

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

ADAN LOPEZ, FRANCISCO MENDEZ, EZEQUIEL)
ABURTO-HERNANDEZ, ELENA RAFAEL-PERALTA,)
JOSÉ PABLO SANDOVAL-MONTALVO, JOSÉ)
JIMENEZ-OLIVAREZ, ALEJANDRO MARTINEZ-MENDEZ,)
FRANCISCO PALACIOS-HERNANDEZ, HUMBERTO DE)
LA LUZ ARMENTA, and ISAIAS ESPINOSA-VAZQUEZ,)
on behalf of themselves and other similarly situated persons,)
)
Plaintiff,) COLLECTIVE ACTION
) § 216(b)
v.) CLASS ACTION
)
HAM FARMS, LLC f/k/a HAM FARMS, INC., HAM) Civil Action No.:
PRODUCE, LLC f/k/a HAM PRODUCE COMPANY, INC.,) 5:17-CV-00329-D
ISMAEL PACHECO, PACHECO CONTRACTORS, INC.,)
HUGO MARTINEZ, GUTIERREZ HARVESTING, LLC,)
ROBERTO TORRES-LOPEZ, 5 G HARVESTING, LLC,)
RODRIGO GUTIERREZ-TAPIA, SR., CIRILA GARCIA-)
PINEDA, BLADIMIR MORENO, and LOS VILLATOROS)
HARVESTING, LLC,)
)
Defendants.)
)

**ORDER GRANTING PLAINTIFFS' UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT, CLASS AND
COLLECTIVE ACTION CERTIFICATION FOR SETTLEMENT PURPOSES,
APPOINTMENT OF PLAINTIFFS' COUNSEL AS CLASS COUNSEL, APPROVAL OF
SETTLEMENT ADMINISTRATOR, AND APPROVAL OF PLAINTIFFS' NOTICE OF
SETTLEMENT AND METHOD FOR DISTRIBUTING NOTICE**

WHEREAS, Plaintiffs Adan Lopez, Francisco Mendez, Ezequiel Aburto-Hernandez, Elena Rafael-Peralta, Jose Pablo Sandoval-Montalvo, Jose Jimenez-Olivarez, Alejandro Martinez-Mendez, Francisco Palacios-Hernandez, Humberto De La Luz Armenta, Isaias Espinosa-Vazquez and Defendants Ham Farms, LLC f/k/a Ham Farms, Inc., Ham Produce, LLC f/k/a Ham Produce Company, Inc., Ismael Pacheco, Pacheco Contractors, Inc., Hugo Martinez,

Gutierrez Harvesting, LLC, Roberto Torres-Lopez, 5 G Harvesting, LLC, Rodrigo Gutierrez-Tapia, Sr., and Cirila Garcia-Pineda have entered into the Settlement Agreement and Mutual Release (“Settlement Agreement”), (see Doc. No. 121-1), which is intended to resolve claims asserted in this action by Plaintiffs; and

WHEREAS, having reviewed and considered the Settlement Agreement; Plaintiffs’ Unopposed Motion for Preliminary Approval of Class and Collective Action Settlement, Certification of the Settlement Classes, Appointment of Plaintiffs’ Counsel as Class Counsel, Approval of the Settlement Administrator, and Approval of the Plaintiffs’ Notice of Settlement and Method of Notice Distribution (“Plaintiffs’ Motion”) (Doc. No. ___); and the Memoranda in support of the Motion, 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, Certification of Settlement Classes for Settlement Purposes, and Appointment of the Plaintiffs and Class Counsel

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 proposed FLSA Collective (“Settlement Collective Action”) and proposed Rule 23 Settlement Classes (“Settlement Classes”), Defendants, and the implementation and administration of the Settlement Agreement.
3. The Settlement Agreement, which was filed with the Court as Exhibit 1 to Plaintiffs’ Memorandum of Law in Support of Plaintiffs’ Unopposed Motion for Preliminary Approval of Class and Collective Action Settlement (Doc No. 121), is preliminarily approved, as

it appears fair, reasonable, and adequate within the meaning of Federal Rule of Civil Procedure 23, subject to final consideration thereof at the Final Approval Hearing provided for below.

4. On the basis of the findings set forth below, the Court hereby certifies the following two Settlement Collective Actions pursuant to Section 16(b) of the Fair Labor Standards Act (“FLSA”), for settlement purposes only, in accordance with the terms of the Settlement Agreement:

- (a) “Section 207 FLSA Collective Action” – In the time period from June 30, 2014 to December 31, 2017, all similarly situated employees who performed work for one or more of the Ham Defendants and/or one or more of the Farm Labor Contractor Defendants Cirila Garcia-Pineda, Ismael Pacheco, Pacheco Contractors, Inc., and Hugo Martinez who allegedly were not paid all wages when due at the overtime rate required by 29 U.S.C. § 207(a)(1) for the hours they performed work for one or more of these Defendants when those hours worked exceeded 40 hours in the same workweek.
- (b) “Section 206 FLSA Collective Action” – In the time period from January 1, 2015 to December 31, 2017, all similarly situated employees who employed with an H-2A visa performed work for one or more of the Ham Defendants with one or more of the Labor Contractor Defendants Roberto Torres-Lopez, Bladimir Moreno, Los Villatoros Harvesting, LLC, Rodrigo Gutierrez-Tapia, Gutierrez Harvesting, LLC, and 5 G Harvesting, LLC who allegedly were not paid all wages when due at the minimum rate required by 29 U.S.C. § 206(a) for the hours they worked in the first workweek that they were jointly employed for one or more of these Defendants.

5. On the basis of the findings set forth below, the Court hereby certifies the following Settlement Classes and Subclasses pursuant to Federal Rule of Civil Procedure 23 for settlement purposes only in accordance with the terms of the Settlement Agreement:

- (a) “MSPA/AWPA Class”: all migrant and seasonal agricultural workers, as the terms “migrant agricultural worker” and “seasonal agricultural worker” are defined in 29 U.S.C. §§ 1802 and 29 C.F.R. §§ 500.20, who performed temporary or seasonal work in agriculture for the Ham Defendants and/or any farm labor contractors (as defined in 29 U.S.C. § 1802(7)), who performed any farm labor contracting activity services with respect to any migrant or seasonal agricultural worker (as those terms are defined in 29 U.S.C. §§ 1802), between June 30, 2014 and December 31, 2017.

The MSPA/AWPA Class contains one subclass:

- (i) All migrant and seasonal agricultural workers, as the terms “migrant agricultural worker” and “seasonal agricultural worker” are defined in 29 U.S.C. §§ 1802 and 29 C.F.R. §§ 500.20, who performed temporary or seasonal work in agriculture for the Ham Defendants and/or any farm labor contractors (as defined in 29 U.S.C. § 1802(7)), for claims that they allegedly did not receive the AEWR when due for corresponding employment for field work performed in any workweek in the time period between July 10 and November 20, 2015 or in the time period from August 13 and November 25, 2016.
- (b) “H-2A Class”: all workers who worked pursuant to an H-2A visa issued or purported to be issued under H-2A regulations, who performed agricultural work for the Ham Defendants and/or any farm labor contractors who performed any farm labor contracting activity services for the Ham Defendants with respect to such H-2A workers, between January 1, 2015 and December 31, 2017.

The H-2A Class contains three subclasses:

- (i) All workers who worked pursuant to an H-2A visa issued or purported to be issued under H-2A regulations, who performed agricultural work for the Ham Defendants and/or the Gutierrez Defendants and allege violations of the NCWHA for failure to pay wages when due.
- (ii) All workers who worked pursuant to an H-2A visa issued or purported to be issued under H-2A regulations, who performed agricultural work for the Ham Defendants and/or any Farm Labor Contractor Defendant and allege violations of the NCWHA for failure to pay for all hours worked.
- (iii) All workers who worked pursuant to an H-2A visa issued or purported to be issued under H-2A regulations, who performed


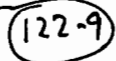
agricultural work for the Ham Defendants and/or Farm Labor Contractor Defendants Los Villatoros Harvesting, LLC, the Gutierrez Defendants and/or J. Rivera Harvesting, LLC, and allege Arriaga claims involving reimbursement of H-2A expenses associated with travel to the United States.

- (c) “Packinghouse Class”: all workers who worked in the Ham Defendants’ packinghouse operations who were furnished by any labor contractors, including Defendant Hugo Martinez, between November 11, 2016 and February 17, 2017.

6. For the purpose of settlement only, the Court further finds that Plaintiffs’ Counsel are adequate to serve as Class Counsel and conditionally appoints Robert Willis of the Law Offices of Robert J. Willis, P.A., Joseph M. Sellers of Cohen Milstein Sellers & Toll, PLLC, and Martha A. Geer of Whitfield Bryson LLP as Class Counsel for the Settlement Classes. Any member of the Settlement Classes who does not elect to be excluded may, but need not, enter an appearance through his or her own attorney. Settlement Class members who do not enter an appearance through their own attorneys will be represented by Class Counsel.

7. For the purposes of settlement only, the Court further finds that Named Plaintiffs Adan Lopez, Francisco Mendez, Ezequiel Aburto-Hernandez, Elena Rafael-Peralta, Jose Pablo Sandoval-Montalvo, Jose Jimenez-Olivarez, Alejandro Martinez-Mendez, Francisco Palacios-Hernandez, Humberto De La Luz Armenta, Isaias Espinosa-Vazquez are adequate Class Representatives.

Notice to Settlement Classes and Appointment of Settlement Administrator

8. The Court approves as to form and content the Notice, attached as Exhibit 9 to the Memorandum of Law in Support of Plaintiffs’ Unopposed Motion for Certification of the Settlement Classes, Appointment of Plaintiffs’ Counsel as Class Counsel, Approval of the Settlement Administrator, and Approval of the Plaintiffs’ Notice of Settlement and Method of Notice Distribution (Doc. No. ); 

9. The manner and forms of Notice to be sent to members of the Settlement Classes set forth in 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 the Settlement Agreement.

10. Members of the Settlement Classes and Collective Action are authorized to receive a settlement payment only if they timely submit a signed Claim Form to the Settlement Administrator via U.S. Mail, fax, email or hand-delivery, so that it is postmarked, if sent by U.S. Mail, or received, if sent by fax, email or hand-delivery, on or before the date one hundred and ninety-five (195) days after the date on which this Order is entered, in accordance with the terms of the Settlement Agreement. All members of the Settlement Classes and Settlement Collective Action 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 Settlement Classes

12. Members of the Putative Rule 23 Settlement Classes may request exclusion from the Rule 23 Settlement Classes and the Settlement. All written requests by members of the Settlement Classes 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 one hundred and fifty (150) days after the date on which this Order is entered, in accordance with the terms of the Settlement Agreement. 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 *Lopez, et al. v. Ham Farms, LLC, et al.*, U.S.

District Court, Eastern District of North Carolina, Western Division, 5:17-CV-00329-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 receives final approval, any member of the Settlement Classes 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 Classes 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 Classes who submit valid and timely notices of their intent to be excluded from the Settlement Classes: (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 Classes 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 one hundred and fifty (150) days after the date on which this Order is entered, in accordance with the terms of the Settlement Agreement. The Parties may file a written response

to the objection in advance of the Final Approval Hearing, 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 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 Simpluris, Inc. 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 Simpluris to perform the administrative duties specified in the Parties Settlement Agreement and the proposal submitted by Simpluris, attached as Exhibit 10 to the Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Certification of the Settlement Classes, Appointment of Plaintiffs' Counsel as Class Counsel, Approval of the Settlement Administrator, and Approval of the Plaintiffs' Notice of Settlement and Method of Notice Distribution (Doc. No. 122-10).

I. Issue Notice of Settlement

17. First, the Court ORDERS Simpluris to distribute the approved Notice to all members of the Settlement Classes and Settlement Collective Actions, as defined above. To that end, Simpluris shall:

18. Accept receipt of information regarding the Plaintiffs and members of the Settlement Classes and Settlement Collective Actions;

19. Update the provided addresses for all members of the Settlement Classes and Settlement Collective Actions, where appropriate;

20. Ensure the total cost is consistent with Simpluris' quoted cost for services and expenses in connection with the administration of the Settlement;

21. Calculate the amount of the individual Settlement Payments in accordance with the terms of the Settlement Agreement;

22. Prepare, format, print, and disseminate by First-Class U.S. Mail or FedEx the Notice Form approved by the Court to any reliable address of any class member, together with a pre-addressed, postage-paid return envelope;

23. Resend any undeliverable Notices where appropriate;

24. In addition to mailing the Notice, Simpluris shall provide notice to the putative class and collective action members through the means outlined in Simpluris' notice proposal, including notice by text message and/or Whats App, targeted Facebook ads, radio advertising, and in-person visits to up to five designated locations in Eastern North Carolina during the same time that the Gutierrez Defendants distribute the Settlement Class and Settlement Collective Action members' pay checks for the prior pay period.

II. Collect Required Forms and Requests for Exclusion

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

27. Establish and maintain a physical mailing address, e-mail account, and fax number for receipt of Court-approved Claim Forms, as well as requests for exclusion and other communications from the members of the Putative Settlement Classes;

28. Follow up with Claimants to obtain signed Claim Forms if any are submitted lacking the necessary signature or identification in accordance with the terms of the Settlement Agreement; and

29. 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

30. Additionally, the Court ORDERS that, following the issuance of an Order from this Court, if any, granting final approval to the Parties' proposed settlement, Simpluris shall take the necessary steps, consistent with the Court-approved settlement, to distribute Settlement Payments to Authorized Claimants, as well as to make any other Court-authorized payments under the Settlement. This shall include:

31. Setting up a Qualified Settlement Fund ("QSF") and accepting distribution by Defendants of the Gross Settlement Amount into that fund;

32. Paying Court-authorized Service Awards to the Named Plaintiffs, if any, from the QSF, and issuing I.R.S. Form 1099s to Named Plaintiffs for such payments;

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

34. Performing all tax reporting duties required by federal, state, or local law;

35. Preparing and sending, by U.S. Mail, FedEx, or through bank routing numbers, Settlement Payments to Authorized Claimants;

36. Preparing and sending, by U.S. Mail or FedEx, I.R.S. Forms W-2 and 1099 to Authorized Claimants either contemporaneously with or an appropriate time after the issuance of Settlement Payments;

37. Providing copies of each negotiated settlement check to Counsel for both Parties;

38. Voiding and placing stop-payments on Settlement Payment checks that are not negotiated within one ninety (90) calendar days after being mailed to Authorized Claimants, or that are reported as potentially stolen or lost by an Authorized Claimant;

39. Reissuing and mailing checks to Authorized Claimants who reported the check was lost or stolen;

40. Within one-hundred (100) days after mailing the Individual Settlement Amount checks, preparing and sending to Defense Counsel and Class Counsel an accounting of the settlement distribution that identifies any checks issued but not cashed and, after approval by the Court of a *cy pres* recipient(s), issuing a check to the *cy pres* beneficiary or beneficiaries agreed upon by the Parties and approved by the Court.

IV. Reporting Activities to the Parties

41. Simpluris is HEREBY ORDERED to regularly report to the Parties, in written form, the substance of the work it performs in this matter pursuant to this Order and the Settlement Agreement. This shall include informing the Parties of the dates Simpluris mails the Notice to members of the Putative Settlement Classes, the number of claim forms, objections or exclusion requests received, and when it distributes funds from the QSF.

43. Simpluris shall provide to Counsel for both Parties, within sixty (60) days of the completion of the notice dissemination process, a declaration from an appropriate agent or agents working for it, stating under penalty of perjury: (a) the names and addresses of all individuals to whom the Settlement Administrator mailed notice of the proposed settlement; (b) the Settlement Class(es) of which that person was a member; (c) whether each such individual has properly submitted the required form to receive a Settlement Payment and, if so, the amount of that payment; and (e) the identity of all individuals who validly and timely requested exclusion from the settlement.

44. To allow the Parties and the Court to evaluate the work performed by Simpluris in this matter, Simpluris 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 Classes; (ii) records reflecting the dates of all materials and inquiries received in connection with the proposed settlement (whether by U.S. Mail, FedEx, fax, text, e-mail, or telephone); (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 Classes 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, text or email communications with any members of the Settlement Classes or Authorized Claimants.

V. Miscellaneous

45. MOREOVER, the Court ORDERS that from the date Simpluris initiates the notice dissemination process, through one-hundred ninety (190) days following the final distribution of funds from the QSF to Authorized Claimants, Simpluris shall establish and maintain a telephone

number for inquiries from members of the Settlement Classes regarding the notice and distribution process.

46. The Court FURTHER ORDERS that counsel for all Parties have the right to review and approve any documents to be mailed or otherwise disseminated by Simpluris in connection with the proposed settlement prior to their mailing or distributing, and Simpluris may not mail or provide any such documents without first receiving written approval from counsel for the Parties or direction from the Court to send such documents.

47. Simpluris is FURTHER ORDERED to take reasonable steps to protect the disclosure of any and all personal information concerning members of the Settlement Classes provided to Simpluris by counsel for the Parties. 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.

48. Finally, Simpluris 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.

The Final Approval Hearing

49. Pursuant to Federal Rule of Civil Procedure 23(e), 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 Classes, 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”).

50. At the Final Approval Hearing, the Court shall also determine whether, and in what amount, service awards should be made to Plaintiffs.

51. The Final Approval Hearing is hereby scheduled to be held before this Court on the 19 day of March 2021 [DATE AT LEAST 150 DAYS AFTER THE DATE OF THIS ORDER], at 1:00 P.M. in Courtroom 1 of the United States Courthouse, 310 New Bern Avenue, Raleigh, NC 27601.

52. 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 Classes or Authorized Claimants other than that which may be posted by the Court.

53. Only members of the Settlement Classes who have filed and served timely notices of objection in accordance with the terms of the Notice and this Order shall be entitled to be heard at the Final Approval Hearing. Any member of the Settlement Classes who does not timely file and serve an objection in writing to the Settlement, within one hundred and fifty (150) days from the entry of this Order, 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

54. 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.

55. The costs of settlement administration shall be paid as set forth in the Settlement Agreement.

56. Certification of the Settlement Classes and Settlement Collective Action is a conditional certification for settlement purposes only. If the Settlement Agreement is terminated pursuant to the terms of the Settlement Agreement, or this Court does not grant final approval of the Settlement Agreement, or the Settlement is not consummated or fails to become effective for any reason whatsoever, the certification of the Settlement Classes and Settlement Collective Action shall automatically be cancelled and shall be void, any collective or class actions certified solely for purposes of the Settlement shall be decertified pursuant to the terms of the Settlement Agreement, and the Defendants shall have reserved all of their rights to challenge the propriety of collective action certification or class action certification for any purpose, including the opposition to any and all class or collective certification motions in this action, to contest the adequacy of any Plaintiffs as representatives of the Settlement Classes, and to contest the adequacy of Plaintiffs' counsel as adequate Class Counsel. Additionally, Plaintiffs reserve all of their rights, including the right to continue with the litigation as set forth in the Settlement Agreement, should the Settlement Agreement not be consummated.

SO ORDERED. This 21 day of September 2020.



JAMES C. DEVER III
United States District Judge