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

MATIAS PUGLISI, individually, on behalf of  
all others similarly situated, and as a  
representative of other aggrieved employees,

Plaintiff,

vs.

STORM WATER INSPECTION &  
MAINTENANCE SERVICES, INC., a  
California corporation; and DOES 1 to 10,

Defendants.

Case No.: 30-2020-01175159-CU-OE-CXC

Assigned for all purposes to:  
Hon. Peter Wilson  
Dept. CX102

CLASS ACTION

**PLAINTIFF'S SUPPLEMENTAL BRIEF IN  
SUPPORT OF MOTION FOR  
PRELIMINARY APPROVAL OF CLASS  
ACTION SETTLEMENT**

Date: October 6, 2022  
Time: 2 pm  
Place: Department CX102

1 On September 7, 2022 the Court continued the hearing on Plaintiff Matias Puglisi's  
2 Motion for Preliminary Approval of Class Action Settlement to October 6, 2022 to permit the  
3 Parties to provide additional information on the Settlement, Class Notice and Proposed Order.

4 Plaintiff respectfully addresses, in turn, the issues raised by the Court in its September 7,  
5 2022 Tentative Ruling. (Plaintiff below tracks the organization and numbering of the issues that  
6 require a response in the Court's Tentative Ruling).

7 **A. Settlement**

- 8 1. Was the Settlement and moving papers served on the LWDA? A proof of  
9 service must be filed with the Court

10 Plaintiff served the Amendment to the Settlement, Settlement, and moving papers on the  
11 LWDA on September 27, 2022. Plaintiff will file a proof of service with the Court.

- 12 2. There is no definition for aggrieved employees or time frame for the  
13 PAGA period

14 Parties' Amendment to Settlement defines "Aggrieved Employees" as all current and  
15 former non-exempt employees who have worked for SWIMS in California during the time  
16 period of December 17, 2019 through the date of Preliminary Approval. And "PAGA Period" is  
17 the period from August 25, 2019 through the date of Preliminary Approval. (See Sections 2.8.1  
18 and 2.9.1 of the Amendment to Settlement, attached as Exhibit A to Proposed Order)

- 19 3. The Settlement does not include the calculation for the individual PAGA  
20 payments

21 Individual PAGA Payment shall be distributed to Participating Class Members pro rata,  
22 based on their respective Settlement Pay Periods. "Settlement Pay Periods" means the number  
23 of payroll periods during which each Participating Class Member was paid wages as a non-  
24 exempt employee by SWIMS during the PAGA Period. (See Section 4.15.4 of Exhibit A)

1           4.     The phrase “..., which shall include any and all claims, rights, demands,  
2                   and/or liabilities of every nature and description, whether known or  
3                   unknown, based on or arising out of the Released Claims” in paragraph  
4                   5.3 appears unnecessary and invites confusion on what is being released  
5                   as it requires reference to the definition of Released Claims in  
6                   paragraph 2.5, which already provides a comprehensive definition of the  
7                   claims being released.

8           Parties removed the phrase. (*See* Section 5.3 of Exhibit A)

9           5.     There is no separate PAGA release, which is preferable so that the  
10                  Settlement clearly identifies what claims are released and not released,  
11                  and the applicable time frames for the Class release and PAGA release, if  
12                  a Class member decides to exclude himself or herself from the  
13                  Settlement.

14          Parties’ Amendment to Settlement now has a separate PAGA release.

15          “Released PAGA Claims” shall mean any and all claims for relief under PAGA, arising  
16          during the PAGA Period, based on the facts alleged by Plaintiff in the Action and Plaintiff’s  
17          notice letters to the LWDA including, but not limited to: 1) Failure to pay overtime wages  
18          (Labor Code sections 510, 1194 and 1198); 2) Failure to provide uninterrupted meal periods, or  
19          pay meal premiums (Labor Code sections 226.7 and 512); 3) Failure to provide uninterrupted  
20          rest periods, or pay rest premiums (Labor Code section 226.7); 4) Failure to issue accurate,  
21          itemized wage statements (Labor Code section 226(a)); 5) Failure to compensate minimum  
22          wages (Labor Code sections 1194, 1197, and 1197.1); 6) Failure to maintain records (Labor Code  
23          sections 1174 and 1174.5); 7) Failure to timely pay wages at termination (Labor Code sections  
24          201, 202, and 203); and 8) Failure to record meal periods (Labor Code section 1198) as well as  
25          violations the applicable IWC Wage Orders, and any resulting claim for attorneys' fees and costs  
26          under PAGA. (*See* Section 2.25.1 of Exhibit A)

1                   6.     Plaintiff should provide calculations for the valuations for each of the  
2                             claims and explain if there was any sampling or use of an expert to assist  
3                             in the evaluation of damages. Also, the valuation for the waiting time and  
4                             PAGA penalties should be separated. Without knowing what value is  
5                             given solely to the PAGA claims, it is difficult to determine if the amount  
6                             allocated to the PAGA Settlement is reasonable.

7                   Plaintiff's valuations of the Class claims below were based on a sampling of more than  
8 one-third of class time and pay records, as maintained by Defendant.

9                   Meal period and rest break claims

10                  Plaintiff calculated Defendant's maximum exposure for the meal periods and rest breaks  
11 by taking the product of the total number of qualifying weeks worked by Class Members during  
12 the Class Period (approximately 10,000) and estimated average hourly rate of pay (\$21) under  
13 the theory that Class Members missed at least one meal period and rest break per shift.

14                  Defendant's maximum theoretical exposure had to be offset by the strength of its  
15 defenses (e.g., no widespread meal period and rest break violations, and Defendant authorized  
16 and permitted meal periods and rest breaks), and the likelihood of the following events: Class  
17 certification; winning on liability; and prevailing on appeal.

18                  Plaintiff provided a deeper discount for the rest break claim because employers do not  
19 have an obligation to record rest periods (rest periods are paid breaks). The relative lack of  
20 written proof would have reduced the likelihood of certifying the claim.

21                  Plaintiff especially recognized the risks of Class certification as highlighted by the  
22 following decisions: See, e.g., *Ali v. U.S.A. Cab Ltd.*, 176 Cal. App. 4th 1333, 1341 (2009)  
23 (denying certification because employees' declarations attesting to having taken meal periods  
24 and rest breaks demonstrated that individualized inquiries were required to show harm);  
25 *Campbell v. Best Buy Stores, L.P.*, 2013 U.S. Dist. LEXIS 137792, at \*30-41 (C.D. Cal. Sept.  
26 20, 2013) (following *Brinker* and denying certification of proposed meal period and rest break  
27 class due to lack of uniform policy); *Jimenez v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 65328  
28 (C.D. Cal. Apr. 18, 2012) (denying motion to certify meal period and rest break class based on

1 employer's practice of understaffing and overworking employees); *Gonzalez v. Officemax N.*  
2 *Am.*, 2012 U.S. Dist. LEXIS 163853 (C.D. Cal. Nov. 5, 2012) (same); *Dura v. Fed. Express*  
3 *Corp.*, 249 F.R.D. 580, 587-88 (C.D. Cal. 2008) (denying certification of driver meal period and  
4 rest break claims based on the predominance of individual issues); *Kenny v. Supercuts, Inc.*, 252  
5 F.R.D. 641, 645 (N.D. Cal. 2008) (denying certification on meal periods claim); *Blackwell v.*  
6 *Skywest Airlines, Inc.*, 245 F.R.D. 453, 467-68 (S.D. Cal. 2007) (declining to certify class action  
7 because individual issues predominated when different employee stations provided different  
8 practices with respect to meal periods).

9 Realistically, and considering the real risks of continued litigation, Plaintiff valued both  
10 meal period and rest break claims for settlement purposes between \$183,750 and \$91,875 each.

#### 11 Overtime claim

12 Plaintiff calculated Defendant's maximum exposure for the overtime claim by taking the  
13 product of the total number of weeks worked by Class Members during the Class Period  
14 (approximately 10,000), 2.5 hours of average overtime, and time and a half of the average  
15 hourly rate of pay (\$31.50).

16 Like the meal period and rest break claims, Defendant's maximum theoretical exposure  
17 had to be offset by the strength of its defense that, among others, Defendant's overtime policy  
18 was valid, and the likelihood of the following events: Class certification; winning on liability;  
19 and prevailing on appeal.

20 Realistically, and considering risks of continued litigation, Plaintiff valued the overtime  
21 claim for settlement purposes between \$137,813 and \$68,906.

#### 22 Wage statement claim

23 Penalties for violations of section 226(a) are assessed at \$50 for the initial pay period in  
24 which a violation occurs and \$100 per employee for each violation in a subsequent pay period,  
25 not to exceed an aggregate of \$4000 dollars per employee. [Cal. Lab. Code § 226(e)]

26 Plaintiff calculated Defendant's maximum exposure for the wage statement claim by  
27 taking the product of the approximate total statutory pay periods worked by Class Members  
28 (approximately 3,333) and the statutory penalty. Plaintiff then offset Defendant's maximum

1 exposure by the strength of its affirmative defenses and the risks of continued litigation.

2 Defendant commonly argue that Class Members are not harmed by non-compliant wage  
3 statements, and Courts should not penalize employers for purported unintentional errors on  
4 wage statements. Before Section 226(e) was amended, the dispositive issue was whether  
5 “suffering injury” was satisfied by the deprivation of a legal right or by consequential damages  
6 caused by the non-compliant wage statements. Employers had frequently prevailed in arguing  
7 for the latter interpretation. Even after the enactment of section 226(e), some courts have held  
8 that this amendment merely clarified existing law and held that Plaintiffs must demonstrate  
9 actual injury. [See *Loud v. Eden Med. Ctr.*, 2013 U.S. Dist. LEXIS 122873, \*\*36-53 (N.D. Cal.  
10 Aug. 28, 2013) (granting summary judgment on wage statement claim because plaintiff could  
11 not show injury due to defects and that incorrect wage information is not willful)] Even if wage  
12 statement claims survive summary judgment, the strength of the claim is inextricably tied to the  
13 strength of the underlying predicate claims (i.e., liability for any wage statement claim is  
14 completely derivative).

15 Hence, and considering the risks of continued litigation, Plaintiff valued the wage  
16 statement claim for settlement purposes between \$56,989 and \$28,494.

#### 17 Waiting-time penalties

18 Waiting time penalties are computed by multiplying the employee’s daily wage rate by  
19 the specified number of days since the payment of the wages became due, not to exceed 30  
20 calendar days. See Lab. Code § 203.

21 There are approximately 101 former employees in the putative class. The average  
22 hourly rate for former employees is \$21. The calculation is performed as follows: \$21/hour  
23 multiplied by 8 hours per day multiplied by 30 days multiplied by the number of former  
24 employees (101).

25 Although the formula for calculating maximum penalties under Labor Code §§ 203 is  
26 fairly straightforward, the analysis becomes more difficult for settlement purposes because  
27 waiting time claims are only as strong as the underlying predicate claims. And Defendant could  
28 have argued that waiting-time penalties are applicable only when the failure to pay wages at

1 termination is “willful.” (See Lab. Code § 203; Cal. Code Regs., tit. 8, § 13520)

2 Hence, and considering the risks of continued litigation, Plaintiff valued waiting time  
3 penalty claims at between \$62,357 and \$31,179.

4 PAGA penalties

5 Under PAGA, the civil penalty for violations of any of the code provisions enumerated  
6 by Lab. Code § 2699.5 is one hundred dollars (\$100) for each aggrieved employee per pay  
7 period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per  
8 pay period for each subsequent violation. See Lab. Code § 2699(f)(2).

9 Statutory one year pay period is approximately 3,333. Class size during the same one-  
10 year time period is 153. The calculation is performed as follows: 3,333 multiplied by \$200  
11 minus the product of \$100 and 153.

12 Like waiting-time penalties, the formula for calculating maximum penalties under Labor  
13 Code § 2699 is fairly straightforward. But the analysis becomes more difficult for settlement  
14 purposes because PAGA penalties are only as strong as the underlying predicate claims.

15 Defendant’s defenses to liability are an important basis for validating the reasonableness  
16 of the settlement amount. SWIMS here has consistently maintained that it has ample legal and  
17 factual grounds for defending this action on substantive grounds.

18 And PAGA penalties are discretionary in nature and, even if Plaintiff was successful at  
19 trial, the Court has discretion to significantly decrease the amount of damages awarded in this  
20 PAGA action. See, e.g., *Fleming v. Covidien, Inc.*, No. ED CV10-01487, 2011 U.S. Dist.  
21 LEXIS 154590, at \*8–9 (C.D. Cal. Aug. 12, 2011) (slashing PAGA penalties for wage  
22 statement violations by over 500%, from \$2.8 million to \$500,000); *Penaloza v. PPG Industries*  
23 *Inc.*, Case No. BC471369, 2013 WL 2917624 at \*2 (Super. Ct. L.A. County, May 20, 2013)  
24 (approving PAGA penalties averaging \$7.49 per aggrieved employee (\$5,000 / 667 aggrieved  
25 employees)); *Cabrera v. Advantage Sale & Marketing, LLC*, Case No. BC485259, 2013 WL  
26 1182822 (Super. Ct. L.A. County, March 12, 2013) (approving PAGA penalties averaging \$3.33  
27 per aggrieved employee (\$10,000 / 3,000 aggrieved employees). Courts have approved PAGA  
28 settlements of \$0. See, e.g., *Nordstrom Com. Cases*, 186 Cal. App. 4th 576, 589 (2010)

1 (“find[ing] no abuse of discretion in the trial court’s approval of the settlement agreement  
2 containing” \$0 for the PAGA claim). California Court of Appeal recently upheld San Diego  
3 Superior Court Judge Katherine Bacal’s heavily-discounted award of only \$5 per pay period in  
4 *Carrington v. Starbucks* (2018) 30 Cal. App. 5th 504 (2018).

5 Plaintiff in *Carrington* had requested more than \$70 million in damages and were  
6 successful in proving their PAGA claim during a bench trial. However Judge Bacal held that  
7 the Defendant had attempted to comply with the law and reduced the total award after trial to  
8 \$150,000 out of the \$70 million requested by Plaintiff’s counsel. In affirming Judge Bacal’s  
9 ruling, the appellate court confirmed that it was within the Court’s discretion to significantly  
10 reduce PAGA penalties even with a finding that violation of the Labor Code occurred.

11 Hence, and considering the risks of continued litigation and discretionary nature of the  
12 award, Plaintiff valued PAGA penalties at between \$79,784 and \$39,892.

13 7. Based on the Guidelines, 60 days for the Response Deadline is  
14 acceptable. Why should the Response Deadline be reduced to 35 days?

15 Parties revised the Response Deadline to 60 days. (*See* Section 2.19 of Exhibit A)

16 8. Is the Response Deadline extended for re-mailed notices?

17 Yes. Class Members who receive re-mailed Notice Packets will have an additional 15  
18 calendar days to respond to the Class Notice. (*See* Section 4.6 of Exhibit A)

19 9. The Court prefers that a Request for Exclusion Form is included in the  
20 Notice Packet. The parties should consider whether to include an  
21 Objection Form or Dispute Form as well.

22 A Request for Exclusion form will be included in the Notice Packet. (*See* Request for  
23 Exclusion Form, attached as Exhibit 1 to Class Notice, attached as Exhibit B to Proposed Order)

24 Parties agree that an Objection Form or Dispute Form are not needed because the Class  
25 Notice provides Class Members sufficient instructions on both, and they will unnecessarily  
26 increase the settlement administration costs.

10. There is no deadline for submitting Disputes. Additionally, the Settlement should be revised to that the parties should file with the Court all disputes submitted by class members, the evidence submitted, and the resolution of those disputes. Although the Settlement Administrator may make the initial decision, the Settlement should be revised so that the Court shall have the right to review any decision made by the Settlement Administrator regarding a claim dispute.

Parties' Amendment to Settlement now states that "Any dispute regarding settlement must be mailed or faxed to the Claims Administrator no later than 60 days from the date of Notice mailing." (See Section 4.16.1 of Exhibit A)

And Settlement was revised to state that the Court shall have the right to review any decision made by the Administrator regarding a claim dispute. The Parties shall file with the Court all disputes submitted by Class members, the evidence submitted, and the resolution of those disputes. (See Sections 4.16 and 4.31 of Exhibit A)

15. Plaintiff should provide information on the Settlement Administrator's qualifications and its bid showing its duties and the breakdown of costs.

Atticus Administration, LLC provides cost-effective digital and mailed class action notice campaigns for employment matters, including wage and hour and FLSA class and collective actions, and other consumer-related class actions. Atticus' Chief Executive Officer, Christopher Longley, JD, was the CEO of Dahl Administration, where he oversaw the administrative services for more than 200 settlements, including high profile cases like *In Re Motor Fuel (Hot Fuel)* and *the Target Data Breach*.

Attached as Exhibit C to the Proposed Order is Atticus' bid showing its duties and the breakdown of costs.

18. The PAGA Notice letter to the LWDA has not been provided.

Attached as Exhibit D to the Proposed Order is the PAGA Notice Letter to the LWDA.

19. There is a provision for continuing jurisdiction but no reference to CCP § 664.6. Settlement, ¶6.15.

Parties' Amendment to Settlement now references CCP § 664.6. (*See* Section 6.15 of Exhibit A)

**B. Class Notice**

2. Does the Class Notice need to be translated to other languages?

No the Class Notice does not need to be translated to other languages.

3. The Class Notice should also refer to this action as being a PAGA action lawsuit

Class Notice now refers to this action as being a PAGA action lawsuit.

4. In the "Ask to Be Excluded" box on page 1, the Class Notice fails to advise that Class Members who are aggrieved employees cannot opt out of the PAGA settlement and will be bound by the release in the PAGA settlement.

The Class Notice now advises that Class Members who are aggrieved employees cannot opt out of the PAGA settlement and will be bound by the release in the PAGA settlement.5.

5. There is no explanation that this lawsuit has a PAGA component to it and also settles all PAGA claims.

Class Notice now has an explanation of that this lawsuit has a PAGA component to it and also settles all PAGA claims. (*See* Section 3 of the Class Notice, attached as Exhibit B to Proposed Order)

6. There is no explanation of the calculation of the individual PAGA payment.

Class Notice now has an explanation of the calculation of the individual PAGA payments. (*See* Section 7 of Exhibit B)

7. There is no definition of "aggrieved employee".

Class Notice now defines "aggrieved employee." (*See* Section 3 of Exhibit B)

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8.     The Class Notice should be consistent in its use of Administrator,  
          Settlement Administrator or Claims Administrator to avoid confusion.  
Class Notice now uses Settlement Administrator throughout the document.
9.     The “presumption” in favor of Defendant’s records unless the documents  
          a Class Member submits are company records should be removed. Class  
          Notice, p. 5.  
The “presumption” language has been removed.

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10. Will an estimate of the individual PAGA payments also be provided?

Yes an estimate of the individual PAGA payments will be provided.

11. In Section 9, the last paragraph should be deleted. This section in the Class Notice should advise Class Members that as an alternative to written objections, they may appear in person or through counsel at the Final Approval hearing and orally object to the Settlement.

The last paragraph in Section 9 has been deleted. And Section 9 of the Class Notice now advises Class Members that as an alternative to written objections, they may appear in person or through counsel at the Final Approval hearing and orally object to the Settlement.

12. The Class Notice advises Class Members how to obtain underlying documents and papers in person at the Orange County Superior Court or from Plaintiff's counsel. The Notice should be revised to provide instructions on how to access documents from the court's website and to obtain documents from the Settlement Administrator's website.

Class Notice now provides instructions on how to access documents from the court's website and to obtain documents from the Settlement Administrator's website. (See Section 18 of Exhibit B)

**C. Proposed Order**

2. The Settlement and Class Notice should be attached to the proposed order as exhibits.

Settlement (including Amendment to Settlement) and Class Notice are attached to the proposed order as Exhibits A and B, respectively.

3. Counsel's contact information should be removed from the first page of the proposed Order

Counsel's contact information was removed from the first page of the proposed Order.

- 1                   4.     The caption of the proposed Order should identify this as a PAGA action  
2                             as well as a Class action settlement.

3             The caption of the proposed Order now identifies this as a PAGA action as well as a  
4     Class action settlement.

- 5                   5.     There is no definition or time frame for aggrieved employees.

6             Proposed Order now has a definition and time frame for aggrieved employees. (*See*  
7     Paragraph 11 of Proposed Order)

- 8                   6.     The parties should consider whether the notice packet should include  
9                             forms for Requests for Exclusion, Objections and Disputes.

10            A Request for Exclusion form will be included in the Notice Packet. (*See* Request for  
11     Exclusion Form, attached as Exhibit 1 to Class Notice, attached as Exhibit B to Proposed Order)

- 12                  7.     In paragraph 2, line 14, “conditionally” should be inserted between  
13                             “Court” and “certifies”.

14            Conditionally was inserted.

- 15                  8.     In paragraph 4, line 20, “conditionally” should be inserted between  
16                             “Court” and “appoints”.

17            Conditionally was inserted.

- 18                  9.     In paragraph 5, line 21, “conditionally” should be inserted between  
19                             “Court” and “appoints”.

20            Conditionally was inserted.

- 21                  10.    The not to exceed amounts for attorney’s fees, litigation costs, Plaintiff’s  
22                             service payment, and the claims administration fee should be included in  
23                             paragraphs 7-9. The amounts for attorney’s fees and costs should be  
24                             separately provided.

25            The not to exceed amounts are now included in the Proposed Order.

26            And the amounts for attorney’s fees and costs are separately provide.

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11.     The proposed Order should state that the Court approves of the procedure for Requests for Exclusions, Objections and Disputes, or something to that effect.

The proposed Order now states that the Court approves of the procedure for Requests for Exclusions, Objections and Disputes. (See Paragraph 12 of Proposed Order)

12.     The parties should propose a date for the Final Approval hearing. Final Approval hearings are held on Thursdays at 2:00 p.m. in this department.

Parties propose March 9, 2023 for the Final Approval hearing. (See Paragraph 16 of Proposed Order).

Dated: September 27, 2022                      Respectfully Submitted,  
PARK APC

*Sang J Park*  
By: \_\_\_\_\_  
Sang J Park  
Attorneys for Plaintiff

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Via Online on below

Via Email on below

Sarah A. Gilbert  
**DUANE MORRIS LLP**  
750 B Street, Suite 2900  
San Diego CA 92101  
sagilbert@duanemorris.com

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

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Sang J Park