IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PAMELA HERRINGTON, both individually and behalf of all other similarly situated persons, **Plaintiffs,** **v.** **WATERSTONE MORTGAGE CORPORATION,** **Defendant.**	**Case No.: 3:11-cv-00779-BBC** **PLAINTIFF'S SUPPLEMENTAL BRIEFING REQUESTED BY THE COURT IN DOC. #44**

ARGUMENT

The NLRB Does Not Have Exclusive Jurisdiction Over The Enforceability of This Arbitration Clause.

This Court requested supplemental briefing on whether the NLRB's exclusive jurisdiction to hear unfair labor practice charges under 29 U.S.C. § 158 affects the Court's consideration of Plaintiff's defense to the Motion to Dismiss. *Doc. 44.* Plaintiff does not ask the Court to adjudicate an unfair labor practice (ULP) charge and the Court has no authority to do so. But since Defendant asked the Court to enforce its arbitration clause the Court must determine if the arbitration clause is lawful and enforceable under Section 2 of the Federal Arbitration Act (FAA). *See Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 444 (2006); 9 U.S.C. § 2. In making this determination, this Court should follow a bedrock principle of federal contract law – that a Court may not enforce an illegal agreement. The Supreme Court has determined that this principle applies even when the illegality at issue is within the NLRB's exclusive jurisdiction to remedy. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-84 (1982). The doctrine of NLRB exclusivity is meant to affirm the central role of the NLRB in establishing labor policy. A

ruling by this Court applying the NLRB's decision in *D.R. Horton*[1] would effectuate the NLRB's decision, not undercut it. In *D.R. Horton,* the NLRB specifically called for Courts to apply the decision in the context of reviewing arbitration agreements with class waivers. 2012 WL 36274 at *14. And because this case seeks solely to enforce wage hour rights which are independent of the NLRA, application of the NLRB's *D.R. Horton* decision to this case is a "collateral" matter that the Court is empowered to address. *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 626 (1975). For each of these reasons, the Court is permitted to reach the illegality defense on this motion.

Arbitration clauses with class waivers are also unlawful under the Norris-LaGuardia Act – a statute protecting concerted activity parallel to the NLRA but without the NLRB's exclusive jurisdiction. 29 U.S.C. §§ 102 and 103. Under Norris-LaGuardia, Courts are specifically directed to refuse enforcement of contracts such as the arbitration clause at issue here, so called "yellow dog" contracts, where an employer requires an employee to waive rights to concerted activity as a condition of employment. *Id.* Norris-LaGuardia directs Courts to refrain from enforcing such waivers and so there is no NLRB exclusive jurisdiction. *Id.*

For each of these reasons, this Court is authorized to decide whether this arbitration clause is unlawful. This Court should apply the NLRB's *D.R. Horton* decision and deny Defendant's motion to enforce its unlawful arbitration clause.[2]

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[1] As was more fully explained in Plaintiff's Sur-reply Brief in Opposition to the Motion to Dismiss, *D.R. Horton* held that a mandatory arbitration clause imposed as a condition of employment containing a class or collective action waiver violates the NLRA's protection for concerted activity. The employment agreement here containing the mandatory arbitration clause and class waiver was imposed as a condition of employment. *See Herrington Decl.* attached hereto as Ex. 1.

[2] If the Court nevertheless were to find that the clause is enforceable, Plaintiff's additional arguments against enforcement must be considered – that Plaintiff Herrington cannot afford arbitration and that the FLSA's statutory purposes cannot be vindicated under the arbitration

POINT ONE

This Court May Not Enforce An Unlawful Contract Notwithstanding The NLRB's Exclusive Jurisdiction Under The NLRA.

Courts may not enforce unlawful contracts. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-84 (1982). In *Kaiser Steel*, the Supreme Court has made perfectly clear that even when the alleged illegality pertains to the NLRA, the rule of deference to the NLRB's otherwise exclusive jurisdiction does not apply.

> As a general rule, federal courts do not have jurisdiction over activity which "is arguably subject to § 7 or § 8 of the [NLRA]," and they "must defer to the exclusive competence of the National Labor Relations Board." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959). *See also Garner v. Teamsters*, 346 U.S. 485, 490-491, 74 S.Ct. 161, 165-166, 98 L.Ed. 228 (1953). It is also well established, however, that a federal court has a duty to determine whether a contract violates federal law before enforcing it. "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in ... federal statutes.... **Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.**" *Hurd v. Hodge*, 334 U.S. 24, 34-35, 68 S.Ct. 847, 853, 92 L.Ed. 1187 (1948) (footnotes omitted).

Kaiser Steel Corp. v. Mullins, 455 U.S. at 83-84 (1982)(emph. added). In *Kaiser Steel*, the Supreme Court succinctly explained why the primary jurisdiction of the NLRB yields to the judicial obligation to abstain from enforcement of illegal agreements: "While only the Board may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which violates [the NLRA]." *Kaiser Steel Corp.*, 455 U.S. at 86.[3] As set forth in

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clause drafted by Defendant.

[3] Even state courts determine whether enforcement of a contractual provision would violate the NLRA:

> Under federal labor law, the court must interpret the contract provision to determine if the provision violates the NLRA, before enforcing a fine under the contractual provision. *Kaiser Steel,* 455 U.S. at 83-84, 102 S.Ct. at 859-60, 70 L.Ed.2d at 843-44; *Scofield v.*

Kaiser Steel, Plaintiff does not seek an affirmative remedy for Waterstone's unfair labor practice in this case, but does ask the court to decline enforcement.[4] The Seventh Circuit also recognizes that Courts cannot enforce illegal promises even if the illegality pertains to the labor law. *Toth v. USX Corp.*, 883 F.2d 1297, 1306 (7th Cir. 1989). *See also Courier-Citizen Co.* v. *Boston Electrotypers Union No. 11, Printing & Graphic Communications Union of N. Am.,* 702 F.2d 273, 276 n. 6 (1st Cir. 1983)("as the federal courts may not enforce a contractual provision that violates section 8 of the Act, they may be obliged at times, in the course of resolving a contract dispute, to decide whether or not such a violation exists.").

In *Costello v. Grundon*, 651 F.3d 614, 623 -624 (7th Cir. 2011), the Seventh Circuit explained *Kaiser Steel,* noting that a party may assert a federal statute as a defense to a claim, even where she would not be able to raise the substance of that defense affirmatively:

> No private right of action under a statute is necessary to assert a violation of that statute as an affirmative defense. *See, e.g., Kaiser Steel Corp. v. Mullins,* 455 U.S. 72, 86, 102 S.Ct. 851, 70 L.Ed.2d 833 (1982) (allowing defense under § 8(e) of the National Labor Relations Act where defendant had no private right of action to enforce the statute); *United States v. Miss. Valley Generating Co.,* 364 U.S. 520, 566, 81 S.Ct. 294, 5 L.Ed.2d 268 (1961) (holding conflict of interest on the part of a government official who participated in contract negotiations in violation of federal law rendered contract unenforceable); *E. Bement & Sons v. Nat'l Harrow Co.,* 186 U.S. 70, 88, 22 S.Ct. 747, 46 L.Ed. 1058 (1902) (assuming that only the Attorney General could bring an action to enforce the Sherman Act, yet allowing the defense that the contract was illegal under the antitrust laws); *Rush–Presbyterian–St. Luke's Med. Ctr. v. Hellenic Republic,* 980 F.2d 449, 455 (7th Cir.1992) (noting that illegality may be a defense to contract even though statutes that make conduct illegal ordinarily prescribe public remedies)

> *NLRB* (1969), 394 U.S. 423, 429, 89 S.Ct. 1154, 1158, 22 L.Ed.2d 385, 393. The courts cannot enforce a contract that violates the NLRA. *Scofield,* 395 U.S. at 429, 89 S.Ct. at 1158, 22 L.Ed.2d at 393.

Commc'n Workers of Am., Local 5900 v. Bridgett, 512 N.E.2d 195, 199 (Ind. Ct. App. 1987). To find otherwise would lead to a result abhorrent to preservation of the robust, employee-protective goals of the NLRA.

[4] Plaintiff separately seeks that relief before the NLRB in an unfair labor practice charge. Ex. 2.

> …
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> By refusing to enforce a contract that violates a statute, the court serves the public interest of deterring contracts in violation of the law and promoting adherence to the law. *[Kaiser Steel]* at 77, 102 S.Ct. 851; *see also N. Ind. Pub. Serv. Co. (NIPSCO) v. Carbon Cty. Coal Co.,* 799 F.2d 265, 273 (7th Cir.1986) (refusing to enforce a contract that violates a statute deters behavior forbidden by that statute).

Costello v. Grundon, 651 F.3d 614, 623-624 (7th Cir. 2011). Plaintiff here seeks only to have the Court decline enforcement of the arbitration contract because it is illegal.

The NLRB itself recognizes the principle that Federal Courts may not enforce contracts which violate the NLRA in *D.R. Horton,* 357 NLRB No. 184, 2012 WL 36274 (N.L.R.B. Jan. 3, 2012).

> Entirely apart from the Supreme Court's teachings in *National Licorice* and *J. I. Case,* supra—cases invalidating private agreements that restricted NLRA rights—it is a defense to contract enforcement that a term of the contract is against public policy. See, e.g., *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987). In fact, this principle has been specifically followed in relation to contract provisions violating the NLRA. … [quote omitted] *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83–84 (1982). … **As explained above, Section 7 of the NLRA manifests a strong federal policy protecting employees' right to engage in protected concerted action, including collective pursuit of litigation or arbitration. Moreover, Section 8(a)(1) and other provisions of the NLRA derived from the earlier Norris-LaGuardia Act manifest a strong federal policy against agreements in the nature of yellow-dog contracts, in which individual employees are required, as a condition of employment, to cede their right to engage in such collective action. A refusal to enforce the [Master Arbitration Agreement]'s class action waiver would directly further these core policies underlying the NLRA.**

D.R. Horton, at *14 (emph. added). Thus, it would be contrary to the NLRB's definitive interpretation of the NLRA for this Court to avoid following *D.R. Horton* as the NLRB directs.

The first federal court decision since *D.R. Horton* applying its rationale was recently rendered in *Owen v. Bristol Care, Inc.,* 11-04258 -CV-FJG (WDMO Feb. 28, 2012), Ex. 3 hereto, where the Court denied enforcement of an unlawful arbitration clause with class waiver, writing simply, "In the employment context, waivers of class arbitration are not permissible.

D.R. Horton Inc., 357 N.L.R.B. 184 (2012)." *Owen, supra, at p. 8-9.* The *Owen* Court found no prohibition to striking the unlawful arbitration clause.[5]

The *Kaiser Steel* and *D.R. Horton* decisions are consistent with the long line of federal cases holding that illegal promises will not be enforced by federal courts. In *Kaiser Steel,* the Supreme Court recounted that history briefly, starting with *McMullen v. Hoffman,* 174 U.S. 639 (1899), where two bidders for public work had rigged bids to share the work equally if one of them were awarded the contract. One of the parties sued to enforce the agreement to share. The Court found the undertaking illegal and refused to enforce it, saying, "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it...." *Id.,* 174 U.S. at 654.

> "[T]o permit a recovery in this case is in substance to enforce an illegal contract, and one which is illegal because it is against public policy to permit it to stand. The court refuses to enforce such a contract and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest."

Id., 174 U.S. at 669. The rule was confirmed in *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.,* 212 U.S. 227 (1909), where the Court refused to enforce a buyer's promise to pay for purchased goods on the ground that the promise to pay was itself part of a bargain that was illegal under the antitrust laws. "In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the

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[5] The Court in *LaVoice v. UBS Financial Services, Inc.,* 2012 WL 124590 (S.D.N.Y. 2012), issued a long decision on a variety of complex arbitration issues. Three days after being presented with the *D.R. Horton* decision in supplemental papers, the Court there declines to follow the NLRB, but states no reason for doing so and says nothing about the exclusive jurisdiction doctrine. At *6.

interests of individual parties." *Id.,* at 262. *Kaiser Steel Corp.,* 455 U.S. at 77-78. *See also, California v. U.S.,* 271 F.3d 1377, 1383 (Fed. Cir. 2001) ("Without a doubt, contractual provisions made in contravention of a statute are void and unenforceable"); *Johnson* v. *Yellow Cab Transit Co.,* 321 U.S. 383, 387 (1944) ("[A] federal court should not, in an ordinary case, lend its judicial power to a plaintiff who seeks to invoke that power for the purpose of consummating a transaction in clear violation of law."); *United States* v. *Felici,* 208 F.3d 667, 670-71 (8th Cir. 2000) ("The doctrine of unclean hands is an equitable doctrine that allows a court to withhold equitable relief if such relief would encourage or reward illegal activity.").

Defendant, in asking this Court to ignore the illegality of its arbitration clause, invites this Court to actively participate in effectuating its unlawful purposes. Consistent with the federal law of contract, this Court should reject that invitation and decline to enforce the arbitration clause in order to vindicate the public interest, as clearly expressed and intended by the NLRB.

POINT TWO

The NLRB's Exclusive Jurisdiction Does Not Apply When The NLRB Has Already Clearly Ruled And Does Not Apply To Collateral Matters.

The doctrine allowing the NLRB to develop interpretive rulings under the NLRA, giving it "exclusive" or "primary" jurisdiction is based upon the need to have a single body with expertise interpret the law in a coherent fashion. *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 245 (1959). "It is essential to the administration of the Act that these determinations be left **in the first instance** to the [NLRB]." *Id.* (Emph. added.) Here, of course, the NLRB in *D.R. Horton* has already decided the issue of whether a class and collective action waiver violates the protection for concerted activity in the NLRA "in the first instance." *Garmon, supra.* Applying the *D.R. Horton* decision here would not conflict with the NLRB in any way.

The general rule of NLRB primary jurisdiction has not been given mechanical application

to bar all suits or defenses that implicate NLRA issues from being decided by the courts. *Sears, Roebuck and Co.* v. *San Diego County District Council of Carpenters* 436 U.S. 180, 188-89 (1978):

> the Court has refused to apply the *Garmon* guidelines in a literal, mechanical fashion. This refusal demonstrates that "the decision to pre-empt . . . state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies" of permitting the state court to proceed.

Id. The primary jurisdiction doctrine is limited to cases implicating "the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose." *Vaca* v. *Sipes,* 386 U.S. 171, 180-181 (1967); *see also, Kaiser Steel Corp.*, 455 U.S. at 83-84; *Sears, Roebuck and Co.,* 436 U.S. at 188-89; *William E. Arnold Co. v. Carpenters District Council,* 417 U.S. 12, 16 (1974). Therefore, unless the Congressional intent to keep labor law uniform is placed in jeopardy, the doctrine is inapplicable. *Id.*

Indeed, even *Garmon* recognized that the rule of deference is not implicated "when the … court can ascertain the actual legal significance under federal labor law by reference to compelling precedent applied to essentially undisputed facts." *Garmon,* 359 U.S. at 245. That is certainly the case here. Thus, when the uniformity of federal labor law is not jeopardized, the courts may resolve the dispute even though it arguably is covered by sections 7 and 8 of the NLRA. *Sears, Roebuck and Co.,* 436 U.S. at 188-89. As discussed in Point One above, the NLRB clearly expressed its intention in *D.R. Horton*[6] that courts should apply its holding concerning the illegality of class waivers and that view is itself entitled to deference.

[6] *In re D.R. Horton,* 2012 WL 36274 at *14.

Amalgamated Utility Workers v. Consolidated Edison Co. of New York, 309 U.S. 261 (1940).[7] Thus, consistent with the NLRB's decision, this Court should determine the legality of the arbitration agreement in this case.

Nor is it uncommon or extraordinary for Courts to pass on NLRA issues in the context of other labor cases. Cases brought under §301 of the Labor Management Relations Act (to confirm or reverse arbitral awards) also have been held to necessarily permit Court resolution of the frequent NLRA issues that are presented, regardless of NLRB exclusive jurisdiction. *Smith v. Evening News Ass'n*, 371 U.S. 195, 198 (1962). *And see Carey v. Westinghouse Corp.,* 375 U.S. 261 (1964), where the Supreme Court held that the existence of an unfair labor practice remedy before the Board did not bar a union from seeking a court order compelling arbitration. At least since then, it has been beyond dispute that the NLRB and the District Court have concurrent jurisdiction over suits to enforce labor contracts, even where the conduct involved might well be an unfair labor practice. *Hines v. Anchor Motor Freight,* 424 U.S. 554, 562 (1976)("Section 301 contemplates suits by and against individual employees as well as between unions and employers; and contrary to earlier indications § 301 suits encompass those seeking to vindicate "uniquely personal" rights of employees such as wages, hours, overtime pay, and wrongful discharge.); *See also Pari Mutuel Clerks Union of La. v. Fair Grounds Corp.,* 703 F.2d 913, 917–18 (5th Cir.1983).

In this matter, uniformity of federal labor law is in no way jeopardized if Waterstone's

[7]"It is the Board's order on behalf of the public that the court enforces. It is the Board's right to make that order that the court sustains. The Board seeks enforcement as a public agent, not to give effect to a 'private administrative remedy'. Both the order and the decree are aimed at the prevention of the unfair labor practice. If the decree of enforcement is disobeyed, the unfair labor practice is still not prevented. The Board still remains as the sole authority to secure that prevention. The appropriate procedure to that end is to ask the court to punish the violation of its decree…". *Amalgamated Utility Workers v. Consolidated Edison Co. of New York*, 309 U.S. 261 (1940). That is exactly what the NLRB has done in *D.R. Horton,* by requesting that Courts enforce the decision.

arbitration agreement is not enforced by the court due to its unlawful impact on employee concerted activity. The current suit is not one that could be brought before the NLRB. And this lawsuit against Waterstone does not assert a cause of action claiming that Waterstone engaged in any kind of unfair labor practice under the NLRA. Rather, the context of this motion is an illegality defense against the attempt by Waterstone to enforce an arbitration agreement that violates federal law. The court is fully empowered, and according to the Supreme Court obligated, to render that determination and doing so does not impinge upon the NLRB's primary jurisdiction. *Kaiser Steel,* 455 U.S. at 83-84; 29 U.S.C. § 102-3. Indeed, Congress authorized courts to make that decision in the FAA. 9 U.S.C. § 2.

After this suit was filed, Plaintiff filed a charge with the NLRA which separately seeks to have Waterstone remove the arbitration clause from its employment agreement. *Charge,* Ex. 2 hereto. The NLRB obviously has authority to hear the ULP charge, but may not adjudicate the wage hour claims that Plaintiff brings in this court. *Cplt., Doc. 3.* This court may hear claims that WMC failed to pay overtime, minimum wage and commissions as are raised in the Complaint, but not ULP claims. *Id.* But, on Defendant's motion to enforce the offending clause, Plaintiff is permitted to raise the illegality of that clause as a defense to enforcement based on the *D.R. Horton* decision. FAA, 9 U.S.C. §2; *Kaiser Steel, supra*., 29 U.S.C. §§ 102-3.

The Supreme Court has also held that "the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies." *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 626, (1975). *And see Marriott Corp. v. Great America Service Trades Council, AFL-CIO*, 552 F.2d 176, 180 (7th Cir. 1977)("[Plaintiff's trademark claim] should not be relegated to the NLRB, an agency, specialized in the field of federal labor law."). *See also Lucky Stores, Inc. v.*

International Broth. of Teamsters Local Numbers 70, 78, l50, 490, 812 F.Supp. 162, 164 (N.D.Cal. 1992); *see also Belknap Inc. v. Hale*, 463 U.S. 491, 510 (1983)("The critical inquiry in applying the doctrine of primary jurisdiction is whether the controversy presented to the state court is identical" with that which could be presented to the NLRB.). The illegality of the arbitration agreement is collateral to Plaintiff's wage hour claims, which cannot be presented to the NLRB.

Because the doctrine of primary or exclusive jurisdiction does not apply when the NLRB has already clearly decided an issue, and does not apply to determinations of collateral labor law issues arising in actions involving independent federal claims, this Court has jurisdiction to decide whether the arbitration clause is enforceable.

POINT THREE

The FAA Requires A Court To Determine If The Arbitration Clause Is Subject To An Illegality Defense.

The FAA requires that a Court consider any illegality in the arbitration clause before determining whether to enforce it. 9 U.S.C. §2. "A written provision … to settle by arbitration … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Illegality is one of the recognized "grounds" for "revocation of any contract." *See Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)("generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2 [of the FAA]."); *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 444 (2006)("Challenges to the validity of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract" can be divided into two types" and illegality of an arbitration agreement was a gatekeeping

function for the Court to decide.[8]); *We Care Hair Development, Inc. v. Engen*, 180 F.3d 838, 842 (7th Cir. 1999)("State contract defenses may be applied to invalidate arbitration clauses if those defenses apply to contracts generally."). Thus, the legality of class waivers in arbitration clauses is something that the Supreme Court has required the District Court to decide as part of a District Court's gatekeeping function under the FAA.

Courts are thus required to evaluate arbitration clauses under the FAA and find them to be unenforceable if they are unlawful, *see Owen v. Bristol Care, Inc.,* 11-04258-CV-FJG (WDMO Feb. 28, 2012) (denying enforcement of an unlawful arbitration clause with class waiver in FLSA case), Ex. 3 hereto. Similar to unlawful arbitration clauses, unconscionable arbitration clauses have been similarly refused enforcement. *Circuit City Stores, Inc. v. Adamas,* 279 F.3d 889 (9th Cir. 2002)(non-mutual arbitration clause unconscionable); *Hadnot v. Bay, Ltd.,* 344 F.3d 474, 478 n.14 (5th Cir. 2003)(ban on punitive and exemplary damages unenforceable); *Alexander v. Anthony Intern., L.P.,* 341 F.3d 256 (3d Cir. 2003)(ban on punitive damages and loser pay expenses clause unconscionable); *Eagle v Fred Martin Motor Co.,* 809 N.E.2d 1161, 1176 (Ohio Ct. App. 2004)(NAF fees for virtually every pleading unconscionable).

The Courts have also regularly refused to enforce arbitration agreements that are not illegal or unconscionable *per se*, but when doing so would interfere with the vindication of statutory rights. *See In re American Exp. Merchants' Litigation*, 667 F.3d 204, 1 (2d. Cir. 2012) ("Amex III")(arbitration class waiver is unenforceable under federal vindication of statutory rights analysis); *Sutherland v. Ernst & Young LLP,* 2012 WL 130420 (S.D.N.Y. Jan. 17, 2012)(collective action waiver in arbitration clause unenforceable under FAA since it would

[8] Illegality in the contract as a whole is to be decided by an arbitrator, illegality in the arbitration clause is determined by the Court as part of its gatekeeping function under the FAA. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395 (1967).

effectuate waiver of FLSA rights); *Raniere v. Citigroup Inc.*, 2011 WL 5881926 (S.D.N.Y. Nov. 22, 2011)(arbitration clause waiving FLSA rights violates FLSA and is unenforceable); *Chen-Oster v. Goldman, Sachs & Co.*, 785 F. Supp. 2d 394, 410 (S.D.N.Y. 2011)(FAA prohibits class waiver of pattern and practice discrimination claim), reconsideration denied, 2011 WL 2671813 (S.D.N.Y. July 7, 2011); *Cf. Plows v. Rockwell Collins, Inc.,* 2011 WL 3501872 (C.D. Cal. Aug. 9, 2011).

In order to fulfill its responsibility under the FAA, this Court should determine whether the arbitration clause is unlawful under federal law, notwithstanding any deference that is due to the NLRB. 9 U.S.C. § 2.

POINT FOUR

The Norris-LaGuardia Act Is Substantively Identical to the NLRA, Has No Rule of Deference To The NLRA, And Is Specifically Enforceable By Courts.

The Norris-LaGuardia Act prohibits "yellow dog contracts" in which workers must give up their right to collective action in order to be hired. 29 U.S.C. §§ 102-3.[9] The Norris-

[9] § 102. Public policy in labor matters declared

> In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:
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> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, **it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.**

LaGuardia Act states that, "any … promise in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, **shall not be enforceable in any court of the United States**" (emph. added). The public policy of Section 102 enshrines the right to be "free from the interference, restraint, or coercion of employers … **in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.**" (Emph. added). Thus, in this key aspect, the Norris-LaGuardia Act is identical in effect to section eight of the NLRA, 29 U.S.C. § 158, which states that "Employees shall have the right to … engage in other concerted activities for the purpose of … mutual aid or protection." But, under the Norris-LaGuardia Act, the jurisdiction of the federal courts is clear and the courts are specifically directed that they may not enforce contracts in which an employee is required to abjure concerted action as a condition of employment. Waterstone's arbitration agreement waiving class and collective actions is a species of "yellow dog contract" prohibited by Norris-LaGuardia.

The NLRB's exclusive jurisdiction to process unfair labor practice charges does not extend to or invalidate parallel remedies arising under other statutes. *Amalgamated Utility Workers v. Consolidated Edison Co. of New York,* 309 U.S. 261, 269 (1940)("We think that the provision of the National Labor Relations Act conferring exclusive power upon the Board to prevent any unfair labor practice, as defined, [is] -a power not affected by any other means of 'prevention that has been or may be established by agreement, code, law, or otherwise'").

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§ 103. Nonenforceability of undertakings in conflict with public policy; "yellow dog" contracts

> **Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court**

Plaintiff is entitled to address illegality of Waterstone's arbitration clause under the Norris-LaGuardia Act as well as the NLRA.

In asking the Court to enforce its arbitration clause with class waiver, Waterstone invites this Court to violate the "public policy of the United States" as expressed in two statutes – the NLRA and the Norris-LaGuardia Act, 29 U.S.C. § 102. This invitation should be refused.

CONCLUSION

This Court should apply the *D.R. Horton* decision and bar enforcement of the arbitration clause with class waiver as an illegal contract. Defendant's motion to dismiss should be denied in all respects.

Dated: March 9, 2012

Respectfully Submitted,

s/ Dan Getman

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