

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between:

Re: 51 160 00393 12

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

Before: Hon. George C. Pratt, Arbitrator

Case Manager: Trenda L. Benitez

**RESPONDENT WATERSTONE MORTGAGE CORPORATION'S JURISDICTIONAL
OPPOSITION TO CLAIMANTS' MOTION FOR A PROTECTIVE ORDER,
TEMPORARY RESTRAINING ORDER, AND PRELIMINARY INJUNCTION**

I. INTRODUCTION

Respondent Waterstone Mortgage Corporation (hereinafter, "Waterstone"), by and through its undersigned counsel, hereby submits this Jurisdictional Opposition¹ in response to Claimant's Motion for Protective Order, Temporary Restraining Order, and Preliminary Injunction (hereinafter, "Claimant's Motion"), in which Claimant incorrectly argues that Waterstone "has demanded that all current loan officer employees waive their right to participate in this arbitration." All of Claimant's arguments, including her claims for relief, fail because Waterstone has never consented to arbitrate its management decisions as to the nature and form of employment agreements with employees who are not parties to this case. Moreover, Claimant's factual predicate for her motion is wholly inaccurate in that the agreements will not prohibit employees from joining this arbitration, and in all events, there is no possibility of irreparable harm.

¹ Should Your Honor determine he has jurisdiction to rule on this matter, Waterstone will submit a more complete brief detailing the lack of merit to Claimant's assertions.

II. FACTUAL BACKGROUND

By way of background, the claims being pursued by Claimant in this arbitration consist of her allegations that Waterstone violated the Fair Labor Standards Act ("FLSA") and also committed acts constituting breach of contract and *quantum meruit*. While Waterstone disputes the validity of Claimant's claims, the present Motion constitutes an attempt by Claimant to preclude Waterstone from exercising its inherent management rights to replacing the arbitration provision in its existing Employment Agreement (hereinafter referred to as "the Agreement"), a copy of which is attached as Exhibit 1, with different language applicable to new employees. It is notable that Waterstone's reason for replacing the current arbitration agreement is that Claimant filed a charge with the NLRB demanding that enforcement of the original arbitration agreement be enjoined. See, Charge filed by Claimant, attached hereto as Exhibit 2. Waterstone's changes are therefore a direct result of Claimant's own actions.

In addressing whether Claimant may raise this challenge in arbitration, it is necessary to look at the scope of the arbitration provision in her Agreement. The operative language of the arbitration provision contained in her Agreement provides in relevant part:

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.

Ex. 1 at p. 6.

The operative language setting forth the scope of arbitration limits the scope of arbitration to "disputes between the parties." In no manner does the scope of arbitration comprehend arbitrating Waterstone's management decisions with respect to other employees not

involved in this case. Indeed Waterstone's efforts to refine the arbitration provision contained in the Agreement is being undertaken in its capacity as an ongoing business operation and not as a litigant in this arbitration. Moreover, its efforts are a direct result of Claimant's litigation before the federal district court and the NLRB. This requires Waterstone to attempt to balance compliance with the NLRB's interpretation of the NLRA and the pending arbitration, through the revision and distribution of the proposed Amendment (hereinafter, "the Amendment") to its loan officer employees, the only employees actually subject to the Agreement. A copy of the correspondence disseminating the Amendment is attached hereto as Exhibit 3 (hereinafter, "Cover Letter") and a copy of the Amendment is attached hereto as Exhibit 4. Ironically, Claimant, who has urged the NLRB to enjoin Waterstone from continuing to use the arbitration provision contained in the Agreement and who has argued that the arbitration provision is invalid as a matter of law to a federal court, now attacks Waterstone's management of its business operations and seeks to enjoin the use of the Amendment that has replaced the Agreement.

In any event, Claimant's attempt here to enjoin the use of the Amendment fails to recognize that the Amendment actually permits employees to join this arbitration. Specifically, the Amendment provides two options to Waterstone's loan officer employees (hereinafter, "employees"): A) employees could elect to proceed in arbitration subject to the rules promulgated by JAMS in their home state, or B) employees could elect to proceed in the United States District Court for the Western District of Wisconsin, the Wisconsin state court in Waukesha County if subject matter jurisdiction is lacking, or any other forum directed by the aforementioned courts. See, Ex. 4. As evidenced by the plain language of the Amendment, it is obvious that employees are not being forced to forego any right that they may have to join Claimant in this arbitration. Simply put, Option B allows employees to bring claims against

Waterstone in specified courts or in "any other forum to the extent it is directed by the foregoing court(s)." Id. Insofar as one of the specified courts, the U.S. District Court for the Western District of Wisconsin, has already directed that the wage and hour claims initiated by Claimant be brought in arbitration and that any employee must be allowed to join Claimant in arbitration, it is clear that Waterstone has not precluded its current employees from joining Claimant in arbitration. See, Opinion and Order of the U.S. District Court for the Western District of Wisconsin, attached hereto as Exhibit 5.

In all events, Claimant has no need for injunctive relief at this time. Indeed, her request presupposes that she will certify a class and that other employees will be precluded from joining her case in the future. If at any time in the future Claimant is successful in certifying a class she would at that time be able to file a motion seeking that any arbitration agreement be set aside – just like she did when this case was initiated. Hence, Claimant's Motion is directed at the wrong forum, based upon a misreading of the relevant documents, and totally premature and unnecessary.

III. ARGUMENT

It is well established that an arbitrator only has jurisdiction over those matters that the parties have agreed to arbitrate. AT&T Techs. v. Communs. Workers of Am., 475 U.S. 643, 648 - 49 (1986) ("The first principle gleaned from the Trilogy is that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.") (internal quotations omitted). Accordingly, the threshold question in this dispute is whether the parties have agreed to arbitrate the equitable relief sought by Claimant here

pertaining to employment policies to which Claimant is not subject. Whether an arbitrator has jurisdiction to resolve a dispute is a question for a court. Association of Flight Attendants v. Republic Airlines, Inc., 797 F.2d 352, 357 (7th Cir. 1986) ("It is certainly true that even where it is the arbitrator's task to resolve the merits of a dispute it remains the court's duty to determine the scope of the arbitrator's jurisdiction"). For that reason alone, Claimant's Motion should fail. However, for the additional reasons set forth below, it is evident that the arbitration provision governing this matter does not permit Your Honor to rule on Claimant's Motion seeking to enjoin Waterstone's conduct as it pertains to **OTHER** employees and not Claimant.

A. There is No Agreement to Arbitrate the Issues Raised in Claimant's Motion

As set forth in the arbitration provision applicable to the parties, Claimant and Waterstone have agreed to arbitrate only "dispute[s] between the parties concerning the wages, hours, working conditions, terms, rights, responsibilities or obligations between them or arising out of their employment relationship." Ex. 1 at p. 6. The critical language contained in the applicable arbitration provision is that which limits the scope of arbitration to "dispute[s] between the parties." Here, in misreading and taking issue with the Amendment, Claimant is not complaining about her wages, her hours, her working conditions, or the terms, rights, responsibilities or obligations between her and Waterstone. Instead, Claimant is raising a challenge in arbitration to the validity of the terms and conditions applied to current employees of Waterstone, a class to which Claimant does not belong.

Such a reading of the arbitration provision is consistent with the additional language contained therein. The arbitration provision also provides, "Nothing herein shall preclude a party from seeking temporary injunctive relief in a court of competent jurisdiction to prevent irreparable harm." Id. Accordingly, not only did the parties fail to agree to arbitrate the

employment terms of other employees, the parties agreed that, in instances of irreparable harm (which Claimant alleges here and Waterstone disputes), a party could seek temporary injunctive relief in Court. Therefore, Claimant does have a process by which she can seek to enjoin conduct that does not fall within the scope of the agreement to arbitrate, but is conduct that she claims will cause her irreparable harm. Similarly, Claimant has also filed an Amended Charge, attached hereto as Exhibit 6, with the NLRB in an attempt utilize the NLRB to enjoin the use of the Amendment. As a result, not only has Claimant already initiated another process challenging the Amendment, but, by filing the Amended Charge and a Motion, she has created the risk of inconsistent determinations.

Likewise, the fact that Rule 39(d) of AAA's Employment Arbitration Rules permit an arbitrator to "grant any remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorney's fees and costs," cannot be read to enlarge the scope of an arbitrator's jurisdiction; instead, this provision must only be read as enlarging the scope of available remedies that an arbitrator has at his or her disposal when issuing an award, be it interim or final, with respect to a matter to which the arbitrator has jurisdiction. While the Rules may operate to expand what an arbitrator may do in resolving a claim, the Rules cannot operate to expand the scope of jurisdiction agreed to by the parties. See generally, AT&T Techs., 475 U.S. at 648 - 49. In this matter, injunctive relief pertaining to working conditions to which Claimant is not subject is simply not something that is the parties agreed to arbitrate.

The parties did not agree to arbitrate such a challenge as the arbitration provision is specifically limited to the working conditions to which Claimant is subject. Allowing Claimant to arbitrate her attempt to obtain an injunction of Waterstone's ongoing business practices, to

which she is not subject, would amount to an unwarranted extension of the jurisdiction conferred to the arbitrator. See generally, Ex. 5. Simply put, the parties have not agreed to arbitrate Claimant's attempts to enjoin Waterstone from managing its current employees and operating its business.

B. The Conduct Complained of by Claimant Does Not Amount to a "Dispute Between the Parties" Because Claimant Has No Legal Right to Assert the Claim for Injunctive Relief

As set forth above, the key language in the parties' agreement to arbitrate specifies that the parties have only agreed to arbitrate "disputes between the parties." The arbitration provisions that current employees are subject to, on its face, cannot be said to be a dispute between Claimant and Waterstone inasmuch as Claimant is clearly not subject to the Amendment.

Moreover, any argument that the arbitration provision applicable to current employees somehow constitutes a dispute between Claimant and Waterstone because she has filed a complaint on behalf of a class is also unavailing as both a matter of law and fact. First, in attempting to justify her attempt to obtain injunctive relief in arbitration absent an agreement to do so, Claimant cites numerous cases pertaining to instances where courts, not arbitrators, have enjoined certain contact with putative members of the proposed class. These cases are distinguishable on several grounds. Clearly, the cases relied upon by Claimant all involve action being taken by a court, and these courts were not restrained in their conduct in the same way as an arbitrator, who may only resolve those issues that the parties have agreed to arbitrate. See generally, AT&T Techs., 475 U.S. at 648 - 49. Moreover, although Claimant has sought to pursue claims on behalf of a class, no such class has been certified. Unless and until a class is

certified, Claimant has no right to asset claims for injunctive relief on behalf of current employees.

C. **The Conduct Complained of by Claimant Does Not Amount to a "Dispute Between the Parties" Because There is No Dispute as a Matter of Fact**

In addition, as a matter of fact, there is no dispute between the parties because the Amendment does not mandate that employees execute an agreement that waives their right to participate in this arbitration. Specifically, Option B permits employees to join Claimant in this arbitration. To wit:

1. Option B provides that employees electing this option may bring claims in "any other forum to the extent it is directed by the foregoing court(s)." See, Ex. 4.
2. The U.S. District Court for the Western District of Wisconsin, which is one of the "foregoing court(s)," has directed that wage and hour claims brought by other employees must be permitted to be joined to Claimant's pending claim in arbitration. See, Ex. 5.
3. Therefore, Claimant's arbitration proceeding in AAA is a forum that has been "directed by the foregoing court(s)." See, Ex. 4.

As a result, it is incorrect to state that Waterstone has precluded employees from joining this arbitration.

Accordingly, there is no dispute between the parties because, contrary to Claimant's assertion, the Amendment does not create the stated dispute of precluding employees from joining this arbitration. Instead of creating a dispute between the parties, Waterstone's conduct is consistent with Judge Crabb's opinion in Sjoblom v. Charter Communications, LLC, 2007 U.S. Dist. LEXIS 94829, *9 - 10 (W.D.Wisc. 2007). In Sjoblom, Judge Crabb ultimately found attorney communications with current employees coercive given the totality of facts and "defendants' less than full disclosure of the affiants' potential interest in this lawsuit." Id. at 9.

As explained by Judge Crabb, several employees of the defendant were told to report to a different work location for training. After just 15 minutes of training, the employees met individually with the employers' attorneys for over an hour each. While the employees were informed of a lawsuit, they were not informed of the fact that they were potentially class members. Id. at 3. Both employees ultimately signed affidavits that were used to oppose class certification; however, both employees "averred that they would not have signed the declaration had they been told that there was a potential class action from which they could collect money or that signing the declaration might constitute a waiver of their right to participate in the class action." Id. at 6 - 7.

Judge Crabb began her analysis by explaining, "Although the manner in which the employees were solicited for defendants' 'blitz campaign of affidavit gathering' is cause for some concern, it alone would not justify limiting discovery. Similarly, the mere fact that the employment relationship is inherently coercive does not justify restricting defendants' communications with their employees. . . . however, considering these factors along with defendants' less than full disclosure of the affiants' potential interest in this lawsuit, I am persuaded that a limitation on defendants' communication with potential class members is necessary." Id. at 8 - 9. Unlike the present case, Judge Crabb found that the employer had engaged in inappropriate conduct because, "it did not notify them that they might be entitled to become a part of the lawsuit," and "the statements concerning the privileged and confidential nature of the discussions are also misleading and somewhat coercive." Id. at 9 - 10. Therefore, as a general proposition, the Western District of Wisconsin does recognize the right of an employer to interact with current employees regarding the subject matter of an FLSA lawsuit. Here, Waterstone has specifically informed its employees, "You are included in the description

of the class in the arbitration proceeding and executing the Amendment will impact your right to potentially join that arbitration against Waterstone." Ex. 3.

D. The Conduct Complained of by Claimant Does Not Amount to a "Dispute Between the Parties" Because No Harm, including Irreparable Harm, has Occurred

In addition, in order for there to be a dispute between the parties, it stands to reason that some potential for harm must exist. As set forth above, the entire premise upon which Claimant rests her claim for relief is without merit insofar as current employees may still join Claimant in this arbitration. While Claimant asserts that "access to the courts is a 'fundamental' constitutional right," Claimant's Motion at p. 21, *citing* Bounds v. Smith, 430 U.S. 817, 821 (1977), and leaving aside the fact that this "fundamental" right can unquestionably be waived in favor of arbitration, nothing contained in the Amendment would preclude Claimant or employees from pursuing claims against Waterstone. Simply put, the Amendment cannot and does not deprive Claimant, nor any other former employee of Waterstone, of any rights whatsoever, as they are not subject to the Amendment. Moreover, the Amendment does not deprive employees of a right to assert claims against Waterstone alongside fellow employees. Accordingly, the "fundamental" right to litigate against one's employer is preserved.² As a result, Claimant has not suffered any harm.

² Claimant relies upon cases that do not address a temporary restraining order or any form of injunctive relief; instead these cases address the rules applicable to obtaining a release of claims under the FLSA. See, Caserta v. Home Lines Agency, Inc., 273 F.2d 943, 946 (2d Cir. 1959) ("An agreement by appellee not to claim overtime pay for the work here in question would be no defense to his later demanding it"); O'Brien v. Encotech Constr. Servs., 203 F.R.D. 346, 348 - 49 (N.D. Ill. 2001) (voiding releases of FLSA claims). Yet again, this law does not establish irreparable harm and, to the contrary, actually demonstrates that if these Amendments actually could be considered a waiver or a release of claims (which for the reasons set forth above, it cannot), there would be a remedy at law as Your Honor could simply declare such waivers void.

Moreover, Claimant is not likely to suffer harm, irreparable or otherwise, as a result of the implementation of the Amendment.³ As the U.S. District Court for the Western District of Wisconsin has already proven by striking the collective action waiver contained in the Agreement, a prohibition against joining this litigation (were employees even compelled to waive their rights, which they were not) can be easily remedied by striking the offending contractual language. If Claimant is able to obtain certification of a class in arbitration, and if the Amendments impact the composition of the class, once Claimant actually represents such a theoretical Class of current employees, Claimant can move to have the offending provisions struck. Accordingly, the entire jurisdictional basis for Claimant's submission is flawed. Respectfully, Your Honor is simply not permitted nor authorized to entertain Claimant's instant demand for relief.

IV. CONCLUSION

WHEREFORE, Respondent Waterstone Mortgage Corporation hereby opposes Claimant's Motion for Protective Order, Temporary Restraining Order, and Preliminary Injunction and requests that Your Honor enter an Order denying Claimant's Motion and for such other relief as justice requires.

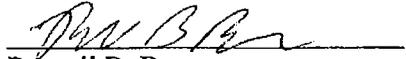
DATED: August 10, 2012

Respectfully submitted,

³ In contrast to the law cited by Claimant, in the 7th Circuit, the standard for issuing a temporary restraining order pursuant to Federal Rule of Civil Procedure 65(b) is identical to the standard for issuing a preliminary injunction. Vienna Beef, Ltd. v. Red Hot Chi., Inc., 833 F. Supp. 2d 870, 874 (N.D. Ill. 2011) *citing* Ty Inc. v. Jones Group, 237 F.3d 891, 895 (7th Cir. 2001); *see also*, Myles v. Mahone, 2011 U.S. Dist. LEXIS 73579, *2 (C.D. Ill. July 8, 2011) *citing* Graham v. Medical Mutual of Ohio, 130 F.3d. 293, 295 (7th Cir. 1997); Procknow v. Schueler, 2006 U.S. Dist. LEXIS 79191, *5 (E.D. Wis. 2006). In order to establish that she is entitled to a temporary restraining order, Claimant must show: "(1) its case has some likelihood of success on the merits; (2) that no adequate remedy at law exists; and (3) it will suffer irreparable harm if the injunction is not granted." Ty Inc., 237 F.3d at 895.



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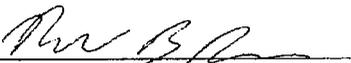


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CERTIFICATE OF SERVICE

THIS WILL CERTIFY that on this 10th day of August 2012, a copy of the foregoing
was electronically filed and delivered via email to:

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


Russell B. Berger

4813-7546-2672, v. 2

**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 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


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 by of any subsequent breach of the Agreement.

20. FAIR LENDING

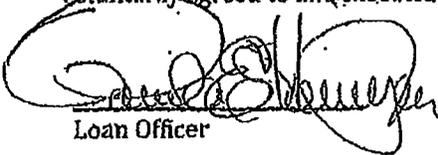
It is the policy of Waterstone to conduct its business in a non-discriminatory manner and in compliance with legal and regulatory guidelines concerning applicable fair lending laws including but not limited to the Fair Lending Act, the Equal Credit Opportunity Act and Regulation B. All Employees and 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.

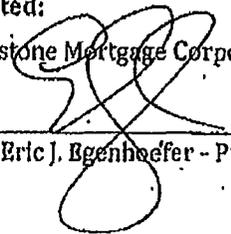
Voluntarily agreed to and executed this 7 day of April, 2011;


Loan Officer

Patricia E. Harrington
Print Name

2001227
NMLS ID

Accepted:
Waterstone Mortgage Corporation

By: 
Eric J. Begenhoefer - 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. Herring

Loan Officer Name

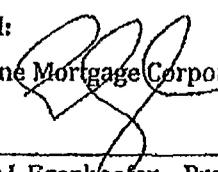
209227

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



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

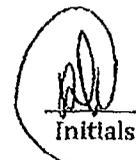
I hereby certify that I understand that under Section 129 of the Truth in Lending Act (15 U.S.C. 1639), subsection (k), I am not able to be paid any form of compensation that is based on any of the following:

- 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. HERPIN
 Loan Officer Name 4/7/11
 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 60% of the loan officer Base Commission Level.



Loan Officer Signature

Pamela E. Henning

Loan Officer Name

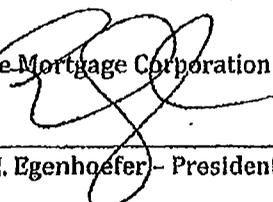
209227

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



Initials

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 Estella Herrington

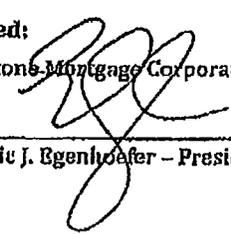
Loan Officer Name

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



United States Government

NATIONAL LABOR RELATIONS BOARD

Region 30

310 West Wisconsin Avenue - Suite 700

Milwaukee, WI 53203-2211

Telephone (414)297-4048

Facsimile (414) 297-3880

www.nlr.gov

January 26, 2012

Mr. Ari Karen, Esq.
Offit/Kurman, Attorneys at Law
8171 Maple Lawn Blvd., Suite 200
Maple Lawn, MD 20759-2521

**Re: Waterstone Mortgage Corporation
Case No. 30-CA-073190**

Dear Mr. Karen:

On January 26, 2012, Ms. Pamela E. Herrington filed a charge alleging that your client has violated the National Labor Relations Act. The charge is being fully investigated by Field Examiner Ms. Adriana A. Kelly.

This is to advise you that Ms. Pamela E. Herrington has also requested that the Board seek temporary injunctive relief pursuant to Section 10(j) of the Act, assuming probable merit is found, pending final determination by the Board of the alleged unfair labor practice(s). As the propriety of such action will also be the subject of our inquiry, we would appreciate your position on the injunction question as well as your position on the merits of the charge during the investigation.

Very truly yours,

Irving E. Gottschalk
Regional Director

cc: Waterstone Mortgage Corporation
1133 Quail Court
Pewaukee, WI 53072-3750





UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
REGION 30
310 W WISCONSIN AVE
STE 700W
MILWAUKEE, WI 53203-2281

Agency Website: www.nlr.gov
Telephone: (414)297-3861
Fax: (414)297-3880

January 26, 2012

WATERSTONE MORTGAGE CORPORATION
1133 QUAIL CT
PEWAUKEE, WI 53072-3750

Re: Waterstone Mortgage Corporation
Case 30-CA-073190

Dear Sir or Madam:

Enclosed is a copy of a charge that has been filed in this case. This letter tells you how to contact the Board agent who will be investigating the charge, explains your right to be represented, discusses presenting your evidence, and provides a brief explanation of our procedures, including how to submit documents to the NLRB.

Investigator: This charge is being investigated by Field Examiner ADRIANA A. KELLY whose telephone number is (414)297-4046. If ADRIANA A. KELLY is not available, you may contact Deputy Regional Director BENJAMIN MANDELMAN whose telephone number is (414)297-3881.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlr.gov, or from an NLRB office upon your request.

If you are contacted by someone about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board. Their knowledge regarding this proceeding was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Presentation of Your Evidence: We seek prompt resolutions of labor disputes. Therefore, I urge you or your representative to submit a complete written account of the facts and a statement of your position with respect to the allegations set forth in the charge as soon as possible. If the Board agent later asks for more evidence, I strongly urge you or your representative to cooperate fully by promptly presenting all evidence relevant to the investigation. In this way, the case can be fully investigated more quickly.

Full and complete cooperation includes providing witnesses to give sworn affidavits to a Board agent, and providing all relevant documentary evidence requested by the Board agent. Sending us your written account of the facts and a statement of your position is not enough to be

January 26, 2012

considered full and complete cooperation. A refusal to fully cooperate during the investigation might cause a case to be litigated unnecessarily.

In addition, either you or your representative must complete the enclosed Commerce Questionnaire to enable us to determine whether the NLRB has jurisdiction over this dispute. If you recently submitted this information in another case, or if you need assistance completing the form, please contact the Board agent.

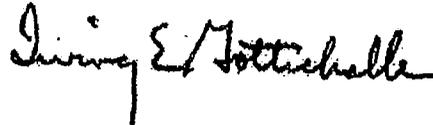
We will not honor any request to place limitations on our use of position statements or evidence beyond those prescribed by the Freedom of Information Act and the Federal Records Act. Thus, we will not honor any claim of confidentiality except as provided by Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4), and any material you submit may be introduced as evidence at any hearing before an administrative law judge. We are also required by the Federal Records Act to keep copies of documents gathered in our investigation for some years after a case closes. Further, the Freedom of Information Act may require that we disclose such records in closed cases upon request, unless there is an applicable exemption. Examples of those exemptions are those that protect confidential financial information or personal privacy interests.

Procedures: We strongly urge everyone to submit all documents and other materials (except unfair labor practice charges and representation petitions) by E-Filing (not e-mailing) through our website, www.nlr.gov. However, the Agency will continue to accept timely filed paper documents. Please include the case name and number indicated above on all your correspondence regarding the charge.

Information about the Agency, the procedures we follow in unfair labor practice cases and our customer service standards is available on our website, www.nlr.gov or from an NLRB office upon your request. NLRB Form 4541 offers information that is helpful to parties involved in an investigation of an unfair labor practice charge.

We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,



IRVING E. GOTTSCHALK
Regional Director

Enclosures:

1. Copy of Charge
2. Commerce Questionnaire

Waterstone Mortgage Corporation
Case 30-CA-073190

- 3 -

January 26, 2012

cc: ARI KAREN
8171 MAPLE LAWN BLVD
STE 200
FULTON, MD 20759-2521

FORM EXEMPT UNDER 48 U.S.C 3512

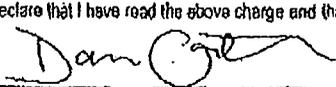
INTERNET
FORM NLRB-501
(2-09)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case 30-CA-073190	Date Filed January 26, 2012

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practices occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT	
a. Name of Employer Waterstone Mortgage Corporation	b. Tel. No. 301.575.0340
	c. Cell No.
	f. Fax No. 301.575.0336
d. Address (Street, city, state, and ZIP code) 1133 Quail Court Pewaukee, Wisconsin 53072.	e. Employer Representative Ari Karen, Ofit Kurman 8171 Maple Lawn Boulevard, Ste. 200, Maple Lawn, MD 20769
	g. e-Mail
	h. Number of workers employed more than 100
i. Type of Establishment (factory, mine, wholesaler, etc.) Mortgage Origination	j. Identify principal product or service Property Mortgages
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) section 7 of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.	
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) I was employed by Waterstone Mortgage Corporation (WMC) January 28, 2011 through October 7, 2011. I am now employed by another mortgage company. During employment with WMC, all loan officers were required, as a condition of employment, to agree to a mandatory arbitration program which prohibited class and representative actions in court and in arbitration. Since on or about April 7, 2011, the above-named employer has maintained and enforced a mandatory arbitration program that purports to prohibit employees from exercising their Section 7 rights. WMC's arbitration agreement applies to all mortgage loan officer employees (and likely its other mortgage staff as well) nationwide and also violates NLRA section 8(a)(1) as it applies to these employees. I filed a FLSA collective and class action against WMC in the WDWI. On 12/12/11, WMC filed a motion to enforce its unlawful arbitration clause and to have the case dismissed in favor of individual arbitration. Relief per Section 10(j) is requested.	
3. Full name of party filing charge (if labor organization, give full name, including local name and number) Pamela E. Herrington	
4a. Address (Street and number, city, state, and ZIP code) 27035 N. 56th Street Scottsdale, AZ 85286	4b. Tel. No. 480-294-9889
	4c. Cell No. 480-294-9888
	4d. Fax No. 9
	4e. e-Mail
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) N/A	
6. DECLARATION	
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	
by  (signature of representative or person making charge)	Tel. No. 845-255-9370
Dan Getman, Attorney (Print type name and title or office, if any)	Office, if any, Cell No.
	Fax No. 845-255-9370
	e-Mail
Address Getman & Sweeney, PLLC, 9 Paradise Ln., New Paltz, NY 12561 1/26/12 (date)	dgetman@getmansweeney.com

RECEIVED
 NLRB
 MILWAUKEE
 REGIONAL OFFICE
 JAN 26 2012

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 161 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

QUESTIONNAIRE ON COMMERCE INFORMATION

Please read carefully, answer all applicable items, and return to the NLRB Office. If additional space is required, please add a page and identify item number.

CASE NAME Waterstone Mortgage Corporation	CASE NUMBER 30-CA-073190
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PLEASE PRINT OR TYPE FULL NAME AND ADDRESS OF ALL RELATED ENTITIES (Form 1)

PLEASE PRINT OR TYPE FULL NAME AND ADDRESS OF ALL RELATED ENTITIES (Form 1)

CORPORATION LLC LLP PARTNERSHIP SOLE PROPRIETORSHIP OTHER (Specify)

A. STATE OF INCORPORATION OR FORMATION	B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES
--	--

PLEASE PRINT OR TYPE FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS (Form 1)

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PLEASE PRINT OR TYPE FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS (Form 1)

PRIVACY ACT STATEMENT
Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

Dear Loan Originators,

In an effort to take into consideration recent nationwide legal developments in the way courts will analyze and interpret arbitration provisions contained in employment agreements, I am providing you with the attached proposed Amendment to your Loan Originator Employment Agreement. Please read the Amendment carefully as you will have the option of replacing the paragraph in your Loan Originator Employment Agreement entitled "Arbitration/Governing Law/Consent to Jurisdiction" with either Option A or Option B as set forth in the attached Amendment. The main difference between the two options, which you should carefully review, is that Option A will allow you to pursue any claims against Waterstone in arbitration in your home state, while Option B will allow you to pursue any claims against Waterstone in the courts of Wisconsin (or in any other forum directed by those courts). Under either Option A or Option B, you will be permitted to join together with other Waterstone employees in pursuit of any claims against Waterstone.

In addition, it is also important that you realize that by executing the attached Amendment you may jeopardize any right you may have to join an arbitration proceeding filed by a former Waterstone employee, Pamela Herrington, alleging that loan officers were not paid properly and were not treated in accordance with their employment agreements. You are included in the description of the class in the arbitration proceeding and executing the Amendment will impact your right to potentially join that arbitration against Waterstone.

Should you have any questions regarding the Amendment, please contact your Branch Manager. I would appreciate it if you would complete and return this Amendment to your Branch Manager by July 31, 2012. Thank you for your cooperation and understanding.

Eric Egenhoefer

Enclosure

cc: All Branch Managers



JULY 23, 2012 AMENDMENT TO
LOAN ORIGINATOR EMPLOYMENT AGREEMENT

This Amendment pertains to the paragraph of the Loan Originator Employment Agreement entitled, "Arbitration/Governing Law/Consent to Jurisdiction", which is hereby deleted and shall be replaced by one of the following two options, as elected by the Employee and indicated below:

Option A

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. By execution of this Agreement, the parties are consenting to personal jurisdiction and venue in any state in the United States of America with respect to matters concerning the employment relationship between them.

In the event the parties cannot resolve a dispute concerning the wages, hours, working conditions, terms, rights, responsibilities or obligations between them or arising out of their employment relationship and/or this Agreement, including the determination of the scope or applicability of this agreement to arbitrate, they shall submit such dispute to binding arbitration administered by JAMS Arbitration and Mediation Services ("JAMS") and proceeding in the state and county where Employee worked for Employer and/or where Employee lives. Employee also may join or be joined by other employees in any JAMS arbitration exclusively through the procedures set forth in Federal Rules of Civil Procedure 20 and 24. The Arbitrator must otherwise apply the law applicable to such claims.

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.

Nothing herein shall preclude or limit Employee from filing any complaint or charge with a State, Federal, or Court agency.



Option B

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. 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.

In the event the parties cannot resolve a dispute concerning the wages, hours, working conditions, terms, rights, responsibilities or obligations between them or arising out of their employment relationship, they shall bring such litigation in either (1) the United States District Court for the Western District of Wisconsin; (2) only if subject matter jurisdiction is lacking, in a Wisconsin State Court located in Waukesha County; or (3) any other forum to the extent it is directed by the foregoing court(s).

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.

Nothing herein shall preclude or limit Employee from filing any complaint or charge with a State, Federal, or Court agency.

I ELECT OPTION _____.

Loan Officer Signature

Branch Manager Signature

Loan Officer Name

Branch Manager Name

NMLS ID

Date

Accepted:

Waterstone Mortgage Corporation

By: _____
Eric J. Egenhoefer - President

Date

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 I.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 plaintiff's 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

INTERNET
FORM NLRB-501
(2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

FORM EXEMPT UNDER 44 U.S.C. 3512

DO NOT WRITE IN THIS SPACE	
Case 30-CA-073190	Date Filed August 1, 2012

INSTRUCTIONS:

FIRST AMENDED

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer Waterstone Mortgage Corporation	b. Tel. No. 301.575.0340
d. Address (Street, city, state, and ZIP code) 1133 Quail Court Pewaukee, Wisconsin 53072.	c. Cell No.
e. Employer Representative Ari Karen, Offit Kurman 8171 Maple Lawn Boulevard, Ste. 200, Maple Lawn, MD 20759	f. Fax No. 301.575.0335
i. Type of Establishment (factory, mine, wholesaler, etc.) Mortgage Origination	g. e-Mail
j. Identify principal product or service Property Mortgages	h. Number of workers employed more than 100

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) section 7 of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)
I was employed by Waterstone Mortgage Corporation (WMC) January 28, 2011 through October 7, 2011. I am now employed by another mortgage company. During employment with WMC, all loan officers were required, as a condition of employment, to agree to a mandatory arbitration program which prohibited class and representative actions in court and in arbitration. Since on or about April 7, 2011, the above-named employer has maintained and enforced a mandatory arbitration program that purports to prohibit employees from exercising their Section 7 rights. WMC's arbitration agreement applies to all mortgage loan officer employees (and likely its other mortgage staff as well) nationwide and also violates NLRA section 8(a)(1) as it applies to these employees. I filed a FLSA collective and class action against WMC in the WDVI. On 12/12/11, WMC filed a motion to enforce its unlawful arbitration clause and to have the case dismissed in favor of individual arbitration. Relief per Section 10(j) is requested. See attached amended charge allegations

3. Full name of party filing charge (If labor organization, give full name, including local name and number)
Pamela E. Herrington

4a. Address (Street and number, city, state, and ZIP code) 27035 N. 56th Street Scottsdale, AZ 85266	4b. Tel. No. 480-294-4989
	4c. Cell No. 480-294-4989
	4d. Fax No.
	4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) N/A

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By Dan Getman Dan Getman, Attorney
(Signature of representative or person making charge) (Print type name and title or office, if any)

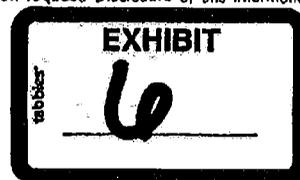
Tel. No. 845-255-9371
Office, if any, Cell No. 32
Fax No. 845-255-8849
e-Mail dgetman@getmansweeney.com

Address Getman & Sweeney, PLLC, 9 Paradise La., New Paltz, NY 12561 Aug. 1, 2012 (Date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.



FIRST AMENDED CHARGE ALLEGATIONS

On or about July 23, 2012, WMC sent all current loan officers a letter and a waiver form, demanding that loan officers sign the waiver, selecting one of two options contained therein. The waiver form would be deemed to amend the loan officer Employment Agreement it requires all mortgage loan officers to sign as a condition of employment, modifying the "Arbitration/Governing Law/Consent to Jurisdiction" section of the loan officer Employment Agreement. In the waiver form, loan officers were forced to choose between one of two options for wage hour and other employment claims: either agree to arbitrate in JAMS Arbitration and Mediation Services or in the District Court for the Western District of Wisconsin. Before the amendment, the employment agreement had required loan officers to file a demand with the American Arbitration Association (AAA), and under that prior agreement, Pamela Herrington had filed a class action demand with AAA on March 23, 2012. Case Number: 51 160 00393 12. On July 11, 2012, the AAA arbitrator, George C. Pratt, concluded that the arbitration agreement permitted the arbitration to proceed on behalf of a class. The waiver form demanded by Waterstone prohibits current or future loan officers from participating in the Herrington class arbitration because it requires employees to pursue claims in either Federal Court or with JAMS. Even if this waiver clause were later determined by the arbitrator not to be effective, the letter and waiver constitute undue and unlawful pressure on employees not to participate in a class or collective action in this arbitration.

Herrington requests immediate injunctive relief per Section 10(j).

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