

**THE AMERICAN ARBITRATION ASSOCIATION
(EMPLOYMENT ARBITRATION RULES)**

ROBERT S. TRUE, LEIDIANA T.
LLERENA, and GUILLERMO
A. CACHO,

CASE NUMBER:

Claimants,
vs.

TIAA BANK, FSB, f/k/a Everbank
Financial Corp.,

Respondent.

DEMAND FOR ARBITRATION

Claimants, ROBERT S. TRUE, LEIDIANA T. LLERENA, and GUILLERMO A. CACHO, (collectively, referred to as “Claimants” or “Named Claimants”) by and through their undersigned attorneys, file this Demand for Arbitration against Respondent, TIAA BANK, FSB, f/k/a Everbank Financial Corp. (hereinafter referred to as “TIAA” or “Respondent”) for arbitration of the claims set forth below pursuant to the Employment Arbitration Rules and Mediation Procedure (“Employment Rules”) of the American Arbitration Association (“AAA”), and state as follows:

INTRODUCTION

This action is brought pursuant to the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, *et seq.*, as amended (“FLSA”). Claimants are former employees of Respondent TIAA who worked as mortgage loan officers, sometimes described by TIAA as “Retail Loan Officers” (“RLOs”) or similar job titles, with substantially similar or identical job descriptions/functions, and who routinely worked in excess of forty (40) hours per week but were not paid any overtime pay for these overtime hours worked. TIAA failed to pay overtime and/or minimum wages to the Claimants because TIAA misclassified Claimants, while working

as RLOs, as exempt from the overtime requirements of the FLSA. Claimants seek to recover unpaid wages, unpaid overtime compensation, liquidated damages, and attorneys' fees and costs pursuant to the FLSA.

PARTIES

1. The Claimants are individuals who resided in Broward County or Palm Beach County, Florida, at all relevant times, and are *sui juris* in all respects.

2. Robert S. True was employed by TIAA during the period from March 2014 through September 2016, during which period he held the job title of Retail Loan Originator ("RLO").

3. Guillermo A. Cacho was employed by TIAA from October 2014 through January 2016, during which period he held the job title of RLO for the Respondent.

4. Leidiana T. Llerena was employed by TIAA during the period between approximately April 2015 through January 2017, during which period she held the job title of RLO for the Respondent.

5. The Claimants are former employees of TIAA whose primary job responsibilities as a RLO included selling TIAA's loan products, collecting loan applicant financial information, and submitting loan applications for TIAA's approval (regardless of their specific titles), and such Claimants were paid in whole, or in part, on a commission basis and were not paid overtime for hours worked over forty (40) hours in a seven (7) day workweek.

6. Other current and former employees of TIAA (or Everbank) employed in the three (3) year period prior to the filing of this Demand for Arbitration, performed the same or substantially the same job functions and had the same job responsibilities as the Claimants, included Respondent's employees with the following job titles: Loan Officer, Retail Direct Loan Officer, Retail Loan Originator, Retail Loan Officer, Inside Mortgage Loan Officer, Inside Sales Loan Officer, Inside Sale Mortgage Loan Officer, Outbound Sales Associate, Residential Loan Officer, and

Mortgage Loan Officer. All TIAA with such job titles were similarly situated to the Claimants in accordance with Section 16(b) of the FLSA, 29 U.S.C. §216(b).

7. During their employment with the Respondent, the Claimants regularly worked 60 to 70 hours per week for the Respondent and were not compensated for hours worked in excess of 40 per week.

8. TIAA is a federally chartered bank and the successor in interest to Everbank, a Federal Savings Association and Everbank Financial Corp., which has its home office in Jacksonville, Duval County, Florida and is *sui juris* in all respects.

ARBITRATION AGREEMENT/APPLICABLE RULES

9. The Claimants bring this arbitration pursuant to the AAA Employment Rules.

10. Each of the Claimants received an Offer Letter from TIAA and/or TIAA's predecessor, Everbank Financial Corp., regarding their employment with TIAA.

11. TIAA and/or TIAA's predecessor, Everbank Financial Corp., prepared and distributed to the Claimants, during their employment with TIAA, a document titled Everbank Home Lending - Retail Channel Cash Incentive and Performance Guide for Retail Loan Originators ("Everbank Performance Guide"). The Everbank Performance Guide provides as follows:

Any dispute relating to or arising under or in connection with this Guide shall be submitted to mandatory arbitration in Duval County, Florida, in accordance with the Commercial Rules of the American Arbitration Association then in effect, and judgment upon the award rendered pursuant to such arbitration may be entered in any court of competent jurisdiction.

A true and correct copy of the Everbank Performance Guide is attached as Exhibit "A" and fully incorporated herein by this reference.

12. AAA Commercial Rule R-1 specifically states: "A dispute arising out of an employer promulgated plan will be administered under the AAA's Employment Arbitration Rules

and Mediation Procedures.” Because the dispute at issue arises out of an employer promulgated plan, to wit: the Everbank Performance Guide, the AAA Employment Rules apply.

FLSA APPLICABILITY ALLEGATIONS

13. At all material times, TIAA has acted, directly or indirectly, in the interest of an employer with respect to Claimants.

14. At all material times, TIAA has been an “employer” of the Claimants within the meaning of 29 U.S.C. § 203(d).

15. At all material times, TIAA has been an “enterprise” within the meaning of 29 U.S.C. § 203(r).

16. At all materials times, TIAA has been an enterprise engaged in commerce or in the production of goods for commerce within the meaning of 29 U.S.C. § 203(s)(1).

17. At all material times, the gross sales volume of TIAA has been in excess of \$500,000.00 per annum.

18. At all material times, the Named Claimants and the Nationwide Collective Claimants were individual, non-exempt employees of TIAA who were engaged in commerce or in the production of goods for commerce, and eligible for protection under the FLSA.

FLSA CLAIM ALLEGATIONS

19. TIAA is involved in the business of selling loans and financial services throughout the country.

12. As retail loan officers or RLOs, the Named Claimants and the Nationwide Collective Claimants’ primary duties were marketing/selling TIAA’s loan products, collecting customer financial information, and submitting loan applications for TIAA’s approval. Claimants were primarily or wholly paid on a commission basis. Commissions were paid on a per-

transaction basis.

20. TIAA paid Named Claimants and the Nationwide Collective Claimants wholly on a draw against commission basis, based on each transaction/loan obtained, funded, and closed.

21. To perform their primary duties as RLOs, the Named Claimants and the Nationwide Collective Claimants were routinely required to work over forty (40) hours per week, but TIAA did not pay Named Claimants and the Nationwide Collective Claimants overtime wages for performing work for the benefit of TIAA, their employer, in excess of forty (40) hours each week.

22. TIAA knew that the Named Claimants and the Nationwide Collective Claimants worked in excess of forty (40) hours per week and they allowed and directed them to do so.

23. Upon information and belief, TIAA management informed the Named Claimants and the Nationwide Collective Claimants in their initial offer letters, and later in other TIAA authored materials (i.e., policy and procedure manuals, etc.) that they were exempt from the requirements of the FLSA, and actively and affirmatively dissuaded Named Claimants and the Nationwide Collective Claimants from recording the actual hours they worked based on TIAA's assertion that they were exempt employees not entitled to overtime compensation pursuant to the FLSA.

24. Because the Named Claimants and the Nationwide Collective Claimants were paid in whole or in part on a commission basis, for certain weeks they worked, TIAA did not pay Named Claimants and the Nationwide Collective Claimants when they were not paid enough to meet the minimum wage requirements of the FLSA. The realized hourly rate of pay fell below the applicable minimum wage during many pay periods.

25. The Named Claimants and the Nationwide Collective Claimants were

compensated as follows: (a) during an initial period of about three or four months, TIAA paid each Named Claimants and the Nationwide Collective Claimants a monthly “draw”, plus commissions; and (b) after such initial period, TIAA paid each Named Claimants and the Nationwide Collective Claimants for each pay period the greater of a \$500 “draw” (in most cases) or the amount of commissions earned, subject to various adjustments.

COLLECTIVE ACTION ALLEGATIONS

General Allegations

26. The foregoing paragraphs are incorporated herein as if set forth in their entirety.

27. Named Claimants bring this action for violations of the FLSA as a collective action pursuant to Section 16(b) of the FLSA, 29 U.S.C. §216(b), on behalf of all RLOs employed by TIAA/Everbank, at all times material hereto described as RLO’s, or employees with similar job titles (as referenced in paragraph 6 above), with substantially similar or identical job descriptions/functions, who were employed by TIAA (or its predecessor, Everbank) nationwide within the last three (3) years (members of this putative class are referred to as “Nationwide Collective Claimants”).

28. Named Claimants’ claims are typical of the claims of Nationwide Collective Claimants, because Named Claimants, like all Nationwide Collective Claimants, were employees of Respondent to whom Respondent failed to pay minimum wage and overtime compensation as required by the FLSA in the last three years.

29. Named Claimants will fairly and adequately protect the interests of Nationwide Collective Claimants, because Named Claimants’ interests are coincident with, and not antagonistic to, those of the class. Named Claimants have retained counsel with substantial experience in the prosecution of claims involving employee wage disputes.

30. No difficulties are likely to be encountered in the management of this collective

action that would preclude its maintenance as a collective action. The class will be easily identifiable from Respondent's records.

31. Similarly situated employees are known to Respondent, are readily identifiable by Respondent, and can be located through Respondent's records. Based on information and belief, the number of potential Nationwide Collective Claimants is estimated to be in excess of 1,000 individuals.

32. Questions of law and fact that are common to the members of the Nationwide Collective Claimants predominate over questions that affect only individual members of the Nationwide Collective Claimants. Among the questions of law and fact that are common to the Nationwide Collective Claimants are whether Respondent failed to pay the Named Claimants and the group of putative Nationwide Collective Claimants' minimum wage and overtime for all hours worked, as required by the FLSA, by: (1) unlawfully and knowingly requiring significant off-the-clock work as a routine part of the employees' employment; (2) treating said employees as "exempt" under the FLSA, (3) not recording the Claimant's work hours as required by the FLSA, and ultimately not paying any overtime as a company-wide policy, thereby evading the requirements of the FLSA.

33. Therefore, Named Claimants should be permitted to bring this action as a collective action for and on behalf of themselves and those employees similarly situated, pursuant to the "opt-in" provisions of the FLSA, 29 U.S.C. §216(b).

COUNT I - FAILURE TO PAY WAGES IN ACCORDANCE WITH THE FAIR LABOR STANDARDS ACT (NAMED CLAIMANTS)

34. Claimants re-assert and re-allege their allegations as set forth in paragraphs 1 through 34 above.

35. Moreover, TIAA has violated and is violating Section 6 of the FLSA, 29 U.S.C.

§§, and §207(a) by employing employees in an enterprise engaged in commerce or in the production of goods for commerce within the meaning of the FLSA, by failing to pay minimum wages due to such employees also failed to pay minimum wages in compliance with the FLSA during many of these weeks. TIAA has acted willfully in failing to pay Claimants.

36. TIAA has violated and is violating the provisions of Sections 7 of the FLSA, 29 U.S.C. §§, and §207(a)(2) by employing employees in an enterprise engaged in commerce or in the production of goods for commerce within the meaning of the FLSA, for workweeks longer than forty (40) hours without compensating such employees for their work in excess of forty (40) hours per week at rate no less than one-and-a-half times the regular rates for which they were employed.

37. TIAA knowingly, willfully, or with reckless disregard carried out its illegal pattern or practice of failing to pay Claimants their minimum wage and overtime compensation.

38. Claimants have retained the undersigned attorneys to represent them in this case and are obligated to pay their attorneys' fees and costs.

WHEREFORE, Named Claimants respectfully request for a Final Award against TIAA as follows:

- a. For an Order pursuant to Section 16(b) of the FLSA finding TIAA liable for unpaid back wages due to Named Claimants and for liquidated damages equal in amount to the unpaid compensation due to Named Claimants for the three (3) years prior to the date of filing of the instant Arbitration Demand;
- b. Awarding Named Claimants the costs of this arbitration proceeding;
- c. Awarding Named Claimants their attorneys' fees and expenses;
- d. Awarding Named Claimants pre-judgment and post-judgment interest at the

highest rates allowed by law; and

- e. Granting such additional relief as may be necessary and appropriate.

**COUNT II - FAILURE TO PAY WAGES IN ACCORDANCE WITH THE FAIR
LABOR STANDARDS ACT (COLLECTIVE CLASS MEMBERS)**

39. Claimants reassert and reallege all allegations contained in Paragraphs 1 through 33 above, as set forth herein, and further allege:

40. At all times material hereto, TIAA did not pay the Nationwide Collective Claimants either minimum wage and/or overtime wages at the rate of one and one-half times their regular hourly rate of pay for hours the Nationwide Collective Claimants worked in excess of forty (40) hours per week.

41. All records regarding the number of hours Nationwide Collective Claimants worked and the amount of compensation Defendants paid Nationwide Collective Claimants are within TIAA's possession, custody, or control. Therefore, Nationwide Collective Claimants cannot specifically state their damage claim. Nationwide Collective Claimants will attempt to obtain information, through discovery, necessary to state their claim(s) for damages with specificity and will seek leave to amend the instant Demand for Arbitration accordingly.

WHEREFORE, Claimants, on behalf of the Nationwide Collective Claimants, pray for a Final Award against TIAA as follows:

a. For an Order granting certification of the collective class and requiring that notice be sent of the instant arbitration to the Nationwide Collective Claimants pursuant to 29 U.S.C. §216(b), so as to allow the Nationwide Collective Claimants to opt in to the instant arbitration;

b. For an Order pursuant to Section 16(b) of the FLSA finding TIAA liable for unpaid back wages due to Nationwide Collective Claimants and for liquidated damages equal in amount to the unpaid compensation found due to Nationwide Collective Claimants for the 3 years prior

to the date of filing of the instant arbitration demand; and

c. For an Order awarding Nationwide Collective Claimants the costs of this arbitration proceeding;

d. For an Order awarding Nationwide Collective Claimants their attorneys' fees and expenses;

e. For an Order awarding Nationwide Collective Claimants pre-judgment and post-judgment interest at the highest rates allowed by law; and

f. For an Order granting such other and further relief as may be necessary and appropriate.

Respectfully Submitted this 5th day of September, 2018,

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