AMERICAN ARBITRATION ASSOCIATION

EMPLOYMENT 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. 01 14 0000 4860

PARTIAL FINAL AWARD ON LIABILTY

(April 13, 2017)

I, George C. Pratt, the undersigned arbitrator, having been designated in accordance with the arbitration agreement entered into between the above-named parties, and having considered the parties' submissions, do hereby issue this award pursuant to the Employment Rules of the American Arbitration Association.

INTRODUCTION

This arbitration has proceeded as a collective action in which Pamela Herrington and 199 former and current employees of Waterstone Mortgage Corp. have opted in, claiming for their services as mortgage loan originators ("LOs") entitlement to unpaid overtime, minimum wages, and expenses. They advance their claims under the Fair

Labor Standards Act, 29 USC 203 et seq. ("FLSA"), Wisconsin law, and as a matter of contract. Collectively, they seek $11,273,856 in damages, plus attorney's fees and costs.

BACKGROUND

A. Claimants.

There are 220 claimants that are the subjects of this arbitration. All have worked for Waterstone as LOs at one or more of its branch offices. Their primary duties, as LOs, required them to "utilize his/her knowledge, training and experience to solicit, sell and facilitate the processing and closing of loan products and financing of residential real estate transactions on behalf of [Waterstone's] customers." (See, e.g. Deblieck Agmt. of 4/1/11 Par. 5a).

Some of them were formerly employed by Waterstone; some are currently employed. All of the LOs were "at will" employees, and before it permitted any LO to close loans, Waterstone required them to sign an employment agreement that described the basis and method for their compensation.

B. Respondent.

Waterstone is a mortgage originator and processor, with headquarters in Pewaukee, Wisconsin. It has branch offices throughout the country. At the time of the hearing it had branch offices in 22 states, but the number of branches has varied during the course of these proceedings. Each branch office is run by a branch manager, who oversees a number of LOs. Since 2008 Waterstone has employed approximately 934 LOs. 225 filed consents to sue in this case, although five were subsequently dismissed.

C. The Employment Agreements.

Because the LOs were at-will employees, Waterstone could, as a practical matter, unilaterally change their employment contracts, and during the relevant time period Waterstone used 13 different forms of contract. For purposes of this arbitration, however, because it focuses on compensation practices, the parties have reduced the differences to four types of contracts depending on the basis for compensation: (1) pre-August 2010 – commissions only; (2) August 2010 to April 2011 – weekly salary plus commissions, subject to the clawback provision; (3) April 2011 to January 2014 – base pay of minimum wage plus overtime at time and a half for hours worked over 40, plus commissions, subject to the clawback provision; and (4) January 2014 on – the greater of base pay (minimum wage plus overtime) and commissions, subject to the clawback provision.

The clawback provision provided, in substance, that from commissions to be paid in any pay period there would be deducted any base pay paid in that period as well as any prior base pay that had not already been taken into account in a prior compensation calculation. The pay period for the LOs' base pay was every two weeks. Commissions were paid on the 15th of the month following the month in which the applicable loan closed. Most of the Claimants regarded the base pay as a draw against their commissions.

None of Waterstone's contracts referred specifically to the FLSA, although its compensation plan for LOs after August 2010 was geared to, directly or indirectly, minimum wage and overtime at time and a half, which are concepts generally understood to refer to the FLSA requirements. The "salary" in the contracts for August 2010 to April 2011 was an amount equal to the product of the required hours and the applicable minimum wage.

The agreements themselves made no reference to LO's expenses or to "exempt" or "non-exempt", but Waterstone's Employee Guidelines Manual and its Employee Handbook both provided that non-exempt employees would be entitled to overtime for work over 40 hours. The Handbook provided that each employee was classified as exempt or non-exempt to determine eligibility for overtime pay and that "your manager will inform you if you are an exempt employee required to enter your number of hours." As noted by Waterstone, "no Claimants can recall having been informed by anyone at any time during their employment how they were classified under the FLSA." (Waterstone PH Memo at 7). An LO who was not told he was exempt would therefore be non-exempt, would be required to report his hours, and would be eligible for overtime. That would include all the Claimants.

Under the FLSA, unreimbursed business expenses incurred by an employee on the employer's behalf would have to be reimbursed to the extent that they brought the employee's periodic compensation below the minimum wage level.

All of the contracts included a standard integration clause, excluding from the arrangement any outside agreements or understandings, and the Guidelines and the Handbook both provided that they were not intended to create any contract rights.

Inconsistently however, each contract also required the LO to comply with company policies:

> (See e.g. Deblieck agmt. of 4/1/2011, Par. 6)
>
> Employee will remain familiar with and adhere to all Company policies, standards and requirements published or otherwise disseminated by the Company . . . as well as all applicable federal, state, and local laws ...

In both the Guidelines and the Handbook, Waterstone informed LOs that they would receive time and a half for all hours worked over 40 – the same requirement as in the FLSA. The agreements also provided that they were to be interpreted, enforced, and governed by the law of Wisconsin.

When it left the commission-only system, Waterstone simultaneously set up a computer-based time-keeping system and changed the LOs' contracts to require them not only to report their time regularly and to do so accurately, but also to get advance approval for any overtime work, a requirement that was also included in the Guidelines and the Handbook. Rarely, if ever, did an LO seek and obtain advance permission for overtime work.

Although LOs were nominally required by their agreements and by Waterstone's written policies to get that advance permission from their branch managers before doing any work over 40 hours in a week, Waterstone must be deemed to have waived that provision. Waterstone knew that the job of an LO required more than 40 hours per week. It also knew that rarely did any LO claim overtime, and that the vast majority of its LOs were regularly reporting exactly 40 hours, no more and no less. Finally, shortly into the hearing Waterstone stipulated that each of the 220 Claimants had worked a total of 52.5 hours per week.

Moreover, in contrast to what may have been provided in the agreements and policies, in actual practice very few employees ever reported or got paid any overtime. Over the years in question, with 50 weeks per year applicable to each of over 200 LOs, or potentially over a thousand reports of overtime in each year, in Waterstone's payroll records only a miniscule number of weeks showed that any overtime was reported.

Finally, testimony by Claimants established that Waterstone had arranged in some unknown way, to have its branch managers discourage, even prevent, LOs from logging overtime. Some LOs testified that they tried to do so and were reprimanded, or were told that it was not allowed. In these circumstances, I find and conclude that Waterstone had abandoned and waived any right to rely on its advance-permission and accurate-reporting requirements.

D. The Fair Labor Standards Act.

The FLSA requires in §206 that Waterstone pay wages to each employee at the rate of $7.25 per hour. Section 207 provides that with certain exceptions, "no employer shall employ any of his employees [in] a workweek longer than forty hours unless such employee receives compensation for his employment in excess of [forty hours] at a rate not less than one and one-half times the regular rate at which he is employed."

Under this statute and its related regulations an employer is required to keep accurate records of the hours worked by each of its employees, to pay each employee for the total hours worked in each week multiplied by the minimum wage rate, and if the total hours in a week exceeds 40, to also pay an additional sum equal to the excess hours times 50% of the minimum wage.

Certain employees are exempt from coverage under the Act. Waterstone relies in this case on the exemption for those employed to do outside sales.

E. Relationship between FLSA and the Agreements.

Waterstone had a two-week pay period. It paid its LOs either a specified salary that (coincidentally?) equaled the minimum wage times the hours required by their contracts, or on the express basis of minimum wage plus overtime at time and one-half.

Although the parties were free to enter into their own contractual arrangements for ascertaining the LOs' compensation, in this business, which is involved in interstate commerce, the FLSA imposes its own requirements for the minimal amount that Waterstone, as the employer, is required by federal law to pay its LOs as its employees. If the agreed compensation arrangement did not satisfy the requirements of the FLSA, and if the LOs were, indeed, entitled to the protections of the FLSA, then quite apart from the agreements, Waterstone was required not only to make up any deficit in the statutorily required minimum compensation, but also to pay to the LOs liquidated damages equal to the deficit, and in addition to pay the LOs' attorney's fees and costs of litigation.

The deficit would equal the amount in any pay period of any failure to pay the required minimum wage, plus the amount of any failure to pay the required overtime pay. Calculations under the FLSA with respect to minimum wage and overtime are to be made on the basis of Waterstone's pay period, which was every two weeks. The minimum wage was the federal hourly rate times the actual number of hours worked in the workweek, up to 40 hours per week. Whether Waterstone paid the required amounts is also determined on the two-week pay-period basis, but whether an LO was entitled to overtime is determined on a workweek basis. The amount of required overtime pay was 1.5 times the minimum wage rate, times the number of hours in the workweek in excess of 40.

F. Outside Sales Exemption.

The federal statute exempts certain classes of employees from its requirements. Waterstone insists that one of those classes – outside salesmen – applies to its LOs so that it would have no liability under the FLSA in this case. Waterstone sought summary judgment, urging that the Outside Sales Exemption ("OSE") precluded any recovery in this arbitration under Claimants' FLSA claims. In the Order of January 20, 2016, I ruled:

> Waterstone's motion for summary judgment based on the OSE defense is denied. Although it is clear that as a matter of law Claimants' primary duty was making sales and Claimants concede that they were customarily and regularly engaged in that work away from any of Waterstone's places of business, there remain issues of fact as to whether Waterstone has waived or is estopped from asserting the OSE defense in this arbitration.
> (Order of 1/20/16 p. 9)

Thus, Claimants' response to Waterstone's OSE defense is both estoppel and waiver.

PROCEDURAL HISTORY

A. DISTRICT COURT ACTION.

In November 2011 Herrington brought in the United States District Court for the Western District of Wisconsin a class-action suit on behalf of herself and others who either then or previously worked for Waterstone as LOs. Waterstone moved to dismiss the complaint or stay the action on the ground that Herrington's claims were subject to an arbitration agreement.

The arbitration clause in the form Agreement, insofar as pertinent here, reads:

> [A]ny dispute between the parties concerning the wages, hours, working conditions, terms, rights, responsibilities or obligations between them or arising out of their employment relationship shall be resolved through binding arbitration in accordance with the rules of the American Arbitration Association applicable to employment claims. Such arbitration may not be joined with or join or include any claims by any persons not party to this Agreement. (Agreement § 13; emphasis added).

On its motion, Waterstone sought not only to require the dispute to be arbitrated, but also to bar Herrington from pursuing any class or collective relief in the arbitration. Waterstone argued that the underscored language quoted above waived any claim by Herrington to join with others in pursuing her wage claims. Herrington argued in opposition that her statutory FLSA claim would not be subject to arbitration, and that in any event, the waiver provision in the arbitration clause violated the National Labor Relations Act because it would require her to give up her right under the statute to bring claims collectively.

United States District Judge Barbara B. Crabb disagreed with Herrington's contention that FLSA claims could only be brought in the district court, but agreed with Herrington on the waiver issue and severed the underscored language from the Agreement. Accordingly, the Court granted Waterstone's motion to require arbitration, and stayed the District Court action pending the outcome of the arbitration. After noting that Waterstone "requests explicitly that a collective action proceed in arbitration rather than federal court in the event the court invalidates the collective action waiver" (D. Ct. Decn. at 16), the Court ordered that Herrington's "claim must be resolved through arbitration, but she must be allowed to join other employees to her case." (*Id.* at 18).

Neither party appealed the District Court's decision.

B. CLAUSE CONSTRUCTION

By demand dated March 23, 2012, Herrington commenced this arbitration, attaching, as her demand, the Class Action Complaint she had filed in the District Court. At the initial hearing the parties agreed that as a threshold matter it should be determined what kind of an arbitration this would be. Herrington contended that this proceeding should proceed as a class arbitration under the AAA's Supplementary Rules for Class Arbitration ("Supplementary Rules"), which permit an "opt-out" proceeding similar to that allowed by Rule 23 of the Federal Rules of Civil Procedure.

Waterstone was understood at the initial hearing to contend that this should be a "collective" proceeding of the type authorized by 29 USC §216(b), which provides that an action for unpaid minimum wages or unpaid overtime compensation may be brought "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated", but that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party" (an "opt-in" proceeding).

In my Partial Final Award on Clause Construction (July 11, 2012) I determined that the parties' arbitration clause "permits this arbitration to proceed on behalf of a class". 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.

C. CLASS CERTIFICATION

Herrington moved to certify the class. At the time, she estimated that Waterstone then employed approximately 220 to 230 LOs, and that the potential class, including former employees, could be as large as 700. Questionnaires were submitted to approximately 900 potential class members to help determine whether a class would satisfy the requirements of the Supplementary Rules. There were 140 responses to the questionnaire, and after briefing and argument an opt-in class was tentatively certified in the Class Certification Award of March 4, 2014, where I concluded, in part:

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 under the AAA's Employment Rules as a collective, opt-in arbitration.

4. Representative proof such as allowed by *Mount Clemens* [*Anderson v. Mount Clemens,* 328 US 680 (1946)] and its progeny will be permitted at the merits hearing, thus making individualized proof of damages and perhaps of several other issues unnecessary.

D. NOTICE TO CLASS

After the proper form for the Notice of Class Determination was established, the Notice was sent to the putative class along with a form to be used by any LO who wished to opt into the arbitration. A total of 225 LOs opted in. Five were later dismissed, leaving 220 LOs in this proceeding as claimants. Hereinafter, they well be referred to as "Claimants".

E. DISCOVERY AND DISPOSITIVE MOTIONS

Because Waterstone's operations were conducted from a large number of offices spread over several states, in order to provide a reasonable basis for using representative testimony at the hearing, discovery of up to 50 of the opt-ins (nearly 25% of the opt-in class) was allowed to Waterstone, 25 chosen by Claimants and 25 by Waterstone. All were to produce certain requested documents and to participate in telephone depositions. Waterstone actually conducted forty-nine depositions. In addition, Claimants conducted discovery that included document production and depositions of some higher-ranking Waterstone employees.

After completion of the discovery, the parties made the following motions:

1. Waterstone's motion to dismiss class members that failed to participate in discovery;
2. Waterstone's motion for summary judgment on the OSE;
3. Waterstone's motion to decertify the class; and
4. Herrington's cross-motion for summary judgment that Waterstone was contractually obligated to pay overtime and minimum wage.

The parties filed extensive briefs and supporting papers on the motions, and presented oral argument on December 8, 2015. The Order of January 20, 2016, disposed of all four motions.

1. Five of the 225 LO's who opted in were dismissed because they failed to respond to attempts to contact them for depositions.

> Under the procedures for opt-ins adopted for this arbitration, only a low level of participation was required. The three opt-in claimants who did respond, albeit after the required date, have shown their interest in and desire to continue as a part of this arbitration, and the motion to dismiss as to them is denied. The other five, however, have made no effort to continue their participation. They are in default and their right to participate is deemed abandoned. Accordingly, this arbitration is dismissed as to the following opt-ins: Dawn Bryan, Donald Burcham, William Coleman, L'Tanya Jones, and John Schumacher.
> (Order of 1/20/16 p. 4).

2. Waterstone's motion for summary judgment that the FLSA claims were barred by the OSE was denied. Although the OSE would otherwise have applied, there were factual issues over Claimants' claims of waiver and estoppel.

> Waterstone's motion for summary judgment based on the OSE defense is denied. Although it is clear that as a matter of law Claimants' primary duty was making sales and Claimants concede that they were customarily and regularly engaged in that work away from any of Waterstone's places of business, there remain issues of fact as to whether Waterstone has waived or is estopped from asserting the OSE defense in this arbitration.
> (*Id.* p. 9).

3. Waterstone's motion to decertify the class was denied with the following comments:

> Waterstone contends that Claimants do not meet any standard for proceeding on a class basis because they were subjected to varieties of pay, expense, and time-reporting practices, had 13 different employment agreements with different terms, and suffered different damage amounts. But precision is neither the goal nor a requirement in wage and hour disputes. Each employee's situation will necessarily differ as to details in such matters as hours worked, supervisors' requirements, and expenses incurred. The focus for purposes of determining class treatment in an opt-in arbitration must be on whether the opt-ins were sufficiently similarly situated to permit determination of the relevant issues in a manner that will yield rough justice to all the parties.
>
> That degree of similarity is present here. The 49 depositions show that the opt-in LOs performed the same type of work in essentially the same manner, that they worked as a rule, more than 40 hours per week, that Waterstone knew the job required more than 40 hours, and that they incurred expenses that were not reimbursed. The number of hours worked by each LO of course varies, as does the amount of expense incurred, but the similarities greatly outweigh the differences. If liability is found, then using representative testimony, a rough approximation of damage can be established that is fair both to the opt-ins and to Waterstone.

> Waterstone's motion to decertify the class is denied.
> (*Id.* pp 14-15*)*.

4. Claimants' motion for summary judgment that Waterstone was contractually obligated to pay overtime and minimum wage was denied because of the factual issues involved. The factual issues included

> . . . the nature of the employment relationship between Waterstone and the Claimant LOs. . . .what impact on the express terms of the Employment Agreements may result from Waterstone's intent in issuing the Employee Handbook, and its actual conduct in enforcing or not enforcing contractual provisions for advance approval of overtime work and accurate recording of time . . . There are also issues as to which ones of the Claimants, if any, can recover under the contractual claim. . . Because of the way in which Waterstone structured the compensation of the branch managers, and given its lax approach to the overtime requesting and reporting provisions in the agreements, questions of fact are presented as to whether Waterstone is able to insist on strict performance of the overtime conditions of the agreements when its pattern of operation at least facilitated, if not caused, non-observance and non-adherence to those conditions.
> (*Id.* pp 10-12).

F . HEARING PLAN

Submission of a plan for the merits hearing was adjourned twice, once so that the parties could conduct a mediation, and a second time at Waterstone's request. A detailed plan for the merits hearing was finally developed and summarized in the Order of September 1, 2016. That Order provided, in part, that

> "The Parties agree that non-Class Member witnesses will be permitted to testify. It is anticipated that between 5 – 10 such witnesses will be called in total.

> A total of thirty (30) members of the Class will be required to testify with 15 to be selected by Claimant and 15 by Respondent.
>
> Class Member witnesses will be chosen exclusively from the Class Members that have already been deposed.
> (Order of 9/1/16 p 2)

G. HEARING

The actual merits hearing began on October 17, 2016, and proceeded in two stages. Some of the witnesses appeared in person, some by SKYPE, and some by telephone.

Stage 1 took place on October 17-21, 2016. After we had heard the testimony of five of the 30 class-member witnesses scheduled to testify, the parties requested a brief recess to see if the proceedings could be shortened. Soon they announced that they had reached a stipulation "to streamline the evidence" with respect to the hours worked and expenses incurred by each LO. The stipulation was intended to reduce the number of LOs to testify and the length of their testimonies, not to preclude any further LO testimony.

The stipulation provided that (1) "Waterstone suffered or permitted 52.5 hours per week of work from its loan originators"; (2) that LOs "bore $100 per week" of "unreimbursed business expenses . . . on behalf of or for the benefit of Waterstone"; and (3) that the Claimants' "waiver estoppel argument does not apply prior to the August [2010] contract change. So there would be no overtime or minimum wage claim under the FLSA for that period, but there would still be claims that the expenses brought the wages below what was contractually promised." (Tr. 293 – 295).

Fourteen more LOs testified, but in light of the stipulation the parties agreed to cancel the scheduled testimony of twelve other LOs because they agreed that the testimony would be cumulative and therefore a waste of time. Testimony was also presented by Kevin Allen, a Senior Vice President at Waterstone; Eric Egenhoefer, President and CEO of Waterstone; and Jason Kandel, an employee of Claimants' attorneys Getman, Sweeney & Dunn, PLLC, who testified about damages. That ended Stage 1 of the hearing.

Stage 2 took place on December 20 and 21, 2016. Five witnesses testified: Christopher Fleming, an Area Manager for Waterstone; David Holbrook, a Branch Manager for Waterstone; Kevin Allen, who was recalled by Waterstone; Darren Weiss, an attorney with Waterstone's attorneys, Offit Kurman, P.A., who testified about damages; and Jason Kandel, who was recalled on Claimants' rebuttal case to adjust some damages figures based on new data that had recently been supplied.

H. POST HEARING SUBMISSIONS

As agreed, the parties submitted post-hearing memoranda on February 13, 2017, followed by post-hearing reply memoranda submitted on March 10, 2017.

DISCUSSION

This arbitration has had a protracted history, due to a number of factors. It has been strenuously contested by parties who were represented by capable, energetic attorneys on each side. Waterstone four times sought court review, each time unsuccessfully, of orders made after briefing, arguments, and formal decisions. Each application to the court entailed a stay of the progress of the arbitration. The amount of damages originally sought by claimant Herrington in the initially sought "opt-out" proceeding generated a "bet the company" approach by Waterstone that necessitated careful preparation, consideration, and disposition of each of the many issues tendered along the way. Finally, the very nature of this class arbitration inherently required a careful, stepped approach that aimed at providing both sides a fair hearing and fundamental due process of law.

Many of the issues raised along the way have already been decided in one or more of the many orders that are mentioned earlier but are described here only in brief summary. Full analysis of those issues is contained in the orders themselves, which form an integral part of the record of this arbitration and basis for this Partial Final Award.

A number of issues remain open for consideration and determination. On the liability side are questions of whether and to what extent Claimants are entitled to recover under the FLSA, under Wisconsin law, or under their common-law contract claims. If liability is determined, the calculation of damages will present additional issues.

Waterstone denies any liability under the FLSA, Wisconsin law, or its contracts with the LOs. It claims that under the OSE, its LOs are exempt from requirements of the FLSA and Wisconsin law; that all LOs were paid the full amounts required by their respective contracts; that its pay plan for LOs was essentially based on commissions earned; and that Claimants' contract claims also fail because Claimants breached the provisions in their contracts that required them to accurately report to Waterstone the number of hours they worked. In addition, Waterstone has continually opposed treating this arbitration as a collective action because of claimed differences in the LOs' situations.

If I determine that there is a legal basis for recovery, I will then be able to consider a proper way to handle the intricate damage issues. The dominating liability issue is whether Claimants have a right to recover under the FLSA.

A. LIABILITY

1. FLSA.

Claimants' claims under Wisconsin law and their contracts will be discussed later. With respect to the FLSA, Claimants argue that Waterstone did not pay them the minimum wages, overtime, and expenses that the FLSA required Waterstone to pay, and that based on the stipulation made at the hearing to the effect that Waterstone had suffered or permitted its LOs to work 52.5 hours per week and to bear $100 per week in expenses on Waterstone's behalf, Claimants are due back pay under the FLSA, plus liquidated damages.

Waterstone does not contest that but for the OSE it would be liable under the FLSA. It argues, however, that the OSE provides Waterstone complete protection from having to comply with the FLSA and from liability to the Claimants under that statute.

Claimants urge two arguments to defeat Waterstone's OSE defense. The first is a procedural argument that Waterstone failed to plead the OSE as an affirmative defense in the arbitration pleadings. This argument fails. A formal answer is not even required of the respondent in arbitration, and it has been clear from the beginning that Waterstone was leaning heavily on the OSE defense.

Claimants' second argument – substantive reliance on the doctrines of waiver and estoppel – has more strength. I have already determined on the summary judgment motion (Order of January 20, 2016) that the OSE would apply in this case unless Waterstone is precluded from relying on that exemption under principles of waiver and estoppel, so that Waterstone's potential liability under the FLSA hinges on those two doctrines.

Waiver is the voluntary, intentional relinquishment of a known right. To succeed on estoppel Claimants have to show conduct by Waterstone that induced reasonable reliance thereon by Claimants to their detriment.

Claimants argue that Waterstone was aware of its obligations under the FLSA; that it told the LOs that they were being reclassified from exempt to non-exempt under the law; that in order to comply with the FLSA it changed to a minimum-wage-plus overtime method of compensation; that Claimants then worked under the new system but did not get paid what Waterstone had implicitly and expressly promised and what the FLSA had guaranteed; and that the failure to pay was partly because Waterstone arranged to discourage and prevent Claimants from reporting their overtime hours.

Before 2010 Waterstone had compensated its LOs on a commission only basis. For some time, the mortgage industry had been going through a period of change. In response to increasing government regulation Waterstone's competing mortgage companies' arrangements with their LOs varied. Some used commission only. Others paid a straight salary. Some paid hourly wages. And there were combinations of commissions, salary, and wages.

In August 2010, based on advice from the same counsel that represented Waterstone in this arbitration, Waterstone began to move away from its commission-only type of compensation system for its LOs. It began by reclassifying the majority of its LOs as "non-exempt", and structured its compensation for LOs around principles identical to the requirements of the FLSA – minimum wage plus overtime.
Later, it expanded the "non-exempt" category to include all the LOs.

Waterstone now argues that the change in system was not related to any need or desire to comply with the FLSA. But, from what, other than the FLSA and state regulations, would they be "exempt" or "non-exempt"? Clearly, Waterstone's intent was to treat the LOs as not exempt from governmental wage requirements. There is no other persuasive reason for the classification. In short, Waterstone's new system requiring LOs to report their time by hours was meant to satisfy the requirements of the FLSA and state-law wage and hour requirements as applied to its LOs.

As determined earlier, despite the new system, and despite the explicit requirements of its employment agreements and employee manuals, Waterstone knew and accepted that its LOs were consistently working more than 40 hours per week and that they were not reporting their hours accurately. Waterstone knew, of course, that to the extent that a branch manager might allow overtime, his own compensation, which was related to the profitability of his branch, could be reduced. In short, Waterstone permitted, or may have even directed, its branch managers to circumvent the overtime-compensation provisions in the FLSA and in its own contracts, by discouraging and forbidding LOs from reporting more than 40 hours.

Waterstone's President Egenhoefer and its Senior Vice President Allen acknowledged in their depositions that its minimum-wage-plus -overtime compensation system was adopted in order to comply with federal (i.e. FLSA) and state wage requirements. At the hearing, however, they both told a story that the change from commission-only was solely so that they could use a new computerized compensation program. I found their hearing testimony on this point to be incredible.

In making the change, Waterstone was obviously following the advice of counsel in how to comply with governmental requirements. It established the much-disliked time-reporting system in order to legally comply with the minimum wage and overtime regulations of the FLSA and state laws. Then it tolerated or told or its branch managers to arrange that the LOs would not report more than 40 hours. In this way, Waterstone complied in form with FLSA's overtime requirement, but in practice it sought to avoid having to make the overtime payments that otherwise would have been made.

In practical effect, Waterstone represented to its LOs, not that they were exempt from coverage under the FLSA as it now claims, but that they were non-exempt and that it was providing for them the protections of the FLSA. It is true, as Waterstone repeatedly emphasizes, that most of the LOs either were ignorant of or did not care about the protections and benefits of the FLSA. They regarded their work as commission-based, and they viewed the payments for hours worked as a draw against the commissions they hoped to earn. The issue, however, is not how the LOs thought about their compensation or what they signed on to in the agreements prepared and required by Waterstone. The FLSA is a collection of rules established to fix the minimum compensation to be paid to employees and to do so apart from what the parties might think, understand, or agree to. The FLSA thus overrides both the employers' and the employees' understandings to the extent that their mutual arrangements in actual practice fail to satisfy the minimum standards laid down by the statute.

By setting up its compensation system, by representing to the LOs that they were non-exempt, by classifying LOs as "non-exempt" in its job description, by hiring new employees and permitting others to continue to work for them after establishing the new system, by tolerating and encouraging the LOs' logging of inaccurate hours into the system, and by continuing that conduct over a period of years, Waterstone has both waived and is estopped from asserting its OSE defense to Claimants' FLSA claims. Consequently, Waterstone is liable to Claimants under the FLSA for unpaid minimum wages, unpaid overtime, some unreimbursed expenses, liquidated damages, and attorney's fees and costs. Determining the amounts of those items will be dealt with in the Damages section of this partial award.

2. Wisconsin-law Claims

Waterstone challenges the constitutional applicability of Wisconsin's wage and hour laws to LOs who worked in other jurisdictions. Waterstone's agreements with its LOs that provide that they are to be interpreted and enforced under Wisconsin law. Forty-six of the Claimants did work in Wisconsin. Claimants assert, however, that all Claimants are covered by Wisconsin's wage and hour laws.

Claimants respond that Wisconsin law should apply only to the extent that its requirements are more favorable to an LO than would be the law of the state where the LO worked. That way, there would be no unconstitutional interference caused by the Wisconsin law.

Whatever the answer to these arguments, the dispute here over whether Wisconsin law provides a separate basis for recovery from the FLSA seems to virtually disappear, since the only claim asserted by Claimants under Wisconsin law that is different from Claimants' FLSA claims is one for a "penalty" of 50% that Claimants wish to add to the damages, which would also include liquidated damages, that would be awarded under their FLSA claims.

The Wisconsin "penalty" is to be imposed only in the discretion of the trial court. There has been no showing that Wisconsin provides greater benefits to employees than does the FLSA, and Claimants are being awarded damages under the FLSA. Finally, Wisconsin law enters this case only by provision of the contracts, and both parties regarded their relationship as one based on a draw against commissions, a system that is inconsistent with Wisconsin's compensation requirements. Even assuming that Claimants were in the abstract entitled to recover under Wisconsin law, in the unusual circumstances of this dispute, I would in my discretion determine that the 50% Wisconsin "penalty" should not be added to the damages that Claimants are otherwise entitled to recover under the FLSA.

Claimants' Wisconsin law claims are, therefore, denied.

3. Contract-law claims.

Both parties recognize that Claimants' contract claims and those under the FLSA are different in that they rest on different juridical principles. They also recognize that if both sets of claims were valid, the respective indicated damages would overlap and that there could not be any double recovery.

Claimants argue that under the contracts they are entitled to recover amounts similar to what would be allowed under the FLSA because they contend that, either directly or indirectly, Waterstone promised to pay minimum wage plus overtime, which is the FLSA requirement, and that this in effect incorporates parts of the FLSA system into their contracts. A major part of the significance of their contract claims is due to the fact that the statute of limitations for contract claims under the controlling Wisconsin laws would permit recovery for a much longer period than the stipulated August 2010 period that starts recovery under the FLSA.

Waterstone raises several obstacles to Claimants' contract approach: no mention of the FLSA in the contracts, no contractual classification of LOs as "non-exempt"; no allowable incorporation of either the Guidelines or the Handbook into the contracts; and LOs' breach of the contract provisions that required Claimants to accurately report their hours. Some of these points have been mentioned earlier in this decision. None of them need be discussed here, however, because the LOs' claim that they are contractually entitled to minimum wage plus overtime simply is not a claim that in all fairness they can maintain here.

Before August 2010, LOs were paid commissions only. After Waterstone had switched to the recorded-time system with bi-weekly payments at the minimum-wage rate, the LOs regarded their bi-weekly payments to be a draw against commissions, which was exactly what Waterstone sought to achieve through the clawback provisions in the contracts. Very few of the LOs were aware of or cared about the FLSA and its requirements. Some of them deliberately failed to report time so that the amounts of their commission payments would not be reduced.

These circumstances do not prevent recovery under the statutory scheme of the FLSA. But a contract results only when there is a meeting of the minds. Generally, the law presumes that what the parties to a contract intended to do is measured by what they wrote into their agreement. But here, despite what the language of these agreements provided, the system under which the LOs actually worked for Waterstone was viewed by both sides as a bi-weekly draw against commissions to be earned, with the draw measured by the amount of the reported hours times the applicable minimum wage plus time and one-half for reported overtime.

Whether blocked by the contract doctrine of practical construction or by some other principle, it simply would not be either reasonable or fair in this case to permit a contractual recovery of back pay for the LOs' services based on unpaid minimum wages and overtime when for years both sides of the agreement accepted the compensation arrangement to be one of a draw against commissions. This is particularly so because the LOs' contracts provided that they would raise any disagreement over the calculation of their commissions within 60 days of the date of payment.

Claimants' contract claims, therefore, are denied.

In summary, then, on liability, Waterstone is liable to Claimants on their FLSA claims, but is not liable under either their Wisconsin-law or contract-law claims.

B. DAMAGES

Claimants may recover damages on their FLSA claims for the time period beginning in August 2010, when Waterstone changed its contracts with LOs from commission only to a combination of base salary and commissions.

As evidence of damages, Claimants presented the testimony of Mr. Kandel, who used records supplied by Waterstone to prepare a large electronic spreadsheet designed to show in separate columns the various elements needed to establish damages under each of Claimants' theories – FLSA, Wisconsin law, and contract law. The spreadsheet shows that information for each of the 220 Claimants and permits calculating total amounts as well. It was set up to permit me as the Arbitrator, ideally, to select the appropriate elements after the liability determinations and then manipulate the spreadsheet so that it could automatically calculate the final damages due in this arbitration. Through Mr. Weiss, Waterstone presented a similar spreadsheet with some different numbers geared to Waterstone's theories and arguments about damages. Ultimately, the parties agreed on a joint spreadsheet and proceeded on the assumption that I would easily be able to calculate any required damages.

Unfortunately, counsel overestimated the capabilities of this arbitrator to work efficiently and reliably with such a complicated electronic document. I have therefore decided to spell out what seem to be the guiding principles for calculating damages in this case under the FLSA and then to leave it to counsel to agree, if possible, on the correct amount of the resulting damages. If they cannot agree on the appropriate number, then they should inform me of the extent of their agreement and their respective positions on any disputed items, so that I can resolve the difference. If I have failed to provide a necessary principle, upon being informed of the oversight I will promptly correct it. Counsel shall report to me on the damage calculation within fourteen days of the date of this award.

The following principles should direct the determination and computation of the amount of damages:

1. Waterstone is liable to Claimants for damages "in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." (29 USC 216(b)).
2. Damages under the FLSA are to be calculated on the basis of what a claimant is entitled to as minimum wage and overtime in each pay period versus what Waterstone actually paid to the claimant during that pay period.
3. Waterstone's "clawback" procedure relates to the parties' contractual arrangements and does not affect the Claimants' rights under the FLSA.
4. Extrapolations. A claimant may not be credited with amounts for hypothetical work periods calculated by extrapolation to fill in apparent blanks in Waterstone's records.
5. In light of the parties' stipulation and subsequent understanding, Claimants' right to recover damages under the FLSA begins as of August 17, 2010.

6. Under the stipulation, each Claimant is deemed to have worked 52.5 hours per week and to have incurred $100 of unreimbursed business expenses per week.

7. Waterstone's two-week pay period applies, and there shall be a separate calculation, for each pay period, of the minimum wage, overtime, and expenses to be credited to each claimant, and of the compensation Waterstone paid to that claimant.

8. Under the FLSA, for each pay period, each claimant was entitled to be paid and is now entitled to be credited in calculating damages, for the first 40 hours worked in a week at the federal statutory rate (minimum wage), plus any excess hours over 40 in a week (overtime) at time and a half.

9. A claimant is also entitled to be credited in each pay period with up to $200 (the stipulated $100 per week of expenses incurred in a two-week pay period) but only if and to the extent that it would have reduced the compensation paid by Waterstone in that pay period to an amount below the total of the claimant's minimum wage and overtime credits for the pay period.

10. To be charged against a claimant for each pay period is the total amount paid by Waterstone to the claimant in that pay period.

11. Any net credit remaining to a claimant in a pay period will constitute that claimant's base damages for that pay period.

12. Liquidated damages. A claimant is also entitled to recover liquidated damages equal to the amount of base damages. (29 USC 216(b)).

13. Waterstone's argument that liquidated damages should not be awarded because of its alleged good faith is rejected. Waterstone's conduct in the manner in which it handled its agreements and time reporting by Claimants does not establish good faith. Claimants are entitled to the normal liquidated damages that the FLSA awards in lieu of pre-judgment interest.

14. A claimant's base damages plus his liquidated damages constitute the claimant's total damages. The total of damages awarded to the 220 Claimants combined shall be the total damage award in this arbitration.

15. Attorney's fees and costs. "The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." (29 USC §216(b)). Under this provision recovery of attorney's fees and costs in an FLSA action is mandatory. Claimants' counsel shall, therefore, within fourteen days after their joint report to me on the damages agreement, file a motion to fix the amount of attorney's fees and costs, with appropriate documentation. Waterstone may respond within fourteen days, and Claimants may reply within ten days after that. After I have received the parties' agreements and submissions on the damage amount and on attorney's fees and costs, if I feel that oral argument is needed I will schedule it with counsel. Once the amounts for total damages, attorney's fees, and costs are finally fixed, I will enter a Final Award that will conclude this lengthy arbitration.

CONCLUSION AND PARTIAL AWARD ON LIABILITY

1. Waterstone is liable to the Claimants under the FLSA for unpaid minimum wages and unpaid overtime, and for unreimbursed expenses to the extent described in this Partial Final Award.
2. Waterstone has waived and is estopped from asserting the "outside sales exemption" defense to Claimants' FLSA claims.
3. Claimants' claims under Wisconsin law are dismissed.
4. Claimant's claims under contract law are dismissed.
5. Claimants' damages under the FLSA shall be determined in the manner and under the principles described above in this Partial Final Award.
6. Waterstone's contractual clawback process does not apply in calculating Claimants' damages under the FLSA.
7. Claimants are entitled to recover attorney's fees and costs to be determined on motion on the schedule set forth above.

Dated: April 13, 2017

George C. Pratt
Arbitrator

MARCIA P. BURKE
Notary Public of the State of New York
Reg # 01BU4991715
COUNTY OF NASSAU
MY COMMISSION EXPIRES 4/8/18

State of New York
County of Nassau

On this 13th day of April, 2017, the above arbitrator came and appeared before me and confirmed to me that s/he is the individual described herein and acknowledged to me that he/she is the individual who executed the foregoing instrument.

Marcia P Burke
Notary Public
State of New York