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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **FOR THE COUNTY OF SANTA CLARA**
13 **(UNLIMITED JURISDICTION)**

14 FELIS A. PEREZ, on behalf of himself, all others
15 similarly situated, the general public, and as an
16 “aggrieved employee” on behalf of other
“aggrieved employees” under the Labor Code
Private Attorneys General Act of 2004,

17 *Plaintiff(s),*

18 vs.
19

20 NXEDGE MH, LLC, a Delaware limited
liability company; NXEDGE SAN CARLOS,
21 LLC, a Delaware limited liability company;
22 NXEDGE CSL, LLC, a Nevada limited liability
company; and DOES 3–50, inclusive,

23 *Defendant(s).*
24

Case No. 21CV387173

**PLAINTIFF FELIS A. PEREZ’S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Hearing Date: February 8, 2023
Hearing Time: 1:30 p.m.
Hearing Dept.: 3, The Honorable
Patricia M. Lucas
Action filed: September 29, 2021



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13	<i>Hicks v. Toys 'R' Us-Delaware, Inc.</i>	
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21	<i>Rose v. City of Hayward</i>	
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23	<i>Sav-On Drug Stores, Inc. v. Superior Court</i>	
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25	<i>Spann v. J.C. Penney Corp.</i>	
26	(C.D.Cal. 2016) 211 F.Supp.3d 1244	22
27	<i>Thurman v. Bayshore Transit Management, Inc.</i>	
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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR**
2 **PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

3 **I. INTRODUCTION**

4 Plaintiff Felis A. Perez ("Plaintiff") submits this memorandum of points and authorities
5 in support of his unopposed motion for preliminary approval of the Joint Stipulation of Class
6 Action Settlement and Release of Claims (the "Settlement")², which provides for a Gross
7 Settlement Amount ("GSA") of \$1,242,000.00 in compromise of all disputed claims on behalf of
8 all persons Defendants NxEdge MH LLC, NxEdge San Carlos, LLC, and NxEdge CSL, LLC
9 (collectively "NxEdge" or "Defendants") employed on a non-exempt, hourly basis in California
10 at any time between September 29, 2017 through the earlier of the date of the Court's preliminary
11 approval order and the latest date before the Class exceeds 22,604 pay periods worked. Through
12 this Motion, Plaintiff respectfully requests for this Court to (1) provisionally certify the below-
13 defined Class for settlement purposes only under Code of Civil Procedure § 382; (2) preliminarily
14 approve the Settlement; (3) preliminarily appoint Plaintiff as Class Representative; (4) appoint
15 David Spivak of The Spivak Law Firm and Walter L. Haines of United Employees Law Group
16 as Class Counsel; (5) approve the proposed notice procedures and related forms; and (6) schedule
17 a final approval hearing.

18 This Court should grant Plaintiff's motion because: (1) for settlement purposes, the
19 Settlement Class meets the requirements for class certification under Code of Civil Procedure §
20 382; (2) the Settlement warrants preliminary approval based on all indicia for fairness,
21 reasonableness, and adequacy; (3) for settlement purposes, Plaintiff is adequate to serve as Class
22 Representative; (4) Plaintiff's attorneys are adequate to serve as Class Counsel; (5) the proposed
23 notice procedures, and related forms, fully comport with due process and adequately apprise Class
24 Members of their rights; and (6) a final approval hearing must be scheduled to allow Settlement
25 Class members an opportunity to be heard regarding the Settlement and to give it finality.
26 Accordingly, for the reasons detailed below, this Court should grant Plaintiff's Motion in its
27 entirety and preliminarily approve the Settlement.

28 **II. BACKGROUND**

Defendants employed Plaintiff as a metal detail and package handler from about
November 25, 2019 until July 6, 2021. *Id.*

² The Settlement is attached as Exhibit ("Ex.") 1 to the Declaration of David Spivak ("DS"),
which is submitted herewith under a separate cover.



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1 **A. The Claims and Procedural History**

2 On September 10, 2021, Plaintiff notified Defendants and the California Labor and
3 Workforce Development Agency (“LWDA”), pursuant to the California Private Attorneys
4 General Act of 2004, California Labor Code sections 2698, *et seq.* (“PAGA”), of alleged Labor
5 Code violations committed by Defendants. DS, ¶5, Ex. 2.

6 On September 29, 2021, Plaintiff filed a Class Action Complaint (“Action”) in the Santa
7 Clara County Superior Court, Case No. 21CV387173, against Defendants on behalf of himself
8 and others similarly situated, alleging causes of action on a class-wide basis for: (1) Failure to
9 Pay All Wages Earned for All Hours Worked (Lab. Code §§ 510, 1194, 1197, and 1198); (2)
10 Failure to Provide Rest Breaks (Lab. Code §§226.7 and 1198); (3) Failure to Provide Meal Periods
11 (Lab. Code §§226.7, 512 and 1198); (4) Wage Statement Penalties (Lab. Code §§ 226 and 226.2);
12 (5) Waiting Time Penalties (Lab. Code §§ 201-203); and (6) Unfair Competition (Bus. & Prof.
13 Code §§ 17200, *et seq.*). DS, ¶ 6, Ex. 3. On November 29, 2021, Plaintiff filed his First Amended
14 Complaint adding a claim under PAGA. DS, ¶ 6, Ex. 4. On April 6, 2022, Defendants filed an
15 answer to Plaintiff’s First Amended Complaint. DS, ¶ 6, Ex. 5. Defendants deny all of Plaintiff’s
16 allegations and strongly contend that their wage and hour policies, practices and procedures are
17 fully compliant with all applicable laws. On or about May 20, 2022 Plaintiff filed a supplemental
18 letter with the LWDA and a Second Amended Complaint with the Court adding NxEdge San
19 Carlos, LLC and NxEdge CSL, LLC as Defendants. NxEdge San Carlos, LLC, a Delaware limited
20 liability company, and NxEdge CSL, LLC, a Nevada limited liability company, are related to the
21 named defendant in the Action and had comparable wage and hour practices and policies during
22 the relevant time period. DS, ¶ 6, Ex. 6. Defendants filed an answer to Plaintiff’s Second
23 Amended Complaint, denying Plaintiff’s allegations. DS, ¶ 6, Ex. 7.

24 **B. Mediation**

25 The Parties thereafter engaged in an informal, voluntary exchange of information in the
26 context of privileged settlement discussions to facilitate an early mediation. Defendants produced
27 Plaintiff’s entire personnel file (including policies and agreements he signed and acknowledged),
28 copies of their relevant company written policies, time-keeping records, email messages, and
29 paycheck data and records for the putative class, and more detailed time and payroll data for a
30 random sample of putative class members specifically selected by Plaintiff’s counsel. DS, ¶ 7.

31 On April 28, 2022, following much of the foregoing informal discovery and exchange of
32 information, the Parties participated in a mediation session presided over by The Honorable John



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1 Leo Wagner (ret.), an experienced class action mediator. During the mediation, the Parties had a
2 full day of productive negotiations and reached agreement on a class-wide settlement during the
3 second mediation session. During the mediation sessions, each side, represented by his/their
4 respective counsel, recognized the risk of an adverse result in the Action and agreed to settle the
5 Action and all other matters covered by this Agreement pursuant to the terms and conditions of
this Agreement. DS, ¶ 8.

6 **III. OVERVIEW OF THE SETTLEMENT**

7 **A. Settlement Class Definition**

8 The Settlement defines the class as all persons Defendants employed in California at any
9 time as regular full-time or part-time hourly, non-exempt employees (current and former) who
10 have not executed releases of claims under the California Labor Code and/or applicable Wage
11 Orders/regulations during the Class Period between September 29, 2017 through the earlier of the
12 date of the Court's preliminary approval order and the latest date before the Class exceeds 22,604
pay periods worked. Settlement para I.B.

13 **B. Monetary Terms**

14 "Gross Settlement Amount" shall mean the Gross Settlement Amount of One Million Two
15 Hundred Forty-Two Thousand Dollars and Zero Cents (\$1,242,000.00) payable by Defendants as
16 provided by this Agreement. The Gross Settlement Amount is non reversionary; no portion of the
17 Gross Settlement Amount will return to Defendants. Defendants' employer-side payroll taxes
18 arising from the payments made under this Settlement will be paid by Defendants separate from
19 and in addition to the Gross Settlement Amount. Settlement para. I.L. "Net Settlement Amount"
20 shall mean \$1,242,000.00 payable by Defendants pursuant to this Settlement, less: 1. the Class
21 Representative Payment approved by the Court; 2. the Class Counsel Fees Payment (one-third or
22 33 and 1/3% of Gross Settlement Amount) and the Class Counsel Litigation Expenses Payment
23 (of not more than \$25,000.00) approved by the Court; 3. the Settlement Administrator's
24 reasonable fees and expenses approved by the Court (not to exceed \$17,500.00); 4. the amount of
25 \$20,000.00 as PAGA Penalties for the PAGA claim, of which \$5,000.00 will be paid to the PAGA
26 Members and \$15,000.00 will be paid to the LWDA; 5. any other fees or expenses (other than
27 attorneys' fees and expenses) incurred by Plaintiff in implementing the terms and conditions of
28 this Agreement as approved by the Court. Settlement para. I.N.

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1 **C. Timing of Payments**

2 The Settlement Administrator shall establish a Settlement Account for distributing
3 Settlement Shares and Payments identified in this Agreement. Within ten (10) business days of
4 the Effective Date, Defendants shall pay the Gross Settlement Amount into the Settlement
5 Account. Should the 10th business day following the Effective Date fall on a weekend or
6 state/federal holiday, Defendants shall remit payment on the following weekday/non-holiday.
7 The Settlement Administrator will mail or wire all required payments no later than 10 business
8 days after receipt of the funds representing the Gross Settlement Amount from Defendants.
Settlement para. IV.J.

9 **D. Calculation of Settlement Shares**

10 Subject to the terms and conditions of this Agreement, the Settlement Administrator will
11 distribute a payment from the Net Settlement Amount to each Participating Class Member. The
12 Settlement Share for each Participating Class Member will be calculated as follows,
13 understanding that the formulas below do not constitute an admission by either party, and are
14 intended only to provide a practical means to simplify and administer the claims process:

15 (a) Participating Class Members' Settlement Shares. The settlement shares are allocated
16 20.00% to wages (for which employment taxes will be deducted and W-2s issued) and 80.00%
17 to penalties and interest (for which 1099s will be issued, if legally required).

18 (b) Class Portion of Settlement Ratio Calculation. The Settlement Administrator shall
19 assign to each Class Member a "Settlement Ratio," which shall be a fractional number comprised
20 of (a) that Class Member's Individual Pay Periods worked as the numerator, and (b) the aggregate
21 total of all Class Members' Individual Pay Periods worked as the denominator. The Settlement
22 Administrator shall assign to each Class Member the "Settlement Share" which shall be
23 calculated by multiplying that Class Member's Settlement Ratio by amount allocated to Class
24 Members from the Net Settlement Amount.

25 (c) PAGA Portion of Settlement Ratio Calculation. The Settlement Administrator shall
26 assign to each Class Member a "Settlement Ratio," which shall be a fractional number comprised
27 of (a) that PAGA Member's Individual Pay Periods worked during the PAGA Period as the
28 numerator, and (b) the aggregate total of all PAGA Members' Individual Pay Periods worked
during the PAGA Period as the denominator. The Settlement Administrator shall assign to each
PAGA Member the "Settlement Share" which shall be calculated by multiplying that PAGA



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1 Member's Settlement Ratio by amount allocated to PAGA Members from the Net Settlement
2 Amount. Settlement para. III.D.

3 **E. Apportionment of Settlement Shares**

4 Each Settlement Share is intended, in part, to settle the Class Members' claims for
5 Defendants' failure to pay all wages for all hours worked, unauthorized and unlawful wage
6 deductions, failure to provide meal periods, failure to authorize and permit rest periods, failure to
7 compensate employees at one hour's pay at employees' regular rate of pay for each day on which
8 employees did not receive one or more meal or rest periods, failure to issue proper wage
9 statements, failure to timely pay wages, failure to maintain required payroll records, and related
10 violations of PAGA and the unfair competition law. Each Class Member shall be individually
11 responsible for the employee's share of applicable payroll tax withholdings and deductions.
12 Accordingly, each Settlement Share allocated to wages will be reduced by applicable employee-
13 side payroll tax withholdings and deductions, and the Settlement Administrator will issue a Form
14 W-2 to each Participating Class Member. The remaining non-wage payments will be reported on
15 an IRS Form-1099 by the Settlement Administrator, if legally required. For PAGA Members who
16 submit a timely and valid request for exclusion to opt out of the class portion of the Settlement,
17 100% of the individual Settlement Share to that individual shall consist of the amount calculated
18 by multiplying that PAGA Member's Settlement Ratio by the sum allocated to PAGA Members
19 from the Net Settlement Amount, and shall be allocated as penalties, and not wages, for which
20 the Settlement Administrator will issue to the PAGA Member an IRS Form-1099 (if legally
21 required). Defendants will be responsible for the normal employer's share of any payroll tax
22 attributable to the wage portion of the Settlement Share payments. Defendants' payment of the
23 normal employer's share of payroll taxes attributable to the wage portion of the Settlement Share
24 payments will be in addition to the Gross Settlement Amount or Net Settlement Amount. The
25 settlement shares are allocated 20.00% to wages (for which employment taxes will be deducted
26 and W-2s issued) and 80.00% to penalties and interest (for which 1099s will be issued, if legally
27 required). Settlement para. III.E, III.D.7

28 **F. The Releases**

Plaintiff and Class Members. The Parties agree that it is their intent that the resolution set
forth in this Settlement will release and discharge the Released Claims by way of any further
attempt, by lawsuit, administrative claim or action, arbitration, demand, or other action of any
kind by each and all of the Settlement Class Members (including participation to any extent in



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1 any representative or collective action) against the Released Parties. This release will not take
2 effect until Defendants have paid the Gross Settlement Amount in full per this Settlement
3 Agreement. All PAGA Members, regardless of whether they submit timely and valid requests for
4 exclusion from the Settlement, will release all Released Claims under PAGA against the Released
5 Parties. The State of California will also release all Released Claims under PAGA against the
6 Released Parties. The Parties intend that the judgment pursuant to California Rule of Court
7 3.769(h) entered by the Court shall be final and binding upon all Settlement Class Members
(including Plaintiff). Settlement para. V.A.

8 Upon the Effective Date, and only after Defendants pay the entirety of the Gross
9 Settlement Amount, Plaintiff will be deemed to have released the Released Parties of and from
10 all of the Released Claims during the Class Period. These claims include all claims alleged or
11 could have been alleged based on the facts, circumstances, and/or primary rights at issue in the
12 Complaint and any amendments thereto. They include without limitation: (1) all claims for failure
13 to pay all wages for all hours worked, including minimum wages, and overtime wages; (2) all
14 claims for failure to provide rest periods and claims for rest period premium pay; (3) all claims
15 for failure to provide meal periods and claims for meal period premium pay; (4) all claims for
16 failure to provide accurate wage statements and related penalties; (5) all claims for failure to
17 timely pay wages during employment and at termination; (6) all claims for violation of California
18 Business and Professions Code §§ 17200, et seq., to the extent such claims are predicated on the
19 other claims released herein; and (7) all claims for violation of PAGA and all related claims for
20 penalties, to the extent such claims are predicated on the other claims released herein. Plaintiff's
21 release set forth herein shall include a waiver of all rights under California Civil Code §1542,
22 which includes a release of all known and unknown claims against the Released Parties during
23 the Class Period. Civil Code section 1542 provides:

24 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR
25 OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR
26 HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF
27 KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR
28 HER SETTLEMENT WITH THE DEBTOR.

29 Upon the Effective Date, Plaintiff will be deemed to have waived his rights under Civil Code
30 §1542 during the Class Period, as set forth above. Plaintiff's release excludes any claim for
31 worker's compensation. It also includes any claims arising out of or relating to Plaintiff's



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1 employment relationship with Defendants based on events pre-dating Plaintiff's execution of this
2 Joint Stipulation, including but not limited to claims for harassment, discrimination, wrongful
3 termination, negligent infliction of emotional distress and intentional infliction of emotional
4 distress and related prayers for compensatory and punitive damages, interest, attorney fees and
costs. Settlement para. V.B.

5 As of the date the Judgment becomes Final, and except as otherwise provided by this
6 Agreement, Class Counsel and any counsel associated with Class Counsel (The Spivak Law Firm
7 and United Employees Law Group), including without limitation David G. Spivak, Esq. and
8 Walter L. Haines, Esq., waive any claim to costs and attorneys' fees and expenses against
9 Defendants or the Released Parties arising from or related to the Action, except those incurred to
10 enforce this Agreement and collect the Judgment, including but not limited to claims based on
11 the California Labor Code, the California Civil Code, the California Code of Civil Procedure, the
Fair Labor and Standards Act, or any other statute or law (the "Class Counsel Released Claims").

12 Defendants make no representation as to the tax treatment or legal effect of the payments
13 called for in this Agreement, and Plaintiff, Settlement Class Members, and PAGA Members are
14 not relying on any statement, representation, or calculation by Defendants or by the Settlement
15 Administrator in this regard. Plaintiff, Settlement Class Members, and PAGA Members
16 understand and agree that except for Defendants' payment of the employer's portion of any
17 payroll taxes, they will be solely responsible for the payment of any taxes and penalties assessed
on the payments described herein.

18 EACH PARTY TO THIS AGREEMENT (FOR PURPOSES OF THIS SECTION, THE
19 "ACKNOWLEDGING PARTY" AND EACH PARTY TO THIS AGREEMENT
OTHER THAN THE ACKNOWLEDGING PARTY, AN "OTHER PARTY")
20 ACKNOWLEDGES AND AGREES THAT: (1) NO PROVISION OF THIS
21 AGREEMENT, AND NO WRITTEN COMMUNICATION OR DISCLOSURE
22 BETWEEN OR AMONG THE PARTIES OR THEIR ATTORNEYS AND OTHER
23 ADVISERS, IS OR WAS INTENDED TO BE, NOR WILL ANY SUCH
24 COMMUNICATION OR DISCLOSURE CONSTITUTE OR BE CONSTRUED OR
BE RELIED UPON AS, TAX ADVICE WITHIN THE MEANING OF UNITED
25 STATES TREASURY DEPARTMENT CIRCULAR 230 (31 CFR PART 10, AS
26 AMENDED); (2) THE ACKNOWLEDGING PARTY (A) HAS RELIED
27 EXCLUSIVELY UPON HIS, HER OR ITS OWN, INDEPENDENT LEGAL AND
28 TAX COUNSEL FOR ADVICE (INCLUDING TAX ADVICE) IN CONNECTION
WITH THIS AGREEMENT, (B) HAS NOT ENTERED INTO THIS AGREEMENT
BASED UPON THE RECOMMENDATION OF ANY OTHER PARTY OR ANY
ATTORNEY OR ADVISOR TO ANY OTHER PARTY, AND (C) IS NOT



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1 ENTITLED TO RELY UPON ANY COMMUNICATION OR DISCLOSURE BY
2 ANY ATTORNEY OR ADVISER TO ANY OTHER PARTY TO AVOID ANY TAX
3 PENALTY THAT MAY BE IMPOSED ON THE ACKNOWLEDGING PARTY;
4 AND (3) NO ATTORNEY OR ADVISER TO ANY OTHER PARTY HAS IMPOSED
5 ANY LIMITATION THAT PROTECTS THE CONFIDENTIALITY OF ANY SUCH
6 ATTORNEY'S OR ADVISER'S TAX STRATEGIES (REGARDLESS OF
7 WHETHER SUCH LIMITATION IS LEGALLY BINDING) UPON DISCLOSURE
8 BY THE ACKNOWLEDGING PARTY OF THE TAX TREATMENT OR TAX
9 STRUCTURE OF ANY TRANSACTION, INCLUDING ANY TRANSACTION
10 CONTEMPLATED BY THIS AGREEMENT. Settlement para. V.D.E.

11 **G. Notice and Claims Process and Procedures**

12 Within fourteen (14) days after the Court grants Preliminary Approval of the Settlement,
13 Defendants shall provide to the Settlement Administrator:

14 (a) An electronic database of all Class Members, last known mailing address, Social
15 Security number, and Defendants' employee identification number ("Class Members' Data").

16 (b) Corresponding to each Class Member's name, Defendants shall provide a figure
17 indicating the total number of Pay Periods worked by the Class Member during the Class Period.
18 That number of Pay Periods shall be referred to as that Class Member's "Individual Pay Periods."

19 (c) If any of the Class Members' Data are unavailable to Defendants, Defendants will so
20 inform Class Counsel and the Parties will make their best efforts to reconstruct or otherwise agree
21 upon the Class Members' Data prior to when it must be submitted to the Settlement Administrator.
22 Class Members' Data will otherwise remain confidential and will not be disclosed to anyone,
23 except as necessary to applicable taxing authorities, or pursuant to Defendants' express written
24 authorization or by order of the Court. Settlement para. IV.B.1.c.

25 Within fourteen (14) days after receiving the Class Members' Data, or as soon thereafter
26 as it can do so, the Settlement Administrator will mail the Class Notice to all identified Class
27 Members via first-class U.S. mail using the mailing address information provided by Defendants,
28 unless modified by any updated address information that the Settlement Administrator obtains in
the course of administration of the Settlement. Settlement para. IV.B.2.

If a Class Notice is returned because of an incorrect address, the Settlement Administrator
will promptly, and not later than ten (10) days from receipt of the returned Class Notice, search
for a more current address for the Class Member and re-mail the Class Notice to the Class
Member. The Settlement Administrator will use the Class Members' Data and otherwise work
with Defendants' Counsel and Class Counsel to find a more current address. The Settlement



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1 Administrator will be responsible for taking reasonable steps, consistent with its agreed-upon job
2 parameters, court orders, and fee, to trace the mailing address of any Class Member for whom a
3 Class Notice is returned as undeliverable by the U.S. Postal Service. These reasonable steps shall
4 include the tracking of all undelivered mail; performing address searches for all mail returned
5 without a forwarding address; and promptly re-mailing to Class Members for whom new addresses
6 are found. If the Class Notice is re-mailed, the Settlement Administrator will note for its own
7 records and notify Class Counsel and Defendants' Counsel of the date and address of each such
re-mailing as part of a weekly status report provided to the Parties. Settlement para. IV.B.3.

8 **1. Class Member Disputes**

9 If a Class Member disputes his/her estimated Settlement Share, the Class Member may
10 produce evidence to the Settlement Administrator for the Class Period. In order for the dispute to
11 be considered, he/she must follow the directions on the Class Notice. To be valid and timely, all
12 disputes and supporting documents must be postmarked by the Response Deadline. Absent
13 evidence rebutting Defendants' records, Defendants' records will be presumed determinative.
14 However, if a Class Member produces evidence contrary to Defendants' records by the Response
15 Deadline, the Settlement Administrator shall notify Class Counsel and Defense Counsel to discuss
16 and resolve the dispute, including providing all available relevant information to all counsel. The
17 Parties will attempt to resolve all disputes jointly and in good faith. If the Parties cannot reach an
agreement, the Settlement Administrator will make the final determination on the issue.
Settlement para. IV.C.

18 **2. Opting Out**

19 Class Members may submit requests to be excluded from the effect of the Settlement, or
20 objections to the Settlement, pursuant to the following procedures:

21 Class Member may request to be excluded from the effect of this Agreement, and any
22 payment of amounts under this Agreement, by timely mailing a letter to the Settlement
23 Administrator stating that the Class Member wants to be excluded from this Action. This letter
24 must include the Class Member's name, address, telephone number, signature, the last four digits
25 of the Class Member's Social Security number, and a clear statement requesting to be excluded
26 from the settlement of the class claims in a form that is the same or substantially similar to the
27 following: "I wish to exclude myself from the class settlement reached in the matter of Perez v.
28 NxEdge MH LLC, NxEdge San Carlos, LLC, and NxEdge CSL, LLC. I understand that by
excluding myself, I will not receive money from the settlement of my individual claims." To be



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1 valid and timely, the request to be excluded must be postmarked by the Response Deadline and
2 received by the Settlement Administrator. A Class Member who properly submits a valid and
3 timely request to be excluded from the Action shall not receive any payment of any kind in
4 connection with this Agreement or this Action, shall not be bound by or receive any benefit of
5 this Agreement, and shall have no standing to object to the Settlement, except that the request for
6 exclusion shall not be effective as to the release of claims arising under PAGA and shall not
7 preclude the Class Member from receiving their share of the PAGA Penalties. A request for
8 exclusion must be mailed to the Settlement Administrator at the address provided on the Class
Notice. Settlement para. IV. B.4.D.1.

9 **3. Objecting**

10 The Class Notice will provide that any Class Member who does not request exclusion
11 from the Action and who wishes to object to the Settlement should submit an objection in writing
12 to the Settlement Administrator. To be valid, an objection must be postmarked by the Response
13 Deadline and received by the Settlement Administrator. The written objection to the Settlement
14 should set forth the grounds for the objection and the other information required in the next
15 paragraph. The objection should be mailed to the Settlement Administrator at the address
16 provided on the Class Notice. Counsel will promptly file such objection with the Court.

17 The written objection should state the objecting Class Member's full name, address, and
18 the approximate dates of his or her employment with Defendants. The written objection should
19 state the basis for each specific objection and any legal support in clear and concise terms. The
20 written objection also should state whether the Class Member intends to formally intervene and
21 become a party of record in the action, and upon formally intervening, appear and argue at the
22 Final Approval Hearing. Regardless of whether an objecting Class Member complies with the
23 objection procedure encouraged above, the Court will provide a Class Member with the
24 opportunity to speak at the final approval hearing regardless of whether he or she has filed an
appearance or submitted a written opposition beforehand. If the objecting Class Member does not
formally intervene in the action and/or the Court rejects the Class Member's objection, the Class
Member will still be bound by the terms of this Agreement. Settlement Ex. A.

25 **H. Uncashed Checks**

26 Any check issued by the Settlement Administrator to Class Members who do not timely
27 and validly opt out shall be negotiable for one hundred and eighty (180) calendar days. Those
28 funds represented by checks returned as undeliverable and those checks remaining un-cashed for



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1 more than 180 days after issuance (collectively, “Voided Settlement Checks”), plus any interest
2 that has accrued on those funds, will be paid to the California Unclaimed Property Fund.
3 Settlement para. IV.M.

4 **IV. CERTIFICATION OF THE CLASS IS APPROPRIATE**

5 Under Code of Civil Procedure § 382, a class may be certified if: (1) it is ascertainable
6 and its members are too numerous for joinder to be practical; (2) the representative and absent
7 class members share a community of interest and questions of law and fact common to the class
8 predominate over questions unique to individual class members; (3) the representative’s claims
9 are typical of the class’ claims; and (4) the representative will fairly and adequately represent the
10 class’ interests. *See, e.g., Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470. Moreover,
11 in the settlement context, the Court can use a lesser standard to determine the appropriateness of
12 a settlement class as opposed to a litigated class certification. *Dunk v. Ford Motor Co.* (1996) 48
13 Cal.App.4th 1794, 1807. As explained below, all of these requirements are met in this case.

14 **A. The Settlement Class Is Objectively Ascertainable**

15 A class is ascertainable when it may be readily identified without unreasonable expense
16 or time by reference to official records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932
17 (citing *Hypolite v. Carlson* (1975) 52 Cal.App.3d 566, 579). Plaintiff maintains that the above-
18 defined Class is ascertainable because its members may be identified by reference to Defendants’
19 records and Defendants have agreed to share the relevant information from their records to
20 facilitate the settlement process. DS, ¶ 10; Settlement para. I.B., III.D.2, IV.B.1. Therefore, the
21 Settlement Class is ascertainable.

22 **B. The Membership of the Settlement Class Is Sufficiently Numerous**

23 The Settlement Class has sufficiently numerous members to render joinder impractical.
24 No set number is required as a matter of law to maintain a class action. *Hebbard v. Colgrove*
25 (1972) 28 Cal.App.3d 1017, 1030. Defendants estimate that there are approximately 331 Class
26 Members. DS, ¶ 11. Plaintiff maintains that it would be impractical and economically inefficient
27 to require each Class Member to separately maintain an individual action or be joined as a named
28 plaintiff in this action. The California Supreme Court has upheld a class of as few as 10
individuals. *See Bowles v. Superior Court* (1955) 44 Cal.2d 574. In light of these considerations,
the Settlement Class’ membership is sufficiently numerous. DS, ¶ 11. *See Daar v. Yellow Cab*
Co. (1967) 67 Cal.2d 695.



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1 **C. Class Members Share a Well-Defined Community of Interest**

2 The community of interest requirement “embodies three factors: (1) predominant common
3 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and
4 (3) class representatives who can adequately represent the class.” *Sav-On Drug Stores, Inc. v.*
5 *Superior Court* (2004) 34 Cal. 4th 319, 326. It “does not mandate that class members have
6 uniform or identical claims.” *Capitol People First v. Dept. of Developmental Servs.* (2007) 155
7 Cal. App. 4th 676, 692. Rather, courts focus on the defendant’s internal policies and “pattern and
8 practice . . . in order to assess whether that common behavior toward similarly situated plaintiffs
9 renders class certification appropriate.” *Id.* (citing *Sav-On*, 34 Cal. 4th at 333).

10 To justify certification, the class proponent “must show ... that questions of law or fact
11 common to the class predominate over the questions affecting the individual members” *See,*
12 *Arenas v. El Torito Rests., Inc.*, 183 Cal. App. 4th 723, 732 (2010) (citing *Washington Mut. Bank,*
13 *FA v. Superior Court*, 248 Cal. 4th 906, 913 (2001)). In light of the more lenient standard for
14 certification of a settlement class, the Parties agree that for the purposes of the Settlement only,
15 the claims of the Class Members all stem from the same sources. DS, ¶ 12.

16 In this case, Plaintiff asserts all class members were subject to the same or similar
17 operations and employment policies, practices, and procedures. The claims arise from
18 Defendants’ alleged policy-driven failure to pay all wages for all hours worked, including
19 minimum wages and overtime wages; failure to provide meal periods and/or meal premium pay,
20 failure to authorize and permit rest periods and/or pay rest premium pay; failure to issue proper
21 wage statements; failure to timely pay wages, failure to maintain required payroll records, and
22 related labor law violations, all of which Plaintiff claims constitute unfair business practices and
23 give rise to PAGA penalties. Plaintiff asserts that common questions include, but are not limited
24 to: (1) Whether Defendants failed to pay all wages earned to class members for all hours worked,
25 including minimum wages and overtime wages, and at the correct rates of pay; (2) Whether
26 Defendants failed to provide the class with all meal and rest periods in compliance with California
27 law; (3) Whether Defendants failed to pay the class one additional hour of pay on workdays they
28 failed to provide the class with one or more meal or rest periods in compliance with California
29 law; (4) Whether Defendants knowingly and intentionally failed to provide the class with accurate
30 wage statements; (5) Whether Defendants willfully failed to provide the class with timely final
31 wages; and (6) Whether Defendants engaged in unfair competition within the meaning of



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1 Business and Professions Code section 17200, *et seq.*, with respect to the class. DS, ¶ 12.
2 Therefore, common questions predominate.

3 **D. Plaintiff Is Typical of the Settlement Class**

4 The class representative must be similarly situated to the rest of the purported class. *See*
5 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46 (stating “it has never been the law in California
6 that the class representative must have identical interests with the class members. The only
7 requirements are ... that the class representative be *similarly* situated”) (emphasis in original); *See*
8 *also* Newberg, § 3:29 (typicality “focuses on whether there exists a relationship between the
9 Plaintiff’s claims and the claims alleged on behalf of the class”). Plaintiff contends that his claims
10 are typical for the purposes of certifying the Settlement Class. Plaintiff asserts that he, like absent
11 Class Members was subject to the same relevant policies and procedures governing his
12 compensation, hours of work and meal and rest periods. Because Plaintiff contends that he was
13 subject to the same general course of conduct as absent Class Members, resolving the common
14 questions as they apply to Plaintiff will determine Defendants’ *prima facie* liability to all Class
15 Members. Moreover, Plaintiff’s claims could potentially be subject to the same primary
16 affirmative defenses as those of absent Class Members. Accordingly, Plaintiff’s claims are typical
17 of the Class. DS, ¶ 13.

18 **E. Plaintiff Will Adequately Represent the Settlement Class**

19 The adequacy requirement is met where the plaintiff is represented by counsel qualified
20 to conduct the litigation and the plaintiff’s interest in the litigation is not antagonistic to the class’
21 interests. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 451. In other words, where the
22 plaintiff has adequate counsel, the plaintiff may represent the entire class absent any disabling
23 conflicts of interest that might hinder the plaintiff’s ability to represent the class. DS, ¶ 14.

24 First, Class Counsel have supplied the Court with declarations to show that they are
25 adequate to represent the Settlement Class and that they have significant experience in
26 employment litigation generally, and wage and hour and employment-related class action
27 litigation specifically. *See* DS, ¶¶ 1-52; Declaration of Walter L. Haines (“Haines Decl.”) ¶ 3.
28 Thus, Plaintiff’s counsel are adequate to serve as Class Counsel.

Second, Plaintiff contends that he is an adequate class representative. Plaintiff and the
Class Members have strong and co-extensive interests in this litigation because they all worked
for Defendants during the relevant time period, allegedly suffered the same alleged injuries from
the same alleged course of conduct, and there is no evidence of any conflict of interest between



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1 Plaintiff and the Class Members. DS, ¶ 15. Moreover, Plaintiff has demonstrated his commitment
2 to the Settlement Class by, among other things, retaining experienced counsel, providing counsel
3 with documents and extensively speaking with them to assist in identifying the claims asserted in
4 this case, assisting them in identifying witnesses, as well as exposing himself to the risk of
5 attorneys' fees and costs awards against him if this lawsuit had been unsuccessful. DS, ¶ 15. Thus,
6 Plaintiff is adequate to serve as settlement class representative. Accordingly, this Court should
7 find that Plaintiff and his counsel are adequate to represent the Settlement Class as required under
Code of Civil Procedure § 382.

8 **F. Class Action Treatment Is the Superior Means For Resolving The Claims**
9 **Of The Class Members**

10 Plaintiff further contends that a class action is also superior to other means adjudicating
11 the issues in this action. The predominance of common legal and factual questions shows that this
12 Court could fairly adjudicate the claims of Class Members through a single class action. In view
13 of the *theoretical* alternatives that proposed class members could potentially utilize—
14 representative PAGA action (where there is less relief available), individual civil lawsuits or wage
15 claims through the Division of Labor Standards Enforcement (where there would be relatively
16 little money at stake, but the claims would be time-consuming to litigate)—a class action is plainly
superior to all of them. Thus, this consideration supports conditional class action treatment for
purposes of this Settlement only. DS, ¶ 24.

17 **V. THE COURT SHOULD GRANT PRELIMINARY APPROVAL BECAUSE THE**
18 **SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE**

19 **A. Legal Standard**

20 A class action settlement requires court approval. California Rules of Court (“CRC”),
21 Rule 3.769 provides three steps for approval: (1) Preliminary approval after submission of a
22 written motion for preliminary approval, the proposed class settlement, and the proposed class
23 notice; (2) Issuance of notice of settlement to class members; and (3) A final settlement approval
24 hearing where class members may be heard regarding the settlement, and at which evidence and
25 argument concerning the fairness, adequacy, and reasonableness of the settlement is presented.
The decision to approve or reject a class settlement is committed to the Court’s broad discretion.
26 *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128. The decision to approve
27 class settlement may be reversed only upon a showing of “clear abuse of discretion.” *Id.*
28

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1 **B. The Settlement Is Presumptively Fair**

2 In assessing preliminary approval, a court evaluates if the settlement process has certain
3 indicia of fairness. A “presumption of fairness exists where (1) the settlement is reached through
4 arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the
5 court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage
6 of objectors is small.” *Kullar*, 168 Cal. App. 4th at 128, quoting *Dunk v. Ford Motor Co.*, (1996)
7 48 Cal.App.4th at 1794.

8 The class settlement here satisfies all of these factors. DS, ¶ 25. The Settlement resulted
9 from thorough, arms’ length, negotiations between experienced counsel with the assistance of a
10 respected mediator after sufficient discovery was exchanged to assess the relative strengths and
11 weaknesses of their respective cases and Defendants’ estimated exposure. *Id.*

12 On or about September 10, 2021, Plaintiff, through his attorneys, sent a letter to the Labor
13 Workforce Development Agency (“LWDA”) alleging the following against Defendant NxEdge
14 MH LLC: failure to pay all wages for all hours worked, unauthorized and unlawful wage
15 deductions, failure to provide meal periods, failure to authorize and permit rest periods, failure to
16 compensate employees at one hour’s pay at employees’ regular rate of pay for each day on which
17 employees did not receive one or more meal or rest periods, failure to issue proper wage
18 statements, failure to timely pay wages, failure to maintain required payroll records, and related
19 allegations (the “PAGA letter”). Plaintiff asserted these representative claims on behalf of all
20 Class Members who are or were employed during the applicable statutory period. On or about
21 May 20, 2022, Plaintiff, through his attorneys, sent a letter to the Labor Workforce Development
22 Agency (“LWDA”) alleging the same facts against Defendants NxEdge San Carlos, LLC, and
23 NxEdge CSL, LLC. DS, ¶ 5.

24 On September 29, 2021, Plaintiff filed a class action complaint in the Santa Clara Superior
25 Court, alleging against NxEdge MH LLC the same wage and hour claims as set forth in the earlier
26 of the PAGA letters and adding a cause of action for unfair competition. On November 29, 2021,
27 Plaintiff filed a first amended class action complaint in the Santa Clara County Superior Court,
28 adding a cause of action under the Labor Code Private Attorneys General Act of 2004 (“PAGA”).
On or about May 23, 2022, Plaintiff filed a second amended class action complaint in the Santa
Clara County Superior Court, adding NxEdge San Carlos, LLC, and NxEdge CSL, LLC as named
defendants. The second amended complaint is the “Operative Complaint.” DS, ¶ 6.



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1 On June 2, 2022, Defendants answered Plaintiff's Second Amended Complaint and
2 denied, and continue to deny, all of Plaintiff's material allegations. Specifically, Defendants deny
3 the failure to pay all wages for all hours worked, unauthorized and unlawful wage deductions,
4 failure to provide meal periods, failure to authorize and permit rest periods, failure to compensate
5 employees at one hour's pay at employees' regular rate of pay for each day on which employees
6 did not receive one or more meal or rest periods, failure to issue proper wage statements, failure
7 to timely pay wages, failure to maintain required payroll records, and related allegations in the
8 Action. Defendants contend that they have complied with the Labor Code, the Business &
9 Professions Code, and the applicable Wage Order at all times. Defendants further allege that the
10 Plaintiff's claims are not amenable to class treatment because common issues do not predominate.
11 The Parties thereafter engaged in an informal, voluntary exchange of information in the context
12 of privileged settlement discussions to facilitate an early mediation. The Parties exchanged
13 discovery requests, documents, information, and data including but not limited to presuit evidence
14 request and preservation letters, pre-mediation data and document exchanges, and related
15 activities. On April 28, 2022, following much of the foregoing informal discovery and exchange
16 of information, the Parties participated in a mediation session presided over by The Honorable
17 Leo Wagner (ret.), an experienced class action mediator. During the mediation, the Parties had a
18 full day of productive negotiations and reached agreement on a class-wide settlement during the
19 second mediation session. During the mediation sessions, each side, represented by his/their
20 respective counsel, recognized the risk of an adverse result in the Action and agreed to settle the
21 Action and all other matters covered by this Agreement pursuant to the terms and conditions of
22 this Agreement. Settlement para. II.A.B.C.D.E. DS, ¶ 28. Plaintiff prepared "damages" estimates
23 for mediation. DS, ¶ 28, Ex. 8. In advance of the mediation, Plaintiff determined Defendants'
24 maximum exposure for restitution and penalties to be approximately \$5,934,485.06 (consisting
25 of \$374,000.00 in unpaid wages, \$187,050.00 in missed meal period premium wages,
26 \$374,100.00 in missed rest break premium wages, \$368,150.00 for wage statement penalties,
27 \$431,660.06 for waiting time penalties, and \$2,296,210.06 for civil penalties). Plaintiff calculated
28 the damages based on the number of workweeks and pay periods provided by Defendants,
Plaintiff's reports, and the sample data. *Id.* Plaintiff also considered the possibility that Defendants
could launch a *Pick Up Stix* campaign and pursue individual release agreements from the Class
Members. Defendants also represented that they had interviewed Defendants' current employees



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1 regarding Plaintiff's claims and would provide declarations from them, under penalty of perjury,
2 that were favorable to Defendants with respect to the relevant factual issues at issue in Plaintiff's
3 action. Plaintiff's Counsel applied discounts to the maximum exposure to account for all other
4 risks discussed below. While it is difficult to assign anything but crudely-determined percentages
5 of risk to any of the claims, it is safe to say that the risk that a *Pick Up Stix* campaign would
6 preclude recovery for such employees is substantial and alone justifies a significant discount
7 because Defendants would likely by trial have gathered releases from the majority of the Class
8 Members. A settlement for approximately 20.93% of the potential recovery is a proportion
substantially in excess of recovery proportions sanctioned by existing case law.³ *Id.*

9 Plaintiff is aware of only two significant awards under the PAGA in a contested
10 proceeding, both issued by federal district courts.⁴ DS, ¶ 28. PAGA penalty awards are often
11
12

13 ³ See, e.g., *In re Newbridge Networks Sec. Litig.*, 1998 WL 765724 at *2 (D.D.C. Oct. 23, 1998)
14 (“[A]n agreement that secures roughly six to twelve percent of a total trial recovery . . . seems to
15 be within the targeted range of reasonableness.”); *Wise v. Ulta Salon, Cosmetics & Fragrance,*
16 *Inc.* 2019 WL 3943859 at *8 (E.D. Cal. Aug. 21, 2019) (granting preliminary approval where the
17 proposed allocation to settle class claims was at least 9.53 percent); *Bravo v. Gale Triangle, Inc.*,
2017 WL 708766 at * 10 (C.D. Cal. Feb 16, 2017) (“a settlement for fourteen percent recovery
of Plaintiffs’ maximum recovery is reasonable”); *In re Omnivision Techs., Inc.*, 559 F.Supp.2d
1036, 1042 (N.D. Cal. 2008) (approving settlement amount that “is just over 9% of the maximum
potential recovery asserted by either party.”).

18 ⁴ In *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2019) U.S. Dist. LEXIS 13253, the court awarded
19 civil penalties under the PAGA of approximately \$25 million, representing a 25% reduction from
20 plaintiff's claim for approximately \$33 million. *Bernstein* represents a unique set of
21 circumstances that is distinguishable from the case at hand. Notably, the plaintiffs in *Bernstein*
22 suffered a particularly sizeable injury – the court found that the defendant's policies caused
23 damages to the plaintiffs in excess of \$45 million. *Id.* at 20. Additionally, the defendants in
24 *Bernstein*, who the court noted had received “millions of dollars from the state of California” to
25 train their flight attendants, engaged in glaring violations of the labor code, such as failing to
26 compensate its flight attendants for work performed outside of “block time” (time during which
27 the aircraft is moving), including time spent participating in pre-flight briefings, boarding
28 passengers, and deplaning. *Bernstein v. Virgin Am., Inc.* (N.D. Cal 2017) 227 F. Supp. 3d 1049,
1055-1058. Indeed, the defendant's liability was so clear in *Bernstein* that the case was resolved
on the plaintiffs' motion for summary judgment. *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2019)
U.S. Dist. LEXIS 13253.

In *Robert Magadia v. Wal-Mart Assocs.* (N.D. Cal. 2019) 384 F. Supp. 3d. 1058, the court
awarded approximately \$102 million in damages, primarily based on the defendants' failures to
comply with the requirements of California Labor Code section 226.



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1 small even for egregious, intentional violations of the Labor Code.⁵ *Id.* For instance, on October
2 24, 2017, the Los Angeles Superior Court awarded a prevailing PAGA plaintiff, represented by
3 very experienced counsel, civil penalties totaling only \$50.00. *Shields v. Security Paving*
4 *Company, Inc.*, LA Superior Court case no. BC492828. Further, in *Carrington v. Starbucks Corp.*
5 (2018) 30 Cal.App.5th 504, 529, the Court of Appeal affirmed judgment which provided for a
6 PAGA penalty of only \$5 per pay period for the defendant's meal period violations. A similar
result could occur here. *Id.*

7 Plaintiff's initial estimates do not realistically account for the risks outlined below or the
8 risk that a class will not be certified. *Id.* Therefore, Plaintiff believes a class settlement for
9 \$1,242,000.00 is fair and reasonable. *Id.*

10 **C. The Settlement Satisfies the Kullar Factors for Approval**

11 The *Kullar* case sets forth several factors a court should consider in determining whether
12 to approve a class settlement. These factors include: (1) the strength of plaintiff's case; (2) the
13 risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class
14 action status through trial; (4) the amount offered in settlement; (5) the extent of discovery
15 completed and stage of the proceedings; (6) the experience and views of counsel; (7) the presence
16 of a governmental participant; and (8) the reaction of the class members to the proposed
settlement. 168 Cal.App.4th at 128. As demonstrated herein, the Settlement satisfies each of these
factors.

17 **1. Evaluation of Plaintiff's Case**

18 **a. Risks Associated with the Unpaid Wages Claim**

19 There is a risk that Plaintiff's recovery for unpaid wages would be extremely limited at
20 best, largely because Defendants' bonuses were non-discretionary and therefore would not
21 support the claim that it did not include them in the regular rate for purposes of calculating
overtime wages. DS, ¶ 30.

22 **b. Risks Associated with the Meal Period Claims**

23 There are risks to Plaintiff's meal period claim. DS, ¶ 31. Defendants presented evidence
24 that, for the entire duration of Perez's employment, Defendants' policies required employees to,

25 ⁵ In 2012, Plaintiff's Counsel tried *Ghrdilyan v. RJ Financial, Inc.*, Los Angeles Superior Court
26 case number BC430633. In *Ghrdilyan*, the employer underpaid commission overtime wages. The
27 plaintiff sought in excess of \$9 million in civil penalties under the PAGA. After a bench trial, the
28 Honorable Judge Ronald M. Sohigian awarded approximately \$325,000 in civil penalties under
the PAGA.



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1 among other things, take compliant rest and meal periods. These policies required employees to
2 take all scheduled rest breaks and to report to Human Resources any instances when they were
3 unable to take their rest breaks due to job demands. Defendants' policies also required that meal
4 periods be accurately recorded, that employees report instances when they were unable to take
5 their meal period, and that employees take all scheduled meal periods, unless waived. These
6 policies also discussed with employees during orientation and reinforced verbally on a frequent
7 basis. Perez acknowledged receipt of Defendants' policies and understood that compliance with
8 these policies was a condition of his employment. With respect to meal periods specifically,
9 Defendants use meal period waivers as applicable. Moreover, Defendants have posted a sign next
10 to employee time clocks urging employees to take their meal periods before the end of the fifth
11 hour of work. With respect to meal and rest periods, Defendants presented evidence that it is
12 standard practice that employee teams working together in various departments take meal and
13 rest breaks together, at the same time, and if one were to walk through the facility during breaks
14 times, they would observe empty production floors. Accordingly, Defendants anticipate that
15 multiple witnesses will testify Perez (and others) regularly took their rest breaks and were not
16 denied rest breaks or meal periods. DS, ¶ 30. Defendants contend that, to establish a violation for
17 missed meal periods, a plaintiff must do more than show that a meal break was not taken. *Brinker*,
18 53 Cal. 4th at 1004. So long as an employer provides employees with a “reasonable opportunity”
19 to take a duty-free meal period, it has no further duty to “police meal breaks and ensure no work
20 thereafter is performed.” *Id.* at 1040-41. *Id.* Instead, a plaintiff must show the employer impeded,
21 discouraged, or prohibited the employee from taking a proper break, or otherwise failed to release
the employee of all control. *Id.* “Thus, the crucial issue with regard to the meal break claim is the
reason that a particular employee may have failed to take a meal break.” *Washington v. Joe’s
Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641. *Id.*

22 Defendants contend they did not impede or discourage Plaintiff, or any other employees,
23 from taking their meal or rest periods. DS, ¶ 32. Defendants’ policies mandate that employees
24 take at least a 30-minute, uninterrupted meal periods and record the beginning and ending time
25 of their meal breaks each day on their time records. *Id.* The time records that comprise the random
sample Defendants produced to Plaintiff for purposes of mediation show that meal periods were
26 taken the vast majority of the time. *Id.* Of the time records that show a late, short or no lunch,
27 individualized evidence may be necessary to determine whether they occurred due to conduct of
28



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1 the Defendants or each of the employees concerned. Accordingly, there is a significant risk that
2 the value of Plaintiff's meal period claim would be substantially reduced at trial. *Id.*

3 c. Risks Associated with the Rest Break Claims

4 There are risks to Plaintiff's rest period claim. DS, ¶ 33. In accordance with the law,
5 NxEdge requires employees to take such rest breaks. NxEdge maintains a compliant rest break
6 policy, requiring that its employees report instances when they were unable to take their rest
7 breaks due to job demands. See Ex. 3. This policy also mandates that employees take all scheduled
8 rest breaks. See *id.* Per NxEdge policy (as found in the Employee Handbook), "[a]ny non-exempt
9 employee who does not receive their meal or break periods must advise their manager promptly
10 so that the Company may determine how to correct the situation.

11 Defendants contend that it has always been their policy that, if a non-exempt employee is
12 unable to take a meal or rest period as discussed above due to the demands of the job, he or she
13 must inform his or her manager or Human Resources; otherwise, NxEdge will assume that the
14 employee voluntarily skipped the meal or rest period, which may subject the employee to
15 disciplinary action." *Id.* Perez acknowledged that he had read and understood NxEdge's rest break
16 policy. Also, NxEdge contends it has scheduled rest breaks and its departments go on breaks as a
17 team. Furthermore, NxEdge contends it is standard practice that employee teams working
18 together in various departments take meal and rest breaks together, at the same time. Employers
19 are not required to record rest periods and such periods are paid. *Id.* Defendants contend they
20 provided non-exempt employees the opportunity to take rest periods in accordance with
21 California law. Further, Defendants' written policies on meal and rest periods are consistent with
22 the Wage Order. *Id.* Thus, unlike meal periods, where there are often records showing whether
23 an employee clocked out or not, there is no such evidence to prove a missed rest period or that
24 the employer refused to authorize and permit one. *Id.* Managing such claims at trial has become
25 exceedingly difficult. *Id.* Plaintiff will depend on sample witness testimony and surveys to prove
26 the claims. *Id.* While a victory with such evidence is certainly possible, relevant caselaw makes
27 such claims risky from a trial management and due process perspective. *Id.*, See *Duran v. U.S.*
28 *Bank National Assn.*, (2014) 59 Cal. 4th 1, 31 (explaining "[I]f sufficient common questions exist
to support class certification, it may be possible to manage individual issues through the use of
surveys and statistical sampling."); *Tyson Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382;
Comcast Corporation v. Behrend (2013) 133 S.Ct. 1426.



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1 d. Risks Associated with the Statutory “Wage Statement” Penalty
2 Claims

3 Plaintiff also asserts claims for wage statement violations, untimely wage violations, and
4 PAGA penalties. Under Labor Code section 226, wage statements must include various
5 information, including the applicable rates of pay, corresponding hours worked, and gross pay.
6 DS, ¶ 35.

7 Here, Plaintiff’s wage statement claim has the same underlying risks as the above claims,
8 as it is derivative of them. *Id.* On their face, the wage statements issued by Defendants comply
9 with the requirements of Labor Code § 226.

10 e. Risks Associated with The Waiting Time Penalties Claim

11 Plaintiff’s claim for untimely wages is predicated on Labor Code section 201 to 203. Like
12 the claim under Labor Code sec. 226, Plaintiff must establish that the late payments were willful.
13 The evidence of good faith Defendants put forth will defeat this claim.

14 f. Risks Associated With the PAGA Claim

15 Regarding PAGA, a court has discretion to award a lesser amount than the maximum
16 penalty. Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203
17 Cal.App.4th 1112, 1135 (reducing PAGA award). As set forth above, Defendants have posed
18 valid defenses to the Labor Code claims underlying Plaintiff’s PAGA allegations. Thus, the
19 PAGA claims likewise face significant uncertainty. DS, ¶ 37. There is a risk that the Court would
20 consider the maximum civil penalty available to be confiscatory. This is particularly the case
21 considering Defendants’ financial condition. *Id.* Moreover, the current COVID-19 pandemic
22 could motivate the Court to further reduce the penalty award to avoid what it may consider a
23 confiscatory taking. *Id.*

24 This uncertainty increases Plaintiff’s risk of pursuing the PAGA claims and required a
25 significant discount for settlement purposes. DS, ¶ 38. For mediation purposes, Plaintiff’s counsel
26 estimated a maximum exposure of approximately \$2,296,210.06 in civil penalties. This estimate
27 did not take into account any of the risks discussed above and assumed a violation for every single
28 pay period. *Id.* Plaintiff’s counsel also assessed multiple penalties for the same pay period for the
29 same alleged violations of different Labor Code provisions and derivative violations. *Id.* Although
30 two federal district court decisions held that “stacking” PAGA penalties in this fashion may be
31 appropriate to determine the amount in controversy for purposes of removal jurisdiction,
32 Plaintiff’s counsel is not aware of any California state courts awarding plaintiffs multiple PAGA



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1 penalties for the same violation for the same pay period under different Labor Code provisions.
2 *Id.* This may be because the PAGA does not provide for what many employers characterize as
3 claim splitting and not merely stacking. *Id.*

4 g. Risks Associated With A Pick-Up Stix Campaign

5 An employer enjoys the right to settle a putative class member's disputed wage claims
6 individually, without the consent or involvement of class counsel. DS, ¶41. (See *Chindarah v.*
7 *Pick Up Stix, Inc.* (2009) 171 Cal. App. 4th 796. *Id.* As discussed above, Defendants may launch
8 a "pick off" settlement campaign to pursue individual release agreements from the Class
9 Members, thereby potentially narrowing the size of the Settlement Class – 331 members - until it
10 is no longer numerous enough for class certification. *Id.* Plaintiff, then, may not have sufficient
11 number of employees to represent. This led to a significant reduction of claim value in settlement
12 negotiations. *Id.*

13 While the evidence gathered through Plaintiff's discovery supports the merits of the
14 claims asserted in this lawsuit, Plaintiff and his counsel recognize that continued litigation
15 presents significant risks that support a downward departure from Defendants' estimated liability
16 exposure. DS, ¶ 42. In view of the risks, the Settlement reflects Plaintiff's estimate of the total
17 amount of damages, monetary penalties or other relief that the Class could reasonably expect to
18 be awarded at trial, taking into account the likelihood of prevailing and other attendant risks. *Id.*
19 It also represents a fair, adequate, and reasonable compromise amount for these claims and
20 warrants preliminary approval. *Id.*, *Torrissi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370,
21 1376 (the financial condition of defendant predominated in assessing the reasonableness of
22 settlement); *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty
23 concerning defendant's financial stability "strongly supports the reasonableness of the
24 settlement"); *Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014
25 WL 2465049, * 3.

26 2. Allocation of the PAGA Payment

27 The settlement of PAGA penalties in the sum of \$20,000.00, of which 75% (\$15,000.00)
28 will be paid to the LWDA and 25% (\$5,000.00) will be distributed to the Class, is reasonable and
appropriate under the circumstances. DS, ¶ 43. The Parties negotiated a good faith amount for
PAGA penalties to be paid to the LWDA and to the Class. *Id.* The portion to be paid to the LWDA
was not the result of self-interest at the expense of other Class Members. *Id.* Where settlements
"negotiate[] a good faith amount" for PAGA penalties and "there is no indication that this amount



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1 was the result of self-interest at the expense of other Class Members,” such amounts are generally
2 considered reasonable. *Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) No. CV-08-0844
3 EDL, 2009 WL 928133, at *9. Likewise, where the employer did not act willfully, and made good
4 faith attempts to comply with wage and hour laws, a reduction or lesser penalty is warranted
5 because imposing maximum PAGA penalty for each violation would have been unjust, arbitrary,
6 and oppressive. *Id. Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 528-529 (affirming
7 trial court’s award of only 10% of maximum PAGA penalty for meal break violations). *Id.* The
8 amount to be paid to the LWDA comports with PAGA settlement amounts approved by other
9 courts. See, e.g., *Chu v. Wells Fargo Investments, LLC* (N.D. Cal., Feb. 16, 2011) 2011 WL
10 67245, 81 (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million common fund);
11 *Lazarin v. Pro Unlimited, Inc.* (N.D. Cal., July 11, 2013) 2013 WL 3541217 (approving PAGA
12 payment of \$7,500 to LWDA out of \$1.25 million common fund settlement); *Hopson v.*
13 *Hanesbrands, Inc.* (N.D. Cal. Aug. 8, 2008) 2008 WL 3385452, at *1 (approving PAGA
14 settlement of 0.3% or \$1,500); see *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 589
15 (approving PAGA settlement and release that allocated \$0 to PAGA claim). Courts have also
16 approved settlements for \$20,000 or less. See, e.g., *Hicks v. Toys ‘R’ Us–Delaware, Inc.*, (C.D.
17 Cal. Sept. 2, 2014) 2014 WL 4703915, at *1 (approving \$5,000 PAGA payment in a case
18 involving \$4 million settlement); *Franco v. Ruiz Food Prods., Inc.* (E.D. Cal. Nov. 27, 2012)
19 2012 WL 5941801 at *14 (approving PAGA penalties of \$10,000 as part of \$2.5 million
20 settlement); *Garcia v. Gordon Trucking* (E.D. Cal. Oct. 31, 2012) 2012 WL 5364575, at *3
21 (approving PAGA payment of \$10,000 as part of \$3.7 million common-fund settlement). *Id.*

22 **3. Presence of Governmental Participant**

23 As required under Labor Code section 2699(l)(2), Plaintiffs will provide notice of this
24 settlement to the LWDA. DS, ¶ 52, Ex. 14.

25 **4. Reaction of Class Members to Proposed Settlement**

26 If the settlement is preliminarily approved, Class Members will be provided with the Class
27 Notice (attached as Exhibit A to the Settlement) and an opportunity to object. DS, ¶ 49. The
28 parties’ proposed notice fully complies with California Rules of Court 3.766(d) and 3.769(f) and
will allow Class Members to make informed responses to the proposed settlement. *Id.*

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1 **VI. THE SETTLEMENT FAIRLY, ADEQUATELY, AND REASONABLY**
2 **COMPENSATE CLASS MEMBERS BECAUSE IT WILL PAY EACH CLASS**
3 **MEMBER BASED ON THE POTENTIAL EXTENT OF HIS OR HER INJURY**
4 **COMPARED TO OTHER CLASS MEMBERS**

5 The Individual Settlement Payments will be paid to each Class Member based on his or
6 her eligible Pay Periods worked compared to the total Pay Periods worked. DS, ¶ 48, Settlement
7 para. I.D. Because this method compensates Class Members based on the extent of their potential
8 injuries, in that Class Members who worked for Defendants longer would have been subject to
9 more alleged violations, it is fair, adequate, and reasonable. *Id.*

10 **VII. ALLOCATION FOR CLASS COUNSEL'S FEE AWARD AND ATTORNEYS'**
11 **FEES AND COSTS AWARD FOR LITIGATION EXPENSES IS**
12 **APPROPRIATE**

13 The Settlement states Class Counsel may seek attorneys' fees of \$413,999.00 (one-third
14 of the GSA) and up to \$25,000.00 for actual reasonable litigation costs and expenses incurred in
15 prosecuting the Action. Settlement para. III.C.2. These amounts are reasonable, given the facts
16 and circumstances of the case. DS, ¶ 44.

17 Trial courts have "wide latitude" in assessing the value of attorneys' fees and their
18 decisions will "not be disturbed on appeal absent a manifest abuse of discretion." *Lealao v.*
19 *Beneficial Cal., Inc.* (2000) 82 Cal. App. 4th 19, 41. Indeed, it is long settled that the "experienced
20 trial judge is the best judge of the value of professional services rendered in his court." *Ketchum*
21 *v. Moses* (2001) 24 Cal. 4th 1122, 1132. California law provides that attorney fee awards should
22 be equivalent to fees paid in the legal marketplace to compensate for the result achieved and risk
23 incurred. *Laffitte v. Robert Half Intl, Inc.* (2016) 1 Cal. 5th 480, 503 (citing *Lealao, supra*, 82
24 Cal.App.4th at p. 48-49). The Supreme Court has recently approved fees equal to one-third (1/3)
25 of the common fund. *Laffitte, supra*, 1 Cal. 5th 480. Many courts have similarly approved fee
26 awards equal to or greater than the percentage requested here. *See, e.g., In re Pacific Enterprises*
27 (9th Cir. 1995) 47 F.3d 373, 379 (award of 33% of the common fund); *In re Activision* (N.D.
28 Cal. 1989) 723 F.Supp. 1373, 1375 (32.8% of the common fund); *In re Ampicillin Antitrust*
Litig. (D.D.C. 1981) 526 F.Supp. 494, 498 (45% of settlement fund).

29 The amount of fees and costs requested are commensurate with (1) the risk Class Counsel
30 took in bringing the case, (2) the extensive time, effort and expense dedicated to the case, (3) the
31 skill and determination Class Counsel has shown, (4) the results Class Counsel achieved, (5) the



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1 value of the Class Counsel achieved for the class, and (6) the other cases Class Counsel turned
2 down to devote time to this matter. DS, ¶ 45. Class Counsel interviewed and obtained information
3 from putative class members, met and conferred with Defendants' counsel on numerous
4 occasions, reviewed and analyzed hundreds of pages of data and documents provided by
5 Defendants and obtained through other sources, researched applicable law, and provided
6 estimates of "damages" for purposes of settlement discussions, among other tasks. *Id.*

7 Class Counsel have borne all the risks and costs of litigation and will receive no
8 compensation until recovery is obtained. DS, ¶ 46. Class Counsel are well-experienced in wage-
9 and-hour class action litigation and used that experience to obtain a fair result for the Class. *Id.*
10 Considering the amount of the attorney fees requested, the work performed, and the risks incurred,
11 the requested fees and costs are reasonable and should be awarded. *Id.*

12 **VIII. THE CLASS REPRESENTATIVE PAYMENT TO PLAINTIFF SHOULD BE**
13 **PRELIMINARILY APPROVED BECAUSE IT IS FAIR, ADEQUATE, AND**
14 **REASONABLE**

15 Courts routinely approve incentive awards to compensate named plaintiffs for the services
16 they provide and the risks they incur during class action litigation, often in much higher amounts
17 than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726
18 (upholding "service payments" to named plaintiffs for their efforts in bringing the case); *Van*
19 *Vranken v. Atlantic Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294 (approving \$50,000
20 enhancement award). The Settlement provides that Plaintiff may seek a Class Representative
21 Payment of \$50,000.00. This amount is entirely reasonable given Plaintiff's efforts in this action
22 and the risks he undertook on behalf of Class Members. DS, ¶ 47. Plaintiff has devoted many
23 hours advancing the interests of the Settlement Class. Plaintiff has done this by, among other
24 things, retaining experienced counsel, providing them with information about his work history
25 with Defendants and Defendants' policies and practices with respect to the wage and hour claims
26 at issue, participating in mediation, and being actively involved in the settlement process to ensure
27 a fair result for the Settlement Class as a whole. In doing this, Plaintiff has been exposed to
28 significant risks, including the risk of an order to pay Defendants' attorneys' fees and costs if this
action had been unsuccessful (*See Labor Code §§ 218.5-218.6*). The efforts and risks that Plaintiff
undertook on behalf of the Settlement Class shows that the proposed Class Representative
Payment is fair, adequate, and reasonable, and thus warrants preliminary approval. DS, ¶ 47.

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1 **IX. THE PROPOSED SETTLEMENT ADMINISTRATION COSTS SHOULD BE**
2 **PRELIMINARILY APPROVED BECAUSE THEY ARE FAIR, ADEQUATE,**
3 **AND REASONABLE**

4 With regard to the settlement administration costs provision, it is reasonable. Before
5 agreeing to Simpluris, Inc. and its bid of \$7,300.00, the Parties sought and reviewed bids from
6 other reputable third-party administrators which provided higher bids. Simpluris, Inc. =
7 \$7,300.00; Phoenix Settlement Administrators = \$7,500.00; and CPT Group, Inc. = \$10,000.00
8 DS, ¶ 50-51, Exs. 11, 12, and 13, respectively. Thus, the settlement administration costs provision
9 should be given preliminary approval.

10 **X. THE PROPOSED NOTICE AND SETTLEMENT ADMINISTRATION PLAN**
11 **SHOULD BE APPROVED BECAUSE IT IS REASONABLY CALCULATED TO**
12 **GIVE ACTUAL NOTICE TO CLASS MEMBERS AND SUFFICIENT TIME TO**
13 **EXERCISE THEIR RIGHTS**

14 This Court should approve the proposed plans for giving notice to the Settlement Class
15 and administering the Settlement. The standard for determining the adequacy of notice is whether
16 the notice has “a reasonable chance of reaching a substantial percentage of the class members.”
17 *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974. The notice process includes multiple
18 measures to ensure that as many Class Members as practicable receive actual notice of the
19 Settlement and have enough time to exercise their rights. The Settlement requires distribution of
20 the Notice by First Class U.S. mail only. Settlement para. IV.B. Although there are current
21 employee Class Members, it is uncertain whether Defendants’ records of their contact information
22 include email addresses and Class Members, who perform all of their work away from a desk, are
23 not in a position to check their emails. As such, notice by mail alone is fair, adequate, and
24 reasonable. DS, ¶ 49.

25 With respect to its content, “[The] notice given to the class must fairly apprise the class
26 members of the terms of the proposed compromise and of the options open to dissenting class
27 members.” *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 151-152.
28 The purpose of the notice in class settlement context is to give class members sufficient
information to decide whether they should accept the benefits offered, opt out and pursue their
own remedies, or object to the settlement. *Id.* The Notice (Exhibit A to the Settlement) provides
Class Members with all pertinent information that they need to fully evaluate their options and
exercise their rights under the Settlement. Specifically, it clearly and concisely explains, among



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1 other things: (1) what the Settlement is about; (2) who is a Settlement Class Member; (3) how
2 Class Counsel will be paid; (4) how to submit an exclusion request not to be bound by the
3 Settlement; (5) how to object to the Settlement; (6) how the Settlement will be allocated; (7) how
4 payments to Class Members will be calculated; (8) how the disputes will be resolved; and (9) the
5 individual Settlement Class Member's estimated payment. Additionally, the Class Notice will
6 include the number of Pay Periods a Class Member worked during the Class Period. Accordingly,
7 the Notice should be approved because it describes the Settlement with sufficient clarity and
8 specificity to explain to Class Members what this action is about, their rights under the Settlement,
and how to exercise those rights. DS, ¶ 49.

9 **XI. CONCLUSION**

10 For the reasons stated above, this Court should grant Plaintiff's Motion in its entirety and
11 adopt the proposed order submitted concurrently herewith.

12 Respectfully submitted,

13 THE SPIVAK LAW FIRM

14 Dated: November 4, 2022

15 By: 

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17 MAYA CHEAITANI
18 CHRISTINA J. PREJEAN, Attorneys
19 for Plaintiff(s), FELIS A. PEREZ, and
20 all others similarly situated
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