UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

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

DEFENDANT WATERSTONE MORTGAGE CORPORATION'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO COMPEL ARBITRATION

Now comes Defendant Waterstone Mortgage Corporation (hereinafter, "Waterstone"), by and through its undersigned counsel, and hereby files this Supplemental Brief in Support of its Motion to Dismiss or, in the Alternative, Motion to Compel Arbitration pursuant to the Court's instructions set forth in its Order dated March 2, 2012 (ECF No. 44) and states as follows:

This Court has asked the parties to provide supplemental briefing as to whether this Court has authority to entertain the parties' dispute about the validity of the arbitration agreement under 29 U.S.C. § 158(a)(1). While this Court unquestionably has the authority to determine, pursuant to the Federal Arbitration Act ("FAA") and applicable Supreme Court and 7th Circuit precedent, whether the arbitration provision applies, this Court lacks the authority to consider Plaintiff's argument that the arbitration provision contained in her Employment Agreement should not be enforced because it violates the National Labor Relations Act ("NLRA").

As a starting point, there can be no dispute that this Court has the authority to enforce arbitration agreements. See, Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 91 (2000). In fact, federal policy favors arbitration. Tinder v. Pinkerton Security, 305 F.3d 728, 733 (7th

Cir. 2002); see also, Morrie Mages & Shirlee Mages Foundation v. Thrifty Corp., 916 F.2d 402, 405 (7th Cir. 1990). Specifically, the FAA "mandates enforcement of valid, written arbitration agreements," like the arbitration provision contained in the Employment Agreement. Tinder, 305 F.3d at 733. Furthermore, the provisions of the FAA "manifest a liberal federal policy favoring arbitration agreements." EEOC v. Waffle House, Inc., 534 U.S. 279, 289 (2002). Whether or not the Court has the jurisdiction to entertain certain of Plaintiff's arguments in opposition, this Court has the authority to rule on the enforceability of the arbitration provision contained in Plaintiff's Employment Agreement.

In response to Waterstone's attempt to enforce the arbitration provision, Plaintiff contends that the entire arbitration provision is invalid inasmuch as it contains a single sentence that prohibits collective actions in supposed violation of the NLRA. As this Court has pointed out, Supreme Court precedent precludes this Court from ruling on whether the NLRA prohibits enforcement of the arbitration provision, holding that the NLRA confers "exclusive power upon the Board to prevent any unfair labor practice." Amalgamated Utility Workers v. Consolidated Edison Co. of New York, 309 U.S. 261, 269 (1940). In Amalgamated Utility, the Supreme Court explained the mandatory nature for determining whether an unfair labor practice had occurred in violation of § 158 of the NLRA. The Court explained, "Congress declared that certain labor practices should be unfair, but it prescribed a particular method by which such practices should be ascertained and prevented. By the express terms of the Act, the Board was made the exclusive agency for that purpose." Id. at 264. Accordingly, the determination as to whether or not Waterstone "has engaged or is engaging in the unfair labor practice rests with the Board." Id. at 265. If a violation does exist, it is the National Labor Relations Board's duty "to state its findings of fact and issue its 'cease and desist' order." Id. at 265. The Court explained,

"[T]he power of the Board to prevent any unfair practice as defined in the Act is exclusive." Id. at 266. Accordingly, if Plaintiff believes that enforcement of the arbitration provision is a violation of the NLRA, and she wishes to prevent this alleged unfair practice, then her remedy lies within the exclusive jurisdiction of the Board.

The Court reaffirmed the exclusive nature of the Board's jurisdiction over prevention of unfair labor practices in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). In this case, the Board had declined to exercise jurisdiction over a complaint of an unfair labor practice and, subsequently, a California state court awarded damages to the aggrieved party applying state law. The Court ruled that the Board's refusal to exercise jurisdiction "did not leave with the States power over activities they otherwise would be pre-empted from regulating." Id. at 238. Likewise, in the present matter, the mere fact that the Board has not passed judgment on Waterstone's arbitration provision does not means this Court has the power to rule on its validity. "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties." Id. at 242. Moreover, "[C]ourts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." Id. at 244 - 45.

The aforementioned cases compel this Court to rule on the issue of arbitration without considering Plaintiff's NLRA argument in opposition. While Plaintiff is likely to rely upon Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982), in support of an argument that the Court can pass judgment on the legality of the arbitration provision, this case is easily distinguishable. Mullins involves a contract provision that did not create an alleged unfair labor practice under 29 U.S.C. § 158(a)(1), but rather a violation of a "hot cargo" clause which required the employer to

make certain concessions to the union when it engaged in business with certain non-union employers in direct violation of the language of 29 U.S.C. § 158(e).

In contrast to Mullins, determination of the legality of the Employment Agreement in this case will require the Court to interpret the NLRA and apply that interpretation to the unique facts of this case. This much is evidenced by the extensive briefing on this issue filed by both parties discussing the NLRA and D.R. Horton, Inc., Case 12-CA-25764, a case decided by the NLRB on its specific facts, which Waterstone has distinguished in prior briefing. Unlike Mullins, there is not a rule or statute that makes unmistakably clear that Waterstone's Employment Agreement, and the collective action prohibition contained therein, is invalid as a matter of law. In contrast, Plaintiff relies on the NLRB's opinion in D.R. Horton, a case that is currently on appeal to the Circuit Court of Appeals for the Fifth Circuit (5th Cir. Docket No. 12-60031). Instead of merely pointing to the express terms of a statute in order to consider Plaintiff's argument of illegality, this Court would need to interpret the NLRA and apply its conclusions of law in this regard to the facts of this case, as distinguished from the facts of D.R. Horton. The holding of Mullins stands distinct as the application of the plain language of a statute passed by Congress does not require a court to interpret the NLRA, but the consideration of an alleged unfair labor practice within the framework of a factually distinguishable and not yet final NLRB opinion would impermissibly require extensive interpretation and application of the NLRA by this Court.

For the simple reason alone that Plaintiff's allegation of an NLRA violation here does not violate the plain statutory language of the NLRA and therefore is in need of statutory interpretation, this Court lacks the authority to address this question. See, Local 1316, International Brotherhood of Electrical Workers v. Superior Contractors & Associates, Inc., 608 F. Supp. 1246, 1251 (N.D. Ga. 1985) ("The contract clause in the case sub judice arguably

provides a basis for an unfair labor practice charge; it is not per se unlawful by statutory fiat. This case is thus distinguishable from Mullins . . . There is no clear statutory basis for a finding that the NECA contract referral provision is illegal.") As applicable here, this Court lacks the authority to consider Plaintiff's not yet ripe argument of invalidity based on the NLRA. Perhaps aware of this issue, Plaintiff filed a charge of an unfair labor practice with the NLRB ("Charge"). A copy of the Charge is attached hereto as Exhibit 1. Now that Plaintiff has invoked the exclusive jurisdiction of the NLRB, the Court should simply let the NLRB procedure run its course separate and apart from the pending wage and hour claims.

In addition, the Supreme Court in Mullins limited its analysis to situations in which a party was attempting to enforce an illegal contract "in order to maintain the action" and or make a "recovery." Mullins, 455 U.S. at 77. These conditions are not present in this matter as Waterstone's attempt to enforce the arbitration provision is not for the purpose of maintaining an action or making a recovery. Likewise, where, as here, the NLRB is reviewing the issue, it is not appropriate for the Courts to usurp the NLRB's authority. Burke v. French Equipment Rental, Inc., 687 F.2d 307, 311 (9th Cir. 1982) ("we find no indication in Kaiser that the Court meant to sweep away the entire jurisprudence of judicial deference to the expertise of the NLRB. The case before us, unlike Kaiser, is not one where the NLRB has had no opportunity to consider the merits of the § 8(e) defense.")

Furthermore, even if this Court is compelled to apply Mullins to the facts of this case and even if the this Court agrees with Plaintiff that the collective action prohibition of the Employment Agreement was invalid, this Court still ought to compel arbitration. If the collective action prohibition is determined to be invalid, it can easily be severed from the

otherwise valid and enforceable arbitration provision, allowing for a collective action in arbitration.

WHEREFORE, the Defendant, Waterstone Mortgage Corporation, respectfully prays this Court enter an order granting its Motion to Dismiss or, in the Alternative, Motion to Compel Arbitration, and for such other and further relief as may be just and proper.

DATED: March 9, 2012

Respectfully submitted,

/s/
Ari Karen (Pro Hac Vice)
Offit Kurman, P.A.
8171 Maple Lawn Blvd., Suite 200
Fulton, MD 20759
Phone: (301) 575-0340
E-Mail: akaren@offitkurman.com
Attorney for Defendant

/s/
Russell B. Berger (Pro Hac Vice)
Offit Kurman, P.A.
8171 Maple Lawn Blvd., Suite 200
Fulton, MD 20759
Phone: (301) 575-0349
E-Mail: rberger@offitkurman.com
Attorney for Defendant

CERTIFICATE OF SERVICE

THIS WILL CERTIFY that on this 9th day of March 2012, a copy of the foregoing was electronically filed and delivered via CM/ECF to:

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

/s/
Russell B. Berger