

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 30

WATERSTONE MORTGAGE CORPORATION

and

Case 30-CA-073190

PAMELA E. HERRINGTON, AN INDIVIDUAL

CHARGING PARTY'S BRIEF TO THE NATIONAL LABOR RELATIONS BOARD

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I. FACTS

Beginning in April 2011, Waterstone Mortgage Corporation required its employees to enter into individual arbitration agreements as a condition of employment. The agreement stated:

...Arbitration/Governing Law/Consent to Jurisdiction . . . In the event 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.**

Jt. Mot. at ¶ 14(a)-(b), Jt. Stipulated Exh. K at p. 6 (emphasis added). This arbitration agreement prohibited employees from any class, collective, or joint action in any forum. Id. at ¶ 14(d). Even though the arbitration agreement has been replaced by another agreement for some of its workers, Waterstone has continued to enforce the individual arbitration agreement.¹ Id. at ¶ 14(e).

In November 2011, Charging Party, Pamela Herrington (hereinafter “Herrington”) commenced a class and collective wage and hour action in the Western District in Wisconsin against Waterstone Mortgage Corporation (hereinafter “Waterstone”) alleging violations of the Fair Labor Standards Act (FLSA). Jt. Mot. at ¶ 15(a). Waterstone moved to compel individual arbitration on the ground that Herrington’s claims were subject to an arbitration agreement requiring employees to waive their right to collectively pursue employment related claims. Id. at ¶¶ 14(a), 15(b). Herrington opposed the motion on grounds that the collective action waiver violated the National Labor Relations Act (hereinafter “the Act”). Jt. Stipulated Exh. N, at p. 3.

On January 26, 2012, Herrington filed her first charge alleging that Waterstone’s mandatory individual arbitration agreement violated her rights under the Act. Id. at ¶ 1. Jt.

¹ Employees who signed this original agreement, and left employment before the second was implemented, are subject to the original agreement.

Stipulated Exh. A. On March 16, 2012, District Court Judge Barbara B. Crabb found the individual arbitration provision to be invalid under the Act, severed the individual arbitration provision from the employment agreement, and ordered that: "...Plaintiff Pamela Herrington's claims must be resolved through arbitration, but she must be allowed to join other employees in her case. . . ." Id. at ¶ 15(c), Jt. Stipulated Exh. N, p. 18.

In District Court, Waterstone explicitly argued that if the Court found the waiver invalid, it should send the case to collective arbitration. See Jt. Stipulated Exh. N, p. 16: "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." However, once in arbitration, Waterstone continued to apply the invalidated waiver and argued that it had not agreed to collective or class relief and that the Court did not require that the arbitration be allowed to proceed on a class basis:

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

Jt. Stipulated Exh. P, p. 4. On July 11, 2012, the AAA Arbitrator, Judge George C. Pratt, granted a clause construction award concluding that the arbitration agreement permitted arbitration to proceed under the AAA's class rules. Id. at ¶ 15(e).

Less than two weeks after the arbitration decision permitting class arbitration (should claimants meet the requirements of AAA Supplementary Rules for Class Arbitration, Rule 4)

Waterstone sent all current employees a letter and new waiver form demanding they select one of two options, both of which prohibited employees from participating in concerted activity and interfered with the workers' right to join in Herrington's class arbitration. *Id.* at ¶¶ 16(a)-(e), *Jt. Stipulated Exhs. R, S.* Waterstone's letter directly warns employees that the mandatory arbitration agreement will interfere with their right to join Herrington's pending class arbitration:

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.

Jt. Stipulated Exh. R. Waterstone's amended arbitration clause allowed employees to select one of two options. Employees that choose Option A agree to JAMS arbitration on an individual or joinder basis. *Jt. Stipulated Exh. S*, p. 1. Employees who choose this option waive any right to bring their claims collectively in JAMS, waive their right to join Herrington's pending class arbitration before the AAA, and even if an individual joinder mechanism exists under JAMS employees, employees selecting this option will waive their right to join their claims with those who choose Option B.

Employees that choose Option B agree to Court resolution of their claims, but they will not be able to bring collective or class action claims in the Western District of Wisconsin together with those that choose individual JAMS arbitration under Option A. *Jt. Stipulated Exh. S*, p. 2. The language of Option B also suggests that employees who choose Option B will be unable to join the pending Herrington's arbitration since under the new agreement there is no contractual basis to send such claims to the AAA and since Waterstone continues to enforce the initial collective action waiver. *Jt. Mot.* at ¶ 14(e).

One effect of Waterstone's amended arbitration agreement was to separate employees into two distinct groups that cannot participate together in any concerted wage and hour claims. – Jt. Mot. at ¶ 16(b), Jt. Stipulated Exh. T, at pp. 2-3. Another effect of Waterstone's amended arbitration agreement is to prohibit employees from engaging in the ongoing *Herrington v. Waterstone* District Court and arbitration action. Jt. Stipulated Exh. T, at pp. 3-6.

In August 2012, Herrington filed a First Amended Charge against Waterstone's ongoing conduct violating the Act by continuing to demand that current employees waive their right to join Herrington's arbitration (Id at ¶ 6, Jt. Stipulated Exh. F) and filed a motion in arbitration to enjoin Waterstone from soliciting waivers from its employees and interfering with their right to participate in the class arbitration. Jt. Mot. at ¶ 16(f), Jt. Stipulated Exh. T.²

Also in August, 2012, Waterstone filed a motion to vacate the Arbitrator's decision allowing Herrington's claims to proceed on behalf of a class. Jt. Mot. at ¶ 15(f), Jt. Stipulated Exh. Q. In its motion to vacate the Arbitrator's clause construction award, Waterstone continued to rely on the initial arbitration agreement requiring employees to waive their right to collectively pursue their claims:

Despite the fact that Stolt-Nielsen requires “a ‘contractual basis’ for finding that the parties had agreed to the class method,”... the Arbitrator completely disregarded this law and instead fabricated an intent to arbitrate that does not exist in – and is in fact contradicted by – the language of the Agreement. In ignoring the parties' expressed intent not to arbitrate class wide, the Arbitrator relies on no law for the proposition that the expressed intention of the parties to avoid class arbitration should be ignored simply because a subsequent change in the law renders the clause unenforceable.

² Charging party requests that the Board take judicial notice of the following facts. The Arbitrator granted Herrington's motion for injunctive relief, ordered Waterstone to distribute a corrective notice to its employees, and imposed sanctions. (United States District Court for the Western District of Wisconsin case: 3:11-cv-00779-bbc, Doc. No. 64-6, attached as Exhibit 1). Additionally, the District Court has denied Waterstone's subsequent attempts to vacate the arbitrator's decisions. (Id. at Doc. No. 72, attached as Exhibit 2).

Jt. Stipulated Exh. Q at p. 10. While the District Court later denied Waterstone's motion to vacate the Arbitrator's clause construction award, Exh. 2, it is clear that Waterstone has continued to maintain that the unenforceable waiver should be applied to prohibit employees from collectively pursuing employment related claims. Jt. Mot. at ¶ 14(e).

II. ARGUMENT

A. THE ORIGINAL AGREEMENT VIOLATES THE NLRA AS SET FORTH IN *D.R. HORTON* AND PRIOR CASES.

The Respondent's arbitration provision's prohibition on class and consolidated actions violates § 7 of the NLRA. The NLRA was enacted by Congress to address "the inequality of bargaining power between employers and employees." 29 U.S.C. § 151. The NLRA guarantees the right of employees to join together to protect and improve their wages, hours and other terms and conditions of employment. 29 U.S.C. § 157. §7 of the NLRA provides that employees have the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." *Id.* This right includes steps taken "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Section 8(a)(1) of the NLRA prohibits employers from taking action to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. § 158(a)(1).

Defendants' insistence on a waiver of the right to maintain a class or consolidated action as a condition of employment directly conflicts with these rights guaranteed under the NLRA. The National Labor Relations Board and the courts have long held that the right to bring class

actions to address wages, hours or working conditions constitutes concerted activity protected by the NLRA. *See, e.g., Saigon Gourmet*, 353 NLRB No. 110 (2009) (concerted assertion of wage and hour claims is protected activity); *2nd Street Hotel Associates D/B/A Novotel New York*, 321 NLRB 624, 633-636 (1996) (collective action under FLSA was protected concerted activity); *Harco Trucking, LLC and Scott Wood*, 344 NLRB 478, 479 (2005) (retaliation for filing a class action violated the NLRA).³

This Board has made clear that the right to engage in concerted activity through class and collective actions may not be waived through an arbitration agreement. In *D.R. Horton, Inc. and Michael Cuda*, 357 NLRB No. 184 (January 3, 2012), the Board held that class and collective action waivers in employment agreements violate and are prohibited by the NLRA. Consistent with prior court and Board decisions, the Board stated that “clearly, an individual who files a class or collective action regarding wages, hours or working conditions...is engaged in conduct protected by Section 7.” *Id.*; 29 U.S.C. § 151 *et seq.* The Board went on to hold that a pre-employment arbitration provision that deprives employees of their right to engage in concerted activity by prohibiting class or collective actions violates the NLRA:

we consider whether an employer violates Section 8(a)(1) of the National Labor Relations Act when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial.[...W]e find that such an agreement unlawfully restricts employees’ Section 7 right to engage in concerted action for mutual aid or protection, notwithstanding the Federal Arbitration Act (FAA), which generally makes employment-related arbitration agreements judicially enforceable.

Id. Following *D.R. Horton*, several courts have agreed that arbitration provisions that purport to

³ *See also Trinity Trucking*, 221 NLRB 364, 365 (1975); *In Re 127 Rest. Corp. d/b/a Le Madri Restaurant*, 331 NLRB 269, 275-276 (2000); *Mohave Electric Cooperative*, 327 NLRB 13 (1998), *enfd* 206 F.3d 1183 (D.C. Cir. 2000); *Host International*, 290 NLRB 442, 442-443, 445 (1988)); *United Parcel Service*, 252 NLRB 1015, 1018, 1022, fn.26 (1980), *enfd* 677 F.2d 421 (6th Cir. 1982).

waive the right to bring class or collective actions are unenforceable. *See Owen v. Bristol Care, Inc.*, 11-04258-CV-FJG, 2012 WL 1192005 (W.D. Mo. Feb. 28, 2012) (“an arbitration clause may not be enforced if it precludes the vindication of substantive rights afforded by statute. These rights include the right to bring a class or collective action in the employment context.”) (citing *Chen–Oster v. Goldman, Sachs & Co.*, 785 F.Supp.2d 394, 406, 403-410 (S.D.N.Y. 2011)); *Herrington v. Waterstone Mortg. Corp.*, 11-CV-779-BBC, 2012 WL 1242318 (W.D. Wis. Mar. 16, 2012) (“because the Board's interpretation of the NLRA in *D.R. Horton*, is “reasonably defensible,” *Sure–Tan v. NLRB*, 467 U.S. 883, 891 (1984), I am applying it in this case to invalidate the collective action waiver in the arbitration agreement.”); *Davis v. Nordstrom, Inc.*, No. C 11-3956 CW, 2012 WL 4478297, *7 n.1 (N.D.Cal. Sep 27, 2012) (“The enforceability of class action arbitration waivers in employment contexts may very well be different in light of the NLRA than the results reached by the Supreme Court in *Concepcion*, addressing a conflict between state and federal law in a consumer arbitration context, and *CompuCredit Corp.*” (citations omitted)).⁴

Activity falls within the scope of Section 7 when it is both concerted and protected. It is clearly "concerted" when two or more employees act together, but Section 7's protection is not limited to such situations. A lone employee's conduct may be concerted under a variety of circumstances, including when the employee attempts to incite or induce concerted action, whether or not the attempt is successful.⁵ "Mutual aid or protection" refers to employee efforts to improve their terms and conditions of employment or lot as employees.⁶

As the Supreme Court held in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-65 (1978),

⁴The District Court in *Herrington* held the illegal arbitration provision was severable and that plaintiff “must be allowed to join other employees to her case.”

⁵ *See Meyers Indus.*, 281 NLRB 882, 887 (1986) (concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action. . . ."), *enforced*, 835 F.2d 1481 (D.C. Cir. 1987); *see also Morton Int'l, Inc.*, 315 NLRB 564, 566 (1994) (posting memo in workplace, annotated with critical comments, concerted because done to induce others to join critique). *Accord City Disposal*, 465 U.S. at 831; *Mobil Exploration & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 238 (5th Cir. 1999).

⁶ *See NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

"mutual aid or protection" includes conduct undertaken outside the immediate employee-employer relationship, or intended to influence issues beyond employees' own workplaces, but affecting their "interests as employees." In *Eastex*, the Supreme Court identified mutual aid or protection as the "broader" category of Section 7-protected conduct, specifically citing the example of employees "seek[ing] to improve working conditions through resort to administrative and judicial forums." In doing so, the Supreme Court approved Board law recognizing NLRA protection for legal proceedings.⁷ For decades, the Board, with court approval, has held that Section 7 protects employees who collectively prepare, join, or pursue all types of employment-related complaints including informal grievances and contractual arbitration⁸ and including proceedings before administrative agencies,⁹ and actions in court.¹⁰ Indeed, not long after the Act's passage, the Board held that the filing of a Fair Labor Standards Act suit by three employees was protected concerted activity, *see Spandsco Oil & Royalty Co.*, 42 NLRB 942,

⁷*Accord Mobil, supra. See also Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-49 (1942).

⁸ *See, e.g., NLRB v. Southwestern Bell Tel. Co.*, 694 F.2d 974, 978 (5th Cir. 1982) ("Section 7 rights are not now and never have been confined to negotiations conducted only during formal grievance, arbitration, or labor contract bargaining sessions."); *UForma/Shelby Business Forms*, 320 NLRB 71, 77 (1995) (contractual arbitration), *enforcement denied on other grounds*, 111 F.3d 1284 (6th Cir. 1997); *El Dorado Club*, 220 NLRB 886, 887-88 (1975) (contractual arbitration), *enforced sub nom. NLRB v. Anthony Co.*, 557 F.2d 692 (9th Cir. 1977).

⁹ *See, e.g., Garage Mgmt. Corp.*, 334 NLRB 940, 951 (2001) (OSHA); *Franklin Iron & Metal Corp.*, 315 NLRB 819, 822 (1994) (Ohio Civil Rights Commission), *enforced*, 83 F.3d 156 (6th Cir. 1996); *Salisbury Hotel*, 283 NLRB 685, 686-87(1987) (DOL); *Gibbs Die Casting Aluminum Corp.*, 174 NLRB 75, 79 & n.12 (1969) (county health department); *Moss Planing Mill Co.*, 103 NLRB 414, 418-19, 426 (1953) (wage-and-hour office), *enforced*, 206 F.2d 557 (4th Cir. 1953).

¹⁰ *See, e.g., Mohave Elec. Co-op, Inc. v. NLRB*, 206 F.3d 1183, 1188 (D.C. Cir. 2000) (concerted petitions for injunctions against harassment at work); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) (participation in union lawsuit; "Generally, filing by employees of a labor related civil action is protected activity under [S]ection 7 of the NLRA unless the employees acted in bad faith."); *Le Madri Restaurant*, 331 NLRB 269, 275 (2000) (concerted lawsuit alleging unlawful pay policies); *Host Int'l, Inc.*, 290 NLRB 442, 442-43, 445 (1988) (concerted lawsuit alleging employer physically assaulted and interrogated employees); *United Parcel Serv., Inc.*, 252 NLRB 1015, 1018, 1022 n.26 (1980) (class-action lawsuit challenging employer's break policy), *enforced*, 677 F.2d 421 (6th Cir. 1982); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975) (concerted lawsuit for breach of contract, unpaid wages), *enforced mem.*, 567 F.2d 391 (7th Cir. 1977); *Spandsco*, 42 NLRB at 948-49 (concerted FLSA lawsuit).

948–949 (1942).

Concerted legal action "aids or protects" employees in various ways, including allowing the pooling of resources and minimizing costs,¹¹ group power in negotiations, the ability to share information, avoiding risks of retaliation, the impression of safety in numbers, and - sometimes - anonymity. *Horton*, (pp. 2-3 & nn.3 & 5). In sum, the Board's determination that Section 7 protects employees' concerted pursuit of employment-related legal claims is consistent with the language of that provision and follows naturally from decades of Board and court precedent. More fundamentally, it effectuates the principal goal of the NLRA: it protects employees' core right to work in concert, with or without a union, to advance their workplace concerns, as a counterbalance to their employers' greater clout.

The original arbitration clause here clearly violates the NLRA because it prohibits employees from engaging in concerted action in a court or arbitration. The District Court's reformation of the arbitration agreement to permit class arbitration does not moot this complaint, because Waterstone has continued to claim that its original agreement is enforceable. It maintained that position to the arbitrator. Jt. Stipulated Exh. P, at p. 4. It maintains that position with respect to its right to appeal the District Court's decision after the arbitration is concluded. Jt. Mot. at ¶15(f). Waterstone has never renounced its original arbitration agreement and class waiver with respect to the entire class. Workers who signed the original agreement would likely believe that the clause they signed bars concerted activity in this case, and in future cases. And Waterstone remains free to assert the original agreement as a bar to concerted legal action in other cases as well. Waterstone's original arbitration agreement violates the NLRA. *Horton*, *supra*, *Eastex*, *supra*.

B. THE AMENDED ARBITRATION AGREEMENT VIOLATES THE NLRA

The amended arbitration agreement, introduced in the middle of this litigation, also violates the NLRA because its clear effect (and presumed intent), was to prevent *Herrington*

¹¹ Also see *Hoffman LaRoche v. Sperling*, 493 U.S. 165, 170 (1989).

class members from participating in that specific collective litigation. The amended arbitration agreements, which Waterstone pressed upon its current employees just after the arbitrator ruled that it would be conducted under AAA Supplementary Rule for Class Arbitration, Rule 4, clearly was intended to chill employees' ability to participate in a specific dispute which was being litigated on a class basis. It also chills employees from engaging in future concerted activity. The amended agreement is in no way required by the *Horton* decision. Nor does *Horton* insulate this effort to preclude concerted activity.

Respondent has claimed that it merely sought the amendment "to balance compliance with the NLRB's interpretation of the NLRA." Jt. Stipulated Exh. U, p.3. In *D.R. Horton*, the Board held that:

So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration. Employers remain free to insist that arbitral proceedings be conducted on an individual basis.

357 NLRB No. 184, slip op. at 16. Waterstone has claimed that its amended arbitration agreement did nothing more than this. But this argument completely ignores the context and intent of *D.R. Horton*, which dealt with pre-employment (and thus pre-dispute) arbitration clauses. This language in *Horton*, when read in the context of that case, permits an employer, in a pre-litigation and pre-employment agreement to allow employees the additional remedy of individual arbitration, so long as an employer has not foreclosed class remedies in Court. That is not what Waterstone has done here.

Here the situation is completely different, in that Waterstone's amendment attempted to preclude any affected class members from being able to participate in the middle of a litigated dispute. Under either Option A or Option B, current employees would be precluded from participating in the existing AAA arbitration being conducted by Arbitrator Pratt. In *Lafayette*

Park Hotel, 326 NLRB 824, 825 (1998), the Board ruled that any effort that tends to chill participation in a theoretical, much less a current, collective dispute constitutes an unfair labor practice.

Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement. *See NLRB v. Vanguard Tours*, 981 F.2d 62, 67 (2d Cir. 1992) (citations omitted).

Id. Here, the restriction purported to completely prevent any current employee from participating in the existing *Herrington* dispute which Herrington raised on behalf of the entire class.

Arbitrator Pratt has now ruled that the amended arbitration agreement and its two options will not bar class members from participation in the current dispute raised by Herrington in the arbitration, but he did not strike the amended agreement *in toto*.¹² Rather, Arbitrator Pratt held that the effectiveness of the amended arbitration agreements in future disputes would be left to future arbitrators to determine. “The validity or permissibility of those options for disputes commenced **after** July 23, 2012 is not at issue here, and the undersigned expresses no opinion on that subject.” Decis. and Order, Sep. 18, 2012, at p. 10, Exh. 1, (emphasis in the original). The ruling also did not address a variety of other chilling aspects of Respondent’s behavior. Through the improper solicitation of the new waivers, Waterstone has created the inescapable impression among class members that they are legally unable to join this case, before any class notice is sent. While steps can be taken to ameliorate this impression, the mischief wrought by Waterstone

¹² Arbitrator Pratt’s Order explicitly deals only with the current dispute, “whatever may be the legality or enforceability of either Option A or Option B in future disputes that might arise between Waterstone and its mortgage-loan employees, those amendments can have no impact on this Herrington arbitration or on the employee class’s rights or choices in it.” Decis. and Order, Sep. 18, 2012, at p. 11, Exh. 1. Arbitrator Pratt explicitly refrained from enjoining further dissemination of the amended agreement and the two choices contained therein: “Since the ‘waiver form’ (Options A and B) does not impact this arbitration, Herrington’s request that its further distribution be enjoined is denied.” *Id.*, p. 14.

persists, as Waterstone has made clear to current employees that it absolutely does not want them to be part of this case. Indeed, as Waterstone has made these individuals promise to never join this case, some employees may well refuse to violate their promise, even though the promise itself was secured in violation of law and is subject to later legal clarification. It is also likely that this letter and waiver will cause class members to refuse to assist class counsel in the case – thereby impeding the effectiveness of concerted activity.

The impact of the Arbitrator’s decision is that current employees who have signed the amendment, selecting either Option A or Option B, are still able to participate as class members in the *Herrington* arbitration for now.¹³ But since Arbitrator Pratt did not address the question whether the amendment is effective with respect to other disputes, separate from the ones raised by *Herrington*, any employee who has signed Option A or Option B of the amendment would be led to believe that they could only act in accordance with their agreement.

Petitioner contends that the amendment constitutes an Unfair Labor Practice because it both encourages and coerces employees to waive their right to participate in collective activity. It is obvious that Waterstone’s amendment, while giving the nominal choice of litigation in Court and individual arbitration, did not make those choices equal. Waterstone burdened the option of going to Court with a forum selection clause selecting the Western District of Wisconsin, while individual arbitration will occur in the location closest to wherever the employee works.¹⁴ Thus, workers may either proceed locally with local counsel *on an individual basis*, or find a lawyer in another distant state (who they’ve never met) to proceed on a class basis. The options are designed to lead workers to choose individual arbitration and thereby waive their right to

¹³ Waterstone retains its right to challenge the arbitrator’s decision on appeal.

¹⁴ Waterstone employees work in at least 12 states: Arizona, Colorado, Florida, Iowa, Idaho, Illinois, Maryland, Minnesota, Ohio, Pennsylvania, Tennessee, and Wisconsin. Jt. Stipulated Exh. L, at ¶ 36.

concerted activity in advance. And Waterstone's letter explaining the options highlighted the very route it wanted workers to travel, writing, "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." Jt. Stipulated Exh. R.

Furthermore, by making workers choose in advance which of the two fora to select for all disputes, whether foreseeable and unforeseen, Waterstone automatically divides its employees into two groups that can never join together collectively in a single action. Waterstone's requirement that workers must choose beforehand which of two separate fora may hear a dispute precludes workers from joining together in a single forum to collectively decide their claims. *24 hour Fitness USA, Inc. and Sanders*, Case 20-CA-035419 (Nov. 6, 2012). If Waterstone had forced workers to select one of 12 fora in which to bring their case, they could have divided the class into 12 subparts that could not work together and could not engage in a single concerted action, in Court or in arbitration. In fact, without saying so, that is exactly what Waterstone has done. Since the JAMS arbitration is to occur only in the home state of the complaining worker, workers from two states may not join together in a single concerted JAMS mediation. Since Waterstone's loan officers work in 12 different states, Waterstone has effectively divided the class into at least 12 separate JAMS mediations and at least one Court action in Wisconsin. The ability to defeat collective activity through this means is obvious and it seems likely to have been Waterstone's intent from the beginning. This was not the Board's intent in *Horton*.

In *Horton*, the Board wrote that an arbitration clause which permits concerted activity in Court, but which also allows an individual to choose arbitration, even individual arbitration, would not necessarily violate the NLRA. It is easy to see that such a clause, if it allowed workers

to make the election at the time a dispute arose, would not act in such a way as to chill concerted activity. But a pre-dispute selection process, which divides workers into groups which can never act concertedly, by definition chills concerted activity.

The Amendment here also chills collective action because it sows confusion. First, it 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, such as indicating that JAMS arbitration “will not administer a demand for class action arbitration when the underlying agreement contains a class preclusion clause, or its equivalent.” JAMS Class Action Procedures Rule 1(a), available at: <http://www.jamsadr.com/rules-class-action-procedures>. Waterstone misleadingly does not highlight that Option A would prohibit class or collective actions in JAMS because the new agreement precludes class arbitration by requiring that employees join their claims “**exclusively**” through individual joinder or a motion to intervene. Jt. Stipulated Exh. S, at p. 1 (emphasis added).

Second, the Amendment also sows confusion by misleadingly suggesting 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. For example, the JAMS arbitration option would only permit workers to engage in a more laborious joinder of separate claims process, whereby each worker would first have to file a separate arbitration to be joined

with another claim. Furthermore, the true effect of the election is hidden from employees.

“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.” To understand the effect of the election, workers would have to look up and then understand what Rules 20 and 24 of the Federal rules require. Even lawyers cannot easily discern the full impact of these rules, merely by reading them. The effect, which is not disclosed, is that workers choosing Option A (JAMS) would only be able to join together if they separately filed individual arbitrations. Courts on the other hand, allow both class and collective actions based on the claim at issue. Thus, the Amendment Letter only suggests that both options allow concerted activity and do so equally, but that simply is not true.

III. REMEDY

The Board should order Waterstone to take the following remedial measures:

1. Rescind (by direct notice and posting at all jobsites) all employment agreements that employees reasonably could believe bar or restrict their right to participate in protected concerted activity, including but not limited to participation in Herrington’s Class Arbitration.
2. Comply with the Arbitrator’s order requiring the distribution of corrective notice to its employees to ameliorate the coercive and misleading impact of its new arbitration agreement.
3. Notify (by direct notice and posting at all jobsites) present and future employees that its amendments to the employment agreement that would prohibit employees from participating in this or other class or collective actions related to their wages, hours, or working conditions in any arbitral or judicial forum will be given no effect.

4. Withdraw any pending motions, requests for reconsideration or for a stay, opposing Herrington's arbitration proceeding on a class basis and otherwise stop taking measures to enforce any agreement restricting concerted activity.
5. Notify the arbitral and judicial fora where this class arbitration is pending that it will no longer oppose class and collective relief or otherwise seek to enforce the arbitration agreements to chill participation in this arbitration.

See e.g. D.R. Horton, Inc. and Michael Cuda, 357 NLRB No. 184, slip op. at 13-14 (January 3, 2012); *24 Hour Fitness USA and Alton j. Sanders*, Case No. 20-CA-035419 (Nov. 6, 2012); *Advanced Services, Inc.*, Nos. 26-CA-63184, 26-CA-71805 (Jul. 2, 2012).

IV. CONCLUSION

Waterstone's mandatory arbitration agreements violate the Act because the agreements prohibit Waterstone's employees from engaging in concerted action for mutual aid and benefit. Charging party respectfully urges the Board to grant the remedial provisions sought and any other relief as the Board may deem appropriate.

Dated: December 12, 2012

Respectfully submitted,

/s/ Dan Getman

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

WATERSTONE MORTGAGE CORPORATION

and

Case 30-CA-073190

PAMELA E. HERRINGTON

CERTIFICATE OF SERVICE

I hereby certify that Charging Party's Brief to the Board was served on the following parties on December 12, 2012 by the following methods:

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EXHIBIT 1

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between

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

Claimant,

and

WATERSTONE MORTGAGE CORPORATION,

Respondent.

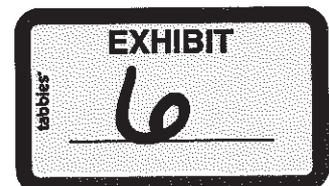
AAA No. 51 160 00393 12

Before:
George C. Pratt
Arbitrator

**DECISION AND ORDER ON
CLAIMANT'S APPLICATION FOR
PROTECTIVE ORDER,
TEMPORARY RESTRAINING ORDER, and
PRELIMINARY INJUNCTION**

(September 18, 2012)

Claimant Herrington has applied for a Protective Order, Temporary Restraining Order, and Preliminary Injunction related to Respondent Waterstone's alleged solicitation of waivers from putative class members of the right to participate in this arbitration. Waterstone opposes the application on jurisdictional grounds and on the merits. The motion is granted to the extent indicated below.



PROCEDURAL BACKGROUND

In November 2011 Claimant brought a class-action suit in the United States District Court for the Western District of Wisconsin alleging that Waterstone had failed to pay its mortgage-loan officers minimum wages and overtime premium pay as required by the Fair Labor Standards Act (FLSA), 20 USC §201 et seq., and in violation of Waterstone's standard Loan Originator Employment Agreement. Waterstone moved to dismiss or stay the action on the ground that Herrington's claims were subject to an arbitration agreement.

On March 16, 2012, the District Court granted Waterstone's motion to require arbitration, and stayed the District Court action pending the outcome of the arbitration. After noting that Waterstone "requests explicitly that a collective action proceed in arbitration rather than federal court in the event the court invalidates the collective action waiver" (D. Ct. Decn. at 16), the Court ordered that Herrington's "claim must be resolved through arbitration, but she must be allowed to join other employees to her case." (Id. at 18). Neither party appealed the District Court's decision.

With her demand for arbitration, dated March 23, 2012, Herrington, attached the Class Action Complaint she had filed in the District Court. At the initial hearing held on May 25, 2012, the parties agreed that a threshold issue was whether the arbitration should proceed on an opt-in basis similar to that contemplated by the FLSA, or whether it should move forward on an opt-out basis as a class arbitration under the AAA's Supplementary Rules for Class Arbitrations. After full briefing by the parties, the undersigned, on July 11, 2012, decided in a clause-construction award under Section 3 of the AAA's Supplementary Rules, that the applicable arbitration clause permits this

arbitration to proceed on behalf of a class. Proceedings were stayed for thirty days to permit either party to seek review of the clause-construction award.

On August 10, 2012, Waterstone moved in the U. S. District Court in Wisconsin to vacate the clause-construction award. That motion is now pending.

Meanwhile, on August 2, 2012, Herrington had made the current application for interim relief. Waterstone's initial response to the motion, on August 10, 2012, was a "Jurisdictional Opposition" ("Respectfully, Your Honor is simply not permitted nor authorized to entertain Claimant's instant demand for relief.") (Jurisd. Opp. at 11). At the request of the undersigned, Waterstone submitted on August 24, 2012, a letter addressed also to the merits of Herrington's motion. Herrington replied in a memorandum dated August 30, 2012. Oral argument of the motion is not necessary.

FACTUAL BACKGROUND

The facts critical to this motion are essentially undisputed.

This arbitration was brought by a former mortgage-loan officer employee of Waterstone on her own behalf and on behalf of other employees similarly situated. Waterstone requires each of its loan officers to execute a form "Loan Officers Employment Agreement." Paragraph 1 of the Agreement, entitled "AGREEMENT OF AT-WILL EMPLOYMENT", provides in part: "[E]ither party may terminate this contract at any time with or without notice for any or no reason." An arbitration clause, paragraph 13, provides that disputes "shall be resolved through binding arbitration in accordance with the rules of the American Arbitration Association applicable to employment claims."

In March 2012, the arbitration clause in the original Agreement was interpreted by the District Court in Wisconsin to require that Herrington arbitrate her claims for unpaid wages and overtime compensation, and that that she be allowed to join other employees to her case. On March 26, 2012, Herrington commenced this arbitration on behalf of herself and all others similarly situated. Subsequently, on July 11, 2012, the undersigned interpreted the arbitration clause to permit Herrington to press her claims as this class arbitration.

Twelve days later, on July 23, 2012, Waterstone sent to its at-will, loan-officer employees a letter with an attached Amendment to the arbitration clause. The letter states in part, referring to the Amendment, “you will have the option of replacing [the current arbitration clause in your employment agreement] with either Option A or Option B”

Option A would require that an employment dispute be resolved through “binding arbitration administered by JAMS Arbitration and Mediation Services (“JAMS”)” in the state and county where the employee works or lives. Joinder of other parties in the arbitration is limited to the procedures of FRCP Rule 20 (permissive joinder) and Rule 24 (intervention).

Option B would require that an employment dispute be resolved in either the federal or state court located in Wisconsin or in “any other forum to the extent it is directed by the foregoing court(s).”

Neither Option A nor Option B would permit a new arbitration like Herrington’s opt-out proceeding, and the letter warns the employees:

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.

Herrington's contentions.

Herrington contends that on July 23, 2012, without notice to her counsel, Waterstone sent to its loan officers, who are potential members of the arbitration class, two documents: a letter and an Amendment to Loan Originator Employment Agreement. According to Herrington the Amendment, under either Option A or Option B, requires each employee to waive its right to participate in this class arbitration, and Waterstone's conduct in sending the letter and Amendment is coercive, the letter and Amendment are misleading, and "the solicitation drastically and misleadingly interferes with the orderly class action process in this case." (Moving Memo at 6).

Herrington concludes that Waterstone's unilateral effort to defeat putative class members' participation in this arbitration requires thorough remedial measures, including a protective order and temporary restraining order to:

1. "Enjoin any further dissemination of the letter (Ex. A) or the waiver form (Ex. B.);
2. Enjoin any effort by [Waterstone] 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 [Waterstone] against any individual participating in this case;

4. Direct that [Waterstone] (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 [Waterstone's] acts and the invalidity of the waivers it solicited;
5. Sanction [Waterstone] with monetary relief for its improper behavior [] so that [Waterstone] 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; [and]
8. Award such further relief in the future, as may become necessary to remedy the ill effects of [Waterstone's] improper behavior."

(Moving Memo at 23-25).

Waterstone's Contentions.

Waterstone opposes Herrington's motion on two levels: jurisdiction and merits.

As to jurisdiction, Waterstone contends that it "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" (Jurisd. Memo at 1). It implies that the Amendment is only "applicable to new employees" (Id. at 2), but later changes that to "current employees of Waterstone, a class to which Claimant does not belong" (Id. at 5), Waterstone contends that the Amendment "is being undertaken in its capacity as an ongoing business operation and not as a litigant in this arbitration" (Id. at 3), and concludes that "injunctive relief pertaining to working conditions to which Claimant is not subject is not something that [] the parties agreed to arbitrate." (Id at 6). Waterstone also points out that because a class has not yet been certified in this

arbitration, Herrington's application for relief is premature. It acknowledges, however, that "[i]f Claimant is able to obtain certification of a class in arbitration, and if the Amendments impact the composition of the class, Claimant can move to have the offending provisions struck." (Id. at 11).

On the merits, Waterstone contends that Herrington cannot demonstrate irreparable harm; that any harm to her "is too theoretical and speculative to be considered justiciable", because at this time we do not know "whether any class or collective action will ever be certified in this case" (Merits Letter at 1-2); that the balance of hardships and the public interest weigh heavily against Herrington; that Waterstone is not "forcing employees to sign employment agreements that prohibit employees from joining her case" (Id. at 2); and that the Amendment follows guidelines set by the NLRB. (Id. at 3).

ANALYSIS

Courts have recognized that in class actions under FRCP 23 the putative class should be protected from a party's unilateral communications that are false, misleading, or coercive. A critical aspect of a class action is whether the putative plaintiffs will decide to participate in the claim or elect to opt out of the litigation. Faced with such a decision, the thinking of putative plaintiffs should not be skewed by misleading or coercive conduct or communications. In order to protect the proceeding, therefore, a court may supervise, monitor, and restrict the information provided to putative plaintiffs by the parties, always balancing any restrictions imposed with the first amendment interests of the communicating party. (See: *Hoffman –LaRoche v. Sperling*, 110 S.Ct.

482, 487 (1989); *Gulf Oil Co. v. Bernard*, 452 US 89, 101 (1981) (“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 the parties.”); *Kleiner v. First Nat’l Bank*, 751 F. 2d 1193, 1201 (11th Cir. 1985) (“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 misstatements could be irreparable.”); *Ojeda-Sanchez*, 600 F. Supp. 1373, 1378 (SDGA 2009) (“The Court has broad authority to oversee collective litigation.”); *Hampton Hardware, Inc. v. Cotter & Co., Inc.*, 156 FRD 630, 632 (ND Tex 1994) (“Due to possible abuses a district court may enter orders in class actions which govern the conduct of counsel and parties. Communications found violative of the principles of Rule 23 include misleading communications to the class members concerning the litigation.”))

The same principles apply both pre-certification and post-certification (Cf. *Ojeda-Sanchez* with *Kleiner*), and they apply equally in FLSA actions to recover unpaid wages and overtime compensation. (*Ojeda-Sanchez* at 1378) (“While this litigation involves a collective action under the FLSA rather than a Rule 23 class action, the same concerns for judicial oversight apply in both cases.”). Particularly in FLSA actions where the putative plaintiffs enjoy an employment relationship with the defendant employer, communications from the employer can be inherently coercive. (*Belt v. Encare, Inc.*, 299 F. Supp. 2d 664, 668 (ED Tex 2003) (“[W]here the absent class member and the defendant are involved in an ongoing business relationship, such as employer-employee, any communications are more likely to be coercive”)).

Waterstone's jurisdictional argument fails. It is true that a class has not yet been certified. Indeed, the clause-construction award that contemplates a class arbitration may itself be vacated by the District Court. However, even if the motion to certify a class should be denied, or if the Court should vacate the clause-construction award, the arbitration may continue as a collective proceeding (opt in) as a result of Judge Crabb's direction that Herrington "must be allowed to join other employees to her case." (D. Ct. Decn. at 18).

Whether a proceeding continues as a class procedure or a collective procedure, it must be protected from coercive or misleading communications that are designed to, or have the effect of, persuading or intimidating potential claimants to withhold their participations. The law realistically recognizes that such improper communications may be just as effective pre-certification as post-certification. Therefore, it is within the jurisdiction – indeed, it is the duty – of the judge or arbitrator before whom such a proceeding is pending to protect the integrity of the proceeding and to require that all information conveyed by the parties to potential class members about the proceeding be accurate, not coercive, and not misleading.

Waterstone's argument that control over communications cannot arise until a class is certified is simply wrong. The power (jurisdiction) to control the parties' communications to class members or putative class members can arise at least as early as when the initial pleading is filed. See, e.g. *Hoffman-LaRoche* 487 ("[I]t lies within the discretion of a district court to begin its involvement early at the point of the initial notice.").

Waterstone's contention that it has "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" (Jurisd. Memo at 1) assumes that this arbitration is about what kind of dispute resolution provision going forward Waterstone may provide in its form employment agreement. The assumption is false. Herrington brought this arbitration to recover past minimum wages and overtime compensation allegedly due to her and to her fellow employees. Jurisdiction over that claim was established with the filing of the demand for arbitration, and it is the duty of the arbitrator to preserve and protect the integrity of the proceedings with respect to that claim. The entire dispute that is subject to this arbitration is therefore to be resolved under the dispute resolution provisions of the pre-Amendment employment agreement that governs Herrington's claims.

Neither of the two options from which Waterstone required its employees to choose will have any impact on this arbitration. The validity or permissibility of those options for disputes commenced after July 23, 2012 is not at issue here, and the undersigned expresses no opinion on that subject. This arbitration was filed on March 26, 2012. Thus, contrary to Waterstone's jurisdiction argument, relief of the type sought by Herrington on this motion would not implicate Waterstone's "management decisions ..." Herrington does not seek "injunctive relief pertaining to working conditions", as argued by Waterstone, but instead seeks injunctive relief pertaining to the proper and orderly functioning of this arbitration which is brought concerning Waterstone's past failures to pay the wages required by law and by the employment agreements.

Conclusion on jurisdiction. The undersigned has jurisdiction to regulate communications to putative class members to assure that in making their decisions – on whether to opt out, if this continues as a class arbitration, or to opt in, if it becomes a collective arbitration – they are provided with accurate information that is not misleading, and that they are not subjected to coercion.

Waterstone's letter and Amendment here are coercive, misleading, and inaccurate. Given the at-will relationship, the employees may have felt that Waterstone's letter and the required Amendment was coercing them with respect to Herrington's arbitration. While the letter warns the employees that "executing the Amendment will impact your right to potentially join [Herrington's] arbitration against Waterstone", it does not state what that "impact" might be, nor does the letter advise the employees of what would happen if they refused to choose either Option A or Option B. Moreover, the letter does not advise the employees of their right to be free of retaliation by Waterstone if they should choose to join, or to remain in, Herrington's arbitration. Furthermore, Option A, the choice for arbitration, seems clearly designed to exclude Herrington's AAA arbitration as a dispute resolution method available to the employees, because it requires that any arbitration proceeding be "administered by JAMS".

However, whatever may be the legality or enforceability of either Option A or Option B in future disputes that might arise between Waterstone and its mortgage-loan employees, those amendments can have no impact on this Herrington arbitration or on the employee class's rights or choices in it. Once Herrington commenced her arbitration under the original arbitration clause in the employment agreement, Waterstone could not change the nature or course of this pending arbitration by

requiring the putative claimants in this proceeding to agree to an entirely different dispute-resolution regime. This arbitration must, therefore, continue under the Agreement that governed when it was commenced, the Agreement that Waterstone, itself, argued successfully to the District Court requires Herrington's dispute to be arbitrated.

Herrington may be exaggerating the impact of the letter and the Amendment. It is too early to assess their full impact on the employees. What is clear is that the message and impact of the letter and the Amendment, if uncorrected, have the potential, indeed the likelihood, of substantially impeding the fair and just progress of this arbitration. Corrective action is therefore warranted.

RELIEF

Herrington seeks relief akin to preliminary injunctive relief that would be available in a court of law. The general standards applied for determining the availability of a preliminary injunction in court are readily met here. Irreparable harm arises from the circumstance that Waterstone's letter and Amendment are not only coercive, but also inaccurate and incomplete expositions of the situation and the rights of the putative class with respect to Herrington's arbitration. If the picture is not clarified and completed for the employees, their choice on whether to participate will not be the result of an informed consent, so that the integrity and fairness of this arbitration would be jeopardized.

The likelihood-of-success standard applied in many courts does not fit well in this situation, because the problem here has nothing to do with the merits of Herrington's

case. It involves only the fairness and integrity of the proceeding itself. Herrington does not have to establish a likelihood of success on her wage claims in order to preserve the fairness of her arbitration process.

The balance--of-hardships and public-interest standards are also fully satisfied here. Waterstone can have no protectable interest in disseminating inaccurate, incomplete, and coercive messages to its employees. And no hardship would be imposed on Waterstone, in any event, because its claim that an injunction would be impinging on its right and interest in the internal management of its own business simply misses the mark. Injunctive relief here will be aimed only at the conduct of this arbitration proceeding and will not control or interfere with any future proceedings that might be brought against Waterstone by its employees.

Finally, the public has an overriding interest in the fairness of the procedures used to determine the rights of the employee class, particularly when those rights are, in part, guaranteed by federal statute.

CONCLUSION

This motion is disposed of as follows:

1. Herrington shall prepare a corrective letter designed to dispel or at least ameliorate any harm done by the letter and Amendment. Included in the corrective letter shall be an accurate statement of this arbitration, of the employees' rights with respect to this arbitration, and of their right to be free of retaliation by Waterstone based on any decision they might make with respect to participating in the arbitration. By October 1, 2012, the letter shall

be submitted to the undersigned for approval after comments to be submitted by Waterstone by October 8, 2012, and reply comments by Herrington to be submitted by October 12, 2012. Once approved, the letter shall forthwith be reproduced on Waterstone stationery, signed by Eric Engenhofer, and distributed to the loan-officer employees in the same manner that the disputed letter was distributed – all at Waterstone's expense.

2. Waterstone is enjoined from any further dissemination of the letter (Ex. A attached to the moving papers).
3. Since the "waiver form" (Options A and B) does not impact this arbitration, Herrington's request that its further distribution be enjoined is denied.
4. During the pendency of this arbitration, Waterstone shall not communicate with the class about the arbitration except in writings approved by the undersigned after notice to Herrington.
5. Since retaliation by Waterstone against any individual participating in this arbitration is already barred by statute and common law, there is no need for duplicative injunctive relief.
6. Since the extent of the impact of Waterstone's letter and Amendment is not fully known at this time, decision on Herrington's request for a monetary sanction against Waterstone is reserved for later consideration.
7. Employees will not be given the opportunity "to join the case post-judgment, should they opt-out now", as requested by Herrington. Each employee class member will, however, be given the opportunity – after the nature of the arbitration has been established and after proper notice to any employee

class – to make an informed, binding decision with respect to his or her participation.

8. Herrington shall recover her reasonable attorneys' fees and expenses in connection with this motion and the implementation of this order. By October 17, 2012, Herrington shall submit an itemization of the fees and expenses. Waterstone may respond by October 23, and Herrington may reply by October 26.
9. Decision on Herrington's request for future relief "as may become necessary" is reserved.

SO ORDERED.
September 18, 2012

George C. Pratt
Arbitrator

EXHIBIT 2

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

After plaintiff Pamela Herrington filed this labor dispute, defendant Waterstone Mortgage Corporation filed a motion to dismiss or stay the case on the ground that plaintiff's claims are subject to an arbitration agreement. I agreed and closed the case administratively while plaintiff submitted her claims to the arbitrator. Now defendant seeks to reopen the case so that it can challenge two preliminary orders of the arbitrator, one in which he concluded that the arbitration agreement permits class arbitration and another in which he sought to prevent misinformation and coercive tactics by limiting defendant's communication about this case with potential class members.

I am denying the motion to reopen because defendant's challenges are premature. Defendant is seeking review under 9 U.S.C. § 10(a)(4), but that provision is about "awards," not preliminary procedural orders. In any event, even if defendant's petitions were timely,

I would deny them. Defendant seems to assume in its briefs that it is entitled to de novo review of the arbitrator's decision because the focus of its arguments is that the arbitrator misinterpreted the arbitration agreement and failed to follow relevant case law. These arguments are doomed from the start because it is well established that legal and factual errors are not grounds for vacating an award. Defendant does not even try to show that the arbitrator violated § 10(a)(4) by "exceed[ing] [his] powers" as the Court of Appeals for the Seventh Circuit has defined that term.

Both the timing of defendant's motions and the substance of its arguments about the arbitrator's orders suggest that it does not understand the fundamental purposes of arbitration agreements, which are "to resolve a dispute in less time, at less expense, and with less rancor than litigating in the courts." Publicis Communications v. True North Communications, Inc., 206 F.3d 725, 727 (7th Cir. 2000). As the court of appeals has recognized on multiple occasions, these purposes are thwarted when a party attempts to relitigate issues decided by the arbitrator or challenges the arbitrator's orders in piecemeal fashion. United Food & Commercial Workers, Local 1546 v. Illinois American Water Co., 569 F.3d 750, 757 (7th Cir. 2009); Edstrom Industries, Inc. v. Companion Life Insurance Co., 516 F.3d 546, 552 (7th Cir. 2008); Prostyakov v. Masco Corp., 513 F.3d 716, 723 (7th Cir. 2008); George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577, 579 (7th Cir. 2001).

Particularly because it was defendant that sought to enforce the arbitration agreement, its immediate and repeated attempts to obtain court intervention in the arbitration process are both ironic and improper. I directed the parties to arbitration

because that is how they agreed to resolve their dispute, not to make the proceedings even more contentious and expensive. Accordingly, I anticipate that defendant will use better judgment in the future in deciding whether and when to invoke § 10(a)(4).

OPINION

A. Class Arbitration

I. Availability of review

A preliminary question is whether defendant's challenge to the arbitrator's decision on class arbitration is premature. Defendant's petition for review relies on 9 U.S.C. § 10(a)(4), which permits a federal district court to vacate an arbitration "award" if "the arbitrato[r] exceeded [his] powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." In an order dated November 5, 2012, dkt. #69, I questioned whether the class arbitration decision was sufficiently final to qualify as an award and I directed the parties to brief the issue. In its response, defendant makes several arguments.

a. Hardship

Defendant says that it will suffer a hardship if it cannot challenge the decision until the arbitration is finished. That argument is undermined somewhat because the arbitrator has not yet decided whether to allow the arbitration to proceed as a class. He has concluded only that the arbitration agreement permits class arbitration. Thus, it remains uncertain

whether defendant will be forced to defend against a class arbitration, which might be reason alone to conclude that defendant's challenge is premature. Dealer Computer Services, Inc. v. Dub Herring Ford, 547 F.3d 558 (6th Cir. 2008) (arbitration panel's preliminary ruling that contract did not bar class proceedings was not ripe for review); Corinthian Colleges, Inc. v. McCague, No. 09 C 4899, 2010 WL 918074, *3 (N.D. Ill. Mar. 4, 2010) (same).

Even if I accept defendant's premise that it needs immediate review to avoid a significant litigation burden, defendant fails to explain why any hardship it will suffer makes the arbitrator's decision an "award" within the meaning of § 10(a)(4). The Supreme Court rejected a similar hardship argument in concluding that orders on class certification by district courts are not final orders subject to immediate appeal under 28 U.S.C. § 1291. Coopers & Lybrand v. Livesay, 437 U.S. 463, 469-70 (1978). (The Federal Rules of Civil Procedure were later amended to give the courts of appeals discretion to allow interlocutory review of class certification decisions, Fed. R. Civ. P. 23(f), but defendant points to no similar provision governing § 10.) Although defendant cites two cases in which the court relied on a hardship rationale to conclude that a party could take an immediate appeal of a decision about class arbitration, Genus Credit Management Corp. v. Jones, CIV. JFM-05-3028, 2006 WL 905936 (D. Md. Apr. 6, 2006); West County Motor Co. v. Talley, 4:10CV01698 AGF, 2011 WL 4478826 (E.D. Mo. Sept. 27, 2011), in neither case did the court identify a statutory basis for its conclusion.

b. Stolt-Nielsen

Defendant “heavily relies” on Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S. Ct. 1758 (2010), which involved an interlocutory review of an arbitrator’s decision to permit class arbitration. Dft.’s Br., dkt. #70, at 4. The Court rejected the argument that the dispute was constitutionally unripe, reasoning that “[t]he arbitration panel’s award means that petitioners must now submit to class determination proceedings before arbitrators who, if petitioners are correct, have no authority to require class arbitration absent the parties’ agreement to resolve their disputes on that basis. Should petitioners refuse to proceed with what they maintain is essentially an ultra vires proceeding, they would almost certainly be subject to a petition to compel arbitration under 9 U.S.C. § 4.” Id. at 1767 n.2 (citations omitted). In addition, the Court concluded that the respondent had waived any argument that the dispute was prudentially unripe by failing to raise the issue in the lower courts. Id.

Stolt-Nielsen provides limited guidance. The Court did not consider the question whether the decision was sufficiently final to qualify as an “award” under 9 U.S.C. § 10(a), but only whether the Constitution prohibited review. Because the Court found that any other issue of ripeness was waived, it would be improper to interpret the case as holding that decisions on class arbitration are appealable as a general matter. Accordingly, I conclude that defendant’s reliance on Stolt-Nielsen is misplaced.

c. Circuit law

Defendant cites Smart v. International Brotherhood of Electrical Workers, Local 702, 315 F.3d 721, 725 (7th Cir. 2002), Publicis Communications v. True North Communications, Inc., 206 F.3d 725 (7th Cir. 2000), and Yasuda Fire & Marine Insurance Company of Europe v. Continental Casualty Company, 37 F.3d 345 (7th Cir. 1994), as examples of cases in which the Court of Appeals for the Seventh Circuit has found an arbitrator's decision to be appealable even though the arbitration was not finished. These cases provide some support to defendant's position, but they are not directly on point. Smart involved a decision on liability that left damages unresolved because the parties had not sought to arbitrate that issue; Publicis involved a decision that resolved a particular claim, but left unresolved other, unrelated claims; Yasuda involved a decision to require a party to post an interim letter of credit that was necessary to protect a potential final award.

In each of these cases, the arbitrator had granted relief related to the substance of the plaintiff's claims. Smart and Publicis were decisions on the merits. Although Yasuda was not a final award, it was inextricably linked to one. Defendant does not cite any cases from this circuit permitting an immediate appeal of a decision regarding class arbitration or any other procedural issue that was distinct from the claims.

Further, the court of appeals has acknowledged that a general test for determining the appealability of an arbitration decision remains elusive. In Smart, 315 F.3d at 725-26, the court rejected a view that the final judgment rule of 28 U.S.C. § 1291 should be applied to arbitration decisions, but it acknowledged that "courts are naturally reluctant to invite a

judicial proceeding every time the arbitrator sneezes.” The court declined to provide more specific guidance, stating that “generalization is difficult.” Id. at 725. Thus, I am reluctant to infer a general rule from Yasuda, Publicis and Smart that district courts may review any decision of an arbitrator that one party views as urgent.

Defendant argues that Publicis supports a rule that “discrete” and “time sensitive” issues are appealable immediately, but the relevant passage from Publicis, 206 F.3d at 729, states that “[a] ruling on a discrete, time-sensitive issue may be final and ripe for confirmation even though other claims remain to be addressed by arbitrators.” Even if I assume that the court was providing a general rule, the court’s reference to “other claims” would not necessarily extend to procedural orders. Id. at 729 (noting that appealed issue “wasn't just some procedural matter—it was the very issue True North wanted arbitrated”). See also Dealer Computer Services, Inc. v. Dub Herring Ford, 623 F.3d 348, 352 (6th Cir. 2010) (“[T]he interim class arbitration determination, albeit a significant procedural step in the arbitration proceedings, has no impact on the parties' substantive rights or the merits of any claim. The denial of class arbitration proceedings arguably disposes of a discrete, independent, severable issue, but it is a procedural issue—hardly the sort of final decision that warrants immediate judicial review in disruption of ongoing arbitration proceedings.”).

Neither party cites Blue Cross Blue Shield of Massachusetts, Inc. v. BCS Ins. Co., 671 F.3d 635 (7th Cir. 2011), which is surprising in light of the similarity of the issues in that case. In particular, the court rejected as premature a request from the defendant to determine whether an arbitration proceeding could be consolidated with other arbitration

proceedings:

If a party could run to court and contest every procedural ruling that it believes is erroneous and not squarely covered by the contract (which rarely tells arbitrators what procedures to use), arbitration would fail to offer an attractive alternative to litigation. Litigation usually entails only one proceeding in the district court, followed by one appeal. If BCS were right, however, every arbitration could be contested (with an appeal) before it begins; every supposed procedural error could be contested in a separate suit (with another appeal) in mid-arbitration; and then the outcome could be contested in a proceeding to confirm or vacate the award, with yet another appeal. That would make arbitration both interminable and impossibly expensive.

Id. at 638.

Obviously, Blue Cross Blue Shield cuts in the other direction from Yasuda, Publicis and Smart. Particularly because the issue whether arbitration proceedings may be consolidated is similar to the issue whether class arbitration is appropriate, Blue Cross Blue Shield seems on point.

The actual holding of Blue Cross Blue Shield was limited to the question whether a party was “entitled to a peremptory order that would take the question out of the arbitrators' hands.” Id. at 640. The court did not decide that a party must wait until the arbitration is finished to appeal any and all procedural decisions or even that the parties in that case must wait until the arbitration was finished to appeal a decision about consolidation of proceedings. Rather, the court held only that the arbitrator must have the first opportunity to address the issue.

Although Blue Cross Blue Shield is not controlling, it supports a distinction between substantive and procedural orders. This makes sense in the context of a statute authorizing

review of an “award,” which ordinarily would be associated with a decision on the merits rather than a matter of procedure.

d. Arbitrator’s intent

Finally, defendant points out that the arbitrator called his decision a “Partial Final Award on Clause Construction” and stayed the case so that defendant could appeal the decision, a practice that is authorized by the rules of the American Arbitration Association. Defendant cites Publicis, 206 F.3d at 729, for the proposition that “the Arbitrator’s understanding of finality is a factor in determining whether” the decision is reviewable. Again, however, Publicis is not directly on point because, in that case, the arbitrator had “explicitly carved out [a particular claim] for immediate action from the bulk of the matters still pending,” id., similarly to the way a district court would make a claim immediately appealable under Fed. R. Civ. P. 54(b). The court of appeals did not say that an arbitrator has the authority to make any decision appealable by calling it an “award,” regardless whether the decision is substantive or procedural. In fact, the court stated that “courts go beyond a document’s heading and delve into its substance and impact to determine whether the decision” can be appealed immediately. Publicis, 206 F.3d at 729. Cf. Blue Cross Blue Shield, 671 F.3d at 638 (“[T]he meaning of a word depends on what it denotes to members of the appropriate linguistic community, not on idiosyncratic usages that people may be able to devise. Meaning is objective and external to the speaker.”) (citations omitted). Defendant also quotes the statement from Smart, 315 F.3d at 725, that “an award is final and

appealable” if “the arbitrator himself thinks he’s through with the case,” but that statement does not support defendant’s position because it is undisputed that the arbitrator is *not* “through with the case.” Thus, I cannot rely solely on the arbitrator’s intent or the name he gave his decision.

Although I acknowledge that there are plausible arguments in favor of both sides of this issue, in my view, circuit law points toward a general rule that an arbitrator’s decision is not an “award” under § 10(a)(4) unless the decision grants substantive relief of some kind. Because an order on class arbitration is not substantive relief, I conclude that it is not immediately appealable.

2. Merits

Even if I assumed defendant’s challenge is timely, defendant could not prevail. “The grounds for overturning an arbitration award are extremely limited.” Halim v. Great Gatsby’s Auction Gallery, Inc., 516 F.3d 557, 563 (7th Cir. 2008). See also Stolt-Nielsen, 130 S. Ct. at 1767-68 (party challenging arbitration award “must clear a high hurdle”). In fact, the court of appeals has stated that it is incorrect to refer to a court’s role under § 10(a) as “judicial review”:

It is tempting to think that courts are engaged in judicial review of arbitration awards under the Federal Arbitration Act, but they are not. When parties agree to arbitrate their disputes they opt out of the court system, and when one of them challenges the resulting arbitration award he perforce does so not on the ground that the arbitrators made a mistake but that they violated the agreement to arbitrate as by corruption, evident partiality, exceeding their powers, etc.—conduct to which the parties did not consent when they included an arbitration clause in their contract.

Wise v. Wachovia Securities, LLC, 450 F.3d 265, 269 (7th Cir. 2006).

In this case, defendant argues that the arbitrator's decision should be overturned because it is "in manifest disregard of the law," Dft.'s Br., dkt. #61, at 6, citing cases such as Health Services Management Corp. v. Hughes, 975 F.2d 1253, 1267 (7th Cir. 1992), in which the court relied on cases from other circuits to conclude that an arbitration award must be vacated if the arbitrators "deliberately disregarded what they knew to be the law in order to reach the result they did." See also National Wrecking Co. v. International Brotherhood of Teamsters, Local 731, 990 F.2d 957, 961 (7th Cir. 1993) ("When arbitrators demonstrate a manifest disregard for the applicable law, courts will not enforce the award."). However, defendant's reliance on these cases is misplaced because they are no longer good law.

Both before and after Health Services Management and National Wrecking, the court of appeals has held that "manifest disregard of the law" is not a ground for vacating an arbitration award because it is not listed in § 10(a). E.g., IDS Life Ins. Co. v. Royal Alliance Associates, Inc., 266 F.3d 645, 650 (7th Cir. 2001); George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577 (7th Cir. 2001); Flender Corp. v. Techna-Quip Co., 953 F.2d 273, 279 (7th Cir. 1992); Chameleon Dental Products, Inc. v. Jackson, 925 F.2d 223, 226 (7th Cir. 1991); Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis, 849 F.2d 264, 268 (7th Cir. 1988). In Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704 (7th Cir. 1994), the court provided a thorough explanation for rejecting the "manifest disregard" standard:

The formula is dictum, as no one has found a case where, had it not been intoned, the result would have been different. It originated in Wilko v. Swan,

346 U.S. 427, 436-37 (1953)—a case the Supreme Court first criticized for its mistrust of arbitration and confined to its narrowest possible holding, and then overruled. Created *ex nihilo* to be a nonstatutory ground for setting aside arbitral awards, the Wilko formula reflects precisely that mistrust of arbitration for which the Court [has] criticized Wilko. We can understand neither the need for the formula nor the role that it plays in judicial review of arbitration (we suspect none—that it is just words). If it is meant to smuggle review for clear error in by the back door, it is inconsistent with the entire modern law of arbitration. If it is intended to be synonymous with the statutory formula that it most nearly resembles—whether the arbitrators ‘exceeded their powers’—it is superfluous and confusing. There is enough confusion in the law. The grounds for setting aside arbitration awards are exhaustively stated in the statute. Now that Wilko is history, there is no reason to continue to echo its gratuitous attempt at nonstatutory supplementation. So it will be enough in this case to consider whether the arbitrators exceeded their powers.

Id. at 706.

Although the court has wavered again from time to time, *e.g.*, Koveleskie v. SBC Capital Markets, Inc., 167 F.3d 361, 366 (7th Cir. 1999), the court’s most recent pronouncement on this issue is the same as its first: “This list [of grounds for vacating an award under § 10] is exclusive; neither judges nor contracting parties can expand it.” Affymax, Inc. v. Ortho-McNeil-Janssen Pharmaceuticals, Inc., 660 F.3d 281, 284 (7th Cir. 2011). Because “[d]isregard of the law is not on the statutory list,” courts may not rely on it to vacate an award, unless it overlaps with a ground that *is* on the list, such as the “arbitrato[r] exceeded [his] powers.” Id. The court stated that any other decisions suggesting a “different or broader” standard did not “surviv[e]” Hall St. Associates, LLC v. Mattel, Inc., 552 U.S. 576, 583-84 (2008), in which the Supreme Court concluded that 9 U.S.C. §§ 10 and 11 “provide the FAA’s exclusive grounds for expedited vacatur and modification.”

The court of appeals has made it clear in numerous decisions that the arbitrator does not exceed his powers simply because he is wrong, on the law or facts, even plainly so. Hill v. Norfolk & Western Railway, 814 F.2d 1192, 1194-95 (7th Cir.1987) ("[T]he question for decision by a federal court asked to set aside an arbitration award . . . is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract."). See also Trustmark Ins. Co. v. John Hancock Life Insurance Co. (U.S.A.), 631 F.3d 869, 874-75 (7th Cir. 2011) ("[A]mong the powers of an arbitrator is the power to interpret the written word, and this implies the power to err; an award need not be correct to be enforceable."); Butler Manufacturing Co. v. United Steelworkers of America, AFL-CIO-CLC, 336 F.3d 629, 636 (7th Cir. 2003) ("That the arbitrator in this case may have misunderstood the FMLA is simply not relevant."); BEM I, LLC v. Anthropologie, Inc., 301 F.3d 548, 554-55 (7th Cir. 2002) ("[T]here is no judicial review of arbitration awards for legal error."); George Watts & Son, 248 F.3d at 579 ("If manifest legal errors justified upsetting an arbitrator's decision, then the relation between judges and arbitrators established by [the Supreme Court] would break down.").

The reason for that rule is straightforward: when the parties agreed to arbitrate, they agreed to allow the arbitrator to decide their case rather than the court. Thus, a party is not entitled to overturn an award unless it shows that arbitrator disregarded the arbitration agreement itself. United Food & Commercial Workers, Local 1546 v. Illinois America Water Co., 569 F.3d 750, 754-55 (7th Cir. 2009) ("[O]nce we conclude that the arbitrator

did in fact interpret the contract, our review is concluded.”); Wise, 450 F.3d at 269 (“[T]he issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all.”); Tice v. American Airlines, Inc., 373 F.3d 851, 854 (7th Cir. 2004) (“[A] federal court is not authorized to set aside the arbitrator's award so long as the arbitrator interpreted the parties' contract.”); American Postal Workers Union, AFL-CIO, Milwaukee Local v. Runyon, 185 F.3d 832, 835 (7th Cir. 1999) (“[O]ur task is limited to determining whether the arbitrator abided by the contractual limits placed on him to decide the dispute.”). Any other rule “would prevent the parties from achieving the principal objectives of arbitration: swift, inexpensive, and conclusive resolution of disputes.” George Watts & Son, 248 F.3d at 579.

The court of appeals has identified only two instances in which a legal error could also be an example of an arbitrator exceeding his authority: (1) the arbitrator refused to apply the body of law required by the arbitration agreement (for example, by refusing to apply a choice of law provision); and (2) the arbitrator required the parties to do something they could "not do through an express contract" (for example, by paying employees less than the minimum wage). Affymax, 660 F.3d 281, 285 (7th Cir. 2011); Halim, 516 F.3d at 564; Edstrom, 516 F.3d at 552; George Watts & Son, 248 F.3d at 578-79.

With this understanding of the standard, it is clear that the arbitrator did not exceed his powers in deciding that the arbitration agreement “permits this arbitration to proceed on behalf of a class.” Dkt. #61-1 at 9. In his decision, the arbitrator stated, “[w]hether a class arbitration is permitted in a particular case is a matter for the arbitrator to determine

by construing the parties' arbitration agreement." Id. at 6. He cited Stolt-Nielsen for the proposition that there must be "a contractual basis" for proceeding on a class basis. Id. at 7. He then cited § 13 of the agreement, which states that disputes would be "resolved through binding arbitration in accordance with the rules of the American Arbitration Association applicable to employments." Id. Those rules include rules for class arbitrations, which "shall apply to any dispute arising out of an agreement that provides arbitration pursuant to any of the rules of the American Arbitration Association ('AAA') where a party submits a dispute to arbitration on behalf of or against a class or purported class." Id. Because plaintiff's complaint was brought "on behalf of others similarly situated," the class arbitration procedures applied.

The arbitrator acknowledged what he referred to as "the waiver clause": "Such arbitration may not be joined with or join or include any claims by any persons not party to this Agreement." Id. at 8. However, the arbitrator concluded that he could not apply that provision because this court had invalidated it under the National Labor Relations Act and had held that plaintiff "must be allowed to join other employees to her case." Id. Even if he considered the waiver, the agreement was ambiguous in light of the provision that arbitration should proceed in accordance with AAA rules and that ambiguity must be construed against defendant, the drafter of the agreement. Id.

The arbitrator interpreted the arbitration agreement and applied the law, which is all he was required to do. United Food & Commercial Workers, 569 F.3d at 755 ("[T]he arbitrator confronted a situation that was not expressly contemplated by the parties,

interpreted the agreement, and reached a conclusion. In short, he provided exactly what the parties bargained for. That is enough.”). Defendant argues vigorously that the arbitrator misinterpreted the agreement and Stolt-Nielsen and peppers its brief with dozens of citations to case law that it says the arbitrator violated, but all of that argument is irrelevant under the rule that courts cannot review an arbitrator’s decision for legal error. United Food & Commercial Workers, 569 F.3d at 757 (“[W]e pass no judgment on the quality of that interpretation but instead defer to the arbitrator.”); Butler, 336 F.3d at 636 (refusing to consider argument that arbitrator’s decision should be overturned because it “grossly misapplied the FMLA”). It is telling that, out of all the cases defendant cites, none are cases in which a court overturned an arbitrator’s decision under circumstances similar to those in this case.

At the end of its brief, defendant argues that the arbitrator violated the FLSA by approving “opt out” rather than “opt in” class procedures when 29 U.S.C. § 216(b) provides an opt in procedure for FLSA claims. This argument is ironic in light of the position defendant took in its motion to compel arbitration, which was that § 216(b) is not binding on parties to an arbitration agreement, a position I adopted in the March 16, 2012 order because the weight of authority supported it. Dkt. #57 at 4-5 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991); Long John Silver's Restaurants, Inc. v. Cole, 514 F.3d 345, 351 (4th Cir. 2008); Carter v. Countrywide Credit Industries, Inc., 362 F.3d 294, 298 (5th Cir. 2004); Horenstein v. Mortgage Market, Inc., 9 Fed. Appx. 618, 619 (9th Cir. 2001); Copello v. Boehringer Ingelheim Pharmaceuticals Inc., 812 F. Supp.

2d 886, 894 (N.D. Ill. 2011)). Although defendant cited many of these cases in its motion to compel, it fails to explain why they should not be controlling now, so I see no reason to reach a different conclusion in this context.

B. Communication with Potential Class Members

The second order defendant has appealed relates to communications with class members and potential class members. In particular, defendant is challenging rulings by the arbitrator that prohibit defendant from disseminating a specific letter to employees about their rights related to this dispute; require the dissemination of a new letter; and require defendant to obtain permission from the arbitrator before communicating with class members about the arbitration. (The order addresses other issues as well, but these are the only issues defendant seems to be challenging. Although parts of defendant's brief suggest that the arbitrator prohibited it from amending its employment agreement, the arbitrator stated expressly in his order that he was not addressing that issue, so I do not consider it either. Dkt. #64-6 at 14, ¶ 3.) The arbitrator issued these orders after concluding that defendant's letter was misleading and coercive because it informed employees that an amendment to their employment agreement "may jeopardize any right you may have to join [plaintiff's] arbitration proceeding" and that "executing the Amendment will impact your right to potentially join [the] arbitration," but it did not explain what that meant, did not indicate whether the employees could decline to sign the amendment and did not inform them of their right to be free from retaliation for participating in the arbitration. Dkt. #64-6

at 11; Dkt. #64-4. Defendant relies again on 9 U.S.C. § 10(a)(4) as permitting the appeal.

I reach the same conclusion about this order as I did with the first one: it is an interim order not subject to appeal. It raises only another issue about procedure and case management rather than the substance of plaintiff's claims, suggesting that the order is not an "award" within the meaning of § 10(a)(4).

Defendant cites Chrysler Motors Corp. v. International Union, Allied Industry Workers of America, AFL-CIO, 909 F.2d 248, 249-50 (7th Cir. 1990), for the proposition that injunctions issued by arbitrators are immediately appealable, but that citation is disingenuous for two reasons. First, Chrysler Motors was a case about the review of nonfinal orders of a district court under 28 U.S.C. § 1292(a)(1), not review of an arbitrator's decision under § 10(a)(4). Because § 1292 gives courts of appeals authority to review preliminary injunctions immediately, cases relying on that provision provide little guidance in applying § 10(a)(4) in the district court.

Second, Chrysler Motors involved an injunction to reinstate an employee as part of the plaintiff's requested relief, not an order regarding the parties' conduct during the proceedings. Even under § 1292, "[a]n order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)." Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271(1988). See also Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., 385 U.S. 23 (1966) ("Orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not . . . 'interlocutory' within the

meaning of [§] 1292(a)(1).”); Allendale Mutual Insurance Co. v. Bull Data Systems, Inc., 32 F.3d 1175, 1178 (7th Cir. 1994) (discovery order not appealable as injunction under § 1292(a)(1)). Because the order at issue does not relate to the merits, Chrysler Motors is not instructive.

Defendant cites other cases in which courts considered immediate appeals of preliminary injunctions issued by arbitrators, but each of them involved substantive relief related to the plaintiff’s claims. E.g., Arrowhead Global Solutions, Inc. v. Datapath, Inc., 166 Fed. Appx. 39, 44 (4th Cir. 2006); Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp., 935 F.2d 1019, 1022–23 (9th Cir. 1991); Island Creek Coal Sales Co. v. Gainesville, 729 F.2d 1046, 1049 (6th Cir. 1984); Ferry Holding Corp. v. Williams, No. 4:11 MC 527 RWS, 2011 WL 5039917, *2 (E.D. Mo. Oct. 24, 2011). Defendant cites no authority for the proposition that a district court may consider an interlocutory appeal of an order like the one in this case. Further, defendant does not argue that its appeal is distinguishable from Gulfstream Aerospace and Switzerland Cheese because it is raising a First Amendment argument, so I do not consider that question. Compare United States v. Brown, 218 F.3d 415, 422 n.7 (5th Cir. 2000) (“As a case management order, the gag order at issue here was indisputably crafted to control the proceedings, in no way impacts the merits of the case against Brown, and therefore is not appealable under section 1292(a)(1).”) with United States v. Ford, 830 F.2d 596, 598 (6th Cir. 1987) (gag order immediately appealable under § 1292(a)(1)).

However, even if I concluded that the arbitrator’s order was ripe for consideration

under § 10(a)(4), defendant has not shown that he is entitled to relief. Defendant does not argue that the arbitrator lacked authority under the arbitration agreement to limit the parties' communication or that he ordered defendant to do something that the law would prohibit the parties from agreeing to themselves. Rather, defendant acknowledges that the arbitrator has the authority and duty "to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." Gulf Oil Company v. Bernard, 452 U.S. 89, 100 (1981). It is arguing only that the arbitrator misapplied the standard set forth in Gulf Oil and in this court in Sjoblom v. Charter Communications, LLC, 3:07-CV-0451-BBC, 2007 WL 5314916 (W.D. Wis. Dec. 26, 2007). Because the arbitrator's decisions are not subject to review for legal error, this argument is unavailing.

ORDER

IT IS ORDERED that

1. Defendant Waterstone Mortgage Corporation's motion to reopen the case, dkt. #60, is DENIED.

2. Defendant's motions to vacate certain orders of the arbitrator, dkts. ##61 and 64, are DENIED as unripe.

Entered this 3d day of December, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge