

AMERICAN ARBITRATION ASSOCIATION

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

**DECISION AND ORDER ON NOTICE TO CLASS
AND RELATED ISSUES**

(April 23, 2014)

The Class Certification Award determined that this arbitration should proceed on an opt-in basis, and directed Counsel for Herrington to submit a proposed Notice of Class Determination, with a proposed form by which Loan Officers may opt in and thereby participate as claimants in this arbitration. The proposed documents were submitted on March 25, 2014, along with Herrington's recommendations for the procedures to be followed. Waterstone submitted its comments, objections, and suggestions on April 9, 2014, and Herrington replied on April 16, 2014.

I have carefully considered and weighed the proposals, comments, and arguments from both sides, and after reviewing many of the multitude of cases offered by each side in support of their respective arguments, I make the following decisions with respect to the Notice and its related issues, including the form of the Notice, the Consent to Sue, the statute of limitations, the manner of sending the notice, whether there should be a reminder sent, whether a questionnaire should be sent with the notice, what communications with putative opt-ins should be permitted, and the schedule for the remainder of this arbitration.

Statute of Limitations

An important issue that determines the scope of this proceeding is how the statute of limitations is to be applied. Waterstone contends that any damages for an opt-in claimant must be cut off going back three years from the date that the claimant will submit the signed Consent to Sue form. Herrington argues that because of the manner in which this arbitration came about and has been processed, the three-year limitation period for damages should be tolled and should be calculated back from November 28, 2011, the date Claimant Herrington's action was filed in the U.S. District Court in Wisconsin.

Waterstone is correct that the typical FLSA action for overtime is subject to a three- (or sometimes two-) year limitation period, but this case is far from typical. Begun as a class action in District Court, the action was, on Waterstone's motion, sent to arbitration, with the direction that Herrington "must be allowed to join other employees to her case." (D. Ct. Decision dated 3/16/12 at 18). Herrington filed her Demand for Arbitration with the American Arbitration Association on March 26, 2012. Following the

AAA's Employment Rules and its Supplementary Rules for Class Arbitrations, a clause construction award determined "that the arbitration clause in the parties' Agreement does permit this arbitration to proceed as a class arbitration on behalf of a class." (Clause Construction Award, 7/11/12 at 4).

However, there was a protracted dispute over whether this should be an opt-in or opt-out class, an issue that was finally determined in Waterstone's favor (an opt-in class) in the Class Certification Award on February 27, 2014. A major part of the delay in getting to this point has been the result of Waterstone's determined resistance through multiple requests for reargument of decisions and orders, and several applications to the District Court to overturn orders in the arbitration.

In these circumstances the statute of limitations should be equitably tolled. Putative claimants cannot be deemed to have slept on their rights. Tolling would have been automatic with an opt-out class proceeding, and until just two months ago this arbitration was potentially just that. Moreover, pursuant to the Order on Claimant's Application for Protective Order, Temporary Restraining Order, and Preliminary Injunction, dated September 18, 2012, "each employee class member [was to be] given the opportunity – after the nature of the arbitration has been established and after proper notice to any employee class – to make an informed, binding decision with respect to his or her participation" in the arbitration. (Order at 14-15.) Only in February of this year has "the nature of the arbitration been established", and finally, after this Decision and Order, the putative claimants will be provided the long-promised "proper notice". Opt-in claimants should not be penalized by delays in which they had no part. Accordingly, the earliest date from which claims and damages may accrue in

this arbitration is November 28, 2008, three years before the filing of Herrington's complaint in the District Court.

Notice and Consent to Sue

The Notice to Waterstone's loan-officer employees and the Consent To Sue shall be in the approved forms attached to this Decision and Order as Exhibits A and B, respectively.

Mailing by Counsel

The Notice and Consent to Sue forms shall be processed by Getman & Sweeney, PLLC, Counsel for Herrington. A Third-Party Administrator will not be required. Within one week of the date of this Decision and Order, Waterstone shall supply to Herrington's Counsel in electronic format, and for all of its loan-officer employees who have worked for Waterstone during any period since November 8, 2008, ("Putative Class Members") the names, current or last-known residence addresses, email addresses to the extent known, and employer identification numbers. Herrington's Counsel shall then mail out the Notice and Consent to Sue forms by first-class mail. At the same time, Herrington's Counsel may send the forms to Putative Class Members by email and may post the forms on its website. The personal identification information for the Putative Class Members need not be returned or destroyed, but it is confidential information and is to be used by Herrington's Counsel only during the opt-in period unless specific permission for later use is granted on request.

Additional information if needed

If any Putative Class Members' mailed Notice and Consent to Sue forms are returned with a forwarding address, Herrington's Counsel shall re-mail them. If any Putative Class Member's mailed Notice and Consent to Sue forms are returned without a forwarding address, Herrington's Counsel shall contact Waterstone's Counsel about the returned mailings. Within three business days, Waterstone's Counsel shall, for skip-tracing purposes, provide Herrington's Counsel with the following information for those Putative Class Members whose mailings were returned: the last four digits of their social security numbers; their telephone numbers, to the extent known; and their dates of birth. After performing a skip trace, Herrington's Counsel shall then re-mail the Notice and Consent to Sue form. If the skip trace does not produce the needed address, Herrington's Counsel may telephone the Putative Class Member solely to ask for his or her address.

Postcard Reminder

Thirty days after the initial mailing, Herrington's Counsel may send to any Putative Class Member who has not returned a Consent to Sue, a postcard reminder in the approved form attached to this Decision and Order as Exhibit C.

Consents to Sue

Completed Consent to Sue forms must be mailed, emailed, or faxed to Herrington's Counsel within 60 days of the date of the initial mailing. Herrington's Counsel shall retain the original completed Consents to Sue for future reference and use in this arbitration, and shall, within 70 days of the date of the initial mailing, email

copies of the signed Consents to Sue to the Arbitrator, the Case Manager, and Waterstone's Counsel.

Communications with Putative Class Members

The prior prohibition on communications with the Putative Class Members imposed by the Order on Claimant's Application for Protective Order, Temporary Restraining Order, and Preliminary Injunction, dated September 18, 2012, is vacated and replaced by the following temporary directions. In this phase of the arbitration it is essential that Putative Class Members be free to decide whether to join in the proceeding without being subjected to improper solicitations from either side. To that end, it is necessary that communications to the Putative Class Members by the parties or anyone acting on their behalf be limited to those communications that receive advance approval by the Arbitrator, except that without advance approval, Herrington's Counsel may respond to inquiries from Putative Class Members. The Notice, Consent to Sue, and Reminder Postcard that are attached to this Decision and Order are all approved, as is the ability of Herrington's Counsel to seek missing postal addresses by telephone, as described above. Any postings to the website of Herrington's Counsel will require advance approval. Expedited review, usually within 24 hours, will be provided. All other communications with the Putative Class Members with respect to this arbitration are prohibited. This limitation on communication is aimed at the opt-in period and shall continue only until the first status conference after the close of the opt-in period. Whether any further limitations will then be needed can be addressed at that conference.

Questionnaire

Waterstone's request that a questionnaire be included in the mailing along with the Notice and Consent to Sue form is denied. The requested information can be obtained from the opt-in claimants as part of the discovery phase that will be conducted under a plan and schedule to be adopted after completion of the opt-in phase.

Schedule

The parties disagree in their submitted proposed schedules for the remainder of the arbitration. The plan for and timing of the discovery that will be needed, of the pre-hearing events, and of the hearing can most sensibly be addressed after the number of opt-in claimants is known. A conference call for that purpose will be scheduled in due course, once the date for completion of the opt-in process has been established.

SO ORDERED
April 23, 2014

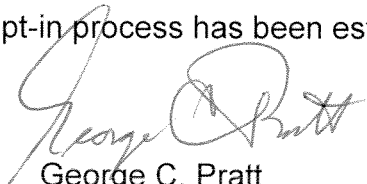

George C. Pratt
Arbitrator

EXHIBIT A

APPROVED NOTICE TO

PUTATIVE CLASS MEMBERS

NOTICE OF OVERTIME AND MINIMUM WAGE LAWSUIT AGAINST WATERSTONE MORTGAGE CORPORATION

[insert MAILING date]

Dear Current or Former Waterstone Loan Officer:

Enclosed is a Consent to Sue form allowing you to join a Fair Labor Standards Act (FLSA) lawsuit that has been filed against Waterstone Mortgage Corporation on behalf of Loan Officers seeking unpaid wages and liquidated damages. The lawsuit is being heard in an arbitration conducted by the American Arbitration Association (AAA), which has entered an order authorizing us to send you this notice informing you of your right to "opt in" and be covered by this case.

What this lawsuit is about:

This lawsuit claims Waterstone violated the FLSA because it failed to pay Loan Officers overtime and minimum wages. The Claimants bringing the case seek back wages and liquidated damages. Waterstone does not agree that it violated the law, and the Arbitrator who will hear the case has not yet made any decision about who is right.

Who can join this lawsuit:

You may join this case if you are a current or former Loan Officer who worked more than 40 hours in any work week, or were not reimbursed for your business expenses, or were not paid the federal minimum wage for all hours worked during any workweek from November 28, 2008 to the present. You are entitled to join this case even though you may have signed a declaration in this case or a severance agreement that purports to release claims against Waterstone. If you do opt-in to this lawsuit, you will be bound by any ruling or settlement in this case, even if it is unfavorable to you. You will not be obligated to pay the lawyers for their costs or legal fees to participate. If the Loan Officers are successful at trial or a settlement, costs expended by attorneys on claimants' behalf will be deducted from any settlement or judgment amount on a pro rata basis, and the fees of the attorneys will be either an amount that the arbitrator directs to be paid by Waterstone or 1/3 of the gross settlement or judgment amount, whichever is greater. If the case is unsuccessful, the Loan Officers' attorneys will be paid nothing. . If you do not join this lawsuit, you will not be able to receive any share of any settlement or judgment that the Loan Officer may obtain, but you are free to retain your own counsel independently and file your own individual lawsuit.

No retaliation:

The law prohibits retaliation against employees for exercising their rights under the FLSA. Therefore, you may not be terminated or subjected to discrimination in any manner because of your exercise of rights under the FLSA, including joining this lawsuit. Although Waterstone disputes the claims raised in the case, it recognizes a Loan Officer's right to pursue these claims free from retaliation.

How to join:

To join the case and be represented by the lawyers who are handling this case, you must fill out the enclosed Consent to Sue Form and return it to:

Getman & Sweeney, PLLC
9 Paradies Lane, New Paltz, NY 12561
Fax: (866) 543-9619 / Email: mayres@getmansweeney.com

no later than [date 60 days from mailing to be inserted]. More detailed information can be found at www.GetmanSweeney.com, or by calling Getman Sweeney at 845-255-9370.

Do not contact Waterstone's supervisors or attorneys about this notice as they are not yet permitted to speak with you about this case.

EXHIBIT B

APPROVED CONSENT TO SUE

AMERICAN ARBITRATION ASSOCIATION

PAMELA HERRINGTON, both individually and
behalf of all other similarly situated persons,

Claimants,

and

WATERSTONE MORTGAGE CORPORATION,

Respondent.

Arbitrator: Hon. George C. Pratt

Administrator: Trenda L. Benitez

Case Number: 51 160 00393 12

CONSENT TO SUE

I hereby consent to be a Claimant in this arbitration under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, to secure unpaid overtime pay, minimum wages, liquidated damages, attorneys' fees, costs and other relief arising out of my employment with Waterstone Mortgage Corporation. I authorize Getman & Sweeney, PLLC, and any associated attorneys as well as any successors or assigns, to represent me with my claims by joining my claims to this existing arbitration proceeding against Waterstone Mortgage Corporation in which they represent Claimants. By signing and returning this consent to sue, I understand that, if accepted for representation, I will be represented by the above attorneys without prepayment of costs or attorneys' fees. I understand that if Claimants are successful, costs expended by attorneys on my behalf will be deducted from my settlement or judgment amount on a pro rata basis with all other claimants. I understand that the attorneys may petition the arbitrator on my behalf for an award of fees and costs to be paid by Respondent. I understand that the fees to be retained by the attorneys will be either the amount received from Respondent or 1/3 of my gross settlement or judgment amount, whichever is greater.

Dated: _____

Address: _____

Signature: _____

Print Name: _____

Phone: _____

Email: _____

To be considered for representation, send this completed form to Getman & Sweeney, PLLC, 9 Paradies Lane, New Paltz, NY 12561, or send it by fax to (866) 543-9619 or (845) 255-8649, or email it to mayres@getmansweeney.com. This Consent to Sue is not valid and effective until you have received a receipt from Claimants' Counsel indicating that it has been filed. If you have not received a receipt within 3 weeks from your transmission of the form to us, you must contact us by phone at (845) 255-9370.

EXHIBIT C

APPROVED POSTCARD REMINDER

Dear Current or Former Waterstone Loan Originator:

We previously mailed you a Notice of Overtime and Minimum Wage Lawsuit and a Consent to Sue form but have not heard from you. If you want to participate in the lawsuit against Waterstone to recover unpaid wages and liquidated damages you must return your Consent to Sue form no later than [insert date] by mailing, emailing, or faxing it to the address below. If you lost the form or have any questions, contact Getman & Sweeney, PLLC at:

Getman & Sweeney, PLLC

Attorneys at Law

9 Paradises Lane, New Paltz, New York 12561

Tel (845) 255-9370 / Fax (866) 543-9619

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Overtime and Minimum
Wage Lawsuit
Against Waterstone