

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

PAMELA HERRINGTON, individually and on behalf of)	
all others similarly situated)	
)	
Plaintiff(s),)	
v.)	Case No. 3:11-cv-00779-bbc
)	
WATERSTONE MORTGAGE CORPORATION)	
)	
Defendant.)	

**DEFENDANT WATERSTONE MORTGAGE CORPORATION'S APPLICATION FOR
REVIEW OF ARBITRATOR'S PARTIAL FINAL AWARD ON CLAUSE
CONSTRUCTION**

Now comes Defendant Waterstone Mortgage Corporation (hereinafter, "Waterstone"), by and through its undersigned counsel, and hereby moves this Court to vacate the Arbitrator's Partial Final Award on Clause Construction and in support thereof states as follows:

On March 16, 2012 this Court entered an Order in which it compelled arbitration of the claims brought by Plaintiff Pamela Herrington against Waterstone, but which allows her to join other employees to her case (ECF 57). Upon Plaintiff's filing of her complaint in arbitration, the parties briefed the issue of whether this Court's Order in the above-captioned matter, along with the applicable agreement to arbitrate, and Supreme Court precedent (including, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010)) required the arbitration to proceed as an opt-out class action, and opt-in collective action, or whether Plaintiff should only be allowed to join others to this arbitration exclusively by way of permissive joinder.

In ruling on this issue, the arbitrator, Hon. George C. Pratt, ruled "that the applicable clause permits the arbitration to proceed on behalf of a class." See, Partial Final Award on Clause Construction, attached hereto as Exhibit 1, at p. 9. However, in doing so, Judge Pratt also

stated, "All further proceedings in this class arbitration are stayed for thirty days from the date of this Clause Construction Award to permit any party to move a court of competent jurisdiction to confirm or to vacate this award." *Id.* Accordingly, pursuant to Judge Pratt's Clause Construction Award, Waterstone now seeks to have this Court vacate the clause construction contained therein insofar as the Arbitrator manifestly disregarded applicable law that requires evidence of contractual intent in order to compel class arbitration.

I. FACTUAL BACKGROUND

This matter arises out of Plaintiff's allegations against Waterstone of violations of the Fair Labor Standards Act ("FLSA") and claims of breach of contract and *quantum meruit*. Plaintiff's FLSA claim alleges that she was not paid the minimum wage for hours worked and that she was not paid overtime hours for hours worked in excess of forty hours per week; however, these assertions are not supported by Plaintiff's employment records. In addition, Plaintiff's non-FLSA claims rely upon the terms of her Employment Agreement (hereinafter referred to as "the Agreement"), a copy of which is attached as Exhibit 2, and are wholly unsupported by the express language of the Agreement.

While Waterstone categorically denies the Complaint's allegations, the litigation of this matter thus far has not yet addressed the merits and instead has focused on whether these claims should be arbitrated. By way of background, Waterstone was forced to seek to compel arbitration of this matter inasmuch as Plaintiff filed her lawsuit in Court despite the fact that the Agreement contains an arbitration agreement that provides:

[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 the arbitration.

Ex. 2 at ¶ 13. During the pendency of this motion, the National Labor Relations Board (hereinafter, "NLRB") issued a ruling in which it held that it is a violation of the National Labor Relations Act (hereinafter, "the NLRA") to require "employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial." In re D.R. Horton, Inc., 357 NLRB No. 184, Case No. 12-CA-25764, at p. 13. Applying the law of the NLRA as explained by the NLRB in D.R. Horton, (a highly criticized opinion for multiple reasons¹ including the fact that it was decided without the necessary quorum required by agency rules²) which is now on appeal to the Fifth Circuit Court of Appeals, this Court granted Waterstone's motion in part, ruling, "Plaintiff Pamela Herrington's claims must be resolved through arbitration, but she must be allowed to join other employees to her case." ECF 57 at p.

¹ The majority of federal courts that have considered the application of D.R. Horton have rejected it. See, Morvant v. P.F. Chang's China Bistro, Inc., 2012 U.S. Dist. LEXIS 63985, *33 (N.D. Cal. 2012) (finding that the "reasoning [of D.R. Horton] does not overcome the direct, controlling authority holding that arbitration agreements, including class action waivers contained therein, must be enforced according to their terms"); Jasso v. Money Mart Express, Inc., 2012 U.S. Dist. LEXIS 52538, *24 - 26 (N.D. Cal. 2012) (holding that Supreme Court precedent articulating a strong policy in favor of enforcement of arbitration agreements requires the enforcement of class waiver provisions); Palmer v. Convergys Corp., 2012 U.S. Dist. LEXIS 16200 (M.D. Ga. 2012) ("The Court reviewed the NLRB decision and finds that it does not meaningfully apply to the facts of the present case"); LaVoice v. UBS Fin. Servs., 2012 U.S. Dist. LEXIS 5277, 19-20 (S.D.N.Y. 2012) (rejecting D.R. Horton and concluding that requiring classwide arbitration is inconsistent with AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011)); Luciana De Oliveira v. Citicorp N. Am., Inc., 2012 U.S. Dist. LEXIS 69573 (M.D. Fla. 2012) (applying 11th Circuit precedent Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005) and Concepcion and rejecting D.R. Horton); Spears v. Mid-America Waffles, Inc., 2012 U.S. Dist. LEXIS 90902, *6 (D.Kan. 2012) (rejecting D.R. Horton and holding that, based on Concepcion, "arbitration agreements are enforceable even when they prohibit the use of a class action").

² With respect to the procedural validity of the Board's decision, there is a problematic defect. That is, at the time D.R. Horton was decided, the NLRB lacked a quorum. Specifically, in January 2012 the President's recess appointments were made without Senate approval making these appointments invalid and causing the number of sitting Board members to fall below the requisite amount for a quorum. See, Nat'l Ass'n of Manuf. v. NLRB, 2012 U.S. Dist. LEXIS 27290 (D.D.C. 2012); see also, Chamber of Commerce v. NLRB, 2012 U.S. Dist. LEXIS 66626, *30 (D.D.C. 2012). As a result, the Board was not operating with the appropriate minimum number of members and, therefore, its rulings were not procedurally adequate. Simply put, "The NLRB is a 'creature of statute' and possesses only that power that has been allocated to it by Congress . . . As the final rule was promulgated without the requisite quorum and thus in excess of that authority, it must be set aside." Id.

18.

Following this Court's ruling, Plaintiff refiled her complaint in an arbitration proceeding administered by the American Arbitration Association ("AAA") and proceeding before arbitrator Hon. George C. Pratt. Shortly thereafter, Judge Pratt issued an order, attached hereto as Exhibit 3, in which he requested briefing in order to determine the threshold issue of "what kind of arbitration proceeding this shall be." The parties then submitted briefs and responsive briefs and, on July 11, 2012, Judge Pratt issued the aforementioned Clause Construction Award. In construing the above-quoted arbitration provision to permit opt-out class arbitration, Judge Pratt literally interpreted the intent of the parties by reviewing the Agreement as if the phrase "Such arbitration may not be joined with or join or include any claims by any persons not party to this Agreement" never appeared in the Agreement. In other words, without identifying any supporting legal basis, Judge Pratt misapplied this Court's decision prohibiting the enforcement of the class waiver language as a ruling that the parties contractual intent should be determined as if the class waiver language had never been written in the first place. As Judge Pratt explained:

Waterstone argues that there can be no conclusion that Waterstone agreed to a class arbitration when in the waiver clause it had provided "Such arbitration may not be joined with or join or include any claims by any persons not party to this Agreement", a sentence that would seem to negate any agreement or consent to a class arbitration.

* * *

The Court has also directed that in this arbitration Herrington "must be allowed to join other employees to her case". Since I am bound to follow the court's order, (Supplementary Rules §1(c)), I must read the agreement as if there were no waiver clause. Waterstone's argument that as a matter of evidence of intent, the waiver clause must be weighed despite the District Court's ruling, is rejected.

Ex. 1 at pp. 8 - 9.

Moreover, Judge Pratt relied on notions of equity, assuming that Waterstone knowingly incorporated an illegal clause for which it should not benefit:

Waterstone should not be able to benefit from its act of incorporating that illegal waiver into a form agreement that it required, as alleged, all of its mortgage loan officers to sign.

Ex. 1 at p. 9. Of course, as this Court knows, class waiver arbitration provisions were largely and almost uniformly upheld prior to the D.R. Horton decision. Horenstein v. Mortgage Market, Inc., 9 Fed. Appx. 618 (9th Cir. 2001); Carter v. Countrywide Credit Indus., 362 F.3d 294 (5th Cir. 2004); Adkins v. Labor Ready, Inc., 303 F.3d 496 (4th Cir. 2002); Caley, 428 F.3d 1359, *supra*; Vilches v. The Travelers Companies, Inc., 413 Fed. Appx. 487 (3rd Cir. 2011); Winn v. Tenet Healthcare Corporation, 2011 U.S. Dist. LEXIS 8085 (W.D. Tenn. 2011); Brown v. Trueblue, Inc., 2011 U.S. Dist. LEXIS 134523 (M.D. Pa. 2011); Valle v. Lowe's HIW, Inc., 2011 U.S. Dist. LEXIS 93639 (N.D. Cal. 2011); Carrell v. L&S Plumbing Partnership, Ltd., 2011 U.S. Dist. LEXIS 84391 (S.D. Tex. 2011); Velez v. Perrin Holden & Davenport Capital Corp., 769 F. Supp.2d 445 (S.D.N.Y. 2011); Copello v. Boehringer Ingelheim Pharmaceuticals Inc., 2011 U.S. Dist. LEXIS 84912 (N.D. Ill. 2011). As such, Waterstone's reliance on the class waiver language was wholly appropriate and it remains a legitimate basis for discerning the parties' intent. The subsequent change of legal precedent does not extinguish the explicit and original intent of the parties based upon the law as it existed when the agreement was executed.

Finally, in determining that an opt-out class was appropriate, Judge Pratt reached such a conclusion based upon his misreading of this Court's Order. Despite the fact that this Court ordered only that Plaintiff be able to join others to her case, Judge Pratt took this to mean that he was required to choose between a collective action and class action. Ex. 1 at p. 6 ("Herrington

would at least be entitled to the statutory opt-in procedure"). Finding no AAA rule permitting collective actions he defaulted to a class action in violation of the parties' intent and congressional intent. Ex. 1 at pp. 8 - 9. For the reasons set forth below, the Clause Construction Award does not rely on any law in ignoring the parties' clearly expressed intentions. Further, the Award's reliance on the AAA rules as if the class waiver was never in the Agreement adopts a legal fiction without factual or rational support. Finally, Judge Pratt's award rests upon a flawed interpretation of this Court's Order. Accordingly, the Clause Construction Award should be vacated.

II. LEGAL STANDARD

At the onset, the Arbitrator's Clause Construction Award is ripe for review by this Court. As set forth above, in issuing the Clause Construction Award, Judge Pratt stated, "All further proceedings in this class arbitration are stayed for thirty days from the date of this Clause Construction Award to permit any party to move a court of competent jurisdiction to confirm or to vacate this award." Ex. 1 at p. 9. Accordingly, the Arbitrator has sanctioned judicial review of the Clause Construction Award.

In this regard, the FAA provides that the district courts have the authority to "make an order vacating the award upon the application of any party to the arbitration . . . where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 USCS §10(a)(4). The Seventh Circuit has explained that, subsumed within the grounds to vacate an award in which the arbitrator has exceeded his powers, lies the ability to vacate "arbitration awards that are in manifest disregard of the law." Wise v. Wachovia Sec., LLC, 450 F.3d 265, 268 (7th Cir. 2006). With this in mind, the Seventh Circuit has defined "manifest disregard of the law" to include

"cases in which arbitrators direct the parties to violate the law." *Id.* at 269 (internal quotations omitted). In other words, "When arbitrators demonstrate a manifest disregard for the applicable law, courts will not enforce the award. In order for a federal court to vacate an arbitration award for manifest disregard of the law, the party challenging the award must demonstrate that the arbitrator deliberately disregarded what the arbitrator knew to be the law in order to reach a particular result." National Wrecking Co. v. International Bhd. of Teamsters, Local 731, 990 F.2d 957, 961 (7th Cir. 1993), *citing* Health Servs. Management Corp. v. Hughes, 975 F.2d 1253, 1267 (7th Cir. 1992).

III. ARGUMENT

The threshold issue Judge Pratt sought to resolve in his Clause Construction Award is the proper procedure for allowing Plaintiff "to join other employees to her case." In ruling that the parties expressed an intent to arbitrate this matter as a class, Judge Pratt manifestly disregarded applicable Supreme Court precedent and ignored the parties' explicit intentions, instead adopting a legal fiction to support an intention directly contrary to the language in the Agreement.

A. The Clause Construction Award Ignores Applicable Supreme Court Precedent and Directs the Parties to Engage in Class Arbitration in Violation of this Law

1. **To Order Arbitration of a Class, there Must Exist Affirmative Evidence that the Parties Intended to Arbitrate Class Claims**

As this Court no doubt recalls, the Order issued by this Court simply stated, "Plaintiff Pamela Herrington's claims must be resolved through arbitration, but she must be allowed to join other employees to her case." ECF 57 at p. 18. The Order did not compel a specific process by which other employees should be permitted to join Plaintiff in arbitration. In order to determine how to effectuate this Court's Order, the Arbitrator, should have applied the Supreme Court's precedent in Stolt-Nielsen, 130 S. Ct. 1758, *supra*. In Stolt-Nielsen, the parties entered into a

contract that provided for arbitration of "any dispute arising from the making, performance or termination of [the agreement]," but which was silent on the question of class arbitration. *Id.* at 1765. The Supreme Court reversed the Second Circuit and ruled that the arbitration panel had erred by ordering class arbitration in the absence of a contractual basis demonstrating an intent to engage in class arbitration, noting that under the FAA, arbitration "is a matter of consent, not coercion" and that private agreements must be "enforced according to their terms." *Id.* at 1773.

The Court continued by noting that because private dispute resolution is a matter of consent, "**a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.**" *Id.* at 1775 (italics emphasis in original; bold emphasis added). The Court continued, "In this case, however, the arbitration panel imposed class arbitration even though the parties concurred that they had reached 'no agreement' on that issue . . . The panel's conclusion is fundamentally at war with the foundational FAA principle that **arbitration is a matter of consent.**" *Id.* at 1775 (emphasis added). As it pertains directly to class arbitration, the Supreme Court stated, "**An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate.** This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.* at 1775 (emphasis added). The Supreme Court then concluded that where there is no agreement to arbitrate on a class-wide basis, parties could not be compelled to submit their dispute to class arbitration. *Id.* at 1776.

This binding Supreme Court precedent is in line and consistent with other Supreme Court cases. To wit, the Supreme Court, in Concepcion, 131 S.Ct. 1740, *supra*, addressed California

case law that prohibited class-action waivers in an arbitration clause of an adhesion contract as unconscionable. In striking down this law, the Supreme Court began by explaining, "**The principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms.**" *Id.* at 1748 (internal quotations omitted, emphasis added). The Court continued, "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute . . . And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." *Id.* at 1749, *citing*, 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009). With the importance of arbitration under the FAA and the sanctity of private contracts in mind, the Court held, "Arbitration is a matter of contract, and **the FAA requires courts to honor parties' expectations.**" *Id.* at 1752 (emphasis added). As a result, the Court specifically affirmed the inclusion of collective action prohibitions in arbitration provisions. *See also*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (holding that arbitration agreements should be enforced as written unless "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue").

The preclusive nature of these holdings is evident, as "Concepcion (which is binding authority) made no exception for employment-related disputes." Iskanian v. CLS Transportation L.A. LLC, 2012 Cal.App. LEXIS 650, *21 (Cal. Ct. App. 2012). The same is also true of the Supreme Court's recent opinion in CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012), which came after D.R. Horton. In CompuCredit, the Supreme Court reaffirmed the "liberal federal policy favoring arbitration agreements" and also that this "is the case even when the claims at issue are federal statutory claims." *Id.* at 669. *See also*, Nat'l Supermarkets Assoc. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchants' Litig.), 634 F.3d 187, 200

(2d Cir. 2011) ("Stolt-Nielsen plainly precludes us from ordering class-wide arbitration").

As a result, it is evident that in Stolt-Nielsen the Supreme Court established a default position that class arbitrations are permitted only where evidence of an intent to participate in a class arbitration exists in the applicable contract; in other words, if there is not a clear intent to participate in class arbitration, then there is no agreement to participate in class arbitration. See, Sutter v. Oxford Health Plans LLC, 675 F.3d 215, 222 (3rd Cir. 2012) ("Stolt-Nielsen established a default rule under the Federal Arbitration Act . . . Absent a contractual basis for finding that the parties agreed to class arbitration, an arbitration award ordering that procedure exceeds the arbitrator's powers and will be subject to vacatur"); In re Am. Express Merchants' Litig., 634 F.3d at 200.

2. There is No Basis Upon Which to Conclude the Parties Intended to Arbitrate Class Claims

Despite the fact that Stolt-Nielsen requires "a 'contractual basis' for finding that the parties had agreed to the class method," Ex. 1 at p. 7, the Arbitrator completely disregarded this law and instead fabricated an intent to arbitrate that does not exist in -- and is in fact contradicted by -- the language of the Agreement. In ignoring the parties' expressed intent not to arbitrate class wide, the Arbitrator relies on no law for the proposition that the expressed intention of the parties to avoid class arbitration should be ignored simply because a subsequent change in the law renders the clause unenforceable. To the contrary, as the Supreme Court explained, "Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties. In this endeavor, as with any other contract, **the parties' intentions control.**" Stolt-Nielsen, 130 S. Ct. at 1773 - 74 (internal quotations omitted, emphasis added).

Basic contract law provides that in determining the parties' intent, fact finders are to look

primarily at the four corners of the document at the time the contract was executed. Montgomery v. Amoco Oil Co., 804 F.2d 1000, 1002 (7th Cir. 1986) ("Unless a contract is ambiguous, the "four corners doctrine" prohibits the court from looking beyond the provisions in the agreement"); Goldstein v. Lindner, 254 Wis. 2d 673, 681 (Wis. Ct. App. 2002) ("The analysis ends if the words convey a clear and unambiguous meaning"); Huntoon v. Capozza, 57 Wis. 2d 447, 460 (1973) ("In the construction of contractual provisions the prevailing idea is to glean the intent of the parties at the time such contract was executed"); EEOC v. CW Transp., Inc., 658 F. Supp. 1278, 1294 (W.D. Wis. 1987) ("its meaning is to be sought within its 'four corners,' although aids to construction such as circumstances surrounding the formation of the order may appropriately be used to resolve ambiguities"); F.W. Hempel & Co. v. Metal World, Inc., 721 F.2d 610, 614 (7th Cir. 1983) (applying Illinois law) ("the Court's task to scrutinize the intention of the parties at the time they entered into the contract"); Pappas v. Jack O. A. Nelsen Agency, Inc., 81 Wis. 2d 363, 371 (1978) ("there must be the intent to contract; and the agreement must in all respects conform to the principles governing the formation of a contract"); Metro. Ventures, LLC v. GEA Assocs., 2006 WI 71, P24 (Wis. 2006) ("The question is whether there is sufficient evidence to ascertain the intent of the parties; this court examines both the wording of the contract as well as the surrounding circumstances in an attempt to discern the parties' intent").

Indeed, the parole evidence rule recognizes that intent clearly manifested in a document is not to be ignored in favor of external evidence. Huml v. Vlazny, 716 N.W.2d 807, 820 (Wis. 2006) ("If the contract is unambiguous, our attempt to determine the parties' intent ends with the four corners of the contract, without consideration of extrinsic evidence"); Eden Stone Co. v. Oakfield Stone Co., 166 Wis. 2d 105, 116 (Wis. Ct. App. 1991) ("The ultimate aim of all

contract interpretation is to ascertain the intent of the parties. If this intent can be determined with reasonable certainty from the face of the contract itself, there is no need to resort to extrinsic evidence.") Moreover, ascertaining the parties' intentions is distinguishable from the question of contractual enforceability. Despite the fact that a clause may not be enforceable due to a subsequent change in the law, it does not negate the fact that it remains a clear expression of the parties' intentions. Larson Quinn Co. v. Alpha Property & Casualty Ins. Co., 166 Wis. 2d 1054 (Wis. Ct. App. 1992) ("Alpha argues in response to an estoppel argument that the notice was too late for reliance upon it. Alpha's argument is no doubt correct, but that does not prevent the court from considering it as evidence of intent."); Scripps v. Sweeney, 160 Mich. 148, 163 (1910) ("We recognize the rule that, in a case of doubt, courts should favor a construction which upholds the validity of the contract, but such a rule cannot apply to a case where the intent of the parties is obvious. A court cannot do violence to the plain meaning of words and the clear intent by making a contract for the parties, under the fiction of a construction."); In re Estate of Doane, 190 Cal. 412, 415 (Cal. 1923) (holding that, in the analogous context of deciphering the intent of a will, "The decedent having made an invalid provision in clear, unequivocal, language, the courts are without power to alter that language to express what may have been in the testator's mind but was not attempted to be expressed by him").

As this Court likely considered at the time it severed the collective action waiver from the Agreement, such a severance could not have occurred if it altered the intent of the parties. See, ECF 57 at p. 16, *citing* Booker v. Robert Half Int'l, Inc., 413 F.3d 77, 84 (D.C. Cir. 2005) ("A critical consideration in assessing severability is giving effect to the intent of the contracting parties"). Accordingly, this Court could not have severed the collective action waiver if doing so would have been contrary to the unambiguous intent specified by the parties prior to this Court

striking the collective action prohibition.

In more detail, the Agreement contains unmistakable language with respect to the intention of the parties. The parties agreed: "Such arbitration may not be joined with or join or include any claims by any persons not party to this Agreement." Ex. 2 at ¶ 13. The Arbitrator chose to disregard this intent, justifying this decision by explaining, "It would simply be letting in the back door what the District Court has barred from entry through the front door." Ex. 1 at p. 9.³ In so doing, the Arbitrator ignored not only the known law set forth in the preceding paragraph, but also the known law requiring that a contractual intent be determined by considering the intent of the parties at the time of contract formation, which would necessarily entail the parties intent to be bound by the provision subsequently determined to be unenforceable. See, Ohio Casualty Group of Ins. Cos. v. Gray, 746 F.2d 381, 383 (7th Cir. 1984) (interpreting a contract at the time of formation); Stolt-Nielsen, 130 S. Ct. at 1773 - 74. Likewise, the Arbitrator failed to consider the known law requiring that the agreement must be viewed as a whole, which would necessarily entail consideration of the intent of the parties in agreeing to the provision subsequently determined to be unenforceable. See, Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir. 1985) ("courts consider several factors in discerning the intent of the parties to the agreement . . . [including] the language and purposes of the agreement as a whole").

As flawed as it is to disregard the parties' expressed intentions, the Arbitrator committed further error by ignoring the language of the agreement to adopt a legal fiction opposite to what the parties stated. Specifically, after determining that he would not honor the parties expressed intentions, Arbitrator Pratt proceeded to pretend that the language at issue was never present, and

³ As argued to the Arbitrator, this conclusion is incorrect insofar as permissive joinder would permit other employees to join the arbitration while still complying with this Court's Order.

with that fiction in place, rely upon AAA's rules permitting class actions as a manifestation of the parties' intent. In other words, pretending that the class waiver language was never there, in the make-believe absence of any other manifestation of intent, the Arbitrator concludes that AAA's class procedure was intentionally adopted. Of course, given that the Agreement explicitly prohibited class arbitration consistent with applicable precedent at the time the Arbitration agreement was executed, the Parties would not have been concerned about AAA's adoption of class procedures since they affirmatively, consciously and explicitly opted out of those rules. Certainly, no one could review such a clause through the lens of the applicable law and infer that when the parties agreed not to "join or include any persons" that the remaining provisions of the Agreement constitute evidence that the parties agreed to arbitrate on a class-wide basis.

Instead, when viewed through the prism of the applicable law, the intent of the parties is very clearly to avoid class arbitration. Indeed, this renders class arbitration in the present matter even more inappropriate than it would have been in Stolt-Nielsen, where there was only a stipulation as to the absence of any intent.

3. The Arbitrator's Decision Was Based Upon a Flawed Reading Of the Court's Order

In light of the unmistakable application of the aforementioned law to the language of the Agreement, the only reason why the Arbitrator required class arbitration was due to the fact that he read this Court's Order as requiring either a class or collective procedure be applied. It is not necessary to engage in any guesswork to reach this conclusion, as the Arbitrator's stated reason for failing to apply the aforementioned law is "It would simply be letting in the back door what the District Court has barred from entry through the front door." Ex. 1 at p. 9. This is not jurisprudence based on applicable law, but rather the Arbitrator's belief that based on this Court's Order requiring that Plaintiff be able to join others, it meant either a class or collective procedure

was required.

Inasmuch as there can be no dispute that such intent is lacking and that the intent of Plaintiff and Waterstone was to exclusively participate in individual arbitrations, there is no basis from which to derive a showing of the intent required in order to support a conclusion of either opt-in or opt-out class arbitration. Therefore, since the application of Stolt-Nielsen prohibits class arbitration, the only permissible means by which Plaintiff may join other employees to this arbitration is through joinder. Had the Arbitrator not flatly rejected this possibility based upon his reading of this Court's Order he may very well have reached the only permissible result pursuant to the known applicable law. The wholesale adoption of the belief that collective or class litigation was required, rendered a decision in manifest violation of the applicable law.

B. The Clause Construction Award Violates Applicable Law by Ordering Opt-Out Class Arbitration Instead of Opt-In Class Arbitration

Even if the Arbitrator's unwillingness to limit the case to persons who affirmatively expressed a desire to join the case (without court ordered notice) was not manifestly in disregard of the law, ordering an opt-out class certainly has no basis in law or fact. "It is clear that Congress labored to create an opt-in scheme when it created Section 216(b) specifically to alleviate the fear that absent individuals would not have their rights litigated without their input or knowledge." Otto v. Pocono Health Sys., 457 F. Supp. 2d 522, 524 (M.D. Pa. 2006). As the statute itself explains in plain language, "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 USCS § 216. In interpreting this statute, the Seventh Circuit noted, "The statute is unambiguous: **if you haven't given your written consent to join the suit, or if you have but it hasn't been filed with the court, you're not a party.** It makes no difference that you are named in the complaint, for you might have been named

without your consent. The rule requiring written, filed consent is important because a party is bound by whatever judgment is eventually entered in the case, and if he is distrustful of the capacity of the 'class' counsel to win a judgment he won't consent to join the suit. We are inclined to interpret the statute literally. No appellate decision does otherwise." Harkins v. Riverboat Servs., 385 F.3d 1099, 1101 (7th Cir. 2004) (emphasis added).

The reasons supporting this conclusion were recently explained by the Third Circuit, which had occasion to consider this history in detail, noting:

These statements, taken together with the historical context, elucidate the congressional purpose behind § 216(b). First, the primary concern of Congress was "representative" actions as Senator Donnell defined them, and of the sort that had dominated the portal-to-portal litigation—that is, instances where union leaders allegedly "stirred up" litigation without a personal stake in the case. As a contemporary commentator stated, "The banning of representative actions for unpaid wages is an obvious device to prevent the maintenance of employee suits by labor unions." Note, Fair Labor Standards Under the Portal to Portal Act, 15 U. Chi. L. Rev. 352, 360 (1948).

Second, Congress intended the requirement of written consent to bar plaintiffs from joining a collective action well after it had begun, particularly when the original statute of limitations had run and when those opting in would not be bound by an adverse decision. These requirements abrogated the Pentland decision and foreclosed the possibility of one-way intervention in FLSA actions. See Fair Labor Standards Under the Portal to Portal Act, supra, at 360 & n.60.

In sum, the enforcement scheme in the Portal-to-Portal Act largely codified the existing rules governing spurious class actions, with special provisions intended to redress the problem of representative actions brought by unions under earlier provisions of the FLSA and the problem of "one-way" intervention. Absent from the debates was any mention of opt-out class actions—an unsurprising fact, since the FLSA had not been interpreted to permit such suits. The FLSA did not become relevant to opt-out class actions until after the revision of Rule 23 and the creation of modern Rule 23(b)(3) in 1966. During that process, the Advisory Committee on Civil Rules disclaimed any intention for the new opt-out rule to

affect 29 U.S.C. § 216(b). Fed. R. Civ. P. 23 advisory committee's note, reprinted in 39 F.R.D. 69, 104 (1966). The effect of this grandfathering was to convert what had been an affirmative grant beyond the limited provisions of pre-revision Rule 23 into "a limitation upon the affirmative permission for representative actions that already exists in Rule 23 of the Federal Rules of Civil Procedure. (That is to say, were it not for this provision of § 216(b) the representative action could be brought even without the prior consent of similarly situated employees.)" Sperling, 493 U.S. at 176 (Scalia, J., dissenting) (emphasis removed).

Knepper v. Rite Aid Corp., 675 F.3d 249, 256-257 (3d Cir. 2012).

Accordingly, even if the arbitrator was somehow correct in concluding (notwithstanding the language of this Court's Order) that this Court's Order prohibited him from limiting the case to affirmative joinder of parties, there is no basis under any law upon which the Arbitrator could order FLSA claims, which, to the extent they may be pursued collectively must be pursued in an opt-in collective action, could be pursued in an opt-out fashion. The Arbitrator disregarded this law entirely in ordering an opt-out class action.⁴ Therefore, even if this Court determines that the Arbitrator did not manifestly disregard the law in permitting class litigation, the Court should still vacate the Clause Construction Award on the grounds that it ignores the applicable law and, instead, is designed to achieve the result that the Arbitrator, by his own words, believes was the only appropriate conclusion. See, Ex. 1 at p. 9.

IV. CONCLUSION

WHEREFORE, the Defendant, Waterstone Mortgage Corporation, respectfully requests that this Court vacate the Arbitrator's Partial Final Award on Clause Construction and for such other relief as justice requires.

⁴ Even though the Arbitrator has ordered an opt-out class action, any award to an opt-out class will certainly be challenged on the basis that the Seventh Circuit has held that no recovery can be had absent a signed opt-in consent form. Harkins, 385 F.3d at 1101.

DATED: August 10, 2012

Respectfully submitted,

/s/

Ari Karen (Pro Hac Vice)
Offit Kurman, P.A.
8171 Maple Lawn Blvd., Suite 200
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Phone: (301) 575-0340
E-Mail: akaren@offitkurman.com
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/s/

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E-Mail: rberger@offitkurman.com
Attorney for Defendant

CERTIFICATE OF SERVICE

THIS WILL CERTIFY that on this 10th day of August 2012, a copy of the foregoing Motion to Reopen Case was electronically filed and delivered via CM/ECF to:

Dan Getman
Matthew Dunn
Getman & Sweeney, PLLC
9 Paradies Lane
New Paltz, NY 12561
Attorneys for Plaintiff

/s/
Russell B. Berger

stay the action on the ground that Herrington's claims were subject to an arbitration agreement.

The arbitration clause in the form Agreement, insofar as pertinent here, reads:

{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. (Agreement § 13; emphasis added).

On its motion, Waterstone sought not only to require the dispute to be arbitrated, but also to bar Herrington from pursuing any class or collective relief in the arbitration. Waterstone argued that the underscored language quoted above waived any claim by Herrington to join with others in pursuing her wage claims. Herrington argued in opposition that her statutory FLSA claim would not be subject to arbitration, and that in any event, the waiver provision in the arbitration clause violated the National Labor Relations Act because it would require her to give up her right under the statute to bring claims collectively.

The District Court disagreed with Herrington's contention that FLSA claims could only be brought in the district court, but agreed with Herrington on the waiver issue and severed the underscored language from the Agreement. Accordingly, the Court granted Waterstone's motion to require arbitration, and stayed the District Court action pending the outcome of the arbitration. After noting that Waterstone "requests explicitly that a collective action proceed in arbitration rather than federal court in the event the court invalidates the collective action waiver" (D. Ct. Decn. at 16), the Court ordered that

Herrington's "claim must be resolved through arbitration, but she must be allowed to join other employees to her case." (*Id.* at 18). Neither party appealed the District Court's decision.

By demand dated March 23, 2012, Herrington commenced this arbitration, attaching, as her demand, the Class Action Complaint she had filed in the District Court. At the initial hearing the parties agreed that as a threshold matter it should be determined what kind of an arbitration this will be. Herrington contended that this proceeding should proceed as a class arbitration under the AAA's Supplementary Rules for Class Arbitration ("Supplementary Rules"), which permit an "opt-out" proceeding similar to that allowed by Rule 23 of the Federal Rules of Civil Procedure. Waterstone was understood at the initial hearing to contend that this should be a "collective" proceeding of the type authorized by 29 USC §216(b), which provides that an action for unpaid minimum wages or unpaid overtime compensation may be brought "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated", but that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party" (an "opt-in" proceeding).

A briefing schedule was established, and the parties have now submitted their initial and responsive briefs. Oral argument is not necessary. Following the directions of the Supplementary Rules, § 3, Herrington submitted her initial brief as an Application for Clause Construction, arguing that the arbitration clause in the parties' Agreement should be construed so as to permit this arbitration to proceed as a class arbitration. Waterstone opposed, contending that under applicable Supreme Court precedent, "Claimant should only be allowed to join others to this arbitration exclusively by way of

permissive joinder, to the exclusion of either an opt-in or opt-out class arbitration and the notice provisions associated with such procedures.” (Waterstone Initial Brief at 1).

Rule 3 of the Supplementary Rules require that the arbitrator determine, as a threshold matter, “whether the applicable arbitration clause permits the arbitration to proceed on behalf of . . . a class.” For the reasons that follow, I conclude that the arbitration clause in the parties’ Agreement does permit this arbitration to proceed as a class arbitration on behalf of a class.

Waterstone’s Position.

Waterstone argues that Supreme Court precedent requires the conclusion that class arbitrations are impermissible and that joinder is the only viable option. In support it argues that under *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010), “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so” (*Id.* at 1775; italics by Waterstone) and that “arbitration is a matter of consent” (*Id.* at 1775). It further contends that, even though the sentence in the arbitration clause waiving joinder has been stricken by the District Court and is not enforceable, nevertheless under this Agreement as written originally, the presence of the waiver clause made clear the intention that Herrington could not join her claim with others in this arbitration.

Waterstone argues that the AAA’s Supplementary Rules for Class Arbitrations do not apply here; that it has never consented to a collective arbitration; that joinder is the only process that Herrington might use to bring other employees into this arbitration; and that there should be no class or collective-action certification and no notice

provisions imposed. It also suggests that the decision by the National Labor Relations Board in *In re D.R. Horton, Inc.*, 357 NLRB No. 184, Case No. 12-CA-25764, on which the District Court relied, may be reversed on appeal.

Herrington's Position.

Herrington contends that by drafting the arbitration clause to require arbitration of any dispute "in accordance with the rules of the American Arbitration Association applicable to employment claims", Waterstone had agreed to a class arbitration; that the AAA applies its Supplementary Rules for Class Arbitrations to FLSA collective actions; that arbitrators in other arbitrations have applied the Supplementary Rules to FLSA claims and courts have upheld them; that Waterstone agreed in the District Court to a collective arbitration; that *Stoldt-Nielsen* does not bar a class arbitration here; and that the parties' intent should be determined without reference to the stricken, unlawful prohibition on joinder.

DISCUSSION

There are three ways that an arbitration might be structured to hear FLSA claims of multiple employees for unpaid minimum wages and overtime wages. The first would be by having the complaining employees join at the beginning as co-claimants in the arbitration. The second would be by following the model of the FLSA for actions in the federal district court, that is, by having an opt-in procedure that would provide notice to all potentially affected employees that they could join in the arbitration. The third would be through a class arbitration procedure, here under the AAA's Supplementary Rules

for Class Arbitrations, which basically follow the pattern of Rule 23 of the Federal Rules of Civil Procedure in providing an opt-out procedure whereby the entire class is given notice of the arbitration and any class member may then opt out of the proceeding.

Waterstone argues for the first type – joinder. Although before the District Court and at the initial hearing in this arbitration Waterstone at least acquiesced in the second – opt-in – procedure, it has now stood firmly against any procedure that provides notice to the other potentially affected employees, i.e., either the second or third types.

It is significant that Waterstone has insisted that this dispute be arbitrated. However, claims under a statute, such as the FLSA, that is “designed to further important social policies may be arbitrated” only so long as “the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum.” (*Green Tree Financial – Alabama v. Randolph*, 531 US 79, 90 [2000]). Under that principle, and contrary to Waterstone’s current position, Herrington would at least be entitled to the statutory opt-in procedure.

By initially suing in federal court, Herrington in effect asked for the second type, the opt-in procedure; but now that she has been forced into arbitration, she seeks only the third type, a class arbitration. Whether a class arbitration is permitted in a particular case is a matter for the arbitrator to determine by construing the parties’ arbitration agreement. (*Green Tree Financial Corp. v. Bazzle*, 539 US 444, 453 [2003]). Typically in past cases, the agreements in question have been silent on whether a class arbitration might be maintained. The plurality opinion in *Bazzle* indicated that the issue that the arbitrator there should determine on remand was whether the agreement *prohibited* class arbitration. In *Stoldt-Nielsen S.A. et al. v. AnimalFeeds International*

Corp., 130 S. Ct. 1758 [2010], however, the majority opinion pointed out differences between a bilateral arbitration and a class-action arbitration and indicated the need for a “contractual basis” for proceeding on a class basis. The Court also noted that merely agreeing to submit a dispute to an arbitrator was insufficient evidence of an agreement to a class arbitration.

Much of the *Stoldt* discussion, however, was dicta. The Court actually held that because the parties had stipulated that there had been *no agreement* about class arbitration, it could not be allowed. Waterstone exaggerates when it asserts that there can be no class arbitration unless the parties have “expressly” agreed to it. All that *Stoldt* requires, if indeed its dicta should be viewed as binding, is that there be a “contractual basis” for finding that the parties had agreed to the class method.

Here, the parties agreed that any dispute would be “resolved through binding arbitration in accordance with the rules of the American Arbitration Association applicable to employment claims”. (Agreement § 13). Thus the agreement was more than simply to submit the dispute to the arbitrator. It was an agreement to arbitrate the dispute under those rules of the AAA that are applicable to employment claims. The AAA does have a set of rules that are expressly “applicable to employment claims”. They are entitled “Employment Arbitration Rules and Mediation Procedures.” Waterstone argues that only those rules apply.

The AAA, however, also has Supplementary Rules for Class Arbitrations, which “shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association (‘AAA’) where a party submits a dispute to arbitration on behalf of or against a class or purported class,

and shall supplement any other applicable AAA rules.” (Supplementary Rules 1(a)). Thus, the Supplementary Rules supplement the Employment Rules, and by agreeing to arbitrate under the AAA rules, Waterstone agreed to all of its applicable rules – both the Employment Rules and the Class Arbitration rules.. Together, they constitute the AAA rules that are “applicable to employment claims.” Since Herrington has submitted this dispute as a class action “on behalf of all others similarly situated”, under Supplementary Rule 1(a) she has triggered application of the Supplementary Rules for this proceeding. Consequently, the parties’ Agreement would permit a class arbitration unless the waiver clause defeats that construction of the Agreement. I turn, therefore, to the waiver clause.

Waterstone argues that there can be no conclusion that Waterstone agreed to a class arbitration when in the waiver clause it had provided that “Such arbitration may not be joined with or join or include any claims by any persons not party to this Agreement”, a sentence that would seem to negate any agreement or consent to a class arbitration. In response, Herrington points out that even if taken at face value, that sentence would not preclude a class arbitration otherwise agreed to, because any member of the class, in order to be similarly situated to Herrington, would also have to be a “party to this Agreement”.

A more substantive response to Waterstone’s position is Herrington’s contention that the District Court has concluded that because the waiver clause is contrary to federal law, it must be severed from the rest of the Agreement. The Court has also directed that in this arbitration Herrington “must be allowed to join other employees to her case”. Since I am bound to follow the court’s order, (Supplementary Rules §1(c)), I

must read the agreement as if there were no waiver clause. Waterstone's argument that as a matter of evidence of intent, the waiver clause must be weighed despite the District Court's ruling, is rejected. It would simply be letting in the back door what the District Court has barred from entry through the front door. Moreover, the invalidated waiver clause was put into the Agreement by Waterstone, and Waterstone should not be able to benefit from its act of incorporating that illegal waiver into a form agreement that it required, as alleged, all of its mortgage loan officers to sign. Furthermore, by providing in its Agreement for arbitration "in accordance with the rules of the American Arbitration Association", which rules include the Supplementary Rules for Class Arbitrations, and at the same time by including in the same paragraph the waiver clause, Waterstone at the very least created an ambiguity, which must be construed against the party who drafted the Agreement – Waterstone.

CONCLUSION

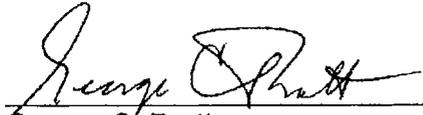
As required by Supplementary Rule 3, my "reasoned, partial final award on the construction of the arbitration agreement" is that the applicable arbitration clause permits this arbitration to proceed on behalf of a class. All further proceedings in this class arbitration are stayed for thirty days from the date of this Clause Construction Award to permit any party to move a court of competent jurisdiction to confirm or to vacate this award.

Any party who makes such an application to a court shall simultaneously notify the AAA Case Manager and me of the application. The party that seeks court review of this award shall also promptly inform the AAA Case Manager and me of the court's

ruling. Whether a further stay of the proceedings is to be granted will be determined on a future application.

SO ORDERED:

Dated: Uniondale, New York
July 11, 2012



George C. Pratt
Arbitrator

**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



- 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 (1) 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 BPO 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's confidential information, and both during his/her employment and after any termination thereof, Employee will use such information solely for Waterstone's 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's 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's 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

4-1-2011


Initials

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 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.

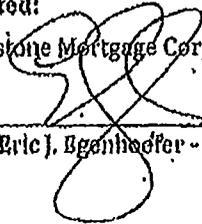
Voluntarily agreed to and executed this 7 day of April, 2011


Loan Officer

Monica E. Henningson
Print Name

204520
NMLS ID

Accepted:
Waterstone Mortgage Corporation

By: 
Eric J. Beanhoefer - President


Initials

ADDENDUM A

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

Commission

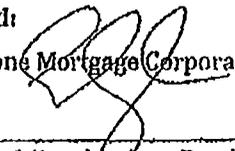
Base Commission Level – Originating Loan Officer to receive compensation of 200 Basis Point (bps) on each closed and funded loan unless otherwise indicated.


Loan Officer Signature
Eric J. Rgenhoefer
Loan Officer Name

209227
NMLS ID

Date: 4/7/11

Accepted:
Waterstone Mortgage Corporation


By: _____
Eric J. Rgenhoefer – President

Chris Randall
Branch Manager Signature
Chris Randall
Branch Manager Name

Date: 4/7/11

Date: 4/7/11



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.

4-1-2011


Initials

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.

 209227
 Loan Officer Signature NMLS ID

Pamela E. Herndon 4/7/11
 Loan Officer Name Date



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

Patricia E. Hennigan

Loan Officer Name

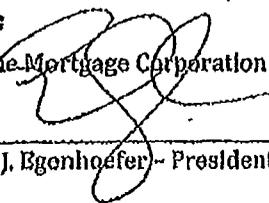
209227

NMLS ID

Date: 4/6/11

Accepted:

Waterstone Mortgage Corporation

By: 

Eric J. Egonhoefer - President



Branch Manager Signature

Chris Randall

Branch Manager Name

Date: 4/6/11

Date: 4/6/11



Initials

May 04 11 11:22a

Pam Herrington

480-563-1463

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

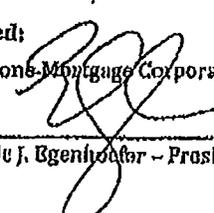
NMLS ID

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

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between

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

Claimant,

and

WATERSTONE MORTGAGE CORPORATION,

RESPONDENT.

AAA No. 51 160 00393 12

Before:

George C. Pratt
Arbitrator

**ORDER FOLLOWING INTIAL HEARING
HELD ON MAY 25, 2012**

The initial hearing in this arbitration was held by telephone conference call on May 25, 2012. Participating were counsel for both parties, a representative of the AAA, and the Arbitrator. The following matters were discussed, agreed to, and are now ordered:

1. The threshold issue is what kind of arbitration proceeding shall this be. Claimant initially brought a class-action complaint under FRCP 23, in the United States District Court for the Western District of Wisconsin, advancing claims under the Fair Labor Standards Act, 29 USC 201 et seq.158, ("FLSA") and "the common law of contract and quasi-contract". On Waterstone's motion, the District Court held that "Pamela Herrington's claims must be resolved through arbitration, but she must be allowed to join other employees to her case." (Decn. of 3/16/12 at



18). Herrington's arbitration demand incorporated her class-action complaint, and she contends that this proceeding should proceed as a class arbitration under the AAA's Class Arbitration Rules, which permit an "opt-out" proceeding similar to that allowed by FRCP Rule 23. Waterstone contends that this should be a "collective" proceeding of the type authorized by 29 USC §216(b), which provides that an action for unpaid minimum wages or unpaid overtime compensation may be brought "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated", but that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party" (an "opt-in" proceeding). After discussion it was agreed that the issue should be submitted to the Arbitrator to decide, with the following briefing schedule:

June 15, 2012: main briefs to be submitted

June 29, 2012: responding briefs to be submitted

No oral argument, unless a need for it develops, in which event it will proceed by telephone conference on a date to be fixed by the Arbitrator.

2. When the type of arbitration has been determined, counsel will be asked to confer, agree on if possible, and propose to the Arbitrator for approval, a schedule for the prompt, efficient, and economical resolution of this dispute.
3. Communications between counsel and the Arbitrator shall be by email, with copies sent to opposing counsel and to the Case Manager. Communications

having more than 10 pages shall be accompanied by a hard copy sent to the
Arbitrator.

SO ORDERED.

May 26, 2012

George C. Pratt
Arbitrator

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

PAMELA HERRINGTON, individually and on behalf of)	
all others similarly situated)	
)	
Plaintiff(s),)	
v.)	Case No. 3:11-cv-00779-bbc
)	
WATERSTONE MORTGAGE CORPORATION)	
)	
Defendant.)	

ORDER

Upon consideration of Defendant Waterstone Mortgage Corporation's Application for Review of Arbitrator's Partial Final Award on Clause Construction, it is this _____ day of _____, 2012, by the undersigned, one of the Judges of the Federal District Court for the Western District of Wisconsin, hereby

ORDERED, that Defendant Waterstone Mortgage Corporation's Application for Review of Arbitrator's Partial Final Award on Clause Construction is **GRANTED**; and it is further

ORDERED, that the Arbitrator's Partial Final Award on Clause Construction is **VACATED**.

Honorable Barbara B. Crabb
Judge, Federal District Court for the
Western District of Wisconsin