

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
AT KANSAS CITY**

MICHAEL HUMPHREY)
19840 Park St.)
Stilwell, KS 66085)

JURY TRIAL DEMANDED

On Behalf of Himself and)
All Others Similarly Situated,)
)
Plaintiffs,)

Case No.: 09-CV-2224-EFM

vs.)

BANK MORTGAGE SOLUTIONS,)
L.L.C.)
Please Serve:)
Stacey L. Seibel)
113 13th Street)
Hays, Kansas 67601)

-and-)

BANK VI)
Please Serve:)
President Alan Eichelberger)
2020 South Ohio)
Salina, KS 67402)

Defendants.)

FIRST AMENDED COMPLAINT
Collective Action Under the FLSA

COMES NOW the Plaintiff Michael Humphrey 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 Defendants Bank Mortgage Solutions, L.L.C. (“BMS”) and Bank VI for unpaid compensation and overtime compensation and related penalties and damages. Defendants’ practice and policy is to willfully fail and refuse to properly

pay overtime compensation due Plaintiff, and all other similarly situated employees, in the Loan Consultant position (a/k/a loan originators). In particular, Defendants have policies in place that (i) fail to pay Loan Consultants overtime compensation for hours worked in excess of forty per week; (ii) fail to correctly calculate the overtime rate of pay due to Loan Consultants by failing to include commission compensation in said calculation; and (iii) failing to accurately and properly record the hours worked by Loan Consultants thereby denying them overtime compensation for work performed “off the clock.” These policies are in direct violation of the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.* (FLSA).

2. Plaintiff seeks injunctive and declaratory relief; overtime premiums for all overtime work required, suffered, or permitted by Defendants; liquidated and/or other damages as permitted by applicable law; and attorney’s fees, costs, and expenses incurred in this action.

PARTIES

3. Plaintiff Michael Humphrey currently resides at 19840 Park Street, Stilwell, Kansas. Plaintiff was employed as a Loan Consultant for the Defendant Bank VI and Defendant BMS and worked at Defendants’ facility located in Lenexa, Johnson County, Kansas.
4. Defendant Bank VI is a banking institute registered to do business and in good standing in the state of Kansas with its principle location of business at 2020 South Ohio, Salina, Kansas. Bank VI operated a business location at 14425 College Blvd., Ste. 100, Lenexa, Johnson County, Kansas.
5. Defendant Bank Mortgage Solutions, L.L.C. (“BMS”) is a limited liability corporation registered to do business and in good standing in the state of Kansas. BMS operates a

6. At all relevant times, both Defendants have been, and continue 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, Defendants have employed, and/or continues to employ, “employee[s],” including each of the putative representative action plaintiffs. At all times relevant herein, Defendants respectively 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. §1311 for the claims brought under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, *et seq.*
8. The United States District Court for the District of Kansas at Kansas City has personal jurisdiction because Defendants both conduct(ed) business within this District and division.
9. Venue is proper in this Court pursuant to 28 U.S.C. §1391(b), inasmuch as the Defendants have (had) offices, conduct(ed) business and can be found in the District of Kansas, and the cause of action set forth herein has arisen and occurred in part in the District of Kansas at Kansas City. Venue is also proper under 29 U.S.C. §1132(e)(2) because Defendants have substantial business contacts within the state of Kansas.

COUNT I – FLSA CLAIM AGAINST BANK VI

10. Plaintiff hereby incorporates paragraphs 1-9 of this First Amended Complaint into this Count.

11. Plaintiff Michael Humphrey was employed as a Loan Consultant for the Defendant Bank VI from on or about July 2006 through on or about July 1, 2007. Plaintiff, along with other Loan Consultants, worked at Defendant's branch located in Lenexa, Johnson County, Kansas.
12. On or about July 1, 2007, Defendant Bank VI sold its mortgage origination unit where the Plaintiff worked to the First National Bank of Hays, Kansas. This mortgage unit began operating on or about that date as Defendant Bank Mortgage Solutions, L.L.C., a wholly owned entity of First National Bank of Hays, Kansas.
13. Plaintiff, along with other Loan Consultants, worked at Defendant Bank VI's branch located in Lenexa, Johnson County, Kansas.
14. Like the Plaintiff, the Defendant Bank VI employed numerous other Loan Consultants who are similarly situated in that they perform essentially the same job functions and they are all governed by the same, or similar, pay policy and plan.
15. Defendant Bank VI classified its Loan Consultants as non-exempt employees under the FLSA entitled to receive overtime.
16. Under the Defendant Bank VI's compensation plan for its Loan Consultants, Defendant failed to correctly calculate the overtime rate of pay due to Loan Consultants by failing to include commission compensation in said calculation as required by the Federal Regulations, thereby, denying them overtime compensation as required under the FLSA.
17. Defendant Bank VI also failed to accurately and properly record the hours worked by Loan Consultants necessary in order to calculate the overtime compensation due to these non-exempt employees, thereby, denying them overtime compensation as required under the FLSA for work performed "off the clock."

18. Plaintiff brings this First Amended 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 Bank VI as Loan Consultants within three years from the commencement of this action who have not been correctly compensated for overtime under the FLSA.
19. 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 Plaintiffs because their claims are similar to the claims of the putative representative action plaintiffs.
20. 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.
21. The FLSA requires each covered employer, such as Defendant Bank VI, 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.
22. 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.
23. At all relevant times, Defendant Bank VI had a policy and practice of failing and refusing to pay Loan Consultants at a rate of not less than one and one-half the regular rate of pay

24. The foregoing conduct, as alleged herein, constitutes a willful violation of the FLSA within the meaning of 29 U.S.C. §255(a).
25. The Plaintiff, on behalf of himself and all similarly situated employees of Defendant Bank VI who compose the putative representative action plaintiffs, seeks 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.
26. The Plaintiff, on behalf of himself and all similarly situated employees of Defendant Bank VI who compose the putative representative action plaintiffs, seeks 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 against Defendant Bank VI:

- 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 Michael Humphrey as Representative Plaintiff of the putative representative action plaintiffs of Loan Consultants employed by Defendant Bank VI 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 Bank VI 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 – FLSA CLAIM AGAINST BMS

- 27. Plaintiff hereby incorporates paragraphs 1-26 of this First Amended Complaint into this Count.
- 28. Plaintiff Michael Humphrey was employed as a Loan Consultant for the Defendant BMS from on or about July 1, 2007 through on or about February 12, 2009. Plaintiff, along with other Loan Consultants, worked at Defendant's branch located in Lenexa, Johnson County, Kansas.

29. Like the Plaintiff, the Defendant BMS employed numerous other Loan Consultants who are similarly situated in that they perform essentially the same job functions and they are all governed by the same, or similar, pay policy and plan.
30. Defendant BMS classifies its Loan Consultants as non-exempt employees under the FLSA entitled to receive overtime.
31. Under the Defendant BMS's compensation plan for its Loan Consultants, said Loan Consultants earn the same amount of compensation regardless of the hours they work, therefore, Defendant fails to pay any premium to Loan Consultants for hours worked in excess of forty in a given workweek in violation of the FLSA.
32. Defendant BMS fails to correctly calculate the overtime rate of pay due to Loan Consultants by failing to include commission compensation in said calculation as required by the Federal Regulations, thereby, denying them overtime compensation as required under the FLSA.
33. Defendant BMS also fails to accurately and properly record the hours worked by Loan Consultants necessary in order to calculate the overtime compensation due to these non-exempt employees, thereby, denying them overtime compensation as required under the FLSA for work performed "off the clock."
34. 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 BMS as Loan Consultants within three years from the commencement of this action who have not been correctly compensated for overtime under the FLSA.
35. 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 Plaintiffs

36. 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.
37. 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.
38. 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.
39. At all relevant times, Defendant BMS had a policy and practice of failing and refusing to pay Loan Consultants 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.*
40. The foregoing conduct, as alleged herein, constitutes a willful violation of the FLSA within the meaning of 29 U.S.C. §255(a).
41. The Plaintiff, on behalf of himself and all similarly situated employees of Defendant BMS who compose the putative representative action plaintiffs, seeks damages in the

42. The Plaintiff, on behalf of himself and all similarly situated employees of Defendant BMS who compose the putative representative action plaintiffs, seeks 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 against the Defendant BMS:

- 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 Michael Humphrey as Representative Plaintiff of the putative representative action plaintiffs of Loan Consultants employed by Defendant BMS 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 BMS and their officers, agents, successors, employees, representatives, and any and all persons acting in concert with Defendant, as provided by

- 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.

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.

Designated Place of Trial

COMES NOW the Plaintiff by and through their counsel of record and hereby designate the place of trial as follows: **Kansas City, Kansas.**

Respectfully submitted,

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

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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing was sent on July 10, 2009 via email address as registered with the Court and under the requirements set forth by the District of Kansas under the policies for ECF Management and standing Orders to:

Kimberly A. Jones

Jeena B. Jenab

Husch Blackwell Sanders LLP

4801 Main Street, Ste. 1000

Kansas City, MO 64112

ATTORNEYS FOR DEFENDANT BMS