

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA
OKLAHOMA CITY DIVISION

| | | |
|--|---|----------------------|
| ABIGAIL G. ZIMMERMAN | : | |
| and HECTOR SARMIENTO, | : | |
| individually and on behalf of | : | |
| all individuals similarly situated, | : | CASE NO.: |
| <i>Plaintiff,</i> | : | |
| v. | : | JUDGE: |
| PROVISION CONCEPTS, LLC, | : | JURY DEMANDED |
| <i>Defendant.</i> | : | |

ORIGINAL COLLECTIVE ACTION COMPLAINT

I. INTRODUCTION

1. Abigail G. Zimmerman (“Plaintiff Zimmerman”) and Hector Sarmiento (“Plaintiff Sarmiento”) (collectively “Named Plaintiffs”) bring this action against Defendant Provision Concepts, LLC (“Defendant”). Defendant operates through multiple subsidiaries as a single enterprise that does business throughout the state of Oklahoma.

2. Named Plaintiffs bring these federal claims against Defendant to recover compensation, liquidated damages, attorneys’ fees and costs, and other equitable relief pursuant to the Fair Labor Standard Act of 1939 (“FLSA”), as amended 29 U.S.C. § 201–19. Named Plaintiffs seek Court Supervised Notice pursuant to 29 U.S.C. § 216(b) to inform other similarly situated employees of their rights under the FLSA.

3. Named Plaintiffs bring their FLSA action on behalf of themselves and all similarly situated employees who file their written consent to join this action pursuant to 29 U.S.C. § 216(b).

4. Named Plaintiffs and those similarly situated are current and former employees of Defendant who were paid less than the federal minimum wage (and minimum overtime wage for hours worked over 40 in a workweek) and for whom Defendant relied on the “tip credit” provisions of the FLSA to satisfy their statutory minimum wage obligations (hereafter, “Tip Credit Employees”). These Tip Credit Employees include, for example, servers and bartenders.

5. Defendant violated the FLSA because it: (1) failed to satisfy the notice prerequisite for taking the “tip credit”; (2) required Tip Credit Employees to share tips with management and back-of-house employees who have no or only *de minimis* interaction with customers while taking a tip credit; and (3) required Tip Credit Employees to spend substantial amounts of time performing non-tip-producing and directly supporting work tasks before and after serving customers and throughout their shift while being paid less than the statutory minimum wage.

6. Because the requirements for taking the tip credit were not satisfied, Defendant was not permitted to rely on it to satisfy its minimum wage and overtime obligations under the FLSA and was required to pay the entire statutory minimum wage and overtime wage.

7. Under the FLSA, Defendant may not retain tips other than to contribute them pursuant to a lawful mandatory tip pool of employees who customarily and regularly

receive tips. By retaining these tips to pay management and back-of-house employees, Defendant retained tips earned by Named Plaintiffs and other Tip Credit Employees and is required to return the tips to the employees who earned them, pay the full statutory minimum wage, and pay liquidated damages.

II. JURISDICTION AND VENUE

8. This Court has jurisdiction over Named Plaintiffs' claims because they are brought pursuant to the FLSA, 29 U.S.C. § 216(b), and because they raise a federal question pursuant to 28 U.S.C. § 1331.

9. Named Plaintiffs have not entered into an arbitration agreement that would affect the Court's subject-matter jurisdiction.

10. Venue for this action properly lies in the Western District of Oklahoma, pursuant to 28 U.S.C. § 1391, because Defendant resided in this judicial district and because a substantial part of the events or omissions giving rise to the claims occurred in this judicial district.

III. PARTIES

A. Plaintiffs

11. Abigail G. Zimmerman ("Plaintiff Zimmerman") is an adult individual residing in Tulsa, Oklahoma. Plaintiff Zimmerman was employed as a Bartender at Defendant's restaurant "Sidecar" from approximately September 2023 until approximately December 9, 2024. Her Notice of Consent to Join this Lawsuit is attached in **Exhibit 1**.

12. Hector Sarmiento ("Plaintiff Sarmiento") is an adult individual residing in Oklahoma City, Oklahoma. Plaintiff Sarmiento was employed as a bartender at

Defendant's restaurant "Sidecar" from approximately May 2024 until approximately March 2025. Plaintiff Sarmiento also worked as a bartender at Defendant's restaurant "Vecina" from approximately February 2025 until approximately March 2025. His Notice of Consent to Join this Lawsuit is attached as **Exhibit 2**.

13. Throughout their employment, Defendant paid Named Plaintiffs' hourly wages less than the statutory minimum wage and the minimum overtime wage and relied on customer tips to satisfy their minimum wage obligations to Named Plaintiffs, pursuant to the tip-credit provisions of the FLSA.

14. The Putative Plaintiffs or Tip Credit Employees are all non-exempt employees employed by Defendant at any time within three (3) years preceding the commencement of this action who were paid a tipped minimum wage and/or were subject to Defendant's tip pooling policies.

B. Defendant

15. Defendant Provision Concepts, LLC ("Defendant") is a domestic limited liability company and is registered to do business in the state of Oklahoma. Process may be served upon its Registered Agent, Zachary Bradt at 851 W I-35 Frontage Road, Suite 310, Edmond, OK 73034.

16. Defendant is an employer pursuant to the FLSA.

17. Defendant owns and operates eight (8) different restaurant “concepts.” Each concept has multiple restaurant locations¹ and each location is operated by one of Defendant’s subsidiary entities.

18. Defendant controls the other integrated subsidiary entities and ultimately shares and controls the customers, properties, employees, and all other assets of the subsidiary entities.

19. On information and belief, Defendant is the ultimate legal parent of its subsidiaries and other affiliated companies.

20. Defendant Provision has the ultimate power to hire and fire any and all of its restaurant employees.

21. Defendant supervises and controls all of the restaurants’ employees’ work schedules and conditions of employment.

22. Specifically, Defendant created the policies and procedures, including the employee handbook, which applied to all of the restaurants’ employees and governed their conditions of employment. *See Provision Concepts Code of Conduct*, attached as **Exhibit 3.**

23. Defendant determined the pay rates and pay policies applicable to all of its restaurants’ employees—Named Plaintiffs and the Putative Plaintiffs. *See Payroll System Email to Plaintiff Zimmerman* attached as **Exhibit 4.**

¹ See <https://www.eatdrinkpc.com/concepts> accessed on April 17, 2025

24. On information and belief, Defendant ultimately made the decision for its subsidiaries and affiliates to not pay the full minimum wage and minimum overtime rate.

25. Defendant maintains copies of the employment records for the direct employees of all of the restaurants.

26. Moreover, Defendant has the power to hire and fire Named Plaintiffs and the Putative Collective Members; supervise and control Named Plaintiffs and the Putative Collective Members' work schedules and conditions of their employment; determine their rate and method of payment and maintain their employment records.

27. Defendant and all of its restaurant locations share the same corporate headquarters at 851 W. I-35 Frontage Road, Suite 310, Edmond, Oklahoma 73034.

28. Defendant centrally controls employment policies and practices for all of its employees.

29. Specifically, Defendant's employees would visit the other restaurants to review training and ensure Defendant's policies and procedures are followed.

30. On information and belief, Defendant's employees hold monthly meetings that all the restaurants' general managers are required to attend.

31. Defendant regularly oversees business operations, addresses employment issues, and specifically implements pay and other employment practices and policies.

32. Defendant and all its restaurant locations share a common purpose of operating bars and restaurants.

33. Defendant's enterprise acts through each of its restaurant locations.

34. Furthermore, each of the restaurant locations acts directly in the interest of

itself and of the other entities comprising the enterprise as an employer in relation to Named Plaintiffs and the Tip Credit Employees.

35. Defendant is a “person” (within the meaning of the FLSA) “acting directly or indirectly in the interest of an employer in relation to an employee.” *See* 29 U.S.C. § 203(a),

36. As a result, Defendant employs the Named Plaintiffs and the Tip Credit Employees within the meaning of the FLSA and Oklahoma Wage Laws.

IV. FACTUAL ALLEGATIONS

37. At all times material to this Complaint, Defendant was an employer within the meaning of the FLSA.

38. At all times material to this Complaint, Defendant employed Named Plaintiffs and the Putative Collective Members within the meaning of the FLSA.

39. At all times material to this Complaint, Named Plaintiffs and the Putative Collective Members were Defendant’s employees pursuant to the FLSA.

40. At all times material to this Complaint, Defendant was an enterprise engaged in commerce or in the production of goods for commerce within the meaning of Section 3(s)(1) of the FLSA, 29 U.S.C. § 203(s)(1), in that said enterprise has had employees engaged in commerce or in the production of goods for commerce, or has had employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and in that said enterprise has had and has an annual gross volume of sales made or business done of not less than \$500,000 per year (exclusive of excise taxes at the retail level).

41. At all times material to this Complaint, Plaintiff Zimmerman was employed at Defendant's Sidecar restaurant at its Cherry Street location, located at 1515 E. 15th St. Suite #501 Tulsa, OK 74120.

42. At all times material to this Complaint, Plaintiff Sarmiento was employed at Defendant's Sidecar restaurant at its Fox Lake location, located at 851 W I-35 Frontage Rd., Suite 210 Edmond, OK 73034 In addition, Plaintiff Sarmiento was employed at Defendant's Vecina restaurant, located at 3533 W. Memorial Rd. Oklahoma City, OK 73134.

43. At all times material to this Complaint, Named Plaintiffs and Putative Collective Members were non-exempt employees as that term is defined by the FLSA.

44. Defendant employs Servers and Bartenders, such as Named Plaintiffs and the Tip Credit Employees, to provide services to their restaurant patrons at multiple restaurant locations throughout Oklahoma.

45. Prior to relying on the tip credit, employers are required to inform employees of certain information.

46. At all times material to this Complaint, Defendant did not inform Named Plaintiffs and other Tip Credit Employees of the required information prior to relying on the tip credit.

A. Defendant's Improper Utilization of a Tip Credit

47. At all times material to this Complaint, Defendant has paid Named Plaintiffs and the Putative Collective Members, at an hourly rate below federal minimum wage.

48. By paying Named Plaintiffs and the Putative Collective Members less than the minimum wage per hour, Defendant is taking advantage of a tip credit which allows Defendant to count a portion of the amounts Named Plaintiffs and the Putative Collective Members receive as tips towards Defendant's obligation to pay tipped employees a minimum wage.

49. Prior to relying on the tip credit, employers are required to inform employees of certain information related to the tip credit.

50. Defendant did not inform Named Plaintiffs and the Putative Collective Members of the required information prior to relying on the tip credit.

51. Defendant did not inform the Named Plaintiffs and the Putative Collective Members that the tip credit offset claimed by Defendant cannot exceed \$5.12 per hour. *See Exhibit 3 at pg. 10*

52. Defendant did not inform the Named Plaintiffs and the Putative Collective Members that the tip credit offset claimed by Defendant cannot exceed the amount of tips actually received by the Named Plaintiffs and the Tip Credit Employees. *Id.*

53. Defendant failed to inform Named Plaintiffs and the Putative Collective Members that all tips received by the Named Plaintiffs and the Putative Collective Members are to be retained by them except when participating in a valid tip pooling arrangement limited to employees who customarily and regularly receive tips. *Id.*

54. Defendant did not inform the Named Plaintiffs and the Putative Collective Members that Defendant is responsible for ensuring they receive at least \$7.25 per hour for all hours worked. *Id.*

55. At all times material to this Complaint, Defendant maintains a policy and practice whereby it requires Named Plaintiffs and the Putative Collective Members to perform non-tip producing “side work” unrelated to their tipped occupation, as well as non-tip producing side work related to their tipped occupation.

56. Specifically, Defendant has created an illegal scheme whereby Named Plaintiffs and the Putative Collective Members are required to spend a substantial amount of time performing non-tip producing and directly supporting work while being paid an hourly wage below the applicable federal minimum wage rate, including:

- a. At the beginning of their scheduled shifts, prior to serving customers (e.g., non-tip-producing and directly supporting work, such as, cutting fruit, refilling ice buckets, washing and drying dishes, stocking glassware and supplies, polishing silverware, and wiping down the bar).
- b. At the end of their scheduled shifts, after serving customers (e.g., non-tip producing and directly supporting work, such as sweeping, mopping, wiping down the bar and tables, taking out the trash, washing dishes, and removing ice from the ice buckets).
- c. Throughout their scheduled shifts, during time periods when some customers were present in the restaurants (e.g., non-tip producing and directly supporting work, such as cleaning and wiping down the bar, re-stocking ingredients, cutting fruit, and washing dishes).

57. Additionally, Named Plaintiffs and the Putative Collective Members are scheduled to begin their shifts at 10:00 a.m. However, according to Defendant’s Code of Conduct, they are required to arrive 15 minutes prior to their scheduled start time. *See Exhibit 3 at pg. 4.*

58. As a result, the Named Plaintiffs and Putative Collective Members are paid the tip credit rate from 9:45 a.m. to 11:00 a.m., a period during which Defendant is closed to customers, and the employees are unable to generate tips.

59. This non-tip-producing and directly supporting work Named Plaintiffs and the Putative Collective Members performed exceeded 20% of each shift while paid at the lower tipped hourly rate. As a result, this non-tip-producing and directly supporting work exceeded 20% of each workweek.

60. At all times material to this Complaint, while Named Plaintiffs and the Putative Collective Members were required to arrive early and perform non-tip producing side work, Defendant continued to pay them less than the federal minimum wage.

B. Defendant's Illegal Tip Pool

61. At all times material to this Complaint, Defendant has had a policy and practice of requiring its servers and bartenders—Named Plaintiffs and the Putative Collective Members --to contribute a portion of the tips they receive from customers to a tip pool that is distributed to other employees.

62. At all times material to this Complaint, and upon information and belief, Named Plaintiffs and the Putative Collective Members were (and continue to be) required to participate in a tip pool, where the total tips earned during a shift are equally distributed among restaurant staff members, including managers and back of house employees who do not interact with customers or whose interactions with customers is *de minimis*. The tips are then allocated based on the number of hours each individual worked.

63. At all times material to this Complaint, however, it was Defendant's practice and policy to not count the hour between 10:00 a.m. and 11:00 a.m. as an "hour worked" when determining the tip distribution at the end of the night. During this time, the plaintiffs only made \$2.13 per hour, as the tipped minimum wage rate applied, and they could not earn tips due to the lack of customers.

64. As a result, Defendant knew or should have known that the Named Plaintiffs and Putative Collective Members were not earning at least the minimum wage for all hours worked, as they were neither receiving tips nor being compensated at the regular minimum wage rate for that hour.

65. At all times material to this Complaint, and upon information and belief, the individuals who receive a portion of the tip pool include supervisors and members of management, in that said supervisors and members of management hold jobs in which (i) their primary duty is to manage Defendant's enterprise or a customarily recognized department or subdivision of the enterprise, and (ii) they customarily and regularly direct the work of at least two (2) or more other full-time employees, and (iii) they have the authority to hire or fire other employees, or at a minimum, their suggestions and recommendations as to the hiring or firing of other employees are given a particular weight.

66. During all times material to this Complaint, and upon information and belief, remitting tips to other employees such as management and other non-customarily and regularly tipped employees is not voluntary; rather, it is a condition of employment and, therefore, mandatory.

67. During all times material to this Complaint, and upon information and belief, Defendant receives the benefit of these tips at the expense of Named Plaintiffs and the Putative Collective Members.

**V. COURT SUPERVISED NOTICE PURSUANT TO 29 USC §216(b)
ALLEGING FLSA VIOLATIONS**

68. Named Plaintiffs re-allege, and incorporate by reference, the allegations set forth in the preceding paragraphs.

69. Named Plaintiffs request that the Court issue Court Supervised Notice to the following group of current and former employees defined as:

All non-exempt employees employed by Defendant as Servers and Bartenders at any time within three (3) years preceding the commencement of this action, who were paid a tipped minimum wage and/or subject to Defendant's tip pooling policies. ("Employees Entitled to Notice")

70. During all times material to this Complaint, Defendant has been an enterprise within the meaning of Section 203(r) of the FLSA, 29 U.S.C. § 203(r).

71. Named Plaintiffs reserve the right to amend and refine the definition of the Employees Entitled to Notice they seek to have the Court serve notice based upon further investigation and discovery.

72. The precise size and identity of the proposed Employees Entitled to Notice should be ascertainable from the business records, tax records, and/or employee and personnel records of Defendant.

73. Court Supervised Notice pursuant to 29 U.S.C. § 216(b) to the Employees Entitled to Notice is appropriate because there exists at least a strong likelihood that they are similarly situated to the Named Plaintiff.

74. Sending Court Supervised Notice pursuant to 29 U.S.C. § 216(b) to the Employees Entitled to Notice is appropriate because they have been subjected to single companywide policies and common business practices referenced in the paragraphs above, and the success of their claims depends upon the resolution of common issues of law and fact, including *inter alia*, whether Defendant satisfied the FLSA's requirements for paying them for all hours worked.

75. Named Plaintiffs and the Employees Entitled to Notice, having willfully not been paid their entitled compensation for work they performed pursuant to the common policies described herein, are "similarly situated" as that term is defined in 29 U.S.C. § 216(b) and the associated decisional law.

76. The Named Plaintiffs and the Employees Entitled to Notice have been similarly affected by the violations of Defendant in workweeks during the relevant time period, which amount to a single decision, policy, or plan to willfully avoid paying all earned FLSA compliant wages.

77. Named Plaintiffs seek to have the Court send supervised notice pursuant to 29 U.S.C. § 216(b), as defined above, to the proposed group of similarly situated current and former employees, i.e., Employees Entitled to Notice.

78. Named Plaintiffs are similarly situated to the Employees Entitled to Notice and will prosecute this action vigorously on their behalf.

79. Named Plaintiffs intend to send notice to all the Employees Entitled to Notice pursuant to Section 216(b) of the FLSA. The names and addresses of the Employees Entitled to Notice are available from Defendant's records. For the purpose of notice and other purposes related to this action, their names, addresses, email addresses, and phone numbers are readily available from Defendant. Notice can be provided by means permissible under the FLSA.

80. Named Plaintiffs and the Employees Entitled to Notice have been damaged by Defendant's willful refusal to pay minimum wage for all hours worked.

81. As a result of Defendant's FLSA violations, Named Plaintiffs and the Employees Entitled to Notice are entitled to damages, including, but not limited to, unpaid wages, liquidated damages, costs, and attorneys' fees.

VI. CAUSES OF ACTION

COUNT I VIOLATION OF THE MINIMUM WAGE REQUIREMENTS OF THE FLSA

82. Named Plaintiffs re-allege, and incorporate by reference, the allegations set forth in the preceding paragraphs.

83. Named Plaintiffs assert this claim on behalf of themselves and the Employees Entitled to Notice who opt into this action by filing a consent form, pursuant to 29 U.S.C. § 216(b).

84. Named Plaintiffs and the Employees Entitled to Notice are employees entitled to the FLSA's protections.

85. The FLSA entitles employees to a minimum hourly wage of \$7.25 for every hour worked. 29 U.S.C. § 206(a).

86. While employers may utilize a tip credit to satisfy their minimum wage obligations to tipped employees, they forfeit the right to do so when certain requirements are not met. *See* 29 U.S.C. §§ 203(m) and 203(t).

87. Employers may only take a tip credit for work performed by a tipped employee that is part of the employee's tipped occupation. *See* 29 C.F.R. § 531.56.

88. Employers may not take a tip credit for work performed by a tipped employee that directly supports tip-producing work when it is done for a substantial amount of time. *See* 29 C.F.R. § 531.56.

89. Here, through the companywide practice of utilizing a tip credit even when Named Plaintiffs and Employees Entitled to Notice performed work that directly supports tip-producing work for a substantial amount of time, Defendant forfeited its right to utilize the tip credit in satisfying their minimum wage obligations.

90. As such, Defendant has violated the FLSA by failing to pay Named Plaintiffs and the Employees Entitled to Notice for all hours worked at \$7.25 per hour.

91. Employers may not take a tip credit if they violate the prohibition against unlawfully retaining any portion of their employees' tips. 29 U.S.C. § 203(m)(2).

92. Named Plaintiffs and the Employees Entitled to Notice are entitled to recover all unpaid minimum wages, an equal amount of liquidated damages, and attorneys' fees and expenses, pursuant to 29 U.S.C. § 216(b).

93. In violating the FLSA, Defendant has acted willfully and with reckless disregard of clearly applicable FLSA provisions.

94. Specifically, Defendant acted in reckless disregard of the tip credit provisions of the FLSA, which clearly prohibit Defendant's actions and were easily accessible to the Defendant through the most basic of internet searches. *See* <https://www.dol.gov/agencies/whd/fact-sheets/15-tipped-employees-flsa> (first result on google when searching "tip credit requirements" last visited on April 17, 2025).

PRAYER FOR RELIEF

WHEREFORE, Named Plaintiff, on behalf of themselves and the Employees Entitled to Notice, pray that this Court enter the following relief:

A. For an Order sending Court Supervised Notice to the Employees Entitled to Notice as defined herein and requiring Defendant to provide the names, addresses, e-mail addresses, telephone numbers, and social security numbers of all putative collective action members;

B. For an Order requiring Defendant to provide the names, addresses, e-mail addresses, telephone numbers, and social security numbers of all Employees Entitled to Notice;

C. In the event the Defendant seeks to have discovery on the issues of whether the Employees Entitled to Notice are similarly situated to the Named Plaintiff, that the Court issue an order tolling the FLSA statute of limitations for the Employees Entitled to Notice as of the filing of this Complaint through the end of the notice discovery period;

D. Issuing proper notice to the Employees Entitled to Notice at Defendant's expense;

E. Unpaid minimum wages, overtime wages, tips, and an equal amount as liquidated damages pursuant to the FLSA and the supporting regulations for the Named Plaintiffs and the Employees Entitled to Notice that join the lawsuit;

F. An order equitably tolling the statute of limitations as of the Named Plaintiffs and Employees Entitled to Notice;

G. Expectation and damages for all missed payments taken from or applied to the Named Plaintiffs' and the Employees Entitled to Notice employees' pay;

H. Designation of the Named Plaintiffs as representatives of the Employees Entitled to Notice who join this lawsuit and counsel of record as their counsel;

I. A finding that Defendant acted willfully and without a good faith basis for its violations of the FLSA;

J. A finding that Defendant has violated the FLSA, and that Defendant has been unjustly enriched with the illegally retained tips;

K. Awarding pre-judgment and post-judgment interest;

L. An award of prejudgment and post-judgment interest;

M. An award of costs and expenses of this action, together with reasonable attorney' fees and expert fees; and,

N. Any other relief to which the Named Plaintiffs and the Employees Entitled to Notice who join this lawsuit may be entitled.

Dated: April 25, 2025

Respectfully submitted,

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JURY DEMAND

Plaintiffs hereby demand a trial by jury on all claims so triable.

/s/ Robert E. DeRose _____

Robert E. DeRose

Attorney for Plaintiffs and Putative Plaintiffs