

**HAINES LAW GROUP, APC**  
Paul K. Haines (SBN 248226)  
phaines@haineslawgroup.com  
Sean M. Blakely (SBN 264384)  
sblakely@haineslawgroup.com  
Diana M. Martinez (SBN 322654)  
dmartinez@haineslawgroup.com  
222 N. Sepulveda Blvd., Suite 1550  
El Segundo, California 90245  
Tel: (424) 292-2350  
Fax: (424) 292-2355

*Attorneys for Plaintiff*

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

JOSE JIMENEZ, as an individual and on behalf  
of all others similarly situated,

Plaintiff,

vs.

FENCEWORKS, INC., a California corporation;  
and DOES 1 through 100,

Defendants.

Case No.: 30-2018-01034150-CU-OE-CXC

**CLASS ACTION**

*[Assigned for all purposes to the Honorable  
William Claster, Dept. CX-104]*

**PLAINTIFF'S NOTICE OF MOTION  
AND MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT**

Date: July 10, 2020

Time: 9:00 a.m.

Dept.: CX-104

**RESERVATION NO. 73283681**

Complaint Filed: November 26, 2018

Trial Date: None Set

1 PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court,  
2 on July 10, 2020 at 9:00 a.m., or as soon thereafter as the matter may be heard in Department  
3 CX-104 of the above-entitled Court, located at 751 West Santa Ana Blvd., Santa Ana, California  
4 92701, Plaintiff Jose Jimenez (“Plaintiff”), individually and on behalf of a class of similarly-  
5 situated individuals, will, and hereby does, move this Court for:

- 6 1. Preliminary approval of the proposed Stipulation of Settlement (“Settlement”);
- 7 2. Pursuant to Section 382 of the California Code of Civil Procedure, provisional  
8 certification of the following Settlement Class:

9 All current and former non-exempt field employees who are or  
10 were employed by Fenceworks, Inc. in the State of California  
during the time period of November 26, 2014 to March 16, 2020.

- 11 3. Preliminary appointment of Plaintiff Jose Jimenez as Class Representative;
- 12 4. Preliminary appointment of Paul K. Haines, Sean M. Blakely, and Diana M. Martinez  
13 of Haines Law Group, APC as Class Counsel;
- 14 5. Appointment of Phoenix Settlement Administrators as the third-party Settlement  
15 Administrator;
- 16 6. Approval of the proposed Class Notice, Request for Exclusion Form, and Notice of  
17 Estimated Settlement Award (collectively, the “Notice Packet”), and an order that the  
18 Notice Packet be disseminated to the Settlement Class members as provided in the  
19 Settlement;
- 20 7. An order granting Plaintiff’s unopposed request to file a First Amended Class and  
21 Representative Action Complaint, which adds a claim for failure to furnish accurate  
22 itemized wage statements and a representative claim under the Labor Code Private  
23 Attorneys General Act (“PAGA”); and
- 24 8. The scheduling of a hearing to consider whether the Settlement should be finally  
25 approved, and to award an amount for enhancement payment to the Class  
26 Representative and attorneys’ fees and costs to Class Counsel.

27 This motion is based on this Notice of Motion; the attached Memorandum of Points and  
28 Authorities; the declarations of Paul K. Haines, Sean M. Blakely, Diana M. Martinez and exhibits

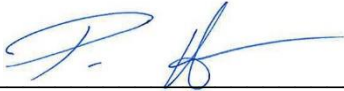
1 attached thereto; the declaration of Jodey Lawrence and exhibits attached thereto; the Declaration  
2 of Jose Jimenez; the pleadings and other papers filed in this action; and on any further oral or  
3 documentary evidence or argument presented at the time of hearing.

4  
5  
6 Dated: May 18, 2020

Respectfully Submitted,

HAINES LAW GROUP, APC

7  
8 By:



Paul K. Haines

Attorneys for Plaintiff

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. SUMMARY OF THE LITIGATION ..... 2

    A. FACTUAL AND PROCEDURAL BACKGROUND..... 2

    B. PLAINTIFF’S CLAIMS AND FENCEWORKS’ DEFENSES ..... 2

        1. Meal Period Claims..... 2

        2. Rest Period Claim (Non-Piece Rate Shifts) ..... 3

        3. Rest Period Claim (Piece-Rate Shifts) ..... 4

        4. Failure to Pay Piece Rate Employees for Non-Productive Time..... 4

        5. Unpaid Overtime Due to “Regular Rate” Miscalculation..... 4

        6. Failure to Pay All Wages Due to Unlawful Rounding ..... 5

        7. Claims Under Labor Code §§ 203, 226, and the PAGA..... 5

    C. DISCOVERY AND MEDIATION..... 6

III. THE PROPOSED SETTLEMENT..... 7

    A. ESSENTIAL TERMS OF THE SETTLEMENT ..... 7

        1. The Settlement Provides for Reasonable Monetary Payments ..... 7

        2. Attorneys’ Fees and Costs, Class Representative Enhancement Payment,  
            and PAGA Payment ..... 8

IV. ARGUMENT..... 10

    A. PRELIMINARY APPROVAL IS WARRANTED ..... 10

        1. Standard for Preliminary Approval..... 10

            a. The Strength of Plaintiff’s Case ..... 10

            b. Risk, Expense, Complexity, and Duration of Further Litigation..... 11

            c. Risk of Maintaining Class Action Status ..... 11

            d. Amount Offered in Settlement Given Realistic Value of Claims..... 11

            e. The Experience and Views of Counsel ..... 18

        2. The Preliminary Approval Standard Is Met..... 18

            a. The Settlement Is Within the Range of Possible Approval..... 18

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

b. The Settlement Resulted from Serious, Informed Negotiations ..... 18

c. The Settlement Is Devoid of Obvious Deficiencies ..... 19

B. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS..... 19

1. The Proposed Class Is Ascertainable and Numerous ..... 19

2. Common Issues of Law and Fact Predominate..... 19

3. The Named Plaintiff’s Claims Are Typical ..... 20

4. Plaintiff and Class Counsel Will Adequately Represent the Class..... 20

C. THE COURT SHOULD ORDER DISTRIBUTION OF THE PROPOSED  
CLASS NOTICE ..... 20

D. THE COURT SHOULD SET A FINAL APPROVAL HEARING ..... 21

V. CONCLUSION ..... 21

**TABLE OF AUTHORITIES**

**Federal Cases**

|                                                                                   |    |
|-----------------------------------------------------------------------------------|----|
| <i>Eisen v. Carlisle &amp; Jacquelin</i> , 417 U.S. 156 (1974).....               | 20 |
| <i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998) .....             | 10 |
| <i>In re Pac. Enter. Securities Litig.</i> , 47 F.3d 373 (9th Cir. 1995) .....    | 18 |
| <i>Patel v. Nike Retail Svcs., Inc.</i> , 58 F.Supp.3d 1032 (N.D. Cal. 2014)..... | 17 |

**State Cases**

|                                                                                                      |        |
|------------------------------------------------------------------------------------------------------|--------|
| <i>AHMC Healthcare, Inc. v. Sup. Ct.</i> , 24 Cal.App.5th 1014 (2018) .....                          | 5      |
| <i>Amaral v. Cintas Corp. No. 2</i> , 163 Cal.App.4th 1157 (2008) .....                              | 16, 17 |
| <i>B.W.I. Custom Kitchen v. Owens-Illinois, Inc.</i> , 191 Cal.App.3d 1341 (1987) .....              | 20     |
| <i>Benton v. Telecom Network Specialists, Inc.</i> , 220 Cal.App.4th 701 (2013).....                 | 19     |
| <i>Bluford v. Safeway, Inc.</i> , 216 Cal.App.4th 864 (2013).....                                    | 19     |
| <i>Brinker Rest. Corp. v. Sup. Ct.</i> , 53 Cal.4th 1004 (2012) .....                                | 3      |
| <i>Capital People First v. State Dept. of Developmental Svcs.</i> , 155 Cal.App.4th 676 (2007) ..... | 20     |
| <i>Carrington v. Starbucks Corp.</i> , 30 Cal.App.5th 504 (2018).....                                | 6, 17  |
| <i>Dunk v. Ford Motor Co.</i> , 48 Cal.App.4th 1794 (1996) .....                                     | 10     |
| <i>Faulkinbury v. Boyd &amp; Assoc., Inc.</i> , 216 Cal.App.4th 220 (2013) .....                     | 19     |
| <i>In re Cellphone Fee Termination Cases</i> , 186 Cal.App.4th 1380 (2010).....                      | 8      |
| <i>Kao v. Joy Holiday</i> , 12 Cal.App.5th 947 (2017) .....                                          | 5      |
| <i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal.App.4th 116 (2008).....                          | 10, 18 |
| <i>Laffitte v. Robert Half Int’l, Inc.</i> , 1 Cal.5th 480 (2016) .....                              | 9      |
| <i>Maldonado v. Epsilon Plastics, Inc.</i> , 22 Cal.App.5th 1308 (2018) .....                        | 6      |
| <i>McGhee v. Bank of America</i> , 60 Cal.App.3d 442 (1976) .....                                    | 20     |
| <i>Naranjo v. Spectrum Security Svcs., Inc.</i> , 40 Cal.App.5th. 444 (2019) .....                   | 6      |
| <i>Price v. Starbucks Corp.</i> , 192 Cal.App.4th 1136 (2011).....                                   | 6      |
| <i>Reed v. United Teachers Los Angeles</i> , 208 Cal.App.4th 322 (2012).....                         | 10     |
| <i>Sav-On Drug Store, Inc. v. Sup. Ct.</i> , 34 Cal.4th 319 (2004).....                              | 19     |

|    |                                                                                    |        |
|----|------------------------------------------------------------------------------------|--------|
| 1  | <i>See's Candy Shops, Inc. v. Sup. Ct.</i> , 210 Cal.App.4th 889 (2012) .....      | 5      |
| 2  | <i>Sevidal v. Target Corp.</i> , 189 Cal.App.4th 905 (2010) .....                  | 19     |
| 3  | <i>Thurman v. Bayshore Transit Mgmt., Inc.</i> , 203 Cal.App.4th 1112 (2012) ..... | 6, 17  |
| 4  | <i>Wershba v. Apple Computer, Inc.</i> , 91 Cal.App.4th 224 (2001) .....           | 10     |
| 5  |                                                                                    |        |
| 6  | <b><u>Federal Statutes and Rules</u></b>                                           |        |
| 7  | Fed. R. Civ. Proc. 23 .....                                                        | 10     |
| 8  | 29 U.S.C. § 207(e)(2) .....                                                        | 5      |
| 9  |                                                                                    |        |
| 10 | <b><u>State Statutes and Rules</u></b>                                             |        |
| 11 | 8 Cal. Code Regs. § 13520 .....                                                    | 5      |
| 12 | Civil Code § 1542 .....                                                            | 8      |
| 13 | Code Civ. Proc. § 382 .....                                                        | 19     |
| 14 | Labor Code § 226(e) .....                                                          | 6, 16  |
| 15 | Labor Code § 226.2 .....                                                           | 4, 14  |
| 16 | Labor Code § 226.7 .....                                                           | 4, 14  |
| 17 | Labor Code § 512(a) .....                                                          | 3      |
| 18 | Labor Code § 2699(e)(2) .....                                                      | 6, 17  |
| 19 | Labor Code § 2699(i) .....                                                         | 9      |
| 20 | Rule of Court 3.766(e) .....                                                       | 21     |
| 21 | Rule of Court 3.769 .....                                                          | 10, 21 |
| 22 |                                                                                    |        |
| 23 | <b><u>Unpublished Cases</u></b>                                                    |        |
| 24 | <i>Chu v. Wells Fargo Inc., LLC</i>                                                |        |
| 25 | No. C-05-4526-MHP, 2011 WL 673265 (N.D. Cal. Feb. 16, 2011) .....                  | 9      |
| 26 | <i>Green v. Lawrence Service Co.</i>                                               |        |
| 27 | No. LA-CV-12-6155-JAK (VBKx), 2013 WL 3907506 (C.D. Cal. July 23, 2013) .....      | 17     |
| 28 |                                                                                    |        |

|    |                                                                           |       |
|----|---------------------------------------------------------------------------|-------|
| 1  | <i>Fleming v. Covidien, Inc.</i>                                          |       |
| 2  | No. ED-CV-10-1487-RGK(OPx), 2011 WL 7563047 (C.D. Cal. 2011) .....        | 6, 17 |
| 3  | <i>Alvarado v. Nederend</i>                                               |       |
| 4  | No. 1:08-cv-01099-OWW-DLB, 2011 WL 1883188 (E.D. Cal. May 17, 2011) ..... | 9     |
| 5  | <i>Ramirez v. United Rentals, Inc.</i>                                    |       |
| 6  | No. 5:10-cv-04374 EJD, 2013 WL 2646648 (N.D. Cal. Jun. 12, 2013) .....    | 16    |
| 7  |                                                                           |       |
| 8  | <b><u>Other Sources</u></b>                                               |       |
| 9  | <i>Manual for Complex Litig.</i> , § 30.41 (3rd Ed. 1995) .....           | 18    |
| 10 | <i>Newberg on Class Actions</i> , §§ 11:24-25 (4th Ed. 2013) .....        | 18    |
| 11 | <i>Newberg on Class Actions</i> , § 14.6 (4th Ed. 2013) .....             | 9     |

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Jose Jimenez (“Plaintiff”) seeks preliminary approval of a class-wide settlement  
4 reached with Defendant Fenceworks, Inc. (“Fenceworks” or “Defendant”). Plaintiff alleges that  
5 Fenceworks failed to pay its piece-rate workers for “non-productive time,” resulting in unpaid  
6 minimum wages; failed to incorporate all non-discretionary incentive pay into the “regular rate”  
7 of pay, resulting in underpayment of overtime wages; unlawfully rounded employee time,  
8 resulting in further unpaid wages; failed to provide all required meal periods; and failed to  
9 authorize and permit all required paid rest periods. Based on these violations, Plaintiff also alleges  
10 derivative claims for Fenceworks’ alleged failure to timely pay all wages at termination and  
11 failure to furnish accurate itemized wage statements. Plaintiff further alleges that as a result of  
12 the above violations, Fenceworks has engaged in unfair business practices and is liable for civil  
13 penalties under the Private Attorneys General Act (“PAGA”).<sup>1</sup>

14 Plaintiff respectfully requests that the Court preliminarily approve this non-reversionary,  
15 common-fund class action settlement,<sup>2</sup> in which Fenceworks has agreed to pay \$895,000.00 on  
16 behalf of the following Settlement Class, which consists of an estimated 570 individuals:

17 All current and former non-exempt field employees who are or were employed by  
18 Fenceworks in the State of California during the time period of November 26,  
2014 to March 16, 2020 (“Class Period”).

19 The Settlement represents an excellent result for Settlement Class members, who will  
20 receive estimated average payments of **\$937.13**, without needing to submit a claim form. The  
21 Settlement was reached after the parties engaged in mediation with Marc Feder, Esq., an  
22 experienced wage and hour class action mediator. In both formal discovery and informally in  
23 connection with mediation, Fenceworks produced extensive documents and information,  
24 including a sampling of timekeeping and payroll records; its relevant wage and hour policies;

25 <sup>1</sup> Plaintiff’s proposed First Amended Complaint (“FAC”), which is attached as Exhibit 5 to the  
26 Declaration of Paul K. Haines filed herewith, alleges causes of action for (1) Meal Period  
27 Violations; (2) Rest Period Violations; (3) Failure to Pay All Overtime Wages; (4) Minimum  
28 Wage Violations; (5) Waiting Time Penalties; (6) Unpaid or Underpaid Rest Period Time; (7)  
Wage Statement Violations; (8) Unfair Competition; and (9) Civil Penalties under the PAGA.

<sup>2</sup> The Stipulation of Settlement (“Settlement”) is attached as Exhibit 1 to the Declaration of Paul  
K. Haines filed herewith. The proposed Class Notice, Request for Exclusion Form, and Notice of  
Estimated Settlement Award are attached as Exhibits 2, 3, and 4, respectively.

1 additional relevant data points; and other documents and information. After extensive research  
2 and investigation, including a detailed analysis of Fenceworks’ potential exposure, the parties  
3 attended a full-day mediation with Mr. Feder on January 16, 2020. With Mr. Feder’s assistance,  
4 the parties reached an agreement in principle, which ultimately resulted in the Settlement.

5 As noted, Settlement Class members are not required to submit a claim form to receive a  
6 payment (“Settlement Award”) from the Settlement. Settlement Awards will be distributed to all  
7 eligible Settlement Class members who do not affirmatively opt out. After deductions for  
8 proposed settlement administration costs, attorneys’ fees and costs, Plaintiff’s class representative  
9 enhancement payment, and payment to the Labor & Workforce Development Agency  
10 (“LWDA”), the average Settlement Award is projected to be \$937.13. For the reasons stated  
11 herein, Plaintiff respectfully requests that the Court preliminarily approve the Settlement.

## 12 **II. SUMMARY OF THE LITIGATION**

### 13 **A. FACTUAL AND PROCEDURAL BACKGROUND**

14 Fenceworks installs and maintains fencing for commercial and residential properties,  
15 including wood fencing, concrete fencing, vinyl fencing, and chain link fencing, and operates  
16 eight locations in California. *See* Declaration of Paul K. Haines (“Haines Decl.”), ¶ 10. Plaintiff  
17 and Settlement Class members are current and former field employees who are or were employed  
18 by Fenceworks, Inc. in California during the Class Period. *See* Settlement, § 1.

19 On November 26, 2018, Plaintiff filed the instant action in this Court, alleging claims for  
20 meal period violations, rest period violations, failure to pay all overtime wages, minimum wage  
21 violations, waiting time penalties, and unfair competition. Haines Decl., ¶ 11. Pursuant to the  
22 Settlement, the parties have stipulated to the filing of a FAC to add causes of action for failure to  
23 furnish accurate and itemized wage statements and for civil penalties under the PAGA. *Id.*

### 24 **B. PLAINTIFF’S CLAIMS AND FENCEWORKS’ DEFENSES**

#### 25 **1. Meal Period Claims**

26 Plaintiff alleges Fenceworks has failed to maintain formal written meal period policies,  
27 and that the lack of any meal period policy has resulted in first and second meal period violations.  
28 Specifically, Plaintiff alleges that first meal periods are regularly late and/or less than 30-minutes,

1 and second meal periods are not provided on shifts over 10.0 hours. Haines Decl., ¶ 16.  
2 Fenceworks counters it maintains a compliant written meal period policy, which it posts in various  
3 places at its offices and yards, including directly above employee time-clocks. *Id.* Fenceworks  
4 also produced timekeeping records showing Plaintiff and other non-exempt employees regularly  
5 took lawful meal periods, and that included signed attestations affirming that employees received  
6 all required meal periods each pay period. *Id.* Fenceworks further counters that it has always  
7 *provided* employees the opportunity to take legally compliant meal periods and is not required to  
8 *ensure* they are taken. *Id.*; *Brinker Rest. Corp. v. Sup. Ct.*, 53 Cal.4th 1004, 1034 (2012) (rejecting  
9 “ensure” standard). Thus, any missed meal periods were the result of employee choice. *Id.* As for  
10 second meal periods, Fenceworks additionally asserts many employees choose to waive their  
11 second meal periods, as they may do under Labor Code § 512(a), so that they do not need to stay  
12 at work for an extra unpaid 30 minutes. *Id.*, ¶ 17. Finally, Fenceworks maintains Plaintiff’s meal  
13 period claim is not suited for class certification, since individual inquiries would be needed to  
14 assess which employees, if any, took non-compliant or missed meal periods, how many meal  
15 periods were non-compliant or missed, and the reasons why a particular employee did not take a  
16 meal period on a particular shift. *Id.*

## 17 **2. Rest Period Claim (Non-Piece Rate Shifts)**

18 Plaintiff alleges Fenceworks does not maintain a written rest period policy and as a result,  
19 non-exempt employees were not authorized or permitted to take all rest periods. Haines Decl., ¶  
20 18. Fenceworks counters it does maintain a compliant written rest period policy; that, in practice,  
21 it has always authorized and permitted employees 10-minute rest periods for each 4 hours worked  
22 or major fraction thereof; and that timekeeping records included signed attestations for each pay  
23 period affirming employees received all rest periods to which they were entitled. *Id.* Any failure  
24 to take rest periods was a result of employee choice, Fenceworks argues, rather than a Fenceworks  
25 policy or practice. *Id.* Fenceworks further argues this claim is not amenable to class treatment,  
26 since individual inquiries would be required to determine which employees failed to take rest  
27 periods, how many rest periods they failed to take, and the reasons why each employee failed to  
28 take rest period(s) on a particular shift, particularly since rest periods are not recorded. *Id.*

1                                   **3. Rest Period Claim (Piece-Rate Shifts)**

2           Plaintiff alleges Fenceworks compensated Plaintiff and other non-exempt employees on  
3 a piece-rate basis, whereby Fenceworks paid its non-exempt field employees per hole, foot, post,  
4 or gate installed and/or completed. *See* Haines Decl., ¶ 19. Plaintiff further alleged that  
5 Fenceworks’ piece-rate compensation plan fails to separately compensate employees for all  
6 required rest periods as required under Labor Code § 226.2, and specifically, that it only pays for  
7 up to two rest periods even where employees work over 10 hours and are therefore entitled to  
8 three paid rest periods. *Id.* Fenceworks argues that only some of its employees are paid on a  
9 piece-rate, and that it does separately compensates piece-rate employees for all required rest  
10 periods (noted “INCENTIVE BREAK” in payroll records). *Id.* Fenceworks contends that at  
11 worst, it is only liable for the unpaid rest period minutes themselves, rather than rest period  
12 premiums under Labor Code § 226.7, substantially reducing any potential liability. *Id.*

13                                   **4. Failure to Pay Piece Rate Employees for Non-Productive Time**

14           Plaintiff alleges that Fenceworks was required to separately compensate employees who  
15 were paid on a piece-rate basis for so-called “non-productive” time, such as time spent obtaining  
16 job assignments, gathering necessary materials for job assignments, driving to, from, and between  
17 job sites, and unloading materials. Haines Decl., ¶ 20. Fenceworks contends that any questions  
18 of non-productive time would be highly individualized as there are no records or other common  
19 evidence of time spent on potentially non-productive tasks necessary to prove class-wide liability  
20 – precluding certification. *Id.* Fenceworks further contends employees work minimal (if any)  
21 “non-productive” time, as the alleged non-productive activities are in fact “directly related” to  
22 piece-rate tasks under Labor Code § 226.2 and thus do not need to be separately compensated. *Id.*

23                                   **5. Unpaid Overtime Due to “Regular Rate” Miscalculation**

24           Plaintiff alleges that Fenceworks paid Plaintiff and other non-exempt employees non-  
25 discretionary incentive pay, including “Incentive Reg,” and of non-discretionary, performance-  
26 based pay, but failed to include these payments when calculating employees’ “regular rate” for  
27 determining overtime compensation, resulting in underpaid overtime wages. Haines Decl., ¶ 21.  
28 Fenceworks counters that any incentive pay or bonus payments were discretionary and, in any

1 event, were not tied to employees' hours worked, and therefore need not be included in the regular  
2 rate. *Id.*; *see also* 29 U.S.C. § 207(e)(2) (payments which are not compensation for hours worked  
3 need not be included in regular rate). Fenceworks also argues that differences in the frequency,  
4 type, and amount of incentive pay received by putative class members would preclude class  
5 certification of this claim. *Id.*

#### 6 **6. Failure to Pay All Wages Due to Unlawful Rounding**

7 Plaintiff alleges that Fenceworks pays its employees in quarter-hour increments, and that  
8 its time-rounding practice has resulted in a systemic underpayment of minimum and overtime  
9 wages. Haines Decl., ¶ 22. Fenceworks counters that it utilizes a neutral time-rounding  
10 mechanism that results, over time, in employees being paid for all hours worked. *Id.*; *see also*  
11 *See's Candy Shops, Inc. v. Sup. Ct.*, 210 Cal.App.4th 889, 901 (2012) (rounding policy lawful if  
12 employer "applies a consistent rounding policy that, on average, favors neither overpayment nor  
13 underpayment."); *AHMC Healthcare, Inc. v. Sup. Ct.*, 24 Cal.App.5th 1014, 1027-28 (2018)  
14 (finding rounding policy lawful where policy was "neutral on its face" and resulted in employees  
15 being overpaid). Fenceworks also argues that any unpaid time could have only amounted to a few  
16 minutes per day, at most, and was thus *de minimis*. *Id.* Finally, Fenceworks asserts this claim  
17 would not be amenable to class certification given the individualized inquiries that would be  
18 required, as many employees were overpaid due to rounding. *Id.* Indeed, and as explained below,  
19 Plaintiff's analysis of time and pay records revealed that employees were largely overpaid due to  
20 rounding, and therefore Plaintiff did not anticipate a realistic recovery on this claim.

#### 21 **7. Claims Under Labor Code §§ 203, 226, and the PAGA**

22 As a result of these alleged wage and hour violations, Plaintiff asserts Fenceworks failed  
23 to comply with its final payment and wage statement obligations, in violation of Labor Code §§  
24 203 and 226, respectively, and that Fenceworks is liable for civil penalties under the PAGA.

25 Fenceworks asserts it has strong, good-faith defenses to Plaintiff's underlying claims,  
26 precluding imposition of waiting time penalties. *See* 8 Cal. Code Regs. § 13520 (a "good faith  
27 dispute that any wages are due will preclude imposition of waiting time penalties"); *Kao v. Joy*  
28 *Holiday*, 12 Cal.App.5th 947, 963 (2017) (holding "good faith dispute" precluded imposition of

1 waiting time penalties). Fenceworks further contends Plaintiff's meal and rest period claims  
2 cannot support a claim for waiting time or wage statement penalties, as a Court of Appeal recently  
3 held in *Naranjo v. Spectrum Security Servs., Inc.*, 40 Cal.App.5th. 444, 473-75 (2019) (review  
4 granted Jan. 2, 2020). Fenceworks further contends any alleged wage statement violations could  
5 not be shown to be "knowing and intentional" given its good-faith defenses; that Plaintiff cannot  
6 show he or other employees "suffer[ed] injury," as required by Lab. Code § 226(e). Fenceworks  
7 further argues that wage statements always accurately reflected hours worked and amounts paid  
8 to employees. See *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308, 1336-37 (2018)  
9 (agreeing with employer's "commonsense position that the pay stubs were accurate in that they  
10 correctly reflected the hours worked and the pay received). Haines Decl., ¶ 24.

11 Finally, Fenceworks contends the PAGA claim fails because the underlying claims fail.  
12 See, e.g., *Price v. Starbucks Corp.*, 192 Cal.App.4th 1136, 1147 (2011) ("Because the underlying  
13 causes of action fail, the derivative UCL and PAGA claims also fail."). Fenceworks further  
14 maintains that given its good-faith defenses, the Court would reduce any PAGA civil penalties.  
15 Haines Decl., ¶ 25; see also Lab. Code § 2699(e)(2) (authorizing reduction in PAGA penalties in  
16 court's discretion); *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012)  
17 (affirming reduction of PAGA penalties); *Fleming v. Covidien, Inc.*, No. ED-CV-10-1487-  
18 RGK(OPx), 2011 WL 7563047 at \*4 (C.D. Cal. 2011) (reducing PAGA penalties by over 82%);  
19 *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA civil penalty of  
20 just \$5 per pay period where employer made "good faith attempts" to comply with the law).

### 21 C. DISCOVERY AND MEDIATION

22 As noted, the parties engaged in extensive discovery. Fenceworks responded to Plaintiff's  
23 Special Interrogatories, and produced payroll records, time records, written policies, and other  
24 documents in response to Plaintiff's Requests for Production. Haines Decl., ¶ 12. In connection  
25 with mediation, Fenceworks produced an additional sample of timekeeping and payroll data, as  
26 well as relevant data points including the total number of class members, average rates of pay,  
27 class members' hire and termination dates, and others. *Id.* This discovery allowed the parties to  
28 assess the merits and value of Plaintiff's claims, as well as Fencework's potential defenses. *Id.*

The parties attended a full-day mediation on January 16, 2020 with Marc Feder, Esq. Haines Decl., ¶ 13. The parties vigorously debated their legal positions, the likelihood of class certification, and the legal bases for their respective claims and defenses. *Id.* With Mr. Feder’s assistance, the parties eventually agreed to a settlement in principle. *Id.* Over the following months, the parties negotiated and formalized the Settlement now before the Court. *Id.*

### **III. THE PROPOSED SETTLEMENT**

#### **A. ESSENTIAL TERMS OF THE SETTLEMENT**

If the Court approves this settlement, Fenceworks will pay a non-reversionary Gross Settlement Amount of \$895,000.00. No Settlement Class member will need to file a claim to reap financial benefit from the Settlement. All Settlement Class members will automatically receive a “Settlement Award” unless they affirmatively opt-out. The monetary terms of the Settlement are summarized below:

|                                                           |                     |
|-----------------------------------------------------------|---------------------|
| • Gross Settlement Amount (“GSA”):                        | \$895,000.00        |
| • Minus Court-approved attorneys’ fees (one-third):       | \$298,333.33        |
| • Minus Court-approved verified costs (up to):            | \$20,000.00         |
| • Minus Court-approved enhancement payment:               | \$5,000.00          |
| • Minus Amount Designated as PAGA penalties:              | \$30,000.00         |
| • <u>Minus estimated settlement administration costs:</u> | <u>\$15,000.00</u>  |
| Net Settlement Amount (“NSA”):                            | \$526,666.67        |
| • PLUS 25% of PAGA penalties to Settlement Class:         | \$7,500.00          |
| <b>Total Amount Paid to Settlement Class members:</b>     | <b>\$534,166.67</b> |

#### **1. The Settlement Provides for Reasonable Monetary Payments**

After deducting amounts for a court-approved class representative enhancement payment, settlement administration costs, attorneys’ fees and costs, and the PAGA payment to the LWDA, the Settlement requires Fenceworks to pay at least \$534,166.67 to all participating Settlement Class members. *See* Settlement, §§ 3(C), 4(A)-(B). According to Fenceworks, there are approximately 570 Settlement Class members. *See* Haines Decl., ¶ 15. Thus, the average Settlement Award is projected to be approximately \$937.13. *Id.* Settlement Class members will have 60 days from the mailing of the Notice Packet to opt out or object, thereby providing ample time to review the Notice without delaying the settlement. *See* Settlement, § 9(C)-(D).

Settlement payments will be calculated as follows: (i) 85% of the NSA shall be distributed to all participating Settlement Class members based on their proportionate number of workweeks

1 worked during the Class Period; (ii) 10% of the NSA is designated the “Waiting Time Amount”  
2 and will be distributed equally to all Settlement Class members who separated their employment  
3 with Fenceworks between November 26, 2015 through March 16, 2020 (the “Waiting Time  
4 Period”); (iii) the remaining 5% of the NSA is designated the “Wage Statement Amount” and  
5 will be distributed to all Settlement Class members who worked for Fenceworks from November  
6 26, 2017 to March 16, 2020, based on the proportionate number of workweeks worked during  
7 that period; and (iv) in addition to the NSA, the \$7,500 “PAGA Amount” (i.e., 25% of total  
8 PAGA penalties) will be distributed to all Settlement Class members who worked for  
9 Fenceworks from February 19, 2019 to March 16, 2020, based on the proportionate number of  
10 workweeks worked during that period. See Settlement, § 4(B).

11 Settlement Class members who do not opt out of the Settlement will be bound by its terms,  
12 and will release all claims asserted in the FAC, or that could have been asserted based on the facts  
13 alleged in the FAC, that arose during the Class Period. See Settlement, § 2(A). Plaintiff has also  
14 agreed to a general release of claims, subject to a waiver of Civil Code § 1542. *Id.*, § 2(B).

15 **2. Attorneys’ Fees and Costs, Class Representative Enhancement Payment,**  
16 **and PAGA Payment**

17 Plaintiff will apply for a class representative enhancement payment of \$5,000 for his  
18 services to the Settlement Class. See Settlement, § 3(C)(3). “[I]ncentive awards are fairly typical  
19 in class action cases...and are intended to compensate class representatives for work done on  
20 behalf of the class [and] to make up for financial or reputational risk undertaken in bringing the  
21 action.” *In re Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380, 1393-94 (2010). As will  
22 be fully briefed at final approval, Plaintiff’s requested enhancement payment is intended to  
23 recognize the time and effort he expended on behalf of the Settlement Class, including providing  
24 information and documents to counsel, identifying potential witnesses, attending in-person and  
25 telephonic meetings with counsel, and otherwise actively participating in the prosecution of this  
26 case; and the risks Plaintiff took in bringing a class action against a former employer. Haines  
27 Decl., ¶ 28. Plaintiff respectfully submits that this requested payment, which is only 0.56% of the  
28 GSA, is well within the range of permissible approval. See, e.g., *Alvarado v. Nederend*, No. 1:08-

1 cv-01099-OWW-DLB, 2011 WL 1883188 at \*10 (E.D. Cal. May 17, 2011) (approving \$7,500  
2 enhancement award to each of five named plaintiffs from \$505,058.60 settlement).

3 The parties have also agreed to designate \$30,000 of the GSA as PAGA civil penalties, of  
4 which \$22,500 (i.e., 75%) will be paid to the LWDA, with the remaining \$7,500 (i.e., 25%)  
5 distributed to the Settlement Class as described above, consistent with the PAGA’s requirement  
6 that 75% of such penalties be allocated to the LWDA with the remaining 25% paid to aggrieved  
7 employees (Labor Code § 2699(i)). *See* Settlement, § 3(C)(5). Plaintiff submits this allocation to  
8 the LWDA is appropriate in light of other settlements allocating PAGA penalties. *See, e.g., Chu*  
9 *v. Wells Fargo Inc., LLC*, No. C-05-4526-MHP, 2011 WL 673265 (N.D. Cal. Feb. 16, 2011)  
10 (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million settlement).

11 In addition, at final approval Plaintiff’s counsel will request attorneys’ fees of one-third  
12 of the GSA (currently estimated at \$298,333.33), and up to \$20,000 in litigation costs. *See*  
13 Settlement, § 3(C)(4). Plaintiff submits the requested fee is fair compensation for undertaking  
14 complex, expensive, risky, and time-consuming litigation on a contingent basis. Haines Decl., ¶  
15 27. Counsel have incurred substantial attorneys’ fees in, among other things, conducting pre-  
16 filing investigation; conducting legal research; engaging in formal written discovery; reviewing  
17 documents and data produced by Fenceworks; analyzing employee timekeeping, payroll, and  
18 other data to create a comprehensive damages model; preparing for and attending mediation;  
19 negotiating and preparing the Settlement Agreement; preparing this Motion; and otherwise  
20 prosecuting this case. *Id.* Counsel also anticipates incurring significant future attorneys’ fees in  
21 overseeing the Notice process, fielding phone calls from Settlement Class members, preparing  
22 the Final Approval Motion, and appearing at the Final Approval Hearing. *Id.*

23 It is appropriate to award attorneys’ fees as a percentage of the “common fund” created  
24 by a class action settlement. *See Laffitte v. Robert Half Int’l, Inc.*, 1 Cal.5th 480 (2016) (holding  
25 “the percentage of fund method survives in California class action cases”). Counsel’s request for  
26 fees of one-third of the GSA is well within the range of reasonableness and is typical for common  
27 fund settlements. *Newberg on Class Actions* § 14.6 (4th Ed. 2013) (historically, courts have  
28 awarded percentage fees in the range of 20% to 50%).

1 **IV. ARGUMENT**

2 **A. PRELIMINARY APPROVAL IS WARRANTED**

3 Rule of Court 3.769 conditions the settlement of a class action on court approval, which  
4 is generally evaluated under the same standards as Fed. R. Civ. Proc. 23. *See Reed v. United*  
5 *Teachers Los Angeles*, 208 Cal.App.4th 322, 337 (2012) (Rule 3.769 requires court to determine  
6 “that the settlement is fair, reasonable and adequate”); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,  
7 1026 (9th Cir. 1998) (Rule 23(e) requires trial court to determine “whether a proposed settlement  
8 is fundamentally fair, adequate, and reasonable”). The court’s role is to ensure the agreement as  
9 a whole is fair and within the range of reasonableness. *Hanlon*, 150 F.3d at 1027. There is a  
10 presumption of fairness when the settlement was negotiated at arm’s length by class counsel. *See,*  
11 *e.g., Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008).

12 **1. Standard for Preliminary Approval**

13 To make a fairness determination, the Court should consider several factors, including:  
14 “the strength of Plaintiff’s case, the risk, expense, complexity and likely duration of further  
15 litigation, the risk of maintaining class action status through trial, the amount offered in  
16 settlement, the extent of discovery completed and the stage of the proceedings, [and] the  
17 experience and views of counsel.” *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996).  
18 “The list of factors is not exclusive and the Court is free to engage in a balancing and weighing  
19 of the factors depending on the circumstances of each case.” *Wershba v. Apple Computer, Inc.*,  
20 91 Cal.App.4th 224, 245 (2001). As discussed below, the proposed Settlement is fair, adequate,  
21 and reasonable in light of the overall balance of factors in this case.

22 **a. The Strength of Plaintiff’s Case**

23 Although he maintains his claims are meritorious, Plaintiff acknowledges there were  
24 substantial risks and uncertainty in proceeding with class certification and eventual trial on the  
25 merits. As described in section II.B., *supra*, Fenceworks presented multiple defenses to Plaintiff’s  
26 claims, both on the merits and to class certification. While Plaintiff was prepared to litigate his  
27 claims through class certification and ultimately trial, success was far from certain.

28 ///

1                                   **b. Risk, Expense, Complexity, and Duration of Further Litigation**

2           Although the parties engaged in both formal discovery and informal discovery in advance  
3 of mediation, they had not yet completed all formal written and deposition discovery, which  
4 would have required expenditure of substantial time and resources by all parties. Haines Decl., ¶  
5 29. Plaintiff also still had to file for class certification, and faced the prospect of appeals in the  
6 wake of a disputed class certification ruling and/or summary judgment ruling. *Id.* Even if Plaintiff  
7 obtained class certification, the parties would incur considerable attorneys' fees and costs through  
8 a possible decertification motion, trial, and potential appeal. *Id.* This settlement avoids those risks  
9 and expenses. *Id.* Thus, this factor supports preliminary approval.

10                                   **c. Risk of Maintaining Class Action Status**

11           Plaintiff has not yet filed his class certification motion, and as such, the extent to which  
12 Plaintiff's proposed classes were certifiable is somewhat speculative. Absent settlement, there  
13 was a risk that there would not be a certified class at trial, or if there was, it would consist of a  
14 significantly smaller group of employees than the proposed Settlement Class, and the expected  
15 recovery would be significantly reduced. Thus, this factor supports preliminary approval.

16                                   **d. Amount Offered in Settlement Given Realistic Value of Claims**

17           This proposed settlement provides a fair and reasonable monetary recovery for the  
18 Settlement Class in the face of disputed claims. Plaintiff conducted an analysis of unpaid wages  
19 due to Fenceworks' allegedly unlawful policies and practices. Plaintiff's analysis of the realistic  
20 expected recoveries for each of the theories of liability pled is set forth below:

21                   First Meal Period Violations: \$273,686

22           As noted above, Plaintiff alleges that Fenceworks' lack of a meal period policy resulted  
23 in first meal periods being late and/or less than 30-minutes. Haines Decl., ¶ 16. Based on  
24 Plaintiff's review and extrapolation of the timekeeping data, there were approximately 247,887  
25 meal period-eligible shifts worked during the putative class period, and Plaintiff estimates that up  
26 to 75% of such shifts experienced a meal period violation. *Id.* In addition, Settlement Class  
27 members' average rate of pay during the Class Period was \$14.02/hour. *Id.* Thus, Plaintiff  
28 estimated the total maximum damages on the first meal period claim as \$2,606,532 (247,887

1 shifts \* .75 \* \$14.02). *Id.* However, Plaintiff’s theory of liability carried significant risks of both  
2 non-certification and losing on the merits. Fenceworks counters it does maintain a written meal  
3 period policy, and produced time records showing that non-exempt employees consistently record  
4 compliant meal periods. *Id.* Further, employee time records include signed attestations for each  
5 pay period affirming they received all required meal periods. *Id.* Thus, Fenceworks maintains it  
6 has always provided its employees the opportunity to take legally compliant meal periods. *Id.*  
7 Fenceworks further asserts that under *Brinker* it is not required to “ensure” meal periods are taken,  
8 and any non-compliant meal periods were the result of employee choice. *Id.* Finally, Fenceworks  
9 maintains the meal period claim is not suited for class certification, since individual inquiries  
10 would be needed to assess which employees allegedly took non-compliant meal periods or missed  
11 meal periods, how many meal periods were non-compliant or missed, and the reasons why a  
12 particular employee did not take a compliant meal period on a particular shift. *Id.* Based on these  
13 defenses, Plaintiff discounted the maximum amount by 70% for risk of non-certification, and an  
14 additional 65% for risk of being unsuccessful on the merits, or failing to recover the full amount  
15 sought, to arrive at an estimated exposure of \$273,686. *Id.*

16 Second Meal Period Violations: \$72,403

17 Plaintiff’s analysis of the timekeeping data showed that during the Class Period there were  
18 approximately 68,857 shifts worked in excess of 10.0 hours that did not reflect a second meal  
19 period. Haines Decl., ¶ 17. Thus, assuming a 100% violation rate for those shifts, Plaintiff  
20 calculates Fenceworks’ maximum exposure for second meal period violations at approximately  
21 \$965,375 (68,857 shifts \* \$14.02 premium). *Id.* However, Plaintiff’s theory of liability carried  
22 significant risks, based on Fenceworks’ arguments that it has always provided employees the  
23 opportunity for second meal periods, that Settlement Class members voluntarily waived their  
24 second meal period on shifts of excess of 10.0-12.0 hours, and that timekeeping records including  
25 signed attestations stating that employees were provided all required meal periods. Haines Decl.,  
26 ¶ 17. In addition, as with first meal periods, Fenceworks argued this claim would not be certified  
27 as requiring individualized inquiries into both the merits and damages. *Id.* In light of these risks,  
28 Plaintiff discounted the maximum amount that the class could potentially recover for second meal

periods by 70% for a risk of non-certification, and an additional 75% for a risk of losing on the merits, or having exposure reduced due to Fenceworks' waiver argument, to arrive at an estimated exposure amount of \$72,403. *Id.*

**Rest Period Premium Wages – Non-Piece Rate Shifts: \$74,721**

Plaintiff alleges that Fenceworks failed to maintain a written rest period policy and failed to authorize and permit rest periods as a result. Haines Decl., ¶ 18. Based on Plaintiff's analysis and extrapolation of the timekeeping data, as well as discussions with other putative class members, Plaintiff estimated a violation rate of approximately 75% for non-piece-rate shifts, and that there were therefore approximately 88,827 non-piece rate shifts worked during the Class Period with potential rest period violations. Thus, Plaintiff estimated a maximum potential exposure of \$1,245,354 (\$14.02 rest period premium \* 88,827 shifts) for this claim. *Id.* As noted, however, Fenceworks presented multiple defenses to this claim. Fenceworks counters it has always authorized and permitted 10-minute rest periods for each 4 hours worked or major fraction thereof, that employees are aware of this policy, and that employee timekeeping records include signed attestations affirming they received all rest periods. *Id.* Any failure to take rest periods was a result of employee choice, Fenceworks contends, rather than any Fenceworks policy or practice. *Id.* Fenceworks therefore asserts any rest period liability would be minimal, and in any event drastically lower than calculated by Plaintiff. *Id.* Fenceworks further argues the rest period claim is not amenable to class treatment, since individual inquiries would be needed to determine which employees did not take rest periods, how many they failed to take, and the reasons why employees failed to take rest period(s) on particular shift(s). *Id.* These manageability concerns are especially present regarding rest periods, Fenceworks contends, since rest periods are not recorded. *Id.* Based on these defenses, Plaintiff discounted the maximum potential exposure by 70% for risk of non-certification, and an additional 80% for a risk of being unsuccessful on the merits or failing to recover the full amount sought, to arrive at an estimated realistic exposure of \$74,721. *Id.*

**Rest Period Premium Wages – Piece-Rate Shifts: \$75,660**

With respect to piece-rate shifts, Plaintiff alleges that Fenceworks' piece-rate pay plan does not separately compensate separately for all required rest periods. *Id.* Specifically, while

1 Fenceworks paid separately for rest periods, denoted as “INCENTIVE BREAK” on wage  
2 statements, Plaintiff’s analysis of the payroll records revealed that Fenceworks failed to pay  
3 separately for third rest periods on shifts over 10.0 hours. *Id.* Based on Plaintiff’s review of the  
4 time records, there were approximately 39,248 shifts in which piece-rate employees worked over  
5 10.0 hours. Thus, assuming a 100% violation rate for such shifts, Plaintiff estimated Fenceworks’  
6 potential maximum exposure at \$550,257 (39,248 shifts \* \$14.02 rest period premium). *Id.*  
7 However, Fenceworks argues it separately compensates for all required rest periods, and produced  
8 examples of employees paid separately for three rest periods on shifts over 10.0 hours. *Id.* Further,  
9 Fenceworks argues that any failure to separately pay for a third rest period was an aberration, and  
10 thus any liability would be minimal. *Id.* Fenceworks further contends that at worst, it is only liable  
11 for 10 minutes of unpaid rest period time for any violation, rather than a full hour of premium pay  
12 under Labor Code § 226.7, which substantially reduces potential liability. *Id.* Fenceworks also  
13 argues that individualized inquiries would be necessary to determine both liability and damages,  
14 including how many rest periods were taken and whether they were all separately compensated  
15 on each shift. *Id.* Based on these defenses, Plaintiff discounted the maximum recovery on this  
16 claim by 45% for risk of non-certification, and by an additional 75% to account for the risk that  
17 Fenceworks could prevail on the merits outright, or could succeed in establishing a much lower  
18 damages measure, to arrive at a projected total of \$75,660. *Id.*

19 Unpaid Non-Productive Time: \$154,074

20 Plaintiff argues that employees on piece-rate shifts were not paid for “non-productive  
21 time” including time spent obtaining job assignments, gathering materials, driving to job sites,  
22 and unloading materials. Haines Decl., ¶ 20. In total, Plaintiff estimates Fenceworks is liable for  
23 approximately 30 minutes of unpaid non-productive time per piece-rate shift, and Plaintiff’s  
24 analysis of the timekeeping data revealed that there were approximately 156,994 piece-rate shifts  
25 during the Class Period. *Id.* Thus, Plaintiff estimates Fenceworks’ maximum liability for unpaid  
26 non-productive time at \$1,100,528 (156,994 shifts \* .5 hrs x \$14.02 avg. hourly rate). *Id.*  
27 Fenceworks counters that all work performed on piece-rate shifts was “directly related to the  
28 activity being compensated on a piece-rate basis,” and therefore did not need to be separately  
compensated under Labor Code § 226.2. Haines Decl., ¶ 20. Fenceworks also argues this claim

1 is not amenable to class treatment, because employees worked at separate jobsites with different  
2 requirements, and maintained no records of when they performed any potential “non-productive”  
3 activities, and it would therefore require an unmanageable series of mini-trials to determine which  
4 tasks were performed by each employee, which tasks were “non-productive,” and how much time  
5 was spent on such tasks by each employee. *Id.* Plaintiff thus discounted Fenceworks’ potential  
6 liability by 60% for risk of non-certification, and by an additional 65% for risk of losing on the  
7 merits or failure to recover the full amount sought, for a projected total of \$154,074. *Id.*

8 **Underpaid Overtime: \$133,694**

9 Plaintiff alleges that Fenceworks failed to incorporate non-discretionary incentive pay,  
10 including “Incentive Reg” and other bonuses, in employees’ “regular rate” when determining  
11 overtime compensation, resulting in underpaid overtime. Haines Decl., ¶ 21. Based on these  
12 allegations, Plaintiff’s analysis of the data revealed an average of \$16.18 in underpaid overtime  
13 per workweek, and approximately 55,086 workweeks during the Class Period. *Id.* Thus, Plaintiff  
14 estimated a maximum of approximately \$891,291 (55,086 pay periods x \$16.18) in underpaid  
15 overtime. *Id.* Fenceworks counters that the incentive payments at issue are not tied to employees’  
16 hours worked and therefore do not need to be included in the regular rate, and/or are discretionary  
17 bonuses which need not be included in the regular rate. *Id.* Fenceworks further argues that  
18 employees did not work overtime hours during every workweek and thus, Plaintiff’s damages  
19 estimates were severely inflated. *Id.* Fenceworks also argues that differences in frequency, type,  
20 and amount of incentive pay received by different employees would preclude class certification  
21 of this claim. *Id.* Based on these defenses, Plaintiff discounted the estimated maximum by 50%  
22 for risk of non-certification, and by an additional 70% to account for risk of losing on the merits  
23 or failure to recover the full amount sought, to arrive at an estimated exposure of \$133,694. *Id.*

24 **Unpaid Wages Due to Rounding: No Value**

25 Plaintiff alleged that Fenceworks pays its employees in quarter-hour increments, and that  
26 employees were underpaid as a result. Haines Decl., ¶ 22. As noted, however, Fenceworks argues  
27 it utilizes a facially neutral rounding mechanism that has resulted in employees being paid for all  
28 hours worked, and Plaintiff’s analysis largely confirmed this contention. *Id.* Plaintiff’s analysis

1 of employee timekeeping and payroll records revealed that employees were actually *overpaid* an  
2 average of .39 minutes per shift. *Id.* Plaintiff's analysis further showed that Fenceworks' rounding  
3 system favored employees on over 50% of all shifts. *Id.* These analyses led Plaintiff to conclude  
4 that he would likely not recover on his rounding claim, and thus, Plaintiff assigned this claim zero  
5 value. *Id.*; *see also, e.g., Ramirez v. United Rentals, Inc.*, No. 5:10-cv-04374 EJD, 2013 WL  
6 2646648 at \*6 (N.D. Cal. Jun. 12, 2013) (denying certification of rounding claim).

7 **Waiting Time Penalties: \$173,230**

8 Based on data provided by Fenceworks, there are approximately 286 Settlement Class  
9 members who separated their employment between November 26, 2015 and March 16, 2020.  
10 Haines Decl., ¶ 23. Plaintiff estimated an average waiting time penalty of \$3,365 ( $\$14.02 \times 8$   
11  $\text{hours} \times 30 \text{ days}$ ), and therefore calculated Fenceworks' maximum waiting time penalty exposure  
12 as approximately \$962,390 ( $286 \text{ former employees} \times \$3,365 \text{ avg. penalty}$ ). *Id.* As noted above,  
13 however, Fenceworks asserts it has strong, good-faith defenses to Plaintiff's underlying claims,  
14 and thus, even if Plaintiff were able to recover on his underlying claims, he would not be able to  
15 recover waiting time penalties. *Id.* Fenceworks further contends Plaintiff's meal and rest period  
16 claims cannot support a claim for waiting time penalties, as multiple courts have held. *Id.*  
17 Moreover, because the waiting time claim is derivative of Plaintiff's underlying wage claims,  
18 Plaintiff would need to overcome Fenceworks' defenses, both as to class certification and as to  
19 the merits, to his underlying claims. Based on these defenses, Plaintiff discounted Fenceworks'  
20 maximum exposure by 55% for risk of non-certification and by an additional 60% for risk of  
21 being unsuccessful on the merits, to arrive at an estimated total of \$173,230. *Id.*

22 **Wage Statement Penalties: \$90,000**

23 Plaintiff's analysis reflected that there were approximately 20,000 pay periods worked  
24 during the liability period applicable to Plaintiff's wage statement claim. Haines Decl., ¶ 24. In  
25 calculating Fenceworks' exposure, Plaintiff gave Fenceworks the benefit of assuming Plaintiff  
26 could only obtain the "initial" wage statement violation rate of \$50 per pay period, for a total of  
27 \$1,000,000 in potential penalties ( $20,000 \text{ pay periods} \times \$50$ ). *Id.*; *see also* Lab. Code 226(e) (\$50  
28 penalty for "initial" violations); *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1209 (2008)

(finding “initial” violation rate applies for civil penalties until employer notified it is violating the Labor Code); *Patel v. Nike Retail Svcs., Inc.*, 58 F.Supp.3d 1032, 1042-43 (N.D. Cal. 2014) (citing *Amaral* and applying “initial” \$50 penalty to all pay periods in calculating amount-in-controversy for wage statement claim). But given Fenceworks arguments that no violations occurred, that employees suffered no “injury,” that any alleged violations were not “knowing and intentional,” and that meal and rest period claims cannot support wage statement penalties, as well as risks associated with Plaintiff’s underlying claims discussed above, Plaintiff discounted the maximum exposure by 55% for risk of non-certification, and by an additional 80% for risk of being unsuccessful on the merits, for an estimated realistic exposure of \$90,000. *Id.*

**PAGA Penalties: \$110,000**

Plaintiff estimated a total of 11,100 pay periods worked during the PAGA period, and thus a maximum PAGA exposure of \$1,110,000 (11,100 pay periods at \$100 “initial” violation rate). *Haines Decl.*, ¶ 25; *Amaral*, 163 Cal.App.4th at 1209. However, these penalties derive from Plaintiff’s underlying claims, each of which Fenceworks vigorously disputes. *Green v. Lawrence Service Co.*, No. LA-CV-12-6155-JAK (VBKx), 2013 WL 3907506 at fn. 5 (C.D. Cal. July 23, 2013) (PAGA claim’s success is determined by merits of underlying claims). The PAGA also specifically grants courts discretion to reduce penalties (Lab. Code § 2699(e)(2)), and Fenceworks argues the Court would reduce penalties significantly given its good-faith defenses. *Id.* Thus, Plaintiff discounted the maximum figure by 60% for risk of losing on the merits and by an additional 75% for risk of the Court reducing penalties, to arrive at estimated exposure of \$111,000. *Id.*; see also *Thurman, supra*, 203 Cal.App.4th at 1135-36 (affirming PAGA penalty reduction); *Fleming, supra*, 2011 WL 7563047 at \*4 (reducing PAGA penalties by over 82%); *Carrington, supra*, 30 Cal.App.5th at 529 (affirming PAGA penalty of just \$5 per pay period).

Using these estimated figures, Plaintiff estimated a realistic total recovery for the Settlement Class of approximately \$1,160,468. *Haines Decl.*, ¶ 26. The proposed settlement of \$895,000 therefore represents over 77% of Plaintiff’s reasonably forecasted recovery. *Id.* This recovery is significant, and preliminary approval is appropriate as the Settlement will provide significant monetary relief to the Settlement Class.

1                                    **e. The Experience and Views of Counsel**

2                    “Parties represented by competent counsel are better positioned than courts to produce a  
3 settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pac. Enter.*  
4 *Securities Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Plaintiff’s counsel have extensive experience  
5 litigating wage and hour class actions from both the plaintiff and defense side, and have been  
6 appointed class counsel in numerous wage and hour actions. *See* Haines Decl., ¶¶ 3-8; Declaration  
7 of Sean M. Blakely, ¶¶ 2-6; Declaration of Diana M. Martinez, ¶¶ 2-3. Counsel conducted an in-  
8 depth review of Fenceworks’ policies, timekeeping, payroll, and other relevant data, and drew on  
9 their extensive experience to assess Plaintiff’s claims. Haines Decl., ¶ 12. The settlement was also  
10 reached with the assistance of Marc Feder, a respected wage and hour class action mediator. *Id.*,  
11 ¶ 13. This factor strongly supports preliminary approval. *Kullar*, 168 Cal.App.4th at 130.

12                                    **2. The Preliminary Approval Standard Is Met**

13                    The Court can grant preliminary approval of a proposed settlement and direct that notice  
14 be given if the settlement: (1) falls within the range of possible approval; (2) appears to be the  
15 product of serious, informed negotiations; and (3) has no obvious deficiencies. *See Manual for*  
16 *Complex Litig.*, § 30.41 (3rd Ed. 1995); *Newberg on Class Actions*, §§ 11:24-25 (4th Ed. 2013).

17                                    **a. The Settlement Is Within the Range of Possible Approval**

18                    As noted, the Settlement reflects over 77% of Plaintiff’s realistic estimated recovery, and  
19 will provide tangible, monetary compensation for hotly disputed classwide wage claims. Plaintiff  
20 submits the Settlement is within the range of possible approval, such that notice should be  
21 provided to the Settlement Class. The Court will again be able to assess the reasonableness of the  
22 Settlement after the Settlement Class has had the opportunity to opt-out and/or object.

23                                    **b. The Settlement Resulted from Serious, Informed Negotiations**

24                    This proposed Settlement is the result of an exchange of substantial information, arm’s-  
25 length negotiations, and a full-day mediation with an experienced mediator. Thus, the Settlement  
26 is entitled to a presumption of fairness. *Kullar*, 168 Cal.App.4th at 130. Plaintiff carefully vetted  
27 the claims at issue, reviewed extensive data and information, and conducted a detailed analysis  
28 of the data. Haines Decl., ¶¶ 16-25. Thus, this factor supports preliminary approval.

1                                    **c. The Settlement Is Devoid of Obvious Deficiencies**

2            The Settlement provides tangible monetary relief to the Settlement Class, and the amounts  
3 proposed for attorneys' fees, costs, Plaintiff's enhancement payment, and PAGA penalties are all  
4 reasonable and appropriate based on the particular facts of this case. Because the Settlement is  
5 devoid of obvious deficiencies, this factor supports preliminary approval.

6                                    **B. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS**

7            The proposed Settlement Class satisfies the criteria for certification of a settlement class  
8 under California law because: 1) the individuals in the Settlement Class are ascertainable and  
9 numerous; 2) common questions of law and fact predominate; 3) Plaintiff's claims are typical of  
10 the claims of the Settlement Class; and 4) Plaintiff and his counsel will fairly and adequately  
11 represent the interests of the Settlement Class. Cal. Code Civ. Proc. § 382.

12                                    **1. The Proposed Class Is Ascertainable and Numerous**

13            A class is "ascertainable" where members "may be readily identified without unreason-  
14 able expense or time by reference to official [or business] records." *Sevidal v. Target Corp.*, 189  
15 Cal.App.4th 905, 919 (2010). The Settlement Class, which includes Fenceworks' non-exempt  
16 field employees in California during the Class Period, can be identified from Fenceworks'  
17 records. Fenceworks represents there are about 570 Settlement Class members, rendering it  
18 impracticable to bring them all before the Court. Haines Decl., ¶ 15. Thus, numerosity is satisfied.

19                                    **2. Common Issues of Law and Fact Predominate**

20            The focus on certification is not on the merits of the case, but rather on what types of  
21 questions, "common or individual," are likely to arise in the action. *Sav-On Drug Store, Inc. v.*  
22 *Sup. Ct.*, 34 Cal.4th 319, 327 (2004). Plaintiff's claims are predicated primarily on Fenceworks'  
23 meal and rest period policies and practices, piece-rate policy, and alleged regular rate  
24 miscalculations. These claims are commonly held proper for class certification. *See, e.g., Benton*  
25 *v. Telecom Network Specialists, Inc.*, 220 Cal.App.4th 701, 726 (2013) (reversing denial of  
26 certification of meal and rest period claims); *Faulkinbury v. Boyd & Assoc., Inc.*, 216 Cal.App.4th  
27 220, 240 (2013) (certifying regular rate claim); *Bluford v. Safeway, Inc.*, 216 Cal.App.4th 864,  
28 871 (2013) (reversing denial of certification of piece-rate rest period claim).

1                                   **3. The Named Plaintiff's Claims Are Typical**

2           Typicality is satisfied where class representatives have claims typical of those of the rest  
3 of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal.App.3d 1341, 1347 (1987).  
4 Here, Plaintiff's claims are typical of Settlement Class members' claims. Plaintiff was employed  
5 by Fenceworks as a non-exempt field employee in California. Plaintiff alleges he was injured by  
6 the same challenged policies that injured the Settlement Class, including an underpayment of  
7 wages, failure to provide meal and rest periods, failure to pay for non-productive time, and failure  
8 to accurately calculate the regular rate. *See Jose Jimenez Decl.*, ¶¶ 2-4. Thus, typicality is satisfied.

9                                   **4. Plaintiff and Class Counsel Will Adequately Represent the Class**

10          The adequacy requirement examines conflicts of interest between named parties and the  
11 class(es) they seek to represent. *Capital People First v. State Dept. of Developmental Svcs.*, 155  
12 Cal.App.4th 676, 697 (2007). Plaintiff and his counsel will adequately represent the Settlement  
13 Class, as there are no known conflicts between Plaintiff and the Settlement Class. *See McGhee*  
14 *v. Bank of America*, 60 Cal.App.3d 442, 450 (1976) (finding adequacy satisfied where there was  
15 no indication that plaintiff's counsel was not qualified and the named plaintiff had no interests  
16 antagonistic to those of the proposed class). Class Counsel also have extensive experience in  
17 wage and hour class action litigation, as noted above.

18                   **C. THE COURT SHOULD ORDER DISTRIBUTION OF THE PROPOSED**  
19                   **CLASS NOTICE**

20          The Court should order distribution proposed Notice by U.S. Mail, postage prepaid, using  
21 last known address information provided by Fenceworks. *See Settlement*, § 9. This manner of  
22 giving notice is the "best notice practicable" under the circumstances as it provides "individual  
23 notice to all members who can be identified through reasonable effort." *See Eisen v. Carlisle &*  
24 *Jacquelin*, 417 U.S. 156, 173 (1974). Plaintiff proposes that the settlement be administered by  
25 Phoenix Settlement Administrators ("Phoenix"), an experienced class action settlement  
26 administrator. *See Declaration of Jodey Lawrence* and attached exhibits. Phoenix will also run  
27 all addresses through the U.S. Postal Service National Change of Address database and/or  
28 perform "skip traces" to obtain current address information. *See Settlement*, § 9(B) & (F).

1 The content of the proposed Notice satisfies Cal. Rule of Court 3.766(d) because it advises  
2 Settlement Class members of the nature of the claims, the basic contentions and denials of the  
3 parties and the key terms of the Settlement, the uniform 60-day deadline to opt-out or object and  
4 the procedures by which to do so, explains the recovery formula and expected recovery amount  
5 for each class member, and advises that they will be bound by the terms of the Settlement if they  
6 do not request exclusion. *See* Haines Decl., Exh. 2. The Notice will also notify Settlement Class  
7 members of the final approval hearing date and time, provides contact information for Class  
8 Counsel, and advise Settlement Class members that they may enter an appearance through counsel  
9 if they wish. This Notice satisfies Cal. Rule of Court 3.766(e) as the most reliable and cost-  
10 effective method of reaching Settlement Class members.

11 **D. THE COURT SHOULD SET A FINAL APPROVAL HEARING**

12 Finally, the Court should set a hearing for final approval of the settlement on a date  
13 appropriately scheduled to follow the deadline by which Settlement Class members must file  
14 objections to the settlement or opt-out. *See* Cal. Rule of Court 3.769.

15 **V. CONCLUSION**

16 For the foregoing reasons, Plaintiff respectfully requests that the Court preliminarily  
17 approve the proposed settlement, provisionally certify the Settlement Class, and enter the  
18 Proposed Order submitted concurrently herewith.

19  
20 Dated: May 18, 2020

Respectfully submitted,  
HAINES LAW GROUP, APC

21 By: \_\_\_\_\_

22 Paul K. Haines  
23 Attorneys for Plaintiff  
24  
25  
26  
27  
28