IN THE
SUPREME COURT OF THE UNITED STATES

No. ___

TUG HILL OPERATING, LLC,

Applicant,

and

RUSCO Operating, LLC

v.

LASTEPHEN ROGERS,

Respondent.

APPLICATION TO THE HON. JOHN ROBERTS FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Pursuant to Supreme Court Rule 13(5), Tug Hill Operating, LLC (defendant-appellee below, hereinafter "Applicant"), hereby moves for an extension of time of 60 days, to and including January 4, 2024, for the filing of a petition for a writ of certiorari. Unless an extension is granted, the deadline for filing the petition for certiorari will be November 5, 2023.

In support of this request, Applicant states as follows:

1. The United States Court of Appeals for the Fourth Circuit rendered its decision on August 7, 2023 (Exhibit 1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

2. This case concerns whether, under the Federal Arbitration Act (FAA), a court or an arbitrator should decide whether a non-signatory, third-party beneficiary

can enforce an agreement to arbitrate when the agreement contains a delegation clause. 9 U.S.C. §§ 2, 4. The district court held that the question was for the arbitrator and compelled arbitration. *Rogers v. Tug Hill Operating, LLC*, 598 F. Supp. 3d 404 (N.D.W.Va. 2022). The Fourth Circuit, however, reversed. It instead held that "a court, not an arbitrator, [ ] must initially decide whether a nonparty to an arbitration agreement is entitled to enforce it." *Rogers v. Tug Hill Operating, LLC*, 76 F.4th 279, 286 (4th Cir. 2023).

3. The Fourth Circuit's decision deepens a widening split of authority among the circuits. On one side of the split are circuits holding that *courts* must always decide whether a non-signatory can enforce an arbitration agreement, despite the existence of a delegation clause. Those courts now include at least the Fourth and Fifth Circuits. *See Rogers*, 76 F.4th at 286; *Newman v. Plains All Am. Pipeline, L.P.*, 23 F.4th 393, 398-99 (5th Cir. 2022). Notably, however, the Fifth Circuit split directly down the middle (with an 8-8 vote) on its en banc poll, with a vigorous dissent identifying the panel decision's conflict with precedent. *See Newman v. Plains All Am. Pipeline, L.P.*, 44 F.4th 251 (5th Cir. 2022); *see id.* at 251-55 (Jones, J., dissenting from the denial of rehearing en banc). On the other side of the split are circuits holding (correctly) that the *arbitrator* must decide in the first instance whether a non-signatory may enforce the agreement when there is a delegation clause. Those courts include at least the Sixth, Eighth, and Tenth Circuits, with the First and Second reaching the same conclusion in the context of disputed assignments of agreements containing an arbitration provision. *See Swiger v. Rosette*, 989 F.3d 501, 507 (6th Cir.

2021); *Eckert/Wordell Architects, Inc. v. FJM Props. of Willmar, LLC*, 756 F.3d 1098, 1099 (8th Cir. 2014); *Casa Arena Blanca LLC v. Rainwater*, 2022 WL 839800, *5 (10th Cir. Mar. 22, 2022); *see also Apollo Comput., Inc. v. Berg*, 886 F.2d 469, 472-74 (1st Cir. 1989); *Contec Corp. v. Remote Sol. Co.*, 398 F.3d 205, 210-11 (2d Cir. 2005).

4. The Fourth Circuit's decision is also in clear conflict with the well-established precedent of this Court, which instructs that a party to an arbitration agreement may agree to have all disputes about arbitrability relating to that agreement decided by an arbitrator and that courts are bound to honor that decision. *See Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2777-78 (2010) ("An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other."); *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920, 1923 (1995) ("Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties [to the arbitration agreement] agreed about *that* matter." (internal citations omitted)). And it contravenes this Court's recent instruction—reaffirming that settled precedent—that "if a valid [arbitration] agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, *a court may not decide the arbitrability issue*." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) (emphasis added). As this Court has held, that is true even when the party resisting arbitration asserts that "the argument that the arbitration agreement

applies to the particular dispute is 'wholly groundless.'" *Id.* at 528. There is no basis in law or logic to treat differently disputes over whether or not the party seeking to compel arbitration is entitled to do so under the asserted agreement—an exception that would swallow the rule.

5. This Court's intervention would serve to reconcile a split among the courts of appeals and other lower courts on a statute that is critical to the American business community yet a frequent victim of judicial hostility. The Fourth Circuit's decision once again impedes Congress's liberal federal policy favoring arbitration and ignores its clear instructions that arbitration agreements are a matter of contract and, as such, must be "rigorously enforce[d]" "according to their terms." *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013); *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). Without this Court's intervention, the courts of appeals will continue to flout arbitration agreements and Congress's instructions in the FAA. And contracting parties will have to wade through a bifurcated and eroded federal regime that is supposed to provide robust enforcement of arbitration agreements on a uniform, nationwide basis.

6. There is good cause to grant an extension, which will give Applicant and its counsel adequate time to determine whether to file a petition for certiorari, and, should the decision to file a petition be made, properly to prepare a petition. The undersigned counsel of record was only retained to assist Applicant in this matter last week, and an extension would provide adequate time to assist Applicant in its assessment and preparations. An extension to January 4, 2024 would further

accommodate the undersigned counsel's obligations in other matters, including *inter alia* briefs due in the Federal Circuit on November 7 and 20, 2023 (*iFIT Inc. v. ITC*, Fed. Cir. No. 23-1965; *Intel Corp. v. PACT XPP Schweiz AG*, Fed. Cir. No. 23-1537) and oral argument in the Seventh Circuit on December 5, 2023 (*Motorola Sols., Inc. v. Hytera Comm'ns Corp.*, 7th Cir. Nos. 22-2370 & 22-2413). In the absence of an extension, those obligations and others will significantly impede counsel's ability to assist Applicant in preparing a well-researched and comprehensive petition that would assist the Court in evaluating the Fourth Circuit's decision.

7. Applicant thus requests a 60-day extension for Applicant and counsel to determine whether to file a petition for certiorari, and, should the decision to file a petition be made, prepare a petition that fully addresses the important issues raised by the decision below and that frames the issues in a manner that will be most helpful to the Court.

WHEREFORE, for the foregoing reasons, Applicant requests that an extension of time to and including January 4, 2024, be granted within which Applicant may file a petition for a writ of certiorari.

Respectfully submitted,

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October 24, 2023

RULE 29.6 STATEMENT

Applicant Tug Hill Operating, LLC has no parent corporation. Its sole member is Tug Hill, Inc., and no publicly held corporation owns more than 10% of Tug Hill, Inc.'s stock.