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**

PLAINTIFFS' MOTION TO COMPEL DISCOVERY PRODUCTION

Plaintiffs respectfully request that the Court order Waterstone to respond to and produce discovery. Despite a scheduling order, Waterstone refuses to produce or participate in discovery. Promptly after the Court's Preliminary Pretrial Conference Order Plaintiffs served interrogatory requests and document demands. Dunn Dec. ¶ 2. However, Waterstone refuses to participate in discovery. See, Ex. 2 to Dunn Dec. Even after Plaintiffs proposed a compromise that would limit their requests to discovery needed for Rule 23 class certification, Waterstone's position remained unchanged when the Parties met and conferred. See, Dunn Dec. ¶¶ 4-5. While, Plaintiffs attempted to resolve the dispute in good faith, Waterstone repeated its refusal to participate in discovery. Dunn Dec. ¶ 5.

Because of the Court's Preliminary Pretrial Conference Order, Plaintiffs are required to pursue discovery. Magistrate Judge Crocker explained that "[t]he parties must attend diligently to their obligations in this lawsuit and must reasonably accommodate each other in all matters so as to secure the just, speedy and inexpensive resolution of each proceeding in this matter as required by Fed. R. Civ. Pro. 1." Doc. 34, p. 1. Under the scheduling order, Plaintiffs must file

their motion for class certification by June 1, 2012, regardless of whether or not the pending motion to dismiss has been decided. Doc. 34, p. 2. That leaves Plaintiffs approximately three months to complete class discovery. Within these three months Plaintiffs must move to compel, await a response, review Waterstone's document production, analyze wage and hour records, speak with class members, take depositions including a 30(b)(6) deposition, and resolve any discovery disputes. In addition, based upon the discovery provided, Plaintiffs must finally draft a class certification motion. Waterstone's refusal to provide discovery prevents Plaintiffs from gathering the evidence needed to meet the Rule 23 standard, even if this motion is granted.

Waterstone complains that it should not have to participate in discovery because it is waiting for the Court to decide whether it must litigate in federal court or arbitrate the case. However, this motion was pending before Magistrate Judge Crocker entered the Preliminary Pretrial Conference Order. And although Magistrate Judge Crocker was aware of Waterstone's motion, he did not stay discovery or the motion deadlines. And despite having over a month to move to stay the discovery and motion deadlines, Waterstone has done nothing.

Finally, because this case is appropriately in Federal Court and not in arbitration, there is no reason to stay discovery. In *D.R. Horton* the NLRB held that the arbitration agreement was unenforceable because "as a condition of their employment, [the employees were required] 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." *D.R. Horton*, 357 NLRB No. 184, 2012 WL 36274 (N.L.R.B. 2012); *see also Raniere v. Citigroup Inc.*, No. 11-cv-2448, 2011 WL 5881926, *15-*17 (S.D.N.Y. Nov. 22, 2011) (holding that a waiver of the right to proceed collectively under the FLSA is unenforceable as a matter of law). Similarly, here the arbitration agreement is unenforceable because the class and

collective action waiver violate the NLRA and require a waiver of the FLSA collective action provisions.

In conclusion, Plaintiffs respectfully request that the Court order Waterstone to respond to and produce discovery.

Dated: February 23, 2012

Respectfully Submitted,

s/ Dan Getman
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