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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

UNLIMITED JURISDICTION

ADAN ORTIZ, on behalf of himself and all other current and former non-exempt employees,

*Plaintiff,*

v.

KIMCO STAFFING SERVICES, INC., a California corporation; and DOES 1 through 50, inclusive,

*Defendant.*

Case No. CIVSB2402387

*Assigned for all purposes to the Honorable Stephanie Tanada, Dept. S33*

**PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS; MEMORANDUM OF POINTS AND AUTHORITIES**

[*Filed concurrently with Declaration of Shaun Setareh, Declaration of David Arakelyan, Declaration of Scott Ernest Wheeler, Declaration of Adan Ortiz, Declaration of Aubrey Bell, Declaration of Maura Ramirez, Declaration of Doan Nguyen, Declaration of Michael Bui in support thereof, [and [Proposed] Order*]

| | |
|---|---|
| Date: | September 30, 2026 |
| Time: | 8:30 a.m. |
| Place: | Department S33 |
| Complaint Filed: | January 8, 2024 |

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

PLEASE TAKE NOTICE that on September 30, 2026, at 8:30 a.m., or as soon thereafter as the matter may be heard in Department S33 of the above-entitled Court located at 247 West Third Street, San Bernardino, California 92415, Plaintiff ADAN ORTIZ ("Plaintiff") will and does hereby move this Court for an Order:

- Preliminarily approving the Class Action and PAGA Settlement;
- Certifying the Settlement Class for settlement purposes only;
- Appointing Plaintiffs Adan Ortiz, Maura Ramirez, and Aubrey Bell as the Class Representatives;
- Appointing Setareh Law Group, Wheeler Law Firm APC, and D. Law, Inc. as Class Counsel;
- Directing that notice be mailed to the Settlement Class via a settlement administrator; and
- Scheduling a hearing date for the Motion for Final Approval of Class Action and PAGA Settlement.

This motion is made pursuant to California Rules of Court 3.769. This motion will be based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, and the following declarations in support thereof: the Declarations of Shaun Setareh, David Arakelyan, and Scott Ernest Wheeler on behalf of Class Counsel; the Declarations of the Class Representatives Adan Ortiz, Aubrey Bell, and Maura Ramirez, the Declaration of Michael Bui on behalf of the Settlement Administrator, and the Declaration of Doan Nguyen on behalf of the *cy pres* recipient, as well as s attached thereto, the arguments of counsel, the documents filed in this action and any other matters as may be properly presented on or before the hearing on this motion.

DATED: August 3, 2026

SETAREH LAW GROUP

*/s/ Farrah Grant*

SHAUN SETAREH
THOMAS SEGAL
FARRAH GRANT
Attorneys for Plaintiff
ADAN ORTIZ

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## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

Plaintiffs Adan Ortiz, Maura Ramirez, and Aubrey Bell ("Plaintiffs") seek preliminary approval of a $1,450,000.00 non-reversionary class and representative action settlement consisting of wage and hour and representative claims under the California Private Attorneys General Act of 2004 ("PAGA") against Defendant Kimco Staffing Services, Inc. ("Defendant" or "Kimco").[1] No class member will have to make a claim. Checks will be mailed directly, and any uncashed checks will go to a *cy pres* designee which subject to court approval is the State Bar of California's Greg E. Knoll Justice Gap Fund. [2]

Plaintiff Ortiz now moves for preliminary approval of the Settlement Agreement. The Gross Settlement Amount ("GSA") is $1,450,000.00, which will be administered to the Settlement Class through a notice and allocation process in order to be optimally cost-efficient and beneficial to the Settlement Class. The Settlement Agreement provides for customary deductions from the GSA — attorneys' fees, litigation costs, administration costs, enhancement payments, and PAGA Fund and LWDA payments — each set forth in detail in Section II below. The **$1,450,000.00** common settlement fund is 5.6% of Plaintiffs' risk-adjusted estimate of exposure, including PAGA penalties. The estimated per-workweek amount for Class Members is $3.47 per qualifying workweek and the estimated per-pay-period amount for qualifying PAGA work periods is $0.12. (Declaration of Michael Bui ("Bui Decl.") ¶¶ 11, 13.) Based on the data currently available, the highest estimated Class Member payment will be approximately $111.03, the average estimated Class Member payment will be approximately $49.34, and the lowest estimated Class Member payment will be approximately $3.47. (*Id.* ¶ 12.) The highest estimated payment to aggrieved employees is approximately $3.73, the lowest estimated PAGA payment is approximately $0.12, and the average PAGA payment is approximately $1.70. *Id.* ¶ 13.

The Settlement is an excellent result given the risks Plaintiffs faced. Class Members were subject

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[1] The Class Action and PAGA Settlement Agreement ("Settlement Agreement" or "Settlement") signed by all parties and counsel is attached as **Exhibit 1** to the Declaration of Shaun Setareh, filed concurrently herewith. The Settlement Agreement will be cited herein as "Settlement."

[2] Capitalized terms used herein but not otherwise defined shall have the meanings set forth in the Settlement Agreement.

to arbitration agreements requiring binding individual arbitration of employment-related disputes, which created the risk the Court would have compelled arbitration and any recovery would have been much smaller. Also importantly, Class Counsel reviewed Defendant's financial statements, which indicated that Defendant would have been unable to pay a significant class judgment.

In light of these and the other risks of continuing with this litigation, Plaintiffs submit that this proposed settlement, which guarantees that all Settlement Class Members and PAGA Group Members will be paid, is fair, reasonable, and adequate. Accordingly, the parties respectfully request that the Court enter an order (a) granting preliminary approval of the Settlement; (b) certifying the proposed Settlement Class for purposes of settlement only; (c) appointing Plaintiffs as the Class Representatives; (d) appointing Setareh Law Group, Wheeler Law Firm APC, and D. Law, Inc. as Class Counsel; (e) approving the proposed form and method of giving Settlement Class Members notice of the action and the proposed Settlement; (f) directing that notice be given to Settlement Class Members in the proposed form and manner; and (g) setting a hearing date and briefing schedule for final settlement approval.

Based upon their evaluation, Plaintiffs and Class Counsel have determined that the Settlement is fair, reasonable, adequate and in the best interest of the Settlement Class and PAGA Group, and request that this Court grant preliminary approval of the Settlement. Class Counsel consulted the San Bernardino Court's published Checklist for Approval of Class Action Settlements in drafting this Motion. **Exhibit 3** to the Declaration of Shaun Setareh ("Setareh Decl.") is a chart identifying where each item required by that checklist is addressed in this Motion. (Setareh Decl. ¶ 46.)

## II. THE MAJOR TERMS OF SETTLEMENT

Key provisions of the proposed settlement include the following:

- The Parties stipulate to certification of the Settlement Class for purposes of settlement only.
- The GSA is **$1,450,000.00** which will be paid to the Settlement Class.
- Defendant will not oppose Class Counsel's application for fees of 1/3 of the GSA, **$483,333.33.**
- Defendant will not oppose Class Counsel's application for actual litigation costs supported by proof to be paid out of the GSA.
- Out of the GSA, Plaintiff Ortiz will be paid **$20,000.00** in exchange for his agreement to resolve additional claims alleged outside the Actions, pursuant to a separate written agreement.

- The Parties shall mutually select a Settlement Administrator, subject to Court approval and the reasonable costs of the Settlement Administrator approved by the Court will be paid from the GSA. The current estimated costs of administration by Simpluris are **$61,985.00**.
- Out of the GSA, **$50,000.00** is allocated to resolve the PAGA claims, with 75%, *i.e*., **$37,500**, to be paid by the Administrator to the LWDA, and 25%, *i.e*., **$12,500**, to be paid to PAGA Group Members **–** *i.e*., non-exempt, hourly-paid employees of Kimco assigned to work for clients in the State of California at any time during the PAGA Period.
- Defendant will not oppose the application for Class Representative Enhancement Awards in the amount of **$10,000.00** to each Plaintiff (**$30,000.00** total), which will be paid out of the GSA to Plaintiffs Adan Ortiz, Maura Ramirez, and Aubrey Bell.
- After deducting Class Counsel's attorneys' fees and costs, the enhancement awards, the separate Ortiz payment, the payment to the LWDA, and the Individual PAGA Payments, and settlement administration costs the remainder – i.e., the Net Settlement Amount ("NSA") -- will be distributed to the Settlement Class Members. After the above Court-approved deductions, the NSA available for distribution to Settlement Class Members is estimated to be $777,395.62. (Bui Decl. ¶ 10.) The Net Class Settlement shares shall be calculated *pro rata* based on workweeks worked during the Class Period. The PAGA Settlement Fund shall be distributed *pro rata* to PAGA Group Members based on workweeks worked during the PAGA Period.
- Settlement Class Members will be mailed a check so long as they do not opt out.
- The Settlement will release specified PAGA claims for all PAGA Group Members. PAGA Group Members cannot opt out of the PAGA portion of the Settlement and will be mailed their share of the PAGA Payment even if they opt out of the rest of the Settlement.
- Any checks issued by the Administrator to participating Settlement Class Members shall be negotiable for not less than 180 calendar days after mailing. Those checks remaining uncashed for more than 180 days after issuance will be tendered to a mutually agreed cy pres recipient, subject to Court approval.

(*See* Settlement.)

## III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

### A. The Parties

The named Plaintiffs worked as hourly-paid, non-exempt employees for Defendant and seek to represent all current and former non-exempt employees of Kimco in the State of California who worked at distribution center worksites during the Class Period of January 8, 2020 through September 29, 2025.

Defendant estimates there are a total of 224,059 workweeks during the Class Period and approximately 15,762 putative class members. (Settlement § 11; Setareh Decl. ¶¶ 35, 39.) Defendant further estimates there are approximately 7,350 PAGA Group Members, i.e., non-exempt employees assigned to work for clients in the State of California during the PAGA Period. (Settlement § 2.5, 11; Setareh Decl. ¶¶ 32, 36.)

### B. The Complaints and Allegations

This settlement resolves three actions which collectively allege employee wage and hour class action claims and PAGA representative claims. The matters are: 1) *Adan Ortiz v. Kimco Staffing Services, Inc.,* San Bernardino County Superior Court Case No. CIVSB2402387; 2) *Maura Ramirez v. Kimco Staffing Services, Inc.,* San Bernardino Superior Court Case No. CIVSB2322451; and 3) *Aubrey Bell v. Kimco Staffing Services, Inc.*, Los Angeles County Superior Court Case No. 23STCV24661. (collectively, the "Actions").

On September 13, 2023, Plaintiff Maura Ramirez filed a PAGA complaint in San Bernardino County Superior Court, CIVSB2322451. (Setareh Decl. ¶ 7.)

On October 10, 2023, Plaintiff Aubrey Bell filed a putative class action complaint in Los Angeles County Superior Court, Case No. 23STCV24661, alleging violations including failure to provide meal periods (Lab. Code §§ 204, 223, 226.7, 512 and 1198) and rest periods (Lab. Code §§ 204, 223, 226.7 and 1198), failure to pay hourly and overtime wages (Lab. Code §§ 223, 510, 1194, 1194.2, 1197, 1197.1 and 1198), failure to provide accurate written wages statements (Lab. Code §§ 226(a)), failure to timely pay all final wages (Lab. Code §§ 201, 202 and 203), failure to pay wages due, negotiable, and payable in cash on demand (Lab. Code. §§ 212 and 213), and unfair competition ((Bus. & Prof. Code §§ 17200 et seq.). Plaintiff Bell filed a First Amended Complaint on December 14, 2023, adding a claim for civil penalties under PAGA (Lab. Code §§ 2698 et seq.). (Setareh Decl. ¶ 8.)

On January 8, 2024, Plaintiff Adan Ortiz ("Ortiz") filed a putative class action complaint in San

Bernardino County Superior Court, Case No. CIVSB2402387, alleging substantially the same meal-period, rest-period, hourly-wage, and final-wage violations alleged in the Bell Complaint, described above. On September 26, 2024, Ortiz filed a First Amended Complaint adding a claim for civil penalties under PAGA (Lab. Code §§ 2698 et seq.). (Setareh Decl., ¶ 9.)

On July 30, 2026, Ortiz filed a stipulation for leave to file a Second Amended Complaint adding Aubrey Bell and Maura Ramirez as named plaintiffs to the action and to include all claims plead in the San Bernardino County Superior Court Case, Case Nos. CIVSB2402387 and CIVSB2322451 and Los Angeles County Superior Court, Case No. 23STCV24661. (Setareh Decl. ¶ 10.)

### C. The Exchange of Detailed Informal Discovery and Legal Analysis by the Parties' Counsel

As a critical part of settlement negotiations, the Parties engaged in extensive informal discovery exchange where Plaintiffs' counsel reviewed and analyzed the following: documents relating to Defendant's policies, practices, and procedures regarding paying non-exempt employees' all hours worked, meal period policies, payroll, timekeeping, and operational policies. Plaintiff also obtained and reviewed time records, earnings records, and information relating to the size and scope of the Class, as well as data permitting Plaintiff to understand the number of weeks worked during the Class Period. (Setareh Decl. ¶¶ 18-20, 35.)

Counsel for the Parties have investigated the law as applied to the facts discovered regarding the alleged claims of Plaintiffs and potential defenses thereto, and the potential damages claimed by Plaintiffs, and have had multiple calls and email exchanges between Plaintiffs' counsel and Defendant's counsel. (Setareh Decl. ¶¶ 23, 30.)

### D. Investigation, Discovery, and Mediation

The Parties engaged in an informal exchange of information throughout the litigation and leading up through mediation. (Setareh Decl. ¶¶ 17-19.) Defendant produced Plaintiffs' personnel files, payroll and timekeeping records, including policies and agreements signed and acknowledged, copies of relevant written company policies, time-keeping records and paycheck data and records. *Id.* Defendant also produced payroll and time records for putative class members. *Id.*

The Parties attended a mediation before Jill Sperber on September 29, 2025. In advance of the Parties' mediation, Defendant provided, *inter alia*, Defendant's handbook and written policies, time and payroll data, and demographics relating to putative class members and the PAGA Group. Plaintiff hired an expert to review and analyze the produced data with respect to potential damages and penalties in preparation for the mediation and prepared a confidential mediation brief. (*Id.* ¶ 18.)

Following a full-day mediation with Ms. Sperber on September 29, 2025, and subsequent further negotiations in the months following mediation, the Parties ultimately agreed to Memorandum of Understanding in March 2026. (Setareh Decl., ¶ 30.) In July 2026, the Parties finalized the Settlement Agreement. (*Id*.) Counsel believes the proposed settlement is fair, reasonable, and adequate in light of the complexities of the case, the uncertainties of further litigation, and that it represents a fair and reasonable recovery for the Settlement Class and PAGA Group. (Setareh Decl., ¶ 33.)

### E. Reasonableness of the Settlement

Plaintiffs' counsel believes that the Settlement is in the best interest of the Settlement Class Members based on their investigation and discovery, their detailed understanding of the issues raised, and the outcome of extensive settlement negotiations. (Setareh Decl., ¶ 31.) Plaintiffs' counsel balanced the Settlement against the probable outcome of class certification, liability, the range of recovery at trial, the risks of losing class certification, losing at trial, or not recovering as much as provided by the proposed Settlement, as well as the difficulties and complexity of the litigation, the lengthy process of litigating to judgment, and the various possible delays and appeals. (Setareh Decl., ¶ 36.)

## IV. DESCRIPTION OF THE SETTLEMENT

### A. Contingent Nature of The Settlement

Solely for purpose of settling this case, the Parties agree to certification of the Settlement Class and to treatment of the representative PAGA claims on a settlement basis only. (Settlement, § 3.)

### B. Appointment of Settlement Class Counsel.

The Parties have agreed to the appointment of Setareh Law Group, Wheeler Law Firm APC, and D. Law, Inc as Class Counsel ("Class Counsel"). (*Id.* § 2.2.)

### C. Appointment of Administrator

The Parties have agreed to the appointment of Simpluris to administer the Settlement and to provide notice to the Class Members (the "Administrator"). (Setareh Decl. ¶ 43.) The settlement administration costs are currently estimated to be **$61,985.** (Bui Decl. ¶ 9.) This is a reasonable fee for a settlement with approximately 16,000 Class Members. (Setareh Decl. ¶ 43.)

### D. Description of The Settlement Class

The Settlement Class means all current and former non-exempt employees of Defendant in the State of California who worked at distribution center worksites during the Class Period (defined as the time period from January 8, 2020 through September 29, 2025) and who do not request exclusion. (Settlement, §§ 2.3, 2.4.) PAGA Group Members means current and former non-exempt employees of Defendant assigned to work for clients in the State of California who worked during the PAGA Period (defined as the time period from July 5, 2022 through September 29, 2025). (*Id.* § 2.5.)

Both periods are tied to applicable statutes of limitations. The Class Period begins January 8, 2020 — four years before Plaintiff Ortiz filed his original Complaint on January 8, 2024 — consistent with the four-year limitations period applicable to restitution for unpaid wages under Business & Professions Code section 17200. The PAGA Period begins July 5, 2022 — one year before Plaintiff Ramirez's July 5, 2023 PAGA notice to the LWDA and Defendant, consistent with the one-year statute of limitations governing PAGA claims. *See* Code Civ. Proc. § 340(a); Lab. Code § 2699.3(a)(1), (d). Both periods run through September 29, 2025, the date of the Parties' mediation. (Setareh Decl. ¶ 11.)

### E. Class Workweeks.

As noted above, Defendant estimated that there are 224,059 workweeks in the Class Period. (Settlement § 11; Setareh Decl. ¶ 35.) Settlement Class Members means all Class Members who do not timely and validly request exclusion from the settlement. (*Id.* § 2.4.)

### F. Escalator Clause

The Settlement Agreement includes an escalator clause to protect the Class if the workweek estimate proves too low. (Settlement, § 11.) If actual workweeks during the Class Period exceed 224,059 by more than ten percent (i.e., exceed 246,465), Defendant must elect to: (1) increase the Gross

Settlement Amount pro rata so the per-workweek value to the Class does not decrease; (2) truncate the Class and PAGA Periods so total workweeks do not exceed 246,465, preserving per-workweek value by shortening the release period instead; or (3) select an alternative end date between September 29, 2025 and the Option 2 truncation date, with the Gross Settlement Amount increased pro rata for the additional workweeks covered. (*Id.*) Defendant must make this election within a reasonable time after the workweek count is confirmed and before final approval papers are filed, or by such other deadline as the Parties may agree or the Court may order. (*Id.*)

**G. Scope of The Release**

**1. Release by Settlement Class Members**

Upon Final approval of the settlement, all Settlement Class Members who do not submit a valid and timely request for exclusion shall release Kimco and the Releasees from any and all claims that were pled or that could have been pled based on, arising out of, or reasonably related to the facts alleged in the Actions during the applicable release period. The release is intended to be coextensive with the factual predicates alleged in the Actions and shall not extend to claims unrelated to those factual predicates. (*Id.* § 13.1.)

**2. Release by PAGA Group Members**

Upon Final approval of the settlement, each PAGA Group Member shall release Kimco and the Releasees from all claims for civil penalties under PAGA that were alleged in the operative complaints or that could have been alleged based on the facts pertaining to Plaintiffs and the PAGA Group Members during the PAGA Period. (Settlement, § 13.2.) A Settlement Class Member who timely and validly requests exclusion shall not receive a Class Settlement payment, shall not be bound by the class release, and shall preserve any individual non-PAGA claims otherwise available, but shall remain bound by the PAGA release to the extent permitted by law as a PAGA Group Member. (*Id.* § 10.2.)

**3. General Release by Named Plaintiffs**

As a material term of this settlement, each named Plaintiff shall execute a general release in favor of Kimco and the Releasees of all claims, known and unknown, whether suspected or unsuspected, arising up to the date of execution of the general release, together with a waiver of California Civil Code section 1542. (*Id.* § 13.3.)

### H. Tax Treatment

For each payment from the Class Settlement Fund to a participating Settlement Class Member, twenty-five percent (25%) shall be treated as wages and reported on an IRS Form W-2, subject to required withholdings and seventy-five percent (75%) shall be treated as non-wage income and reported on an IRS Form 1099. (*Id.* § 8.1.) Payments from the PAGA Settlement Fund to PAGA Group Members shall be treated as 100% non-wage income and reported on IRS Form 1099. (*Id.* § 8.2.) The Administrator will be responsible for issuing to Plaintiffs, participating Settlement Class Members, and Class Counsel any W-2, 1099, or other tax forms as may be required by law for all amounts paid pursuant to this Settlement. (*Id.* § 9.2.)

In addition to the Wage Portion allocated on the Class Settlement Fund, Kimco shall separately pay any employer-side payroll taxes owed on the Wage Portion of each Individual Class Payment; these employer-side payroll taxes are not deducted from, and are exclusive of, the Gross Settlement Amount. (Settlement, §§ 2.6, 4.2, 12.1.) Kimco will fund these employer-side payroll taxes at the same time it funds the Gross Settlement Amount. (*Id.* § 12.1.)

### I. Notice To Class Members of Settlement[3]

The Settlement Administrator shall provide notice of the settlement and estimated individual recoveries pursuant to the preliminary approval order and approved class notice. (*Id.* § 10.1.) Within twenty-one (21) days of the Court granting preliminary approval of the settlement, Kimco shall provide the Settlement Administrator with a confidential class list containing the names, employee identification numbers, last known mailing addresses, Social Security numbers, and workweeks worked during the Class Period and PAGA Period. The Settlement Administrator shall maintain the confidentiality of all such

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[3] The Class Notice is attached to the Setareh Declaration as **Exhibit 2**. The Class Notice will be cited herein as "Class Notice."

information and shall not disclose it except as necessary to administer the settlement or as required by law or Court order. (*Id.* § 9.3.)

Settlement Class Members shall have 45 calendar days from the initial mailing of the Notice Packet, or such other date set by the Court, in which to postmark a valid request for exclusion. Any Settlement Class Member who timely and validly requests exclusion shall not receive a Class Settlement payment, shall not be bound by the class release, and shall preserve any individual non-PAGA claims otherwise available, but shall remain bound by the PAGA release to the extent permitted by law as a PAGA Group Member. (*Id.* § 10.2.)

The first page of the Class Notice will prominently estimate the dollar amounts of any Individual Class Payment and/or Individual PAGA Payment payable to the Class Member, and the number of Workweeks during the California Class Period and/or the PAGA Period used to calculate these amounts. (*See* Class Notice.) The Class Notice explains the key terms of the Settlement, its binding nature, and the procedures for opting out of and objecting to the Settlement, and disputing the information used to calculate the Class Member's individual payments. (*Id.*)

The Class Notice further discloses the amount of attorneys' fees, litigation costs, and class representative enhancement awards that Class Counsel and Plaintiffs will request at the final approval hearing (Class Notice §§ III.2.A–B, VII), as well as the date, time, and location of the final approval hearing (Class Notice § VIII). The Parties have appointed Simpluris as the sole Administrator responsible for mailing the Class Notice, calculating and issuing settlement payments, deciding Workweek challenges, and receiving and processing Class Members' requests for exclusion and objections; no other person or entity will perform these functions. (Class Notice §§ III.8, IV.3, VI, VII.)

Any Settlement Class Member who does not request exclusion may object to the settlement in the manner and by the deadline set forth in the Notice Packet and preliminary approval order. (*Id.* § 10.3.) The only affirmative obligation placed on Class Members is the option to timely dispute their recorded workweeks under the procedure described in Section IV of the Class Notice; no other action is required to receive payment. (*See* Class Notice.)

First-class mail to the last known address on file, updated through the United States Postal

Service's National Change of Address ("NCOA") database and supplemented by skip-tracing for undeliverable mail, is the best available method to reach the Settlement Class. (Bui Decl. ¶ 14.) The procedures Simpluris will follow in providing notice are designed to maximize the likelihood that notice is successfully delivered to Class Members, based on Simpluris' experience administering similar settlements. (*Id.* ¶¶ 3-4, 14.) The Notice will be mailed in English and Spanish. (*Id.* ¶ 14.)

### J. The Proposed *Cy Pres* Recipient Is Appropriate

Any settlement checks that remain uncashed 180 days after issuance will be distributed to the State Bar of California's Greg E. Knoll Justice Gap Fund ("Justice Gap Fund"), the Parties' mutually agreed *cy pres* recipient, subject to Court approval. (Settlement, § 14; Setareh Decl. ¶ 44.)

Code of Civil Procedure section 384 governs the distribution of unpaid residual funds in class action settlements and requires that any *cy pres* recipient have a nexus to either the objectives of the underlying litigation or the interests of the class members. Cal. Code Civ. Proc. § 384(b).

The Justice Gap Fund is a well-established, non-profit program administered by the State Bar of California that funds civil legal aid organizations providing free legal services to low-income Californians, including services specifically addressing "failure to pay wages... and/or misclassification of employees by employers." (Nguyen Decl. ¶ 6.) The Fund's mission is to expand access to justice for low-wage workers facing unpaid-wage and related employment claims, and is directly aligned with the wage-and-hour and PAGA claims asserted in this Action on behalf of the Settlement Class and the general public. (*Id.* ¶¶ 6–8.)

The nexus to this specific case is further reinforced by the Fund's support of legal aid organizations serving San Bernardino County, where this Action is pending, including Legal Aid at Work, Wage Justice Center, and Worksafe, Inc. (*Id.* ¶ 10.) Finally, there are no conflicts of interest between the Justice Gap Fund, Plaintiff Ortiz, or Setareh Law Group. (*Id*.; see also *id.* ¶ 3.) Accordingly, the Justice Gap Fund is an appropriate *cy pres* recipient under Code of Civil Procedure section 384, and the Court should approve it as such.

### K. Notice And PAGA Payment To The LWDA

In connection with Settlement approval, Class Counsel will submit the Settlement to the LWDA. (Setareh Decl., ¶ 45.)

### L. Class Members' Right To Opt Out

Any Class Member wishing to opt out from the Settlement Agreement must sign and email, fax or postmark a written request for Exclusion to the Administrator within forty-five (45) calendar days of the initial mailing of the Notice Packet, or such other date set by the Court. (Settlement, § 10.2.)

A request for exclusion does not exclude a PAGA Group Member from the PAGA portion of this Settlement or the PAGA release. (*Id.* § 10.2)

### M. Class Members' Right To Object

A Class Member who wishes to object must not request exclusion and must object as described above. (Settlement § 10.3.)

### N. Related Actions in Other Jurisdictions

In addition to the instant Action, and the Bell and Ramirez Actions, the Parties are aware of the following related actions pending against Kimco: *Rosa Manriquez-Gonzalez v. Kimco Staffing Services, Inc.*, Los Angeles County Superior Court, Case Nos. 24STCV04242 (class claims) and 24STCV10590 (PAGA claims); *Daniel Villa v. Kimco Staffing Services, Inc.*, San Bernardino County Superior Court, Case No. CIVSB2534449; *Velasquez v. Kimco Staffing Services, Inc., et al.*, San Bernardino County Superior Court, Case No. CIVSB2106091; and *Slavsky v. Cambro Manufacturing Co.; Kimco Staffing Services, Inc.*, Orange County Superior Court, Case No. 30-2025-01500568-CU-OE-CXC. (Setareh Decl., ¶ 12.)

To the extent any other action is currently pending against Defendant, this Settlement will have no effect on it except to the extent the individuals involved fall within the Class Period (January 8, 2020 through September 29, 2025) or PAGA Period (July 5, 2022 through September 29, 2025) and assert claims arising from the same factual predicates alleged in the Actions. The release is expressly limited to such claims and does not extend to unrelated claims, time periods, or worksites. (Settlement §§ 13.1–13.2; Setareh Decl., ¶ 13.)

## V. ARGUMENT

### A. The Court Should Conditionally Certify the Settlement Class Because It Meets All The Requirements For Class Certification for Settlement Purposes Only Under Code of Civil Procedure Section 382

Under Code of Civil Procedure § 382, class certification is warranted so long as there is "a numerous and ascertainable class with a well-defined community of interest among its members" and a "class action proceeding is superior to other means for a fair and efficient adjudication of the litigation." *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, 332. "The certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.'" *Id.* at 326 (quoting *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-440).

"[I]t is also well established that trial courts should use different standards to determine the propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement cases." *Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal. App. 4th 836, 859 (citing *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1807 n.19 ("*Dunk*")). As shown below, this Settlement and the Settlement Class easily meet all of the requirements for certification for settlement purposes.

#### 1. Objectively Ascertainable and Sufficiently Numerous Class

A class is ascertainable when it may be readily identified via an objectively stated definition without unreasonable expense or time by reference to official records. *Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 932. No set number of class members is required to maintain a class action. *Hebbard v. Colgrove* (1972) 28 Cal. App. 3d 1017, 1030. Here, the Settlement Class may be readily ascertained by reference to Defendant's personnel records. (Setareh Decl., ¶ 39.) Defendants estimate there are approximately 15,762 putative class members. (*Id.*)

#### 2. Predominance of Common Questions

A question of law or fact is common to the members of a class if it may be resolved through common proof. *See Jaimez,* 181 Cal. App. 4th at 1305. As for predominance, it "is a comparative concept, and 'the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.'" *Sav-on*, 34 Cal.4th at 334. Thus, "[i]ndividual issues do not render class certification inappropriate so long as such issues may effectively be managed." *Id.*

In this case, the Settlement Class meets these requirements. Plaintiffs submit that Defendant's liability arises from the same set of facts and legal questions that apply to and are answered equally as to all Class Members. (*See generally* First Amended Complaint.) Plaintiffs allege Class Members were subjected to a common practice in that Defendant: failed to pay them, *inter alia*, for missed meal periods, including premiums (FAC, ¶¶ 51-62), for rest periods, including premiums (*Id.* ¶¶ 63-72), for all hourly wages and overtime wages owed (*Id.* ¶¶ 73-100), and failed to pay all final wages (*Id.* ¶¶ 101-111).

**3. <u>Typicality of Plaintiffs' Claims</u>**

Typicality "requires a showing that the class representative has claims or defenses typical of the class." *See, e.g.*, *Fireside Bank v. Super. Ct. (Gonzalez)* (2007) 40 Cal.4th 1069, 1090.

Under these standards, Plaintiffs' claims are typical of those of the Class Members. Like other Class Members, Plaintiffs were hourly non-exempt employees of Defendant in the State of California who worked at distribution center worksites. (Setareh Decl., ¶ 37; Settlement § 2.3.) Plaintiffs allege the same meal-period, rest-period, wage, and final-wage violations common to the class described above. (*See generally* FAC.) *See Classen*, 145 Cal. App. 3d at 46 (representative plaintiffs need not share all the same claims with class members; they need only have claims that are "typical of the class").

**4. <u>Adequacy of Plaintiff and Class Counsel to Represent the Class</u>**

The adequacy requirement is met where the named plaintiff is represented by counsel qualified to conduct the litigation and the plaintiff's interest in the litigation is not antagonistic to the class's interests. *McGhee v. Bank of America* (1976) 60 Cal. App. 3d 442, 450-51.

In this case, Plaintiffs have no conflict of interest with absent Settlement Class Members and have agreed to place the classes' interests above their own. (Ortiz Decl. ¶ 16; Bell Decl. ¶ 14 ; Ramirez Decl.¶¶ 10, 18; Setareh Decl., ¶ 37.) *See Global Minerals, supra*, 113 Cal. App. 4th at 851 (the inquiry into the adequacy of a class representative is intended to uncover any conflicts between the plaintiff and the class he or she seeks to represent). Class Counsel Setareh Law Group, Wheeler Law Firm APC, and D. Law, Inc. are knowledgeable and experienced in wage and hour class action litigation. (Setareh Decl., ¶¶ 3-6; Ortiz Decl., ¶ 16; Wheeler Decl., ¶¶ 5-11; Arakeylan Decl. ¶¶ 3-7.)

### B. Standard For Granting Preliminary Settlement Approval

Cases brought as class actions may only be settled upon court approval and then only after a determination that the settlement is fair, adequate, and reasonable is made. *In re Microsoft I-V Cases* (2006) 135 Cal. App. 4th 706, 723. Courts have broad discretion to make this determination and consider factors, such as the strength of plaintiff's case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed, the experience and views of counsel, and the reaction of the class members to the proposed settlement. *See also, Dunk,* 48 Cal. App. 4th at 1800-01;

California Rule of Court 3.769 sets forth the procedures for settlement of class actions in California. A two-step process is required: the court first preliminarily approves the settlement and directs that class members be notified, and then, following notice, conducts a final approval hearing to inquire into the fairness of the settlement before entering judgment.

In deciding whether to grant preliminary approval, courts are to give "due regard" to "what is otherwise a private consensual agreement between the parties." *Sutter Health Uninsured Pricing Cases* (2009) 171 Cal. App. 4th 495, 505. When approving a settlement, "the court need not 'reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of the outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.'" *Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1291 (*quoting Officers for Justice v. Civil Serv. Comm'n* (9th Cir. 1982) 688 F.2d 615, 625).

### C. This Court Should Grant This Motion and Issue an Order Preliminarily Approving the Settlement Because It is Fair, Adequate, And Reasonable

#### 1. <u>The Settlement Resulted from Serious, Informed, Non-Collusive Negotiations</u>

The Parties reached this settlement only after they conducted extensive and protracted arm's-length negotiations through an experienced and knowledgeable mediator, Jill R. Sperber, Esq. (Setareh Decl., ¶¶ 25, 27.) The Parties have not engaged in any collusion or improper negotiations. (Setareh Decl., ¶ 29.) The only other agreement Plaintiffs and Defendant have regarding the proposed Settlement is for the Separate Ortiz Payment, which is disclosed within the Settlement. (*Id.*; Settlement § 2.14.)

#### 2. <u>Sufficient Fact Investigation and Discovery Has Occurred to Assess the</u>

**Fairness of the Settlement**

As discussed above, Plaintiff's counsel engaged in extensive investigation and informal written discovery that has allowed them to evaluate the merits of the Class Members' claims and Defendant's defenses as well as the range of possible recoverable damages. (Setareh Decl., ¶¶ 13-25.) Based on Plaintiffs' counsel's investigation and discovery, Plaintiffs and their counsel are of the opinion that the Settlement is fair, reasonable, adequate, and in the Class Members' best interest. (Setareh Decl., ¶¶ 31, 33, 36; Ortiz Decl., ¶ 19)

**3. The Separate Ortiz Payment is Fair, Reasonable, and Justified**

In addition to his pro rata share of the Class Settlement Fund and his requested Enhancement Award, Plaintiff Ortiz will receive, from the GSA, a Separate Ortiz Payment of $20,000.00 in exchange for the release of an individual retaliation claim against Defendant that is separate and apart from the wage-and-hour claims resolved by this Settlement. (Settlement, § 2.14, 6; Ortiz Decl., ¶¶ 12-13.) This separate payment, and the additional release it reflects, is appropriately disclosed to the Court and is fair and reasonable for several reasons.

First, after Ortiz filed this action, Defendant rehired him at a Kimco hiring event, and he was terminated approximately one week later after being seen by his former supervisor, notwithstanding Defendant's continued hiring for the same position both before and after his termination. (Ortiz Decl., ¶¶ 5-10.) Based on this sequence of events, Ortiz believes he was terminated in retaliation for filing and pursuing this action, giving rise to a potential individual claim for retaliation under Labor Code section 1102.5 and related statutes that is wholly separate from the class wage-and-hour claims. (*Id.* ¶ 11.)

Second, by signing the Settlement, Ortiz will provide a general release that encompasses this individual retaliation claim, in addition to the class wage-and-hour claims released by all Settlement Class Members. (*Id.* ¶ 12.)

Third, the $20,000.00 Separate Ortiz Payment is negotiated and paid in exchange for this additional release and is separate from, and in addition to, the $10,000.00 Enhancement Award Ortiz is separately requesting for his service as a Class Representative — an amount equal to only 0.7% of the $1,450,000.00 Gross Settlement Amount. (*Id.* ¶ 17.) Because the Separate Ortiz Payment is consideration for a distinct, individual retaliation claim that is not asserted on behalf of the class, it does not create a conflict of interest between Ortiz and the class, and the existence and terms of this separate agreement have been fully disclosed to the Court as required. (Settlement, § 2.14; Setareh Decl., ¶ 29.)

**4. Plaintiffs' Counsel Are Experienced Class Action and Employment Attorneys and the Amount of Attorneys' Fees Sought Are Appropriate**

As detailed more completely in the declarations of counsel, Class Counsel are particularly experienced in employment law and wage and hour class actions. (Setareh Decl., ¶¶ 3-6; Wheeler Decl. ¶¶ 4-11; Arakelyan Decl. ¶¶ 3-7.) Class Counsel believe that the one-third of the GSA that they will seek in attorneys' fees is appropriate in this matter. (Setareh Decl., ¶ 40.) The Court of Appeal has recognized that one factor supporting a lodestar multiplier is to match privately negotiated contingency fees "to ensure that the fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation." *Lealao v. Beneficial California, Inc.* (2000) 82 Cal. App. 4th 19, 50. Contingency fees typically range from one-third to forty percent and Class Counsel has been awarded one-third-common-fund attorneys' fees in numerous class actions. (Setareh Decl., ¶ 40.)

**5. The Settlement Is Fair and Reasonable Based on the Strength of Plaintiffs' Case and the Risks and Costs of Further Litigation**

**(a) The Wage and Hour Claims of the Settlement Class**

California courts recognize that "'the merits of the underlying class claims are not a basis for upsetting the settlement of a class action.'" *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 246. The settlement need not provide one-hundred percent of the damages sought in order to be judged reasonable. *Wershba*, 91 Cal. App. 4th at 250.

The following are the total potential damages for the Action as estimated by Plaintiff:

$1,850,356.22 in meal break claims
$628,146.40 in rest period claims
$530,887.77 in off-the-clock claims
$394,050.00 for reimbursement of business expenses
<u>Sub-total potential damages excluding penalties for 203, 226 and PAGA: </u>$3,403,440.39
$18,740,736.00 in waiting time penalties
$2,676,800.00 in wage statement penalties
<u>Sub-total potential damages and penalties excluding PAGA:</u> $21,417,536
$4,421,122.55 in PAGA penalties
**TOTAL** $25,838,658.55 (Setareh Decl. ¶ 35.)

The Declaration of Shaun Setareh contains a chart delineating the damages and a full discussion of the risks in the Action. (*Id.* ¶ 36.)

Despite a total potential recovery of $3,403,440.39 on their unpaid wage, non-penalty class claims, and approximately $21 million on all class claims, including statutory penalties, Plaintiffs recognize the challenges they face in certifying a class action and establishing liability on the wage and hour claims and estimate that their likelihood of prevailing on all their causes of action, and thus of recovering anything close to $21 million on behalf of a class, is very unlikely (*Id.* ¶ 36.) For those claims, if any, that are certified for class treatment, Plaintiffs must prevail at a trial on the merits. (*Id.*)

Courts regularly approve settlements where the recovery is less than one quarter of the maximum potential realistic recovery. *E.g., Bravo v. Gale Triangle* (C.D. Cal. 2017) 2017 WL 708766 *9 (approving settlement where recovery was 7.5% of projected maximum recovery amount); *Officers for Justice v. Civil Service Com'n of City & County of S.F.* (9th Cir. 1982) 688 F.2d 615, 628 ("[A] cash settlement amounting to only a fraction of the potential recovery will not per se render the settlement inadequate or unfair.") Here, the GSA is reasonable in comparison to the likely potential award at trial, which meets or exceeds percentages routinely approved by courts.

**(b) The Uncertainties Faced Justify the Discounted Settlement Figure**

In all the above respects, Defendant strongly deny any liability and the propriety of class certification for any reason other than settlement. (Settlement, § 1.4.) Continued litigation of this lawsuit presented Plaintiffs and Defendant with substantial legal risks that were (and continue to be) very difficult to assess. (Setareh Decl., ¶ 36; Arakelyan Decl., ¶¶ 23-27.)

Most significantly, Plaintiffs faced a genuine risk that the Court would have compelled arbitration of the class claims on an individual basis. Class Members, including Plaintiff Ortiz, signed arbitration agreements with Defendant requiring binding individual arbitration of employment-related disputes and including a class and collective action waiver. (Setareh Decl. ¶ 36.) Defendant took the position that this agreement was enforceable. While Class Counsel believes these employees are exempt from the Federal Arbitration Act as transportation workers engaged in interstate commerce under *Ortiz v. Randstad Inhouse Services, LLC*, 95 F.4th 1152 (9th Cir. 2024), this remains a developing and contested area of law, and there was a genuine risk the Court would have compelled arbitration. Had that occurred, few, if any Class Members would likely have pursued individual arbitration, and the Class as a whole would likely have recovered nothing on these claims. (Setareh Decl. ¶ 36.)

Plaintiffs also faced a serious risk regarding Defendant's ability to satisfy a judgment approaching Plaintiffs' claimed exposure. During mediation with Jill Sperber, and pursuant to the mediation privilege, Defendant provided Class Counsel with financial statements prepared by an independent auditor. Based on Class Counsel's review of that financial information, Defendant would likely have significant difficulty satisfying a judgment at or near the full scope of Plaintiffs' claimed exposure, a factor that materially informed Class Counsel's assessment that the Settlement is fair, reasonable, and adequate notwithstanding the discount from Plaintiffs' maximum theoretical recovery. (*Id.*)

Beyond these two considerations, Plaintiffs faced numerous additional risks that supported the compromise reflected in the Settlement. These included the risk that Plaintiffs would be unable to establish liability for the alleged unpaid wage, meal-and-rest-period, and PAGA claims given Defendant's factual and legal defenses; the risk that individualized inquiries into whether each employee received compliant meal and rest periods would defeat class certification or class-wide liability; the risk that Plaintiffs would not recover waiting-time and wage-statement penalties absent a showing of willfulness or knowing intent; and the risk that any PAGA penalty award would be substantially reduced by the Court in its discretion under Labor Code section 2699(e)(2), as occurred in *Carrington v. Starbucks*, 30 Cal.App.5th 504, 529 (2018) (reducing PAGA meal-break penalties from $50 to $5 per violation) and *Thurman v. Bayshore Transit Management, Inc.*, 203 Cal.App.4th 1112, 1136 (2012) (affirming a 30% reduction). (Setareh Decl. ¶ 36.)

Finally, Plaintiffs faced the risk of lengthy and costly appellate litigation on both liability and certification issues, the risk of a prolonged and expensive trial, and the risk of being held liable for Defendant's attorneys' fees and costs had the case proceeded unsuccessfully. (*Id.*) Each of these risks bore heavily on the negotiations leading to the Settlement and, taken together, confirms that the compromise reflected in the GSA is a fair, reasonable, and appropriate resolution given the substantial uncertainties of continued litigation.

In light of the uncertainties of protracted litigation, the Settlement amount reflects a fair and reasonable compromise recovery for the Class Members (Setareh Decl. ¶ 36.) Moreover, each Settlement Class Member will be given the opportunity to opt out, allowing those who think they have claims greater than the benefits they can receive under this Settlement to pursue their own claims. (*Id.*)

### D. The Court Should Grant This Motion and Issue an Order Directing That Notice Be Sent

"The notice given to the class must fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members." *Trotsky v. L.A. Fed. Sav. & Loan Ass'n* (1975) 48 Cal. App. 3d 134, 151-52.

The Class Notice explains (i) information regarding the nature of the Action; (ii) a summary of the Settlement's principal terms, including the amount of attorneys' fees, litigation costs, and enhancement payments requested; (iii) the Settlement Class and Aggrieved Employee group; (iv) the total estimated number of Workweeks each respective Class Member worked for Defendant during the Class Period and the PAGA Period; (v) each Class Member's estimated Individual Class Payment and/or PAGA Payment, and the formula for calculating Individual Class Payments and PAGA Payments; (vi) instructions on how to submit Requests for Exclusion or Objections; (vii) the deadlines by which the Class Member must postmark, email or fax Request for Exclusions and Objections to the Settlement; (viii) the claims to be released; and (ix) the date of the Final Approval Hearing. (*See* Class Notice.)

### E. The Court Should Set A Hearing For Final Approval

Finally, the Court should set a formal hearing to conduct an inquiry into the fairness of the proposed settlement. Cal. Rule Ct. 7.769(e), (g).

## VI. CONCLUSION

For the foregoing reasons, the Parties respectfully submit that the Settlement's terms are fair, adequate, and reasonable and that it is in the best interest of the Class Members. The Class should be conditionally certified, the Settlement preliminarily approved, notice directed to the Class, and a final approval hearing scheduled.

DATED: August 3, 2026

SETAREH LAW GROUP

*/s/ Farrah Grant*

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