

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

LAURA PONTONES, on behalf of herself)
and all others similarly situated,)

Plaintiff,)

v.)

Case No. 5:18-cv-219-D

SAN JOSE RESTAURANT,)
INCORPORATED, et. al;)

Defendants.)

**ORDER GRANTING PLAINTIFF’S UNOPPOSED MOTION FOR PRELIMINARY
APPROVAL OF CLASS AND COLLECTIVE ACTION SETTLEMENT; APPROVAL
OF SETTLEMENT ADMINISTRATOR; AND APPROVAL OF PLAINTIFF’S NOTICE
OF SETTLEMENT**

WHEREAS, Named Plaintiff Laura Pontones, on behalf of herself and all others similarly situated (“Plaintiffs”), and Defendants have entered into the Settlement Agreement of Class and Collective Action and Release of Claims (“Settlement Agreement”), (*see* Dkt. 225-1), which is intended to resolve claims asserted in this action by Plaintiffs; and

WHEREAS, having reviewed and considered the Settlement Agreement and accompanying Exhibits, (Dkt. 225-1), the Plaintiff’s Motion for Preliminary Approval, the declaration filed in support of the Plaintiff’s Motion for Preliminary Approval, and having heard and considered the argument of counsel, the Court makes the findings and grants the relief set forth below, authorizing notice of the settlement contained in the Settlement Agreement upon the terms and conditions set forth in this Order.

IT IS HEREBY ORDERED AS FOLLOWS:

Jurisdiction

1. Capitalized terms used in this Order have the meanings assigned to them in the Settlement Agreement and this Order.

2. The Court has jurisdiction over the subject matter of this action, including the claims asserted, Plaintiffs, the members of the FLSA Collective (“Settlement Collective Action”) and Rule 23 Settlement Class (“Settlement Class”), Defendants, and the implementation and administration of the Settlement Agreement.

3. The Settlement Agreement, which was filed with the Court as Exhibit A to Plaintiff’s Motion for Preliminary Approval (Dkts. 224, 225-1), is preliminarily approved, as it appears fair, reasonable, and adequate within the meaning of Fed. R. Civ. P. 23, subject to final consideration thereof, at the Final Approval Hearing provided for below.

Notice to Settlement Classes, Opt-In Procedure, and Appointment of Settlement Administrator

8. The Court approves as to form and content the Notice and Claim Form, attached as Exhibits to the Settlement Agreement, which is an Exhibit to Plaintiffs’ Motion for Preliminary Approval, respectively (Dkt. 225-1).

9. The manner and forms of Notice to be sent to members of the Settlement Class set forth in § V of the Settlement Agreement are hereby approved and the provisions thereof are hereby incorporated into this Order so that upon entry of this Order, the Parties are directed to ensure that the Notice is disseminated according to the terms of § V(A)(3) of the Settlement Agreement. (Dkt. 225-1).

10. Except for Named Plaintiff, Opt-in Plaintiffs, and Service Award Recipients, as identified in the Settlement Agreement, all members of the Settlement Class are authorized to receive a settlement payment only if they timely submit a signed Claim Form to the Settlement

Administrator via U.S. Mail or the online portal so that it is postmarked, if sent by U.S. Mail, or received, if submitted via the online portal, on or before the date forty-five (45) calendar days after the date on which the Settlement Administrator first mails the Notice and Claim Form to the members of the Settlement Class and Settlement Collective, in accordance with the terms of the Settlement Agreement. All members of the Settlement Class who fail to comply with these requirements shall be forever barred from receiving any settlement payment pursuant to the Settlement set forth in the Settlement Agreement.

11. Prior to the Final Approval Hearing, the Settlement Administrator shall serve and file a sworn statement attesting to compliance with the Settlement Agreement.

Requests for Exclusion from the North Carolina State Law Settlement Class

12. Members of the Rule 23 Settlement Class may request exclusion from the Rule 23 Settlement Class and the Settlement. All written requests by members of the Settlement Class, to exclude themselves from the Settlement must be returned by First-Class U.S. Mail to the Settlement Administrator so that it is postmarked no later than forty-five (45) calendar days after the date on which the Settlement Administrator first mails the Notice and Claim Form to the members of the Putative Settlement Class. A written request seeking exclusion must expressly state that the class member wishes to be excluded from the Settlement. The request should state at the top of the letter "Request for Exclusion from Settlement in *Pontones v. San Jose Restaurant Incorporated, Inc., et al.*, CA No. 5:18-cv-219-D," and should include the name, address, telephone number, and signature of the individual requesting exclusion from the Settlement.

13. In the event the Settlement Agreement receives final approval, any member of the Settlement Class who did not properly and timely request exclusion shall be bound by all the terms and provisions of the Settlement Agreement, the final approval order, the final judgment, and the

releases set forth therein, and will be deemed to have waived all objections and opposition to the fairness, reasonableness, and adequacy of the Settlement, whether or not such person objected to the Settlement and whether or not such person made a claim upon, or participated in, the Settlement. All members of the Settlement Class who do not timely and validly request to be excluded would be enjoined from proceeding against the Defendants for the claims made in the Complaint.

14. All members of the Settlement Class who submit valid and timely notices of their intent to be excluded from the Settlement Class: (i) shall not have any rights under the Settlement Agreement; (ii) shall not be entitled to receive a settlement payment; and (iii) shall not be bound by the Settlement Agreement, any final approval order, or the final judgment.

Objections to the Settlement

15. Consistent with the Settlement Agreement, members of the Settlement Class who have not requested exclusion and wish to object to the Settlement must file a written objection with the U.S. District Court for the Eastern District of North Carolina setting forth the nature of his or her objection, and the arguments supporting the objection, and serve copies of the objection to Class Counsel and Defense Counsel. Any objections must be filed and served no later than forty-five (45) calendar days after the date on which the Settlement Administrator first mails the Notice and Claim Form to the members of the Settlement Classes. To the extent that any objection is filed in advance of the Final Approval Hearing, the Parties may file a written response to the objection as time permits. Unless otherwise permitted by the Court, objecting Settlement Class Members shall not be entitled to speak at the hearing on the Final Approval Date unless they have timely filed and served a written objection. Any Settlement Class Member who has properly and timely submitted objections may appear at the Final Approval Date hearing, either in person or through a lawyer retained at their own expense. Any Settlement Class Members who fail to file

and serve a timely written objection shall be deemed to have waived any objection and shall be foreclosed from objecting to this Settlement.

Approval and Appointment of Settlement Administrator

16. The Court approves and appoints Angeion Group (“Angeion”) to serve as the neutral, third-party Settlement Administrator in accordance with the terms of the Settlement Agreement and this Order. The Court HEREBY ORDERS and AUTHORIZES Angeion to perform the administrative duties specified herein.

I. Issue Notice of Settlement

17. First, the Court ORDERS Angeion to issue the approved Notice, Claim Form, and postage pre-paid return envelope and via text message¹ to all members of the Settlement Class and Settlement Collective Action, as defined above. To that end, Angeion shall:

18. Accept receipt of information regarding the Named and Opt-In Plaintiffs and members of the Settlement Class and Settlement Collective (as described in § V(A)(1) of the Settlement Agreement) and shall keep that information confidential in accordance with the terms of § V(A)(2) of the Settlement Agreement;

19. Update the provided addresses for all members of the Settlement Class and Settlement Collective Action using the National Change of Address database in accordance with the terms of § V(A)(1) of the Settlement Agreement;

20. Ensuring the total cost is consistent with Angeion’s quoted cost for services and expenses in connection with the administration of the Settlement prior to the mailing and texting

¹ Notice by text message does not violate federal consumer protection law, as Plaintiffs willingly provided Defendant their phone numbers for purposes of receiving communications related to their employment. *See Telephone Consumer Protection Act, 47 U.S.C. 227, et seq.*

of the Settlement Notice, in accordance with the terms of §§ V(C)(3), V(C)(4) of the Settlement Agreement;

21. Confirming the calculated amounts of the individual Settlement Payments are in accordance with the terms of § III(C)(1)-(2) of the Settlement Agreement;

22. Prepare, format, print, and disseminate by Text and First-Class U.S. Mail the Notice and Claim Form approved by the Court, together with a pre-addressed, postage-paid return envelope, and follow-up on any undeliverable Notices and Claim Forms with a skip trace in accordance with the terms of § V(A)(3) of the Settlement Agreement;

23. Resend the approved Notice and Claim Form where appropriate in accordance with the terms of § V(A)(1)-(3) of the Settlement Agreement;

24. The Settlement Administrator may provide replacement copies of the Notice by mail or email if requested by a member of the Settlement Class or Settlement Collective Action.

II. Collect Required Forms and Requests for Exclusion

25. The Court FURTHER ORDERS Angeion to collect the Court-approved Claim Forms returned by members of the Settlement Class and Settlement Collective, as well as to collect written requests for exclusion by members of the Rule 23 Settlement Class. As part of these tasks, Angeion shall:

26. Establish and maintain a P.O. Box, email account, and website for receipt of Court-approved Claim Forms, as well as requests for exclusion and other communications from the members of the Settlement Class;

27. Follow up to obtain signed Claim Forms if any are submitted lacking the necessary signature in accordance with the terms of § V(A)(4) of the Settlement Agreement; and

28. Contact any members of the Putative Rule 23 Settlement Class who timely and properly submit both (i) a written request for exclusion, and (ii) a Claim Form, or objections to the proposed settlement, to inform such individuals that they cannot both request exclusion from the Settlement and submit a Claim Form and/or object to the settlement and ask such individuals which option they wish to pursue.

III. Establish and Distribute Funds from a Qualified Settlement Fund

29. Additionally, the Court ORDERS that, following the issuance of an Order from this Court, if any, granting final approval to the Parties' proposed settlement, and after the Effective Date of the Parties' proposed settlement, as defined in § II(A)(11) of the Settlement Agreement, Angeion shall take the necessary steps, consistent with the Court-approved settlement, to distribute Settlement Payments (as defined in § II(A)(35) of the Settlement Agreement) to Authorized Claimants, as well as to make any other Court-authorized payments under the Settlement. This shall include:

30. Setting up a Qualified Settlement Fund ("QSF") and accepting distribution payments by Defendants of the Gross Settlement Amount into that fund in accordance with the terms of § V(B)(1) of the Settlement Agreement;

31. Paying Court-authorized awards of Class Counsel's Fees and Expenses (as set forth in §§ IV, V(B)(2)-(3) of the Settlement Agreement), if any, from the QSF, and issuing I.R.S. Form 1099s to Class Counsel for such payments, in accordance with the terms § V(B)(3) of the Settlement Agreement;

32. Paying Court-authorized Service Awards to the Named Plaintiff Laura Pontones and Opt-in Plaintiffs/Class Members Angel Berber, Vicente Urbina, Jackie Bullard, Tianya Locklear, Imran Shafiq Khan, Carolina San Augustin, Oscar Torres, Olivia Pineda, Sandy Johnson, and Kathi Johnson (as set forth in §III(C)(3) of the Settlement Agreement), if any, from the QSF, and issuing I.R.S.

Form 1099s to the Service Award Recipients for such payments, in accordance with the terms of § III(D) of the Settlement Agreement;

33. Determining which members of the Settlement Class or Settlement Collective are Authorized Claimants who will receive Settlement Payments;

34. Performing all tax reporting duties required by federal, state, or local law, in accordance with the terms of § V(A)(4) of the Settlement Agreement;

35. Preparing and sending, by U.S. Mail, Settlement Payments to Authorized Claimants in accordance with the terms of § V(B) of the Settlement Agreement;

36. Preparing and sending, by U.S. Mail, I.R.S. Forms W-2 and 1099, as necessary, to Authorized Claimants either contemporaneously with or at an appropriate time after the issuance of Settlement Payments, in accordance with the terms of § V(B)(5) of the Settlement Agreement;

37. Voiding and placing stop-payments on Settlement Payment checks that are not negotiated within one hundred-eighty (180) calendar days after being mailed to Authorized Claimants, or that are reported as potentially stolen or lost by an Authorized Claimant; Reissuing and mailing checks to Authorized Claimants who reported the check was lost or stolen. Authorized Claimants whose Settlement Payment has not been cashed will remain in the Gross Settlement Fund until the Authorized Claimant or next of kin is found and claims the Settlement Payment;

38. To the extent there is any money left unclaimed, any reverter back to Defendants will not exceed \$300,000.00.

IV. Reporting Activities to the Parties

39. Angeion is HEREBY ORDERED to regularly report to Class Counsel, in written form, the substance of the work it performs in this matter pursuant to this Order and the Settlement Agreement in accordance with the terms of § V(A)(4) of the Settlement Agreement. This shall

include informing of the dates Angeion mails and texts the Notice to members of the Putative Settlement Class, the number of claim forms, objections or exclusion requests received, and when it distributes funds from the QSF.

40. The Settlement Administrator shall provide to counsel for both parties, within sixty (60) days of the mailing of the Notice of Settlement a declaration from an appropriate agent or agents working for it, stating under penalty of perjury: (a) a listing of the total number of all individuals (identified by a unique identifier), who were mailed Notice; (b) how many individuals timely and properly submitted the required Claim Form to receive a Settlement Payment and, if so, the amount of that payment; (c) the identity of all such individuals who validly and timely requested exclusion from the settlement; and (d) whether each such individual was a member of the Settlement Collective, and/or a member of a Settlement Class. Class Counsel will file such declaration with the Court prior to the fairness hearing along with any final approval documents, to allow the Court to evaluate whether procedural and substantive due process concerns have been met.

41. To allow the Parties and the Court to evaluate the work performed by Angeion in this matter, Angeion is also ORDERED to maintain records of all activities associated with its settlement administration duties pursuant to this Order and the Settlement Agreement, including: (i) records reflecting the dates of all mailings to members of the Settlement Class or Settlement Collective Action; (ii) records reflecting the dates of all materials and inquiries received in connection with the proposed settlement (whether by U.S. Mail and/or text); (iii) the original mailing envelope for any returned Notice, any claim forms received, any written requests for exclusion, or any other correspondence received from members of the Settlement Class, Settlement Collective Action, or Authorized Claimants; (iv) logs or date-stamped copies showing the dates

and times of receipt of claim forms received by fax; (v) the original copies of any U.S. mail, or email/text communications with any members of the Settlement Class, Settlement Collective Action, or Authorized Claimants.

V. Miscellaneous

42. The Court FURTHER ORDERS that counsel for all Parties have the right to review and approve any documents to be mailed by Angeion in connection with the proposed settlement prior to their mailing, to ensure such documents are consistent with Notice and form the Parties agreed to, and Angeion may not mail any final approval documents associated with Settlement Payments without first receiving written and/or final approval or direction from the Court to send such documents and/or Settlement Payments.

43. Angeion is FURTHER ORDERED to take reasonable steps to protect the disclosure of any and all personal information concerning members of the Settlement Class or Settlement Collective Action provided to Angeion by counsel for the Parties, including but not limited to members of the Settlement Class or Settlement Collective personal information provided pursuant to § V(A)(1)-(4) of the Settlement Agreement. This includes maintaining reasonable administrative, physical, and technical controls in order to avoid public disclosure of any such information and to protect the confidentiality, security, integrity, and availability of such personal data in accordance with the terms of § V(A)(1) of the Settlement Agreement).

44. Finally, Angeion is ORDERED to perform whatever additional tasks that are agreed to by all Parties, and which are reasonably necessary to effectuate the issuance of the Court-authorized Notice, to collect and track the Claim Forms submitted by Authorized Claimants, and requests for exclusion from those Settlement Class members who wish to exclude themselves from

the proposed settlement, and, if it is later granted final approval, to distribute funds associated with the settlement in accordance with the terms of the Settlement Agreement.

Acceleration Clause and/or Consent Judgment

45. As security for the payment of the foregoing amount, Defendants will execute, contemporaneously with this Agreement, a Confession of Judgment in the amount of \$1,500,000.00, substantively in the form of attached as Exhibit A-3 (Dkt. 225-1).² Plaintiff's counsel will hold in trust and maintain possession and control and will not file the Confession of Judgment with the appropriate court until and unless there is a default under the terms of this Agreement and Defendants are unable to cure such default pursuant to the terms of this paragraph. If any of the payments under this Agreement are more than five (5) business days overdue, Named Plaintiff and/or her attorney(s) may send a demand letter via certified mail to Counsel for Defendants as stated in § VI(K) of the Settlement Agreement, as well as to the Registered Agent for Defendants, requesting immediate payment of the overdue amount. Defendants will then have thirty (30) business days to pay any overdue payments under the Agreement that are described in the demand letter. If Defendants do not cure the default within thirty (30) business days following receipt of the certified letter, the parties agree that the Confession of Judgment in favor of Plaintiffs may be entered into the and filed with a court of competent jurisdiction, which judgment shall be for an amount equal to \$1,500,000.00 less any amounts that have been paid by Defendants pursuant to the terms of this Agreement. The Confession of Judgment may be entered by the court without the need for a motion to be filed by Plaintiff (or Plaintiff can file an unopposed motion for entry of judgment if such a motion is necessary). Upon receipt of the final payment from Defendants,

² The Confession of Judgment will be executed by Defendants, simultaneously with the Settlement Agreement, and will be held at Plaintiff's Counsel's office.

Class Counsel will return the Original Confession of Judgment to Defendants' Counsel.

Injunctive Relief and/or Commitment to Retaining An Independent Wage and Hour Consultant to Confirm Future Compliance

46. Defendants agree to ensure future compliance with the FLSA and the NCWHA. Defendants commit to retaining an independent Wage and Hour Consultant, within ninety (90) days of the Court's final approval of the Settlement Agreement. The parties agree to confer regarding such individual(s), and to the extent the parties are unable to reach an agreement on a neutral independent consultant, the parties will submit one name per party to Magistrate Judge James Gates within fifteen (15) days after the Court grants preliminary approval of the Settlement Agreement. Upon completion of such an audit by Defendants, the consultant will provide notice of the same to Class Counsel.

The Final Approval Hearing

47. Pursuant to Rule 23(e) of the Fed. R. Civ. P., the Court will hold a hearing to determine whether the Settlement Agreement and its terms are fair, reasonable and in the best interests of the members of the Settlement Class, and whether a final judgment as to Plaintiffs' claims as provided in the Settlement Agreement should be entered granting final approval of the Settlement (the "Final Approval Hearing").

48. At the Final Approval Hearing, the Court shall also determine whether, and in what amount, attorney's fees, costs, and expenses should be awarded to Class Counsel, and whether, and in what amount, service awards should be made to Plaintiffs.

49. The Final Approval Hearing is hereby scheduled to be held before this Court on the 15 day of July 2022 [DATE AT LEAST 90 DAYS AFTER THE DATE OF THIS

ORDER], at 1:00P.M. in Courtroom 1 of the Terry Sanford Federal Building, 310 New Bern Avenue Raleigh, North Carolina 27611.

50. The date and time of the Final Approval Hearing shall be set forth in the Notice, but the Final Approval Hearing shall be subject to adjournment by the Court without further notice to the members of the Settlement Class Settlement Collective Action, or Authorized Claimants other than that which may be posted by the Court.

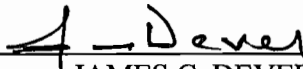
51. Only members of the Settlement Class who have filed and served timely notices of objection in accordance with the terms of § V(A)(4) of the Settlement Agreement and this Order shall be entitled to be heard at the Final Approval Hearing. Any member of the Settlement Class who does not timely file and serve an objection in writing to the Settlement Administrator, within 45 calendar days after the mailing date of the Notice of Settlement, prior to entry of Final Judgment, or to Class Counsel's application for fees, costs, and expenses or to service awards, in accordance with the procedure set forth in the Notice and mandated in this Order, shall be deemed to have waived any such objection by appeal, collateral attack, or otherwise.

Other Provisions

52. Each and every time period and provision of the Settlement Agreement shall be deemed incorporated herein as if expressly set forth and shall have the full force and effect of an Order of this Court.

53. The costs of settlement administration shall be paid as set forth in § V(C)(5) of the Settlement Agreement.

SO ORDERED. This 29 day of March, 2022.



JAMES C. DEVER III
United States District Judge