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Employment Arbitration Rules Demand for Arbitration

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Mediation: If you would like the AAA to contact the other parties and attempt to arrange mediation, please check this box. There is no additional administrative fee for this service.

Parties (Claimant)

Pamela Herrington, individually and on behalf of class

Name of Claimant:

27035 N. 56th Street

Address:

Scottsdale AZ 85266

City: State Zip:

480-294-4989

Phone: Fax:

pamh@wildblue.net

Email Address:

Dan Getman, Matthew Dunn

Representative's Name (if known):

Getman & Sweeney, PLLC

Firm (if applicable):

9 Paradise Lane

Address:

New Paltz NY 12561

City: State Zip:

845-255-9370 845-255-8649

Phone: Fax:

dgetman@getmansweeney.com mdunn@getmansweeney.com

Email Address:

Parties (Respondent):

Waterstone Mortgage Corporation

Name of Respondent:

1133 Quail Court

Address:

Pewaukee WI 53072

City: State Zip:

Phone: Fax:

Email Address:

Ari Karen

Representative's Name (if known):

Offit Kurman 8171 Maple Lawn Boulevard, Ste. 200

Firm (if applicable):

8171 Maple Lawn Boulevard, Ste. 200

Address:

Maple Lawn MD 20759

City: State Zip:

301.575.0340 301.575.0335

Phone: Fax:

akaren@offitkurman.com

Email Address:

Claim: What was the employee's annual wage range?

Note: This question is required by California law.

Less than \$100,000 \$100,000 - \$250,000 Over \$250,000

Amount of Claim: class claim - unknown

Claim involves:

Statutorily Protected Rights Non-statutorily protected rights

In detail, please describe the nature of each claim. You may attach additional pages if necessary:

Respondent failed to pay loan officers (and similarly titled employees) overtime for hours over 40, minimum wage for each hour worked, and commissions as stated in the employment agreement. The allegations are set forth in detail in the attached complaint, originally filed in federal court.

Other Relief Sought: Arbitration Costs Attorney's Fees Interest Punitive/Exemplary Damages Other:

Neutral: Please describe the qualifications for arbitrator(s)

to hear this dispute:

Class action panel

Wage Hour experience

Hearing: Estimated time needed to present case at hearing:

Hours: Days: 5.00

Hearing locale: Wisconsin

Requested by Claimant Locale provision included in the contract

Filing Fee: Employer-Promulgated Plan fee requirement or \$175 (max amount per AAA rules)

Standard Fee Schedule for individually negotiated contracts Flexible Fee Schedule for individually negotiated contracts

Amount Tendered: \$3,525.00

Notice: To begin proceedings, please send a copy of this Demand and the Arbitration Agreement, along with the filing fee as provided for in the Rules, to: American Arbitration Association, Case Filing Services, 1101 Laurel Oak Road, Suite 100 Voorhees, NJ 08043. Send the original Demand to the Respondent.

Pursuant to Section 1284.3 of the California Code of Civil Procedure, consumers with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to a waiver of arbitration fees and costs, exclusive of arbitrator fees. This law applies to all consumer agreements subject to the California Arbitration Act, and to all consumer arbitrations conducted in California. Only those disputes arising out of employer promulgated plans are included in the consumer definition. If you believe that you meet these requirements, you must submit to the AAA a declaration under oath regarding your monthly income and the number of persons in your household. Please contact the AAA's Western Case Management Center at 1-877-528-0879. If you have any questions regarding the waiver of administrative fees, AAA Case Filing Services can be reached at 877-495-4185.

Signature of claimant or representative:

Dan Getman

Date: 3/23/12

Jt. Stipulated Exh. O

Exhibit

A

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN**

**PAMELA HERRINGTON, individually and on behalf of all others
similarly situated,**

Plaintiff(s),

-against-

3:11-cv-00779

WATERSTONE MORTGAGE CORPORATION,

Defendant.

CLASS ACTION COMPLAINT

INTRODUCTION

1. This case is brought to remedy the failure of Defendant WATERSTONE MORTGAGE CORPORATION (“WATERSTONE”), to pay Plaintiffs minimum wages and overtime premium pay as required by the Fair Labor Standards Act (FLSA), 29 U.S.C. §201 et seq., and the common law of contract and quasi-contract. Plaintiffs are mortgage loan officers (“loan officers”) for WATERSTONE. Like loan officers throughout the mortgage industry, they work very long hours.
2. Prior to April 2011, WATERSTONE treated its mortgage loan officers as exempt from the FLSA and failed to record their hours of work. On March 24, 2010, the U.S. Department of Labor issued an administrative Interpretation of the FLSA declaring that loan officers were not administratively exempt from the FLSA and withdrawing a prior Wage Hour Opinion Letter to the contrary. Upon information and belief, WATERSTONE was well aware of the change, which was well publicized in the mortgage industry. Nevertheless, WATERSTONE did not begin to record loan officers hours of work and did not move to pay loan officers overtime for hours over forty in a

work week.

3. In or about April, 2011, WATERSTONE explicitly recognized that their loan officers are not exempt from the FLSA and sent its loan officers a new written employment agreement, under which it changed its compensation structure to pay them an hourly wage set at the minimum wage rate plus a monthly commission, from which the hourly pay during that pay period was to be deducted. WATERSTONE then began treating its loan officers as FLSA non-exempt hourly workers requiring that it pay loan officers the minimum wage for each work week, with overtime at the rate of time and one half for each hour over forty worked in a workweek. Because it had begun paying loan officers hourly, and because WATERSTONE recognized that loan officers are not exempt from the FLSA, WATERSTONE was required to pay the minimum wage for each hour worked and time and one half for all hours over forty worked in a workweek.
4. After the change in April 2011, to evade its FLSA obligations as well as its contractual promise to loan officers, WATERSTONE pressured its loan officers to underreport their work hours. WATERSTONE and its officials and supervisors told loan officers that no matter how many hours they worked, they should not report more than eight hours in a day, and it pressured them not to report more than forty hours per week on their time sheets. In fact, for a period of time, WATERSTONE's time keeping system would not allow Loan Officers to report more than 40 hours in a week.
5. Commissioned loan officers must work long hours, well over forty in a week, in order to make money, since they must engage in extensive promotional activities necessary to originating loans, activities such as meeting with realtors and attorneys, attending open houses, networking, and working to process their loans through to closing.

6. WATERSTONE requires loan officers to bear expenses which are for the benefit and convenience of WATERSTONE, such as licensing, meeting, travel, internet, and cell phone expenses, among others. These expenses for the benefit and convenience of WATERSTONE act as deductions or *de facto* deductions from the minimum wage earnings of the Plaintiffs.
7. WATERSTONE knew or should have known that loan officers worked hours in excess of those they reported, because WATERSTONE pressured them to underreport their hours and WATERSTONE's time keeping system would not allow recording hours over forty. WATERSTONE knew that loan officers had worked long hours prior to moving to the new compensation system, that in fact loan officers routinely worked 8-12 hours per day, 5-6 days per week. Defendant WATERSTONE knows that loan officers never work routine hours, and because WATERSTONE had not changed loan officers' responsibilities when it moved to the new compensation system, they knew that loan officers typically work well over 40 hours in a week.'
8. WATERSTONE also knew or should have known that Plaintiffs were required to bear WATERSTONE's business expenses.
9. While WATERSTONE's contract with loan officers stated that "Commissions are calculated by deducting the Base Pay *paid during the current pay period* from the aggregate commission calculated pursuant to Addendum A." WATERSTONE uses a bi-weekly pay period and pays commissions on a monthly basis, if any were earned. However, WATERSTONE deducted from the commissions it paid the Base Pay earned by loan officers over the entire month. If Base Pay exceeded the commission due in any given month, such Base Pay amounts were carried forward until commissions exceeded

the aggregate Base Pay made to date.

10. Plaintiff seek unpaid wages for the overtime hours they worked but were pressured not to report, liquidated damages, costs and attorneys' fees as well as declaratory relief. Plaintiff brings this claim individually and on behalf of other similarly situated employees under the collective action provisions of the FLSA. 29 U.S.C. § 216(b).
11. In addition, by the conduct described in this Class Action Complaint, Defendant has violated the common law of contract as well as the wage and hour laws of the various states in which the loan officers worked, by failing to pay their employees the promised overtime compensation at the rate of time and one half, and by making *de facto* unlawful deductions from the Plaintiff(s)' minimum wages, by failing to pay for the employers' business expenses which were borne by the Plaintiff(s), and by paying commissions in an amount below that provided by the contract it entered into with the Plaintiffs.
12. Defendant has also violated the common law doctrines of contract and quasi-contract by failing to honor its promise to pay premium pay at the rate of time and one half, and by failing to reimburse Plaintiff for the employers' expenses. Plaintiff HERRINGTON brings these claims individually and on behalf of other similarly situated employees under the class action provisions of Fed. R. Civ. P. 23.

JURISDICTION

13. Jurisdiction is conferred upon this Court by 29 U.S.C. §216(b) of the Fair Labor Standards Act, by 28 U.S.C. §1331, this action arising under laws of the United States, and by 28 U.S.C. §1337, this action arising under Acts of Congress regulating commerce. Jurisdiction over Plaintiff(s)' claims for declaratory relief is conferred by 28 U.S.C. §§2201 and 2202.

14. This Court has supplemental jurisdiction over the state claim raised by virtue of 28 U.S.C. §1367(a).

VENUE

15. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).
16. Upon information and belief, Defendant WATERSTONE resides in this district.
17. Plaintiff labored for Defendant within this District.
18. The cause of action set forth in this Complaint arose in this District.

PARTIES

A. Plaintiff(s)

19. Plaintiff HERRINGTON was an employee of Defendant. Her "Consent to Sue" is attached to the back of this complaint.
20. Plaintiff HERRINGTON worked for Defendant in the state of Arizona.
21. Plaintiff HERRINGTON was engaged in commerce in her work for Defendant.

B. Represented Parties under FLSA

22. The term "Plaintiff(s) " as used in this complaint refers to the named plaintiff(s) and any additional represented class members pursuant to the collective action provision of 29 U.S.C. §216(b).
23. The named plaintiff(s) represent current and former "all loan officers who have worked for WATERSTONE between March 24, 2010 and the date of final judgment in this matter in a non-supervisory capacity."
24. The named Plaintiff bring this case as a collective action for class members throughout the U.S. as defined in the preceding paragraph, under the collective action provision of the FLSA as set forth in 29 U.S.C. §216(b).

C. Class Action Allegations

25. Plaintiff HERRINGTON brings the Second, Third, and Fourth Causes of Action under Rule 23 of the Federal Rules of Civil Procedure, on behalf of herself and a class of persons consisting of “all mortgage loan officers who have worked for WATERSTONE or WATERSTONE since March 24, 2010 and the date of final judgment in this matter in a non-supervisory capacity.”
26. Excluded from the Class are Defendant’s legal representatives, officers, directors, assigns, and successors, or any individual who has, or who at any time during the class period has had, a controlling interest in Defendant; the Judge(s) to whom this case is assigned and any member of the Judges’ immediate family; and all persons who will submit timely and otherwise proper requests for exclusion from the Class.
27. The persons in the Class identified above are so numerous that joinder of all members is impracticable. Although the precise number of such persons is not known to Plaintiff(s), the facts on which the calculation of that number can be based are presently within the sole control of Defendant.
28. Upon information and belief, the size of the Class is at least 100 loan officers.
29. Defendant acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole.
30. The Second Cause of Action is properly maintainable as a nationwide class action under Federal Rule of Civil Procedure 23(b) (3). There are questions of law and fact common to the Class that predominate over any questions solely affecting individual members of the Class, including but not limited to:

- a. whether Defendant pressured Plaintiff not to correctly report their hours;
- b. whether Defendant failed to keep true and accurate time records for all hours worked by the Plaintiff and the Class;
- c. what proof of hours worked is sufficient where an employer fails in its duty to maintain true and accurate time records;
- d. whether Defendant failed and/or refused to pay the Plaintiff and the Class overtime pay for hours worked in excess of 40 hours per workweek;
- e. the nature and extent of Class-wide injury and the appropriate measure of damages for the Class;
- f. whether Defendant's policy of failing to pay overtime was instituted willfully or with reckless disregard of the law;
- g. whether Defendant correctly calculated and compensated the Plaintiff and the Class for hours worked in excess of 40 per workweek;
- h. whether Defendant failed to pay all the commission earnings to which it had agreed in its employment agreement with Plaintiffs; and
- i. whether Defendant wrongfully failed to reimburse loan officers for employer expenses which effected a *de facto* deduction from the wages due to Plaintiff.

31. The claims of the Plaintiff are typical of the claims of the Class they seek to represent. The Plaintiff and the Class members work or have worked for Defendant and have been subjected to their policy and pattern or practice of failing to pay overtime wages for hours worked in excess of 40 hours per week. Defendant acted and refused to act on grounds generally applicable to the Class, thereby making declaratory relief with respect to the

Class appropriate.

32. The Plaintiff will fairly and adequately represent and protect the interests of the Class.
 - a. The Plaintiff understands that, as class representatives, they assume a fiduciary responsibility to the Class to represent its interests fairly and adequately.
 - b. The Plaintiff recognizes that as a class representative, she must represent and consider the interests of the Class just as she would represent and consider her own interests.
 - c. The Plaintiff understands that in decisions regarding the conduct of the litigation and its possible settlement, she must not favor her own interests over those of the Class.
 - d. The Plaintiff recognizes that any resolution of a class action lawsuit, including any settlement or dismissal thereof, must be in the best interests of the Class.
 - e. The Plaintiff understand that in order to provide adequate representation, she must remain informed of developments in the litigation, cooperate with class counsel by providing them with information and any relevant documentary material in her possession, and testify, if required, in a deposition and in trial.
33. The Plaintiff has retained counsel competent and experienced in complex class action employment litigation.
34. A class action is superior to other available methods for the fair and efficient adjudication of this litigation - particularly in the context of wage litigation like the present action, where individual Plaintiffs may lack the financial resources to vigorously prosecute a lawsuit in federal court against a corporate defendant. The members of the Class have been damaged and are entitled to recovery as a result of Defendant's common and

uniform policies, practices, and procedures. Although the relative damages suffered by individual members of the Class are not *de minimis*, such damages are small compared to the expense and burden of individual prosecution of this litigation against WATERSTONE. In addition, class treatment is superior because it will obviate the need for unduly duplicative litigation that might result in inconsistent judgments about Defendant' practices.

D. Defendant

35. Defendant WATERSTONE lists its principal office address as 1133 Quall Court, Pewaukee, Wisconsin 53072. Upon information and belief, Defendant WATERSTONE is a corporation having its headquarters and office in Wisconsin and places of business in Wisconsin.
36. Defendant WATERSTONE is southeastern Wisconsin's largest mortgage lender with more than \$1.1 billion in annual origination volume. It is a wholly owned subsidiary of an FDIC bank, WaterStone Bank SSB (NASDAQ: WSBF) which has assets of more than \$1.7 billion. WATERSTONE has more than 400 employees in 12 states: Arizona, Colorado, Florida, Iowa, Idaho, Illinois, Maryland, Minnesota, Ohio, Pennsylvania, Tennessee, and Wisconsin.
37. Upon information and belief, Defendant WATERSTONE grossed more than \$500,000 in each of the last ten calendar years.
38. Defendant WATERSTONE is an enterprise engaged in interstate commerce for purposes of the Fair Labor Standards Act.
39. WATERSTONE employed Plaintiffs and participated directly in employment decisions

regarding the Plaintiffs for which they seek redress in this case.

40. All actions and omissions described in this complaint were made by Defendant directly or through its supervisory employees and agents.

FACTS

41. Plaintiff HERRINGTON began employment with Defendant in or about January 28, 2011. Plaintiff HERRINGTON left employment with Defendant on or about October 7, 2011.
42. Plaintiffs are or were loan officers employed by WATERSTONE to originate mortgage loans.
43. Plaintiff(s)' job responsibilities were established by Defendant WATERSTONE.
44. Plaintiff and class members regularly worked more than 40 hours per week for Defendant. Plaintiffs regularly work 60 or more hours per week.
45. Prior to April 2011, WATERSTONE treated its mortgage loan officers as exempt from the FLSA.
46. From January to April 2011, Plaintiff HERRINGTON was paid on a salary basis.
47. On March 24, 2010, the U.S. Department of Labor issued an administrative Interpretation of the FLSA declaring that loan officers were not administratively exempt from the FLSA and withdrawing a prior Wage Hour Opinion Letter to the contrary.
48. Upon information and belief, WATERSTONE was well aware of the change, which was well publicized in the mortgage industry. Nevertheless, WATERSTONE did not begin to record loan officers hours of work and did not move to pay loan officers overtime for hours over forty in a work week until April 2011.
49. The recording and tracking of plaintiff loan officers' work is administered and monitored

by Defendant WATERSTONE on computerized time keeping systems.

50. Defendants and their pay systems have refused to permit Plaintiffs to enter their actual hours of work to the extent these hours exceed forty in a work week.
51. In or about April 2011, Defendant WATERSTONE changed its compensation structure, sending each loan officer a new written employment agreement to be executed by the company and the loan officer. The new employment agreement agreed to pay loan officers under a combination commission and hourly wage structure. According to the new agreement, the pay would consist of a monthly commission, from which the hourly pay during that current pay period was to be deducted.
52. Beginning in April 2011, WATERSTONE treated loan officers as FLSA non-exempt hourly workers requiring that it pay loan officers at least the minimum wage for each work week, with overtime at the rate of time and one half for each hour over forty worked in a workweek.
53. WATERSTONE promised its loan officers that they would receive a regular hourly rate at or near the minimum wage rate.
54. To evade its FLSA obligations as well as its contractual promise to loan officers, WATERSTONE pressured its loan officers to underreport their work hours.
55. WATERSTONE officials told loan officers not to correctly report their hours. They told Plaintiffs that no matter how many hours they worked, they should not report more than eight hours in a work day. The Plaintiffs were pressured not to report more than forty on their time sheets.
56. Loan officers must work long hours, well over forty in a week, in order to make commission income exceeding their floor, since they must engage in extensive

promotional activities necessary to originating loans, activities such as meeting with realtors and attorneys, attending open houses, networking, etc. They must also engage in extensive loan processing activities to see that the loans they originate are processed through to closing.

57. Defendant knew or should have known that Plaintiff and class members were working in excess of forty hours in a work week.
58. Loan officers told Defendant that they were working overtime hours but reporting only forty.
59. Defendant knew or should have known that Plaintiff and class members were not recording all the hours they worked, particularly those in excess of forty hours in a week.
60. Defendant knew or should have known that Plaintiff were recording their hours of work in rote fashion even though a loan officers' hours are never routine, since they must answer calls from prospective customers at all hours of the day, including in the evening and on weekends.
61. WATERSTONE requires loan officers to bear expenses which are for the benefit and convenience of WATERSTONE, such as travel expenses, internet, training, and cell phone expenses, among others.
62. Defendant discouraged Plaintiff and class members from recording hours of work in excess of forty in a work week.
63. Upon information and belief, Defendant failed to keep accurate time records for all the work Plaintiff and the class members did on a daily or weekly basis.
64. Defendant failed to pay the Named Plaintiff and the class members overtime compensation at the rate of time and one-half for all hours worked over 40 in a week.

65. Defendant did not pay Plaintiff and the class members their wages "free and clear."
66. WATERSTONE's contract with loan officers stated that "Commissions are calculated by deducting the Base Pay *paid during the current pay period* from the aggregate commission calculated pursuant to Addendum A."
67. WATERSTONE uses a bi-weekly pay period and pays commissions on a monthly basis, if any were earned.
68. From the commissions it was to pay, WATERSTONE deducted the Base Pay earned by loan officers over the entire month as well as any base pay from prior months not yet counted against any commissions, not merely the Base pay "paid during the current pay period." If Base Pay exceeded the commission due in any given month, such excess Base Pay amounts were carried forward until commissions exceeded the aggregate Base Pay made to date.
69. Defendant required Plaintiff to purchase tools of the trade for their work for Defendant, which included cell phones, video conferencing, and computers.
70. Defendant failed to reimburse Plaintiff for their purchase of all work tools and supplies.
71. Beginning in April 2011, Defendant promised to pay Plaintiff a set hourly rate (generally set at or near the minimum wage) for all straight time hours and time and one half their regular hourly rate for hours worked over 40 in a week.
72. This promise was stated in a contract given to each loan officer.
73. Defendant failed to pay Plaintiff their regular rate for each hour they worked.
74. Defendant's stated policy was to pay Plaintiffs time and one half their regular hourly rate for hours worked over 40 in a week.
75. Defendant did not pay Plaintiffs time and one half their regular hourly rate for hours worked

over 40 in a week.

76. Defendant did not pay Plaintiffs minimum wages or overtime in compliance with their promise to do so or in compliance with federal law.
77. Defendant's failure to pay Plaintiff and class members the proper wages required by law was willful.

CLASS-WIDE FACTUAL ALLEGATIONS

78. Defendant failed to accurately record Plaintiffs start and stop time and daily and weekly hours of work.
79. Defendant knew or should have known that Plaintiffs worked hours over forty and worked hours that they did not report.
80. Upon information and belief, it was Defendant's willful policy and pattern or practice not to pay its employees, including Plaintiffs, the Class Members, and the FLSA Collective Members (collectively "Class Members"), for all hours of work at their promised rate of pay, at the regular rate of pay, or pay an overtime premium for all work that exceeded 40 hours in a week, or in the amount agreed to by its employment agreement with loan officers.
81. Defendant's unlawful conduct, as set forth in this Class Action Complaint, has been intentional, willful, and in bad faith, and has caused significant damages to Plaintiff and the Class Members.
82. Defendant was aware or should have been aware that the law required it to pay non-exempt employees, including Plaintiff and the Class Members, an overtime premium of time and one half for all work-hours it suffered or permitted in excess of 40 per workweek. Upon information and belief, Defendant applied the same unlawful policies and practices to its employees in every state in which it operated.

**FIRST CAUSE OF ACTION
(FAIR LABOR STANDARDS ACT)**

83. Defendant failed to pay overtime wages to Plaintiffs in violation of the Fair Labor Standards Act, 29 U.S.C. §207 et seq. and its implementing regulations.
84. Defendant's failure to pay proper wages for each hour worked over 40 per week was willful within the meaning of the FLSA.
85. Defendant failed to pay minimum wages to Plaintiffs in violation of the Fair Labor Standards Act, 29 U.S.C. §206 et seq. and its implementing regulations.
86. Defendant's failure to pay proper minimum wages for each hour worked per week was willful within the meaning of the FLSA.
87. Defendant's failure to comply with the FLSA overtime and minimum wage protections caused Plaintiff to suffer loss of wages and interest thereon.

**SECOND CAUSE OF ACTION
(COMMON LAW CONTRACT
AND/OR QUASI-CONTRACT)**

88. Plaintiffs re-allege and incorporate by reference all allegations in all preceding paragraphs.
89. Defendant promised orally and in writing to pay Plaintiffs at a set hourly rate for each hour of work up to forty in a work week, and at the rate of time and one half for hours worked over forty.
90. Defendant promised in writing to pay Plaintiffs a commission in accordance with an attached commission schedule deducting only the Base Pay *paid during the current pay period* yet it violated its written promise by also deducting Base Pay from prior pay periods, thereby failing to pay all the commissions it was contractually obligated to pay.
91. Plaintiffs performed labor for Defendant knowing of Defendant's promise.
92. Defendant failed to pay the promised regular rate and the overtime premium wages for the hours it knew or should have known that Plaintiffs worked in violation of their promise to pay

such wages.

93. Defendant's failure to pay overtime as promised violated Plaintiffs' rights under the common law doctrines of contract and/or quasi-contract.

WHEREFORE, Plaintiff requests that this Court enter an Order:

1. Declaring that the Defendant violated the Fair Labor Standards Act;
2. Declaring that the Defendant's violations of the FLSA were willful;
3. Granting judgment to Plaintiff and represented parties for their claims of unpaid wages as secured by the Fair Labor Standards Act, as well as an equal amount in liquidated damages;
4. Awarding Plaintiff and represented parties their costs and reasonable attorneys' fees;
and
5. With respect to the Class:
 - A. Certification of this action as a class action;
 - B. Designation of Plaintiff as Class Representatives;
 - C. A declaratory judgment that the practices complained of herein are unlawful under appropriate state law, including contract and state minimum wage and overtime guarantees;
 - D. Granting Plaintiff appropriate equitable and injunctive relief to remedy Defendant's violations of state law, including but not necessarily limited to an order enjoining Defendant from continuing its unlawful practices;
 - E. Granting an award of damages, liquidated damages, appropriate statutory penalties, and restitution to be paid by Defendant according to proof;
 - F. Granting an award of Pre-Judgment and Post-Judgment interest, as provided

- by law;
- G. Granting such other injunctive and equitable relief as the Court may deem just and proper; and
- H. Awarding Plaintiff attorneys' fees and costs of suit, including expert fees and costs.

Dated: November 23, 2011

Respectfully Submitted,



Dan Getman (Pro Hac Vice)
GETMAN & SWEENEY, PLLC
9 Paradies Lane
New Paltz, NY 12561
phone: (845)255-9370
fax: (845) 255-8649
Email: dgetman@getmansweeney.com

ATTORNEYS FOR PLAINTIFF(S)

CONSENT TO SUE UNDER THE FLSA

I, Pamela Herrington, hereby consent to be a plaintiff in an action under the Fair Labor Standards Act, 29 U.S.C. §201 et seq., to secure any unpaid wages, minimum wages, overtime pay, liquidated damages, attorneys' fees, costs and other relief arising out of my employment with Waterstone Mortgage Corporation and any other associated parties.

I authorize Getman & Sweeney, PLLC, and any associated attorneys as well as any successors or assigns, to represent me in such action.

Dated: 10.31.2014

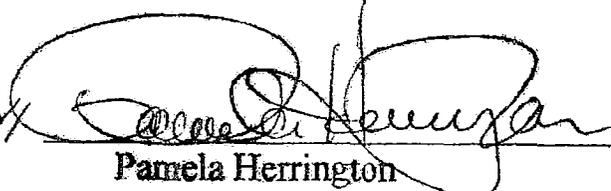

Pamela Herrington

Exhibit B

EXHIBIT A

1 of 11

**WATERSTONE MORTGAGE CORPORATION
LOAN ORIGINATOR EMPLOYMENT AGREEMENT**

This Employment Agreement ("Agreement") is made and entered into this 7 day of April, 2011, and between Waterstone Mortgage Corp., its subsidiaries, successors and/or assigns (together "Waterstone" or the "Employer" or "Company") and Pamela Herrington Loan Officer ("Employee") (collectively referred to as the "Parties").

1. AGREEMENT OF AT-WILL EMPLOYMENT

Except for the provisions relating to the protection of Waterstone's Confidential and Proprietary information, trade secrets, and the non-solicitation and non-competition restrictions and covenants contained herein which continue beyond the termination of employment, either party may terminate this contract at any time with or without notice for any or no reason. There is no guarantee of continued employment and the Company does not have term employment contracts, oral or written, express or implied.

2. SCOPE OF AUTHORITY

Employee acknowledges that he/she has no right or authority, express or implied, to bind or create any obligation on the part of Waterstone, without the express written consent of an officer of the Company.

3. EFFECTIVE DATE

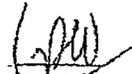
This plan is effective as of April 1st, 2011 and supersedes all prior Loan Officer Employment Agreements and Compensation Plans and addenda thereto.

4. ELIGIBILITY

Designated employees in a Mortgage Loan Originator, Sales Manager, and Production Manager jobs are eligible to participate in the Plan. Employees are required to sign the Addendums A, B, and C attached hereto in order to be eligible to participate in the plan. Waterstone may modify the plan at any time without the employee's consent and without prior notice.

5. DUTIES

- a. Employee shall be employed as a Loan Officer for Employer. Employee's primary duties shall be to utilize his/her knowledge, training and experience to solicit, originate, sell and facilitate the processing and closing of loan products and financing of residential real estate transactions on behalf of the Company's customers.
- b. Employee acknowledges s/he does not and will not work more than 40 hours per week, unless additional hours are approved in advance and in writing by his/her Supervisor. These hours do not include lunch breaks or other daily breaks. Employee must at the end of each week submit a time sheet electronically via the company's payroll system that accurately reflects all hours worked and each such submission shall constitute Employee's certification as to the number of hours worked.
- c. Employee understands that it will be his/her responsibility to develop referral sources and originate loans by engaging with the public outside and away from Waterstone's offices.
- d. Employee agrees to devote Employee's time, attention and energy to the position set forth


Initials

- with Waterstone, Employee shall not enter into or continue any employment or render any service for compensation or remuneration to any person or entity, except Waterstone, involved in the business of real estate, banking, mortgage banking, or mortgage brokerage.
- e. Employee will cooperate with periodic on-site audits and examinations to verify Loan Officer compliance with company guidelines, Employer's operating requirements, and federal and state banking laws and regulations.
 - f. As applicable, Employee acknowledges that the duties set forth herein do not reflect any change in the manner of work in which Employee has been engaged for Employer, and merely restates the duties, manner, and method of work that has previously existed between the parties since the inception of their employment relationship.

4. COMPANY RULES

Employee will remain familiar with and adhere to all Company policies, standards and requirements published or otherwise disseminated by the Company (including but not limited to the Loan Officer Policies and Procedures) as well as all applicable federal, state, and local laws (including but not limited to Truth In Lending Act and Regulation Z, the Real Estate Settlement Procedures Act, the Fair Lending Act, and the Equal Credit Opportunity Act and Regulation B).

5. COMPENSATION TO EMPLOYEE

Waterstone shall pay Employee compensation for services performed under this Agreement, as follows:

- a. Base Pay. Employer shall pay Employee an hourly wage equal to the then-prevailing minimum wage for hours worked each week up to 40 hours plus the then-prevailing minimum wage at time and one-half for any hours worked in excess of 40 hours in a week as approved in accordance with Section 3.b above.
- b. Loan Originator's Compensation as defined in Addendum A and/or Base Price as defined in Addendum B to this Agreement will not as a matter of course be reviewed or adjusted quarterly.
- c. Loan Originator's compensation will only be subject to review in one of the following three circumstances:
 - a. Loan Originator frequently fails to adhere to the Base Price. "Frequently" is defined as 3 or more loans in a single quarter that are subject to pricing exceptions;
 - b. Loan Originator requests a review of his or her compensation;
 - c. There are losses associated with Early Payment Defaults (EPD'S), Early Payoffs (EPO's), unsaleable loans, delinquencies, or other material loan performance issues.
- d. In the event a Loan Originator's compensation is evaluated for adjustment, a variety of criteria including pull through rate, quality of loan files, loan volume, seniority, overall sources of origination, loan performance, any relevant competitive forces impacting Loan Originator's performance, and any relevant macroeconomic trends will be reviewed in establishing a new Base Price and/or Compensation Level as to prospective loans originated in the future. Loan Originator's compensation may or may not be adjusted accordingly. Waterstone will not establish or maintain a Base Price that it does not believe can be adhered to on an ongoing basis.
- e. In addition, Loan Originator's commission rate can be adjusted or suspended at any time if the Company has reason to believe that (i) Loan Originator has breached his or her fiduciary

- duty to the company; (ii) Loan Originator has violated any law, policy, procedure or acted improperly in regard to any transaction with a consumer; or (iii) Loan Originator is engaged in self-dealing, acting purely in his or her own pecuniary interest without regard to and inconsistent with the interests of the Company and/or the consumer.
- f. Subject to the terms and conditions set forth herein, Employee will receive a commission based on the schedule attached hereto as Addendum A, subject to the terms and conditions herein.
 - g. Commissions are calculated by deducting the Base Pay paid during the current pay period from the aggregate commission calculated pursuant to Addendum A. In the event that Employee's Base Pay for the applicable period exceeds the commission, any negative balance will be carried over and reduced in the calculation of future commissions, provided that Employee is not and may not be held responsible for negative balances except to the extent that his/her commissions can be reduced. Under no circumstance, and at no time during or after employment, will Employee be required or expected to re-pay Waterstone beyond and/or except as per the deductions from commission described herein.
 - h. Rates and pricing to the consumer will be calculated based upon the charges reflected on the Company's pricing engine or any other pricing engine being used by Company for registering or locking loans.
 - i. It is understood that Employee is not entitled to commission simply for procuring a loan. No commission is earned, accrued, or payable to Employee unless and until the loan has closed under Employee's supervision, and the applicable EPO or EPD period has expired on the loan. Commissions will be advanced to Employee on the 15th of the following month from the date the loan closes. A closing is defined below.
 - j. As defined herein, a loan is not closed unless and until the loan has gone through closing, all monies have funded, all recessionary periods have expired, and all proper documentation has been filed in connection with the loan, and in accordance with RESPA.
 - k. Employee agrees that in the event s/he believes there is any error in connection with the calculation of his/her commission, s/he will raise any such disagreement in writing with the Company, within 60 days of payment of the commission. Failure to do so acknowledges agreement with the amount of the commissions paid. Employee agrees that as of the execution of this Agreement, there are no disputes pertaining to compensation with Waterstone and that employee has received all pay and compensation due to him/her as of the date of the execution of this Agreement.

6. RESTRICTIVE COVENANTS: CONFIDENTIALITY; NONSOLICITATION; NONCOMPETITION

- a. Employee acknowledges that by reason of his/her employment hereunder, Employee will occupy a position of trust and confidence with Waterstone and that Employee will have access to confidential and proprietary information and trade secrets of Waterstone, all of which are the unique and valuable property of Waterstone. Employee acknowledges that, among other things, its loan programs, advertising programs, referral sources, business plan, marketing strategies, software, customer lists, and investor lists have been developed through the expenditure of substantial time, effort and money which Waterstone wishes to maintain in confidence and withhold from disclosure to other persons. Accordingly, as a material inducement to Waterstone to enter into this Agreement, Employee acknowledges that s/he will become intimately involved and/or knowledgeable in regard to Waterstone'

business and will be entrusted with Waterstone' confidential information, and both during his/her employment and after any termination thereof, Employee will use such information solely for Waterstone' benefit, and maintain as secret and will not disclose any of the Confidential Information to any third party (except as Employee's duties may require) without Waterstone' prior express written authorization.

- b. Employee agrees that during his/her employment with Waterstone s/he will not directly or indirectly, on behalf of himself/herself or any other individual, organization, or entity solicit any customer or client or prospective customer or client of Waterstone to engage in or transact business with any entity or person other than Waterstone.
- c. Employee agrees that for a period of twelve (12) months following the cessation of employment with Waterstone (such period not to include any period(s) of violation or period(s) of time required for litigation to enforce the covenants herein) s/he will not directly or indirectly, on behalf of himself/herself or any other individual, organization, or entity, solicit for the purpose of providing services of the type provided by Waterstone (i) any actual or prospective customer or client of Waterstone with whom during Employee's employment with Waterstone s/he has communicated or contacted; and/or (ii) any actual or prospective customer about whom Employee has obtained confidential information in connection with his/her employment with Waterstone.
- d. Employee agrees that during his /her employment with Waterstone and for a period of twelve (12) months after the termination of employment with Waterstone (such period not to include any period(s) of violation or period(s) of time required for litigation to enforce the covenants herein) Employee will not on behalf of himself/herself or on behalf of any other person, firm, or entity, directly or indirectly solicit any of Waterstone' employees, consultants, or contractors to leave Waterstone; form or join another entity; and/or sever (or cause the termination of) their relationship with Waterstone.
- e. Employee agrees that during the term of this Agreement and for a period of 12 months following such termination, s/he will not contact (i) any actual or prospective customer or client of Waterstone with whom during Employee's employment with Waterstone s/he has communicated or contacted; and/or (ii) any actual or prospective customer about whom Employee has obtained confidential information in connection with his/her employment with Waterstone for the purpose of refinancing any loan closed through the Company, where any such refinance would result in an early pay-off resulting in the recapture of any revenue paid to the Company. Employee agrees that in the event that employee encourages any customer to undertake any such transaction s/he shall be liable to the Company in the amount of any recaptured revenue in addition to any other damages as permitted under this Agreement or under applicable law.
- f. Employee agrees that for twelve (12) months following the termination of employment with Waterstone, s/he will show this Agreement to any and every subsequent employer during such time.
- g. Employee agrees that the restrictions herein will not interfere with or unduly limit his/her ability to obtain suitable alternative employment following termination of employment. Employee acknowledges that the protections afforded to Waterstone herein, are reasonable and necessary.
- h. Employee recognizes that irreparable damage will result to Waterstone in the event of the violation of any covenant contained herein made by him/her, and agrees that in the event of

such violation Waterstone shall be entitled, in addition to its other legal or equitable remedies and damages as set out below, including costs and attorney's fees, to temporary and permanent injunctive relief to restrain against such violation(s) thereof by him and by all other persons acting for or with him/her.

7. NO EXISTING RESTRICTIVE COVENANTS

Employee represents and warrants to the Company that no "non-compete", non-solicitation or confidentiality agreements with any other company, person or entity are binding upon him/her or affect his/her employment with the Company as of the date this Agreement.

8. INDEMNIFICATION

To the maximum extent permissible by RESPA and/or HUD, Employee hereby agrees to indemnify and defend Waterstone for any and all attorneys' fees, costs of prudent settlement, judgments, or damages incurred by the Company as a result of any violation by Employee of any term or obligation under this Agreement.

9. RETURN OF RECORDS AND PAPERS

Employee agrees upon the cessation of his/her employment with Waterstone for any reason whatsoever, to return to the President of Waterstone all company equipment, including but not limited to computers or cell phones, and all records, copies of records, computer records, and papers and copies thereof, pertaining to any and all transactions handled by Employee while associated with Waterstone. Employee further agrees to provide upon termination a written account of any and all open leads, business prospects, and/or loans in process as of the date of his/her termination.

10. SEVERANCE AND DEATH/DISABILITY BENEFIT

- a. In the event that Employee provides reasonable notice of his/her resignation and complies with all terms and conditions of this Agreement, the Company, in its discretion, may pay Employee a severance based upon the loans in Employee's pipeline dependant upon the amount of work necessary to complete any pending transactions. This severance is determined by the Company in its sole discretion.
- b. In the event Employee dies and/or becomes disabled such that Employee cannot physically perform any gainful employment for a period of at least 180 days, Employee (and/or the Estate, as applicable) shall be entitled to payout of all loans in his/her pipeline upon the close of such loans, as if employee supervised such loans to completion. Employee acknowledges that this benefit is in exchange for the execution of this Agreement and acceptance of the restrictive covenants set forth herein.

11. PIPELINES

Employee further acknowledges that all leads and loans in process are property of the Company. Employee agrees to provide upon termination a written account of any and all open leads, business prospects, and/or loans in process as of the date of his/her termination, and agrees not to take any action to divert such loans to a competitor or away from the Company.

12. ALTERNATIVE DISPUTE RESOLUTION

The parties agree that in the event of any dispute between them that arises out of the employment

relationship and/or this Agreement, prior to initiating any lawsuit, the party intending to initiate such a claim or proceeding, will at least ten (10) days prior to doing so, provide the other party with a specific demand for monetary relief, as well as a calculation explaining the basis for said monetary demand, as well as a short and plain statement of the grounds upon which such demand is sought. Notwithstanding the foregoing, this provision does not prohibit a party from immediately seeking injunctive relief limited to preventing irreparable harm.

13. ARBITRATION/GOVERNING LAW/CONSENT TO JURISDICTION

This Agreement is made and entered into in the State of Wisconsin and shall in all respects be interpreted, enforced, and governed by and in accordance with the laws of the State of Wisconsin. In the event that the parties cannot resolve a dispute by the ADR provisions contained herein, any 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. Except as otherwise set forth herein, the parties will share equally in the cost of such Arbitration, and shall be responsible for their own attorneys' fees, provided that if the Arbitration is brought pursuant to any statutory claim for which attorneys fees were expressly recoverable, the Arbitrator shall award such attorneys' fees and costs consistent with the statute at issue. Nothing herein shall preclude a party from seeking temporary injunctive relief in a court of competent jurisdiction to prevent irreparable harm, pending any ruling obtained through Arbitration. Further, nothing herein shall preclude or limit Employee from filing any complaint or charge with a State, Federal, or County agency. By execution of this Agreement, the parties are consenting to personal jurisdiction and venue in Wisconsin with respect to matters concerning the employment relationship between them.

14. LOAN PRICING

- a. Loan officer will be assigned a specific minimum Base Price and corresponding rates.
- b. Loan Officer may not lock any loan below the rate corresponding to the Base Price without the Company's approval.
- c. Exceptions to Base Price. So long as a loan is closed at or above the rate corresponding to the Base Price, no pre-approval is necessary. In the event Loan Officer wishes to lock a loan below the rate corresponding to the assigned Base Price the Company will examine the Loan Officer's seniority, volume of production, source of the loan, potential for repeat business, the extent of the requested variance, and Loan Officer's historical adherence to the Company's pricing, which includes adherence to price locks, avoidance of rate lock extensions, and collections of required third party fees. The determination of whether to approve a rate lock below the Base Price has no impact on Loan Officer's compensation.
- d. The company reserves the right in its discretion to approve/disapprove any requested variance in pricing.

15. SEVERABILITY

The Parties agree that to the extent that any provision or portion of this Agreement shall be held, found or deemed to be unreasonable, unlawful or unenforceable by a court of competent jurisdiction, then any such provision or portion thereof shall be deemed to be modified or redacted

to the extent necessary in order that any such provision or portion thereof shall be legally enforceable to the fullest extent permitted by applicable law, and that it will not affect any other portion, or provision of this Agreement, and the Parties hereto do further agree that any court of competent jurisdiction shall, and the parties hereto do hereby expressly authorize, request and empower any court of competent jurisdiction to enforce this Agreement, and any such provision or portion thereof to the fullest extent permitted by applicable law.

16. LEGAL FEES

Employee further agrees that Waterstone shall be entitled to the cost of all legal fees and expenses incurred in investigating and enforcing the covenants contained herein, including fees and expenses incurred prior to filing suit.

17. UNDERSTANDING OF PARTIES

This Agreement represents the entire agreement between the Parties and supersedes any and all prior agreements or understandings, oral or written between Employee and Waterstone. It is further agreed that this Agreement shall remain in full force and effect until superseded in writing, signed by all Parties. In the event of a company name change, this Agreement will continue to be fully enforceable.

18. VOLUNTARY AGREEMENT

Employee acknowledges that he has been given sufficient time and opportunity to review, consider, and obtain advice in connection with the execution of this Agreement, and that Employee has not been forced to sign this Agreement under duress.

19. NON-WAIVER

A waiver or inaction by either party of a breach of any provision of this Agreement shall not operate nor be construed as a waiver by of any subsequent breach of the Agreement.

20. FAIR LENDING

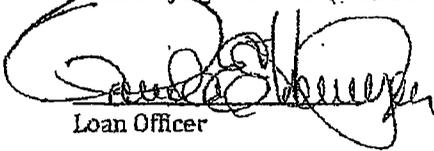
It is the policy of Waterstone to conduct its business in a non-discriminatory manner and in compliance with legal and regulatory guidelines concerning applicable fair lending laws including but not limited to the Fair Lending Act, the Equal Credit Opportunity Act and Regulation B. All Employees and Managers are responsible for treating all borrowers in a fair and non-discriminatory manner. This includes, but is not limited to, not basing price quotes or lender credits on stereotypical assumptions about applicants which may be related to race, color, religion, national origin, sex or marital status, or age. It is a part of Company's objective that the frequency and magnitude of permissible lender credits to protected classes not differ materially from the frequency and magnitude of permissible lender credits to non-protected people. Employees and Managers are instructed that they will be permitted to grant lender credits only insofar as their lending record is consistent with this objective.

21. FULL AND COMPLETE AGREEMENT

This Agreement sets forth the entire understanding and agreement of the parties hereto and fully supersedes any and all prior or contemporaneous agreements, understandings or negotiations between the parties with respect to the subject matter hereof. No prior negotiations or drafts of this Agreement shall be used by either party to construe the terms or to challenge the validity hereof.

Agreement shall be used by either party to construe the terms or to challenge the validity hereof. This Agreement may not be modified except in writing between all parties hereto. No oral promises, assurances, agreements, or understandings either prior or subsequent to the execution of this Agreement are binding or may be relied upon except and unless incorporated herein or incorporated by written modification as permitted herein.

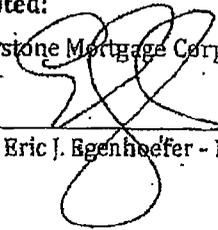
Voluntarily agreed to and executed this 7 day of April, 2011:


Loan Officer

Patricia E. Henneman
Print Name

209227
NMLS ID

Accepted:
Waterstone Mortgage Corporation

By: 
Eric J. Egenhoefer - President


Initials

ADDENDUM A

Employee shall be provided with the following compensation arrangement for the duration of this employment agreement:

Commission

Base Commission Level – Originating Loan Officer to receive compensation of 200 Basis Point (bps) on each closed and funded loan unless otherwise indicated.



Loan Officer Signature

Pamela E. Herrens

Loan Officer Name

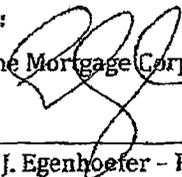
209227

NMLS ID

Date: 4/7/11

Accepted:

Waterstone Mortgage Corporation

By: 
Eric J. Egenhoefer - President



Branch Manager Signature

Chris Randall

Branch Manager Name

Date: 4/7/11

Date: 4/7/11


Initials

ADDENDUM B

Brokered Transactions

Brokered transactions (including table funded or wholesale transactions) with borrower- paid compensation are not allowed. All brokered transactions are required to be co-originated with the Waterstone Direct division and compensation for these transactions will be based on 50% of the Waterstone Direct loan officer compensation plan. Under no circumstances is Employee allowed to quote an interest rate or provide disclosures to a consumer on any brokered transaction without the prior engagement of a loan officer from Waterstone Direct. Contact the corporate office for a copy of the current Waterstone Direct compensation plan. This does not apply to Reverse Mortgage Loans.

Reverse Mortgages

Reverse Mortgages that are originated on a brokered basis are not required to be co-originated with Waterstone Direct. The compensation for all reverse mortgage loans that are originated on a brokered basis is the same as what is defined in Addendum A for all other loans.

203(k) Loans

203(k) loans that are originated on a correspondent basis are required to go through Waterstone's 203(k) division. The first three transactions Employee originates on a correspondent basis are considered test cases and are required to be co-originated with a loan officer in the 203(k) division. Compensation for these loans will be split 50% based on the compensation plan defined in Addendum A. After the successful closing of the first three transactions, Employee will be allowed to originate and earn the full commission on 203(k) loans; however these loans are still required to be submitted to the 203(k) division prior to underwriting and prior to closing.

Branch Pricing Policy - Base Price

The minimum price required on all correspondent transactions is 100.00. The pricing and rates displayed in the Company's pricing engine are reflective of all margins and compensation to the loan officer. The pricing shown in the pricing engine plus any origination fees must be greater than or equal to 100.00 on all loans. Any transaction achieving a final price including any origination fees or discount points of less than 100.00 must be approved in writing, in advance, from the branch manager.

Telemarketing

Loan officer is prohibited from engaging in any telemarketing activities unless approved in writing and with a modification signed by the President of the Company and attached hereto.

ADDENDUM C

Loan Officer Disclosures

I hereby certify the following:

I am a licensed real estate agent or hold a real estate sales license Y N
I have been convicted of a felony in the past 7 years Y N

I acknowledge receiving and understanding the following policies:

Loan Officer Policies and Procedures Y N
Rate Lock Policy Y N

Regulation Z / Loan Officer Compensation Disclosure

I hereby certify that I understand that under Section 129 of the Truth in Lending Act (15 U.S.C. 1639), subsection (k), I am not able to be paid any form of compensation that is based on any of the following:

- Interest Rate or APR
- LTV (Loan to Value)
- Prepayment penalty or any specific loan terms
- Credit Score
- Amount of fees collected
- CRA (Community Reinvestment Act) Eligibility
- Existence of PMI (Private Mortgage Insurance) on a loan
- Individual loan profitability
- Loan type or feature
- Any other term or condition of a loan or proxy for a term or condition

I further understand that I cannot be paid any form of compensation from both the borrower and the lender. I cannot steer consumers to products on the basis of increased compensation, and I cannot credit a borrower any fees by deducting them from my compensation.


 Loan Officer Signature 209227
 NMLS ID
 Pamela E. Herndon 4/7/11
 Loan Officer Name Date


 Initials

ADDENDUM D

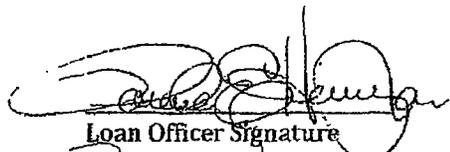
Employee shall be provided with the following bonus compensation arrangement for the duration of this employment agreement:

Bonus Commission Plan

Monthly Production Volume Incentive - Additional bps paid retroactive on total closed and funded loans during the calendar month.

- 10 closed units = Additional 10 bps on total volume
- 15 closed units = Additional 3 bps on total volume for a total of 13 bps
- 20 closed units = Additional 3 bps on total volume for a total of 16 bps

*Company generated referrals are paid out at 50% of the loan officer Base Commission Level.



Loan Officer Signature

PAMELA E. HENNING

Loan Officer Name

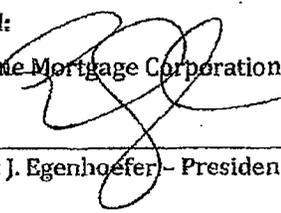
209227

NMLS ID

Date: 4/6/11

Accepted:

Waterstone Mortgage Corporation

By: 

Eric J. Egenhoefer - President



Branch Manager Signature

Chris Randall

Branch Manager Name

Date: 4/6/11

Date: 4/6/11

4-1-2011



Initials

May 04 11 11:22a Pam Herrington

480-563-1469

p.1

AMENDMENT TO LOAN ORIGINATOR EMPLOYMENT AGREEMENT DATED APRIL 1, 2011

The effective date of the In-House Loan Originator Employment Agreement dated April 1, 2011 and any addendums thereto (collectively the "Agreement") shall be amended to April 6, 2011. All other sections of the Agreement shall remain in full force and effect except as set forth herein.

Paragraph 3 of the Agreement is hereby removed and replaced with the following:

3. EFFECTIVE DATE

This Agreement and compensation plan is effective as of April 6th, 2011 and supersedes all prior Loan Officer Employment Agreements and Compensation Plans and addenda thereto.



Loan Officer Signature

Pamela Estelle Herrington

Loan Officer Name

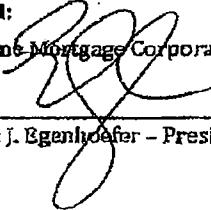
209227

NMLS ID

Date: 4/6/11

Accepted:

Waterstone Mortgage Corporation

By: 

Eric J. Egenhofer - President



Branch Manager Signature

Linda Hall

Branch Manager Name

Date: 4-6-11

Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PAMELA HERRINGTON,
individually and on behalf of all
others similarly situated,

Plaintiff,

v.

WATERSTONE MORTGAGE CORPORATION,

Defendant.

OPINION AND ORDER

11-cv-779-bbc

In this proposed collective action, plaintiff Pamela Herrington contends that defendant Waterstone Mortgage Corporation failed to pay its loan officers for overtime work, in violation of the Fair Labor Standards Act and state law. November 2011, when plaintiff filed her complaint, the parties have filed several motions.

First, defendant moved to to dismiss or stay the case on the ground that plaintiff's claims are subject to an arbitration agreement. In addition, defendant asked for "the costs associated with enforcing the arbitration provision" in this court, including attorney fees. Dkt. #13. Plaintiff sought leave to file a sur-reply brief to discuss the implications of a recent decision from the National Labor Relations Board. Dkt. #35. In response, defendant

filed a document it called an “opposition” to plaintiff’s motion, but was actually a sur-sur-reply brief. Dkt. #36. I have considered both briefs.

While the parties were briefing defendant’s motion to dismiss, each side filed an additional motion. Plaintiff filed a “motion to strike defendant’s claim for attorneys’ fees and costs,” dkt. #15, which is simply the mirror image of defendant’s request for costs. (Defendant does not have a “claim” for attorney fees or costs because it has not yet filed an answer or counterclaim.) Defendant filed a “motion to strike, for protective order and for sanctions,” dkt. #18, in which it argues that counsel for plaintiff has engaged in inappropriate communication with potential class members.

With respect to defendant’s motion to dismiss, plaintiff agrees with defendant that her claims fall within the scope of the parties’ arbitration agreement. However, she says that the court should refuse to enforce the agreement because arbitration would be too costly for her and the agreement violates both the FLSA and the National Labor Relations Act.

Although plaintiff has failed to show that arbitration would be any more expensive than litigation in federal court, I agree with her that the arbitration agreement violates the NLRA because it includes a provision that requires her to give up her right under the statute to bring claims collectively. However, because the prohibition on collective actions is severable from the remainder of the arbitration agreement, I am granting defendant’s motion to stay the case while pending arbitration. I am denying defendant’s requests for costs and

sanctions and plaintiff's motion to strike.

OPINION

On April 7, 2011, the parties signed an employment agreement that included the following language:

[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. Except as otherwise set forth herein, the parties will share equally in the cost of arbitration.

Defendant argues that all of plaintiff's claims in this case are subject to arbitration and must be dismissed or stayed.

As noted above, plaintiff does not deny that her claims fall within the scope of this provision, but she argues that the arbitration agreement is unenforceable for three reasons: (1) it places excessive costs on employees by requiring them to pay half the cost of arbitration; (2) it prohibits employees from bringing a collective action, in violation of the FLSA; and (3) it prohibits employees from engaging in "concerted activity" protected by the National Labor Relations Act. The parties agree that whether the agreement is enforceable is a question for the court. Lumbermens Mutual Casualty Co. v. Broadspire Management

Services, Inc., 623 F.3d 476, 480 (7th Cir. 2010).

With respect to her first argument, plaintiff says that she cannot afford the cost of arbitration, which she estimates at \$14,000. Although she acknowledges that the arbitration agreement allows her to recover these expenses if she prevails, she says she cannot take that risk. Even if I assume that a fee shifting provision might not provide adequate protection in some circumstances, plaintiff's argument founders because she failed to conduct any comparison of the costs of litigating in federal court. James v. McDonald's Corp., 417 F.3d 672, 680 (7th Cir. 2005) ("The cost differential between arbitration and litigation is evidence highly probative to [the plaintiff's] claim that requiring her to proceed through arbitration, rather than through the courts, will effectively deny her legal recourse."). Particularly because her counsel admits that discovery is likely to be more streamlined in arbitration, Getman Decl. ¶ 6, dkt. #22-5, her failure to compare the relative costs dooms her claim of hardship.

Plaintiff's second argument focuses specifically on the part of the arbitration agreement that prohibits multiple-plaintiff arbitration proceedings. She says that it conflicts with 29 U.S.C. § 216(b) of the FLSA, which allows employees to bring a collective action so long as each gives his or her consent. However, this argument is undermined by Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991), in which the Court stated that an arbitration agreement that eliminates class-wide relief is not necessarily invalid in cases

brought under the Age Discrimination in Employment Act, which also includes a collective action provision. Id. at 32 (“[E]ven if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.”).

Numerous other courts have relied on Gilmer to conclude that a waiver of rights in § 216(b) is permissible because that provision does not confer a substantive right. E.g., Long John Silver's Restaurants, Inc. v. Cole, 514 F.3d 345, 351 (4th Cir. 2008) (rejecting argument that “Congress expressly intended that the ‘opt-in’ procedure could not be waived by the parties’ agreement to an alternate procedure”; “no court has explicitly ruled that the ‘opt-in’ provision of the § [2]16(b) provision creates a substantive, nonwaivable right.”); Carter v. Countrywide Credit Industries, Inc., 362 F.3d 294, 298 (5th Cir. 2004) (“[W]e reject the Carter Appellants’ claim that their inability to proceed collectively deprives them of substantive rights available under the FLSA.”); Horenstein v. Mortgage Market, Inc., 9 Fed. Appx. 618, 619 (9th Cir. 2001) (“Appellants’ contention that the arbitration clause in the Employment Agreements may not be enforced because it eliminates their statutory right to a collective action, is insufficient to render an arbitration clause unenforceable.”); Copello v. Boehringer Ingelheim Pharmaceuticals Inc., 812 F. Supp. 2d 886, 894 (N.D. Ill. 2011) (“Courts routinely hold that FLSA does not grant employees the unwaivable right to proceed

in court collectively under § 216(b) . . . [W]hile FLSA prohibits substantive wage and hour rights from being contractually waived, it does not prohibit contractually waiving the procedural right to join a collective action.”). See also Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1378 (11th Cir. 2005) (concluding that collective action waiver was not unconscionable under state law, citing Gilmer).

Plaintiff’s third argument, that the prohibition on collective actions in the arbitration agreement violates the National Labor Relations Act, is her strongest. Under 29 U.S.C. § 157, “[e]mployees shall have the right to . . . engage in . . . concerted activities for the purpose of . . . mutual aid or protection.” Under 29 U.S.C. § 158(a)(1), employers may not “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.” Plaintiff says that the collective action waiver interferes with her right to engage in a concerted activity protected by § 157.

A threshold question I asked the parties to brief is whether I have authority to enforce §§ 157 and 158 in light of statements by the Supreme Court that the National Labor Relations Board generally has exclusive jurisdiction over enforcement of those provisions. Amalgamated Utility Workers v. Consolidated Edison Co. of New York, 309 U.S. 261, 264 (1940) (“Congress declared that certain labor practices should be unfair, but it prescribed a particular method by which such practices should be ascertained and prevented. By the express terms of the Act, the Board was made the exclusive agency for that purpose.”); San

Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236, 244-45 (1959) ("It is essential to the administration of the Act that these determinations [under § 157 and § 158] be left in the first instance to the National Labor Relations Board.").

Having reviewed the parties' supplemental briefs, I agree with plaintiff that Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982), gives a federal court authority to invalidate a contractual provision that violates the NLRA. In that case, the Court stated: "While only the Board may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which violates § 8(e) [another provision in § 158]." Id. at 86.

Defendant says that Kaiser Steel is distinguishable because, in that case, it was "unmistakably clear" that the contract violated the NLRA and the plaintiff was attempting to enforce the contract "in order to maintain the action." However, defendant cites no language from Kaiser Steel showing that either of these facts was relevant to the Court's decision. The Court of Appeals for the Seventh Circuit has interpreted Kaiser Steel as standing for the broad proposition that "a court may not enforce a contract provision which violates federal law." Costello v. Grundon, 651 F.3d 614, 623-24 (7th Cir. 2011).

With respect to the merits of plaintiff's argument that the collective action waiver violates §§ 157 and 158(a)(1), various decisions from federal courts and the National Labor Relations Board hold that collective actions are a "concerted activity" and that lawsuits for

unpaid wages under the FLSA are “for the purpose of . . . mutual aid or protection” within the meaning of § 157. Brady v. National Football League, 644 F.3d 661, 673 (8th Cir. 2011) (“[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is ‘concerted activity’ under § 7 of the National Labor Relations Act.”); Leviton Manufacturing Co., Inc. v. NLRB, 486 F.2d 686, 689 (1st Cir. 1973) (“[T]he filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7, unless the employees acted in bad faith.”); Saigon Gourmet Restaurant, 353 NLRB No. 110 (2009) (“[A] wage and hour lawsuit [is] clearly protected concerted activity.”); In re 127 Restaurant Corp., 331 NLRB 269, 269 (2000) (lawsuit filed on behalf of 17 employees regarding wages was protected activity); 52nd Street Hotel Associates, 321 NLRB 624, 624 (1996) (collective action brought under FLSA was protected activity), abrogated on other grounds by Stericycle, Inc., 357 NLRB No. 61 (2011); Host International, 290 NLRB 442, 443 (1988) (multiple-plaintiff lawsuit “concerning working conditions” was protected activity); United Parcel Service, Inc., 252 NLRB 1015, 1016 (1980) (class action lawsuit regarding lunch breaks is protected activity), enforced, 677 F.2d 421, 422 (6th Cir. 1982); Trinity Trucking & Materials Corp., 221 NLRB 364, 364 (1975) (filing of lawsuit by group of employees for failure to pay wages in accordance with contract was protected activity), enforced, 567 F.2d 391 (7th Cir. 1977).

In a recent opinion, the Board considered the precise question in this case and

concluded that an employer violates the NLRA by entering into individual arbitration agreements that include a prohibition on collective actions by employees. In re D.R. Horton, Inc., 357 NLRB No. 184 (2012), available at 2012 WL 36274. The Board began by noting that it “has consistently held that concerted legal action addressing wages, hours or working conditions is protected by” § 157. Id. at *2. It then stated that the Supreme Court has held that “employers cannot enter into individual agreements with the employees in which employees cede their statutory rights to act collectively.” Id. at *6 (citing J.I. Case Co. v. NLRB, 321 U.S. 332 (1944)). In addition, the Board cited a case from the Court of Appeals for the Seventh Circuit for the proposition that such a contract violates the NLRA “even if ‘entered into without coercion,’ because it ‘obligated [the employee] to bargain individually’ and was a ‘restraint upon collective action.’” Id. (quoting NLRB v. Stone, 125 F.2d 752, 756 (7th Cir. 1942)).

The Board rejected the argument that either the Federal Arbitration Act or Gilmer required it to enforce the agreement. It relied on the Supreme Court’s statement in Gilmer, 500 U.S. at 26, that an arbitration agreement may not require a party to “forgo the substantive rights afforded by the statute.” It then stated:

The question presented in this case is not whether employees can effectively vindicate their statutory rights under the Fair Labor Standards Act in an arbitral forum. Rather, the issue here is whether the [arbitration agreement’s] categorical prohibition of joint, class, or collective federal state or employment law claims in any forum directly violates the substantive rights vested in

employees by Section 7 of the NLRA.

* * *

Any contention that the Section 7 right to bring a class or collective action is merely "procedural" must fail. The right to engage in collective action—including collective legal action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest. . . . Rule 23 may be a procedural rule, but the Section 7 right to act concertedly by invoking Rule 23, Section 216(b), or other legal procedures is not.

D.R. Horton, 2012 WL 36274, at *12 (internal citations omitted).

It is not clear whether defendant disputes any of this as a general matter. It acknowledges that "a prohibition against a collective action may, in some instances, violate an employee's NLRA rights to engage in concerted activity to improve the terms and conditions of employment," Dft.'s Br., dkt. #32, at 11, but then it cites two district courts that came to a contrary conclusion. Grabowski v. Robinson, 2011 WL 4353998 (S.D. Cal. 2011); Slawinski v. Nephron Pharmaceutical Corp., 2010 WL 5186622 (N.D. Ga. Dec. 9, 2010).

In Slawinski, 2010 WL 5186622, at *2, the court wrote:

There is no legal authority to support plaintiff's position [that a class action waiver violates the NLRA]. The relevant provisions of the NLRA, as well as the case law cited by plaintiff, deal solely with an employee's right to participate in union organizing activities. . . . That right is not implicated by the allegations in plaintiffs complaint. Indeed, it is apparent from the face of the complaint that plaintiff and the other opt-ins are not 'advocat[ing]

regarding the terms and conditions of their employment.’ . . . Rather, plaintiffs are pursuing FLSA claims in an attempt to collect allegedly unpaid overtime wages.

In Grabowski, 2011 WL 4353998, at *7-8, the court adopted the analysis in Slawinski, adding:

Plaintiff, who resigned from his employment with Defendants six months before filing suit, has failed to show that this suit implicates the ‘mutual aid or protection’ clause, or that he suffered retaliation by Defendants. The Court finds that the NLRA does not operate to invalidate or otherwise render unenforceable the arbitration provisions of the Bonus Incentive Agreements signed by Plaintiff.

Id. at *8.

If defendant means to rely on these decisions for the proposition that collective actions for unpaid wages are not protected activity under § 157, he is off base. The statement in Slawinski that the NLRA “deal[s] solely with an employee’s right to participate in union organizing activities” is directly contrary to the statement by the Supreme Court in Eastex, Inc. v. NLRB, 437 U.S. 556, 565-66 (1978), that “the ‘mutual aid or protection’ clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums.” In Slawinski and Grabowski, both courts seem to conclude that actions for unpaid wages are not for “mutual aid or protection,” but neither court explains its conclusion. The assumption seems to be that only claims for injunctive relief could qualify, but it is not clear why seeking

compensation for legal violations is any less an act of “mutual aid.”

Further, neither court acknowledged any of the NLRB decisions cited by plaintiff in this case, presumably because the parties did not cite them. However, the Supreme Court has stated on multiple occasions that courts must give considerable deference to the Board’s interpretations of the NLRA. ABF Freight System, Inc. v. NLRB, 510 U.S. 317, 324 (1994) (Board's views are entitled to "the greatest deference"); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891 (1984) (interpretations of Board will be upheld if "reasonably defensible") (internal citation omitted). Particularly because defendant develops no argument that the Board has interpreted the NLRA incorrectly, I see no reason to question the Board’s judgment in this instance.

Defendant’s primary argument against applying D.R. Horton is that the NLRA protects rights of “employees,” not “former employees” such as plaintiff. (Defendant does not cite anything the record that establishes plaintiff’s employment status, but plaintiff alleges in her complaint that she “left employment with Defendant on or about October 7, 2011.” Dkt. #3, ¶ 41.) Although defendant cites no case law in support of this view, in Woodlawn Hospital v. NLRB, 596 F.2d 1330, 1336 (7th Cir. 1979), the court stated that “a discharge for activity not protected by the Act terminates employee status” under the NLRA. See also Halstead Metal Products, a Division of Halstead Industries, Inc. v. NLRB, 940 F.2d 66, 70 (4th Cir. 1991) (employee who resigned not protected under NLRA from

future discrimination, even if discrimination arises from participation in concerted activities with employees protected by Act).

This argument is a red herring. The question under § 158 is whether the employer has “interfere[d] with, restrain[ed], or coerce[ed] employees in the exercise of the rights guaranteed in section 157 of this title.” Regardless whether plaintiff is an employee now, it is undisputed that she was an employee at the time defendant interfered with her right to pursue a collective action by requiring her to sign a waiver. Defendant seems to assume that the alleged interference is limited to its attempt to *enforce* the arbitration agreement in this case, but “[a]n employer's coercive action affects protected rights whenever it can have a deterrent effect on protected activity. This is true even if an employee has yet to exercise a right protected by the Act.” Medeco Security Locks, Inc. v. NLRB, 142 F.3d 733, 745 (4th Cir. 1998). See also NLRB v. Vanguard Tours, Inc., 981 F.2d 62, 67 (2d Cir. 1992) (invalidating rule under § 158(a)(1) before rule was enforced); Jeannette Corp. v. NLRB, 532 F.2d 916, 918 (3d Cir.1976) (same). Thus, plaintiff need not show that she is still an “employee” with the meaning of the NLRA.

Also, defendant says that the Board was “illogical” to conclude that collective action waivers conflict with the “effort to vindicate work-place rights and the NLRA,” D.R Horton, 2012 WL 36274, at *12, because an individual can bring about a change in workplace conditions without joining his claims with other employees. This is a non sequitur.

Although the goal of § 157 may be to improve workplace conditions, the way Congress chose to achieve that goal in the statute was through the protection of “concerted activity” of employees. The court’s task is to apply the language of the statute as written, not to apply a general policy. Mertens v. Hewitt Associates, 508 U.S. 248, 261 (1993) (“[V]ague notions of a statute’s ‘basic purpose’ are . . . inadequate to overcome the words of its text regarding the specific issue under consideration”). Thus, it is simply irrelevant whether an individual claim may be just as effective as a collective action.

Finally, defendant says that D.R. Horton conflicts with AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), in which the Court declined to strike a class action waiver in an arbitration agreement. However, I agree with the Board that AT&T Mobility is not on point because the class action waiver in that case did not conflict with the substantive right of a federal statute. Rather, the question was whether the FAA preempted a ruling under state law by the California Supreme Court.

Accordingly, because the Board’s interpretation of the NLRA in D.R. Horton, is “reasonably defensible,” Sure-Tan, 467 U.S. at 891, I am applying it in this case to invalidate the collective action waiver in the arbitration agreement.

This does not end the matter, however. Although the NLRA guarantees plaintiff the right to pursue her claims collectively, it does not give her a right to pursue her claims in federal court rather than in arbitration. The employment agreement includes a severability

clause stating that any portion of the agreement found to be unenforceable “shall be deemed to be modified or redacted to the extent necessary” to bring the agreement in line with the law. Dkt. #14-1, at ¶ 15. Because the bar on collective actions is the only aspect of the arbitration agreement that violates the NLRA, this raises the question whether that provision is severable from the rest of the arbitration agreement, so that the matter can be resolved in arbitration, but in the context of a collective action.

In her opposition brief, plaintiff acknowledges that courts may sever invalid clauses in an otherwise valid arbitration agreement under some circumstances. E.g., Kristian v. Comcast Corp., 446 F.3d 25, 62 (1st Cir. 2006) (severing class action waiver from arbitration agreement). Generally, courts focus on two factors in making this determination: whether the unlawful provision is essential to the agreement as a whole and whether multiple unlawful provisions support the conclusion that the drafter of the agreement was attempting to undermine the other party’s rights. E.g., Nino v. Jewelry Exchange, Inc., 609 F.3d 191, 206 (6th Cir. 2010) (in determining whether provision is severable, court should consider whether “the unconscionable aspects of the employment arbitration agreement constitute an essential part of the agreed exchange of promises between the parties” and whether “a multitude of unconscionable provisions in an agreement to arbitrate . . . evidence a deliberate attempt by an employer to impose an arbitration scheme designed to discourage an employee’s resort to arbitration or to produce results biased in the employer’s favor”);

Booker v. Robert Half International, Inc., 413 F.3d 77, 84-85 (D.C. Cir. 2005) (“A critical consideration in assessing severability is giving effect to the intent of the contracting parties. . . . If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts . . . the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties.”).

Neither party argues that the collective action waiver is integral to the arbitration agreement or that a collective action could not be pursued in an arbitration proceeding. In fact, plaintiff says that “collective action procedures are not inherently incompatible with arbitration and at least some AAA arbitrators have approved collective actions and those decisions have been affirmed by the Courts.” Plt.’s Br., dkt. #22, at 20-21 (citing Veliz v. Clintas, 2009 WL 1766691 (N.D. Cal. June 22, 2009)). This is consistent with the practice of the American Arbitration Association, which has published rules for class arbitration. American Arbitration Association, Supplementary Rules for Class Arbitration (Oct. 8, 2003), available at <http://www.adr.org/aaa>. As for defendant, it requests explicitly that a collective action proceed in arbitration rather than federal court in the event the court invalidates the collective action waiver. Dft.’s Br., dkt. #45, at 6-7.

Plaintiff’s only argument against severance is that “there are several clauses that together combine to ‘taint’ the agreement as a whole.” Plt.’s Br., dkt. #22, at 36. Plaintiff points to the cost-sharing provision as well as what she calls two “indemnity clauses” that

require plaintiff to reimburse defendant for costs associated with violations of the employment agreement. However, none of these other provisions support plaintiff's argument. With respect to the cost-sharing provision, plaintiff fails to show that it was unlawful. The other two provisions are not related to the arbitration clause and plaintiff fails to explain how they might be relevant to a determination regarding severability. Accordingly, I am severing the collective action waiver and granting defendant's motion to stay the case pending arbitration.

The remaining motions require little discussion. Defendant's requests for costs relies on the two "indemnity clauses" discussed above, with defendant arguing that plaintiff's attempt to bring a collective action is a violation of the arbitration agreement. Because I am invalidating the prohibition on collective actions, plaintiff's attempt cannot serve as the basis for an award of costs. This moots plaintiff's motion to "strike" the request for costs.

Also moot is defendant's motion to sanction plaintiff's counsel for contacting potential members of the collective action without notifying defendant or the court. Because I am agreeing with defendant that plaintiff's claims are subject to arbitration, I cannot decide the motion for sanctions. Defendant will have to raise that issue with the arbitrator.

ORDER

IT IS ORDERED that

1. Defendant Waterstone Mortgage Corporation's motion to dismiss, or, in the alternative to compel arbitration, and for costs, dkt. #13, is GRANTED IN PART. Plaintiff Pamela Herrington's claims must be resolved through arbitration, but she must be allowed to join other employees to her case.

2. Defendant's requests for costs is DENIED.

3. Plaintiff's motion to file a surreply brief, dkt. #35, is GRANTED.

4. Plaintiff's motion to "strike" defendant's request for costs, dkt. #15, is DENIED as moot.

5. Defendant's "motion to strike, for protective order and for sanctions," dkt. #18, is DENIED as moot.

6. Because the arbitration may dispose of the disputed issues, I am directing the clerk of court to close the case administratively, subject to reopening on motion of any party if issues remain for resolution after the arbitration has been completed.

Entered this 16th day of March, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge