable. In re Northrop Grumman Corp. ERISA Litig., No. cv-06-06213, 2011 WL 3505264, at *7 n.61 (C.D. Cal. Mar. 29, 2011).

Class action settlements must be approved by the court. See Fed. R. Civ. P. 23(e). At the preliminary approval stage, the Court "must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms." Id. "The settlement need only be *potentially* fair, as the Court will make a final determination of its adequacy at the hearing on Final Approval." Acosta v. Trans Union, LLC, 243 F.R.D. 377, 386 (C.D. Cal. 2007) (emphasis in original). To determine whether a settlement agreement is potentially fair, a court considers the following factors: the strength of the plaintiff's case, the risk, expense, complexity, and likely duration of further litigation, the risk of maintaining class action status throughout the trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement. Staton v. Boeing Co., 327 F.3d 938, 959 (9th Cir. 2003).

III. CONDITIONAL CERTIFICATION OF THE PROPOSED SETTLEMENT CLASS

The parties seek certification of the proposed settlement class for purposes of the Settlement Agreement. (Mot. at 22-25.) The Court first addresses the requirements of Rule 23(a) and then turns to the requirements of Rule 23(b).

[1] All references to "Rule" in this Order refer to the Federal Rules of Civil Procedure unless otherwise noted.

A. Requirements of Rule 23(a)

Rule 23(a) requires the following: (1) the class must be so numerous that joinder is impracticable (numerosity); (2) there must be questions of law or fact common to the class (commonality); (3) the claims of the class representative must be typical of the other class members (typicality); and (4) the representative parties must fairly and adequately protect the interests of the class (adequacy). See Fed R. Civ. P. 23(a). Additionally, the class must be ascertainable (ascertainability). In re Northrop Grumman, 2011 WL 3505264, at * 7 n.61.

1. Numerosity

A class satisfies the prerequisite of numerosity if it is so large that joinder of all class members is impracticable. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). To be impracticable, joinder must be difficult or inconvenient, but need not be impossible. Keegan v. Am. Honda Motor Co., 284 F.R.D. 504, 522 (C.D. Cal. 2012). There is no numerical cutoff for sufficient numerosity. Id. However, 40 or more members will generally satisfy the numerosity requirement. Id.

Here, at the time of mediation, there were approximately 1,600 putative class members. (Mot. at 14.) Accordingly, the numerosity requirement is satisfied.

2. Commonality

The commonality requirement is satisfied when plaintiffs assert claims that "depend upon a common contention . . . capable of classwide resolution—which means that a determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).

In this case, the commonality requirement is met; there is a common question of whether class members assigned to perform MCS inspections are employees of MCS. (Mot. at 15.)

3. Typicality

"The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiff, and whether other class members have been injured by the same course of conduct." Wolin v. Jaguar Land Rover No. Am., 617 F.3d 1168, 1175 (9th Cir. 2010) (quoting Hanon, 976 F.2d at 508). Because typicality is a permissive standard, the claims of the named plaintiff need not be identical to those of the other class members. Hanlon, 150 F.3d at 1020.

Here, Plaintiff's claims are typical of those of putative class members. Plaintiff predicates the claims entirely upon MCS's uniform practice of not treating inspectors in California as MCS

employees for the purpose of the wage, break, reimbursement and pay stub requirements of California law. (Mot. at 15.)

4. Adequacy

In determining whether a proposed class representative will adequately protect the interests of the class, the court should ask whether the proposed class representative and his counsel have any conflicts of interest with any class members and whether the proposed class representative and his counsel will prosecute the action vigorously on behalf of the class. Johnson v. General Mills, Inc., 275 F.R.D. 282, 288 (C.D. Cal. 2011).

There is no potential conflict between any putative class members and the proposed class representative or his counsel because Plaintiff challenges practices allegedly applied uniformly to all putative class members. (Mot. at 16.) Further, Plaintiff's interests are aligned with those of the class as a whole. (Id.) Plaintiff and his counsel will adequately represent the class in that counsel has extensive expertise and experience in prosecuting wage and hour class action cases. (Id.)

B. Ascertainability

Ascertainability is satisfied when it is "administratively feasible for the court to determine whether a particular individual is a member" of the proposed class. In re Northrup Grumman, 2011 WL 3505264, at *7 n.61. The Parties have defined the settlement class as follows:

> "Class Members" means all persons who performed residential home inspections in California at the direct or indirect request of MCS ("Inspections") at any time from February 4, 2010 through the date the Court grants preliminary approval of the settlement.

(Settlement Agreement at 2-3.) MCS has represented that it possesses the names of the majority of class members and has the email and/or home addresses of hundreds of class members. (Mot. at 13.) MCS also has the addresses of the persons and entities it contracted with to provide inspectors. (Id.) Several people with whom MCS directly contracted, and principals of the entities with which MCS contracted, are in the class. (Id.) The contracts with the entities and people with whom MCS contracted provide that they should maintain the contact information of the inspectors. (Id.) As set forth in the Settlement Agreement, the Parties are seeking contact information for inspectors from those entities as well as from Aspen Grove. (Id. at 14; see also Settlement Agreement at 22-23.) Plaintiff also maintains that settlement class members can read the class notice or the newspaper notice to determine whether they are in the class. (Mot. at 14.)

C. Requirements of Rule 23(b)

"In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." Amchem Prod., Inc.

v. Windsor, 521 U.S. 591, 614 (1997). Here, Plaintiffs allege the Settlement Agreement satisfies the requirements of Rule 23(b)(3). (Mot. at 21-22.)

Rule 23(b)(3) requires (1) issues common to the whole class to predominate over individual issues and (2) that a class action be a superior method of adjudication for the controversy. See Fed. R. Civ. P. 23(b)(3). As to predominance, the "inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Hanlon, 150 F.3d at 1022 (quoting Amchem, 521 U.S. at 623). "[T]he examination must rest on 'legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement.'" Id. (same). A class should not be certified if the issues of the case require separate adjudication of each individual class member's claims. Id.

Here, the Court is satisfied that Plaintiff has met the predominance requirement. The common question of employer status can be resolved for all class members in a single adjudication and constitutes a substantial portion of the case. (Mot. at 17.) The claims of the class members and Plaintiff are premised on the same legal theory: that they were employees of MCS during the class period. (Id.)

A class action must also be superior to other methods of adjudication for resolving the controversy. Fed. R. Civ. P. 23(b)(3). To determine superiority, a court's inquiry is guided by the following pertinent factors:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;
(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
(D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3)(A)-(D). However, "[confronted] with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." Amchem, 521 U.S. at 620.

Here, a class action is the superior method, as it will enable the adjudication of a large number of claims of similarly situated persons. The monetary amounts due to many individual class members is likely to be relatively small and the burden of litigation would make it unattractive and difficult to obtain relief in piecemeal fashion.

IV. SETTLEMENT AGREEMENT

Plaintiff submitted a copy of the parties' proposed Settlement Agreement as Exhibit A to the Declaration of Dennis F. Moss, Plaintiff's Counsel[2]. Plaintiff attaches the following to the Settlement Agreement:

- Exhibit 1: The text of the newspaper advertisement of settlement
- Exhibit 2: The notice of class action settlement
- Exhibit 3: The claim form
- Exhibit 4: The first amended complaint ("FAC")
- Exhibit 5: The letter, seeking address information for each inspector who performed MCS-related inspections during the class period, which MCS shall send to each vendor that performed inspections and/or engaged others to perform inspections during the class period
- Exhibit 6: A copy of the subpoena that MCS will serve on Aspen Grove, seeking production of name and address information for class members who performed inspections in California during the class period

The terms of the Settlement Agreement are discussed below.

A. Settlement Class

The settlement class for the purposes of the settlement of this case includes: "all persons who performed residential home inspections in California at the direct or indirect request of MCS ('Inspections') at any time from February 4, 2010 through the date the Court grants preliminary approval of the settlement." (Settlement Agreement at 2-3.)

B. Financial Terms

The parties agree Defendant shall pay a maximum gross settlement amount of $4,000,000.00. (Id. at 16.)

1. Settlement Class Members

The claims administrator will calculate individual settlement payments to class members from the adjusted gross settlement based on the following formula. (Id. at 19.)

> The Adjusted Gross Fund value shall equal the amount remaining in the gross settlement amount after deducting the Fixed Payments [outlined below]. This shall be a claims-made settlement, with claims being paid to Qualified Claimants

[2] Plaintiff also attaches a list of over 40 newspapers that have Parade Magazines inserted into their Sunday Editions (Exhibit B), and the CV of Phoenix Class Action Administration Solutions (Exhibit C).

> from the Adjusted Gross Fund Value. Any payments made to Qualified Claimants shall be made from the Adjusted Gross Fund Value on a claims-made basis only according to the following formula: Adjusted Gross Fund Value divided by the total of the number of inspections performed in California during the class period by MCS to class members, including, but not limited to, all inspections attributed to class members in claim forms, and any additional inspections credited to Qualified Claimants based on information and records submitted during the claims period . . . ("Inspection Payment Rate") multiplied by the number of inspections performed in California during the class period credited by MCS to the individual class member at issue, less applicable withholdings ("Individual Settlement Payment"). To the extent that less than 55% of the gross fund value is paid as Fixed Payments and/or Individual Settlement Payments, Qualified Claimants submitting valid claims shall be entitled to an increase in their Individual Settlement Payment up to a maximum of 135% of the Individual Settlement Payment to which they would otherwise be entitled ("Increased Individual Payments"); but in no case shall any Increased Individual Payments require payment of more than 55% of the gross fund value. If the Fixed Payments and/or Individual Settlement Payments, taking into account any and all Increased Individual Payments, still equal less than 55% of the Gross Fund Value, the difference between (i) the sum of the Fixed Payments and Individual Settlement Payments (or Increased Individual Payments) and (ii) 55% of the Gross Fund Value (i.e., $2,200,000.00) shall be the "Residual Amount." The Residual Amount, if any, shall be distributed to Bet Tzedek, a 501(c)(3) charity ("Cy Pres") selected by MCS and approved by Plaintiff's Counsel.

(Id. at 18-19.)

2. Class Representative

The Settlement provides for an incentive award of up to $20,000 from the gross settlement amount to the class representative. (Id. at 17.)

3. Private Attorneys General Act ("PAGA")

The Settlement Agreement allocates $25,000.00 for satisfaction of any and all claims for penalties under PAGA. (Id. at 17.) Seventy-five percent of such amount shall be paid to Labor and Workforce Development Agency ("LWDA") and twenty-five percent shall be paid in equal shares to qualified claimants as part of the adjusted gross fund value. (Id.)

4. Settlement Administration Costs

In the Settlement Agreement, Plaintiff estimates both $30,000 and $108,484 as administration costs. (Id.) In Dennis Moss's Declaration, he rounds the administration costs to $108,500.

5. Attorneys' Fees and Costs

Defendant agrees no to oppose Class Counsel's application for fees up to $1,000,000.00 and costs up to $30,000. (Settlement Agreement at 16-17.)

C. Injunctive Relief

No injunctive relief is provided as part of the Settlement Agreement.

D. Release

All settlement class members agree to release their claims as follows:

> Upon the Effective Date, all Class Members, including Qualified Claimants and those Class Members who do not return a valid Claim Form and do not return a valid Request for Exclusion within the Claims Period and thus do not receive their Settlement Payment allocation, shall be deemed to have fully, finally and forever released, settled, compromised, relinquished and discharged any and all Released Claims against the Released Parties as set forth in this Joint Stipulation.

(Id. at 32.) The Settlement Agreement defines "released class member claims" as follows:

> [T]he claims released by Plaintiff, and each Class Member who do not timely opt out of settlement. Plaintiff, and each Class Member who does not timely opt out of settlement on behalf of themselves, their heirs, spouses, executors, administrators, attorneys, agents, assigns, and any entities or businesses in which any of them have a controlling ownership interest, shall fully and finally release and discharge the Released Parties[3] from, which are all applicable California wage and hour claims, rights, demands, liabilities and causes of action of every nature and description whether known or unknown, arising from or related to the claims litigated in the Weinstein matter or that could have been asserted based on the facts alleged in the Weinstein matter against MCS, including but not limited to claims for: violations of California Labor Code §§ 226.7, 226.8, 510, 512, 558, 1197, 2753, or 2802; failure to pay all wages in a timely manner in violation of California Labor Code §§ 200, 201, 202, 203, 204, 210; failure to provide accurate wage statements in violation of

[3] The Settlement Agreement defines released parties to mean "MCS/Defendant and its former and present parents, subsidiaries, affiliated corporations and entities, clients, and vendors and independent contractors through which MCS conducts business, and each of their respective current, former and future officers, directors, members, managers, employees, consultants, vendors, independent contractors, clients, partners, shareholders, joint venturers and third-party agents, and any successors, assigns, or legal representatives." (Settlement Agreement at 9.)

> California Labor Code § 226; unfair competition; violations of the California Labor Code Private Attorneys General Act, Labor Code § 2698 et seq.; claims under California Business & Professions Code §§ 17000 and 17200, et seq.; and any damages, penalties, restitution, disgorgement, interest or attorneys' fees as a result thereof.

(Id. at 8-9.) The Settlement contains a release as to all settlement class members, including the class representative, releasing the released parties from any and all released class members claims. (Id. at 14.) As of the effective date[4], each class member agrees not to sue or otherwise make a claim against any of the released parties for the released class member claims, as defined above. (Id.)

The Settlement Agreement further provides the release of additional claims and rights by the class representative. It provides:

> "Class Representative Released Claims" means claims released by Plaintiff, on behalf of Plaintiff, Plaintiff's heirs, spouses, executors, administrators, attorneys, agents, assigns, and any entities or businesses in which Plaintiff has a controlling ownership interest, which are any and all claims of any nature, known or unknown, contingent or accrued, against all Released Parties, whether in tort, contract or equity, including but not limited to the Released Claims, and any claims arising out of or relating to any Inspections prior to the Final Judgment.
>
> "Class Representative Release of Claims" means a general release, on behalf of Plaintiff, Plaintiff's heirs, spouses, executors, administrators, attorneys, agents, assigns, and any entities or businesses in which Plaintiff has a controlling ownership interest, releasing any and all claims of any nature, known or unknown, contingent or accrued, against all Released Parties, whether in tort, contract or equity, including but not limited to Released Claims, and any claims arising out of

[4] The Settlement Agreement defines the effective date as the date upon which final approval of the settlement can no longer be appealed by an objector in the event of an objection, or in the absence of any objections (or if all objections are withdrawn with Court approval prior to final approval) the final approval date. If objections are heard by the Court and overruled, and no appeal is taken of the judgment by an objector, then the effective date will be 35 calendar days after the entry of judgment. If any appeal is taken from the Court's overruling of any objections to the settlement, then the effective date will be 10 calendar days after all appeals are withdrawn or after an appellate decision affirming the final approval order and judgment becomes final. However, Defendant shall not be required to fund any portion of the total settlement amount and the claims administrator shall not distribute or pay any monies, unless and until all such appeals have been finally resolved or dismissed with prejudice, and the judgment is final and enforceable. (Settlement Agreement at 4.)

> or relating to any Inspections performed by Plaintiff and/or Plaintiff's engagement to perform any inspections.

(Id. at 3.; see also id. at 14-15.)

E. Notice

The Settlement Agreement proposes the following procedure to notify the class members of the Settlement Agreement. (Id. at 27-29.) Within 70 calendar days after the Court enters an Order granting preliminary approval of the settlement, the claims administrator shall send via United States First Class Mail the settlement documents, consisting of the notice of class action settlement ("Notice"), a claim form, a W-9 and W-4 form (collectively, "Notice Packet"). (Id. at 27.) The Notice provides that class members will have 60 calendar days from the date the Notice is mailed to return the claim form with or without challenging the allocation of inspections, return the request for exclusion, or object to the settlement. (Id.) At the same time, the administrator shall email the class member for whom it only has an email address, advising such individuals how to obtain a Notice Packet. (Id. at 27-28.) The costs of this notice procedure will be considered part of the administration costs to be paid from the gross settlement amount. (Id. at 28.) Unless the claims administrator receives as Notice Packet returned from the United States Postal Service with a forwarding address for the recipient, that Notice Packet shall be deemed mailed and received by the class member to whom it was sent. (Id.) In the event that subsequent to the first mailing of a Notice Packet and prior to the claims period deadline, that Notice Packet is returned to the claims administrator by the United States Postal Service with a forwarding address for the recipient, the claims administrator shall re-mail the Notice Packet to that address within five business days, the Notice Packet will be deemed mailed as of the date of re-mailing, the forwarding address shall be deemed the updated address for the class member, and the settlement class member must return a claim form by the claims period deadline[5] or within fifteen calendar days from the date of re-mailing, whichever is later, in order to participate in the settlement. (Id.) In the event that subsequent to the first mailing of a Notice Packet, the Notice Packet is returned to the claims administrator by the United States Postal Service because the address of the recipient is no longer valid, the claims administrator shall engage in reasonable

[5] The claims period is defined as: "Class Members have sixty (60) calendar days from the date of mailing of the Class Notice to return a valid Claim Form (the 'Claims Period') to the Claims Administrator. If the 60th day falls on a Sunday or holiday, the deadline to return Claim Forms will be the next business day that is not a Sunday or holiday. Class Members who return valid, signed Claim Forms bearing a postmark or other proof of transmission within the Claims Period shall be deemed Qualified Claimants under the Settlement. Qualified Claimants will receive their allocation from the Adjusted Gross Fund agreed upon and calculated pursuant to the terms of [the] Joint Stipulation. Claims Forms bearing a postmark after the last day of the Claims Period will be considered late claims. Class Members who return late Claim Forms will not be considered Qualified Claimants, unless agreed to by the Parties, but will still be bound by the Class Member Released Claims." (Settlement Agreement at 29.)

address search measures in an effort to ascertain the current address of the particular class member in question. (Id.) If such an address is ascertained, the claims administrator shall re-mail the Notice Packet within five business days of receiving such information, the Notice Packet will be deemed mailed as of that date of re-mailing, the newly obtained address shall be deemed the updated address for that Class Member, and the Class Member must return a qualifying claim form by the claims period deadline or within fifteen days from the date of re-mailing, whichever is later, in order to participate in the settlement. (Id.) If no updated address is obtained for that class member from a Notice Packet returned by the United States Postal Service, no Notice Packet shall be re-mailed. (Id. at 28-29.) If applicable, the Notice Packet shall be deemed received when it is mailed for the second time under this paragraph. (Id. at 29.)

Further, the claims administrator will publish an advertisement to potential class members on how they can obtain a Notice Packet from the claims administrator. (Mot. at 10.) This advertisement will be published in Parade Magazine and will consume 2/5 of a page. (Id.) It will run four consecutive Sundays in Parade Magazines inserted in newspapers throughout California. (Id.)

F. Administration

Phoenix Class Action Administration Solutions will act as the settlement administrator. (Settlement Agreement at 2.) The settlement administrator's duties and responsibilities include:

- Arranging for the mailing and distribution of settlement class notice, including the claim form;
- Arranging for publication of the settlement class notice;
- Emailing any class member for whom it only has an email address, advising such individuals how to obtain a Notice Packet
- Handling returned mail and emails not delivered to settlement class members;
- Attempting to obtain updated address information for settlement class members and for settlement class notice mailers returned without a forwarding address;
- Answering written inquiries from settlement class members and/or forwarding such inquiries to class counsel;
- Receiving and maintaining any settlement class member correspondence regarding requests for exclusion;
- Providing any objections to Class Counsel and Defendant's Counsel, who in turn shall file them with the Court in connection with the final approval motion;
- Updating and maintaining the settlement website and toll-free telephone line; and
- Receiving and processing claims and distributing payments to the class.

(Mot. at 12 (citing Settlement Agreement at 25-29); Settlement Agreement 27-28, 33)

Within seven days after the effective date, the claims administrator will provide the Parties with an accounting of the amounts to be paid by Defendant pursuant to the terms of the settlement. (Settlement Agreement at 33.) Within 21 days after the claims administrator

provides the parties with the accounting of amounts to be paid, Defendant shall pay to the claims administrator the amount necessary to fund the qualified settlement fund as follows: (1) the total aggregate of the Settlement Payments to be paid to qualified claimants, (2) the claims administrator costs incurred and reasonably anticipated to be incurred by the Claims Administrator and as approved by the Court, (3) the Court-approved incentive award payment to the class representative, (4) the Court-approved attorneys' fees for class counsel, (5) the Court-approved litigation costs of class counsel, (6) the PAGA payment to the LWDA, and (7) any employer share of taxes to be paid to governmental entities as part of the wage component of the settlement. (Id. at 33-34.) Defendant will wire the funds requested by the claims into the qualified settlement fund set up and controlled by the claims administrator and the total amount of all funds wired into the qualified settlement fund shall not exceed the maximum settlement amount. (Id. at 34.)

Class members who wish to "opt-out" of and be excluded from the settlement must submit a written request for exclusion from the settlement bearing a post-mark with a date within the claims period. (Id. at 31.) The request for exclusion must: (1) state the class member's name, address, telephone number and the last four digits of his/her Social Security number, (2) state the case name as follows: Weinstein v. MCS, (3) state that the class member requests exclusion from or "opts out" of the settlement or words to that effect, (4) be dated, and (5) be signed by the class member. (Id.) Requests for exclusion must be made individually and cannot be made on behalf of a group or other class members. (Id.) If a class member submits a deficient request to opt-out, the claims administrator shall notify the class member of the deficiency within five business days of receipt. (Id.) The class member shall have 15 days from notice of the deficiencies to cure said deficiencies, at which point his or her request for exclusion will be rejected if not received. (Id.) Mailing a notice of the deficiencies by the claims administrator is sufficient if no other contact information is provided by the class member. (Id.) Class members submitting untimely or deficient requests to opt-out shall be bound by the settlement and the class member released claims but will not be considered qualified claimants for settlement payment distribution purposes unless they have timely returned a valid claim form. (Id.) If a class member submits both a claim form and a request for exclusion, the claims administrator shall notify the class member of the deficiency within five business days of receipt, and the class member shall have until 15 days from notification to clarify his or her submission. (Id. at 31-32.) Mailing a notice of the deficiency by the claims administrator is sufficient if no other contact information is provided by the class member. (Id. at 32.) Unless a class member who files both a timely request for exclusion and a claim form responds that he or she wishes to be excluded from the settlement, such class member shall be deemed to be bound by this settlement and the claim form will be operative. (Id.) Neither the parties nor any of their counsel will solicit, encourage, or advise any class member to submit a request for exclusion. (Id.) Class members who opt out of the settlement are prohibited from objecting to the settlement. (Id.)

Class members who do not opt out of the settlement class may object to the settlement by mailing written objections to the settlement claims administrator no later than 60 calendar days from the mailing of the Notice Packet. (Id.) This deadline applies notwithstanding any argument regarding alleged late receipt or non-receipt of the Notice Packet. (Id.) Any class member who

fails to timely mail written objections in this manner shall be deemed to have waived any objections and shall be foreclosed from making any objection to the settlement and from filing any appeal from any order granting final approval issued by the Court. (Id. at 32-33.) Class members who timely and validly return a request for exclusion from the settlement shall have no right to object and shall be foreclosed from making any objection to the settlement. (Id. at 33.) The settlement claims administrator shall promptly provide any such objections to class counsel and Defendant's Counsel, who in turn shall file them with the Court in connection with the final approval motion. (Id.) Written objections must include: (a) the name of the action, (b) the full name, address, and telephone number of the person objecting; and (c) a written explanation setting forth the specific basis or reason, if any, for each objection, including any legal and factual support the objector wishes to bring to the Court's attention and any evidence the objector wishes to introduce in support of the objection(s). (Id.) Any class member wishing to appear at the final approval hearing to object to the settlement shall expressly indicate this in his or her written objections. (Id.) The making of an objection to this Settlement does not affect the Class Members' ability to return a valid claim form and become a qualified claimant if the settlement is finally approved. (Id.)

V. PRELIMINARY APPROVAL OF THE SETTLEMENT

"[Rule 23] requires the district court to determine whether a proposed settlement is fundamentally fair, adequate, and reasonable." Hanlon, 150 F.3d at 1026. To determine whether a settlement agreement meets these standards, the court considers a number of factors, including "the strength of the plaintiff's case, the risk, expense, complexity, and likely duration of further litigation, the risk of maintaining class action status throughout trial, the amount offered in settlement, the extent of discovery completed, and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement." Stanton, 327 F.3d at 959 (internal citations omitted). The settlement may not be a product of collusion among the negotiating parties. In re Mego Fin, Corp. Sec. Litig., 213 F.3d 454, 458 (9th Cir. 2000) (citing Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1290 (9th Cir. 1992)).

"At the preliminary approval stage, some of the factors cannot be fully assessed. Accordingly, a full fairness analysis is unnecessary." Litty v. Merrill Lynch & Co., 2015 WL 4698475, *8 (C.D. Cal. Apr. 27, 2015). Rather, the court need only decide whether the settlement is potentially fair, Acosta, 243 F.R.D. at 386, in light of the strong judicial policy in favor of settlement of class actions. Class Plaintiffs, 955 F.2d 1276. "[T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." Hanlon, 15 F.3d at 1027.

A. Extent of Discovery Completed and Stage of the Proceedings

For a court to approve a proposed settlement, "[t]he parties must . . . have engaged in sufficient investigation of the facts to enable the court to intelligently make an appraisal of the settlement." Acosta, 243 F.R.D. at 396 (internal quotation marks omitted).

Here, the parties have actively litigated the case for nearly four years, including litigating a motion for summary judgment and briefing class certification. (Mot. at 22.; Moss Decl. ¶ 47.) The extensive PMQ deposition, vendor deposition, and documents and data produced in addition to interviews of inspectors have revealed the strengths and weaknesses of the case. (Mot. at 22.; Moss Decl. ¶ 48.) The parties engaged in months of settlement negotiations facilitated by a mediator. (Moss Decl. ¶ 47.)

The Court finds the parties have engaged in substantial investigation of the facts and the applicable law, and further, the settlement negotiations were at arm's length and were not collusive. This factor weighs in favor of granting preliminary approval of the Settlement.

B. Amount Offered in Settlement

In determining whether the amount offered in settlement is fair, a court compares the settlement amount to the parties' estimates of the maximum amount of damages recoverable in a successful litigation. In re Mego, 213 F.3d at 459. Up through mediation, Plaintiff projected the following:

- $3,778,707: Projected unpaid minimum wages for the class, using class and inspection data provided
- $477,936: Unpaid overtime
- $2,265,075: Unpaid rest break premium pay
- $6,372,480: Unpaid reimbursements (not including interest)

(Mot. at 23.) The above amounts total just under $13,000,000.00. Plaintiff's Counsel did not project an amount for possible meal break violations. (Id.) With interest, the amount would total in excess of $17,000,000.00. (Id.) The settlement amount, $4,000,000.00, is a little less than one-fourth the potential recovery, which, considering the challenges and uncertainties of the case, is fair and adequate. See Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 628 (9th Cir. 1982) ("It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair."); In re Mego, 213 F.3d at 459 ("Even assuming that Nadler's methodology was more sound, the Settlement amount of almost $2 million was roughly one-sixth of the potential recovery, which, given the difficulties in proving the case, is fair and adequate.")

C. Strength of Case and Risk, Expense, Complexity, and Likely Duration of Litigation

To succeed at trial, Plaintiff would have to overcome Defendant's defenses on the merits and prove damages for each of the 1,600 class members. (Mot. at 20.) Plaintiff's Counsel assessed the following:

- The risks related to certification and decertification on contested motions based on the facts at bar;
- Certification jurisprudence generally and as applied to wage and hour and employee status cases;
- The defenses to liability and damages asserted by Defendant;
- Arbitration agreements between some vendors and inspectors; and
- Risks related to the possibility of mini-trials for each of the 1600 putative class members' damages.

(Moss Decl. ¶ 44.) Further, prosecuting the action to verdict would likely take years, involve an appeals process, and result in additional costs and delays. (Id. ¶ 45.) The California Supreme Court will address the independent contractor issues at the helm of this case in Dynamex Operations, Inc. v. Superior Court (Case No. S222732). (Id.) Settlement avoids the risks Dynamex poses for both parties. (Id.) Further indication of changes and uncertainty in the law can be seen in the NLRB's recent decision overturning its "joint employer" decision. (Id.) There are also risks of a decertification ruling. (Mot. at 20.)

Accordingly, the risk, expense, complexity, and likely duration of further litigation weigh in favor of preliminary approval. Settlement of this matter will conserve the resources of this Court and the parties, thus weighing heavily in favor of preliminary approval.

D. Experience and Views of Counsel

"Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation." Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 528 (C.D. Cal. 2004) (internal citation and quotation marks omitted).

Plaintiff's Counsel Dennis Moss has been an employment/labor lawyer since 1977. (Moss Decl. ¶ 49.) He has handled several cases concerning employment and labor law. (Id.) His co-counsel also has significant class action experience. (Id.) Mr. Moss and his co-counsel believe the settlement is fair and equitable. (Id. ¶ 44.) This weighs in favor of preliminary approval.

E. Collusion Between the Parties

"To determine whether there has been any collusion between the parties, courts must evaluate whether 'fees and relief provisions clearly suggest the possibility that class interests gave

way to self interests,' thereby raising the possibility that the settlement agreement is the result of overt misconduct by the negotiators or improper incentives for certain class members at the expense of others." Litty, 2015 WL 4698475, at *10 (quoting Staton, 327 F.3d at 961).

As an initial matter, the Court notes that settlement negotiations were conducted at arms-length. The parties engaged in mediation with an experienced mediator. (Moss Decl. ¶ 47.) The use of a mediator experienced in the settlement process tends to establish that the settlement process was not collusive. See, e.g., Satchell v. Fed. Ex. Corp., No. C 03-2659 SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007). The Court thus turns to the financial terms of the Settlement Agreement.

Plaintiff requests an incentive award of $20,000 for the class representative in this action. (Settlement Agreement at 17.) A court may grant a modest incentive award to class representatives, both as an inducement to participate in the suit and as compensation for the time spent in litigation activities. See In re Mego Fin. Corp., 213 F.3d at 463 (finding the district court did not abuse its discretion in awarding an incentive award to the Class Representatives). The incentive award is 0.5% of the total gross settlement. The Court is concerned about the apparent disproportionate incentive award. See Custom LED, LLC v. eBay, Inc., No. 12-CV-00350-JST, 2014 WL 2916871, at *10 (N.D. Cal. June 24, 2014) (approving $7,500 incentive award from $3,230,000 total settlement amount); Glass v. UBS Fin. Servs., Inc., No. C-06-4068 MMC, 2007 WL 221862, at *1, 16-17 (N.D. Cal. Jan. 26, 2007) (approving $25,000 incentive awards from $45,000,000 total settlement amount). At the preliminary approval of class action settlement stage, the Court finds the request for enhancement award potentially fair. However, the parties should be prepared to discuss and justify the disproportionate incentive award as part of the final approval.

Plaintiff seeks attorneys' fees in the amount of $1,000,000 and costs up to $30,000. (Settlement Agreement at 16-17.) Attorneys' fees sought constitute one-fourth or 25% of the total gross settlement. Generally, courts find that a benchmark of 25% of the common fund is a reasonable fee award. Hanlon, 150 F.3d at 1029 ("This circuit has established 25% of the common fund as a benchmark award for attorney fees."); Paul, Johnson, Alston & Hunt v. Graulty, 866 F.3d 258, 272 (9th Cir. 1989) (the 25% benchmark can be adjusted in either direction "to account for any unusual circumstances[,]" but the justification for adjustment must be apparent); Monterrubio v. Best Buy Stores, L.P., 291 F.R.D. 443, 455 (E.D. Cal. 2013) (citing Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990)) ("In applying this method, courts typically set a benchmark of 25% of the fund as a reasonable fee award, and justify any increase or decrease from this amount based on circumstances in the record."). The Court finds there is no evidence of impropriety or collusion.

F. Governmental Participants in this Action

The State of California will receive $18,750 on account of the PAGA claim. (Mot. at 23.)

G. The Settlement Release

Settlement class members will only release claims "arising from or related to the claims litigated in this action or that could have been asserted based on the facts alleged in the FAC." (Mot. at 23.) Thus, the settlement releases only those claims based on the same factual bases as the underlying claims in this action. Of the factors considered, all weigh in favor of preliminary approval of the Settlement Agreement.

VI. NOTICE TO THE CLASS

Rule 23(c)(2)(B) requires the Court to "direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Similarly, Rule 23(e)(1) requires that a proposed settlement may only be approved after notice is directed in a reasonable manner to all class members who would be bound by the settlement agreement. Fed. R. Civ. P. 23(e)(1). Notice must be "timely, accurate, and informative." See Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 172 (1989); Churchill Village, LLC v. Gen. Elec., 361 F.3d 566 (9th Cir. 2004) ("Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'")

The Notice informs the class members of their eligibility to take part in the settlement, options for opting-out or objecting, the date and location of the final approval hearing, the significant terms of the settlement, and how to obtain more information. (Settlement Agreement, Exh. 2.) Further, it notifies recipients that they must complete and return a claim form to obtain payment pursuant to the settlement. (Id.)

VII. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Preliminary Approval is GRANTED. The Court thus ORDERS as follows:

1. The Settlement Agreement is preliminarily approved as fair, reasonable, and adequate for members of the settlement class.
2. The following settlement class is certified for settlement purposes only: All persons who performed residential home inspections in California at the direct or indirect request of Mortgage Contracting Services, LLC at any time from February 4, 2010 through the date the Court grants preliminary approval of the settlement.
3. Dennis Moss, Jeremy Bollinger, and Ari Moss of Moss Bollinger, LLP and Samuel Deskin of Deskin Law Firm are appointed as class counsel for the purposes of settlement only.
4. Plaintiff Lawrence Weintstein is qualified to act as representative of the settlement class and is preliminarily appointed class representative.
5. Phoenix Class Action Administration Solutions is appointed as the settlement administrator.

6. The settlement notice, as set forth in Exhibit 2 to the Settlement Agreement, is approved in form and substance for use in the administration of the Settlement Agreement.
7. Phoenix Class Action Administration Solutions is directed to mail the notice packet to all individuals entitled to receive notice.
8. Settlement class members will have 60 days from the initial mailing of the notice packet to file a claim, opt-out, or file an objection to the Settlement.
9. The final approval hearing will be scheduled for a date to be determined by the parties in Courtroom 1 of the United States District Court for the Central District of California, Eastern Division located at 3470 12th Street, Riverside, California 92501.

IT IS SO ORDERED.