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 K*leiner),* and they apply equally in FLSA actions to recover unpaid wages and overtime compensation. (O*jeda-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* at 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 Engenhoefer, 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