

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
ST. LOUIS DIVISION

MARK BOSWELL,
DAVID LUTTON, and
VICKIE SNYDER, on behalf of all others similarly
situated,

Plaintiffs,

v.

Case No. 4:14-CV-1833

PANERA BREAD COMPANY and
PANERA LLC,

Defendants.

ORDER

This matter is before the Court on the parties' joint Motion For Enforcement Order to Govern Execution of the Judgment ("Plaintiffs' Motion") (DN 316 & DN 317). The proposed order governs the timing, manner, and documentation of the execution of the Court's Final Judgment dated June 16, 2016 (DN 259), as amended by the Court's Order on Plaintiffs' Motion for Attorney Fees, Costs, and Service Awards (DN 290), and the Court's Order taxing certain costs against Panera (DN 285). The proposed order also governs the timing, manner, and documentation for the payment of post-judgment interest. The Court finds good cause for granting the motion. Accordingly, the Court hereby grants the Motion and orders as follows:

I. BACKGROUND

On June 16, 2016, the Court entered a Final Judgment in favor of the 67 class members and against Panera in the total amount of \$4,774,022. (DN 259 at 2.) This amount represents Plaintiffs' damages in the amount of \$3,838,302 and pre-judgment interest in the amount of \$935,720. (*Id.*; *see also* DN 258 ¶5.) The Final Judgment incorporated a stipulated final judgment date of May 17, 2016. (DN 290 at 2.) The parties filed a joint stipulation setting forth the amounts of damages and pre-judgment interest attributable to each class member. (DN 258

& DN 258-1.)

On June 24, 2016, Plaintiffs filed a Motion for Attorneys' Fees, Costs, and Service Awards to be paid out of the total common-fund judgment amount. (DN 265 & DN 266.) Notice of the Motion for Attorneys' Fees, Costs, and Service Awards was disseminated to the class members, providing the class members with an opportunity to object. (DN 262; DN 278.) No class members objected, and on September 19, 2016, the Court entered an Order awarding attorneys' fees, non-taxable costs, and service awards in the following amounts, to be deducted from the total judgment amount: attorneys' fees in the amount of \$1,575,427; non-taxable costs in the amount of \$30,167.22; and service awards in the amount of \$20,000 to each of the three named Plaintiffs. (DN 290 at 1-2.)

On August 19, 2016, the Court entered an Order granting Plaintiffs' Bill of Costs. (DN 285.) This Order directed the Clerk to tax costs against Panera in the amount of \$5,578.64.

Thus, the total amount owed by Panera (before the assessment of post-judgment interest or costs of appeal) is \$4,779,601 (\$4,774,022 judgment amount plus \$5,578.64 in taxed costs (or \$4,779,600.20 total without rounding), the "Total Judgment and Taxed Costs Amount").

On September 20, 2016, pursuant to the Court's Order on the Motion for Attorney's Fees, Costs, and Service Awards (DN 290 at 2), Plaintiffs filed a Motion for Approval of Notice of Allocation of Class Action Judgment, taking into account the awards of attorneys' fees, costs, and service awards. (DN 291.) The Notice of Allocation disclosed to each class member the total estimated amounts of the payments he or she would receive representing damages and pre-judgment interest, respectively, after the pro-rata deduction for fees, costs, and service awards, if the Court's judgment was affirmed on appeal. (See DN 291 & DN 292.) The Court granted the Motion, instructed that the Notice be disseminated to the Class, and closed the case. (DN 294.)

Panera appealed the Final Judgment to the United States Court of Appeals for the Eighth Circuit. (DN 270; DN 297.) Panera filed a motion to stay the execution of the judgment pending the resolution of its appeal to the Eighth Circuit, and posted a supersedeas bond in the amount of \$4,827,327. (DN 296; DN 301.) On October 19, 2016, the Court approved the bond and granted Panera's motion to stay the execution of the judgment pending the resolution of Panera's appeal to the Eighth Circuit Court of Appeals. (DN 299.)

On January 5, 2018, the Eighth Circuit affirmed this Court's judgment. (DN 304.) On January 29, 2018, the formal mandate issued. (DN 306.) Panera's appeal has therefore been resolved and the stay of the judgment is no longer in effect.

Pursuant to 28 U.S.C. §1961, Plaintiffs are entitled to post-judgment interest on the Total Judgment and Taxed Costs Amount from the stipulated judgment date of May 17, 2016 until the date Panera pays the Total Judgment and Taxed Costs Amount. The parties agree the applicable post-judgment interest rate is 0.53%.

The Court orders the following timing, procedures, and related measures for executing the judgment and distributing the total judgment amount and taxed costs consistent with the Court's orders discussed above, as well as for the distribution of post-judgment interest on each class member's and class counsel's pro-rata share of the judgment amount and taxed costs.

II. ALLOCATION OF THE TOTAL PAYMENT

Before the calculation of post-judgment interest, Panera will pay a total of \$4,779,600.20 ("Total Judgment and Taxed Costs Amount") plus any applicable employer payroll taxes.

Panera will pay the Total Judgment and Taxed Costs Amount in the manner set out in this Order no later than April 2, 2018.

If Panera pays the Total Judgment and Taxed Costs Amount by April 2, 2018, Panera will pay a total of \$47,728.13 in post-judgment interest ("Post-Judgment Interest Amount".)

The Post-Judgment Interest Amount will be allocated on a pro-rata basis among the class members and class counsel according to their respective shares of the Total Judgment and Taxed Costs Amount as described below.

The Total Judgment and Taxed Costs Amount together with the Post-Judgment Interest Amount will be referred to herein as the “Total Payment”. If Panera pays the Total Judgment and Taxed Costs Amount by April 2, 2018, the Total Payment will be \$4,827,328.33.

The Total Payment will be distributed among the class members and class counsel as follows:

1. Panera will pay, as contract damages to each class member, the amounts reflected on Column C of Exhibit 1 to Plaintiffs’ Motion (“Exhibit 1”, titled “Summary of Payments”). These amounts were previously disclosed to the individual class members in the Notice of Allocation of Class Action Judgment. (DN 291 & DN 292; DN 294.) Panera will make these payments by mailing to class counsel individual checks made out to each of the class members in the amounts indicated on Column C. Class counsel will distribute the checks to the class members. The parties agree this portion of the payments to the class members, consisting of unpaid Buyout payments, will be classified as wages and reflected in W-2 forms. Panera will be responsible for issuing the W-2 forms. All employee payroll taxes will be paid from the class members’ respective contract damages, as reflected on Column C of Exhibit 1. With each such check classified as wages, Panera will provide itemized documentation of the total contract damages payment, as shown on Column C, and of all employee payroll taxes and income taxes withheld from each check. All employer payroll taxes will be paid by Panera, separate and apart from Panera’s payment of the Total Judgment and Taxed Costs Amount.

2. Panera will pay, as pre-judgment interest to each class member, the amounts reflected on Column D of Exhibit 1 to Plaintiffs’ Motion. These amounts were previously disclosed to the individual class members in the Notice of Allocation of Class Action

Judgment. (DN 291 & DN 292; DN 294.) Panera will make these payments by mailing to class counsel individual checks made out to each of the class members in the amounts indicated on Column D. Class counsel will distribute the checks to the class members. The parties agree this portion of the payments to the class members will be classified as non-wage income, not subject to payroll taxes, and reflected in 1099 forms. Panera will be responsible for issuing the 1099 forms.

3. Panera will pay, as attorneys' fees to Popham Law Firm and Coffield PLC, separately, the respective amounts reflected in Column E of Exhibit 1 to Plaintiffs' Motion. These amounts reflect the Court's Order awarding attorney's fees and non-taxable costs to be deducted from the total judgment amount, and the Court's Order taxing certain costs against Panera. The amount of attorneys' fees to be deducted from the total judgment amount was previously disclosed to the individual class members in the Notice of Motion for Attorneys' Fees, Costs, and Service Awards (DN 261-1 & DN 262) and the Notice of Allocation of Class Action Judgment. (DN 291 & DN 292; DN 294.) Panera will make these payments by mailing to class counsel two checks, one made out to Popham Law Firm for \$551,399.49, and one made out to Coffield PLC for \$1,024,027.62. The parties agree these payments will be reflected on 1099 forms issued separately to Popham Law Firm and Coffield PLC, and will not be classified as income to any class members.

4. Panera will pay, as reimbursement for litigation costs to Popham Law Firm and Coffield PLC, separately, the respective amounts reflected in Column F of Exhibit 1 to Plaintiffs' Motion. These amounts reflect the Court's Order awarding attorney's fees and non-taxable costs to be deducted from the total judgment amount, and the Court's Order taxing certain costs against Panera. The amount of litigation costs to be deducted from the total judgment amount was previously disclosed to the individual class members in the Notice of

Motion for Attorneys' Fees, Costs, and Service Awards (DN 261-1 & DN 262) and the Notice of Allocation of Class Action Judgment. (DN 291 & DN 292; DN 294.) Panera will make these payments by mailing to class counsel two checks, one made out to Popham Law Firm for \$12,955.48, and one made out to Coffield PLC for \$22,790.38. The parties agree these payments will be reflected on 1099 forms issued separately to Popham Law Firm and Coffield PLC, and will not be classified as income to any class members.

5. Panera will pay, as service awards, the amount of \$20,000 to each of the three class representatives, for a total of \$60,000, as reflected in Column G of Exhibit 1 to Plaintiffs' Motion. These amounts reflect the Court's Order awarding service awards to be deducted from the total judgment amount. The amount of service awards to be deducted from the total judgment amount was previously disclosed to the individual class members in the Notice of Motion for Attorneys' Fees, Costs, and Service Awards (DN 261-1 & DN 262) and the Notice of Allocation of Class Action Judgment. (DN 291 & DN 292; DN 294.) The parties agree these payments to the three class representatives will be classified as non-wage income, not subject to payroll taxes, and reflected in 1099 forms issued separately to each of the three class representatives. Panera will be responsible for issuing the 1099 forms.

6. Panera will pay, as post-judgment interest to each class member and class counsel, the amounts reflected on Column I of Exhibit 1 to Plaintiffs' Motion. Panera will make these payments by mailing to class counsel individual checks made out to each of the class members and class counsel in the amounts indicated on Column I. Class counsel will distribute the checks to the class members. The parties agree this portion of the payments to the class members will be classified as non-wage income, not subject to payroll taxes, and reflected in 1099 forms. Panera will be responsible for issuing the 1099 forms.

7. Panera may, if it chooses, consolidate the class members' payments into two checks for each class member as follows: (A) one check to each class member for contract damages as described in Paragraph 1 above, and (B) a second check to each class member that combines the pre-judgment interest payments described in Paragraph 2, the post-judgment interest payments described in Paragraph 6, and (as for the three class representatives) the service awards described in Paragraph 5. If Panera chooses to consolidate the checks as described herein, the amount of the second check to each class member (representing pre and post-judgment interest, and service awards) will be the amount show on Column J of Exhibit 1.

8. To summarize the above, Panera will deliver to class counsel:

- (a) At least two checks made out to each class member (including the three class representatives): one for contract damages, and one or more checks comprising pre-judgment interest, post-judgment interest, and (as to the three class representatives) service awards;
- (b) Itemized documentation of any payroll taxes and any income tax withheld from each of the contract damages checks issued to each class member;
- (c) Two checks for attorneys' fees: one to Popham Law Firm and one to Coffield PLC;
- (d) Two checks for litigation costs (including taxable and nontaxable costs): one to Popham Law Firm and one to Coffield PLC; and
- (e) Two checks for class counsel's pro rata share of post-judgment interest: one check to Popham Law Firm and one to Coffield PLC.

9. In addition, Panera will pay to Popham Law Firm the taxable costs awarded on appeal.

III. POST-JUDGMENT INTEREST

10. Pursuant to 28 U.S.C. §1961, Plaintiffs are entitled to post-judgment interest from the stipulated final judgment date of May 17, 2016 until the date Panera pays the Total Judgment and Taxed Costs Amount. The parties agree the applicable post-judgment interest rate is

0.53%. Post-judgment interest will be assessed at the applicable rate on each class member's and class counsel's allocated share of the Total Judgment and Taxed Costs Amount. Each class member's and class counsel's allocated share of the Total Judgment and Taxed Costs Amount is reflected on Column H of Exhibit 1 to Plaintiffs' Motion. If Panera pays the Total Judgment and Taxed Costs Amount by April 2, 2018, each class member's and class counsel's allocated share of post-judgment interest is reflected on Column I of Exhibit 1.

IV. TAX REPORTING OF ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS

11. The parties agree the amounts paid to class counsel (attorneys' fees and costs) out of the total judgment amount are not taxable income to the class members. The parties agree this conclusion is consistent with the rulings of the IRS in cases concerning the distribution of a common fund in opt-out class actions. *See* IRS letter rulings PLR 200625031, PLR 200610003, PLR 200609014, PLR 200551008 (all stating that attorney fees paid to class counsel out of a common fund in opt-out class actions were not income to class members); IRS Chief Counsel Advice 200246015 (same). Accordingly, Panera will not issue form 1099s to the class members for payments of attorneys' fees or litigations costs made to class counsel. These payments will be reported using form 1099s issued to class counsel only.

12. Similarly, the parties agree the amounts paid to the three class representatives as service awards out of the total judgment amount are not taxable income to the class members. The parties agree this conclusion is consistent with the rulings of the IRS in cases concerning the distribution of a common fund in opt-out class actions. *See* IRS letter rulings PLR 200625031, PLR 200610003, PLR 200609014, PLR 200551008 (all stating that attorney fees paid to class counsel out of a common fund in opt-out class actions were not income to class members); IRS Chief Counsel Advice 200246015 (same). Accordingly, Panera will not issue form 1099s to the class members for payments of service awards made to the class

representatives. These payments will be reported using form 1099s issued to the three class representatives only.

V. TIMING AND MANNER OF PAYMENTS

13. Panera will disseminate the Total Payment as described in Section II, as well as the other information and documentation described in Section II, no later than April 2, 2018.

14. Panera will disseminate the Total Payment in a single mailing to class counsel containing each of the individual checks described in Section II, and the itemized documentation of any taxes withheld from the checks.

15. The parties agree Panera will organize the checks comprising the Total Payment by JVGM number or JVGM name.

VI. COOPERATION

16. Panera will continue to cooperate with class counsel to ensure that all class members receive their payment checks. If any of the checks that class counsel attempts to deliver to class members, by US Postal service or other recognized delivery service, are returned as undeliverable, class counsel may inquire with Panera's counsel about last known contact information for the class member(s) whose checks are returned undeliverable, and Panera will provide the requested information in its possession.

VII. SATISFACTION OF THE JUDGMENT

17. Panera will be deemed to have satisfied the judgment as of the date it has:

- (a) satisfied all provisions of Section II; and
- (b) delivered to class counsel all checks comprising the Total Payment as described herein.

VIII. JURISDICTION

18. The terms of this Order will survive the termination of this litigation, and the Court will retain jurisdiction for the limited purpose of enforcement of the Final Judgment and the terms of this Order executing the Final Judgment, assessment of post-judgment interest, and related proceedings.

Audrey G. Fleissig
AUDREY G. FLEISSIG
UNITED STATES DISTRICT JUDGE

Dated this 7th day of March, 2018.