

AMERICAN ARBITRATION ASSOCIATION

**PAMELA HERRINGTON, both individually and
behalf of all other similarly situated persons,**

Claimant,

and

**WATERSTONE MORTGAGE
CORPORATION,**

Respondent.

**Arbitrator: Hon.
George C. Pratt**

**Case Number:
51 160 00393 12**

**CLAIMANTS' MOTION FOR A PROTECTIVE ORDER, TEMPORARY
RESTRAINING ORDER, AND PRELIMINARY INJUNCTION RELATED
TO WATERSTONE SOLICITING WAIVERS FROM CLASS MEMBERS
OF THEIR RIGHT TO PARTICIPATE IN THIS ACTION, WITH BRIEF
IN SUPPORT.**

INTRODUCTION

Respondent Waterstone Mortgage Corp. (WMC) has demanded that all current loan officer employees waive their right to participate in this arbitration.

This demand is unlawful.

This is a Fair Labor Standards Act (FLSA) and state overtime and minimum wage back pay case brought on behalf of a class of mortgage loan officers. A brief summary of the history of the litigation shows that Claimants filed a class and collective action in federal court in the Western District of Wisconsin. WMC then moved to compel arbitration before the AAA on an individual basis based on a pre-employment arbitration clause that it demanded of its prospective or current

employees. Plaintiffs asked the Court to strike the class and collective action waiver. WMC then told the Court that if the class and collective action waiver was invalid, the case should proceed to AAA arbitration on a collective action basis. The Court agreed, struck the class and collective waiver and sent this case to arbitration under the AAA's Supplementary Rules for Class Arbitration. WMC then argued to Your Honor that it had not agreed to collective or class relief and the Court did not require that the arbitration be allowed to proceed on a class basis. Your Honor disagreed with WMC in every respect and issued a partial clause construction award in Herrington's favor.

Now, in a brazen effort to defeat the clause construction award, WMC has *secretly* demanded that its current employees who are class members sign *another* waiver form.¹ The waiver form does not give employees a choice as to whether or not they must sign. It requires loan officers to exercise a choice between two specific options - Option A - going to JAMS mediation on an individual basis (though purporting to allow individual joinder) or Option B, going back to Court in

¹ The fact that the Letter and Waiver were only sent to class members is clear by the language in Ex. A that “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. A, *emph added.*)

the Western District of Wisconsin.² Either choice prohibits participation in this very action. WMC sent the attached letter (Ex. A) and waiver form (Ex. B) to current loan officers on July 23, 2012 without notice to Claimants' Counsel. Presumably it is continuing to demand that any new hires waive their right to participate in this action.

WMC later supplied the waiver to the NLRB (which is bringing an Unfair Labor Practice complaint against WMC to hearing, for its refusal to withdraw the class and collective action waiver from its employment agreement under the authority of *In re D.R. Horton*, 357 NLRB No. 184, 2012 WL 36274 (N.L.R.B. 2012). Ex. C. In that transmittal, WMC informed the NLRB that it had already sent the letter and waiver on July 23, 2012. Claimants' counsel learned of the letter and waiver, yesterday, July 31, 2012.

This waiver is *coercive* because it was sent to current employees who are employed on an at-will basis and requires them to waive their right to participate in this case. While the waiver does not explicitly state that employees will be fired if they refuse to sign, the waiver gives employees the directive, in mandatory "shall" language, that they have only two choices. At-will employees know as a practical

² The waiver, Ex. B, states, "the paragraph of the Loan Originator Employment Agreement entitled, "Arbitration/Governing Law/Consent to Jurisdiction", ... is hereby deleted and shall be replaced by one of the following two options, as elected by the Employee...".

matter that they must comply with all work rules of their employer or risk being fired. While the consequences of refusal are unstated they are unstated because all the language of the letter and waiver are formulated as mandatory requirements with which employees must comply.

This waiver is *misleading* because WMC:

1. Misleadingly leads loan officers to believe they *must* sign the waiver and make an election, when WMC is without the legal power to preclude current loan officers from participating in this case.
2. Misleadingly suggests that the purpose of the agreement is “an effort to take into consideration recent nationwide legal developments in the way courts will analyze and interpret arbitration provisions contained in employment agreements,” when in fact the main, if not sole purpose of the waiver, is to prohibit participation in this action.
3. Misleadingly fails to inform class members of the Partial Final Clause Construction Award in this arbitration, which the waiver would nullify *sub rosa*. Since the class has not yet received notice of this class action, WMC’s communications poison the well, before class members have correct information.
4. Misleadingly suggests “The main difference between the two options ... 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” -- thus encouraging the selection of JAMS arbitration on a purely individual or individual joinder basis without fully apprising employees of the meaning or import of that decision, without apprising employees of the application of the AAA’s class rules to this arbitration, and without application of the Partial Clause Construction Award in this arbitration affirming the availability of class relief.

5. Misleadingly suggests that “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” when in fact both options would have significant ramifications detrimental to the classability of claims - which is not fully or clearly explained in language a layperson could be expected to understand.
6. Misleadingly threatens that loan officers cannot be part of this arbitration by stating “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.” Ex. A (emph added.)

The solicitation drastically and misleadingly interferes with the orderly class action process in this case. Through the improper solicitation of the new waivers, WMC has created the inescapable impression among class members that they are legally unable to join this case, before any class notice is sent. But even if this impression were corrected, the mischief wrought by WMC persists, as WMC has made clear to current employees that it absolutely does not want them to be part of this case. Indeed, as WMC has made these individuals promise to never join this case, in counsel’s experience, some employees may well refuse to violate their promise, notwithstanding any later legal correction. It is also likely that this letter and waiver will cause class members to refuse to assist class counsel in the case.

The waiver is plainly invalid. The purpose behind this letter and waiver is to coerce individuals not to assert their rights *in this case and to mislead them into believing they cannot or should not be part of it*. And that purpose has clearly been effectuated by WMC and its counsel. That purpose is illegitimate under the FLSA. In this motion, Herrington seeks 1) to prevent further improper efforts to chill

participation in this case; 2) to remedy the harm WMC has already caused; and 3) to sanction WMC for its conduct.

POINT ONE

THE REMEDIAL PURPOSES OF THE FLSA ARE FURTHERED BY CONCERTED ACTIVITY.

“The principal congressional purpose in enacting the FLSA was to protect all covered workers from substandard wages and oppressive working hours. . . . [and to ensure that employees] would be protected from the evil of 'overwork' as well as 'underpay.’” *Barrentine v. Arkansas Best Freight System, Inc.*, 450 U.S. 728, at 739, 101 S.Ct. 1437, at 1444 (1981) (citations omitted). To protect against excessive hours of work, the statute requires that employers pay employees for hours in excess of 40 in a week "at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1).

The FLSA was designed “to extend the frontiers of social progress’ by ‘insuring to all our able-bodied working men and women a fair day’s pay for a fair day’s work.’ ... Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. ” *A.H. Phillips v. Walling*, 324 U.S. 490, at 493, 65 S.Ct. 807, at 808 (1945). The FLSA’s overtime rules, "like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in

purpose. Such a statute must not be interpreted or applied in a narrow, grudging manner." *Giles v. City of New York*, 41 F.Supp.2d 308, 316 (S.D.N.Y. 1999) (quoting *Tenn. Coal, Iron & R.R. Co., et al. v. Muscoda Local No. 123, et al.*, 321 U.S. 590, 64 S.Ct. 698 (1944)).

The FLSA's collective action provisions are an important aspect of achieving the statute's remedial purpose. Section 216(b) of FLSA authorizes any one or more employees to sue an employer for unpaid overtime compensation and liquidated damages on behalf of himself and other employees similarly situated. The procedure, called a collective action, "allows . . . plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources." *Hoffman Larouche v. Sperling*, 493 U.S. 165, 170-71, 110 S.Ct. 482, 486,(1989). Sending notice of the action to all similarly situated employees of the action "comports with the broad remedial purpose of the Act, which should be given a liberal construction, as well as with the interest of the courts in avoiding multiplicity of suits." *Braunstein v. Eastern Photographic Laboratories, Inc.*, 600 F.2d 335, 336 (1979).

POINT TWO

A PROTECTIVE ORDER SHOULD BE ENTERED TO PRECLUDE WMC FROM FURTHER COERCIVE AND MISLEADING COMMUNICATIONS WITH THE CLASS.

As the Supreme Court noted in *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99-100

(U.S. 1981):

Class actions serve an important function in our system of civil justice. They present, however, opportunities for abuse as well as problems for courts and counsel in the management of cases. Because of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.

Id. at 99-100. Implementing *Gulf Oil*, “Courts have found a need to limit communications with absent class members where the communications were misleading, coercive, or an improper attempt to undermine Rule 23 by encouraging class members not to join the suit. *See, Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1206 (11th Cir.1985); *Burrell v. Crown Central Petroleum*, 176 F.R.D. 239, 244–45 (E.D.Tex.1997); *Hampton Hardware, Inc. v. Cotter & Co., Inc.*, 156 F.R.D. 630, 632–33 (N.D.Tex.1994).” *Belt v. Emcare, Inc.*, 299 F.Supp.2d 664, 667-668 (E.D.Tex. 2003).

It is the job of the Court or Arbitrator hearing an FLSA action to safeguard the rights of unnamed and unknown prospective Claimants in a collective action. *See Hoffman-LaRoche v. Sperling*, 493 U.S. 165 (1989); *Belt v. Emcare*, 299 F. Supp. 2d 664 (W.D. Tex 2004). As the *Sperling* Court noted, judicial oversight of communication with the class helps protect against misleading communications to potential class members because the court resolves any disputes about the contents

of the notice prior to its distribution. *Sperling*, 493 U.S. at 171, 110 S.Ct. at 486-87, 107 L.Ed.2d at 488; As the Eleventh Circuit explained in *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1203 (1985)(disqualification and \$50,000 fine for counsel's advice to Defendant to solicit opt-outs in violation of court order, affirmed), "[u]nsupervised, unilateral communications with the Plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the facts, without opportunity for rebuttal. The damages from misstatements could well be irreparable." *See also Bower v. Bunker Hill Co.*, 689 F.Supp. 1032, 1033 (E.D.Wash.1985) (recognizing "extreme potential for prejudice to class members' rights" if Defendant was permitted to discuss suit with class members). Further, the solicitation of exclusions from a pending class action by a Defendant constitutes a serious challenge to the authority of the Court to maintain control over communications with class members. *See 3 Newberg on Class Actions* § 15.19 (3d ed. 1992). "Unsupervised unilateral communications with the Plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the facts, without opportunity for rebuttal. The damage from these statements could well be irreparable." *Kleiner, supra*, 751 F.2d at 1203 *citing Zarate v. Younglove*, 86 F.R.D. 80, 90 (C.D. Cal. 1980). The Courts have recognized that "[c]oercion of

potential class members by the class opponent may exist if both parties are ‘involved in an on-going business relationship,’” and that “[c]ourts have found the danger of such coercion between employers and employees sufficient to warrant the imposition of restrictions regarding communication between defendants and potential class members.” *EEOC v. Morgan Stanley & Co., Inc.*, 206 F.Supp.2d 559, 562 (S.D.N.Y. 2002). *See also Wu v. Pearson Educ. Inc.*, No. 09 Civ. 6557, 2011 WL 2314778, *6 (S.D.N.Y. 2011):

In some circumstances where there is an ongoing and unequal business or employment relationship between the parties, communications may be deemed inherently coercive. *See In re Currency Conversion Fee Antitrust Litigation*, 361 F.Supp.2d 237, 253 (S.D.N.Y.2005) (holding arbitration clauses proffered by defendant credit card companies during litigation coercive and unenforceable where “the potential class consisted of cardholders who depended on defendants for their credit needs”); *Ralph Oldsmobile*, 2001 WL 1035132, at *4 (finding defendant's request for releases from putative class members potentially coercive where “potential class members depend upon the defendant for information, supplies, and credit” and where “[t]heir continued success and, indeed, existence may depend upon [defendant's] good will”). Furthermore, a communication may be coercive where the defendant interferes with participation by potential class members in the lawsuit or misleads them by failing to reveal how some proposed transaction might affect their rights in the litigation. *See Goody v. Jefferson County*, No. CV–09–437, 2010 WL 3834025, at *3 (D.Idaho Sept. 23, 2010) (requiring corrective notice where defendant's communications with potential class members caused confusion about right to join suit); *In re Currency Conversion Fee Antitrust Litigation*, 361 F.Supp.2d at 254 (“[D]efendants' unsupervised communications were improper because they sought to eliminate putative class members' rights in this litigation.”).

Wu v. Pearson Educ. Inc., No. 09 Civ. 6557, 2011 WL 2314778, *6 (S.D.N.Y.

2011).

Federal Courts routinely prohibit communications which have the potential to mislead, coerce, or discourage class members from joining a suit. *Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1206 (11th Cir. 1985); *Hampton Hardware, inc. v. Cotter & Co., Inc.*, 156 F.R.D. 630, 632-33 (N.D. Tex. 1994); *Mevorah v. Wells Fargo Home Mortg., Inc., a div. of Wells Fargo Bank*, 2005 WL 4813532 (N.D.Cal.,2005). And, as explained in *Burrell v. Crown Cent. Petroleum*, 176 F.R.D. 239 (E.D. Tex. 1997), a plaintiff need not show actual harm to justify limitations on a defendant's communications with putative class members; it is sufficient if a plaintiff shows a potential for such abuses. *Id* at 243-244. *See also Allen v. Suntrust Bank, Inc.*, 549 F. Supp. 2d 1379, 1383 (N.D. Ga. 2008) where the Court enjoined a bank's conditioning grant of severance benefits on waiver of pending FLSA rights :

Class Plaintiffs in this action may well decline the severance benefit out of fear that agreeing to the terms of the Severance Agreement will require them to dismiss the instant action and abandon their claims under the FLSA. Alternatively, should Plaintiffs enter the Severance Agreement and continue this action, Defendant will imminently act to deny those individuals the severance benefit based on their participation in this action. In either case, Class Plaintiffs will suffer irreparable harm in the absence of injunctive relief.

Id. at 1383.

The principle that a Court should prevent misleading and coercive communication by defendant with the putative plaintiff class has been affirmed in the Rule 23 context in *In re Currency Conversion Fee Antitrust Litigation*, 361 F.Supp.2d 237, 252 (S.D.N.Y.,2005):

One policy of Rule 23 is the protection of class members from “misleading communications from the parties or their counsel.” *Erhardt v. Prudential Group*, 629 F.2d 843, 846 (2d Cir.1980); *see also In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288(DLC), 2003 WL 22701241, at *8 (S.D.N.Y. Nov.17, 2003). That same policy concern applies where a party misleads class members by omitting critical information from its communications. Communications that threaten the choice of remedies available to class members are subject to a district court’s supervision:

A district court’s duty and authority under Rule 23(d) to protect the integrity of the class and the administration of justice generally is not limited only to those communications that mislead or otherwise threaten to create confusion and to influence the threshold decision whether to remain in the class. Certainly communications that seek or threaten to influence the choice of remedies are ... within a district court’s discretion to regulate.

Id. However, there is no difference between the Court’s authority to regulate misleading or coercive pre-Notice communications by defendant with the plaintiff class under Rule 23 or the collective action provisions of the FLSA. *Kleiner v. First Nat. Bank of Atlanta, supra; Belt v. Emcare, supra.*

When an employer unilaterally attempts to defeat the Court or Arbitrator’s authority to supervise participation by class members, the Courts take decisive and comprehensive measures, including sanctions. In *Belt v. Emcare, Inc.*, 299

F.Supp.2d 664 (E.D.TX 2003), the Court issued a variety of protective measures and sanctions for an employer's attorneys' *ex parte* communication with members of an FLSA collective action class. In that case, the employer's counsel drafted a misleading letter to members of the class concerning the merits of joining the case, in a manner designed to chill participation. As here, the employer in *Belt* contacted putative class members before the notice was mailed or approved. The Court wrote:

As in Rule 23 class actions, courts have the authority to govern the conduct of counsel and parties in § 216(b) collective actions. *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 171, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989). Moreover, a court's authority to control counsels' conduct in a § 216(b) collective action includes the authority to "manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands or the provisions of the Federal Rules of Civil Procedure." *Id.* Indeed, because of the potential for abuses in collective actions, such as unapproved, misleading communications to absent class members, "a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *See Gulf Oil Company v. Bernard*, 452 U.S. 89, 100, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981).

* * *

Courts have found a need to limit communications with absent class members where the communications were misleading, coercive, or an improper attempt to undermine Rule 23 by encouraging class members not to join the suit. *See Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1206 (11th Cir.1985); *Burrell v. Crown Central Petroleum*, 176 F.R.D. 239, 244-45 (E.D.Tex.1997); *Hampton Hardware, Inc. v. Cotter & Co., Inc.*, 156 F.R.D. 630, 632-33 (N.D.Tex.1994). As commercial speech, *ex parte* communications tending to discourage absent class members from joining

the suit may be limited by orders grounded in good cause and issued with a heightened sensitivity for First Amendment Concerns. *Kleiner*, 751 F.2d at 1203; *Hampton Hardware, Inc.*, 156 F.R.D. at 633. Courts examine four criteria to determine good cause in this context: the severity and likelihood of the perceived harm, the precision with which the order is drawn, the availability of a less onerous alternative, and the duration of the order. *Kleiner*, 751 F.2d at 1203; *Hampton Hardware, Inc.*, 156 F.R.D. at 633.

In considering whether to limit Defendants' speech with absent class members, the Court, as noted above, first determines whether there is a need for limitation on speech and then tailors the limitations accordingly. Thus, the Court first determines whether Defendants' speech is misleading, coercive, or an attempt to undermine the collective action. Then, if the Court finds any basis for restricting the speech, it will tailor appropriate injunctions and sanctions in light of First Amendment concerns.

299 F.Supp.2d at 667-8. The Court then found the employer's letter to absent class members misleading and also coercive. *Id.* at 668. A unilateral communications scheme, moreover, is rife with potential for coercion. "[I]f the class and the class opponent are involved in an ongoing business relationship, communications from the class opponent to the class may be coercive." *Kleiner*, 751 F.2d at 1202. The same coercion appears in the letter demanding waiver of rights that WMC solicited here.

The *Belt* Court noted that the only purpose for the employer's communication was an impermissible one:

the Court finds that EmCare's letter was intended to undermine the purposes of the collective action by encouraging absent class members not to join. EmCare could have no purpose but to discourage absent class members from joining the suit when it misrepresented damages available and preyed upon

the absent class members' fears and concerns. The fact that defense counsel admittedly assisted in the letter's drafting convinces the Court that these misrepresentations were not accidental. Additionally, sending the letter with no notice to Plaintiff or the Court, the day before EmCare was to provide Plaintiff with the potential class members' mailing addresses for the Court-approved notice, persuades the Court that EmCare intended to subvert the Court's carefully crafted notice and its role in administering the collective action.

299 F.Supp.2d at 669.

In this case, the WMC has undermined the authority of this Arbitrator and the well-established procedures for FLSA actions. AAA Supplementary Rules. It has taken matters into its own hands for the sole and express purpose of preventing class members from being part of this litigation. Improperly attained agreements not to be part of an action are precisely the type of conduct that the Court or an Arbitrator must prevent. Accordingly, the circumstances warrant the issuance of a protective order and corrective action to remedy WMC abuses. *See Haffer v. Temple University*, 115 F.R.D. 506, 512 (E.D. Pa. 1987) (courts routinely issue restraining orders after parties initiate improper communications with class members); *accord Hampton Hardware, Inc. v. Cotter & Company, Inc.*, 156 F.R.D. 630 (N.D. Tex. 1994). The protection of innocent class members must be of tantamount importance when an employer engages in this type of inappropriate conduct.

POINT THREE

A TEMPORARY RESTRAINING ORDER RETURNING THIS CASE TO THE STATUS QUO PRIOR TO THE IMPERMISSIBLE MAILING IS REQUIRED.

Courts routinely issue orders prohibiting misleading and coercive communication between defendants and FLSA putative class members. *Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1206 (11th Cir. 1985); *Belt v. Emcare, Inc.*, 299 F.Supp.2d 664 (EDTX 2003); *Hampton Hardware, Inc. v. Cotter & Co., Inc.*, 156 F.R.D. 630, 632-33 (N.D. Tex. 1994); *Mevorah v. Wells Fargo Home Mortg., Inc., a div. of Wells Fargo Bank*, 2005 WL 4813532 (N.D.Cal.,2005). *Burrell v. Crown Cent. Petroleum*, 176 F.R.D. 239 (E.D. Tex. 1997).

Abusive practices that have been considered sufficient to warrant a protective order include communications that coerce prospective class members into excluding themselves from the litigation; communications that contain false, misleading or confusing statements; and communications that undermine cooperation with or confidence in class counsel.

Cox Nuclear Medicine v. Gold Cup Coffee Services, Inc., 214 F.R.D. 696, 697 - 698 (S.D.Ala. 2003).

Interim injunctive relief is also available in arbitration under the Employment Arbitration Rules and Mediation Procedures. Employment Rule 32, Interim Measures, states;

At the request of any party, the arbitrator may grant any remedy or relief that would have been available to the parties had the matter been heard in court,

as stated in Rule 39(d), Award. A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

Claimant here states a clear entitlement to interim relief under federal and arbitral standards for an injunction.

Where a preliminary injunction is sought to preserve the status quo, a motion for injunctive relief requires a showing that the moving party will suffer irreparable harm absent the injunction and that either (1) the moving party is likely to succeed on the merits or (2) there are serious questions relative to the merits and the balance of hardships tips in favor of the moving party. *McGraw-Hill Companies, Inc. v. Ingenium Technologies Corp.*, 364 F.Supp.2d 352 (SDNY 2005); *N. Atl. Instruments, Inc. v. Fred Haber*, 188 F.3d 38, 43 (2d Cir.1999).³

The standard for granting a temporary restraining order and a preliminary injunction pursuant to Rule 65 of the Federal Rules of Procedure are

³As this Court noted in *Smith v. Bowers*, 337 F.Supp.2d 576 (S.D.N.Y.,2004): "The Second Circuit has established two different tests for establishing a plaintiff's right to preliminary injunctive relief. The first test, to be applied where a plaintiff seeks a preliminary injunction that maintains the status quo, requires the plaintiff to "establish irreparable harm and either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly in its favor." *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir.2002). The second, more stringent test, requires the plaintiff to prove a "clear or substantial likelihood of success on the merits." *Tom Doherty Associates, Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 37 (2d Cir.1995). It applies where "(i) an injunction will alter, rather than maintain, the status quo, or (ii) an injunction will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits." *Id.* at 33-34."

identical.” *Spencer Trask Software and Info. Servs., LLC v. RPost Int’l Ltd.*, 190 F.Supp.2d 577, 580 (S.D.N.Y.2002).

To satisfy the threshold requirement of irreparable harm or injury, a movant need not demonstrate its certainty. *See, e.g., Reuters Ltd. v. United Press Int.l, Inc.*, 903 F.2d 904, 907 (2d Cir.1990) (“a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction.”) (citation and internal quotation marks omitted) (emphasis added). “Irreparable harm must be shown by the moving party to be imminent, not remote or speculative, and the alleged injury must be one incapable of being fully remedied by monetary damages.” *Reuters*, 903 F.2d at 907. The movant is required to establish not a mere possibility of irreparable harm, but that it is “likely to suffer irreparable harm if equitable relief is denied.” *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 79 (2d Cir.1990) (emphasis in original). “Likelihood sets, of course, a higher standard than ‘possibility.’” *Id.*

Wenner Media LLC v. Northern & Shell North America Ltd., 2005 WL 323727 at *3 (S.D.N.Y. 2005).

1. Irreparable Harm

As the Court in *Wenner Media LLC v. Northern & Shell North America Ltd.*, 2005 WL 323727 at *3 (S.D.N.Y. 2005) explained:

To satisfy the threshold requirement of irreparable harm or injury, a movant need not demonstrate its certainty. *See, e.g., Reuters Ltd. v. United Press Int.l, Inc.*, 903 F.2d 904, 907 (2d Cir.1990) (“a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction.”) (citation and internal quotation marks omitted) (emphasis added). “Irreparable harm must be shown by the moving party to be imminent, not remote or speculative, and the alleged injury must be one incapable of being fully remedied by monetary damages.” *Reuters*, 903 F.2d at 907.

Chilling of First Amendment rights is “irreparable harm.” See *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”); *Maciera v. Pagan*, 649 F.2d 8, 18 (1st Cir.1981) (“chilling effect” meets “irreparable harm” requirement both in the context of the First Amendment and the LMRDA); *Matthews v. Sutton*, 1996 WL 515221 (E.D.Pa.1996)(injunction prohibiting disciplinary charges against union official running for election).

In *Elrod v. Burns*, the Supreme Court held that an injunction was properly entered where an employer was threatening termination of employees for political reasons. The Court held that prohibiting termination of employees to protect First Amendment rights was appropriate:

At the time a preliminary injunction was sought in the District Court, one of the respondents was only threatened with discharge. In addition, many of the members of the class respondents were seeking to have certified prior to the dismissal of their complaint were threatened with discharge or had agreed to provide support for the Democratic Party in order to avoid discharge. It is clear therefore that First Amendment interests were either threatened or in fact being impaired at the time relief was sought. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. See *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971). Since such injury was both threatened and occurring at the time of respondents' motion and since respondents sufficiently demonstrated a probability of success on the merits, the Court of Appeals might properly have held that the District Court abused its discretion in denying preliminary injunctive relief. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67, 83 S.Ct. 631, 637, 9 L.Ed.2d 584 (1963).

427 U.S. at 373-4.

WMC clearly threatens such loss of rights here. *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516 (2002) ("the right to petition extends to all departments of the Government, and that "[t]he right of access to the courts is ... but one aspect of the right of petition.") Access to the courts is a "fundamental" constitutional right. *Bounds v. Smith* 430 U.S. 817, 821 (1977). Absent an injunction, the threat of continued chilling of the First Amendment right to participate in this litigation constitutes irreparable harm.

The Courts have prohibited actions by defense counsel that chill participation in an expected class or collective case. *See Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2nd Cir. 1959) ("an express release by the employee is invalid, and this even though the release is limited to the claims for liquidated damages and was made in settlement of a bona fide dispute"); *See also O'Brien v. Encotech Constr. Services, Inc.*, 203 F.R.D. 346, 348 (N.D. Ill. 2001) (after employer offered employees additional compensation in exchange for an FLSA release, court enjoined defendant from soliciting further releases, declared the releases that had been signed void, and ordered corrective notice informing employees that they retain their right to sue under the FLSA).

Notably, WMC will suffer no cognizable harm if the injunction is ordered.

2. Likelihood of Success.

Claimant is likely to succeed on the merits. WMC is an employer subject to the FLSA and state labor law protections. WMC failed to pay their loan officers time and one half overtime premium, failed to pay minimum wages by requiring class members to work overtime hours but only paid them at the minimum wage rate for hours up to forty. There is no exemption applicable to these employees. There is no valid defense to federal and state overtime requirements to pay for all hours and time and one-half for these Plaintiffs. *Reich v. State of N.Y.*, 3 F.3d 581, 587-8 (2d Cir. 1993)(no administrative exemption for BCI investigators because investigations are production work rather than administrative activity) *cert. den.* 510 U.S. 1163. The Plaintiff is also likely to succeed on some form of notice being approved. *See Partial Final Award on Clause Construction, July 11, 2012; Hoffman v. Sbarro, Inc.*, 982 F.Supp. 249 (S.D.N.Y.1997).

WMC has coerced the loan officer class to renounce participation in this action to collect overtime and minimum wages. This waiver was demanded in writing. It was obviously prepared by defense counsel. It was delivered by the WMC to the class. Claimant is likely to prevail on the merits of the claim, or alternatively, there are serious questions relative to the merits and the balance of

hardships tips in favor of the moving party. Uncorrected, WMC' actions will result in irreparable harm. No cognizable harm will ensue to WMC from entering an injunction.

POINT FOUR

WMC'S UNILATERAL EFFORTS TO DEFEAT CLASS MEMBERS' PARTICIPATION IN THIS ARBITRATION REQUIRES THOROUGH REMEDIAL MEASURES.

The Courts have utilized a variety of sanctions and other orders to try to remedy the harm caused by employers' subversion of class remedies. As a remedy for the non-approved *ex parte* letter, the Court in *Belt* enjoined future ex-parte communications, and required a corrective letter on the employer's letterhead. The Court also sanctioned the employer by requiring it to bear corrective notice costs and all reasonable attorneys' fees and costs Plaintiff incurred in bringing the motion. The court also reserved the option of allowing class members to opt in to the case, post-verdict as a further sanction, and reserved possible future sanctions. In *Kleiner*, the Court also issued \$50,000 in sanctions to defense counsel and disqualified the firm from the case.

A protective order and temporary restraining order should be entered here in broad terms to remedy the various harms that will likely result from WMC's

unilateral actions. Herrington requests an Order to:

1. Enjoin any further dissemination of the letter (Ex. A) or the waiver form (Ex. B);
2. Enjoin any effort by WMC or its counsel to chill participation in this case, including prohibiting any further unauthorized communication with any class members concerning joining the case, except as approved by the Arbitrator;
3. Enjoin retaliation by WMC against any individual participating in this case;
4. Direct that WMC (in a form and manner supervised by the Arbitrator or on consent of claimants' counsel) promptly notify all class members who received Exhibits A and B of the impropriety of WMC's acts and the invalidity of the waivers it solicited;
5. Sanction WMC with monetary relief for its improper behavior and so that the WMC does not achieve any of the benefit of chilling individuals from participating in this case;
6. Reserve the opportunity for individuals to join the case post-judgment, should they opt-out now, given their employer's clear statement of its desire that they not join this case;
7. Award Claimant's costs and attorneys' fees for the time spent on this

motion.

8. Award such further relief in the future, as may become necessary to remedy the ill effects of WMC's improper behavior.

WMC's behavior intended to chill class member participation in this arbitration must be remedied in full though such chill is often difficult to detect.

CONCLUSION

WMC engaged in misleading and coercive conduct designed to thwart the ability of the AAA to award complete relief to the Claimants on a class basis.

WMC cannot be permitted to benefit from its unlawful behavior. A protective order is required to safeguard Your Honor's ability to manage this case as a class action in a lawful and orderly process. A broad injunction is required to remedy

WMC's impermissible conduct and return this case to the status quo existing prior to the issuance of its letter and waiver.

Dated: August 1, 2012

Respectfully Submitted,

/s/Dan Getman

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