

COPY

1 DAVID YEREMIAN & ASSOCIATES, INC.
David Yeremian (SBN 226337)
2 david@yeremianlaw.com
535 N. Brand Blvd., Suite 705
3 Glendale, California 91203
Telephone: (818) 230-8380
4 Facsimile: (818) 230-0308

Filed **DEC 19 2018**
ROSA JUNQUEIRO, CLERK

By **GRANT FREEO**
DEPUTY

5 Attorneys for Plaintiffs ADAM MITCHELL and
FRANCISCO SANCHEZ, on behalf of themselves and
6 others similarly situated

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SAN JOAQUIN

10
11
12 ADAM MITCHELL, on behalf of himself and
others similarly situated,

13 Plaintiff,

14 vs.

15 NUSHAKE, INC., a California corporation; and
16 DOES 1 through 50, inclusive,

17 Defendants.

Case No. STK-CV-UOE-2013-0011503

**[PROPOSED] ORDER GRANTING
FINAL APPROVAL FOR CLASS
SETTLEMENT**

Date: 12/19/2018

01/03/2019

01/08/2019

Time: 09:00 a.m.

Dept.: 41013

1 On _____, 2018/2019, Plaintiffs' Motion for Final Approval of Class Action
2 Settlement and Motion for Awards of Attorneys' Fees, Costs, and Incentive Payments came before
3 the Court, in Department 41, for hearing pursuant to the Order of this Court, dated January 31, 2018
4 ("Preliminary Approval Order"), on the application of Plaintiff Adam Mitchell and the Certified
5 Class for approval of the Settlement set forth in the Joint Stipulation of Class Action Settlement and
6 Addendum (collectively the "Stipulation"). Full and adequate notice having been given to the Class
7 as required in the Court's Preliminary Approval Order, and the Court having considered all papers
8 filed and proceedings held herein and otherwise being fully informed in the premises and good cause
9 appearing therefor.

10 NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

- 11 1. This Order incorporates by reference the definitions in the Stipulation, and all
12 capitalized terms used, but not defined herein, shall have the same meanings as in the Stipulation.
- 13 2. This Court has jurisdiction over the subject matter of the Action and over all parties
14 to the Action, including all Class Members.
- 15 3. The Motion for final approval is granted. The Court approves the settlement as fair,
16 reasonable and adequate. The Court makes the following awards and approves the following
17 payments:
 - 18 a. \$58,333.33 in attorneys' fees and \$11,385.06 in costs to Class Counsel;
 - 19 b. \$5,000.00 (\$10,000.00 in total) as a service award to each named Plaintiff: Adam
20 Mitchell and Francisco Sanchez;
 - 21 c. \$15,000.00 in costs to the claims administrator CPT Group, Inc.;
 - 22 d. The residual of the uncashed checks to the Department of Industrial Relations in
23 the names of the employees who submitted the claims;
 - 24 e. The residual of unclaimed funds to California Rural Legal Assistance.
- 25 4. In accordance with the Settlement and the terms set forth in this order, this Order
26 shall not be deemed a judgment in favor of Class Members or any them and shall not constitute an
27 obligation for direct compensation of any one or any number of the Settlement Class Members, but
28

1 rather it simply approves and undertakes to monitor the execution of the settlement between the
2 Parties. Except for the payment due under the Settlement, the parties are each to bear their own costs
3 and attorneys' fees. The Court approves the Settlement and Defendant is discharged from the
4 Released Claims in accordance with the terms of the Settlement.

5 5. In this wage and hour class action lawsuit, Plaintiffs sued Defendant for a variety of
6 Labor Code violations. The operative Complaint alleges that Defendant failed to pay wages and
7 overtime, failed to provide meal and rest breaks, failed to provide accurate wage statements, failed to
8 provide suitable seating, failed to pay final wages when due, unreimbursed expenses, and unfair
9 business practices, and violations under the Private Attorney General Act ("PAGA") all in violation
10 of California law. The operative complaint seeks recovery of premium pay for improper meal and
11 rest breaks, penalties for improper wage statements, waiting time penalties, penalties under Labor
12 Code § 2699 *et seq.*, prejudgment interest, post-judgment interest, and attorneys' fees and costs.

13 6. The parties settled this matter at mediation and thereafter sought and obtained
14 preliminary approval on January 31, 2018. Defendant made and makes no admission of liability and
15 none shall be inferred from the Settlement or entry of judgment. Neither this order nor the
16 Settlement shall be used or submitted into evidence in any proceeding or action, except for the sole
17 purpose of enforcing the terms hereof.

18 7. In California, the notice to class members must have "a reasonable chance of reaching
19 a substantial percentage of the class members." *Wershba v. Apple Computer, Inc.* (2001) 91
20 Cal.App.4th 224, 251. Importantly, however, the plaintiff need not demonstrate that each member of
21 the class received notice. As long as the notice had a "reasonable chance" of reaching a substantial
22 percentage of class members, it should be found effective.

23 8. CPT Group, Inc. is providing settlement administration services for this settlement.
24 (Declaration of Melinda Yang with Respect to Settlement Administration and Class Notice filed
25 with the Final Approval Motion, ¶1.) Between February 12-16, 2018, CPT received the confidential
26 class information from Defendant; the list contained 204 class members. (Id. at ¶ 3-4.) CPT
27 conducted a search of the NCOA to update addresses and, on February 26, 2018, mailed notice to all
28

1 class members. (Id. at ¶¶ 5-6.) Notice was sent in English and Spanish. (Id. at ¶¶ 2.) CPT forwarded
2 notice packets returned with forwarding addresses and performed skip searches on all other returned
3 mail. (Id. at ¶ 8-10.) On July 20, 2018, CPT mailed reminder postcards to those Class Members who
4 had not yet submitted a Claim Form or Request for Exclusion. (Id. at ¶ 7.) Ultimately, 4 notice
5 packets were undeliverable. (Ibid.) CPT received zero objections. (Id. at ¶10.) CPT received zero
6 request for exclusion. (Id. ¶11.) Based on the foregoing, the Court finds that the notice provided to
7 class members conforms to due process requirements.

8 9. It is the duty of the Court, before finally approving the settlement, to conduct an
9 inquiry in the fairness of the proposed settlement. California Practice Guide, Civil Procedure Before
10 Trial, The Rutter Group, ¶14:139.12 (2012). The trial court has broad discretion in determining
11 whether the settlement is fair. In exercising that discretion, it normally considers the following
12 factors: strength of the plaintiff's case; the risk, expense, complexity and likely duration of further
13 litigation; the risk of maintaining class action status through trial; amount offered in settlement;
14 extent of discovery completed and stage of the proceedings; experience and views of counsel;
15 presence of a governmental participant; and reaction of the class members to the proposed class
16 settlement. *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801; *In Re Microsoft I-V Cases*
17 (2006) 135 Cal.App.4th 706, 723. This list is not exclusive and the Court is free to balance and weigh
18 the factors depending on the circumstances of the case. *Wershba v. Apple Computer, Inc.* (2001) 91
19 Cal.App.4th 224, 244-245.

20 10. The proponent bears the burden of proof to show the settlement is fair, adequate and
21 reasonable. *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135,
22 1165-1166; *Wershba, supra*, 91 Cal.App.4th at 245. There is a presumption that a proposed
23 settlement is fair and reasonable when it is the result of arms'-length negotiations. 2 Herbert
24 Newburg & Albert Conte, *Newburg on Class Actions* §11.41 at 11-88 (3d ed. 1992); *Manual for*
25 *Complex Litigation* (Third) §30.42.

26 11. At the time of preliminary approval, Class Counsel claims that Defendant failed to
27 pay minimum wage and overtime was valued at \$135,900 (Yeremian Declaration re: Preliminary
28

1 Approval, ¶ 23), provide proper meal breaks were valued at \$604,000.00. (Yeremian Declaration re:
2 Preliminary Approval, ¶¶25-29.) Rest break violations were valued at \$604,000.00. (Yeremian
3 Declaration re: Preliminary Approval, ¶ 30.) The paystub violations were valued at \$148,000.00. (Id.
4 at ¶¶31-34.) The claim for failure to pay final wages valued at \$916,800.00. (Id. at ¶¶ 35-37.)
5 Unreimbursed Expenses claim at \$65,400. (Id. at ¶¶ 38-39.) PAGA Penalties at \$840,000.00 (Id. at
6 43.)

7 12. Had this case not settled, there would have been additional risks and expenses
8 associated with continuing to litigate. Procedural hurdles (e.g., motion practice and appeals) are also
9 likely to prolong the litigation as well as any recovery by the class members. Moreover, there was a
10 significant risk of insolvency by Defendants.

11 13. There is always a risk of decertification. *Weinstat v. Dentsply Intern., Inc.* (2010) 180
12 Cal.App.4th 1213, 1226 (“Our Supreme Court has recognized that trial courts should retain some
13 flexibility in conducting class actions, which means, under suitable circumstances, entertaining
14 successive motions on certification if the court subsequently discovers that the propriety of a class
15 action is not appropriate.”)

16 14. As part of the Court’s analysis of this factor, the Court should take into consideration
17 the admonition in *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133. In *Kullar*,
18 objectors to a class settlement argued the trial court erred in finding the terms of the settlement to be
19 fair, reasonable, and adequate without any evidence of the amount to which class members would be
20 entitled if they prevailed in the litigation, and without any basis to evaluate the reasonableness of the
21 agreed recovery. The Court of Appeal agreed with the objectors that the trial court bore the ultimate
22 responsibility to ensure the reasonableness of the settlement terms. Although many factors had to be
23 considered in making that determination, and a trial court was not required to decide the ultimate
24 merits of class members’ claims before approving a proposed settlement, an informed evaluation
25 could not be made without an understanding of the amount in controversy and the realistic range of
26 outcomes of the litigation.

27 15. Defendant has agreed to settle for the non-reversionary amount of \$175,000.00 all in,
28

1 with no additional sums being due from Defendant for damages, costs, attorneys' fees, contributions,
2 reimbursements or for any other reason. According to the claims administrator's calculations, the
3 average settlement payment will be over \$827.64 per Class Member and the highest settlement
4 payment is \$2,197.61 (Yeremian FA Decl., ¶ 12; Yang Decl. ¶ 16.)

5 16. Class Counsel conducted an investigation that included informal discovery, reviewed
6 time records, prepared a questionnaire for class members, interviewed class members, reviewed
7 Plaintiff's documents, depositions, and formed damage models based on all of these. (Yeremian
8 Declaration re: Final Approval, ¶ 6.)

9 17. Class Counsel has experience with wage and hour class litigation. (Yeremian
10 Declaration re: Preliminary Approval, ¶¶ 51-54.) He is of the opinion that this settlement is in the
11 best interest of the class (Yeremian Declaration re: Final Approval, ¶ 9-12) and provides substantial
12 benefit to class members. (Id. at ¶ 11-12.)

13 18. The class reacted very positively claiming 52.62% of the Net Settlement Amount
14 with no opt outs or objectors. (Yang Declaration, ¶ 14.)

15 19. On balance, this is a fair settlement that satisfies the *Dunk* factors, such that final
16 approval is warranted.

17 20. Class Counsel requested attorneys' fees of \$58,333.33. The Court employs the
18 lodestar method in awarding fees, as opposed to a "percentage of the common fund" method. This
19 amount would reflect the actual work performed, plus a multiplier (if applicable) to recognize
20 counsel's efforts. In common fund cases, the Court may employ a percentage of the benefit method,
21 as cross-checked against the lodestar. *Laffitte v. Robert Half Int'l, Inc.* (2016) 1 Cal.5th 480, 503.

22 21. Here, fees are sought pursuant to the percentage method. (Motion at 16.) The
23 determination of what constitutes an appropriate percentage "is somewhat elastic and depends
24 largely on the facts of a given case, but certain factors are commonly considered. Specifically, the
25 court may address the percentage likely to have been negotiated between private parties in a similar
26 case, percentages applied in other class actions, the quality of class counsel, and the size of the
27 award." *In re Ikon Office Solutions, Inc., Securities Litigation* (E.D. Pa. 2000) 194 F.R.D. 166, 193.
28

1 22. These factors favor the \$175,000.00 award. As for the first factor, private contingency
2 fee agreements are routinely 30% to 40% of the recovery. (Id. at 194.) As for the second factor,
3 although the median percentage of attorney fees in class action is 25%, “most fees appear to fall in
4 the range of nineteen to forty-five percent.” (Id.) As for the third factor, Class Counsel has
5 experience in class actions, including wage and hour cases. Most importantly, Class Counsel
6 achieved good results for the class as evidenced by the class members’ reaction to the settlement. As
7 for the fourth factor, Class Counsel negotiated a \$175,000.00 gross settlement. Applying the lodestar
8 cross-check, Class Counsel states that members of his firm have spent at least 204.8 hours on this
9 case, with an estimate 10 hours yet to come, for a total of 214.8 (Yeremian Declaration, ¶¶ 17-18.) .
10 At the firm’s blended billing rate of \$600, the lodestar is calculated at \$122,800.00. (Yeremian
11 Declaration, ¶ 19-24.) The hourly rates appear to be reasonable for attorneys with their respective
12 years of experience. (Yeremian Declaration, ¶ 19-20), and the hours spent is reasonable for this case,
13 which has been pending for three years. It appears that Class Counsel utilized skill in litigating this
14 case, and by all accounts, have good reputations in the legal community; at the very least, there is no
15 evidence before the Court to indicate that the attorneys have negative reputations in the legal
16 community. It also appears that Class Counsel spent appreciable time on the case, which time could
17 have been spent on other meritorious fee-generating cases. Based on the \$122,800 lodestar, the fee
18 request of \$58,333.33 translates into a multiplier of 0.47. Because the fee request is based on a
19 reasonable percentage of the settlement fund and is supported by the lodestar calculation, and
20 because the class was provided with notice of the fee request and did not object, the Court awards
21 fees in the amount requested.

22 23. Class Counsel requests costs in the amount of \$11,385.06 which \$12,000.00
23 settlement cap on such costs. (Yeremian Declaration, ¶ 39.) Class Counsel’s actual costs, totaling
24 \$11,385.06, consist of filing fees, Case Anywhere costs, mediation, deposition, travel costs, opt out
25 notice costs, questionnaire copying and mailing, courtcalls and court appearances, copying and
26 service. These costs appear reasonable and necessary to the conduct of the litigation. Further, as with
27 the fee requests, the maximum cost request was disclosed to class members and deemed
28

1 unobjectionable. For these reasons, the cost request is granted in the amount of \$11,385.06.

2 24. Claims administrator CPT requests administration costs of \$15,000.00. (Yang
3 Declaration, ¶ 17.) Based upon the work performed and yet to be performed, and the fact that the
4 class was provided notice of up to \$15,000.00 for claims administration expense and none objected,
5 the request for administration costs of \$15,000.00 is granted.

6 25. Finally, Class Counsel seeks an incentive payment of \$5,000.00 (\$10,000.00 in total)
7 to each class representative. The Court considers the following factors, among others, in determining
8 whether to pay an incentive or enhancement award to a class representative: whether an incentive
9 was necessary to induce the class representative to participate in the case; actions, if any, taken by
10 the class representative to protect the interests of the class; the degree to which the class benefited
11 from those actions; the amount of time and effort the class representative expended in pursuing the
12 litigation; the risk to the class representative in commencing suit, both financial and otherwise; the
13 notoriety and personal difficulties encountered by the class representative; the duration of the
14 litigation; and the personal benefit (or lack thereof) enjoyed by the class representative as a result of
15 the litigation. California Practice Guide, Civil Procedure Before Trial, ¶14:146.10 (The Rutter Group
16 2012) (citing *Clark v American Residential Services, LLC* (2009) 175 Cal.App.4th 785, 804; *Bell v.*
17 *Farmers Ins. Exch.* (2004) 115 Cal.App.4th 715, 726; *In re Cellphone Fee Termination Cases* (2010)
18 186 Cal.App.4th 1380, 1394; *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186
19 Cal.App.4th 399, 412. Plaintiff Mitchell devoted 55 hours of time to this litigation (Mitchell Decl. ¶
20 5). He assisted his attorneys by having multiple conferences with them and by providing documents,
21 along with having his deposition taken. (Ibid.) Plaintiffs also helped Class Counsel prepare for
22 mediation. (Ibid.) Plaintiffs freely chose to champion the rights of the class and accepted the risks
23 associated with acting as a class representative. (Id. at ¶ 7.) Plaintiff Sanchez devoted 35 hours of
24 time to this litigation (Sanchez Decl. ¶ 5). The Court grants an enhancement award of \$5,000.00
25 (\$10,000.00 in total) to each named Plaintiff for the following reasons: Plaintiffs spent significant
26 time on this litigation; Plaintiffs' actions benefitted the class; and Plaintiffs accepted the risks and
27 notoriety that are associated with acting as a class representative.
28

1 26. All Parties, including each and all class members, are bound by this Final Approval
2 Order and by the Stipulation. All Class Members shall be deemed to have entered into the Settlement
3 and the releases provided therein. Defendant shall have no obligation to pay any sums in excess of
4 the \$175,000.00 settlement payment set forth in the Settlement. Other than as provided in the
5 Settlement, Defendant shall have no obligation after entry of judgment to pay any sum to any person,
6 whether for costs, attorneys' fees, class member reimbursement or contribution, as a result of entry
7 of judgment.

8 27. The Court previously certified the Action as a class action under California Code of
9 Civil Procedure section 382. The Class is defined as follows:

10 a. "Settlement Class Members:" All roofers and gutters employed by Defendant,
11 within the State of California, during the period from November 15, 2009 through
12 March 9, 2017.

13 28. Excluded from the Class would have been those persons who validly requested
14 exclusion in accordance with the requirements set forth in the Preliminary Approval Order.

15 29. The certified Classes continue to meet all the requirements of California Code of
16 Civil Procedure section 382, as already found, and for the reasons set forth, in the Court's
17 Preliminary Approval Order.

18 30. Plaintiffs Adam Mitchell and Francisco Sanchez are the Court-appointed Class
19 Representatives for the Claims Class.

20 31. David Yeremian of the law firm David Yeremian & Associates, Inc., is the Court-
21 appointed Class Counsel.

22 32. Upon the Effective Date (as defined in the Stipulation), all Released Claims of each
23 and every member of the Class, save and except for those who timely requested exclusion (there
24 were none), are and shall be deemed to be conclusively released as against the Released Parties. All
25 persons and entities who are in the Classes are hereby forever barred and enjoined from
26 commencing, prosecuting or continuing, either directly or indirectly, against the Released Parties, in
27 this or any other jurisdiction or forum, any and all Released Claims (as defined in the Stipulation.
28

33. Without affecting the finality of this Order in any way, this Court hereby retains continuing jurisdiction over: (a) implementation of the Settlement and any award or distribution of the Settlement Amount, including interest earned thereon; (b) disposition of the Settlement Amount; (c) hearing and determining applications for attorney fees and expenses in the Action; and (d) all parties hereto for the purpose of construing, enforcing, and administering the Stipulation and the Settlement therein.

34. There is no just reason for delay in the entry of judgment approving the Class Settlement and immediate entry by the Clerk of the Court is expressly directed.

IT IS SO ORDERED.

DEC 19 2018
DATED: _____

CARTER P. HOLLY
HON. CARTER P. HOLLY
SUPERIOR COURT JUDGE