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11
12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **FOR THE COUNTY OF LOS ANGELES**
14

15 SANTIAGO ALVAREZ, individually, and
16 on behalf of other aggrieved employees
17 pursuant to the California Private Attorneys
18 General Act;

19 Plaintiff,

20 vs.

21 BIAGI BROS., INC.; and DOES 1 through
22 100, inclusive,

23 Defendant.

Case No. 21STCV38247

Assigned to Hon. Cherol J. Nellon
Dept. 14

**PLAINTIFF'S MOTION FOR APPROVAL
OF SETTLEMENT OF PRIVATE
ATTORNEYS GENERAL ACT (CAL.
LABOR CODE §§ 2698, ET SEQ.)
REPRESENTATIVE ACTION**

Date: February 19, 2025
Time: 8:30 a.m.
Dept.: 14

Complaint Filed: October 18, 2021
Trial Date: November 27, 2023

Reservation ID: 003778636506

1 **PLEASE TAKE NOTICE** that on February 19, 2025, at 8:30 a.m., or as soon as
2 thereafter as the matter may be heard before The Honorable Cherol J. Nellon in Department 14
3 of the above captioned court, Plaintiff Santiago Alvarez (“Plaintiff”) will and hereby does move
4 for entry of the following orders and entry of judgment:

- 5 1. Granting approval, pursuant to California Labor Code section 2699, subdivision (1),
6 of the proposed settlement between Plaintiff and Defendant of the claims brought
7 pursuant to the Labor Code Private Attorneys General Act of 2004 (“PAGA”) as set
8 forth in the parties’ PAGA Settlement Agreement (“Settlement,” “Agreement,” or
9 “Settlement Agreement”), attached as Exhibit “A” to the Declaration of Arya Rhodes;
- 10 2. Approving the Total Settlement Amount of \$195,000 to settle the claims asserted in
11 this PAGA action;
- 12 3. Approving the allocation of the Net Settlement Amount of at least \$42,371.47, of
13 which seventy-five percent (75% = \$31,778.60) shall be paid to the California Labor
14 and Workforce Development Agency (“LWDA”) and twenty-five percent (25% =
15 \$10,892.87) shall be paid to the employees identified in the Settlement Agreement as
16 the “PAGA Settlement Group Members”;
- 17 4. Appointing ILYM Group, Inc. (“ILYM”) as the Settlement Administrator for
18 purposes of administering the Settlement;
- 19 5. Directing Defendant to remit payment of the Total Settlement Amount of \$195,000
20 according to the terms of the Settlement Agreement to the Settlement Administrator
21 for disbursement to Plaintiff, Plaintiff’s Counsel, all PAGA Settlement Group
22 Members, and the LWDA;
- 23 6. Directing the Settlement Administrator to mail individual Settlement Shares
24 (individual payments) to the PAGA Settlement Group Members;
- 25 7. Directing the Settlement Administrator to pay the LWDA Payment to the LWDA for
26 its portion of the PAGA penalties;

27 ///

- 28 8. \$10,000 payment to Plaintiff for the resolution of Plaintiff’s individual claims, in

1 exchange for his Civil Code section 1542 waiver, and as a service payment for
2 bringing this action on behalf of the State of California and his coworkers;

3 9. Awarding to Plaintiff's Counsel \$68,250 as reasonable attorneys' fees and up to
4 \$70,528.53 as reimbursement for costs and expenses incurred in litigating the PAGA
5 Claim pursuant to California Labor Code section 2699, subdivision (g)(1); and

6 10. Approving the Administrative Costs from the Total Settlement Amount in an amount
7 up to \$3,850, to be paid to ILYM.

8 This motion will be based upon the following Memorandum of Points and Authorities,
9 the Settlement Agreement, the Declaration of Arya Rhodes, the Declaration of Santiago Alvarez,
10 and the [Proposed] Order and Judgment, as well as the pleadings and other records on file with
11 the Court in this matter, and such evidence and oral argument as may be presented at the hearing
12 on this motion.

13 Dated: January 17, 2025

SCHIMMEL & PARKS, APLC

14 

15 By:

16 Alan I. Schimmel
17 Michael W. Parks
18 Arya Rhodes
19 Ashtyne Cofer
20 *Attorneys for Plaintiff*

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to the Parties' Settlement Agreement and Release ("Agreement"), Plaintiff
4 Santiago Alvarez ("Plaintiff") seeks the Court's approval, pursuant to Labor Code section
5 2699(l), of the parties' settlement of Plaintiff's claims under the Labor Code Private Attorneys
6 General Act of 2004 ("PAGA"). A true and correct copy of the Agreement is attached as Exhibit
7 A to the Arya Rhodes declaration submitted in support of this motion. For the reasons explained
8 below, Plaintiff respectfully requests that the Court approve the settlement.

9 **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

10 This is a PAGA action entirely about temperature and seating. Plaintiff alleged violations
11 of the obligation to provide reasonably comfortable temperatures and seating opportunities in the
12 workplace pursuant to IWC Wage Order Sections 14 and 15.

13 IWC Wage Order Section 14 provides that: (A) All working employees shall be provided
14 with suitable seats when the nature of the work reasonably permits the use of seats. (B) When
15 employees are not engaged in the active duties of their employment and the nature of the work
16 requires standing, an adequate number of suitable seats shall be placed in reasonable proximity
17 to the work area and employees shall be permitted to use such seats when it does not interfere
18 with the performance of their duties.

19 IWC Wage Order Section 15 provides that: (A) The temperature maintained in each work
20 area shall provide reasonable comfort consistent with industry-wide standards for the nature of
21 the process and the work performed; (B) If excessive heat or humidity is created by the work
22 process, the employer shall take all feasible means to reduce such excessive heat or humidity to a
23 degree providing reasonable comfort. Where the nature of the employment requires a
24 temperature of less than 60° F, a heated room shall be provided to which employees may retire
25 for warmth, and such room shall be maintained at not less than 68° F; (C) A temperature of not
26 less than 68° F shall be maintained in the toilet rooms, resting rooms, and change rooms during
27 hours of use; and, (D) Federal and State energy guidelines shall prevail over any conflicting
28 provision of this section. Defendant denies all of Plaintiff's allegations.

1 Plaintiff was employed by Defendant from June 2019 to May 2021, and worked at one of
2 Defendant's warehouses located at 1420 N. McKinley Avenue in Los Angeles, California 90059.
3 Plaintiff alleged that he worked as a "warehouse lead," and his job duties included operating a
4 forklift or pallet jack to prepare cargo for shipment, overseeing the warehouse's day to day
5 operations, and maintaining and updating a list of outgoing inventory using a laptop computer.

6 Plaintiff filed his PAGA Complaint on or around October 18, 2021. Prior to filing this
7 lawsuit, Plaintiff complied with the PAGA notice requirement by providing the California Labor
8 and Workforce Development Agency ("LWDA") with written notice of the claims in this action,
9 by online submission, and to Defendants by certified mail ("PAGA Notice"). A true and correct
10 copy of the PAGA Notices are attached as Exhibit B to the Arya Rhodes declaration submitted in
11 support of this motion.

12 Plaintiff's individual non-representative PAGA claims were compelled to Arbitration and
13 the representative claims were stayed. On October 3, 2022, the Court partially granted
14 Defendant's motion to compel arbitration, staying the remaining representative action and setting
15 the trial for non-individual PAGA claims on August 7, 2023. On December 22, 2022, the Parties
16 agreed to terminate arbitration and transfer the individual claims back to this Court. On January
17 6, 2023, the Court approved the stipulation and ordered this matter back to State Court and lifted
18 the stay on this action. Thereafter the Parties conducted extensive written discovery, document
19 analysis, percipient witness depositions, PMK depositions, expert discovery, site inspections, a
20 Belaire-West administration, aggrieved employee survey, and trial prep including but not limited
21 to final preparation of trial documents, exhibit lists, and witness lists. In the weeks leading up to
22 trial, following extensive negotiations in this heavily contested case, the Parties reached an arms-
23 length settlement which Plaintiff now asks this Court to approve.

24 **III. SUMMARY OF THE SETTLEMENT TERMS**

25 **A. Aggrieved Employees**

26 The aggrieved employees in this PAGA action are alleged to be all current and former
27 hourly paid, non-exempt employees who worked for Defendant at any of its locations in the State
28 of California at any time from August 14, 2020, through October 1, 2024. Based on preliminary

information provided by Defendants, there are approximately 350 aggrieved employees.

B. Released Claims

In exchange for the Total Settlement Amount, Plaintiff, LWDA, the State of California, and the PAGA Settlement Group Members will release Defendants from all claims which arise from or are related to the allegations in the Action as defined in the Settlement Agreement's definition of Released PAGA Claims.

C. Distribution of the Total Settlement Amount

Defendant will pay the Total Settlement Amount of \$195,000 to settle the Action in compliance with the Settlement Agreement. The Total Settlement Amount will be fully distributed, and no portion of it will revert to Defendant.

D. Distribution of the Net Settlement Amount

The Net Settlement Amount will be the Total Settlement Amount, less the following amounts: (1) Plaintiff's Counsel Payment of up to \$68,250 as attorneys' fees and reimbursement of litigation costs and expenses in the amount of \$70,528.53, to be paid to Schimmel & Parks, APLC ("Plaintiff's Counsel"); (2) \$10,000 payment to Plaintiff for the resolution of Plaintiff's individual claims, in exchange for his Civil Code section 1542 waiver, and as an incentive payment for bringing this action on behalf of the State of California and his coworkers; and (3) all costs associated with administration of the Settlement (Administrative Costs) in an amount up to \$3,850.

The Net Settlement Amount is currently estimated to be at least \$42,371.47, 75 percent of which (approximately \$31,778.60) will be allocated toward LWDA's share of the recovery of civil penalties under PAGA (the "LWDA Payment") and 25 percent of which (approximately \$10,892.87) will be allocated toward the PAGA Settlement Group Members' share of recovery of civil penalties under PAGA ("Individual Settlement Shares"). The amount of each Individual Settlement Share will be calculated on the basis of attributed pay periods, as determined by the Settlement Administrator pursuant to the formula set forth in the Agreement.

The Individual Settlement Shares in their entirety will be considered penalties, such that no payroll deductions or withholding will be taken from the Individual Settlement Shares. The

1 Settlement Administrator will issue an IRS Form 1099 to each PAGA Settlement Group Member
2 for his or her Individual Settlement Share.

3 The Settlement Administrator will distribute the Individual Settlement Share checks. The
4 checks issued to PAGA Settlement Group Members will expire 180 days from the date of the
5 mailing. Upon expiration of the 180-day period, any unpaid cash residue or unclaimed or
6 abandoned PAGA Settlement Group Member funds generally attributable to California residents,
7 plus any accrued interest that has not otherwise been distributed pursuant to order of the court,
8 shall be transmitted to the California Controller's Unclaimed Property Fund in the name of the
9 Allegedly Aggrieved Employee.

10 **E. Settlement Administration**

11 Plaintiff has selected, subject to court approval, to retain ILYM Group, Inc. ("ILYM" or
12 "Settlement Administrator") to handle the administration of the settlement fund. ILYM is a
13 major third-party neutral settlement administrator. The Settlement Administrator will establish a
14 Qualified Settlement Fund ("QSF"). The Settlement Administrator will send the LWDA
15 Payment to the LWDA, calculate the amount to be paid to each PAGA Settlement Group
16 Member and distribute the Individual Settlement Payments to all PAGA Settlement Employees.
17 The Settlement Administrator will distribute attorneys' fees and costs to Plaintiff's Counsel, as
18 well as Plaintiff's individual payment. The Settlement Administrator will handle and administer
19 all required tax reporting on behalf of Defendant as a result of this Settlement, and perform any
20 other customary duties of a Settlement Administrator in administering a PAGA settlement.

21 **F. Attorneys' Fees, Costs, Etc.**

22 The Agreement permits attorneys' fees not to exceed 35 % of the Total Settlement
23 Amount or \$68,250 plus reimbursement of litigation costs in the amount of \$70,528.53. The
24 Agreement permits Plaintiff to receive \$10,000 from the Gross Settlement Amount for the
25 resolution of Plaintiff's individual claims, in exchange for his Civil Code section 1542 waiver,
26 and as a representative payment for bringing this action on behalf of the State of California and
27 his coworkers. Absent something unanticipated, the Administrative Costs are estimated to be no
28 more than \$3,850. Defendant agreed not to oppose such applications.

1 **IV. THE PAGA SETTLEMENT SHOULD BE APPROVED**

2 **A. The Settlement provides genuine and meaningful relief to the State, Plaintiff,**
3 **and the PAGA Settlement Employees**

4 Labor Code section 2699(1)(2) states that “[t]he superior court shall review and approve
5 any settlement of any civil action filed pursuant to” PAGA. “When a PAGA claim is settled, the
6 relief provided for under the PAGA [should] be genuine and meaningful, consistent with the
7 underlying purpose of the statute to benefit the public.” (*Villalobos v. Calandri Sunrise Farm*
8 *LP, supra*, 2015 WL 12732709, at *13.)

9 In this action, Plaintiff alleged that Defendant failed to maintain reasonably comfortable
10 indoor temperatures in the workplace, in violation of Wage Order section 15, and failed to
11 provide reasonably comfortable seating opportunities in violation of Wage Order section 14.
12 Defendant denied those allegations.

13 This was not a garden variety PAGA action and involved a claim that is rarely litigated in
14 depth and without much authority on the various issues at play. Plaintiff and PAGA Counsel
15 recognize the expense and length of continued proceedings necessary to litigate their disputes
16 through trial and through any possible appeals. Plaintiff and PAGA Counsel have also taken into
17 account the uncertainty and risk of the outcome of further litigation, and the difficulties and
18 delays inherent in such litigation. Plaintiff and PAGA Counsel are also aware of the burdens of
19 proof necessary to establish liability for the claims asserted in the Action, both generally and in
20 response to Defendant’s defenses thereto (many of which have been shared at the mediation and
21 in settlement discussions), and the obligation to establish liability and penalties for the Aggrieved
22 Employees.

23 Plaintiff and PAGA Counsel have also taken into account the extensive settlement
24 negotiations conducted. Further, Plaintiff and PAGA Counsel have taken into account
25 Defendant’s agreement to enter into a settlement that confers substantial relief upon the LWDA
26 and Aggrieved Employees. Based on the foregoing, Plaintiff and PAGA Counsel have
27 determined that the settlement set forth in this Agreement is a fair, adequate and reasonable
28 settlement, and is in the best interests of the Aggrieved Employees.

1 In addition to the defenses on the merits, Plaintiff also considered Defendants' position
2 that PAGA penalties are discretionary in nature. For instance, the California Court of Appeal
3 upheld the San Diego Superior Court's heavily-discounted award of only \$5 per pay period in
4 *Carrington v. Starbucks* (2018) 30 Cal.App.5th 504. The plaintiffs in *Carrington* had requested
5 more than \$70 million in damages and were successful in proving their PAGA claim during a
6 bench trial. However, the trial court ruled that Starbucks had attempted to comply with the law
7 and reduced the total award after trial to only \$150,000 out of the \$70 million requested by the
8 plaintiffs. In affirming the trial court's ruling, the Court of Appeal confirmed that it was within
9 the trial court's discretion to significantly reduce PAGA penalties even when there is a finding
10 that a violation of the California Labor Code occurred. Moreover, at least one appellate court
11 holds, in the context of other Labor Code violations, that the "subsequent" violation penalty rate
12 for a Labor Code violation does not apply until an employer is notified that its conduct violates
13 the law. (*Amaral v. Cintas Corp.* (2008) 163 Cal.App.4th 1157, 1207-09.)

14 While Plaintiff believes that the PAGA Claim is meritorious, Defendants asserted
15 numerous defenses the outcome of which was truly uncertain given the paucity of appellate case
16 law on these temperature claims and some challenging court of appeal and supreme court
17 decisions regarding the seating claims. Defendants have many potentially meritorious challenges
18 and defenses to many of the claims in this action which, given the burdens of proof, could have
19 resulted in no gain to the employees or the State of California. It appears, whether by way of this
20 lawsuit or otherwise, the enforcement policy behind the PAGA has been accomplished. Given
21 all of the risks to both parties, the proposed Settlement provides genuine and meaningful relief to
22 the State and the PAGA Settlement Employees, including Plaintiff. Defendant has agreed to pay
23 a Total Settlement Amount of \$195,000 to resolve this case.

24 Defendant realizes that any further defense of this litigation may be protracted and
25 expensive for all parties. Substantial amounts of time, energy and resources of Defendant, unless
26 this Settlement is made, may be devoted to the defense of the claims asserted by Plaintiff.
27 Defendant has also taken into account the risks of further litigation in reaching the decision to
28 enter into this Settlement including the fact that a trial outcome cannot be predicted given all the

1 factors and variables that go into prevailing at trial. Despite continuing to contend that they are
2 not liable for any of the claims set forth by Plaintiff, Defendant has, nonetheless, agreed to settle
3 in the manner and upon the terms set forth in the Agreement to put to rest the claims as set forth
4 in the Action.

5 Based on the information available to the Parties and their experienced counsel, the
6 Parties have agreed that this PAGA action is well-suited for settlement given its strengths and
7 weaknesses.

8 A settlement may be fair and reasonable even where it only provides a fraction of what
9 could have been obtained at trial. (See *Officers for Justice v. Civil Service Comm'n* (9th Cir.
10 1981) 688 F.2d 615, 625 [“The proposed settlement is not to be judged against a hypothetical or
11 speculative measure of what might have been achieved by the negotiators.”]; accord *City of*
12 *Detroit v. Grinnell Corp.* (2d Cir. 1974) 495 F.2d 448, 455 n.2 [“The fact that a proposed
13 settlement may only amount to a fraction of the potential recovery does not, in and of itself,
14 mean that the proposed settlement is grossly inadequate and should be disapproved.”].) Indeed,
15 “the very essence of a settlement is compromise, ‘a yielding of absolutes and an abandoning of
16 highest hopes.’” (*Officers for Justice, supra*, 688 F.2d at p. 624.) Moreover, “[t]he purpose of
17 the PAGA is not to recover damages or restitution, but to create a means of ‘deputizing’ citizens
18 as private attorneys general to enforce the Labor Code. [Citation.]” (*Brown v. Ralphs Grocery*
19 *Co.* (2011) 197 Cal.App.4th 489, 501.)

20 Moreover, the purpose of PAGA is not to compensate employees, who retain any private
21 right of action they may have under the applicable Labor Code provisions. The purpose of the
22 PAGA is deterrence and enforcement, and both of those purposes have been realized here.
23 Public policy strongly favors the settlement of litigation. (*Consumer Advocacy Group v.*
24 *Kintetsu Enterprises of America, Inc.* (2006) 141 Cal.App.4th 46, 63. Because the proposed
25 Settlement serves the public interest and the purposes of PAGA, it should be approved. (*Id.*)
26 Accordingly, the proposed Settlement provides genuine and meaningful relief to the State,
27 Plaintiff, and the PAGA Settlement Employees, and should be approved.

1 **B. The Proposed Payment to Plaintiff Is Reasonable and Should Be Approved.**

2 Plaintiff's individual PAGA case was compelled to arbitration. The Parties have agreed
3 to a \$10,000 settlement payment Plaintiff to settle his individual claims and in exchange for a
4 1542 waiver. The payment is also reasonable and appropriate in representative litigation,
5 including class cases (where an individual sues on behalf of those similarly-situated) and
6 derivative cases (where an individual sues on behalf of a legal entity). (*In re Cellphone Fee*
7 *Termination Cases* (2010) 186 Cal.App.4th 1380, 1383 [class action]; *Barovic v. Ballmer* (W.D.
8 Wash. 2016) 2016 WL 199674, *5.) "The rationale for making an enhancement or incentive
9 awards to named plaintiffs is that they should be compensated for the expense or risk they have
10 incurred in conferring a benefit on other members of the class." Among other things, incentive
11 payment to a named plaintiff can be used to "recognize their willingness to act as a private
12 attorney general." (*Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958.).

13 While not expressly saying so, PAGA clearly supports an incentive award for a named
14 plaintiff. As with class and derivative cases, the named plaintiff brings PAGA claims on behalf
15 of a legal entity (the State), and similarly-situated employees share in any resolution. Moreover,
16 "the lack of government resources to enforce the Labor Code led to a legislative choice to
17 deputize and incentivize employees uniquely positioned to detect and prosecute such violations
18 through PAGA." (*Iskanian v. CLS Transportation, supra*, 59 Cal.4th at p. 390.)

19 Here, Plaintiff, as the PAGA representative, contributed considerable time and efforts to
20 provide the facts and evidence necessary to support the PAGA claim over the course of three (3)
21 years. Despite having his individual claims severed from his coworkers and compelled to
22 arbitration, Plaintiff was available whenever counsel needed him and tried to obtain information
23 that would benefit the State and the PAGA Settlement Group Members. Plaintiff appeared for
24 his deposition and was ready/willing/able to take the stand at trial. Because of Plaintiff's
25 decision to bring this action, hundreds of workers across the State of California and the LWDA
26 will realize a net benefit. Accordingly, it is appropriate and just for Plaintiff to receive \$10,000 to
27 settle his individual claims and in exchange for a 1542 waiver. Alternatively, the \$10,000 is a
28 reasonable incentive payment for his representative services on behalf of the State and PAGA

1 Settlement Group Members, in addition to the Individual Settlement Share he will receive as a
2 PAGA Settlement Group Member. Plaintiff has submitted a declaration in support of this
3 request which outlines his contributions in further detail.

4 **C. The Proposed Plaintiff's Counsel Payment Is Reasonable and Should Be**
5 **Approved.**

6 **1. Plaintiff's Counsel Payment should be awarded from the common fund**
7 **created by the Settlement.**

8 Plaintiff's Counsel is entitled to recover reasonable attorneys' fees and costs as a matter
9 of right under PAGA. (See Lab. Code § 2699(g)(1) ["Any employee who prevails in any
10 [PAGA] action shall be entitled to an award of reasonable attorney's fees and costs."].
11 Plaintiff's counsel is also entitled to fees and costs under California Code of Civil Procedure
12 section 1021.5, as the instant PAGA action is by definition "for the benefit" and secured
13 monetary awards for a large number of aggrieved employees, as well as the State of California.
14 (Accord *Estrada v. FedEx Ground Package Sys. Inc.* (2007) 154 Cal.App.4th 1, 16-17
15 [recognizing that recovery obtained on behalf of 209 individuals "satisf[ies] the 'significant
16 benefit,' 'public interest,' and 'large class of persons' requirements of Code of Civil Procedure
17 section 1021.5, regardless of plaintiff's personal motivation].) The LWDA Payment will also
18 benefit the LWDA in enforcing labor laws and educating "employers and employees about their
19 rights and responsibilities under [the Labor Code]." (Lab. Code § 2699(i).)

20 In addition, when the prosecution of a matter results in the creation of a common fund, a
21 court can and should award fees and costs from that fund. The reason is "that persons who
22 obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the
23 successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court
24 to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees
25 proportionately among those benefitted by the suit. (*Boeing Co. v. Van Gemert* (1980) 444 U.S.
26 472, 478.) Thus, it is proper to award from a fund attorneys' fees and costs "to a party who has
27 recovered or preserved a monetary fund for the benefit of himself or herself and others."
28 (*Laffitte v. Robert Half Intern., Inc.* (2016) 1 Cal.5th 480, 488 [*"Laffitte II"*]).

1 Accordingly, Plaintiff's Counsel's Payment is properly paid from the common fund
2 created by the Settlement.

3 **2. The Court should use the percentage-of-recovery method in**
4 **calculating the fee award,**

5 Under California and federal authorities, a court has discretion to determine attorneys'
6 fees using either the lodestar method or the percentage-of-recovery method. (*Vizcaino v.*
7 *Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043.) In *Laffitte II*, the Supreme Court approved a
8 superior court's use of the percentage-of-recovery method in common fund cases. (*Id.* at p. 503.)

9 Trial courts have "wide latitude" in assessing the value of attorneys' fees and their
10 decisions will "not be disturbed on appeal absent a manifest abuse of discretion":

11 The recognized advantages of the percentage method—including
12 the relative ease of calculation, alignment of incentives between
13 counsel and the class, a better approximation of market conditions
14 in a contingency case, and the encouragement it provides counsel
to seek an early settlement and avoid unnecessarily prolonging the
litigation . . . convince us the percentage method is a valuable tool
that should not be denied our trial courts.

15 (*Id.*) The Supreme Court further found that, while a trial court may adjust the percentage based
16 on a "lodestar cross check," it is not required to do so. (*Id.* at pp. 505-506 ["We further hold that
17 the trial courts have discretion to do a lodestar cross-check on a percentage fee . . . they also
18 retain the discretion to forego the lodestar cross-check and use other means to evaluate the
19 reasonableness of a requested fee percentage."])

20 Consistent with *Laffitte II*, the Court should exercise its discretion and utilize the
21 percentage-of-recovery method in awarding attorneys' fees. Here, the common fund with a
22 lodestar cross-check, confirms the reasonableness of the 35% requested fee. (E.g., *Jones v. J.C.*
23 *Penny Corp.*, Los Angeles Superior Court, Case No. BC451823 [approving fee award from
24 PAGA-only settlement of \$1.375M (42%) against a common fund of \$3.2M].)

25 **3. The Requested Fee Falls Within the Range of Typical Marketplace**
26 **Contingency Fee Arrangements**

27 Plaintiff's Counsel seeks an attorney fee's award of \$68,250, or 35% of the \$195,000
28 common fund. California courts have been expressly authorized "to ensure that the fee awarded

1 is within the range of fees freely negotiated in the legal marketplace in comparable litigation.”
2 *Lealao, supra*, 82 Cal.App.4th at p. 31. During the past few years, the Parties have engaged in
3 extensive litigation, discovery, and trial prep. Defendants had a strong legal team providing an
4 aggressive defense, and the risks for Plaintiff’s Counsel given the unknowns and certain
5 likelihood of a protracted appellate process were immense. While the gross amount may not be
6 massive, the result achieved by Plaintiff’s Counsel is nevertheless exceptional. The gross
7 settlement and monetary amount being paid to the State of California is still significant. Because
8 of this, a 35% attorney fee award to Plaintiff’s Counsel is reasonable and just.

9 In California, “[c]ourts agree that, because the percentage-of-the-fund approach is results-
10 oriented rather than process-oriented, it better approximates the workings of the marketplace
11 than the lodestar approach.” *Id. at p. 48* [citation and quotation marks omitted]; *see also In re*
12 *Continental Illinois Securities Litigation* (7th Cir. 1992) [noting the trial court’s function “is to
13 determine what the lawyer would receive if he were selling his services in the market rather than
14 being paid by court order”].) California courts recognize that marketplace contingency fees
15 percentages generally range between 10% to 50% of total recovery, with most between the 20%
16 to 40%. *E.g., Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, pp. 65–66 [affirming trial
17 court’s cross-check of fee award against estimate that marketplace contingency fees range
18 between 20 and 40 percent after deducting costs]; *see also Ridgeway v. Wal-Mart Stores Inc.*
19 (N.D.Cal. 2017) 269 F.Supp.3d 975, 1000 [noting that “contingency fee contracts charged by
20 law firms in large damages cases typically range from 10 to 50 percent”]; *Katz v. China Century*
21 *Dragon Media, Inc.* (C.D.Cal., Oct. 10, 2013, No. LA CV11-02769 JAK (SSx)) 2013 U.S.Dist.
22 Lexis 189987, at pp. *23-24 [recognizing that the prevailing market rate for contingency fee
23 cases is 30% to 40%] *In re M.D.C. Holdings Securities Litigation* (S.D. Cal., Aug. 30, 1990, No.
24 CV 89-0090 E (M)) 1990 U.S.Dist. Lexis 15488, at p. *22 [“In private contingent litigation, fee
25 contracts have traditionally ranged between 30% and 40% of the total recovery.”].

26 California courts have approved fee awards of 40% (and more) of the common fund in
27 class action settlements. *See, e.g., Erlandsen v. FlexCare, LLC* (Super. Ct. Santa Barbara
28 County, July 23, 2014, No. 1390595) [awarding 40% of the settlement funds for attorney’s fees]

1 *Adaauto v. Door Components, Inc.* (Super. Ct. LA County, Jul. 1, 2013, No. BC469230 [awarding
2 attorney’s fees equal to 40% of the settlement fund, plus costs]; *Ayala v. Denbeste*
3 *Manufacturing, Inc.* (Super. Ct. Kern County, Feb. 7, 2013, No. S-1500-CV-275248) [awarding
4 attorney’s fees equal to approximately 40% of the settlement funds, plus costs]; *Crandall v. U-*
5 *Haul International, Inc.* (Super. Ct. LA County, Aug. 17, 2001, No. BC178775 [awarding
6 attorney’s fees equal to 40% of the settlement fund]; *Abzug v. Kerkorian* (Super. Ct. LA County,
7 Nov. 1990, No. CA-000981) [45% fee of \$35 million class action settlement, plus costs]; *Haitz v.*
8 *Meyer, et al.* (Super. Ct. Alameda County, Aug. 20, 1990, No. 572968-3 [45% fee award]; *Birch*
9 *v. Office Depot, Inc.* (S.D.Cal., Sept. 28, 2007, No. 06 CV 1690 DMS (WMC)) 2007 U.S.Dist.
10 Lexis 102747, at pp. *7–8 [40% award of attorney’s fees and costs in wage and hour class
11 action]; *Rippee v. Boston Market Corp.* (S.D.Cal. Oct. 10, 2006, No. 05cv1359 BTM(JMA))
12 2006 U.S.Dist. Lexis 101136, at pp. *11–12 [awarding a 40% fee on a \$3.75 million wage and
13 hour class action].)

14 Plaintiff’s Counsel’s request of 35% of the common fund falls within the range of typical
15 contingency fee arrangements. Attorneys and courts throughout the state recognize that 30-40%,
16 plus costs, is the prevailing local market rate for contingent employment litigation.

17 **4. Plaintiff’s Counsel’s Lodestar**

18 If the Court chooses to perform a lodestar cross-check in this case, it will confirm the
19 reasonableness of Plaintiff’s fee request. In calculating an initial lodestar figure, a court
20 considers: (1) the reasonable hours spent; and (2) the prevailing hourly rates for “private
21 attorneys in the community conducting *non-contingent* litigation of the same type.” (*Ketchum v.*
22 *Moses* (2001) 24 Cal.4th 1122, 1134 [emphasis in original].). These facts may be established
23 through a declaration by counsel. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224,
24 254-55 [relying on plaintiffs’ counsel’s declarations as sufficient evidence to demonstrate the
25 appropriate hourly rate].) In performing a cross-check, the Court may also rely on a declaration
26 “summarizing overall time spent, rather than demanding and scrutinizing daily time sheets in
27 which the work was broken down by individual task.” (*Laffitt II, supra*, 1 Cal.5th at p. 505.)
28

1 **a. Plaintiff's Counsel's Hourly Rates**

2 The best indicator of a “reasonable market rate” is the actual rate charged by an attorney
3 to his or her private clients. (*Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.* (7th Cir. 1985) 776 F.2d
4 646, 660.) “When an attorney’s customary billing rate is the rate at which the attorney requests
5 the lodestar be computed and that rate is within the range of prevailing market rates, the court
6 should consider this rate when fixing the hourly rate to be allowed. When the rate is not
7 contested, it is *prima facie* reasonable.” (*Islamic Center of Mississippi v. City of Starkville* (5th
8 Cir. 1989) 876 F.2d 464, 469.) Hourly rates are reasonable if they are within the range of hourly
9 rates charged by attorneys of comparable experience, reputation, and ability for similar litigation.
10 *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133 (Ketchum); *Children’s Hosp., supra*, 97
11 Cal.App.4th at p. 783 [affirming rates that were “within the range of reasonable rates charged by
12 and judicially awarded comparable attorneys for comparable work”].

13 The attorney billing rates of Schimmel & Parks are as follows: \$1,200 per hour for Alan
14 I. Schimmel (Partner admitted in 1981), \$1,000 per hour for Michael W. Parks (Partner admitted
15 in 1991), \$800 per hour for Arya Rhodes (Partner admitted in 2014). (*See* Appendix A to
16 Rhodes Declaration.) These rates are undoubtedly less than the hourly rates charged by
17 Plaintiff’s Counsel’s peers at large corporate firms, are at, or below, the market rates for
18 attorneys with comparable skills and years of experience. In class action and complex litigation
19 in Southern California, hourly rates in the range of \$470 to \$720 for attorneys and over \$1,000
20 for partners are reasonable. *See, e.g., Herring Networks, Inc. v. Maddow* (S.D.Cal. Feb. 5, 2021,
21 No. 3:19-cv-1713-BAS-AHG) 2021 U.S.Dist. Lexis 23163, at pp. *20–21, 22 [awarding fees
22 based on \$1,150–\$1,050 partner rates, \$720 senior attorney rate, and \$265 paralegal rate].
23 Accordingly, Plaintiff’s Counsel’s rates are *prima facie* reasonable.

24 **b. Time Spent**

25 As noted above, Defendants have robustly defended this case, and the parties’ took
26 several years to reach settlement. To date, Plaintiff’s Counsel has collectively invested
27 approximately 236.5 hours that are potentially relevant to the Settlement. (*See* Appendix A to
28 Arya Rhodes Declaration.) This work includes novel legal research, investigation into the facts

1 of this case, drafting the PAGA notice, drafting the pleadings, seeking and analyzing discovery,
2 analyzing voluminous records, significant meet and confers, preparing for and attending the
3 court hearings, taking and defending depositions, vetting experts and coordinating expert
4 opinions, performing multiple site inspections across the state of California, negotiating the
5 terms of a settlement, devising a trial plan and finalizing trial docs, and preparing this approval
6 motion, among other things.

7 Under California law, every hour reasonably spent on the Plaintiff's case is compensable:
8 "absent circumstances rendering the award unjust, an attorney fee award should ordinarily
9 include compensation for all the hours reasonably spent, including those relating solely to the
10 fee." *Ketchum, supra*, 24 Cal. 4th at p. 1133 [original emphasis].) Hours are reasonable if "at the
11 time rendered, [they] would have been undertaken by a reasonable and prudent lawyer to
12 advance or protect his client's interest in the pursuit of a successful recovery of [] damages."
13 *Moore v. Jas. H. Matthews & Co.* (9th Cir. 1982) 682 F.2d 830, 839.

14 Courts properly rely on declarations by counsel to determine the lodestar. *Concepcion v.*
15 *Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1324 ["Declarations of counsel setting
16 forth the reasonable hourly rate, the number of hours worked and the tasks performed are
17 sufficient."]; *see also Wershba, supra*, 91 Cal.App.4th at p. 255 ["Here plaintiffs' attorneys
18 submitted declarations evidencing the reasonable hourly rate for their services and establishing
19 the number of hours spent working on the case . . . California case law permits fee awards in the
20 absence of detailed time sheets." (citations omitted)]; *Dunk v. Ford Motor Co.* (1996) 48
21 Cal.App.4th 1794, 1810 [noting that a lodestar calculation could be based on counsel's estimate
22 of time spent].) "An experienced trial judge is in a position to assess the value of the professional
23 services rendered in his or her court." *Wershba*, at p. 255.

24 For purposes of the lodestar cross check, Plaintiff thus recommends attributing 236.5
25 hours of Plaintiff's Counsel's time. Applying the above reasoning, Plaintiff's Counsel's
26 collective lodestar for purposes of the cross-check is \$192,160 which exceeds the fees being
27 requested, even without applying a multiplier. Adding a 1.5 or 2.0 multiplier, as is customary
28 and common in these high-risk contingency type cases, would show a lodestar cross-check that

1 far exceeds what is being requested by Plaintiff.

2 ***c. Plaintiff's Counsel's costs should be approved.***

3 Plaintiff's Counsel have collectively incurred, to date, approximately \$70,528.53 in costs.
4 It is appropriate for these costs to be paid from the common fund. *In re Omnivision*
5 *Technologies, Inc.* (N.D. Cal. 2008) 559 F.Supp.2d 1036 ("Attorneys may recover their
6 reasonable expenses that would typically be billed to paying clients in non-contingency
7 matters."); *In re Media Vision Tech. Sec. Litig.* (N.D. Cal. 1996) 913 F.Supp. 1362, 1366
8 ("Reasonable costs and expenses incurred by an attorney who creates or preserves a common
9 fund are reimbursed proportionally by those class members who benefit by the settlement.').
10 Accordingly, Plaintiff's Counsel requests reimbursement of litigation costs in the amount of
11 \$70,528.53. A true and correct copy of Plaintiff's Counsel's near final cost bill is attached as
12 Exhibit C to the Arya Rhodes declaration submitted in support of this motion.

13 **D. The Proposed Administrative Costs Are Reasonable and Should Be**
14 **Approved.**

15 Plaintiff respectfully requests that the Court approve the proposed Administrative Costs.
16 ILYM, a major third party neutral administrator agreed to by the parties, will perform all usual
17 and customary duties of a settlement administrator to administer and complete the Settlement.
18 The Settlement allocates up to \$3,850 toward the Administrative Costs, which shall be paid out
19 of the Total Settlement Amount. Based on information available to Defendants, as of the filing
20 of this motion, the total number of PAGA Settlement Group Members was estimated to be 350
21 individuals. The Parties obtained a quote for ILYM for the administration of the settlement.
22 Any leftover money will be put back into the distribution and ILYM will provide a declaration
23 accounting for such funds. Accordingly, the Administrative Costs of up to \$3,850 is reasonable
24 and should be approved. A true and correct copy of ILYM's quote is attached as Exhibit D to
25 the Arya Rhodes declaration submitted in support of this motion.

26 **V. CONCLUSION**

27 For the foregoing reasons, Plaintiff respectfully requests that the Court approve the
28 proposed Settlement, including the Total Settlement Amount, and the proposed allocation for the

1 individual payment to Plaintiff, Plaintiff's Counsel Fee and Costs, and the Administrative Costs.

2 Dated: January 17, 2025

SCHIMMEL & PARKS, APLC

3 

4 By:

5 _____
6 Alan I. Schimmel
7 Michael W. Parks
8 Arya Rhodes
9 Ashtyne Cofer
10 Attorneys for Plaintiff

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 15303 Ventura Blvd., Suite 650, Sherman Oaks, CA 91403.

On January 17, 2025, I served the following document(s) described as: **PLAINTIFF'S MOTION FOR APPROVAL OF SETTLEMENT OF PRIVATE ATTORNEYS GENERAL ACT (CAL. LABOR CODE §§ 2698, ET SEQ.) REPRESENTATIVE ACTION** on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

Arif Virji, Esq. Justin Hein, Esq. Sarah Hirschfeld-Sussman, Esq. CARLE MACKIE POWER & ROSS 100 B Street, Suite 400 Santa Rosa, CA 95401 Tel.: (707) 526-4200 Fax: (707) 526-4707 Email: avirji@cmprlaw.com jhein@cmprlaw.com shsussman@cmprlaw.com Michelle Swift – mswift@cmprlaw.com Mari Coppinger - mcoppinger@cmprlaw.com	Attorneys for Biagi Bros., Inc.
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BY E-MAIL: I caused a copy of the document(s) to be sent from e-mail address mconsuegra@spattorneys.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 17, 2025, at Sherman Oaks, California.

/s/ Michelle Consuegra

Michelle Consuegra



Court Reservation Receipt

Reservation

Reservation ID: 003778636506	Status: RESERVED
Reservation Type: Motion re: (Motion for Approval of Settlement of Private Attorneys General Act)	Number of Motions: 1
Case Number: 21STCV38247	Case Title: SANTIAGO ALVAREZ vs BIAGI BROS., INC.
Filing Party: SANTIAGO ALVAREZ (Plaintiff)	Location: Stanley Mosk Courthouse - Department 14
Date/Time: February 19th 2025, 8:30AM	Confirmation Code: CR-FGOT9RYYOEQ5RESM4

Fees

Description	Fee	Qty	Amount
Motion re: (name extension)	0.00	1	0.00
TOTAL			\$0.00

Payment

Amount: \$0.00	Type: NOFEE
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