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

RESPONDENT'S STATEMENT OF POSITION

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Jt. Stipulated Exh. X

RESPONDENT'S STATEMENT OF POSITION

This matter arises from Respondent's attempt to enforce an arbitration provision contained in an employment agreement (hereinafter, "the Agreement") voluntarily executed by Pamela Herrington during the course of her employment. In response, Ms. Herrington, who is no longer employed by Respondent, contends that the Agreement and Respondent's attempted enforcement thereof constitute an unfair labor practice. Following a ruling by the Western District of Wisconsin in which the Court ordered Ms. Herrington's wage and hour claims to proceed in an arbitration that other employees of Respondent may join, and the filing of a Complaint by the NLRB, Respondent sought to refine the arbitration provision contained in the Agreement. As a result of its efforts to balance compliance with the NLRB's interpretation of the National Labor Relations Act ("the Act") and the pending Herrington litigation, Waterstone revised the Agreement and distributed the proposed Amendment (hereinafter, "the Amendment").

The Agreement, which contained a collective action waiver that compels individual arbitration, has been replaced by the Amendment, which permits employees to choose one of two options: A) employees could elect to proceed in arbitration subject to the rules promulgated by JAMS in their home state, or B) employees could elect to proceed in the United States District Court for the Western District of Wisconsin, the Wisconsin state court in Waukesha County if subject matter jurisdiction is lacking, or any other forum directed by the aforementioned courts. Neither option precludes employees from joining together to pursue claims against Respondent.

Both the Agreement and the Amendment are valid under the Act because there is significant law, including Supreme Court precedent, that compels that conclusion that the Board's decision in D.R. Horton, 357 NLRB No. 184 (Jan. 3, 2012) is both procedurally and

substantively defective. Specifically, at the time of the Board's decision in D.R. Horton in January 2012, the Board lacked appropriate authority to issue its decision because the President's recess appointments were made without Senate approval, meaning these appointments were invalid and the number of sitting Board members fell below the requisite amount.

Likewise, the Board's decision in D.R. Horton is substantively defective to the extent that the Board's interpretation of the Act runs counter to established Supreme Court precedent. Where a ruling made by the Board conflicts with a federal statute, such as the FAA, and Supreme Court precedent, it is without question that the Board's ruling should be struck down. Here, the Board's interpretation of the Act is necessarily limited by the Supreme Court's ruling in AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 1748 (2011), where the Court specifically affirmed the inclusion of collective action prohibitions in arbitration provisions, stating, "The principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms." Similarly, the Supreme Court has also held, contrary to D.R. Horton, that "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." Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775 (2010). The preclusive nature of these holdings is evident, as "Concepcion (which is binding authority) made no exception for employment-related disputes." Iskanian v. CLS Transportation L.A. LLC, 2012 Cal.App. LEXIS 650, *21 (Cal. Ct. App. 2012).

As it pertains to the Amendment itself, which is currently being utilized by Respondent, the existence of an employee option is consistent with both the Act and substantive law. In D.R. Horton, 357 NLRB No. 184 at 12, the Board explained, "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." Here, Respondent has exceeded this standard by not only providing unfettered class access to the Courts (Option B), but also by providing the ability to join with other employees in arbitration (Option A). The Amendment is also buoyed by the fact that employees have the option of pursuing wage and hour claims jointly or individually under the Fair Labor Standards Act, but, importantly, must affirmatively make the choice to join a collective action and are not automatically part of a class. 29 U.S.C. §216(b).

As it pertains to Option A, this choice is lawful not only because it is part of an option scheme suggested by the Board and consistent with substantive law, but also because the only "rights" restricted by Option A are the procedural rights associated with class actions and collective actions, which are not protected by the Act. In fact, Supreme Court precedent, as well as other federal law, makes clear that the "right" to a class action pursuant to Federal Rule of Civil Procedure 23 is a procedural right, and not a substantive right. See, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S.Ct. 1431, 1443. Similarly, the right to a collective action pursuant to the FLSA is also procedural, and not substantive. 14 Penn Plaza LLC v. Pyett, 129 S.Ct. 1456, 1465 (2009). Even in D.R. Horton, 357 NLRB No. 184 at p. 3, the Board acknowledged that the Act only protects "employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator." In the analogous context of protections for union organizing under Section 7 of the Act, the protections are not so expansive as to contain no procedural limitations on the substantive right to organize. Moreover, there is no dispute that Option B is unlawful.