No. 17-3609

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PAMELA HERRINGTON, individually and
on behalf of all others similarly situated,

Plaintiff-Appellee,

v.

WATERSTONE MORTGAGE
CORPORATION,

Defendant-Appellant.

On Appeal from the United States District Court
For the Western District of Wisconsin
District Court No. 3:11-cv-0079-bbc,
Hon. Barbara B. Crabb Presiding

APPELLEES' PETITION FOR REHEARING AND ALTERNATIVELY, FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellee and the other 174 opt-in Plaintiffs are represented by Getman, Sweeney & Dunn, PLLC. Plaintiff, the other 174 opt-in Plaintiffs, and Plaintiff's counsel certify that they are not corporate parties. Below is the list of Plaintiffs:

Henry Achilles	Michael Childs	George Getsch
Donald K. Albro	Lisa Cline-Davis	Steven Goldman
Craig Anderson	Breanna Colon	Tim L. Good
Teddy Bagley	Kathleen Dalzell	Sunshyne Griffin
Jeffrey W. Bailey	Joyce Davis	Bruce A. Griffy
Fred J. Basiago	Kendel DeBlieck	Julie Hart
Bartley C. Beckley	Jose DeJesus	John D. Haugh
Barbara Benassi	Charles J. Dickison	Pamela Herrington
George Benjamin	Gary Dorfman	Paul C. Hillmer
David Bizousky	Dave Duran	SK Holt-Clark
Terry Blitsch	David Egerton	William R. Howe
William Bloom	Jeremiah J. Ellingson	Robert Hurst
Keith Borngesser	Michael Engelking	Ralph Jeffery
Sharon Bouchard-Chamberlain	Randy A. Epley	Michael L. Jiru
Nathan Brack	Laurie Evans	Brandon Johnson
Michele Brandt	Teri Everson	Jodie Johnson
Grady Brown	George P. Faison II	Raeleen Johnson
Montserrat Burkhart	Cheryl M. Floryance	David Jones
Anthony D. Burks Sr.	Michael Frank	Christopher Kaisinger
VirLynda Cantoral	Jeanne Fulkerson	Tracey Keyes
Joel Casillas	Patricia Gagnon	Sandra Keys
Nereida Ceballos	Calvin Gale	Dan Kiehl
Tina Chaulklin	Lloyd Garroway	Kenneth Kilman

Jeffrey Chaulklin	Charles E. Gering	Jill D. Kiser
Nick Knabe	David H. Meserve	Laurel Santamarina
Ric A. Kohlbeck	Matthew Mews	Keila S. Santos
James J. Kophamel	Tracy Miklas	Mark Schellhammer
Jacob Kornberg	Michael J. Miley	Greg Schliesmann
Mary Kuxhausen	David J. Miller	Matthew Schulteis
Martin R. Kuzel	Aaron Moe	Michael J. Schwarz
Stephen R. LaDue	Brandan C. Moffett	Michael Sember
Kenneth LaKind	Stephen Nadolny	Timothy A. Shortreed
Donna Langley	Joshua Neumann	Deborah L. Sims
Lance A. Lastinger	Ernest Nwajuobi	Julian Smith
Heidi Laursen	Tara O'Connor	Dusty Smith
Mike LaVenture	Stephan O'Connor	Marlene Smith
Laurel Lawson	Joseph Orrey	Jamie R Steelman
Thomas Leist	Vicki Orritt	Carol Stewart
Joseph Lepiscopo	Sandra Overcash	Noel Stiller
John J. LeRose	Rick Palandri	Terrence M. Sullivan
Ronny Loew	Robin L. Palmer	Tammy Swift
Thomas Lovell	Dino Parducci	Jeanette Swords
Amy Lowrance	Rose Patterson	John Szalay
Rayven Macnab	Elizabeth Peter	Victoria Taylor
Bob Mangold	Brad Peterson	Nathaniel Trudgeon
Adel Manuel	Yves Petithomme	Richard Turcios
Lisa Marth	Anthony Portincaso	Cheri Ure
Carol Mason	Mark Poseley	Pamela VanStraten
Robertta Masoud	Derrick Potter	Karen Vercauteren
Terra Mattox	Michael A. Profancik	Lucila S. Vizcarra
William McCarthy	Allyson Rayfield	Kurt Waltenberger
William T. McKay	Nathan Richter	Jamie Ware
Sean McKenzie	Sonny Rock	John S. White
Mark Mediate	Beverley Sackman	Laurence Wiechert
Joseph Mendivil	Troy Sainsbury	Patrick M. Wiese
John Merrill	Aleida Salvador-Harbeck	Prince Williams

Kenneth L Williams	Peter Young	Jaime Zickus
Cindy Wyatt	David Zegunis	Robert Zyzo
Jamie Yepes		

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RULE 35(b) REHEARING EN BANC STATEMENT AS TO WAIVER

Plaintiff/Appellee Pamela Herrington certifies that the Panel Opinion, insofar as it failed to address the question of Waterstone's waiver of district court determination of arbitrability, conflicts with this Court's decisions in *AGCO Corp. v. Anglin*, 216 F.3d 589, 593 (7th Cir. 2000) and *Environmental Barrier Co. v. Slurry Systems, Inc.*, 540 F.3d 598, 606 (7th Cir. 2008) and that consideration by the full court is necessary to secure and maintain uniformity of the court's decisions holding that a party who willingly and without reservation presents issues to an arbitrator to decide cannot subsequently argue that they were issues of arbitrability for the district court to decide.

ISSUES FOR REHEARING

Herrington also moves this Court to grant rehearing to:

(1) consider, or clarify that the district court may consider, whether Waterstone waived its right to have the district court decide class arbitrability when it successfully demanded the arbitrator decide that question;

(2) clarify that the district court may consider whether the parties' agreement delegated arbitrability questions, including the question of class arbitration, to the arbitrator; and

(3) clarify that, if the district court does not affirm the class arbitral award, it may consider whether to affirm Herrington's individual damage award.

STATEMENT OF THE CASE

Herrington, a former loan originator, filed this action against her employer, Waterstone, alleging that Waterstone had violated the Fair Labor Standards Act (FLSA), and breached her contract. A-22 ¶1, A-25 ¶10, A-27 ¶25. Herrington brought her FLSA claim as a collective action, A-25 ¶10, and her breach of contract claim as a Rule 23(b)(3) class action. A-27 ¶25. Waterstone moved to compel arbitration based on the arbitration agreement in Herrington's form employment agreement. A-39-69.

The district court granted the motion to compel arbitration but struck, as unlawful, a clause in the agreement that appeared to forbid joinder of claims. The court ordered that Herrington be permitted to join other workers in arbitration but did not decide how that should be accomplished. Waterstone's subsequent brief to the Arbitrator took the position that the district court had deliberately "ordered neither class nor collective procedures in [the] Arbitration," A-397, because it was "exclusively within the jurisdiction of the arbitrator" to interpret the agreement and determine whether it evidenced an intent to permit class or collective action. A-392-394. Waterstone specifically relied on the plurality opinion in *Green Tree Fin. Corp v. Bazzle*, 539 U.S. 444, 452-453 (2003), in support of that proposition. *Id*, A-392-3. Pursuant to its view that the arbitrator had "exclusive jurisdiction" over the issue, Waterstone asked the arbitrator to interpret the contract as a whole,

including the language struck by the district court, to determine whether it demonstrated a clear intent to agree to class arbitration. *Id.*, A-394-396.

The arbitrator then did exactly what Waterstone requested – he interpreted the agreement as a whole, including the language struck by the district court, and concluded that the contract permitted class arbitration under both approaches.[1] A-182. Based on that determination, he eventually awarded damages and fees to Herrington and 174 similarly situated employees, including an individual award to Herrington in the amount of $19,471.57 for her minimum wage and unpaid overtime claims. Waterstone objected to confirmation of the arbitral award, but the district court affirmed.

Waterstone's sole issue on appeal was that the district court erred in striking the waiver language in the agreement and that, without that language, the agreement unequivocally prohibited class arbitration. Herrington responded that, because Waterstone had urged the arbitrator to make an independent interpretation of the contract, *including the waiver language struck by the district court*, to determine if it allowed for class arbitration, Waterstone was bound by the arbitrator's interpretation and could not challenge it as "logically flawed" or "dicta," the phrases Waterstone used in its appeal brief. Waterstone Appeal Brief,

[1] The arbitrator also followed the instructions of the district court and interpreted the agreement without the strickened language. A-182. He concluded that the contract, properly construed, allowed for class arbitration under both alternative approaches. A-182.

Dkt. 33, at 25-26. At no time did Waterstone ask the district court to rule on whether the agreement permitted class/collective arbitration, nor did it ever claim that the question of class/collective arbitration was an issue of arbitrability for the district court to decide, either below or in its Brief on Appeal.

At oral argument, this Court *sua sponte* asked whether class arbitration was an issue of arbitrability for the district court to determine, or a procedural question for the arbitrator to decide along with the merits of the case. Neither party had briefed this issue. After oral argument Waterstone was given permission to file a supplemental brief in which it argued, for the first time, that whether the agreement authorized class/collective arbitration was an issue of arbitrability for the district court to decide. In Herrington's reply brief she argued that, because Waterstone:

> successfully urged the Arbitrator to construe the procedural aspects of the arbitration agreement (albeit with a result it did not like), Waterstone 6/15/12 brief, A-393, Waterstone should not now be heard to argue that the district court, rather than the Arbitrator, should be the one to interpret whether the contract permitted class arbitration. *See Matter of Cassidy*, 892 F.2d 637, 641-642 (7th Cir. 1990) (holding appellant judicially estopped from changing previous legal position noting "the change of position on the legal question is every bit as harmful to the administration of justice as a change on an issue of fact.").

Dkt 48 at 9.

THE PANEL OPINION

On March 22, 2018 this Court issued an opinion concluding that the district court's order striking the alleged waiver language in the arbitration agreement was

error in light of *Epic Systems Corp. v. Lewis* ___U.S. ____, 138 S.Ct. 1612 (2018). Slip Op. at 7. The Court then addressed the "hard part"– i.e. who is to decide whether the agreement permits class arbitration – the district court or the arbitrator. The Court concluded that "the availability of class or collective arbitration involves a foundational question of arbitrability," *id.* at 10, rather than a procedural question for the arbitrator, and remanded to the district court to "conduct the threshold inquiry regarding class or collective arbitrability to determine whether Herrington's agreement with Waterstone authorizes the kind of arbitration that took place." *Id.* at 17.

In the course of its discussion of arbitrability, the Court never addressed Herrington's argument that Waterstone had waived its right to have the district court decide the class arbitrability question because Waterstone 1) took the position below that the arbitrator had exclusive jurisdiction to decide that issue, and 2) affirmatively asked the arbitrator to rule on that issue, which he did. Accordingly Herrington seeks rehearing so that this Court can address that properly preserved waiver issue or, alternatively, instruct the district court to address it on remand.

Even if there were no waiver of the arbitrability question, the Panel Opinion noted that "the parties can agree to delegate to an arbitrator the question whether an agreement authorizes class or collective arbitration. . . . In that circumstance, the

agreement must 'clearly and unmistakably provide' for such delegation." *Slip Op.* at 9, fn 3 (citations omitted). However, the Court did not discuss, let alone decide, whether there was a delegation of the class arbitrability question in Herrington's agreement. That issue was never briefed because the arbitrability question was not an issue on appeal and arose only at oral argument. Accordingly, Herrington asks this Court to clarify that the question of whether there was a delegation provision in her agreement remains open for the district court to decide on remand.

Finally, the opinion said nothing about Herrington's individual award as Waterstone did not challenge her award. Herrington seeks rehearing to clarify that, on remand, the district court can consider whether to affirm her individual award even if it decides not to affirm the class award.

REASONS FOR GRANTING PETITION FOR REHEARING

1. Waterstone's Waiver Of The Class Arbitrability Question Remains An Issue In This Case. As noted above, when the Court *sua sponte* asked whether class arbitration was a question of arbitrability for the district court, Herrington argued in her supplemental brief that Waterstone was estopped from raising that issue because it had taken the position below that it was "exclusively for the arbitrator to determine" whether the agreement permitted class arbitration. A-392-3 ("resolution of [the class] issue is reserved for the arbitrator once the Court has compelled arbitration."). Indeed, Waterstone consistently took the position that the

district court had no authority to decide any gateway issues and sought fees from Plaintiffs for having filed their case in court in the first instance. A-44-54.

Once the case was sent to arbitration, Waterstone told the arbitrator that Judge Crabb had not decided the class issue because the arbitrator had "exclusive jurisdiction" over the class/collective action question. A-392-394, 397. Accordingly, Waterstone asked the arbitrator to make his own independent interpretation of the agreement as a whole, A-392-8, including the sentence struck by the district court because that "sentence is still valid evidence of the agreement between and intentions of the parties." *Id.* at 7, A-396. The Arbitrator did exactly what Waterstone, asked: He interpreted the Agreement as a whole, including the sentence struck by Judge Crabb, and concluded that, contrary to Waterstone's position, the Agreement allowed for class arbitration. A-182. Not surprisingly, Waterstone was dissatisfied with the arbitrator's response to its request for an interpretation of whether the contract allowed class arbitration. And, as a result, Waterstone has reversed positions and now claims that the arbitrator had no authority to make the class/collective determination.

The Seventh Circuit has repeatedly held, "[i]f a party willingly and without reservation allows an issue to be submitted to arbitration, he cannot await the outcome and then later argue that the arbitrator lacked authority to decide the matter." *AGCO Corp. v. Anglin*, 216 F.3d 589, 593 (7th Cir. 2000) (citing cases).

This Court has been adamant that "[t]his is not a tactic we can accept, for sound policy reasons. It is wasteful of the arbitrator's time, the parties' time, and the court's time. . . [K]eeping the arbitrability card close to the chest would allow a party like [petitioner] to take a wait-and-see approach: if it had like [the] Arbitrator['s] decision it would have remained silent, but since it did not, it is now complaining about arbitrability." *Environmental Barrier Co., LLC v. Slurry Systems, Inc.*, 540 F.3d 598, 606 (7th Cir. 2008).

That is precisely what Waterstone has done here. Waterstone not only urged the Arbitrator to interpret the contract as a whole to decide the class/collective action issue, it claimed the Arbitrator had "exclusive authority" to make that determination. Before the case was sent to the arbitrator, Waterstone could have insisted that the class/collective issue was a question of arbitrability for the district court. It did not. Even after Herrington had filed her arbitration petition, Waterstone could have insisted that the district court determine whether the agreement permitted class/collective arbitration by filing a declaratory judgment action as defendants often do. *See, e.g. Wells Fargo Advisors, LLC v. Sappington,* 884 F.3d 392, 393 (2d Cir. 2018) (after class arbitration demand was filed with AAA, defendant filed declaratory judgment action in district court requesting the court to determine whether the agreement allowed class arbitration); *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 968 (8th Cir. 2017) (same);

Chesapeake Appalachia LLC v. Scout Petroleum, 809 F.3d 746, 751 (3d Cir. 2016). Waterstone did not do that either.

Instead, Waterstone decided to take its chances with the arbitrator's interpretation of the contract, "willingly and without reservation." *AGCO Corp.*, 216 F.3d at 593. Not having received the answer it wanted, Waterstone now wants a second bite at the apple insisting that the district court, not the arbitrator, has exclusive jurisdiction to determine if the agreement permits class or collective arbitration, which is contrary to its previous position. *AGCO Corp.*, and *Environmental Barrier Co.* clearly prohibit such tactics.

Herrington preserved this waiver argument in her Opposition Brief on Appeal and by asserting it again in her reply to Waterstone's supplemental brief as soon as the question of arbitrability was raised *sua sponte* by the Court at oral argument.[2] Although Herrington's waiver argument in her Opposition Brief is clear, the briefing in the supplementary briefs on the specific question of waiver of arbitrability is admittedly sparse given the unusual and last-minute circumstances in which the issue of arbitrability arose in this appeal. Accordingly, the Panel may prefer to grant rehearing and direct the district court to address the issue on

[2] Herrington's Brief on Appeal argued that because Waterstone asked the arbitrator to exercise his "exclusive jurisdiction" to make the class/collective action determination, it was bound by the arbitrator's interpretation of the contract on that point. Brief, Dkt. 29 at 4, 12-18. Herrington did not phrase this argument in terms of "waiver of arbitrability" because Waterstone had not raised arbitrability in its appeal brief. After arbitrability became an issue at oral argument, Herrington's supplemental brief urged that the same actions constituted waiver of arbitrability.

remand, rather than decide it itself, so that the parties can have a full opportunity to brief the issue.

2. Clarifying That the District Court May Address the Delegation Question on Remand. Although the Panel Opinion noted that parties can delegate arbitrability questions to the arbitrator, Slip Op. at 9, fn 3, it did not address, let alone decide, whether the parties in this case had done so. That is of crucial importance because Herrington's arbitration agreement specifically states "any dispute between the parties concerning . . . wages, hours . . . or obligations arising out of their employment agreement shall be resolved through binding arbitration *in accordance with the rules of the American Arbitration Association applicable to employment claims."* A-62 (emphasis added). "Virtually every circuit to have considered the issue has determined that incorporation of the American Arbitration Association's (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Oracle America Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013). In other words, Herrington's arbitration agreement does contain a delegation clause making it appropriate for the arbitrator to have decided whether the agreement permitted class arbitration. *See, e.g., Dish Network LLC v. Ray*, 900 F.3d 1240, 1246 (10th Cir. 2018) (holding that reference to AAA rules in arbitration agreement evidences a clear and unmistakable intent to allow the arbitrator to determine the class arbitrability

issue); *Wells Fargo,* 884 F.3d at 395, 396 (same); *Arnold v. Homeway, Inc.,* 890 F.3d 546, 552 & fn 5 (5th Cir. 2018) (incorporation of AAA rules evidences a clear and mistakable intent to refer arbitrability questions to the arbitrator); *Galilea LLC v. AGCS Marine Insurance Co.,* 879 F.3d 1052, 1062 (9th Cir. 2018) (same); *Fallo v. High Tech Inst.,* 559 F.3d 874, 878 (8th Cir. 2009) (same); *Qualcomm Inc. v. Nokia Corp.,* 466 F.3d 1366, 1373 (Fed. Cir. 2006) (same); *Terminix Int'l Co. v. Palmer Ranch LP,* 432 F.3d 1327, 1332 (11th Cir, 2005) (same); *Contec Corp. v. Remote Solution Co.,* 398 F.3d 205, 208 (2d Cir. 2005) (same). *See also Simply Wireless, Inc. v. T-Mobile US, Inc.,* 877 F.3d 522, 527-528 (4th Cir. 2017) (incorporation of JAMS arbitration rules clearly delegates arbitrability questions).

Although the 7th Circuit has never specifically addressed whether incorporation of the AAA Rules constitutes a delegation of arbitrability questions, it long ago held that an "agreement of the parties to have any arbitration governed by the rules of the AAA incorporate[s] those rules into the agreement." *Commonwealth Edison Co. v. Gulf Oil Corp.,* 541 F.2d 1263, 1272 (7th Cir. 1976). Following that directive, district courts in the 7th Circuit have followed the majority of circuit courts and concluded that incorporation of AAA rules into an arbitration agreement constitutes a delegation of arbitrability issues to the arbitrator. *See, e.g., Huron Consulting Group, Inc. v. Gruner,* 2018 WL 572709 *6 (N.D. Ill. Jan. 24, 2018); *Ali v. Vehi-Ship, LLC,* 2017 WL 5890876 *3-4 (N.D. Ill. Nov. 27, 2017);

Boehm v. Getty Images (US), Inc., 2016 WL 6110058, at *2 (W.D. Wis. Oct. 19, 2016).

Herrington recognizes that a minority of circuit courts have taken a different position. *See Catamaran Corp.*, 864 F.3d at 973; *Chesapeake Appalachia LLC*, 09 F.3d at 762-766; *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013). But the fact that a few circuit courts have disagreed with the majority rule only highlights the importance of allowing the district court to decide the issue in the first instance on full briefing. While Herrington believes that the 2nd, 4th, 5th, 9th, 10th, D.C. and Federal Circuits have decided the issue correctly, the issue plainly merits full briefing so the district court, and this Court should there be an appeal, can decide the issue after plenary consideration.

To date the issue has not had that kind of consideration. The question of delegation was never an issue before the district court because, as noted above, Waterstone took the position that the question of whether the agreement permitted class arbitration was exclusively for the arbitrator to determine and it argued against class or collective treatment in the case entirely. A-392-8. Herrington recognizes that Waterstone filed a short supplemental brief after argument that referenced the *Chesapeake, Reed* and *Catamaran* cases in a footnote at the very end of its supplemental brief. But that footnote did not actually present an argument about delegation and it certainly did not candidly set forth the state of the

law regarding the majority rule that referencing the AAA rules is a delegation. Dkt. 45-2 at 13 fn 2. Such a footnote at the end of a supplemental brief cannot be considered to have raised the delegation issue. *See Harmon v. Gordon,* 712 F.3d 1044, 1053 (7th Cir. 2013) ("We have often said that a party can waive an argument by presenting it only in an undeveloped footnote"); *Parker v. Franklin Cnty. Cmty. Sch. Corp.,* 667 F.3d 910, 924 (7th Cir. 2012) (finding waiver when argument was in footnote, consisted of four sentences, and did not contain any citation to authority); *U.S. v. White,* 879 F.2d 1509, 1513 (7th Cir. 1989) (argument raised in passing in a footnote deemed waived).

In any event, it is clear that the Panel did not decide whether incorporation of AAA rules in the arbitration agreement constitutes an agreement to delegate arbitrability issues to the arbitrator. Because the issue has not been decided, the Panel should clarify that the district court remains free to consider the issue on remand.

3. Clarifying That the District Court May Consider Affirming Herrington's Individual Award. The Panel vacated the district court's affirmance of the entire arbitral award, pending a decision as to whether the agreement permits collective or class arbitration. *Slip Op.* at 17. The Panel said nothing, however, about what should happen to Herrington's individual award in the event the district court were to find that the arbitration agreement did not permit class arbitration.

Waterstone has cited no error with respect Herrington's individual award. Waterstone's sole ground for vacating the award relates to the class aspect of the arbitration. That error, if the district court finds it was error, in no way affects the legitimacy and finality of the individual award to Herrington. The fact that similarly situated workers may be found to have been improperly joined in the arbitration should not affect Herrington's recovery.

Appellate courts typically affirm individual awards rendered by a trial court where error relates to the class aspects of a proceeding rather than the plaintiff's individual case. For example, the Second Circuit affirmed two individual awards and the district court decertification order which occurred after a class jury trial. *Mazzei v. Money Store*, 829 F.3d 260, 266-269 (2d Cir. 2016) (affirming decertification of class after jury verdict in its favor but upholding named plaintiff's individual award); *see also Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1126 (10th Cir. 2005) (affirming district court's judgment with respect to individual plaintiff while remanding class claims with direction to decertify without prejudice); *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 280–81 (4th Cir. 1980) (decertifying class on appeal but affirming individual determinations of liability for remedial back and front pay awards); *Scott v. Univ. of Delaware*, 601 F.2d 76, 89 (3d Cir. 1979) (affirming final judgment entered as to Scott's individual disparate treatment claims and "because we have concluded

that the district court erred in refusing to decertify Scott's class action, we will vacate so much of the final judgment as pertains to the class action."). Even when a judgment is against the plaintiff, if errors with respect to the class do not infect that judgment, it is typically upheld. *See O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864, 869–70 (9th Cir. 1982) (affirming decertification of class but affirming judgment against the individual class representatives).

Here, Waterstone's appeal only challenged the class aspect of the arbitral award. Nothing in its briefing or in the Court's opinion casts the slightest doubt upon the correctness of Herrington's individual arbitral award. Accordingly the district court should be free to affirm that award on remand regardless of what happens to the class aspects of the award. That is particularly true given the underlying rationale for arbitration "to achieve 'streamlined proceedings and expeditious results.'" *Preston v. Ferrer*, 552 U.S. 346, 357–58 (2008).

CONCLUSION TO REQUEST FOR REHEARING

The petition for rehearing should be granted to 1) decide or clarify that the district court may consider whether Waterstone waived its right to have the district court decide class arbitrability, 2) clarify that the district court may consider whether the parties' agreement delegated arbitrability questions to the arbitrator, including the question of class arbitration, and, 3) clarify that the district court may consider whether to affirm Herrington's individual damage award.

Dated: November 5, 2018

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP RULE 32(a)(7), FRAP RULE 32(g) and CR 32(c)

I, Dan Getman, counsel of record for the Plaintiff-Appellee, Pamela Herrington, individually and on behalf of all others similarly situated, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

This brief conforms to the rules contained in F.R.A.P. Rule 35, Rule 40, and Circuit Rule 32 for a brief produced with proportionally spaced font. The length of this brief is 3,648 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point, Times New Roman font. Footnotes are in 12-point Times New Roman font.

Dated: November 5, 2018

Respectfully submitted,

/s/ Dan Getman
Dan Getman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on November 5, 2018, a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Dan Getman
Attorney For Appellee