AMERICAN ARBITRATION ASSOCIATION
EMPLOYMENT AND CLASS ACTION ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

PAMELA HERRINGTON, individually and
on behalf of all others similarly situated,

CLAIMANT,

and

WATERSTONE MORTGAGE CORPORATION,

RESPONDENT.

AAA No. 51 160 00393 12

Before:
George C. Pratt
Arbitrator

CLASS CERTIFICATION AWARD
(March 4, 2014)

Respondent Waterstone Mortgage Corporation is a mortgage lender based in Pewaukee, Wisconsin. It operates through 56 offices scattered across 12 states, employing at any given time over 200 mortgage loan officers ("LOs").

Claimant Pamela Herrington was employed by Waterstone as an LO from January to September 2011. She commenced an action in the U. S. District Court for the Western District of Wisconsin on behalf of herself and "all other similarly situated persons" seeking to recover damages because of Waterstone's alleged failure to pay the minimum wages and overtime compensation required by the Federal Fair Labor Standards Act ("FLSA"), 29 USC §§ 201 et seq., and under "the common law doctrines

of contract and quasi-contract" (Complaint ¶¶ 10 and 12). Herrington sought to proceed as a collective action for her FLSA claims and as a class action for her contract claims. For both theories she requested certification on behalf of a class that she described as "all mortgage loan originators (LOs) who have worked for Waterstone between March 24, 2010 and the date of final judgment in this matter in a non-supervisory capacity." (*Id.* at 23). When the U.S. District Court decided that this dispute should be resolved through arbitration, it directed that in the arbitration Herrington "must be allowed to join other employees to her case".

Herrington then brought this arbitration under the American Arbitration Association's Employment Arbitration Rules and Supplementary Rules for Class Arbitrations. Under those rules the undersigned was duly appointed to serve as arbitrator. The Partial Final Award on Clause Construction (July 11, 2012) determined that the parties' arbitration clause "permits this arbitration to proceed on behalf of a class." (Clause Construction Award at 9). Waterstone's motion to the United States District Court for the Western District of Wisconsin to vacate the Clause Construction Award was denied on December 3, 2012. (Opinion and Order at 20).

For the next step in this proceeding, Herrington moved for class certification under Rule 4 of the Supplementary Rules. Generally, Rule 4(a) parallels the requirements of Rule 23 of the Federal Rules of Civil Procedure -- numerosity, commonality, typicality, and adequacy of claimant and counsel to protect the interests of the class. Rules 4(b) and 5 set forth additional requirements that also reflect similar provisions in FRCP Rule 23. On Herrington's amended motion, which is the subject of this Award, the parties made extensive evidentiary submissions and thoroughly briefed

the issues, with Herrington's reply brief having been submitted on September 18, 2013. Oral argument of the motion, requested by Waterstone, was held on October 30, 2013.

It was estimated that Waterstone employed 220 to 230 LOs at any one time during the requested class period, and that the total number of LO's for the entire period would exceed 700. Herrington's most prominent claim is for overtime pay under the FLSA. She alleges that Waterstone knew or should have known that its LOs worked more than 40 hours in a week, and that Waterstone failed to pay them overtime premium pay as required by the statute. She also seeks payment of the guaranteed minimum wages which she alleges were sometimes not effectively paid because Waterstone failed to reimburse for necessary business expenses. And of course she seeks related relief of liquidated damages, interest, and attorney's fees.

Waterstone has denied Herrington's allegations, and on this motion it opposes class certification on a number of grounds. In addition to arguing that none of Rule 4's requirements, except numerosity and adequacy of counsel, are satisfied by Herrington, Waterstone focuses intently on claimed differences among the LOs, such as different employment agreements, different offices and time reporting practices, different supervisors, different arbitration agreements, and different damages. Waterstone argues that individualized proof as to each LO's circumstances would be required, thus making a class arbitration unworkable and inappropriate. In addition Waterstone has raised as a defense the claimed exempt status of some or all of its LOs.

Waterstone also argued that Herrington, who had worked at only one of Waterstone's 56 branch offices, had not presented sufficient evidence to show the common or pervasive practice that might warrant certification of a class. In support of

her motion Herrington had presented evidence with respect to herself and three other employees to show that they were told by their supervisors not to report having worked more than 40 hours a week, that as a result they reported only 40 hours although they worked substantially more, and that Waterstone knew or should have known of the widespread circumstance of unreported overtime hours. Herrington argued that despite Waterstone's formal, written, corporate policy governing time reporting and working overtime, the unwritten policy or practice, as implemented or permitted in its local offices, was to keep reported hours at or below eight hours per day and 40 hours per week, when in fact the job of an LO required more than 40 hours of work per week.

Waterstone argued that Herrington's claims, based on instructions by only three or four supervisors in four of its 56 offices, called for individualized proof, were not reflective of the experiences of the entire class, and did not present a showing of common issues sufficient to warrant subjecting Waterstone to the burdens of defending a class arbitration challenging the compensation practices in its widespread array of offices. Waterstone contended that the actions of a few "rogue" supervisors did not override its facially valid, written, company policy. In addition, Waterstone presented affidavits from 40 LOs, dubbed "happy campers" by Herrington, that for them, directly contradict Herrington's claims. The gist of Waterstone's argument was that Herrington and the three other former employees were outliers, and did not present the general picture of conditions in Waterstone's offices that is needed to warrant class treatment.

Herrington explained her meager evidentiary showing by pointing out that an earlier order in the arbitration had prevented counsel from seeking out and obtaining a wider base of evidence to show that underreporting the hours worked was an across-

the-board, or at least common, practice in Waterstone's offices. In a corrective letter that I had required Waterstone to send to all of its LOs, I had directed that the following statement be included:

> Both Waterstone and Ms. Herrington, and their representatives, have been ordered by the Arbitrator not to speak to you or to communicate with you in any way about the arbitration, except by a writing that has been reviewed and approved in advance by the Arbitrator. (Emphasis added).

Herrington's counsel interpreted that direction as a blanket prohibition against their seeking the very evidence that could now support their request for class certification. At oral argument, I asked how to cure the apparent prejudice resulting from counsel's interpretation of my direction in the corrective letter, in order to provide Herrington a fair opportunity to present her case for class certification. Herrington's counsel assured me that if the class were to be provisionally certified they would then present ample evidence from the other Waterstone offices to establish a general policy of requiring that hours worked be understated, and that substantial overtime was in fact worked and not paid. I pointed out that the present issue is whether there should be any class certification, provisional or otherwise. They then suggested that a questionnaire sent to all of Waterstone's LOs, past and present, would be a satisfactory protection.

I approved the proposal of a questionnaire that would be designed to help me to determine how widespread the wage-and-hour violations claimed by Herrington might be and to evaluate Waterstone's "rogue supervisor" argument. After input from both sides, a questionnaire of seven questions was sent to 823 persons identified by Waterstone as present or former LOs. It asked:

1. When did you work for Waterstone as a Loan Originator?

2. Are you currently employed by Waterstone in any capacity?
3. In what branches did you work when employed by Waterstone as a Loan Originator?
4. To the best of your recollection, what were your average weekly work hours?
5. If you answered that you worked 40 or less hours per week on average, were there weeks when you worked more than 40 hours a week?
6. Did you incur business expenses necessary to perform your work for which Waterstone failed to reimburse you?
7. Did your supervisor ever tell you not to report all the hours that you worked?

Of the questionnaires initially mailed out, 112 were returned undelivered, and 105 were remailed. Ultimately 7 were reported as undeliverable. Along with the questionnaire was a letter signed by me, requesting each recipient to answer the questions anonymously and to return the answers directly to me in the provided envelope.

As of February 20, 2014, 140 answers were returned. When tabulated, they showed, in addition to whether the responder was currently employed and in what branch(es) the responder had worked, that

- 73 said they had worked on average 40 hours per week or less.
- 63 said they had worked more than 40 hours.
- Of the 73 who said they worked on average 40 hours or less, 44 said they sometimes worked more than 40 hours.
- 90 said they had incurred expenses that were not reimbursed; 46 said that had not occurred.
- In answer to the question whether the Supervisor had instructed not to report all hours worked, 31 said "yes", and 100 said "no".

Of course, the questionnaire results cannot be considered as proof that Waterstone has actually violated the FLSA. Such proof, if it exists, must come later. These answers were anonymous and unsworn. They were devoid of context and not subject to cross-examination. Moreover, the responders were a self-selected group and represented only 17% of the entire LO population at Waterstone. Nevertheless, when viewed in light of Waterstone's evidence that it rarely paid overtime to its LOs (to only 55 of over 800 LOs during the claimed class period of over four years, spread over more than 100 of the two-week pay periods), even these anonymous, unsworn reports by 63 LOs (45% of the responders) that on average they worked more than 40 hours per week raise a strong suggestion that Herrington's claim for overtime pay is not fanciful, frivolous, or confined to just a few of Waterstone's "rogue" offices.

The occurrence of unreimbursed expenses appears to be even more widespread (two-thirds of the responders) than the apparent overtime violations.

When I reported the questionnaire responses to counsel, I invited them to suggest what inferences I might draw from the responses for purposes of this motion. I have considered their suggestions. As a result of the responses, I have reached two conclusions. First, substantial FLSA violations of the type alleged by Herrington are indicated to have occurred across a broad range of Waterstone's branch offices. Second, the violations are not uniform; instead there are significant variations, with different results indicated both between offices and within the same office.

As a result, although I have concluded, as discussed below, that Herrington has satisfied the required showing of conditions for a class arbitration, to conduct the remainder of this arbitration on an opt-out basis as urged by Herrington, would be

unmanageable and potentially unfair to Waterstone. Consequently, the arbitration will proceed on an opt-in basis, making it similar to the collective action authorized for the U.S. District Court under §216 of the FLSA.

While certification requirements are not set out for a collective action under FLSA §216, the Seventh Circuit has recognized the similarity between a Rule 23 opt-out class action and a collective opt-in action under the FLSA. See *Espenscheid v. DirectSat USA LLC,* 705 F3d 770 (7th Cir. 2013) ("[T]here isn't a good reason to have different standards for the certification of the two different types of action, and the case law has largely merged the standards . . ."). Both require a representative plaintiff and notice to the potentially affected employees. Because of the different effects of the judgment, however, the requirements for certifying a collective action under the FLSA are "less stringent" than those for a Rule 23 class action. (*Bontempo v. Metro Networks,* 2002 WL 1923911 [ND Ill 2002] ("modest factual showing"); *Perez v. Radioshack Corp.*, 552 FSupp 2d 731, 744 [ND Ill 2005] ("considerably less stringent"); *Nehmelman v. Penn Nat'l Gaming, Inc.*, 822 FSupp 2d 745, 755 [ND Ill 2011] (same)).

There are several advantages in proceeding here as a collective arbitration with an opt-in requirement. It will provide an opportunity to determine on a class basis many of the significant common issues advanced by Herrington as well as some of Waterstone's claimed defensive claims. Requiring LOs who feel aggrieved to opt in to the proceeding will produce a much smaller universe of employees to be studied and evaluated. Using representative testimony will help efficiently to resolve not only the claims of those employees who feel deprived of their rights under the FLSA, but also the "individualized" circumstances advanced by Waterstone in defense. (*Reich v. Gateway*

Press, Inc., 13 F3d 685, 701-702 (3rd Cir. 1994) ("[N]ot all employees need to testify in order to prove the [FLSA] violations or to recoup back wages [citation]. Rather, the Secretary can rely on testimony and evidence from representative employees . . .").

CERTIFICATION ANALYSIS

Because from this point forward the arbitration will proceed as a collective, opt-in arbitration, the AAA's Supplementary Rules for Class Arbitrations will no longer apply and following the practice of the AAA, the remainder of the proceedings will be governed by the Employment Rules. Nevertheless, since the certification aspects of a class arbitration and a collective arbitration are similar, the Supplementary Rules for Class Arbitrations will be used as a guide to determine whether the collective class should be certified. Rule 4 provides that "the arbitrator shall determine whether the arbitration should proceed as a class arbitration" after considering and determining that the specified conditions are met.

Numerosity. Waterstone does not contest numerosity except possibly if sub-classes might be established. None have yet been sought. Even if there were a challenge to numerosity, it would fail in view of the indication by 63 LOs that they had worked on average more than 40 hours per week. Moreover, numerosity has become less significant because the proceeding will be conducted on an opt-in basis. Only those LOs who elect to participate in the arbitration will be bound by the final award; there will be no absent claimants affected.

I find that the "numerosity" condition has been met.

Commonality. Despite the array of differences highlighted by Waterstone, Herrington has pinpointed a number of issues of fact and law that are common between Herrington and the putative class. Herrington's basic claim is that as a matter of policy Waterstone has violated the FLSA by failing to pay its LOs minimum wage and overtime. Among the issues common to Herrington and the putative class that need to be addressed are:

- Whether Waterstone's LOs are covered by the FLSA;
- Whether they worked off-the-clock hours between March 2010 and April 2011;
- Whether they worked off-the-clock hours between April 2011 and the present;
- Whether they bore expenses that were for the benefit and convenience of Waterstone;
- Whether by failing to reimburse expenses, Waterstone failed to pay the minimum wage required by the FLSA;
- Whether Waterstone acted in good faith in not paying overtime from 2010 to 2011;
- Whether Waterstone acted wilfully in failing to change its treatment of LOs as FLSA-exempt as of March 2010;
- Whether Waterstone acted wilfully in failing to reimburse expenses for LOs it knew it was nominally paying at a minimum wage rate per hour; and
- Whether Waterstone acted wilfully in pressuring workers to underreport their hours, failing to pay overtime, and failing to pay minimum wage.

Included in the issue of FLSA coverage would also be Waterstone's defense of "outside sales exemption".

I find that the "commonality" requirement has been met.

Typicality. Herrington's claims are based on the same legal theories and arise from the same conduct by Waterstone as would the claims of the putative opt-in class. All the LO's shared essentially the same duties; they all were employed under Waterstone's form employment agreements, which though they varied from time to time did not differ in respects that are material here; and they were all paid under the same general policies.

I find that the "typicality" requirement has been met.

Adequacy of Representative. Ms. Herrington is a part of the class; she has been an LO employed by Waterstone, She claims to share the same injury as the class – deprivation of minimum wage and overtime payments that are allegedly required by the FLSA. She has no interests that are antagonistic to or in conflict with the class. Many of the differences advanced by Waterstone will likely be screened out by the opt-in process; others can be addressed through the representative proof that Herrington seeks the opportunity to provide. Indeed, if that proof should not be forthcoming and persuasive, that will simply mean that the claimants will be unsuccessful and their claims will be dismissed.

I find that Herrington will be an adequate representative to represent the opt-in claimants in this arbitration and that this condition has been met.

Adequacy of Counsel. As indicated earlier, Waterstone does not challenge the adequacy of Herrington's counsel, the firm of Getman & Sweeney, PLLC, which has had extensive experience in handling FLSA and other employment-law cases.

I find that Getman & Sweeney, PLLC will be adequate counsel to represent Herrington and the putative opt-in class in this arbitration and that this condition has been met.

Arbitration Agreement. Rule 4(a)(6) requires as a condition for class certification that "each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members." Waterstone argues that "257 putative class members did not sign any arbitration provision whatsoever" but that 233 class members "signed the same arbitration as Herrington." (Waterstone's Opp. Memo at 21). In form, therefore, condition (a)(6) would fail. In substance, however, as pointed out by Herrington, the circumstances by which this dispute came to be arbitrated, when combined with the opt-in process, meet the requirements for an agreed arbitration.

Herrington initially brought this dispute as a collective action in federal district court. Waterstone moved to dismiss on the ground that Herrington had agreed to arbitrate her grievances. In the course of the proceedings before the district court judge, Waterstone requested the judge to send the matter to arbitration. She did so with the proviso that Herrington "must be allowed to join other employees to her case". It is clear, therefore, that Waterstone has consented to arbitration. The opt-in procedure allows Herrington "to join other employees to her case", and each claimant who files the opt-in form will also be agreeing to have the issues determined in this arbitration. Consequently, the purpose of condition (a)(6) – that the parties to be affected by the arbitration award will have agreed to proceed in arbitration – will have been satisfied. To require execution of a single document containing the agreement of both parties to

arbitrate their differences would exalt form over substance and for some of the aggrieved employees would undercut the remedial purpose of the FLSA.

I find that the condition requiring agreement to arbitration has been met.

Subparagraph (b) of Rule 4 provides that to certify a class, in addition to the prerequisites of subdivision (a), the arbitrator must make two other findings:

1. That the questions of law or fact common to the members of the class predominate over any questions affecting only individual members ("predominance"), and
2. That a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy ("superiority").

I find that both of these conditions have been met for purposes of this now collective arbitration. The general considerations advanced by Rule 4(b) do not prevent collective treatment.

- No putative class member has a particular interest in individually controlling the prosecution of her claim, and if she did, all she need do is refrain from opting in.
- I have not been made aware of other pending proceedings concerning this controversy.
- Concentrating determination of the claims in a single forum is desirable and furthers the general policy of the FLSA.
- The difficulties likely to be encountered in managing this collective arbitration do not seem to be particularly unusual or extraordinary; they can be

surmounted by a combination of careful management, cooperation of counsel, and use of representative proof in appropriate circumstances.

The specific findings called for by Rule 4(b) must also be addressed.

Predominance. As indicated earlier, much of Waterstone's opposition to class certification has been focused on its repeated argument that individualized proof will be needed in order to determine for each employee such things as how many hours were worked in each week for each pay period, what salary was paid, whether a commission was earned during that period, whether the employee's work circumstances created the outside sales exemption, and the effect of the employees' agreements. Herrington counters the argument, relying on *Anderson v. Mt. Clemens Pottery Co.,* 328 US 680 (1946) and its progeny, which permit the use of representative testimony in FLSA cases. Herrington's counsel at oral argument indicated their intent to establish the elements of Herrington's case with carefully selected representative proof. Such proof, if reliable and persuasive, could obviate the need for the endless individualized testimony that Waterstone argues would be necessary and would leave the common issues to predominate.

Superiority. At this stage of the proceeding we do not know how many of Waterstone's LOs will opt in to the arbitration. If there are a substantial number, then adjudication through this arbitration would, on both a time and cost basis, be superior to requiring separate arbitrations before separate arbitrators or judges, the only other available method to resolve these claims. If only a few choose to opt in, then the "superiority" issue would resolve itself because the individualized proof that Waterstone clamors for would become readily available and be easily managed.

Rule 5 sets forth some special requirements for the certification award. Paragraph (b), which directs that a copy of the Notice of Class Determination "shall be attached to the award." (emphasis added), no longer applies because of the different needs for a collective, opt-in procedure. Input from counsel will be needed for proper preparation of the notice to the putative class and the opt-in form. Counsel are advised below as to the procedure for completing the notice.

Paragraph (c) requires that the Award "state when and how members of the class may be excluded from the class arbitration." Since this will be an opt-in arbitration, the only members of the class will be those who affirmatively agree to participate. Any putative member will be excluded if he or she fails, intentionally or otherwise, to follow the opt-in procedures to be set out in the notice that will be sent to all putative members.

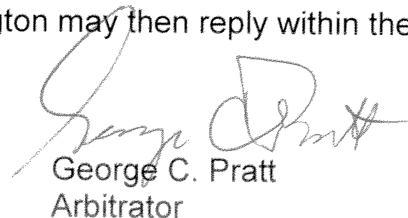
CONCLUSIONS

1. Herrington's motion for class certification is granted to the extent described in this Award.
2. The class will be an opt-in class, to be established by present and former Waterstone LO's who consent in writing to become claimants in this arbitration for the purpose of pursuing their claims to recover from Waterstone minimum wage and overtime payments and unreimbursed expenses.
3. The arbitration will continue as a collective, opt-in arbitration under the AAA's Employment Rules.

4. Representative proof such as allowed by *Mount Clemens* and its progeny will be permitted at the merits hearing, thus making individualized proof of damages and perhaps of several other issues unnecessary.
5. Under Rule 5(d), all further proceedings in this class arbitration are stayed for thirty days from the date of this Class Determination Award in order to permit any party to move a court of competent jurisdiction to confirm or to vacate this Award. Any party who makes such an application to a court shall simultaneously notify the AAA Case Manager and me of the application. The party that seeks court review of this Award shall also promptly inform the AAA Case Manager and me of the court's ruling. Whether a further stay of the proceedings is to be granted will be determined on a future application.
6. If neither party seeks court review, or if the court refuses to vacate this Class Determination Award, counsel for Herrington shall within two weeks thereafter submit (a) a proposed Notice of Class Determination, (b) a proposed form by which LOs may opt in and thereby participate in this collective arbitration, and (c) a proposed schedule for the remainder of the arbitration, including the hearing on the merits. Counsel for Waterstone may submit any objections, corrections, and suggestions as to Herrington's proposals within two weeks after service thereof, and Herrington may then reply within the following week.

SO ORDERED.

March 4, 2014



George C. Pratt
Arbitrator