

Larry W. Lee (State Bar No. 228175)
Kwanporn “Mai” Tulyathan (State Bar No. 316704)
DIVERSITY LAW GROUP, P.C.
515 S. Figueroa Street, Suite 1250
Los Angeles, CA 90071
(213) 488-6555
(213) 488-6554 facsimile

William L. Marder (State Bar No. 170131)
Polaris Law Group LLP
501 San Benito Street, Suite 200
Hollister, CA 95023
(831) 531-4214
(831) 634-0333 facsimile

Attorneys for Plaintiff, the Class, and Aggrieved Employees

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SONOMA**

FAHEEM KHAN, as an individual and on
behalf of all others similarly situated,

Plaintiffs,

vs.

AMY’S KITCHEN, INC., a California
corporation; and DOES 1 through 50,
inclusive,

Defendants.

Case No.: SCV-266127

(Assigned to the Hon. Arthur A. Wick,
Courtroom 17)

**PLAINTIFF’S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY APPROVAL
OF CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: TBD

Time: TBD

Dept.: 17

Complaint Filed: March 4, 2020

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on a date to be determined by the Clerk, or as soon
3 thereafter as the matter may be heard before the Honorable Arthur A. Wick in Department 17 of
4 the Superior Court of the State of California, County of Sonoma, located at 3055 Cleveland
5 Avenue, Santa Rosa, California 95403, Plaintiff Faheem Khan (“Plaintiff”) will and hereby does
6 move this Court for the following relief with respect to the Joint Stipulation of Class Action
7 Settlement (“Stipulation” or “Settlement Agreement”) entered into by Plaintiff and Defendant
8 Amy’s Kitchen, Inc. (“Defendant”) (together with Plaintiff, the “Parties”):

9 1. That the Court approve the Stipulation referenced above;

10 2. That the Court conditionally certify the following Class for settlement purposes
11 only: all current and former non-exempt employees of Defendant in the State of California
12 who were paid shift differential wages at any time during the period of March 4, 2019, through
13 April 12, 2020;

14 3. That Plaintiff be appointed as the Class Representative, and that Larry W. Lee and
15 Kwanporn “Mai” Tulyathan of Diversity Law Group, P.C., and William L. Marder of Polaris
16 Law Group LLP, be appointed as Class Counsel;

17 4. That the Court preliminarily approve the Stipulation and the total Gross
18 Settlement Amount of Three Hundred Ninety Thousand Dollars and Zero Cents (\$390,000.00);

19 5. That the Court finds on a preliminary basis that the Stipulation appears to be
20 within the range of reasonableness of a settlement, including the amount of the PAGA penalties,
21 class representative enhancement payment, attorneys’ fees and costs, settlement administration
22 fees, and the allocation of payments to Settlement Class Members, that could ultimately be given
23 final approval by this Court;

24 6. That the Court approve the mailing of the proposed “Notice of Class Action
25 Settlement” to be sent to Settlement Class Members;

26 7. That the Court appoint Phoenix Settlement Administrators as the Claims
27 Administrator; and

28 8. That the Court schedule the matter for a Final Fairness and Final Approval

1 hearing.

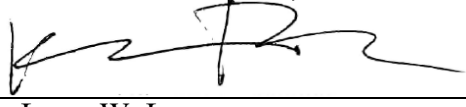
2 This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which
3 provides for court approval of the settlement of a purported class action and allows the Court to
4 preliminarily certify a class for settlement purposes.

5 The basis for this Motion, filed without any opposition from Defendant, is that the
6 proposed settlement is fair, adequate, and reasonable, and the procedures proposed by the Parties
7 are adequate to ensure the opportunity of Class Members to participate in, opt-out of, or object to
8 the settlement.

9 This Motion will be based on the attached Memorandum of Points and Authorities, the
10 Settlement Agreement and the proposed Class Notice, and the supporting Declarations of Larry
11 W. Lee, Mai Tulyathan, William L. Marder, and Plaintiff Faheem Khan, upon the oral arguments
12 of counsel (should there be any), and on the complete records and file herein.

13
14 DATED: August 25, 2020

DIVERSITY LAW GROUP, P.C.

15
16 By: 

Larry W. Lee

Mai Tulyathan

Attorneys for Plaintiff, the Class, and Aggrieved
Employees

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	7
II. PROCEDURAL HISTORY	8
A. Proposed Class Definition	11
B. Settlement Terms and Evaluation	11
1. Amount and Manner of Distribution of the Compensation to be Provided to Class Members Including the Amount, or an Estimate, of What Each Class Member Will Receive	15
2. Whether, and Under What Circumstances, Amounts Available for Payment in Settlement Might Not Be Paid to Class Members or Might Revert to the Defendant....	15
3. Scope of the Release of Class Members' Claims	15
4. Tax Treatment of Settlement Amounts.....	16
5. Affirmative Obligations to be Undertaken by Class Members or Class Counsel and the Reasons for Any Such Obligations.....	16
C. Notice to Class Members	17
D. Typicality and Adequacy of Representation	17
1. Class Representative's Claims are Typical of the Class	17
2. Class Counsel Has Adequately Represented the Class and Has Experience with Wage and Hour Class Actions	18
E. Costs and Fees	18
1. Attorneys' Fees and Costs	18
2. Proposed Payment to the Class Representative	20
3. Class Administration Fees	21
IV. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR PRELIMINARY APPROVAL	21

TABLE OF AUTHORITIES

Page(s)

State Cases

<i>Carrington v. Starbucks Corp.</i> , 30 Cal. App. 5th 504 (2018)	12, 13
<i>City and County of San Francisco v. Sweet</i> , 12 Cal.4th 105, 110 (1995).....	19
<i>City of San Jose v. Superior Court</i> , 12 Cal. 3d 447, 460 (1974)	18
<i>Dunk v. Ford Motor Co.</i> , 48 Cal.App.4th 1794, 1803 (1996)	10
<i>Duran v. U.S. Bank Nat'l Ass'n</i> , 59 Cal. 4th 1 (2014).....	13
<i>Laffitte v. Robert Half Int'l</i> , 1 Cal.5th 480, 503(2016)	19, 20
<i>Richmond v. Dart Industries, Inc.</i> , 29 Cal. 3d 462, 473 (1981).....	17
<i>Serrano v. Priest</i> , 20 Cal. 3d 25, 34 (1977)	18, 19
<i>Stephens v. Montgomery Ward & Co.</i> , 193 Cal. App. 3d 411, 421 (1987)	18
<i>Vasquez v. Superior Court</i> , 4 Cal. 3d 800, 812-13 (1971).....	18
<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal. App. 4th 224, 240 (2001).....	10, 18

Federal Cases

<i>Bellinghausen v. Tractor Supply Co.</i> , No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015)	14
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472, 478 (1980).....	18
<i>Hammon v. Barry</i> , 752 F.Supp. 1087 (D.D.C. 1990)	11
<i>Hanlon v. Chrysler Corp.</i> 150 F.3d 1011, 1019 (1998).....	17
<i>In re Armored Car Antitrust Litig.</i> , 472 F. Supp. 1357 (N.D. Ga. 1979)	11
<i>In re Baldwin-United Corp.</i> 105 F.R.D. 475, 478 (S.D.N.Y. 1984).....	10
<i>In re Chicken Antitrust Litig.</i> , 560 F. Supp. 957, 962 (N.D. Ga. 1980).....	11
<i>In re Mego Fin. Corp. Secs. Litig.</i> 213 F.3d 454, 459 (9th Cir. 2000)	14
<i>Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.</i> , 834 F.2d 677, 682 (7th Cir. 1987)	11
<i>Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.</i> , 221 F.R.D. 523, 528 (C.D. Cal. 2004)....	11, 12
<i>Priddy v. Edelman</i> , 883 F.2d 438, 447 (6th Cir. 1989).....	11

1	<i>Sommers v. Abraham Lincoln Federal Sav. & Loan Ass’n</i> , 79 F.R.D. 571 (E.D. Pa. 1978)	11
2	<i>Steinberg v. Carey</i> , 470 F.Supp. 471 (S.D.N.Y. 1979).....	11
3	<i>Van Ba Ma v. Covidien Holding Inc.</i> , U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014) 14	
4	<i>Villegas v. J.P. Morgan Chase & Co.</i> , No. CV 09-00261 SBA EMC, 2012 WL 5878390, at *6	
5	(N.D. Cal. Nov. 21, 2012).....	14
6	<i>Vincent v. Hughes Air West, Inc.</i> , 557 F. 2d 759, 769 (9th Cir. 1997)	18, 19
7	Statutes	
8	Labor Code § 226(a)	7, 8
9	Labor Code § 226(a)(9)	7
10	Labor Code § 226(e)	12, 13
11	Labor Code § 2699(e)(2)	12
12	Labor Code § 2698 <i>et seq.</i>	passim
13	Other Authorities	
14	4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> , § 11.26 (4th ed. 2002)....	10, 11
15	4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> , § 11.24	10
16	4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> , § 11.47	12
17	Manual for Complex Litigation (Third) § 30.41	9

1 **I. INTRODUCTION**

2 This is a wage and hour class and representative Private Attorneys General Act
3 (“PAGA”) action seeking statutory and civil penalties under the California Labor Code. Plaintiff
4 Faheem Khan (“Plaintiff”) alleges that Defendant Amy’s Kitchen, Inc. (“Defendant”) failed to
5 furnish accurate itemized wage statements to its employees, in violation of Labor Code §§ 226(a)
6 and 2698, *et seq.* In particular, Plaintiff alleges that Defendant’s wage statements omit the
7 applicable hourly rates of pay and number of hours worked whenever shift differential wages
8 were paid, in violation of Labor Code § 226(a)(9). Defendant denies each, every, and all of the
9 allegations of the operative Complaint.

10 Prior to the settlement of this action, Plaintiff and Defendant (jointly referred to as the
11 “Parties”) thoroughly investigated the facts relating to the claims alleged in the operative
12 Complaint. Through informal discovery, Defendant provided necessary data related to the
13 number of employees and number of wage statements with payment for shift differential wages
14 at issue for Settlement Class Members. This data allowed Plaintiff to conduct a full analysis of
15 the claims, damages, and penalties at issue. Thereafter, the Parties participated in private
16 mediation with mediator Louis Marlin, Esq., and ultimately reached the current settlement. The
17 terms of the settlement provide that Defendant pay a Gross Settlement Amount of Three
18 Hundred Ninety Thousand Dollars (\$390,000.00), which will be distributed to the class on a
19 **non-reversionary basis**, such that the entire settlement amount will be distributed and no
20 remaining amounts will revert back to Defendant. Further, no claim forms are required. The
21 following represents the key terms of the Settlement:

- 22 • Gross Settlement Amount of \$390,000.00;
- 23 • Estimated Class of 503 individuals;
- 24 • Class Representative Enhancement Payment of up to \$10,000.00;
- 25 • Class Counsel’s attorneys’ fees of up to \$130,000.00;
- 26 • Class Counsel’s costs of up to \$15,000.00;
- 27 • Settlement Administration Costs of up to \$8,500.00;
- 28 • Payment to the Labor & Workforce Development Agency (“LWDA”) of

1 \$15,000.00 (75% of the total PAGA allocation of \$20,000.00);

- 2 • Net Settlement Amount of \$211,500.00.

3 The Parties believe that this amount is fair, adequate, and reasonable, especially given the
4 risks and uncertainty of class certification and the merits of this case. Although Plaintiff and his
5 counsel are confident that they would prevail on class certification and on the merits of his
6 claims at trial, they recognize the inherent risks involved in drawn-out litigation. Significantly,
7 there are specific risks that a class might not be certified and/or that Plaintiff could fail to
8 establish liability.

9 Based on their own independent investigation and evaluation, the Parties and their
10 respective counsel are of the opinion that the Settlement for the consideration and on the terms
11 set forth in the Joint Stipulation of Class Action Settlement¹ (the “Stipulation” or “Settlement
12 Agreement”) is fair, reasonable, and adequate and is in the best interests of Class Members and
13 Defendant in light of all known circumstances, and the expenses and risks inherent in litigation.

14 Therefore, the Parties respectfully request that the Court grant this Motion for
15 Preliminary Approval of Class Action Settlement.

16 **II. PROCEDURAL HISTORY**

17 On or about March 3, 2020, Plaintiff filed a putative class and representative action
18 complaint in the Sonoma County Superior Court. (Declaration of Mai Tulyathan (“Tulyathan
19 Decl.”) at ¶ 2.) The operative Complaint asserts causes of action for (1) violation of Labor Code
20 § 226(a), and (2) violation of the Private Attorneys General Act (“PAGA”), Labor Code § 2698,
21 *et seq.*, predicated on Defendant’s alleged violation of Labor Code § 226(a). (*Id.*) As alleged in
22 the operative Complaint, Plaintiff contends that when shift differential wages are paid to Plaintiff
23 and other non-exempt employees, the wage statements provided by Defendant failed to identify
24 the applicable hourly rates of pay and number of hours worked. (*Id.* at ¶ 3.) Rather, Plaintiff
25 alleges that the shift differential wage entries identify only a lump sum, without a breakdown as
26 to the hourly rates and hours worked. (*Id.*) As a result of such alleged violations, Plaintiff seeks
27

28

¹ Joint Stipulation of Class Action Settlement attached as Exhibit A to Declaration of Mai Tulyathan.

1 statutory and civil penalties under the Labor Code. (*See id.*)

2 After the filing of the operative Complaint, the Parties engaged in informal settlement
3 negotiations to attempt to resolve the lawsuit. (Tulyathan Decl. at ¶ 4.) The Parties
4 subsequently agreed to participate in private mediation with mediator Louis Marlin, Esq. (*Id.*)
5 In connection with the Parties' settlement discussions and in advance of the mediation,
6 Defendant provided informal data to Plaintiff, including data regarding the putative class size
7 and the number of wage statements with payment for shift differential wages, as well as
8 information regarding Defendant's pertinent wage statement policies and practices. (*Id.* at ¶ 5)
9 After thorough investigation and evaluation of the facts and claims, and as a result of the arm's
10 length negotiation, facilitated by mediator Louis Marlin, Esq., the Parties reached the current
11 Settlement. (*Id.*)

12 The Parties recognize the risk, expense, and delay in continuing litigation with the class
13 and PAGA claims, and believe the Settlement to be fair, reasonable, and adequate. (Tulyathan
14 Decl. at ¶ 7.) Accordingly, the Parties desire to settle, compromise, and discharge all disputes
15 and claims arising from or relating to the afore-referenced claims.

16 **III. DISCUSSION**

17 Any settlement of a class action lawsuit must be reviewed and approved by the Court.
18 This is done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final
19 review after notice has been distributed to the class members for their comment or objections.
20 The Manual for Complex Litigation (Third) § 30.41 states:

21 Approval of class action settlements involves a two-step process. First,
22 counsel submits the proposed terms of settlement and the court makes a
23 preliminary fairness evaluation. If the preliminary evaluation of the
24 proposed settlement does not disclose grounds to doubt its fairness or
25 other obvious deficiencies, such as unduly preferential treatment of class
26 representatives or of segments of the class, or excessive compensation for
attorneys, and appears to fall within the range of possible approval, the
court should direct that notice...be given to the class members of a formal
fairness hearing, at which arguments and evidence may be presented in
support of and in opposition to the settlement.

27 Thus, the preliminary approval by the trial court is simply a conditional finding that the
28 settlement appears to be within the range of acceptable settlements. As Professor Newberg

1 comments, “[t]he strength of the findings made by a judge at a preliminary hearing or conference
2 concerning a tentative settlement proposal may vary. The court may find that the settlement
3 proposal contains some merit, is within the range of reasonableness required for a settlement
4 offer, or is presumptively valid subject only to any objections that may be raised at a final
5 hearing.” (4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26 (4th ed.
6 2002).)

7 The procedures for the parties’ submission of a proposed settlement for preliminary
8 approval by the court also are discussed in 4 *Newberg on Class Actions*:

9 When the parties to an action reach a monetary settlement, they will
10 usually prepare and execute a joint stipulation of settlement, which is
11 submitted to the court for preliminary approval. The stipulation should set
12 forth the central terms of the agreement, including but not limited to, the
amount of settlement, form of payment, manner of determining the
effective date of settlement and any recapture clause.

13 (*Id.* at § 11.24.)

14 Here, the Parties have reached such an agreement and have submitted to this Court in
15 connection with this Motion a copy of the Stipulation fully setting forth the agreement reached
16 by the Parties. The Stipulation sets forth all terms of the agreement reached by the Parties,
17 which include, among other things, the method for calculating each Class Members’ individual
18 portion of the Settlement fund.

19 The parties also may, at the preliminary approval stage, request that the court
20 provisionally approve certification of the class for settlement purposes—conditional upon final
21 approval of the settlement. “[P]re-certification settlements are routinely approved if found to be
22 fair and reasonable.” (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 240;
23 *accord Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1803 (although the settlement was
24 reached before any “adversary certification,” the court was satisfied that it was “fair, adequate
25 and reasonable”); *In re Baldwin-United Corp.* (S.D.N.Y. 1984) 105 F.R.D. 475, 478 (“many
26 courts have employed this practice in the name of judicial efficiency in order to facilitate
27 apparently beneficial settlement proposals”).) As further explained by Professor Newberg:

28 The strength of the findings made by a judge at a preliminary hearing or
conference concerning a tentative settlement proposal...may be set out in

conditional orders granting tentative approval to the various items submitted to the court. Three basic rulings are often conditionally entered at this preliminary hearing. These conditional rulings may approve a temporary settlement class, the proposed settlement, and the class counsel's application for fees and expenses.

(4 Newberg on Class Actions, at § 11.26.)

In addition to such terms as class identification, settlement amount, and payment procedures, the Settlement Agreement reached among the Parties contains a provision pursuant to which the Parties stipulate to the Court's provisional certification of the class for the purposes of this settlement only. (*See* Stipulation at ¶ 88.)

A. Proposed Class Definition

The current settlement is being settled on behalf of "all current and former non-exempt employees of Defendant in the State of California who were paid shift differential wages at any time during the period of March 4, 2019, through April 12, 2020." (*See* Stipulation at ¶ 4.) The Class Period is defined as the period from March 4, 2019, through April 12, 2020. (*Id.* at ¶ 8.) Pursuant to the Stipulation, Defendant has represented that there are approximately 503 individuals that comprise the Class. (*Id.* at ¶ 4.)

B. Settlement Terms and Evaluation

Courts presume the absence of fraud or collusion in the negotiation of settlement unless evidence to the contrary is offered. (*Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447; *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.* (7th Cir. 1987) 834 F.2d 677, 682; *In re Chicken Antitrust Litig.* (N.D. Ga. 1980) 560 F.Supp. 957, 962.) Courts do not substitute their judgment for that of the proponents, particularly where, as here, settlement has been reached with the participation of experienced counsel familiar with the litigation. (*Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 528; *Hammon v. Barry* (D.D.C. 1990) 752 F.Supp. 1087; *Steinberg v. Carey* (S.D.N.Y. 1979) 470 F.Supp. 471; *In re Armored Car Antitrust Litig.* (N.D. Ga. 1979) 472 F.Supp. 1357; *Sommers v. Abraham Lincoln Federal Sav. & Loan Ass'n* (E.D. Pa. 1978) 79 F.R.D. 571.)

While the recommendations of counsel proposing the settlement are not conclusive, the Court can properly take them into account, particularly where, as here, they have been involved

1 in informal discovery and negotiations for some period of time, appear to be competent, have
2 experience with this type of litigation, and have exchanged substantial evidence from the
3 opposing party. (*See Newberg on Class Actions, supra*, at § 11.47; *Nat’l Rural Telecomms.*
4 *Coop.*, 221 F.R.D. at p. 528 (“[s]o long as the integrity of the arm’s length negotiation process is
5 preserved, however, a strong initial presumption of fairness attaches to the proposed
6 settlement...[citations] and ‘great weight’ is accorded to the recommendations of counsel, who
7 are most closely acquainted with the facts of the underlying litigation”).)

8 Here, both Plaintiff’s and Defendant’s counsel have a great deal of experience in wage
9 and hour class action litigation. Plaintiff’s counsel have been approved as class counsel in a
10 number of wage and hour class actions and have extensive litigation experience. (Tulyathan
11 Decl. at ¶¶ 18-22; Declaration of Larry W. Lee (“Lee Decl.”) at ¶¶ 10-13; Declaration of William
12 L. Marder (“Marder Decl.”) at ¶¶ 8-15.) Each side has apprised the other of their respective
13 factual contentions, legal theories and defenses, resulting in negotiations taking place between
14 the Parties. (Tulyathan Decl. at ¶ 6.)

15 Based on the class data provided by Defendant, Plaintiff estimated that Defendant would
16 face potential liability of up to approximately \$1.07 million for Plaintiff’s class claims if Plaintiff
17 succeeded at trial. (Tulyathan Decl. at ¶ 8.) Plaintiff was able to estimate the potential penalties
18 based on data provided by Defendant, including the number of employees in the putative class
19 and the number of wage statements with shift differential wages at issue. (*Id.*) Specifically, the
20 amount of Labor Code § 226(e) penalties is based on 11,000 deficient wage statements. (*Id.*)

21 With respect to potential liability of Plaintiff’s PAGA claims, Plaintiff estimated that
22 Defendant could face civil penalties of up to a maximum \$2.75 million if Plaintiff were
23 successful at trial. (*Id.* at ¶ 9.) However, even assuming Plaintiff ultimately prevails on his
24 PAGA claims, the Court still has discretion to reduce any PAGA penalties. Pursuant to Labor
25 Code § 2699(e)(2), the Court can decline to award PAGA penalties where “if, based on the facts
26 and circumstances of the particular case, to do otherwise, would result in an award that is unjust,
27 arbitrary and oppressive, or confiscatory.” Indeed, as shown in the Court of Appeal’s decision in
28 *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, while the plaintiff prevailed on his

1 PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%,
2 citing the employer's good faith attempt at complying with the law. (*Id.* at p. 517.) Upon
3 review, the Court of Appeal found such reduction to be proper. (*Id.* at p. 539.)

4 Although Plaintiff believes in the merits of the alleged claims and maintains that there is
5 no reason for reducing PAGA penalties, Plaintiff is aware that Defendant may raise defenses to
6 the wage statement claims and further with respect to the reduction of PAGA penalties and that it
7 could be persuasive to the Court. (Tulyathan Decl. at ¶ 11.) Thus, even if Plaintiff were to
8 successfully prove his claims at trial, there is a possibility that the Court may only award a small
9 percentage of PAGA penalties, as the Court has discretion to do so. The Gross Settlement
10 Amount was premised with this risk in mind, associated with the possibility of the Court
11 significantly reducing Plaintiff's PAGA penalties, along with other attendant risks, even if
12 Plaintiff was to prevail at trial. (*Id.*)

13 Further, Defendant raised several defenses that presented risk, including that Plaintiff
14 cannot prove "injury" under Labor Code § 226(e) as employees can determine their shift
15 differential wages by mathematical calculation.

16 Thus, the Settlement for each Settlement Class Member is fair, reasonable, and adequate,
17 given the inherent risks of litigation, including the substantial risks relative to class certification
18 and the merits of the claims, the costs of pursuing such litigation, and the risks associated with
19 the Court's discretion to reduce PAGA penalties. The Settlement is the result of extensive arm's
20 length negotiations between the Parties and their counsel and was facilitated by an experienced
21 and neutral mediator.

22 Although Plaintiff believes that a class can be certified, Plaintiff also believes in the
23 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff
24 involved in not prevailing on one or more of the causes of action or theories alleged in the
25 operative Complaint, the possibility of non-certification, and the potential for appeals.
26 (Tulyathan Decl. at ¶ 7..) These risks on class certification are compounded by the California
27 Supreme Court's holding in *Duran v. U.S. Bank Nat'l Ass'n* (2014) 59 Cal.4th 1. There, the
28 plaintiffs obtained class certification and subsequently prevailed at trial after eight years of

1 litigation, but the judgment and the certification ruling were reversed by the California Supreme
2 Court after an additional five years of litigation. The case was remanded back to superior court
3 where class certification was denied and plaintiffs' subsequent appeal also was denied.

4 Indeed, numerous courts have held that **gross** settlements approximating between only 8
5 and 25% of the defendant's potential exposure are fair and reasonable. (*See, e.g., In re Mego*
6 *Fin. Corp. Secs. Litig.* (9th Cir. 2000) 213 F.3d 454, 459 (holding that class action settlement
7 recovering 16% of potential exposure was fair and reasonable; "[i]t is well-settled law that a cash
8 settlement amounting to only a fraction of the potential recovery does not per se render the
9 settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement should
10 be assessed relative to risks of pursuing the litigation to judgment"; noting that whether the
11 settlement is fair and adequate depends on the "the difficulties in proving the case");
12 *Bellinghausen v. Tractor Supply Co.* (N.D. Cal. Mar. 20, 2015) No. 13-CV-02377-JSC, 2015
13 WL 1289342, at p.*6 (holding that class action settlement recovering between **8.5% and 25%** of
14 the defendant's potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.* (C.D. Cal.
15 2014) U.S. Dist. Ct. Case No. 8:12-cv-02161 (granting preliminary approval of wage and hour
16 class settlement which obtained **only 9.1%** of projected damages, given the risks of continued
17 litigation); *Villegas v. J.P. Morgan Chase & Co.* (N.D. Cal. Nov. 21, 2012) No. CV 09-00261
18 SBA EMC, 2012 WL 5878390, at p.*6 (holding that gross class action settlement of
19 approximately 15% of the potential recovery was fair and reasonable).) Here, the gross
20 settlement amount is fair and reasonable as it is approximately **10.2%** of the potential recovery
21 of Plaintiff's class and PAGA claims if Plaintiff were to fully succeed at trial. (Tulyathan Decl.
22 at ¶ 10.)

23 Despite the asserted fairness of the settlement terms, as set forth in the Notice of Class
24 Action Settlement ("Notice"), should any Class Member wish to pursue his or her own case for
25 the claims being released herein, each Class Member has the right to submit a request for
26 exclusion (*i.e.*, opt-out) from the settlement. (*See* Notice, attached as **Exhibit B** to Tulyathan
27 Decl., at ¶ 26, pp. 4-5.) Moreover, as set forth in the Notice, Class Members are advised of their
28 right to object to any of the terms contained in the Stipulation and attend the final approval

1 hearing. (*Id.* at pp. 5-6.)

2 **1. Amount and Manner of Distribution of the Compensation to be**
3 **Provided to Class Members Including the Amount, or an Estimate, of**
4 **What Each Class Member Will Receive**

5 The Stipulation provides for Three Hundred Ninety Thousand Dollars and Zero Cents
6 (\$390,000.00) as the Gross Settlement Amount. (*See* Stipulation at ¶ 17.) The Net Settlement
7 Amount, calculated after deduction of attorneys' fees (up to \$130,000.00), costs (up to
8 \$15,000.00), the Class Representative Enhancement Payment (up to \$10,000.00), payment to the
9 LWDA (\$15,000.00), and Settlement Administration Costs (up to \$8,500.00), is estimated to be
10 approximately \$211,500.00. (*Id.* at ¶¶ 6, 10, 19, 22, 31.) Each Participating Class Member that
11 does not opt-out of the Settlement will be awarded a portion of the Net Settlement Amount on a
12 pro-rata basis, based upon the number of wage statements each respective Participating Class
13 Member received during the Class Period that included payment for shift differential wages.
(*See* Stipulation at ¶ 44.)

14 Based thereon, on a raw average, each Participating Class Member potentially may
15 recover approximately \$420.48. (Tulyathan Decl. at ¶ 12.) The amount actually paid to each
16 Participating Class Member may increase or decrease depending on the actual number of wage
17 statements he or she received during the Class Period with payment for shift differential wages.

18 Finally, the terms of the Settlement provide that uncashed settlement payment checks
19 (upon the expiration date) shall be distributed to Legal Aid at Work, a nonprofit legal services
20 organization for low-income workers. (*See* Stipulation at ¶ 63.)

21 **2. Whether, and Under What Circumstances, Amounts Available for**
22 **Payment in Settlement Might Not Be Paid to Class Members or Might**
23 **Revert to the Defendant**

24 The Settlement is non-reversionary, meaning that none of the settlement funds will revert
25 back to Defendant. (*See* Stipulation at ¶¶ 38, 44.)

26 **3. Scope of the Release of Class Members' Claims**

27 As a condition of participating in this Settlement, Participating Class Members agree to
28 provide the following limited release:

Upon the Effective Date, all Participating Class Members, on behalf of
themselves and their heirs, executors, representatives, administrators,

1 trustees, and/or permitted assigns, hereby do and shall be deemed to have
2 fully, finally and forever release, settle relinquish, and discharge the
3 Released Parties from any and all Released Claims that accrued during the
4 Class Period.

5 (See Stipulation at ¶ 67.)

6 Participating Class Members agree to release the following claims (defined as
7 “Released Claims”) accrued during March 4, 2019, through April 12, 2020 (the “Class
8 Period”):

9 [A]ny and all claims that were alleged or reasonably could have been
10 alleged in the operative Complaint based upon the facts, legal theories,
11 or causes of actions contained therein, including but not limited to all of
12 the following claims for relief:

- 13 a. Improper and/or inaccurate wage statements; and
- 14 b. Civil penalties under the PAGA predicated on improper and/or
15 inaccurate wage statements.

16 (See Stipulation at ¶ 26.)

17 Given that the release is tailored only to claims as pled in the operative Complaint and
18 nothing more, the release is appropriately limited.

19 **4. Tax Treatment of Settlement Amounts**

20 Given that Plaintiff’s lawsuit sought penalties, the Parties have agreed that the individual
21 settlement payments to Class Members shall be classified 100% as penalties and shall be deemed
22 IRS Form 1099 income. (See Stipulation at ¶ 45.)

23 **5. Affirmative Obligations to be Undertaken by Class Members or Class 24 Counsel and the Reasons for Any Such Obligations**

25 As stated above, Class Members do not need to do anything should they wish to receive
26 their share of the settlement funds. In other words, because this is not a claims-made settlement,
27 Class Members will not be required to make a submission to participate in the settlement. No
28 claim forms are required. Thus, this substantially decreases the amount of burden each Class
Member must bear in order to receive their share of the settlement funds. If a Class Member
does not wish to take part in this Settlement or be bound by the release, the Class Member must
submit a request for exclusion. (See Stipulation at ¶¶ 57-58.)

1 **C. Notice to Class Members**

2 Should the Court grant the instant motion, Defendant will provide the Claims
3 Administrator with a list containing each Class Member’s full name, employee number, last
4 known mailing address and phone number, Social Security Number, and the number of wage
5 statements each Class Member received during the Class Period that included payment for shift
6 differential wages (“Class List and Data”) within fifteen (15) calendar days of preliminary
7 approval. (*See* Stipulation at ¶¶ 7, 52.) Upon receipt of the information and prior to mailing the
8 Notice to Class Members, the Claims Administrator shall perform a search based on the National
9 Change of Address Database for information to update and correct any known or identifiable
10 address changes. (*Id.* at ¶ 54.) Within ten (10) calendar days of receipt of the Class List and
11 Data from Defendant, the Claims Administrator will then mail the Notice out to Class Members
12 using the most current mailing address. (*Id.* at ¶ 53.) Any Notices returned to the Claims
13 Administrator as non-deliverable on or before the opt-out deadline shall be re-mailed via regular
14 First-Class U.S. mail to the forwarding address affixed thereto. (*Id.* at ¶ 56.) If no forwarding
15 address is provided, the Claims Administrator shall attempt to find the correct address using a
16 skip-trace or other search to locate the most current address to re-mail the Notice. (*Id.*)

17 As set forth in the Class Notice, Class Members will be allowed to opt out of the
18 Settlement by a certain deadline, or object to the settlement. (*See* Stipulation at ¶ 55.)

19 **D. Typicality and Adequacy of Representation**

20 **1. Class Representative’s Claims are Typical of the Class**

21 The commonality requirement is met when there are questions of law and fact common to
22 the class. (*See Hanlon v. Chrysler Corp.* (1998) 150 F.3d 1011, 1019 (“The existence of shared
23 legal issues with divergent legal factual predicates is sufficient, as is a common core of salient
24 facts couple with disparate legal remedies within the class”).) Commonality requires only that
25 some common legal or factual questions exist; the plaintiffs need not show that all issues in the
26 litigation are identical. (*See Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 473.)
27 Defendant’s conduct is central to the commonality inquiry. (*See City of San Jose v. Superior*
28 *Court* (1974) 12 Cal.3d 447, 460; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 812-13.)

Where the employer's conduct is uniformly directed at a class of employees, as Plaintiff alleges here, the class wide impact of the Defendant's policies satisfies the commonality requirement. (*See Stephens v. Montgomery Ward & Co.* (1987) 193 Cal.App.3d 411, 421.)

Plaintiff alleges that Defendant, as a matter of its corporate policy, practice, or procedure, violated the Labor Code by failing to provide accurate itemized wage statements whenever shift differential wages were paid. (Declaration of Faheem Khan ("Khan Decl.") at ¶ 3.) In other words, Plaintiff contends he was subjected to the same policy and practice as other Class Members and that his claims are typical to those of the Class.

Moreover, Plaintiff does not have any interests adverse to the Class, nor have any such issues been raised or presented. (*Id.* at ¶ 4.) Plaintiff has taken all necessary steps to represent the interests of the Class, including by providing information and documents to Plaintiff's counsel. (*Id.* at ¶ 5.) For such reasons, Plaintiff has adequately represented the Class Members and will continue to do so.

2. Class Counsel Has Adequately Represented the Class and Has Experience with Wage and Hour Class Actions

From the inception of the case, Class Counsel have zealously represented the interests of the class. The settlement was obtained for the benefit of the class, as opposed to the individual Class Representative. Further, Class Counsel have been approved as class counsel on a number of prior cases, have litigated numerous other class action cases, and are competent to represent the class. (Lee Decl. at ¶¶ 10-13; Tulyathan Decl. at ¶¶ 20-22; Marder Decl. at ¶¶ 14-15.)

E. Costs and Fees

1. Attorneys' Fees and Costs

California state and federal courts have recognized that an appropriate method for determining award of attorneys' fees is based on a percentage of the total value of benefits to Class Members by the settlement. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254; *Serrano v. Priest* (1977) 20 Cal.3d 25, 34; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *Vincent v. Hughes Air West, Inc.* (9th Cir. 1997) 557 F.2d 759, 769.) The purpose of this equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs

1 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
2 burden alone.” (*Vincent*, 557 F.2d at p. 769.)

3 The Common Fund doctrine is predicated on the principle of preventing unjust
4 enrichment. When a litigant’s efforts create or preserve a fund from which others derive
5 benefits, she may require the passive beneficiaries to compensate those who created the fund.
6 Both California state and federal courts have embraced this doctrine. (*Serrano III*, 20 Cal.3d at
7 p. 35; *Vincent*, 557 F.2d at p. 769.) Similarly, in *City and County of San Francisco v. Sweet*
8 (1995) 12 Cal.4th 105, 110, the California Supreme Court recognized that the common fund
9 doctrine has been applied “consistently in California when an action brought by one party creates
10 a fund in which other persons are entitled to share.” The reasons for applying the common fund
11 doctrine include:

12 Fairness to the successful litigant, who might otherwise receive no benefit
13 because his recovery might be consumed by the expenses; correlative
14 prevention of an unfair advantage to the others who are entitled to share in
15 the fund and who should bear their share of the burden of its recovery;
16 encouragement of the attorney for the successful litigant who will be more
willing to undertake and diligently prosecute proper litigation for the
protection or recovery of the fund if he is assured that he will be properly
and directly compensated should his efforts be successful.

17 (*Id.*)

18 Indeed, in 2016, the California Supreme Court has also now held that the award of
19 attorneys’ fees in common fund wage and hour class action settlements should start with the
20 percentage method. (*See Laffitte v. Robert Half Int’l* (2016) 1 Cal.5th 480, 503 (“We join the
21 overwhelming majority of federal and state courts in holding that when class action litigation
22 establishes a monetary fund for the benefit of the class members, and the trial court in its
23 equitable powers awards class counsel a fee out of that fund, the court may determine the amount
24 of a reasonable fee by choosing an appropriate percentage of the fund created”).)

25 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3
26 percent of the fund. (*Laffitte*, 1 Cal.5th at p. 506.) And this was based on a lodestar amount that
27 required a multiplier of 2.13. (*Id.* at p. 487.) As the Court held, only when the multiplier is
28 “extraordinarily high or low [should] the trial court [] consider whether the percentage method

1 should be adjusted so as to bring the imputed multiplier within a justifiable range.” (*Id.* at p.
2 505.)

3 The Parties have agreed to a payment of a maximum of one-third of the Gross Settlement
4 Amount, or \$130,000.00, for payment to Class Counsel as attorneys’ fees. (*See* Stipulation at ¶
5 40.) The Parties have agreed to a payment of the foregoing attorneys’ fees and, thus, this
6 payment should be presumed to be fair. Further, the Parties have agreed to reimbursement of
7 Class Counsel’s litigation costs up to \$15,000.00. (*Id.*) Class Counsel have, at their own risk,
8 expended costs, for example, to file this instant action, effect service of process, participate in
9 mediation, and have paid other litigation-related costs.

10 Based on the foregoing, the court should preliminarily approve the attorney’s fees and
11 costs being requested by the Parties.

12 **2. Proposed Payment to the Class Representative**

13 Class Representative Faheem Khan requests a modest enhancement of \$10,000.00. (*See*
14 Settlement Agreement at ¶ 41.) The Class Representative met and conferred with Class Counsel
15 on several occasions to discuss the case, provided documents and information to Class Counsel,
16 and reviewed the Settlement Agreement. As part of his duties as the Class Representative,
17 Plaintiff provided invaluable information, evidence, and documents that resulted in this
18 Settlement. (Khan Decl. ¶ 5.) In addition to the invaluable services that Plaintiff provided, he
19 also took a significant risk, both professionally and monetarily, in acting as the Class
20 Representative and seeking benefits on behalf of the Class. Because the claims alleged by the
21 Class Representative involved the payment of costs to the prevailing party, Plaintiff could have
22 possibly faced paying the costs of Defendant, had Plaintiff not prevailed in this action.

23 Furthermore, given that future employers are much less likely to hire individuals who
24 have filed suit against their prior employer, particularly cases of this nature, Plaintiff may face
25 prejudice in the future from other potential employers. Plaintiff took this risk upon himself and
26 the whole class benefited from these risks taken by Plaintiff. Class Members did not have to file
27 individual lawsuits and bear the risks of payment of costs if they did not prevail, nor did they
28 have to face the potential for retaliation and not getting future employment had they filed a

1 public lawsuit on their own.

2 **3. Class Administration Fees**

3 The Parties have agreed to an estimated payment of \$8,500.00 to the Claims
4 Administrator, Phoenix Settlement Administrators, to send notices and to administer this
5 settlement. (See Stipulation at ¶ 42.) Phoenix Settlement Administrators is a well-recognized
6 class action claims administrator. The Parties believe that the administration fee is reasonable
7 and should be approved.

8 **IV. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR**
9 **PRELIMINARY APPROVAL**

10 The Settlement presented here is fair, adequate, and reasonable. The Settlement will
11 result in both substantial monetary benefits to Class Members; it is non-collusive; and it was
12 achieved as the result of informed, extensive, and arm's length negotiations conducted by
13 counsel for the respective Parties who are experienced in wage and hour class action litigation
14 and facilitated by an experienced class action mediator. For the foregoing reasons, Plaintiff
15 respectfully requests that the Court grant preliminary approval of the proposed Settlement, sign
16 the proposed Order, approve and authorize mailing of the proposed Class Notice, and set a date
17 for a final approval hearing.

18 DATED: August 25, 2020

DIVERSITY LAW GROUP, P.C.

20 By: 

Larry W. Lee

Mai Tulyathan

Attorneys for Plaintiff, the Class, and Aggrieved
Employees

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

STATE OF CALIFORNIA]
]ss.
COUNTY OF LOS ANGELES]

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 515 S. Figueroa Street, Suite 1250, Los Angeles, California 90071.

On August 25, 2020, I served the following document(s) described as: **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** on the interested parties in this action as follows:

Mike Resch
Ashely Park
Amy's Kitchen, Inc.
1650 Corporate Circle, Ste. 200,
Petaluma, CA 94954
Attorneys for Defendant Amy's Kitchen, Inc.

 X BY ELECTRONIC SERVICE: Based on a court order I caused the above-entitled document(s) to be served through the Odyssey eFileCA E-Filing System at the website www.california.tylerhost.net, addressed to all parties appearing on the electronic service list for the above-entitled case. The service transmission was reported as complete and a copy of the filing receipt/confirmation will be filed, deposited, or maintained with the original document(s) in this office.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 25, 2020, at Los Angeles, California.


Erika Mejia