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Superior Court of California
County of Los Angeles

JUN 02 2017

Sherri R. Carter, Executive Officer/Clerk

By ______, Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

BY FAX

TINA PATEL, in her representative capacity, Plaintiff, vs. ONEWEST RESOURCES, LLC, and Does 1-50, inclusive, Defendants.	Case No. BC653645 Assigned to Hon. Maren E. Nelson **CLASS ACTION** **PLAINTIFF TINA PATEL'S NOTICE OF MOTION AND MOTION SEEKING AN ORDER:** **(1) PRELIMINARILY CERTIFYING THE CLASS FOR SETTLEMENT PURPOSES;** **(2) PRELIMINARILY APPROVING THE CLASS ACTION SETTLEMENT AGREEMENT; AND** **(3) DIRECTING THAT NOTICE BE MAILED TO CLASS MEMBERS** **AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Hearing Date: June 30, 2017 Hearing Time: 11:00 a.m. Dept.: 307

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TINA PATEL

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COUNTY OF LOS ANGELES

TINA PATEL, in her representative capacity,

Plaintiff,

vs.

ONEWEST RESOURCES, LLC, and Does 1-50, inclusive,

Defendants.

Case No. BC653645

Assigned to Hon. Maren E. Nelson

CLASS ACTION

PLAINTIFF TINA PATEL'S NOTICE OF MOTION AND MOTION SEEKING AN ORDER:

(1) PRELIMINARILY CERTIFYING THE CLASS FOR SETTLEMENT PURPOSES;

(2) PRELIMINARILY APPROVING THE CLASS ACTION SETTLEMENT AGREEMENT; AND

(3) DIRECTING THAT NOTICE BE MAILED TO CLASS MEMBERS

AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing Date: June 30, 2017
Hearing Time: 11:00 a.m.
Dept.: 307

TO DEFENDANT AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on June 30, 2017, at 11:00 a.m., or as soon after as the matter can be heard, in Department 307 of the above-entitled Court located at 600 South Commonwealth Avenue, Los Angeles, California, plaintiff Tina Patel will and hereby does move this Court, pursuant to California Rule of Court 3.769, for an order: (1) Preliminarily certifying this action as a class action for settlement purposes; (2) Preliminarily approving the settlement described in the Joint Stipulation of Class Action Settlement and Release of Claims, attached as Exhibit 1 to the Declaration of Michael Curtis; (3) Approving the manner and form of notice to be sent to class members; (4) Appointing Tina Patel as class representative; (5) Appointing Baker, Curtis & Schwartz as class counsel; (6) Appointing CAC Services Group, LLC as claims administrator; and (7) Scheduling a hearing for consideration of final approval of the Settlement.

This Motion is based on this Notice of Motion, the Memorandum of Points and Authorities attached to this Motion, the Declarations and Exhibits in Support of this Motion, all pleadings and papers filed herein, the arguments of counsel and any other matters properly before the Court.

Dated: May 31, 2017

BAKER CURTIS & SCHWARTZ, P.C.

By: ______________________

Chris Baker
Attorneys for Plaintiff
TINA PATEL

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Tina Patel and Defendant OneWest Resources, LLC have agreed to a class-wide, non-reversionary, settlement of Patel's class action lawsuit. In exchange for a release tailored to the facts and claims asserted in this lawsuit, OneWest will pay $420,000, in addition to the employer's share of any payroll taxes, to a Qualified Settlement Account for distribution to class members according to the plan of allocation.

This is an excellent result for this class of 504 individuals who worked for OneWest in non-exempt positions at non-branch locations. The settlement was negotiated at arm's length with the assistance of Lisa Klerman, a well-respected class action mediator. Assuming the Court awards the maximum allowable deductions from the common fund for fees, costs, PAGA and enhancement payment, each class member will receive, on average, $467, for claims that OneWest's timekeeping program shorted them a few minutes of worktime a day. This settlement confers substantial benefit to the class members, particularly after considering the difficulties of this wage and hour class action litigation. Settling now removes the risk of certifying this class and prevailing at trial and removes the delay of proceeding through trial and potential appeals.

Plaintiff asks that the Court grant preliminary approval of the Settlement because the settlement falls within the required range of reasonableness and satisfies all criteria for preliminary approval under California law.

II. BRIEF STATEMENT OF FACTUAL ALLEGATIONS AND CLAIMS

Plaintiff worked for OneWest as a non-exempt Systems Analyst from March 2009 to May 2015. (Patel Decl. ¶ 2.) Shortly after Plaintiff's employment ended, OneWest was acquired by CIT Bank, N.A. (Curtis Decl. ¶ 12, Ex. 6.) CIT Bank took over the employment of all OneWest's employees on January 1, 2016. (*Id.*) While OneWest operated retail bank branches throughout Southern California during Plaintiff's employment, it also employed employees at its non-branch locations. This lawsuit seeks approval of a settlement class comprised of 504 non-exempt employees who worked at non-branch locations. A similar class action settlement on behalf of employees at branch locations (*Rickerd et al. v. OneWest et al.*, BC562538) was

approved by Department 308 of this Court earlier this year.

Throughout the relevant period, OneWest required its non-exempt employees to record their worktime on an internet-based timekeeping system, called eTIME. (Curtis Decl. ¶ 11, Exs. 11 and 13.) In this lawsuit, Plaintiff alleges that OneWest violated numerous Labor Code sections by requiring its non-exempt employees to record their worktime on eTIME because that necessitated their performing several minutes of uncompensated work each day. (Complaint ¶¶ 1; 10.) Employees had to boot up their computers and then go to the eTIME website, log into the website with a username and password and navigate to the page where they would click a button that would time stamp the beginning of their work time. (Patel Decl. ¶ 3; Curtis Decl. Ex. 13.) Based on Plaintiff's investigation into this case, it is reasonable to assume for settlement purposes that Class Members worked approximately 20 minutes per week of uncompensated time associated with logging in and out of their computers. (See Curtis Decl. ¶ 18.) This breaks down to three minutes of worktime each day before employees could reach the eTIME timestamp to clock in and one minute after clocking out to log out of or shut down their computers. (*Id.*)

As a result of OneWest's timekeeping practice, Plaintiff claims that OneWest violated the Labor Code by failing to pay regular and overtime wages due (§§ 510, 558, 1182.12, 1194, 1194.2, 1197, 1197.1 and 1198), failing to provide timely meal periods (§§ 226.7, 512, and 558), failing to provide accurate wage statements or keep accurate pay records (§§ 226(a), 1174, and 1174.5), and failing to pay all wages due at termination (§§ 201, 202 and 203). Plaintiff also alleges a derivative claim under Business and Professions Code section 17200.

III. THE PRECURSOR ACTION AND MEDIATION

Plaintiff originally filed a lawsuit alleging the above Labor Code violations against OneWest through a single cause of action under the Private Attorneys General Act (PAGA). (Curtis Decl. ¶ 13; Ex. 7) That matter was Case No. BC595033, which was in Department 42, before the Honorable Holly E. Kendig. (*Id.*)

While Case No. BC595033 was pending, the parties began settlement negotiations in a mediation on July 26, 2016, with Lisa Klerman. (*Id.* at ¶ 14.) The parties continued to negotiate with the Ms. Klerman's assistance until reaching an agreement in principal on October 24, 2016.

During the parties' settlement negotiations for the 504 alleged aggrieved employees under Plaintiff's PAGA claim, the discussion evolved and a settlement agreement was reached that also included class claims with a four-year statute of limitations for that group of employees. Department 42, however, instructed the parties that they s dismiss Case No. BC595033 and file a class action in order to get approval of the class claims on which their settlement was based. (*Id.* at ¶ 15; Ex. 8.) Plaintiff accordingly dismissed the precursor action, filed this lawsuit and now seeks approval of the parties' settlement.

IV. THE RICKERD ACTION

Plaintiffs Melissa Rickerd and Farinaz Pirshirazi filed an action similar to this one against OneWest on October 31, 2014, but on behalf of branch employees, instead of the employees who worked at non-branch locations whom Plaintiff here seeks to represent. The *Rickerd* action included the same Labor Code violations alleged here, plus claims for failure to provide rest periods, failure to provide reporting time pay and a claim that OneWest improperly calculated their regular rates of pay. (Curtis Decl. Ex. 9, ¶ 58, 73-78, and 95-99; Ex. 9, pp. 4, 6.) The *Rickerd* plaintiffs' off-the-clock claim included the time-clock claim asserted in this action and also alleged that OneWest's opening and closing procedures at its branches required employees to work off-the-clock additional time for things like mandatory security sweeps. (*Id.* at Ex. 8, ¶ 56.)

The *Rickerd* action was originally filed as only a single PAGA claim, but as happened here, the settlement negotiations evolved to include a class settlement. (*Id.* at ¶ 16; Ex. 9.) After the *Rickerd* plaintiffs filed their motion for preliminary approval of that settlement and stipulation to file a second amended complaint adding class claims, Department 31 of this Court, before the Honorable Samantha P. Jessner, ordered the parties to submit Complex Case Questionnaires to the Complex Court at Central Civil West. (*Id.* at ¶ 16.) The *Rickerd* case was then transferred to Department 308, before the Honorable Ann I. Jones, who granted the motion for preliminary approval of the settlement on September 2, 2016 and final approval on January 11, 2017. (*Id.* at ¶ 16; Ex. 10.) Under the settlement, class counsel in *Rickerd* received 33% of the settlement sum as its fees and each of the plaintiffs received a $10,000 enhancement. (*Id.* at Ex. 10, p. 3.)

In order to protect the potential recovery of Plaintiff and the employees she seeks to represent, Plaintiff's counsel spent considerable efforts trying to intervene in the *Rickerd* action, including filing an appeal of Department 308's denial of its motion to intervene. Part of the consideration for the settlement sum in this case is Plaintiff's agreement to dismiss her appeal in the *Rickerd* action. (Curtis Decl. ¶ 17; Ex. 1, ¶ 30.)

V. THE SETTLEMENT

OneWest has agreed to pay $420,000 plus its share of any payroll taxes[1] into a Qualified Settlement Account. The Agreement permits certain deductions from this common settlement fund for attorneys' fees (no more than $140,000), actual litigation costs (no more than $16,000), claims administration costs (estimated to be $7,000), PAGA ($12,000)[2], and an enhancement payment to Plaintiff (no more than $10,000). Assuming the Court approves all of the deductions, a net amount of $235,000 will be distributed to the 504 members of the Class. That amount will be divided by the aggregate total number of workweeks worked by all Class Members, 82,534, resulting in the "Workweek Value" of 2.85, which will then be multiplied by the Class Members' number of workweeks to determine their individual recoveries under the settlement. (Curtis Decl. ¶ 24; Ex. 1, ¶38; Trembley Decl. ¶ 17.)

Class Members will receive notice of the Settlement and the opportunity to opt-out or

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[1] These payroll taxes (at least with respect to Social Security) benefit the class. The amount of money an employer contributes to Social Security on behalf of an employee correlates with the amount of money the employee eventually receives from Social Security. *See,* SOCIAL SECURITY, UNDERSTANDING THE BENEFITS (2015) at 8-9 (http://www.ssa.gov/pubs/EN-05-10024.pdf). The payroll tax will be determined by the Claims Administrator based on OneWest's payroll data. Plaintiff will inform the Court of an estimate of this amount in her motion for Final Approval.

[2] The allocation to the PAGA penalties is actually $16,000 but pursuant to ¶ 35 of the Settlement Agreement, 75% of that is sent to the LWDA with the remaining $4,000 distributed pro rata to the class members as part of the Net Settlement Amount, so the deducted amount identified above is that sent to the LWDA. The $16,000 allocation is 3.8% of the settlement sum, which is considerably more than allocations in other approved settlements. *See, e.g., Nordstrom Commission Cases* (2010) 186 Cal.App.4th 576, 581 (upholding a class action/PAGA settlement that allocated zero funds to the PAGA claims); *Franco v. Ruiz Food Products, Inc.* (E.D. Cal. 2012) 2012 WL 5941801 (approving PAGA allocation of $10,000 against a settlement fund of $2.5 million (.4 percent)); *Garcia v. Gordon Trucking, Inc.* (E.D. Cal. 2012) 2012 WL 5364575 (approving PAGA allocation of $10,000 against a settlement fund of $3.7 million (.3 percent)); *Chu v. Wells Fargo Investments, LLC* (N.D. Cal. 2011) 2011 WL 672645 (approving PAGA allocation of $10,000 against a settlement fund of 6.9 million (.1 percent)). Plaintiff has submitted a copy of this settlement to the LWDA. (Curtis Decl. ¶ 35.)

object. (Curtis Decl. Ex. 1 at ¶¶ 44-47.) If the settlement is finally approved, those eligible class members who do not opt-out will receive a settlement award via check. Class members need not submit a claim form to receive their awards. The average award will be $467.[3]

VI. ARGUMENT

A. Preliminary Certification of the Class Is Appropriate for Settlement Purposes

1. Legal Standard for Class Certification

California public policy favors the settlement of class actions. *Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589. This Court is authorized to preliminarily certify a class for settlement purposes. CRC 3.769(d). Approval occurs in two steps: (1) an early "preliminary" review and (2) a subsequent "final" review after notice of the settlement has been distributed to the class members to provide them with the opportunity to object. CRC 3.769(c)-(g); *In re Cellphone Termination Fee Cases* (2010) 180 Cal.App.4th 1110, 1118.

The parties here have stipulated to the Class, which is specifically identified in the Settlement Agreement (See Curtis Decl. Ex. 1 at ¶¶ 6 and 7, and Proposed Order).

As discussed below, the Class is (1) ascertainable and sufficiently numerous, (2) with a well-defined community of interest, and (3) there are substantial benefits that render proceeding as a class superior to the alternatives. See *Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 372; see also *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, 1807 (courts should apply a lesser standard of certification scrutiny for settlement cases).

2. There Is an Ascertainable and Sufficiently Numerous Class

The parties have identified a total of 504 class members who worked for OneWest at a non-branch location between September 18, 2014 and December 31, 2015. The class size flows from the PAGA complaint and has been concretely defined by OneWest's records so it is ascertainable. Classes with as few as nine members have been held to meet the numerosity requirement. *Henderson v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213, 1223. The 504 here plainly meet that requirement.

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[3] This amount is approximate and subject to change based on the final payroll data and the Court's final order with respect to deductions.

3. There Is a Well–Defined Community of Interest and Substantial Benefits to Proceeding as a Class

A class must also have a well-defined community of interest. This typically depends on whether common questions of law or fact predominate. *Martinez*, 231 Cal.App.4th at 372. "The certification question is essentially a procedural one that examines whether the theory of recovery advanced by the proponents of certification is, as an analytic matter, likely to prove amenable to class treatment. A certification motion does not ask whether an action is legally or factually meritorious, but rather whether the common issues it presents are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and the litigants." *Id.* (citations and quotations omitted).

Patel's theory of this case is that OneWest required Class Members to record their worktime in eTIME, which deprived them of compensation each day. Each of the alleged Labor Code violations flows from this common theory. Defendant, of course, disputes this claim. Nevertheless, Patel's theory of this case raises a number of common questions justifying class certification for settlement purposes, including:

1. Was eTIME capable of capturing all compensable worktime?

2. Is the three minutes it takes non-exempt employees to log into their computers, then go to the eTIME website, log into the eTIME website with a username and password and navigate to the page where they would click a button that would time stamp the beginning of work, compensable worktime under California law?[4]

3. Is the time it takes employees to shut down or log out and lock their computers after clocking out in eTIME compensable worktime under California law?

4. Does OneWest's policy directing employees to "request the supervisor to make necessary changes to the employee's time entries to reflect accurate time worked" comply with its obligations under the Labor Code to pay for all time worked?

5. Does the *de minimis* doctrine bar the claims for uncompensated worktime?

6. Does the failure to capture the worktime before clocking in on eTIME cause meal periods that would otherwise be timely to become untimely in violation of Labor Code section 226.7?

[4] Exhibit 13 to the Curtis Declaration shows the screens employees had to navigate to clock in.

These questions are subject to common proof and argument. OneWest admits it required all Class Members to record their time through eTIME. (Curtis Decl. Ex. 11.) Its policy directing employees to seek edits of their time entries also applies to all Class Members. (*Id.* at Ex. 12.) Whether OneWest's time-recording practice complies with or violates the Labor Code will be determined uniformly for the entire class.

4. Patel's Claims Are Typical and She Is an Adequate Representative

"Typicality refers to the nature of the claim or defense of the class representative, and not the specific facts from which it arose or the relief sought." *Martinez*, 231 Cal.App.4th at 372. Accordingly, "representative claims are 'typical' if they are reasonably co-extensive with those of the absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.* (1998) 150 F.3d 1011, 1020. Here, Patel worked as a non-exempt employee at non-branch locations and, like the rest of the Class, made her time entries in eTIME each workday. The Class Members' claims are the same as hers, irrespective of what specific position they held. See *Hartman v. Duffey*, 19 F.3d 1459, 1471 (D.C. Cir. 1994) (permitting class certification of different job categories where illegal conduct is the same).

The "adequacy of representation component of the community of interest requirement" only "comes into play when the party opposing certification brings forth evidence of widespread antagonism to the class suit." *Martinez*, 231 Cal.App.4th at 375-76; NEWBERG ON CLASS ACTIONS § 3.58 (5th ed. 2016). There is no evidence of antagonism here.

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For the above reasons, the Court should preliminarily certify the proposed class for settlement purposes.

B. The Proposed Settlement Should Be Preliminarily Approved

Rule of Court 3.769(c) requires preliminary approval of a class action settlement. In determining whether to grant preliminary approval, courts consider whether the settlement: (1) is the product of serious, informed, non-collusive negotiations; (2) has no obvious deficiencies; (3) does not improperly grant preferential treatment to class representatives or segments of the class; and (4) falls within the range of possible approval. *In re Tableware Antitrust Litigation* (N.D.

Cal. 2007) 484 F.Supp.2d 1078, 1080.

Moreover, because parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation, courts generally favor approval of settlement rather than continuation of litigation. *In re Pac Enters Sec. Litig.* (9th Cir. 1995) 47 F.3d 373, 378. "Due regard should be given to what is otherwise a private consensual agreement between the parties. The inquiry '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.' 'Ultimately, the [trial] court's determination is nothing more than 'an amalgam of delicate balancing, gross approximations, and rough justice.'" *Dunk, supra,* 48 Cal.App.4th at 1801 (citations omitted).

1. The Settlement Is the Product of Serious, Informed, Non-collusive Negotiations

"[W]hat transpires in settlement negotiations is highly relevant to the assessment of a proposed settlement's fairness." *State of California v. Levi Strauss & Co*. (1986) 41 Cal.3d 460, 482. The settlement in this case was reached after significant investigation by counsel, significant information exchange (through informal exchanges, exchanges for mediation and through formal discovery), the review and analysis of OneWest's policies and related documents, the creation of damage and recovery models, a mediation, and significant subsequent negotiation over the form of the agreement. (Curtis Decl. ¶¶ 14, 18.) Plaintiff's counsel had more than sufficient information to make a considered judgment as to the value of the case. Mediator Lisa Klerman's assistance in helping the parties to reach the settlement shows the negotiations meet this standard. *Dunk, supra,* 48 Cal.App.4th at 1802–03 (noting significance of an experienced and well-respected mediator recommending the settlement); *D'Amato v. Deutsche Bank* (2d Cir. 2001) 236 F.3d 78, 85 ("mediator's involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure."). There is no collusion here.

2. The Settlement Agreement Has No Obvious Deficiencies

The $420,000 settlement (plus payroll taxes) has no obvious deficiencies. The settlement

amount is non-reversionary. *E.g., Minor v. FedEx Office & Print Services, Inc.* (N.D. Cal. 2013) 2013 WL 503268 *4 ("settlement agreements containing reversionary clauses often raise concerns about whether the settlement is in the best interests of the class.") It also does not present any "hot button indicators," such as a coupon settlement or *cy pres* relief. See Curtis Decl. ¶ 32, Ex. 16 [B. Rothstein & T. Willging, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES ("Pocket Guide")] at 17-22 (3rd Ed. 2010). The settlement permits a single $10,000 enhancement to Patel, which amount is regularly approved. The settlement permits Patel's counsel to seek a fee award of up to $140,000 –less than 33% of the monetary settlement – which is within the reasonable range and which will be supported by an independent fee application. *Chavez v. Netflix* (2008) 162 Cal.App.4th 43, 65 n. 11 ("Empirical studies show that, regardless of whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.")[5] The proposed notice to the class is detailed and clearly explains to class members their options with respect to the settlement. And finally, the release is tailored to the claims that were or could have been raised in this case given the operative facts. (Curtis Decl., Ex. 1 at ¶ 22.)

3. The Settlement Agreement Does Not Grant Preferential Treatment

Plaintiff will receive a settlement award using the same formula as all the other class members. She also requests an enhancement, but that does not constitute preferential treatment. *Harris v. Vector Marketing Corp.* (N.D. Cal. 2011) 2011 WL 1627973, *9.

"[I]t is established that named plaintiffs are eligible for reasonable incentive payments to compensate them for the expense or risk they have incurred in conferring a benefit on other members of the class." *Munoz,* 186 Cal.App.4th at 412; accord *In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1393 (affirming award of $10,000 to each of the four class representatives). An incentive award is appropriate where, as here, the "class representatives

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[5] The reasonableness of the requested fees is further supported by CIT's modifying eTIME when it took over employment on January 1, 2016, which was only three and a half months after Plaintiff filed the precursor lawsuit. (Curtis Decl. ¶ 33.) Employees can now personally edit their time entries instead of requesting their supervisors to do so. This gives employees a better opportunity to receive compensation for their worktime that eTIME does not capture. California law endorses a catalyst theory for recovery of attorneys' fees under these types of circumstances. *Graham v. Daimler Chrysler* (2004) 34 Cal.4th 553; *Tipton-Whittington v. City of Los Angeles* (2004) 34 Cal.4th 604.

remained fully involved and expended considerable time and energy during the course of the litigation" and where they "released their actual damages claims as part of the settlement." *Schaffer v. Litton Loan Servicing, LP* (C.D. Cal., Nov. 13, 2012) 2012 WL 10274679, at *19-20. As discussed in Patel's declaration, she undertook considerable time and risk. And not only did Plaintiff agree to a general release, she was aware of the possibility that she could have maximized her personal recovery by resolving her individual claims and she chose to seek only a class resolution that would benefit her former coworkers. (Curtis Decl., ¶ 34; Ex. 1 at ¶ 63(b).)

Because the settlement does not improperly grant preferential treatment to class representatives or segments of the class, this criteria has been met.

4. <u>The Settlement Falls within the Range of Possible Approval</u>

At the preliminary approval stage, the Court "need only determine whether the proposed settlement falls within the range of possible approval," meaning what could be found to be "fair, adequate, and reasonable." *Williams v. Costco Wholesale Corp.* (S.D. Cal. 2010) 2010 WL 761122, *5; *Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1276; *North County Contractor's Assn., Inc. v. Touchstone Ins. Services* (1994) 27 Cal.App.4th 1085, 1089-90. In making this determination, courts should consider "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial [and] the amount offered in settlement…" *Kullar v. Foot Locker Retail, Inc*. (2008) 168 Cal.App.4th 116, 128.

Of course, the fairness determination does not depend on a mathematical equation yielding a particularized sum. *In re Global Crossing Securities and ERISA Litigation* (S.D.N.Y. 2004) 225 F.R.D. 436, 461. There is no reason "a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *City of Detroit v. Grinnell Corp*. (2d Cir. 1974) 495 F.2d 448, 455. "[I]t is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242. A judge's "duty in a class action settlement situation [is] to estimate

the *litigation value* [not the undiscounted, pie-in-the-sky value] of the claims of the class and determine whether the settlement is a reasonable approximation of that value." *Mirfashihi v. Fleet Mort. Corp.* (7th Cir. 2004) 356 F.3d 781, 786 (emphasis added). Moreover, it is the Class's estimated compensatory damages that should be weighed against the value received by the settlement. *See, e.g., Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 964 (noting that courts determine the fairness of class action settlement based on how it compensates for past injuries). To consider penalties or other punitive measures that could result from the alleged claim, presupposes that the plaintiff prevails at the end of trial, which undercuts the point of a negotiated resolution where defendants do not admit liability. See *Id.*

Here, Plaintiff values the *undiscounted* compensatory damages of the Class at $1,339,645, or an average of $2,658 per Class Member. (Trembley Decl. ¶ 15). Assuming that the Court approves the Settlement with all deductions, the total average *net* recovery for the Class Members will be $467. (*Id.* at ¶ 16). This is a recovery of 18 cents on the compensatory damages dollar. (*Id.* at ¶ 18). And Class Members on average will receive 31 cents on the dollar based on the Gross Settlement Amount of $420,000.[6] (*Id.*) This is a good settlement in light of (among other things) the significant risks associated with this case. (Curtis Decl. ¶¶ 24-31).

a. Risk to the Class in Proceeding

Two considerable risks in this case are the *de minimis* doctrine and the potential for individualized issues.

All of the alleged claims are based on Plaintiff's theory that Class Members' time at work before and after making their time entries in eTIME is compensable. If the case continues, OneWest will request this Court to rule that the alleged time is not compensable under the *de minimis* doctrine. Defendant argues this doctrine applies to California wage claims (*Gillings v. Time Warner Cable LLC* (9th Cir. 2014) 583 F. App'x 712, 714; *Gomez v. Lincare, Inc.* (2009) 173 Cal.App.4th 508, 527) and application of the doctrine depends on three factors: (1) the

[6] It is appropriate to consider the gross award (*before* deductions) in comparing the litigation value against the settlement award. Among other things, it is appropriate to pay fees out of a common fund, even in a fee-shifting case, "to avoid the unjust enrichment of those who benefit from the fund that is created, protected, or increased by litigation and who otherwise bear none of the litigation costs." *Sobel v. Hertz Corporation* (D. Nev. 2014) 2014 WL 5063397, *5.

practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work. *Rutti v. Lojack Corp., Inc.* (9th Cir. 2010) 596 F.3d 1046, 1058-59. Some courts have ruled that time less than 10 minutes is *de minimis.* See, e.g. *Lindow v. United States* (9th Cir.1984) 738 F.2d 1057, 1062; *Rutti,* 596 F.3d at 1056. Plaintiff contends there is no *per se* rule and that a proper application of the factors shows the time at issue here is compensable, but OneWest argues that because computer boot up times vary there is high practical administrative difficulty of recording the additional time, and that instructing its employees to request edits when needed was the best solution.

If the case proceeds, OneWest would also argue that its policies necessitate individualized inquiries. OneWest's timekeeping policy states that: "non-exempt employees must promptly request the supervisor to make necessary changes to the employee's time entries to reflect accurate time worked and accurate unpaid periods of time. Work time includes, for example, time spent waiting to bring up a computer to log in." (Curtis Decl. Ex. 12.) OneWest will contend that individual trials are required for each class member to determine whether they requested changes when eTIME did not capture all their worktime and if not, why not.[7] Further, OneWest will argue that its policy that "[a]n employee's meal period must begin no later than the completion of the 5th hour of work. For example, if the workday starts at 8:00 a.m., the meal period must begin no later than 1:00 p.m" (*Id.*), complies with the timing requirements set in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1041. While Plaintiff could offer evidence of meal periods that become untimely when the time eTIME failed to capture at the beginning of shifts is added, she may need to prove that eTIME constitutes a uniform practice to violate OneWest's written meal period policy in order to prevail. See *Campbell v. Best Buy Stores, L.P.* (C.D. Cal., Sept. 20, 2013) 2013 WL 5302217, at *11 (applying *Brinker* to deny certification of meal claim where evidence did "not show … there was a uniform, consistent 'policy to violate the policy.'")

[7] OneWest will also argue the PAGA claim is unmanageable for the same reasons. See e.g. *Bowers v. First Student, Inc.* (C.D. Cal., Apr. 23, 2015) 2015 WL 1862914, at *4.

Accordingly, the *de minimis* doctrine and potential individual issues increase the risk of this case.

b. The Settlement Provides the Class Members Here a Better Deal than Class Members Received in Comparable Litigation

Courts also consider comparable settlement agreements when assessing a settlement. See Curtis Decl. Ex. 16, Pocket Guide at 13-14; *Lazarin v. Pro Unlimited, Inc.* (N.D. Cal. 2013) 2013 WL 3541217, *8 (relying on prior fee awards in similar cases in assessing the reasonableness of fee request).

The most obvious comparator settlement here is the *Rickerd* action. In *Rickerd*, the average class member will receive $600. (Curtis Decl. Ex. 10, p. 3.) While this is somewhat more than the $467 the average class member will receive here, the settling class members in the *Rickerd* action are releasing far broader claims. Among other things, the *Rickerd* action asserted as its most valuable claim, a rest period claim that class counsel valued at up to $350,000. (*Id.* at p. 4.) The *Rickerd* action also asserted claims for unpaid reporting time pay and unreimbursed business expenses. (*Id.* at p. 6.) There are no such claims in this action. And while both cases include claims for off-the-clock work, the theories of recovery asserted in *Rickerd* are much broader. The time spent using eTIME is only one part of the work branch employees have to perform as part of the opening and closing procedures. (Curtis Decl. Ex. 9 at ¶ 56.) Unlike the non-branch employees covered in this case, branch location employees "were required to report to work but were not permitted to clock in until mandatory security sweeps of their retail branches were completed" and they also had to work off the clock to complete "the required closing duties." (*Id.*) Finally, this case does not include the claim in *Rickerd* that OneWest did not include its non-discretionary incentive payments when calculating regular rates of pay. (*Id.* at ¶ 58.)

In sum, the claims asserted and released in *Rickerd* are considerably broader than those alleged and released in this action, but the class members here are receiving more than three quarters of the recovery by the class members in *Rickerd.*

A second comparator is *Gillings v. Time Warner,* 583 F. App'x 712. There the plaintiff alleged a claim related to an electronic time keeping system's depriving employees of compensation—like alleged in this action—and an illegal rounding of time-entries claim. (Curtis Decl. Ex. 14, p. 8.) When the parties settled, the plaintiff estimated the value of the claims to be $3,155,571, approximately evenly split between the two claims. (*Id.* at pp. 8-9.) The average class member would receive $510 under the settlement. (*Id.* at p. 5.) Based on this valuation, the district court approved a claims-made settlement in which Time Warner agreed to pay out a minimum of $519,743. (*Id.* at p. 5; Ex. 15.) That means the *Gillings* court approved the settlement in which Time Warner agreed to pay out a net 16 cents on the dollar of the plaintiffs' valuation of the claims. The Class Members in this action do better by receiving a net of 18 cents on the dollar. Moreover, the settlement in this action obtains Class Members on average nearly as much as the average recovery approved in *Gillings* ($467 compared to $510) and this case only has a time-clock claim.[8]

As explained further in the Curtis Declaration, and given the risks and uncertainties associated with continued litigation, including the substantial possibility that class certification would be denied, the Settlement Agreement falls well within the range of possible approval.

C. Notice to the Class

In order to protect the rights of absent class members, the Court must provide the best practical notice to them of a potential settlement. *Kass v. Young* (1977) 67 Cal.App.3d 100, 106.

The proposed notice meets each of the requirements set forth in California Rule of Court 3.766(d). (Curtis Decl. Ex. 2) First, the notice will be directly mailed to each class member, based on the contact information in Defendant's possession, as well as a check of the National Change of Address Database. Second, the notice includes a brief explanation of the case, and refers the class members to Plaintiff's counsel's website, which will include a dedicated section if they have any questions or seek more information. See CRC 3.766(d)(1). Third, the notice

[8] While Plaintiff believes the comparison to these two cases shows the settlement falls within the range of possible approval, she can also provide the Court with citations to cases where the Los Angeles Superior Court approved settlements in which the average class member received less than here and the representative plaintiffs received the same or greater enhancement payments.

permits class members to opt-out of the settlement and sets forth the procedure for doing so. CRC 3.766(d)(2)-(3). Fourth, the notice states that the settlement and resulting judgment will bind them if they do not opt-out. CRC 3.766(d)(4). Fifth, the notice provides class members with the ability and procedure for objecting to the settlement.

D. Proposed Order and Schedule

Finally, filed with this motion is a proposed order that includes a proposed schedule for major settlement-related events in this case, including a final fairness hearing. The proposed schedule assumes that preliminary and final approval are granted during or promptly following the hearing on this motion.

VII. CONCLUSION

Based on the foregoing, Plaintiff respectfully moves this Court to enter the [Proposed] Preliminary Approval order submitted with this motion.

Dated: May 31, 2017

BAKER CURTIS & SCHWARTZ, P.C.

By: ______________________
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