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FELIS A. PEREZ, and all others similarly situated
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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **FOR THE COUNTY OF SANTA CLARA**

11 **(UNLIMITED JURISDICTION)**

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

16 *Plaintiff(s),*

17 vs.

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

21 *Defendant(s).*

Case No. 21CV387173

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

Hearing Date: April 5, 2023
Hearing Time: 1:30 p.m.
Hearing Dept.: 19, The Honorable
Theodore C. Zayner
Action filed: September 29, 2021

**Submitted Herewith Under Separate
Cover:**

1. Supplemental Memorandum of Points and Authorities;
2. Supplemental Declaration of David Spivak; Supplemental Declaration of Walter Haines; Declaration of Dora Lane; and
3. [Proposed] Order



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1 **SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiff Felis Perez (“Plaintiff”) submits this supplemental memorandum of points and
3 authorities in support of his Motion for Preliminary Approval of Class Action Settlement.
4 Pursuant to the Court’s ruling of February 8, 2023, the Parties have entered into a “First Amended
5 Joint Stipulation of Class Action Settlement and Release” (“First Amended Settlement”) with its
6 the Notice of Class Action Settlement. Supplemental Declaration of David Spivak, Exhibit 15.
7 Each of the Court’s comments are recited below in bold following by a discussion of the
8 Plaintiff’s response to the comment.

9 **A. “Plaintiff does not provide an estimate of the net settlement amount that will
10 be available for payments to class member, nor do they provide an average individual
11 settlement award amount. In fact, the settlement agreement states that the gross settlement
12 amount and the net settlement amount are the same, \$1,242,000. (Settlement Agreement at
p. 5, Ins. 15-17; p. 5, Ins. 25-26.) Plaintiff must address these issues before the court will
preliminarily approve the class.”**

13 The Parties calculate the Net Settlement Amount, and the average Settlement Share from
14 the Net Settlement Amount as follows:

15		
16	<u>Gross Settlement Amount</u>	<u>\$1,242,000.00</u>
17	Class Counsel Fees Payment	
18	Percentage	33.33%
19	Class Counsel Fees Payment	
20	(cap)	\$414,000.00
21	Class Counsel Litigation	
22	Expenses Payment (cap)	\$25,000.00
23	Settlement Administrator fees	
24	(cap)	\$17,500.00
25	Class Representative Payment	
26	(cap)	\$50,000.00
27	PAGA Penalties	\$20,000.00
28	>> LWDA Percentage	75%
	>> LWDA Amount	\$15,000.00



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1	>> PAGA Members Percentage	25%
2	>> PAGA Members Amount	\$5,000.00
3	Net Settlement Amount ("NSA")	\$720,500.00
4	Putative Class Members ("PCM")	331
5	Average Settlement Share of NSA	\$2,176.74
6		
7	Pay Periods	22,549
8	Pay Period value	\$31.95
9		

10

11 **B. “The parties’ proposal to send funds to the Unclaimed Property Fund does not comply with Code of Civil Procedure section 384, which mandates that unclaimed or abandoned class member funds be given to ‘nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent.’ Accordingly, the parties must agree on an appropriate cy pres recipient for any unclaimed settlement funds.”**

16 In the First Amended Settlement and its class notice, the Parties designate Legal Aid at Work (“LAAW”) in place of the California Unclaimed Property Fund as the recipient of uncashed checks. Ex. 15, First Amended Settlement ¶ IV.M; Ex. 15 sub. A, First Amended Class Notice, ¶ 7. LAAW was founded in 1916 and is a nonprofit organization providing civil legal services to the indigent consistent with California Code of Civil Procedure section 384. For over 100 years, LAAW has provided continuous service with the aim of offering free and high-quality legal assistance to those who are unable to afford legal representation. For more than four decades, LAAW has primarily devoted its resources to protecting the workplace rights of California’s low-wage workers. LAAW’s nonprofit status and work providing services to the indigent make it an appropriate designee of cy pres funds. LAAW is a CCP § 384 organization as described more specifically below. LAAW addresses the full range of employment issues that low-wage workers confront through the following seven programs: (a) Community Legal Services; (b) Disability Rights; (c) Gender and LGBT Equity; (d) National Origin and Immigrants’ Rights; (e) Racial Economic Equity; (f) Wage Protection; and (g) Work and Family.



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The core of LAAW's work is providing free legal services to low-wage workers with employment law claims. It litigates cases that address an array of issues important to low-wage workers, including (a) violations of wage-and-hour laws; (b) workplace retaliation; (c) discrimination on account of race, national origin, disability, sex, gender identity, sexual orientation, immigration status and language proficiency; (d) harassment; and (e) failure to comply with equal pay laws and family medical leave laws. Whether in state or federal court, at the trial level or on appeal, nearly all of LAAW's cases impact the law and industry practices, raise community awareness, and change the course the clients' lives. Since 1970, LAAW has defined its mission and devoted its practice to representing low wage workers in enforcing the full range of their employment rights. LAAW is one of very few legal services nonprofits in the country that has this singular purpose. Legal Aid at Work operates a statewide network of clinics and helplines that provide job related legal advice and counsel to low-income Californians throughout the state. It operates some of its clinics in partnership with the Warehouse Worker Resource Center and the Legal Aid Society of San Bernardino, respectively, and normally hold 22 clinics each year collectively at those locations. For further information, see <https://legalaidatwork.org/>.

C. "Plaintiff calculates Defendants' total potential liability, including restitution and penalties, to be \$5,934,485.06. This amount consists of unpaid wages in the amount of \$374,000, estimated potential liability for the meal break violations at approximately \$187,050, and rest break violations at \$374,100. Exposure for non-compliant wage statements was estimated at \$368,150 and for waiting time penalties at \$431,660.06. Plaintiff calculated Defendants' maximum exposure for civil penalties at \$2,296,210.06. The court notes that these amounts do not total \$5,934,485.06. Accordingly, the court requests further information regarding the calculation of Defendants' maximum exposure."

Plaintiff calculated the Defendants' total potential liability as follows:

Restitution	
Unpaid OT on nondiscretionary compensation:	\$5,181.10
Meal period premium wages:	\$804,651.09
Rest period premium wages:	\$2,828,442.81
Restitution subtotal:	\$3,638,275.00



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<u>Penalties</u>		
Statutory wage statement penalties:		\$368,150.00
Waiting time penalties:		\$431,660.06
Overtime wages (Lab.Code § 510): civil penalties:		\$187,050.00
Meal periods Lab.Code § 512): civil penalties:		\$187,050.00
Rest periods (Lab.Code § 1198):civil penalties:		\$374,100.00
Improper pay stubs (Lab.Code § 226):civil penalties:		\$374,100.00
Untimely wages (Lab.Code §§ 201-204): civil penalties:		\$374,100.00
Penalties subtotal:		\$2,296,210.06
Grand total:		\$5,934,485.06

Plaintiff presents the spreadsheet at the last page of Exhibit 8 to the declaration of David Spivak in support of Plaintiff’s motion for preliminary approval of class action settlement. The preceding pages of Exhibit 8 show how Plaintiff reached these amounts.

D. “The incentive award is somewhat high. The motion and Plaintiff’s counsel’s declaration state that the class representative spent many hours working on behalf of the settlement class and that he was exposed to significant risk due to his participation in the lawsuit. But, the court requires more information regarding the quantum of time Plaintiff spent working on the lawsuit, the specific tasks he completed, and the risks specific to him. The class representative shall file a declaration specifically detailing his participation in the action.”

Plaintiff believes that the maximum Class Representative Payment sought, \$50,000.00 is reasonable and intends to establish this in his moving papers in support of final approval of the settlement once distribution of the settlement notice is complete and the deadline has passed for Class Members to respond to the settlement. Plaintiff requests that the Court allow him to do so



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at that stage as is customary instead of at this stage, which Plaintiff believes is premature given the fact that he has yet to perform all duties required of him under the settlement.

E. “Finally, the settlement provides for administration costs of up to \$17,500. But, the actual bid received by the chosen administrator was \$7,300. Plaintiff must explain this discrepancy.”

It is the experience of counsel for Plaintiff that settlement administration costs can rise following distribution of the notice of settlement to Class Members due to circumstances unforeseen at the time the parties negotiated the settlement agreement. Supplemental Declaration of David Spivak, ¶ 4. Thus, in an abundance of caution, the parties request that the Court allow them to advise the class that Settlement Administration fees will be no more than \$17,500. In the event that Settlement Administration fees do not change following preliminary court approval of the settlement, no more than \$7,300 will be subtracted from the Gross Settlement Amount to cover Settlement Administrator fees. So long as Settlement Administration fees are no more than \$17,500, the class notice will adequately notify the class of the possibility of such a fee, which the Parties submit is reasonable for a class settlement of this kind.

F. “The gross settlement amount and estimated deductions are provided. But, as with the settlement agreement itself, the notice fails to provide an estimate of the net settlement amount that will be available for payments to class member, nor do they provide an average individual settlement award amount for class members to evaluate their options.”

As stated above, the Parties calculate the Net Settlement Amount, and the average Settlement Share from the Net Settlement Amount as follows:

Gross Settlement Amount	\$1,242,000.00
Class Counsel Fees Payment Percentage	33.33%
Class Counsel Fees Payment (cap)	\$414,000.00
Class Counsel Litigation Expenses Payment (cap)	\$25,000.00
	\$17,500.00



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1	Settlement Administrator fees	
2	(cap)	
3	Class Representative Payment	
	(cap)	\$50,000.00
4	PAGA Penalties	\$20,000.00
5	>> LWDA Percentage	75%
6	>> LWDA Amount	\$15,000.00
	>> PAGA Members Percentage	25%
7	>> PAGA Members Amount	\$5,000.00
8	Net Settlement Amount	
	("NSA")	\$720,500.00
9	Putative Class Members	
10	("PCM")	331
11	Average Settlement Share of	
	NSA	\$2,176.74
12	Pay Periods	22,549
13	Pay Period value	\$31.95

15 The class notice attached to the First Amended Settlement provides the Parties' estimate
16 of the Net Settlement Amount, \$720,500, that will be available for payments to Class Members
17 along with the average Settlement Share of the Net Settlement Amount to Class Members,
18 \$2,176.74, so they can evaluate their options. Ex. 15 sub. A, First Amended Class Notice, page
19 2 (third bullet point).

20 **G. "The notice must be modified so class members will know that further**
21 **proceedings will be in Department 19 before Judge Zayner."**

22 The class notice attached to the First Amended Settlement notifies class members that
23 further proceedings will be in Department 19 before Judge Zayner. Ex. 15 sub. A, First Amended
24 Class Notice, ¶ 13.

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1 **H. “Finally, the sentence in the notice reading, “All PAGA Members, regardless**
2 **of whether they submit timely and valid requests for exclusion from the Settlement, will**
3 **release all Released Claims under PAGA against the Released Parties” shall be written in**
4 **bold.”**

5 The class notice attached to the First Amended Settlement notifies in bold print that Class
6 Members that, “All PAGA Members, regardless of whether they submit timely and valid requests
7 for exclusion from the Settlement, will release all Released Claims under PAGA against the
8 Released Parties.” Ex. 15 sub. A, First Amended Class Notice, ¶ 8.

9 **I. The notice provides information regarding how to appear at the final**
10 **approval hearing, but states only that any objectors may appear in person or**
11 **through counsel. The language shall be modified to state the following:**

12 **Class members may appear at the final approval hearing either in person (or via**
13 **their individual counsel) in the courtroom or by telephone via CourtCall. Class**
14 **members who wish to appear by CourtCall should contact class counsel at least**
15 **three days before the hearing if possible, to arrange a telephonic appearance. Any**
16 **CourtCall fees for an appearance by an objecting class member will be paid by class**
17 **counsel.**

18 The class notice attached to the First Amended Settlement notifies “Class members may
19 appear at the final approval hearing either in person (or via their individual counsel) in the
20 courtroom or by telephone via CourtCall. Class members who wish to appear by CourtCall
21 should contact class counsel at least three days before the hearing if possible, to arrange a
22 telephonic appearance. Any CourtCall fees for an appearance by an objecting class member will
23 be paid by class counsel.” Ex. 15 sub. A, First Amended Class Notice, ¶ 14.

24 Respectfully submitted,

25 THE SPIVAK LAW FIRM

26 Dated: March 17, 2023

27 By:



28 DAVID G. SPIVAK
MAYA CHEAITANI, Attorneys for
Plaintiff(s), FELIS A. PEREZ, and all
others similarly situated



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