

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

SHAWN McCAULEY)
10215 East Watson)
Sunset Hills, MO 63127)

JURY TRIAL DEMANDED

On behalf of himself and)
all others similarly situated,)

Plaintiff,)

Case No.: 10-CV-0980

vs.)

FIRST OPTION MORTGAGE, L.L.C.)
Please Serve Registered Agent:)
National Registered Agents, Inc.)
300 B East High Street)
Jefferson City, Missouri 65101)

Defendant.)

FIRST AMENDED COMPLAINT
Collective Action Under the FLSA
Rule 23 Class Action under Missouri Wage Laws

COMES NOW the Plaintiff Shawn McCauley and hereby sets forth this representative action for violation of the Fair Labor Standards Act under 29 U.S.C. §216(b) as follows:

PRELIMINARY STATEMENT

1. Plaintiff brings this action against Defendant First Option Mortgage, L.L.C. (“FOM”) for unpaid compensation and overtime compensation and related penalties and damages. Defendant’s practice and policy is to willfully fail and refuse to properly pay overtime compensation due Plaintiff, and all other similarly situated employees, who work as loan originators (a/k/a Loan Officers). In particular, Defendant has policies in place that (i) fail to pay Loan Officers overtime compensation for hours worked in excess of forty per week; (ii) fail to correctly calculate the overtime rate of pay due to Loan Officers by

failing to properly include commission compensation in said calculation, and (iii) failed to pay Loan Officers for all hours worked. These policies are in direct violation of the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.* (FLSA) and regarding Defendant's employees in Missouri, the Missouri wage and hour laws, RSMo. § 290.500 *et seq.*

2. Plaintiff seeks injunctive and declaratory relief; overtime premiums for all overtime work required, suffered, or permitted by Defendant; liquidated and/or other damages as permitted by applicable law; and attorney's fees, costs, and expenses incurred in this action.
3. Plaintiff also brings a claim for retaliation under the FLSA. Soon after filing bringing this legal action against Defendant, Defendant terminated Plaintiff's employment.

PARTIES

4. Plaintiff Shawn McCauley currently resides at 10215 East Watson, Sunset Hills, Missouri. Plaintiff is employed as a Loan Officer at Defendant's facility located at 3 City Place Drive, St. Louis, Missouri.
5. Defendant First Option Mortgage, L.L.C. ("FOM") is a Georgia limited liability company registered to do business and in good standing in the state of Missouri. FOM operates a business location at 3 City Place Drive, St. Louis, Missouri. FOM also operates offices as an "employer" under the FLSA with Loan Officers located in Florida, Georgia, Ohio, Indiana, Texas, Colorado, Arizona, Utah, and Nevada. Some of these offices are operated as First Option Lending, L.L.C. which is an entity wholly owned by Defendant.
6. At all relevant times, Defendant has been, and continues to be, an "employer" engaged in the interstate "commerce" and/or in the production of "goods" for "commerce" within the meaning of the FLSA, 29 U.S.C. §203. At all relevant times, Defendant has employed,

and/or continues to employ, “employee[s],” including the putative representative action Plaintiffs. At all times relevant herein, Defendant has had gross operating revenues in excess of \$500,000.00 (Five Hundred Thousand Dollars).

JURISDICTION AND VENUE

7. This Court has original federal question jurisdiction under 28 U.S.C. §1331 for the claims brought under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, *et seq.*
8. This Court has supplemental jurisdiction for all claims asserted under the Missouri wage laws in that the claims under this law is part of the same case and controversy as the FLSA claims, the state and federal claims derive from a common nucleus of operative fact, the state claim would not substantially dominate over the FLSA claims, and exercising supplemental jurisdiction would be in the interests of judicial economy, convenience, fairness, and comity.
9. The United States District Court for the Eastern District of Missouri has personal jurisdiction because Defendant conducts business within this District and division.
10. Venue is proper in this Court pursuant to 28 U.S.C. §1391(b), inasmuch as the Defendant has offices, conducts business and can be found in this district, and the cause of action set forth herein has arisen and occurred in part in this district. Venue is also proper under 29 U.S.C. §1132(e)(2) because Defendant has substantial business contacts within the state of Missouri.
11. At all relevant times, Defendant has been, and continues to be, an “employer” engaged in the interstate “commerce” and/or in the production of “goods” for “commerce” within the meaning of the FLSA, 29 U.S.C. §203. At all relevant times, Defendant has employed, and/or continues to employ, “employee[s],” including each of the putative representative

action plaintiffs. At all times relevant herein, Defendant has had gWaters operating revenues in excess of \$500,000.00 (Five Hundred Thousand Dollars).

12. At all relevant times, Defendant has been, and continues to be, an “employer” within the meaning of the Missouri wage laws, RSMo. §290.500(4). At all relevant times, Defendant has employed, and/or continues to employ, “employee[s],” including each of the putative representative action plaintiffs within the meaning of the Missouri wage laws, RSMo. § 290.500(3).

COUNT I
Collective Action Claim under the FLSA

13. The Plaintiff hereby incorporates by reference paragraphs 1 through 12 of this First Amended Complaint into this count.
14. Plaintiff Shawn McCauley was employed as a Loan Officer for the Defendant from on or about July 2009 through on or about October 2009 at Defendant’s St. Louis, Missouri location. From on or about October 2009 through on or about February 2010, McCauley was employed as a Branch Manager by Defendant at its Atlanta, Georgia location. From on or about February 2010 through the present, the Plaintiff McCauley has been employed as a Loan Officer at Defendant’s Atlanta, Georgia and St. Louis, Missouri locations.
15. Like the Plaintiff, the Defendant employs numerous other Loan Officers at its offices located in numerous other states, including Florida, Georgia, Ohio, Indiana, Texas, Colorado, Arizona, Utah, and Nevada, who are similarly situated in that they all perform essentially the same job functions and they are all governed by the same, or similar, pay policy and plan at issue in this matter.

16. Defendant classifies its Loan Officers as non-exempt employees under the FLSA entitled to receive overtime.
17. Under the Defendant's compensation plan for its Loan Officers, said Loan Officers earn the same amount of gross compensation regardless of the hours they work, therefore, Defendant fails to pay any premium to Loan Officers for hours worked in excess of forty in a given workweek in violation of the FLSA.
18. Under the Defendant's compensation plan for its Loan Officers, any compensation paid to Loan Officers that is labeled as overtime pay is simply later deducted from the Loan Officer's commission income, which in essence, eliminates any alleged overtime paid.
19. Under the Defendant's compensation plan for its Loan Officers, Defendant fails to correctly calculate the overtime rate of pay due to Loan Officers by failing to properly include commission compensation in said calculation as required by the federal regulations, thereby, denying them overtime compensation as required under the FLSA.
20. The Defendant regularly requires its Loan Officers to perform work "off the clock," and in turn, fails to compensate them for all overtime. This includes requiring Loan Officers to work during uncompensated breaks and on weekends without full compensation.
21. Plaintiff brings this Complaint as a collective action pursuant to 29 U.S.C. §216(b) of the FLSA, on behalf of all persons who were, are, or will be employed by the Defendant as Loan Officers within three years from the commencement of this action who have not been correctly compensated for overtime under the FLSA.
22. This Complaint may be brought and maintained as an "opt-in" collective action pursuant to 29 U.S.C. §216(b) of the FLSA for all claims asserted by the Representative Plaintiff

because their claims are similar to the claims of the putative representative action Plaintiff.

23. The names and addresses of the putative representative action plaintiffs are available from Defendant. To the extent required by law, notice will be provided to said individuals via First Class Mail and/or by the use of techniques and a form of notice similar to those customarily used in representative actions.
24. The FLSA requires each covered employer, such as Defendant, to compensate all non-exempt employees for services performed and to compensate them at a rate of not less than one and one-half the regular rate of pay for work performed in excess of forty hours in a work week.
25. The Plaintiff and the putative representative action plaintiffs are not exempt from the right to receive overtime pay under the FLSA and are not exempt from the requirement that their employer pay them overtime compensation under the FLSA. The Plaintiff and the putative representative action plaintiffs are entitled to be paid overtime compensation for all overtime hours worked.
26. At all relevant times, Defendant had a policy and practice of failing and refusing to pay Loan Officers at a rate of not less than one and one-half the regular rate of pay for work performed in excess of forty hours in a work week, and therefore, Defendant has violated, and continues to violate, the FLSA, 29 U.S.C. §§201, *et seq.*
27. The foregoing conduct, as alleged herein, constitutes a willful violation of the FLSA within the meaning of 29 U.S.C. §255(a).
28. The Plaintiff, on behalf of himself and all similarly situated employees of Defendant who compose the putative representative action plaintiffs, seek damages in the amount of all

respective unpaid overtime compensations at a rate of one and one-half times the regular rate of pay for work performed in excess of forty hours in a work week, plus liquidated damages, as provided by the FLSA, 29 U.S.C. §216(b), and such other legal and equitable relief as the Court deems just and proper.

29. The Plaintiff, on behalf of himself and all similarly situated employees of Defendant who compose putative representative action plaintiffs, seek recovery of all attorneys' fees, costs, and expenses of this action, to be paid by Defendant, as provided by the FLSA, 29 U.S.C. §216(b).

WHEREFORE, Plaintiff, on behalf of himself and all proposed putative representative action plaintiffs, prays for relief as follows:

- a. Designation of this action as a collective action on behalf of the proposed putative representative action plaintiffs and prompt issuance of notice pursuant to 29 U.S.C. §216(b) to all putative representative action plaintiffs (the FLSA opt-in class), apprising them of the pendency of this action and permitting them to assert timely FLSA claims in this action by filing individual Consents To Join pursuant to U.S.C. §216(b);
- b. Designation of Plaintiff Shawn McCauley as Representative Plaintiff of the putative representative action plaintiffs of Loan Officers and designation of Donelon, P.C. as class counsel;
- c. A declaratory judgment that the practices complained of herein are unlawful under the FLSA, 29 U.S.C. §201, *et seq.*;
- d. An injunction against Defendant and their officers, agents, successors, employees, representatives, and any and all persons acting in concert with Defendant, as provided by

law, from engaging in each of the unlawful practices, policies, and patterns set forth herein;

- e. An award of damages for overtime compensation due for the Plaintiff and the putative representative action plaintiffs, including liquidated damages, to be paid by Defendant;
- f. Costs and expenses of this action incurred herein, including reasonable attorneys' fees and expert fees;
- g. Pre-Judgment and Post-Judgment interest, as provided by law; and
- h. Any and all such other and further legal and equitable relief as this Court deems necessary, just and proper.

COUNT II

Rule 23 Class Action under Missouri Wage Laws

- 30. The Plaintiff hereby incorporates by reference paragraphs 1 through 29 of this First Amended Complaint into this count.
- 31. Plaintiff Shawn McCauley, the Missouri Named Plaintiff, was employed as a Loan Officer for the Defendant from on or about July 2009 through on or about October 2009 at Defendant's St. Louis, Missouri location. From on or about October 2009 through on or about February 2010, McCauley was employed as a Branch Manager by Defendant at its Atlanta, Georgia location. From on or about February 2010 through the present, the Plaintiff McCauley has been employed as a Loan Officer at Defendant's Atlanta, Georgia and St. Louis, Missouri locations.
- 32. The Missouri Named Plaintiff brings this Count as a class action pursuant to Fed. R. Civ. P. 23(b)(3), on behalf of himself and the following class of persons (Missouri Class Members):

All current and former Loan Officers of Defendant who have at worked locations in Missouri at any time during the last two years.

33. The state law claims, if certified for class wide treatment, may be pursued by all similarly situated persons who do not opt-out of the class.
34. The Missouri Named Plaintiff, individually and on behalf of the above Missouri Class Members, brings a class action based on the Missouri wage laws, RSMO. § 290.500 *et seq.*, in particular, § 290.505.1 and § 290.527.
35. The Missouri Named Plaintiff and the Missouri Class Members are all similarly situated in that they were all subject to Defendant's policy of (a) failing to pay Loan Officers overtime compensation for hours worked in excess of forty per week; (b) failing to correctly calculate the overtime rate of pay due to Loan Officers by failing to properly include commission compensation in said calculation, and (c) failing to pay Loan Officers for all hours worked. These policies deny overtime compensation and are in violation of the Missouri wage laws, in particular RSMo. § 290.505.
36. Class certification of this Count for violations of Missouri wage laws is appropriate pursuant to Fed. R. Civ. P. 23(a) in that:
 - a. The members of the Missouri Class are so numerous that joinder of all members is impracticable. The exact number of class members is unknown to the Missouri Named Plaintiff at the present time;
 - b. There are questions of law and fact arising in this action which are common to the Missouri Named Plaintiff and the Missouri Class Members, including:
 - (i) Whether Defendant's policies and practices described within this Complaint were illegal;

(ii) Whether Missouri Class Members are paid for all of the overtime they work;

(iii) Whether Defendant maintains accurate records of the time the Missouri Class Members work;

(iv) Whether Defendant's policies and practices regarding the recording and modifying of time is lawful; and

(v) Whether Defendant failed to pay appropriate overtime premiums to the Missouri Class Members in violation of the Missouri wage laws, RSMo. §290.505.

37. Missouri Named Plaintiff's claims are typical of the claims of the Missouri Class Members. The Missouri Named Plaintiff was paid under the same policy and procedure as all members of the class. The Missouri Named Plaintiff and all members of the class were victims of the same wrongful conduct engaged by Defendant in violation of the Missouri wage laws.

38. The Missouri Named Plaintiff will fairly and adequately protect the interests of the members of the class.

39. The Missouri Named Plaintiff has retained counsel who is competent and experienced in class action and complex litigation involving compensation claims.

40. The Missouri Named Plaintiff has no interests which are adverse to or in conflict with other Missouri Class Members.

41. Class certification of the respective class is appropriate under Fed. R. Civ. P. 23(b)(3) because questions of law and fact common to class members predominate over any questions affecting only individual members and a class action is the superior procedural

vehicle for the fair and efficient adjudication of the claims asserted herein given that: (a) there is minimal interest of members of this class in individually controlling their prosecution of claims under the Missouri wage laws; (b) it is desirable to concentrate all the litigation of these claims in this forum; and, (c) there are no unusual difficulties likely to be encountered in the management of this case as a class action.

42. In the absences of a class action, Defendant would be unjustly enriched because it would be able to retain the benefits and fruits of the wrongful violation of the Missouri wage laws.
43. The class action mechanism is superior to any alternatives that might exist for the fair and efficient adjudication of this cause of action. Proceeding as a class action would permit the large number of injured parties to prosecute their common claims in a single forum simultaneously, efficiently, and without unnecessary duplication of evidence, effort, and judicial resources. A class action is the only practical way to avoid the potentially inconsistent results that numerous individual trials are likely to generate. Moreover, class treatment is the only realistic means by which plaintiffs can effectively litigate against large, well-represented corporate defendants. Numerous repetitive individual actions would also place an enormous burden on the courts as they are forced to take duplicative evidence and decide the same issues relating to Defendant's conduct over and over again.
44. Defendant failed to pay the Missouri Named Plaintiff and the Missouri Class Members the overtime required by Missouri law.
45. Defendant's failure to pay the correct amount of overtime violates the Missouri wage law, RSMo. §290.505.

46. Because Defendant failed to properly pay overtime as required by law, the Missouri Named Plaintiff and the Missouri Class Members are entitled under the Missouri wage laws to bring this civil action under RSMo. § 290.527, are entitled to all overtime compensation due to them at a rate of 1 and ½ times the regular rate of pay for all overtime hours worked in the past two years under RSMo. § 290.505 and § 290.527, and under RSMo. § 290.527 to recover additional liquidated damages in the same amount, costs, and reasonable attorneys' fees.

WHEREFORE, the Missouri Named Plaintiff, on behalf of himself and the Missouri Class Members, pray for relief as follows for Count II of this First Amended Complaint:

- a. Designation of this action as a class action under FED.R.CIV.P. 23 on behalf of the Missouri Class Members and issuance of notice pursuant to all Missouri Class Members, apprising them of the pendency of this action;
- b. Designation of Missouri Named Plaintiff Shawn McCauley as Representative Plaintiffs of the Missouri Class Members;
- c. Designation of Donelon, P.C. as the attorneys representing the Missouri Class Members;
- d. A declaratory judgment that the practices complained of herein are unlawful under the Missouri wage laws;
- e. An award of damages for overtime compensation due for the Plaintiffs and the putative representative action plaintiffs, including liquidated damages allowed under Missouri law, to be paid by Defendant;
- f. Costs and expenses of this action incurred herein, including reasonable attorneys' fees and expert fees;
- g. Pre-Judgment and Post-Judgment interest, as provided by law; and

- h. Any and all such other and further legal and equitable relief as this Court deems necessary, just and proper.

COUNT III
Retaliation under the FLSA

47. The Plaintiff hereby incorporates by reference paragraphs 1 through 46 of this First Amended Complaint into this count.
48. On May 28, 2010, the Plaintiff McCauley filed a collective action Complaint in this Court alleging that Defendant violated the FLSA by failing to pay himself and all other Loan Officers overtime as required under the FLSA.
49. On June 4, 2010, the Defendant's corporate agent was served with this Complaint. In turn, the Defendant was provided with a copy of this Complaint.
50. On June 14, 2010, the Defendant, through its Vice President Josh Fitzwater, informed the Plaintiff that he was no longer considered an employee of the Defendant, thereby, terminating his employment.
51. At the time of this termination, the Defendant was fully aware that Plaintiff was exercising his rights under the FLSA to assert a claim for overtime compensation.
52. Because the Plaintiff asserted his statutorily protected rights and filed his Complaint asserting an overtime claim under the FLSA, the Defendant terminated his employment. The Defendant's termination of Plaintiff's employment was in direct retaliation against him for asserting his rights under the FLSA, and was in violation of the FLSA, in particular 29 U.S.C. § 215(a)(3).
53. Defendant's conduct was willful and negligently disregarded his rights under the FLSA to pursue a claim for overtime pay.
54. As a direct result of the adverse employment actions taken by Defendant, Plaintiff has

suffered, and is seeking, damages in form of lost wages and benefits.

55. Further, as a direct result of Defendant's adverse treatment of Plaintiff Chankin, Plaintiff Chankin suffered, and is seeking, compensation for mental distress.

56. The Plaintiff is seeking compensation for attorneys' fees and costs incurred in this matter.

57. The Plaintiff is also seeking punitive and/or liquidated damages.

WHEREFORE, Plaintiff Chankin, prays for front pay, back pay actual/compensatory damages, liquidated damages, punitive damages, attorney fees, costs, prejudgment interest, post-judgment interest and all damages available to him under the FLSA to compensate him for Defendant's retaliatory conduct and for any further relief this Court deems just.

Demand for Jury Trial

Plaintiff hereby demands a jury trial on all causes of action and claims with respect to which he, and all members of the proposed representative action, have a right to jury trial.

Respectfully submitted,

the law office of **DONELON, P.C.** www.donelonpc.com

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