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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KAREN TAYLOR, individually and on behalf of all others similarly situated, and PAULISA FIELDS,

Plaintiffs,

v.

WEST MARINE PRODUCTS, INC.,

Defendant.

Case No. 13-CV-4916-WHA

Assigned to Hon. William H. Alsup

JOINT NOTICE OF MOTION AND MOTION FOR AN ORDER GRANTING FINAL APPROVAL OF THE SETTLEMENT BETWEEN THE PARTIES

Date: May 21, 2015
Time: 2:00 p.m.
Courtroom: 8

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, on May 21, 2015, at 2:00 p.m., or as soon thereafter as the matter may be heard before the Honorable William H. Alsup in Courtroom 8 of the United States District Court, Northern District of California, San Francisco Division, located at 450 Golden Gate Avenue, San Francisco, California, 94102, Plaintiff and Class Representative Karen Taylor, Plaintiff Paulisa Fields (hereafter Plaintiffs) and Defendant West Marine Products, Inc. (hereafter Defendant) (collectively, the Parties) will, and hereby do, move for an Order granting final approval of the class settlement in this Action.

This Motion is based on the grounds that the settlement is fair, adequate, and reasonable given:

(1) the relative strengths and weaknesses of the Parties' claims and defenses, including the defense contention that this action presents a question of first impression concerning whether the "regular rate" should be recalculated in weeks with *no* weekly overtime but in which daily overtime is worked, and should also be re-calculated at a rate of 1.5 (not .5) to each overtime hour worked (though the California Court of Appeal has held that the re-calculated regular rate should be applied only to the premium pay (.5 hours) and not to the underlying overtime hour[1]);

(2) the risks, expense, complexity and likely duration of the litigation, but for the settlement;

(3) the amount offered in settlement, especially in light of the modest "underpayment" to the class and the many multiples that each class member is receiving of their maximum underpayment under the Court's interpretation of the law;[2] and

(4) the uncertainties of appeal.

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[1] *See Marin v. Costco Wholesale Corp.*, 169 Cal. App. 4th 804, 817 (2009).

[2] As is discussed in more detail below, across a five year period, 33% of these class members were underpaid by just *$1 or less*. The data shows that 55% of these class members were underpaid by just by *$5 or less*, again across five years. The data shows that 88% of the class was underpaid by $50 or less. Under the Court's approach, as analyzed by Mr. Boedeker, the greatest total overtime underpayment for the entire class across five years is $18,283. **Yet, the $435,000 non-reversionary settlement pays each of the participating 686 class members (depending on the extent of their damage) at least $224.63 and as much as $1,120.29.** (Declaration of Mark D. Kemple ("Kemple Decl."), ¶3, Ex. 1.)

As a very clear validation of the reasonableness of the settlement, the parties note that just twenty-one persons (2.9% of the class) have chosen not to participate in the settlement and, to date, none of the 707 members of the class have objected to the settlement. In short, the reaction of the class has been overwhelmingly positive.

This Motion is based upon this Notice, the accompanying Memorandum of Points and Authorities, the accompanying declarations of Alan Harris, Mark D. Kemple and Stacy Roe and evidence, and on such further oral and documentary evidence as may be presented at the hearing on this motion.

Respectfully submitted,

Dated: April 17, 2015

HARRIS & RUBLE BLECHER COLLINS PEPPERMAN & JOYE, P.C.

By */s/ Alan Harris*
Alan Harris
Donald Pepperman
Attorneys for Plaintiffs

In accordance with Local Rule 15-1(i)(3), Attorneys for Defendants attest that Alan Harris has concurred to the filing of this document.

DATED: April 17, 2015

GREENBERG TRAURIG, LLP

By */s/ Mark D. Kemple*
Mark D. Kemple
Ashley M. Farrell
Attorneys for Defendant
WEST MARINE PRODUCTS, INC.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff and Class Representative Karen Taylor, Plaintiff Paulisa Fields (hereafter Plaintiffs) and Defendant West Marine Products, Inc. (hereafter Defendant) (collectively, the Parties) have entered into a Class Settlement Agreement and Release ("Settlement Agreement"), attached as Exhibit 1 and Exhibit 2 to the concurrently filed Declaration of Alan Harris ("Harris Decl."). Under the terms of the Settlement Agreement, which satisfy all the criteria for final approval under Rule 23 of the Federal Rules of Civil Procedure, Defendant has agreed to pay a non-reversionary sum of $435,000 to settle the certified class claims asserted by Plaintiffs in this action relating to a failure to include spiff awards in the calculation of daily overtime pay.

On January 20, 2015, this Court preliminarily approved the Settlement Agreement for purposes of the settlement. In addition, the Court's January 20, 2015 Order (the "Preliminary Approval Order") directed distribution of the Notice of Class Action Settlement, and Request for Exclusion from Class Action Settlement form (collectively, the "Notice"). Following entry of the Preliminary Approval Order, the Parties ensured that each step necessary to effectuate the Settlement Agreement occurred as ordered by the Court. Specifically, on February 20, 2015, Notice was published and mailed to Class Members, who could choose whether to participate in the settlement, opt-out of it by April 6, 2015, or object to it by April 28, 2015. (Harris Decl. at ¶18; Declaration of Stacy Roe ("Roe Decl.") ¶ 9.) The response from the Class Members have been overwhelmingly positive. Out of a class of 707 members, only twenty-one persons (2.9% of the class) have chosen not to participate in the settlement. (Roe Decl. ¶ 12, Ex. A, Opt-out Forms received from putative class members.) Further, to date, none of the 707 members of the class have objected to the settlement. (*Id.* at ¶13.) These responses are a very clear validation of the reasonableness of the settlement.

It should be noted that settlement of this Action was effectuated only after extensive investigation, formal discovery and expert analysis by the Parties, including multiple settlement conferences and settlement sessions before Magistrate Judge Joseph C. Spero.[3] (Harris Decl. at ¶¶ 5-6.)

[3] Judge Spero not only conducted a full-day mediation with the Parties, but further facilitated two additional in-depth settlement discussions before the instant settlement was reached. [*See* Dkt. 133, 135.]

As a result of Judge Spero's extensive efforts, the Parties reached agreement to resolve the certified claims on a class-wide basis, as well as all of Plaintiffs' individual claims raised in the Action.

As described herein, the settlement is fair to the class. The defense contends that this action presents a question of first impression concerning whether the "regular rate" should be recalculated in weeks with *no* weekly overtime but in which daily overtime is worked, each class member is receiving in settlement many multiples of his or her maximum underpayment under the Court's interpretation of the law. Moreover, the Parties note that the Court's interpretation applies the recalculated overtime rate not only to the premium pay (for example, .5 hours per overtime hour), but to the underlying overtime hour as well, such that the re-calculated regular rate is applied at a rate of 1.5 (not .5) to each overtime hour worked. The defense contends that, though not applied to daily overtime in a week in which there was no weekly overtime as well, even in the weekly overtime context, one California Court of Appeal has held that the re-calculated regular rate should be applied only to the premium pay (.5 hours) and not to the underlying overtime hour. *Marin v. Costco Wholesale Corp.*, 169 Cal. App. 4th 804, 817 (2009). As such, and again, the Parties believe that this settlement which pays multiples of daily overtime, and applies the re-calculated regular rate to 1.5 hours rather than .5 hours, is fair.

Further, and even before recovery of these settlement dollars (which make the putative class members more than whole) any prior "underpayment" to the class is modest. Under the Court's interpretation – and again before taking into account the settlement payouts – 33% of these class members were underpaid by just *$1 or less* across a five year period. The data shows that 55% of these class members were underpaid by just by *$5 or less*, again across five years. The data shows that 88% of the class was underpaid by $50 or less. Under the Court's approach, as analyzed by Mr. Boedeker, the greatest aggregate total overtime underpayment for the entire class across five years is $18,283. Yet, the $435,000 non-reversionary settlement pays *each of the remaining 686 class members* (depending on the extent of their damage) at least $224.63 and as much as $1,120.29.[4] (Declaration of Mark D.

[4] This estimate assumes that the Court approves the maximum deductions for Class Counsel Attorney's Fees, Litigation Costs, Individual Plaintiff Payments, Administrative Costs and the California Labor and Workforce Development Agency's share of allocated California Labor Code Private Attorney General Act penalties. However, because there has been a reduction in the fees charged by the administrator and the cost reimbursement sought by class counsel and the settlement does not provide for any reversion to

Kemple, ("Kemple Decl.") Ex. 1, ¶¶ 2-3.) To be clear, on a typical total injury of $1 or $5 (pennies, or up to a dollar per year) each of these class members would receive hundreds of dollars in settlement proceeds. Further, notably, if one uses the method set forth in *Marin,* and applies it to daily events even in the absence of weekly overtime, the "damage" to the class members of over five years is even *less* ($5,849 total across the entire five year period), and the settlement is even more generous.[5]

Because the Settlement satisfies all the criteria for final approval under Federal Rules of Civil Procedure, Rule 23, including that it is fair, reasonable, adequate, and further meets the parameters outlined in this Court's November 8, 2013 Notice Regarding Factors To Be Evaluated In Any Proposed Class Settlement, the Parties respectfully request that the Court issue an Order granting final approval of the class settlement in this Action.

II. THE SETTLEMENT BEFORE THE COURT.

Pursuant to the terms of the Settlement Agreement, West Marine will pay a non-reversionary $435,000 in satisfaction of (1) each Plaintiff's individual claims, (2) class-wide claims arising from any failure by Defendant to include spiff awards in the calculation of the regular rate of pay for purposes of paying overtime compensation for daily overtime under the method set forth in the Court's September 19, 2014 Order, (3) derivative class-wide claims for inaccurate wage statements and related California Labor Code Private Attorney General Act penalties, and (4) class-wide waiting time penalties.

There are 707 current and former West Marine employees employed in California during the class period who had spiff earnings in a workweek in which they also worked over eight hours on at least one day in that same week and where the spiff earnings were not included in the regular rate calculations under the method set forth in the Court's September 19, 2014 Order. The Settlement Agreement calls for the following deductions: Class Counsel's Fee (up to $130,500); Expenses (up to

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the Defendant, class members will in fact receive greater than these estimated amounts. (Kemple Decl. ¶¶ 2-5, Ex. 1.)

[5] The defense contends that under *Marin* so applied, fully 50% of the class was "underpaid" by $1 or less across five years, and virtually every class member suffered less than $50 in underpayment across those five years. Yet, again, the payouts are at least $224.63 and as much as $1,120.29 (and will be higher as there has been a reduction in fees charged by the claims administrator and the cost reimbursement sought by Class Counsel). (Kemple Decl. ¶¶ 2-3, Ex. 1.)

$30,000);[6] Administration Costs (up to $15,000, with Defendant paying any excess cost, in addition to the $435,000 sum); payment in settlement of each Plaintiffs' individual claims ($10,000); and a PAGA payment representing the State of California's share of civil penalties ($5,000). In their Motion for Award of Attorney's Fees, Incentive Award and Reimbursement of Costs (Docket No. 149) , Plaintiffs requested reimbursement of $27,568.81 in litigation expenses, rather than the $30,000 contemplated by the Settlement Agreement. (Harris Decl. ¶8.) Further, Claims Administration Costs are estimated to be $14,962, rather than the $15,000 projected by the Settlement Agreement (Roe Decl. ¶ 14). Therefore, assuming that the Court approves the full amount of all contemplated deductions, a total of $246,468 (rather than the $244,500 projected at the time of Preliminary Approval) will remain for distribution to the 686 Settlement Class Members who have chosen not to exclude themselves (i.e. opt-out) from the Class. Unclaimed funds will not revert to the Defendant, but will be distributed to the California State Bar (consistent with California Code of Civil Procedures section 384(a)).

Importantly, the Settlement Agreement allocates (to each of the 686 Participating Class Members) multiples of the *total amount* due to as a result of any underpayment of the regular rate under the method set forth in the Court's September 19, 2014 Order – thereby making each class member more than "whole." As discussed above, applying the Court's method, fully 33% of class members were underpaid by just $1 or less across five years. Some 55% of class members were underpaid by just by $5 or less, again across five years, and, 88% of the class was underpaid by $50 or less. Aggregating the entire potential underpayment across the class and five years, results in a potential underpayment of just $18,283 – again using the Court's methodology. Yet, on a typical potential damage of $1 or $5 across five years (pennies, or up to a dollar per year), each of these class members receive hundreds of dollars in settlement proceeds. Specifically, depending on the extent of their damage, each of the 686 Participating Class Members would receive at least $224.63 and as much as $1,120.29. ("Kemple Decl. ¶3, Ex. 1.)[7]

[6] By separate Motion, Plaintiffs request the Court award attorney's fees of $130,500 and reimbursement for litigation costs of $27,568.81. In that Motion, Plaintiffs further request the Court grant Plaintiff Taylor an incentive award of $500. (*See* Docket No. 149.)

[7] Notably, the Defendant contends that if one uses the method set forth in *Marin* (but applies it to daily events even in the absence of weekly overtime) the "damage" to the class members of over five years is even *less* ($5,849 total across the entire five year period) and the settlement even more generous.

The Settlement Agreement also allocates (to each of the 686 Participating Class Members) an equal distribution of the settlement funds that remain after deducting from the Net Settlement Amount (1) waiting time penalties,[8] and (2) total reimbursement of the alleged underpayment due to the class under the method set forth in the Court's September 19, 2014 Order (discussed above). Again, only twenty-one persons (2.9% of the class) have chosen not to participate in the settlement. (Roe Decl. ¶12, Ex. A, Opt-out Forms received from putative class members.)

In exchange for these benefits, all Participating Class Members narrowly release Defendant and its past, present and future, direct and indirect, parents, subsidiaries, divisions, partners and affiliates of all "Released Claims," as set forth at Section I.S. of the Settlement Agreement, which, as discussed in the Court's Preliminary Approval Order (Docket No. 148) is properly limited to claims relating to underpayment of *daily* overtime.

As discussed below, the settlement should be finally approved. The valuation of the claims was presented to the Court at Preliminary Approval, and the Court made a preliminary finding that the settlement is fair, reasonable, adequate, and in the best interests of the Settlement Class. (Docket No. 148, Preliminary Approval Order.) The response of the class overwhelmingly confirms that conclusion.

III. THE SETTLEMENT MEETS THE STANDARDS FOR FINAL APPROVAL AS FAIR, REASONABLE, AND ADEQUATE.

There is a "strong judicial policy that favors settlements" and an "overriding public interest in settling and quieting litigation" particularly where class action litigation is concerned. *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (reversal of settlement approval only upon clear showing of abuse of discretion); *Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) (public interest in containing the burdens of expensive class-action litigation favors settlement). In determining if a settlement meets Rule 23's final-approval standards, the district court must find that the settlement is "fair, reasonable, and adequate." Fed. Rule Civ. Proc. 23(e)(2). There is an initial presumption of

[8] The Settlement Agreement allocates the first thirty percent (30%) of the Net Settlement Amount to waiting time penalties for Participating Class Members whose employment with West Marine ended prior to the Preliminary Approval Date – approximately $73,350 – to be dispersed equally among 418 former West Marine employees (approximately $175 each).

fairness when a proposed class settlement is negotiated at arm's length and presented for court approval. *See* Newberg and Conte, Newberg on Class Actions (4th ed. 2002) ("Newberg"), § 11:41, p. 90.

This determination to approve or reject a settlement is made in the "sound discretion of the trial court." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). In assessing a settlement, the district 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 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." *Id.* In addition, a settlement must not have been the product of collusion. *Class Plaintiffs, supra*, 955 F.2d at 1290. Here, these factors heavily weigh in favor of the Court's granting final approval of the settlement.

A. *The Strength of Plaintiffs' Case.*

Assessing the strength of a plaintiff's case and its likelihood of recovery involves weighing the merits against the amount offered in settlement and the potential recovery. *See* Newberg, *supra,* at §11:44, pp. 121-122. It is not necessary, however, for the Court to "reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in the litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Class Plaintiffs,* 955 F.2d. at 1291 (citing *Officers for Justice v. Civil Service Com.*, 866 F.2d 615, 625 (9th Cir. 1982)). Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, Defendant contends that a number of defenses asserted by West Marine present serious threats to the claims of Plaintiffs and the other class members. These include risks to maintenance of class certification, including Defendant's pending appeal; risk of loss on the merits at trial; and risk of further appeal. There is thus a material dispute and risk as to liability on these claims.

As the federal court held in *Hopson v. Hanesbrands Inc.*, 2009 U.S. Dist. LEXIS 33900 at *19 (N.D. Cal. 2009), granting final approval of a wage and hour class action:

> Plaintiffs may have a strong case, but the risks inherent in continued litigation are great. Defendants strongly deny liability for Plaintiffs' principal claim that full-time Service Associates were misclassified as exempt. In addition to the uncertainties raised by Defendants at the preliminary stage regarding Plaintiffs' chance of success in this case,

> Defendants notes that the question of an employer's duty to provide rest and meal periods is an open one, signaling even less certainty for Plaintiffs. ....[T]he gross settlement amount and the Class Members' expected net recovery, after fees and other costs are deducted, appear to be a reasonable compromise, in light of the risks of litigation.

Hopson, supra, 2009 U.S. Dist. Lexis at *19; see also *Browning v. Yahoo!, Inc.*, 2007 U.S. Dist. LEXIS 86266, at *30 (N.D. Cal. 2007) ("In considering the strength of Plaintiff's case, legal uncertainties at the time of settlement - particularly those which go to fundamental legal issues - favor approval.") As recognized in a federal decision approving settlement of a wage and hour class action:

> The potential complexity and possible duration of trial also weigh in favor of granting final approval. Plaintiffs acknowledge the difficulties of proving damages, recognize the uncertainty of outcome, and believe defendant would appeal in the event of adverse judgment. A post-judgment appeal would require many years to resolve and delay payment to class members. Plaintiffs believe the benefits of a guaranteed recovery today outweigh an uncertain future result. Accordingly, plaintiffs argue, and the Court agrees, the actual recovery confers substantial benefits on the class that outweigh the potential recovery through full adjudication.

Barcia v. Contain-A-Way, Inc., 2009 U.S. Dist. LEXIS 17118, *9 (S. D .Cal. 2009). To illustrate these considerations, below is a brief summary of some of West Marine's arguments. (Plaintiffs dispute each of these arguments, but acknowledge the risk they pose.)

Initially, Defendant has filed a Petition for Permission to Appeal the Court's September 19, 2014 Order, which identifies several bases on which the Court's granting of class certification could be reversed, some of which are addressed below.

- First, in certifying the miscalculation of overtime class, the Court rejected the theories offered by both Plaintiff and Defendant, and ruled on an issue of first impression – thereby creating new law. Defendant respectfully argues that this was an error and that application of it will result in hugely divergent overtime rates even for the same overtime hours in the same week, and that it inverts the policy of the overtime laws (rewarding those who cram overtime into a single day, rather than space the same overtime hours over several days).
- Second, Defendant argues that the Court's interpretation incorrectly applies the re-calculated overtime rate not only to the premium pay (for example, .5 hours per overtime hour), but to the underlying overtime hour as well, such that the re-calculated regular rate is applied at a rate of 1.5 (not .5) to each overtime hour worked. Though never applied to daily overtime in a week in

which there was no weekly overtime as well, even in the weekly overtime context, the California Court of Appeal has held that the re-calculated regular rate may be applied only to the premium pay (.5 hours) and not to the underlying overtime hour. *Marin, supra,* 169 Cal. App. 4th at 817.

- Third, Defendant argues that the Court's certification of the derivative wage statement class based on the miscalculation of the overtime claim was incorrect for three separate reasons. *Initially*, as the Court's September 19, 2014 Order makes clear, Plaintiffs' wage statement claim is timely only to the extent that it alleges damages (as opposed to penalties). [Docket No. 113, at 11:3-12:3.][9] However, whether any actual damages were incurred as a result of any alleged inaccurate wage statements is subject to individualized proof. *Further*, because Plaintiff Taylor suffered no damages as a result of receiving what she alleges were inaccurate wage statements, Defendant argues that her claim is barred by the one year limitations period. *Finally*, Defendant argues that even were it otherwise proper, a three year statute of limitations period cannot be applied because determination of whether each putative class member suffered damage as a result of the wage statement would create individualized issues.
- Fourth, and similar to the derivative wage statement class, Defendant argues that the application of a 4 year period to the derivative waiting time claims is incorrect because either a one year period (for penalties) or a three year period (for damages, which is also individualized) is the maximum period on these claims. And, separately, the derivative waiting time claims may fail because West Marine has a "good faith dispute" to bar application of any waiting time penalty

[9] Assuming that the Court had found that Plaintiffs could recover penalties in relation to the wage statement claim, the application of any penalties likely would be declined at trial, because West Marine has a "good faith dispute" to bar application of a waiting time penalty recovery. *Aguilar v. Zep Inc., No. 13-CV-00563-WHO, 2014 WL 4245988, at *19 (N.D. Cal. Aug. 27, 2014) (internal citations and quotation omitted)* ("Plaintiffs have brought claims under California Labor Code section 203, which permits employees to recover penalties when an employer 'willfully fails to pay ... any wages of an employee who is discharged or who quits,' and California Labor Code section 226, which permits employees to recover statutory penalties 'as a result of a knowing and intentional failure by an employer' to provide accurate wage statements. Cal. Lab. Code §§ 203, 226. The good faith defense to the willfulness element of these sections is clearly established under California law. California's administrative regulations also state that 'a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203.' Cal. Code Regs., Tit. 8, § 13520. Therefore Zep's good faith defense is a tenable defense against the plaintiffs' labor code claims and if successful, could preclude the plaintiffs from recovering.").

recovery. Specifically, until this Court issued its September 19, 2014 Order, there was no authority holding that West Marine was required to include spiffs earned in a workweek in which the employee also worked over eight hours on at least one day in that same week in the regular rate calculations. Absent this authority, West Marine properly performed its calculation of the overtime rate in accordance with the only authority that was available – that set forth in *Marin v. Costco Wholesale Corp.*, 169 Cal. App. 4th 804 (2009). In all, because West Marine had no basis on which to determine that its calculation the overtime rate needed to expand beyond that which the California Supreme Court mandated in *Marin*, we believe it would be found that West Marine did not "willfully" fail to pay wages. *See Aguilar v. Zep Inc., No. 13-CV-00563-WHO, 2014 WL 4245988, at *19 (N.D. Cal. Aug. 27, 2014) (internal citations and quotation omitted)* ("Plaintiffs have brought claims under California Labor Code section 203, which permits employees to recover penalties when an employer 'willfully fails to pay ... any wages of an employee who is discharged or who quits,' … The good faith defense to the willfulness element of th[is] section[] is clearly established under California law. California's administrative regulations also state that 'a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203.' Cal. Code Regs., Tit. 8, § 13520. Therefore Zep's good faith defense is a tenable defense against the plaintiffs' labor code claims and if successful, could preclude the plaintiffs from recovering.").

Additionally, Defendant argues that Plaintiffs will face serious obstacles to succeeding on the merits at trial, some of which are discussed below.

- First, in regards to both wage statement and waiting time claims, each Plaintiff must prove that they incurred actual damages – a high hurdle to overcome.
- Second, also in regards to both wage statement and waiting time claims, West Marine believes it has a "good faith" defense which will bar recovery. As discussed above, until this Court issued its September 19, 2014 Order, there was no authority holding that West Marine was required to include spiffs earned in a workweek in which the employee also worked over eight hours on at least one day in that same week in the regular rate calculations; West Marine utilized the method set forth in *Marin v. Costco Wholesale Corp.*, 169 Cal. App. 4th 804 (2009); *see also Aguilar,*

*2014 WL 4245988, at *19* ("Plaintiffs have brought claims under California Labor Code section 203, which permits employees to recover penalties when an employer 'willfully fails to pay ... any wages of an employee who is discharged or who quits,' … The good faith defense to the willfulness element of th[is] section[] is clearly established under California law. California's administrative regulations also state that 'a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203.' Cal. Code Regs., Tit. 8, § 13520. Therefore Zep's good faith defense is a tenable defense against the plaintiffs' labor code claims and if successful, could preclude the plaintiffs from recovering.").

- Third, even if Plaintiffs are successful in their wage-statement and PAGA claims, recent authority from this Court holds that statutory damages and civil penalties predicated on the same underlying alleged wrong cannot be "stacked" on top of one another. *Smith v. Lux Retail N. Am., Inc., No. C 13-01579 WHA,* 2013 WL 2932243, at *4 (N.D. Cal. June 13, 2013) (refusing to "pile one penalty on another for a single substantive wrong" and noting that "no actual holding in any judicial decision has ever blessed such stacking."). Accordingly, at the conclusion of a successful trial, Plaintiffs may be limited in their recovery statutory damages and civil penalties for derivative wage-statement violations.

In all, the significant risks of further litigation of this matter – just some of which are addressed above – evince that the proposed settlement which pay multiples of any underpayment is fair for the putative class.

B. *The Risk, Expense, Complexity, and Likely Duration of Further Litigation.*

"Additional elements that should be considered by the court in determining the appropriateness of settlement are the likely expenses of continuing the litigation and its prospects for relief for the class." *See* Newberg, *supra*, at § 11:50, p. 155. "[U]nless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Nat'l Rural Telcomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) (internal quotations omitted). The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation. *See* Newberg, *supra*, at § 11:41, p. 87. The uncertainty of outcome, difficulties of proof, and length of litigation of class action suits lend

them readily to compromise and settlement. *Id.* at § 11:41, 87-88. But for this settlement, Plaintiffs would expend significant fees and costs litigating the pending appeal, and seeking to take this action to trial. Indeed, even if they prevailed at trial and on any subsequent appeal, any damage/penalty recovery could be dwarfed by the fees and costs expended to obtain it.

C. *The Amount Offered in Settlement.*

As detailed above, the $435,000 common fund will accomplish the payment of far more than what Class Members are owed in unpaid overtime. This represents a more than equitable resolution of this case. *See Rodriguez v. West Publ'g Corp.*, 2007 U.S. Dist. LEXIS 74767, at *30 (C.D. Cal. filed Sept. 10, 2007) (noting that a "'settlement amount representing 33% of the maximum possible recovery was well within a reasonable range when compared with recovery percentages in other class action settlements'") (quoting *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 257–58 (D. Del. 2002)), *rev'd in part on other grounds,* 563 F.3d 948 (9th Cir. 2009). Consequently, this factor weighs as well in favor of approval.

D. *The Extent of Discovery and the Stage of the Proceedings.*

Prior to mediation, West Marine responded to extensive formal and informal discovery requests in this case. In addition, the Parties have engaged in significant law-and-motion practice directed to the merits of Plaintiffs' overtime claim. (Harris Decl. ¶¶ 5-7.) The extensive analysis of Plaintiffs' claims in connection with these matters, coupled with the additional data provided to Plaintiffs in connection with mediation, allowed them "to make an informed decision about settlement." *Williams v. Centerplate, Inc.*, 2013 U.S. Dist. LEXIS 121307, at *14 (S.D. Cal. filed Aug. 26, 2013). This "weigh[s] heavily in favor of granting . . . approval." *Id.* at *15.

E. *The Experience and Views of Counsel.*

"With regard to class action settlements, the opinions of counsel should be given considerable weight both because of counsel's familiarity with this litigation and previous experience with cases." *West v. Circle K Stores, Inc.*, 2006 U.S. Dist. LEXIS 76558, *17-18 (E.D. C.A. 2006). Here, Class Counsel have substantial experience in prosecuting class actions, including wage-and-hour matters, and they are of the opinion that the Settlement Agreement represents an good compromise for the Class, given the inherent risks, hazards, and expenses of carrying the Action through trial. (Harris Decl. ¶¶ 20-

23.) As the Central District has explained, this weighs strongly in favor of approving the settlement. *See Rodriguez,* 2007 U.S. Dist. LEXIS 74767, at *31 ("[T]he trial court is entitled to, and should, rely upon the judgment of experienced counsel for the parties."). All counsel of record agree that this settlement is fair to the class. (Harris Decl. ¶23; Kemple Decl. ¶6.)

F. *The Reaction of the Class Members to the Proposed Settlement.*

The reaction of the Settlement Class overwhelmingly supports approval of the Settlement. Significantly, after dissemination of the Notice to the members of the Settlement Class, which provided each class member with the terms of the settlement, including the specific payment amount to that employee, there only twenty-one (21) opt-outs, which correlates to 2.9% of the Settlement Class. (*See* Roe Decl. ¶12, Ex. A, Opt-out Forms received from putative class members.) Accordingly, because the vast majority of Settlement Class Members (97.5%) is participating in this settlement and will receive a Settlement Award, the Parties respectfully submit that the class settlement is fair, reasonable and adequate, and should be finally approved.

Further, to date, none of the 707 members of the class have objected to the settlement. (Roe Decl. ¶13.) The absence of any objector strongly supports the fairness, reasonableness and adequacy of the Settlement. *See In re Austrian & German Bank Holocaust Litigation*, 80 F. Supp. 2d 164, 175 (S.D.N.Y. 2000) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement."); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118-19 (3d. Cir. 1990) (29 objections out of 281 member class "strongly favors settlement"); *Laskey v. Int'l Union*, 638 F.2d 954 (6th Cir. 1981) (That only 7 out of 109 class members objected to the proposed settlement should be considered when determining fairness of settlement.) The overwhelming approval of the class is evident.

G. *Arm's-Length Negotiation and Settlement.*

Courts respect the integrity of counsel and presume the absence of fraud or collusion in the negotiation of settlements, unless there is evidence to the contrary. *See* Newberg, *supra*, at § 11:51, p. 158. Here, as noted above, on October 29, 2014, the Parties engaged in full-day settlement conference before Magistrate Judge Spero, wherein they each aggressively advocated for their respective positions. The Parties' settlement discussions did not end at the conference, but indeed continued over several

weeks with the aid of Judge Spero who himself further facilitated two additional telephonic settlement conferences [Docket No. 133, 135] before the instant Agreement was made. Accordingly, "[t]here is likewise every reason to conclude that settlement negotiations were vigorously conducted at arms' length and without any suggestion of undue influence." *In re Wash. Public Power Supply System Sec. Litig.*, 720 F. Supp.1379, 1392 (D.Ariz. 1989). Indeed, that the settlement was negotiated with the assistance of Judge Spero supports approval. *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 666 (E.D .Cal. Jun 24, 2008); *Glass v. UBS Fin. Servs.*, 2007 U.S. Dist. LEXIS 8476; 15 Wage & Hour Cas. 2d (BNA) 1330, at *15 (N.D. Cal. 2007) ("The settlement was negotiated and approved by experienced counsel on both sides of the litigation, with the assistance of a well-respected mediator with substantial experience in employment litigation [and] this factor supports approval of the settlement.").

IV. CONCLUSION.

For the aforementioned reasons, the Parties Settlement Agreement meets the Rule 23 requirements. Consequently, the Parties respectfully request that this Court issue an Order granting final approval of the class settlement in this Action.

Respectfully submitted,

Dated: April 17, 2015

HARRIS & RUBLE BLECHER COLLINS PEPPERMAN & JOYE, P.C.

By */s/ Alan Harris*
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In accordance with Local Rule 15-1(i)(3), Attorneys for Defendants attest that Alan Harris has concurred to the filing of this document.

DATED: April 17, 2015

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