EXHIBIT A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1480

LASTEPHEN ROGERS, Individually and for others similarly situated,

Plaintiff - Appellant,

v.

TUG HILL OPERATING, LLC; RUSCO OPERATING, LLC,

Defendants - Appellees.

Appeal from the United States District Court for the Northern District of West Virginia, at Wheeling. John Preston Bailey, District Judge. (5:21-cv-00199-JPB)

Argued: May 3, 2023 Decided: August 7, 2023

Before NIEMEYER, KING, and HARRIS, Circuit Judges.

Reversed and remanded by published opinion. Judge Niemeyer wrote the opinion, in which Judge King and Judge Harris joined.

ARGUED: Richard Jennings Burch, BRUCKNER BURCH PLLC, Houston, Texas, for Appellant. John Barrick Bollman, MCDERMOTT WILL & EMERY, LLP, Chicago, Illinois; Christian Charles Antkowiak, BUCHANAN INGERSOLL & ROONEY PC, Pittsburgh, Pennsylvania, for Appellees. **ON BRIEF:** Anthony J. Majestro, POWELL & MAJESTRO PLLC, Charleston, West Virginia, for Appellant. Erin J. McLaughlin, BUCHANAN INGERSOLL & ROONEY PC, Pittsburgh, Pennsylvania, for Appellee Tug Hill Operating, LLC. Rachel B. Cowen, MCDERMOTT WILL & EMERY, LLP, Chicago, Illinois, for Appellee RUSCO Operating, LLC.

NIEMEYER, Circuit Judge:

Lastephen Rogers worked for Tug Hill Operating, LLC, a Texas-based oil and natural gas exploration and production company, for approximately a year and a half at rig sites in West Virginia. He commenced this action against Tug Hill under the Fair Labor Standards Act ("FLSA"), alleging that while Tug Hill formally classified him as an independent contractor, he actually qualified as an employee for purposes of the FLSA based on the degree of control that Tug Hill exercised over his work. He therefore claimed that Tug Hill was required to pay him overtime for those weeks in which he worked more than 40 hours.

Tug Hill filed a motion to dismiss Rogers' action on the ground that Rogers was contractually required to arbitrate his claim against it. The arbitration clause, however, was not in any contract between Rogers and Tug Hill, but rather in a contract between Rogers and RigUp, Inc.,[1] a third-party company that had helped Rogers find the position with Tug Hill. RigUp was in the business of connecting skilled workers with oil and gas companies for a fee.

In addition, RigUp itself filed a motion to intervene in order to seek the action's dismissal in favor of arbitration, despite language in RigUp's contract with Rogers that the arbitration specified in their contract related only to disputes between Rogers and RigUp and that "RigUp will not be a party to disputes . . . between [Rogers] and [Tug Hill]."

[1] RigUp, Inc., changed its name to Workrise Technologies, Inc., in 2021. That company, as well as its wholly owned subsidiary, RUSCO Operating, LLC, are referred to herein as "RigUp."

The district court granted both motions — allowing RigUp to intervene as a defendant and granting Tug Hill's motion to dismiss Rogers' action and compel arbitration. For the reasons that follow, we reverse both rulings and remand for further proceedings between Rogers and Tug Hill.

I

Rogers had experience working as a foreman at oil rig sites — a position referred to in the oil and gas industry as a "company man" — and he sought to find work with oil and gas companies through RigUp, a company in the business of connecting skilled workers in the industry with companies looking for such workers. To engage RigUp's services, Rogers executed an agreement with RigUp in January 2019 that governed their relationship, entitled "Agreement Between Independent Professional & RigUp For Use Of RigUp Service" (hereafter, "the Agreement"). The Agreement stated that it was "a binding agreement between [Rogers], an independent professional ('you') and RUSCO Operating, LLC, a wholly owned subsidiary of RigUp, Inc. . . . governing [Rogers'] use of the Service (as defined in the RigUp Terms of Service . . .) to provide freelance services to third party companies (each a 'Company' or collectively the 'Companies')."

In signing the Agreement, Rogers represented to RigUp that he was "an independent professional and entrepreneur" who wanted to "be introduced to new clients by RigUp . . . to provide [them] services . . . as an independent professional, and not as an employee." The Agreement explained to Rogers, however, that after RigUp helped match Rogers with a company, he *and that company* would "solely negotiate and determine . . . when and

where [he would] perform [p]rojects" and that "[a]ny interactions or disputes between [him] and a Company [would be] solely between [him] and that Company." The Agreement provided further that "RigUp . . . shall have no liability, obligation or responsibility for any interaction between you and any Company." And it expressly stated that "RIGUP WILL NOT BE A PARTY TO DISPUTES OR NEGOTIATIONS OF DISPUTES, BETWEEN YOU AND COMPANIES." The Agreement did provide, however, that Rogers would "indemnify and hold the RigUp Parties and Company harmless from and against all losses, damages, liabilities, . . . actions, [and] judgments . . . arising out of or resulting from" several occurrences, one of which was "a determination by a court or agency that [Rogers] [was] an employee of RigUp or a Company."

The Agreement incorporated RigUp's Terms of Service, and in a paragraph entitled "Dispute Resolution," it also specifically incorporated "Section 24 of the Terms." That section contained an arbitration provision, which stated:

> *In the interest of resolving disputes between you and RigUp in the most expedient and cost effective manner, you and RigUp agree that every dispute arising in connection with these Terms will be resolved by binding arbitration*. . . . This agreement to arbitrate disputes includes all claims arising out of or relating to any aspect of these Terms, whether based in contract, tort, statute, fraud, misrepresentation, or any other legal theory, and regardless of whether a claim arises during or after the termination of these Terms. YOU UNDERSTAND AND AGREE THAT, BY ENTERING INTO THESE TERMS, YOU AND RIGUP ARE EACH WAIVING THE RIGHT TO A TRIAL BY JURY OR TO PARTICIPATE IN A CLASS ACTION.

(Emphasis added). Section 24 also provided that "[a]ny arbitration *between you and RigUp* will be settled under the Federal Arbitration Act" and "administered by the [American Arbitration Association]" and that "[t]he arbitrator has exclusive authority to resolve any

dispute relating to the interpretation, applicability, or enforceability of this binding arbitration agreement." (Emphasis added).

In January 2019, pursuant to RigUp's matchmaking, Rogers began work as a "company man" at a rig site operated by Tug Hill in West Virginia. Tug Hill classified Rogers as an independent contractor and assigned him to "oversee the rig site and make sure the operations were being performed in accordance with Tug Hill's procedures and instructions." Rogers continued work for Tug Hill through July 2020. According to Rogers, during that year and a half, he worked exclusively for Tug Hill and was paid a daily rate for his work.

In 2021, Rogers commenced this action against Tug Hill, alleging that it had violated the FLSA by failing to pay him any overtime even though he "typically worked more than 80 hours a week." He alleged that he had been "misclassified as an independent contractor by Tug Hill" when he actually performed his work as an employee, based on the degree of control that "Tug Hill exercised . . . over all aspects of his job." He brought the action on behalf of himself and all other similarly situated workers, a class he defined as "[a]ll company men employed by or performing work on behalf of Tug Hill classified as independent contractors and paid a day-rate without overtime during the past three years."

RigUp filed a motion to intervene in the action "as of right" pursuant to Federal Rule of Civil Procedure 24(a)(2), or "by permission" pursuant to Rule 24(b)(1)(B), arguing that it was "in the business of facilitating relationships between oil-and-gas operators and independent contractors who contract to provide freelance services for those operators" and that it had facilitated such a relationship between Tug Hill and Rogers. RigUp argued

that intervention was warranted so that it could "represent . . . [its] unique interest in preserving its business model by protecting the independent-contractor status of the workers it serves." It also alleged that if Rogers' action succeeded, it might have some liability to Tug Hill "as a potential indemnitor" under a contract it had with Tug Hill. RigUp indicated that if its motion to intervene were granted, it would thereafter file a motion to compel arbitration and dismiss or stay the action.

After RigUp filed its motion to intervene, Tug Hill filed a motion to dismiss Rogers' action under Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(b)(7), contending that "this action should be dismissed and [Rogers] should be compelled to individual arbitration pursuant to the arbitration clause to which he is contractually bound" in his contract with RigUp. Tug Hill claimed that in the Agreement between Rogers and RigUp, Rogers had "entered into a valid and enforceable" agreement to arbitrate "every dispute arising in connection with these Terms," including "all claims arising out of or relating to any aspect of these Terms," and it maintained that this language covered Rogers' FLSA claim against it. Tug Hill asserted that the fact that it was "not a signatory to the . . . Agreement" between Rogers and RigUp was "a red herring" because the arbitration clause delegated to the arbitrator the "exclusive authority" to decide questions of arbitrability. It argued alternatively that it could enforce the arbitration agreement either "as a third-party beneficiary . . . or pursuant to estoppel principles."

In response to RigUp's motion to intervene, Rogers pointed to specific language in his contract with RigUp and argued that "RigUp contractually disclaimed any right to be [a] party to . . . disputes" between workers and operators and that his FLSA suit against

Tug Hill was such a dispute. And with respect to Tug Hill's motion to dismiss, Rogers argued (1) that he never "agree[d] to arbitrate his claims against Tug Hill"; (2) that the court, not an arbitrator, "decides existence, validity, and enforceability of arbitration agreements"; and (3) that "Tug Hill cannot compel arbitration under the agreement" based on either third-party beneficiary or estoppel principles.

In a memorandum opinion and order dated April 12, 2022, the district court granted RigUp's motion to intervene, concluding that RigUp was "entitled to intervene in this matter by right" under Rule 24(a) because it had "significantly protectible" interests in the litigation that "could potentially [be] impair[ed]" absent intervention. *Rogers v. Tug Hill Operating, LLC*, 598 F. Supp. 3d 404, 417, 421 (N.D. W. Va. 2022). It identified (1) RigUp's "purely economic interest[]" in its "business model," (2) RigUp's interest in "seeking to enforce [its] arbitration agreement," and (3) RigUp's "potential liability" to Tug Hill under an indemnity provision in the contract between RigUp and Tug Hill. *Id.* at 417–19, 421. The court concluded alternatively that RigUp "would be entitled to permissive intervention" under Rule 24(b). *Id.* at 421.

The court also granted Tug Hill's motion to dismiss and compel arbitration, concluding that the language in Rogers' arbitration agreement with RigUp — providing that "all claims arising out of or relating to any aspect of these Terms [of Service]" were subject to arbitration — was broad enough to cover Rogers' FLSA claim against Tug Hill. The district court further concluded that "the fact [that] defendant Tug Hill [was] not a signatory" to the RigUp Agreement was "of no moment" because any question of arbitrability had to be decided by the arbitrator based on the "delegation clause" in the

arbitration agreement. *Rogers*, 598 F. Supp. 3d at 425. Alternatively, the court concluded that Tug Hill was "a third-party beneficiary" that was "permitted to enforce" Rogers' arbitration agreement with RigUp.[2] *Id*. at 427.

From the district court's judgment, Rogers filed this appeal, challenging both of the district court's rulings.

II

With respect to the district court's dismissal order, Rogers contends that he never agreed to arbitrate anything with Tug Hill and that, as a result, the district court erred in dismissing his action and ordering him to arbitrate with Tug Hill on the ground that his arbitration agreement with RigUp contained a delegation clause authorizing the arbitrator to determine arbitrability. It cannot be, he maintains, that a person like him who has "execut[ed] an arbitration agreement containing a delegation clause" with one party (RigUp) is required to arbitrate whether he must arbitrate with a different party (Tug Hill).

In defending the district court's ruling, Tug Hill contends that Rogers' contract with RigUp contained "a valid arbitration agreement"; that Rogers' FLSA claim against Tug Hill falls within the scope of that arbitration agreement because Rogers agreed to serve "as an independent professional, and not as an employee"; and that the arbitration agreement contained a delegation clause giving the arbitrator "exclusive authority" over arbitrability

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[2] Because the district court concluded that Tug Hill was a third-party beneficiary, it did not address Tug Hill's alternative argument that it was entitled to enforce the RigUp arbitration agreement under estoppel principles. *See Rogers*, 598 F. Supp. 3d at 427 n.7. Tug Hill has not raised estoppel on appeal, and the issue therefore is not before us.

issues, a category that should be understood to include whether the arbitration agreement is enforceable by a third party. In other words, according to Tug Hill, because Rogers and RigUp delegated "threshold questions to the arbitrator (not a court)," the arbitrator is the one "who must decide whether Rogers must arbitrate his [FLSA] claim[] against Tug Hill."

The parties' positions thus present us with the issue of whether a court or an arbitrator must decide whether Tug Hill can enforce the arbitration clause in the contract between Rogers and RigUp given that the arbitration clause has a delegation provision.

As a foundational principle, the Federal Arbitration Act ("FAA") provides for the enforcement of agreements to arbitrate *when they are created by contract*, and such contracts must be treated like any other contract under applicable state law. Thus, as relevant to the issue presented in this case, the Supreme Court has held that "[b]ecause 'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel,'" "those who are not parties to a written arbitration agreement" may be eligible for relief under the FAA. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 629, 631 (2009) (quoting 21 Richard A. Lord, *Williston on Contracts* § 57:19, at 183 (4th ed. 2001)). What *Arthur Andersen* also makes clear, however, is that it is *a court*, not an arbitrator, that must initially decide whether a nonparty to an arbitration agreement is entitled to enforce it. *See id.* at 630–32. This emanates from the requirements of the FAA.

The FAA grounds arbitration obligations in contract law, as § 2 provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract . . . .

9 U.S.C. § 2. And consistent with that proposition, § 4 provides that a party "aggrieved" by the failure "of another to arbitrate *under a written agreement* for arbitration may petition" *a federal court* "for an order directing that such arbitration proceed in the manner provided for in such agreement." *Id*. § 4 (emphasis added). That section adds that the court "shall" order arbitration "upon being satisfied that *the making of the agreement* for arbitration or *the failure to comply therewith* is not in issue." *Id.* (emphasis added); *see also id*. § 3 (directing a court to stay a civil action if the claim is "referable to arbitration *under an agreement in writing* for such arbitration" (emphasis added)).

The Supreme Court has recognized explicitly and repeatedly that arbitration obligations are grounded in contract law, including by emphasizing recently that under the FAA, "arbitration agreements [are] as enforceable as other contracts, but not more so." *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022) (cleaned up); *see id*. (explaining that the Court's prior recognition of a federal "policy favoring arbitration" was "merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate" and that "the federal policy is about treating arbitration contracts like all others, not about fostering arbitration" (cleaned up)). Moreover, it is well established that when a challenge to the existence of a contractual obligation is properly raised, "*the court* determines whether a valid arbitration agreement exists" "*before* referring a dispute to an arbitrator." *Henry Schein, Inc. v. Archer & White*

Sales, Inc., 139 S. Ct. 524, 530 (2019) (emphasis added); *see also Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 71 (2010) ("If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, *the federal court* must consider the challenge before ordering compliance with that agreement under § 4" (emphasis added)).

Thus, as a general matter, the relevant threshold question that a court must address when being asked to compel arbitration is whether "an arbitration agreement exists *between the parties*." *Hightower v. GMRI, Inc.*, 272 F.3d 239, 242 (4th Cir. 2001) (emphasis added). But, as noted, there are circumstances in which a nonparty to a contract may nonetheless be entitled to enforce it under standard contract principles, such as "through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel." *Arthur Andersen*, 556 U.S. at 631 (cleaned up). Therefore, when an objection is properly raised that the party seeking to enforce an arbitration agreement is not itself a party to that agreement, *the district court* must determine — as a condition precedent to the entry of any § 3 stay or § 4 order compelling arbitration — whether that party is entitled to enforce the arbitration agreement under state contract law. Otherwise, a party with no contractual right to compel arbitration might be permitted to do just that. And nothing in the FAA, or the Supreme Court's jurisprudence interpreting it, allows such a counterintuitive result — a result that would undermine the contractual foundation of the order compelling arbitration.

This principle finds direct support in the Supreme Court's decision in *Arthur Andersen*. In that case, after an accounting firm and others were sued by a group of former clients, those defendants "moved to stay the action, invoking § 3 of the FAA and arguing

that the principles of equitable estoppel demanded that [the plaintiffs] arbitrate their claims" based on an arbitration agreement the plaintiffs had entered into with another defendant. *Arthur Andersen*, 556 U.S. at 626–27. While the Sixth Circuit had determined "that those who are not parties to a written arbitration agreement are *categorically* ineligible for relief" under the FAA, the Supreme Court concluded that that holding was incorrect. *Id.* at 629, 631 (emphasis added). It reasoned that while § 2 "creates substantive federal law regarding the enforceability of arbitration agreements, requiring courts to place such agreements upon the same footing as other contracts," neither it nor § 3 "purports to alter background principles of state contract law regarding the scope of agreements" — including the questions of "who is bound by them" and who can enforce them. *Id.* at 630 (cleaned up). Thus, "a litigant who was not a party to the relevant arbitration agreement may invoke § 3" to obtain a stay from the district court "*if the relevant state contract law allows him to enforce the agreement*." *Id.* at 632 (emphasis added). The Court explained that this was so because "[i]f a written arbitration provision is made enforceable against (or for the benefit of) a third party under state contract law, *[§3's] terms are fulfilled*," such that the court would then be "require[d]" to grant a § 3 stay to the third party. *Id.* at 631–32 (emphasis added).

Arthur Andersen thus stands for the principle that if state contract law allows a person who was not a party to an arbitration agreement to nonetheless enforce it, then that nonparty is entitled to invoke the FAA's enforcement mechanisms in federal court. *See* 556 U.S. at 631–32; *see also GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1644 (2020). And the necessary

corollary to this principle is that when a nonparty to an arbitration agreement seeks to enforce it with a stay under § 3 or an order to compel arbitration under § 4, it is *the court* that must first determine that "the relevant state contract law allows [that nonparty] to enforce the agreement" so as to assure itself that the FAA's "terms are fulfilled." *Arthur Andersen*, 556 U.S. at 631–32; *see also GE Energy Power*, 140 S. Ct. at 1643 (recognizing that "Chapter 1 of the [FAA] permits *courts* to apply state-law doctrines related to the enforcement of arbitration agreements," including "doctrines that authorize the enforcement of a contract by a nonsignatory" (emphasis added)).

In this case, Tug Hill nonetheless contends that under the terms of the arbitration clause — particularly its delegation provision — the arbitrator, not the court, must be the one to decide whether Tug Hill can enforce the arbitration clause, even though it is in a contract between Rogers and RigUp. It notes that under the language of the delegation provision, "[t]he arbitrator has exclusive authority to resolve any dispute relating to the interpretation, applicability, or enforceability" of the arbitration agreement. In making that argument, however, Tug Hill fails to address the *contractual* source of the arbitrator's authority. When the delegation provision is read in the context of the arbitration clause as a whole, it is plain that Rogers agreed to arbitrate issues — including threshold issues — arising *between him and RigUp*. But he did not enter into any agreement that allows an arbitrator to decide whether a third party like Tug Hill has rights under the arbitration agreement. *See Rent-A-Center*, 561 U.S. at 68–70 (recognizing that a delegation provision is simply "an agreement to arbitrate threshold issues concerning the arbitration agreement"

and that "the FAA operates on this additional[,] [antecedent] agreement just as it does on any other").

Of course, the fact that Tug Hill was not itself a party to the arbitration agreement does not categorically mean that Tug Hill is ineligible to obtain relief from the district court under the FAA. *See Arthur Andersen*, 556 U.S. at 629–32. But it does mean that, *as a precondition* to granting Tug Hill the right to enforce any portion of an arbitration clause to which it was not a party, *the district court* was required, when that right was challenged, to determine whether "the relevant state contract law allow[ed] [Tug Hill] to enforce [that] agreement," so as to ensure that the FAA's terms "are fulfilled." *Id*. at 631–32; *cf. New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 536–38 (2019) (holding that even "[w]hen a contract delegates questions of arbitrability to an arbitrator," "a court should decide for itself whether [the FAA's] 'contracts of employment' exclusion applies before ordering arbitration" because "to invoke its statutory powers under §§ 3 and 4 to stay litigation and compel arbitration according to a contract's terms, a court must first" resolve that "necessarily antecedent statutory inquiry").

Accordingly, we conclude that the district court erred in ruling that it could use its statutory powers under the FAA to grant Tug Hill's motion to compel arbitration without first resolving whether, as a matter of state contract law, Tug Hill was authorized to enforce the arbitration agreement between RigUp and Rogers. *Accord Newman v. Plains All Am. Pipeline, L.P.*, 23 F.4th 393, 398–99 (5th Cir. 2022) (holding that it is for the court, not an arbitrator, to decide whether a litigant can enforce an arbitration agreement between two other parties); *see also CCC Intelligent Solutions Inc. v. Tractable Inc.*, 36 F.4th 721, 723–

24 (7th Cir. 2022) (affirming the district court's application of "the rule that a judge must decide whether the parties have agreed to arbitrate" and concluding that an exception to the "dominant rule" that generally "C [cannot] claim rights under a contract that has only A and B as parties" was not applicable). *But see, e.g.*, *Becker v. Delek US Energy, Inc.*, 39 F.4th 351, 355–56 (6th Cir. 2022) (holding that the question of whether a third party could enforce a delegation provision in an arbitration clause was for the arbitrator, not the court).

III

While the district court simply allowed Tug Hill to enforce the RigUp-Rogers arbitration agreement without determining Tug Hill's contractual authority to do so, it also concluded alternatively that it would apply West Virginia law and find that the RigUp Agreement "demonstrates an intent to make . . . Tug Hill a third-party beneficiary" by "provid[ing] specific — and significant — benefits to . . . Tug Hill." *Rogers*, 598 F. Supp. 3d at 427. Based on this, the court concluded that "Tug Hill should be permitted to enforce [Rogers'] agreement" to arbitrate "every dispute" arising in connection with the Agreement. *Id.* The court also explained that while it had found that West Virginia law governed, it would reach the same result under Texas law. *Id.* at 427 n.5.

While the parties dispute whether West Virginia or Texas law applies, they agree that with respect to the third-party beneficiary issue, the law in the two states does not materially differ. Consequently, we need not decide which law applies in resolving whether Tug Hill may enforce the RigUp arbitration agreement as a third-party beneficiary.

Both Texas and West Virginia apply a presumption against finding that a contract confers third-party beneficiary status. *See First Bank v. Brumitt*, 519 S.W.3d 95, 103 (Tex. 2017) ("We must begin with the presumption that the parties contracted solely for themselves, and only a clear expression of the intent to create a third-party beneficiary can overcome that presumption" (cleaned up)); *Eastern Steel Constructors, Inc. v. City of Salem*, 549 S.E.2d 266, 278 (W. Va. 2001) ("In the absence of a provision in a contract specifically stating that such contract shall inure to the benefit of a third person, there is a presumption that the contracting parties did not so intend and in order to overcome such presumption the implication from the contract as a whole and the surrounding circumstances must be so strong as to be tantamount to an express declaration" (quoting Syl. pt. 2, *Ison v. Daniel Crisp Corp.*, 122 S.E.2d 553, 553–54 (W. Va. 1961))). And both Texas and West Virginia law similarly include a requirement that the parties must have intended to secure a benefit to a third party. Under West Virginia law, "[a] third-party beneficiary may enforce a contract only if it is made for its *sole benefit*." *Donna S. v. Travis S.*, 874 S.E.2d 746, 755 (W. Va. 2022) (emphasis added) (citing W. Va. Code § 55-8-12). And Texas law provides that "a person seeking to establish third-party-beneficiary status must demonstrate" not only "that the contracting parties intended to secure a benefit to that third party" but also that they "entered into the contract *directly for the third party's benefit*." *First Bank*, 519 S.W.3d at 102 (emphasis added) (cleaned up).

In this case, the Agreement between Rogers and RigUp contains no provision stating specifically that it was entered into *for the sole benefit* of Tug Hill or *directly* for its benefit. Indeed, the language of the Agreement indicates to the contrary. The Agreement provides

that its purpose was to govern *only* the legal relationship *between RigUp and Rogers*. While RigUp's matchmaking service enabled Rogers to connect with Tug Hill, the Agreement anticipated that Rogers and Tug Hill would have to separately "negotiate and determine . . . when and where [Rogers would] perform Projects" for Tug Hill, as well as how much Tug Hill would pay Rogers. Moreover, the Agreement expressly disclaimed any "responsibility for any interaction between [Rogers] and [Tug Hill]" and distanced itself from any arrangement that Rogers might reach with Tug Hill by providing that "[a]ny interactions or disputes between [Rogers] and [Tug Hill] are solely between [Rogers] and [Tug Hill]." The Agreement also provided that "RigUp is not responsible or liable for the actions or inactions of [Tug Hill] or other third party in relation to Projects as completed by [Rogers]" and that RigUp "will not be a party to disputes or negotiations of disputes, between [Rogers] and [Tug Hill]."

Finally, and perhaps most tellingly, the arbitration clause itself limits its applicability to disputes *between Rogers and RigUp*. It provides that "[i]n the interest of resolving disputes between [Rogers] and RigUp in the most expedient and cost effective manner, [Rogers] and RigUp agree" to arbitrate disputes, such that "by entering into these terms, *[Rogers] and RigUp* are each waiving the right to a trial by jury." (Emphasis added). The remaining provisions of the arbitration clause similarly contemplate arbitration only between Rogers and RigUp, not between Rogers and any company for whom Rogers performed projects (here, Tug Hill). Thus, it provided that "[a]ny arbitration *between [Rogers] and RigUp* will be settled under the Federal Arbitration Act," and it included

additional details of how arbitration would proceed between "[Rogers] and RigUp." (Emphasis added).

These numerous provisions in the Agreement preclude any conclusion that the Agreement was entered into *solely or directly for the benefit of Tug Hill*, such that Tug Hill could enforce it as a third-party beneficiary. Accordingly, the district court erred in granting Tug Hill's motion to dismiss and compelling Rogers, under the arbitration agreement between him and RigUp, to proceed to arbitration with respect to his FLSA claim against Tug Hill.

IV

Rogers also contends that the district court abused its discretion in granting RigUp's motion to intervene under Federal Rule of Civil Procedure 24. We agree.

Rogers' suit against Tug Hill is a claim for overtime wages under the FLSA, which brings to issue the terms and conditions under which Rogers *actually* worked for Tug Hill over a period of some 18 months. While RigUp acted as matchmaker in initially connecting Rogers with Tug Hill, their subsequent arrangement, as stated in the Agreement, was independent of Rogers' contract with RigUp. Indeed, the Rogers-RigUp Agreement went to great lengths to distance RigUp's matchmaking service from the work that Rogers would thereafter perform for the company with which he was matched. And in its motion to intervene, RigUp only claimed that its interest in Rogers' suit against Tug Hill was to protect its own business model and to avoid or mitigate liability to Tug Hill under the agreement governing their business relationship. We might well question, simply on that

basis, whether RigUp has articulated a sufficient interest under Rule 24 to justify intervention in Rogers' FLSA action.

Instead, however, we conclude that the district court abused its discretion in allowing RigUp's intervention because it failed to recognize, as Rogers had specifically argued, that "RigUp contractually disclaimed any right to be [a] party to . . . disputes" like this one.

In several specific provisions of the Agreement, Rogers and RigUp agreed that RigUp would not be a party to disputes between Rogers and the oil and gas operator for whom he would work, which ended up being Tug Hill. For example, the Agreement stated broadly that "[a]ny interactions or disputes between [Rogers] and [Tug Hill] [were] solely between [Rogers] and [Tug Hill]" and that "RigUp and its licensors shall have no liability, obligation or responsibility for any interaction between [Rogers] and [Tug Hill]." Elsewhere, the Agreement stated that "RigUp [was] not responsible or liable for the actions or inactions of [Tug Hill]," and Rogers agreed to "waive and release RigUp from any and all liability, claims or damages arising from or in any way related to projects or companies." The Agreement then provided, "RIGUP WILL NOT BE A PARTY TO DISPUTES OR NEGOTIATIONS OF DISPUTES, BETWEEN [ROGERS] AND COMPANIES."

RigUp thus expressly agreed with Rogers that it would "not be a party to disputes" between Rogers and any third-party company, such as Tug Hill. By doing so, RigUp waived whatever right it might otherwise have had to be a party to Rogers' action against Tug Hill, thus precluding its intervention under Rule 24. Indeed, one of the requirements for intervention as of right under Rule 24(a)(2) is that the would-be intervenor be "situated

[such] that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." Fed. R. Civ. P. 24(a)(2). Because RigUp's agreement with Rogers expressly disclaimed any interest in any litigation Rogers might have with a company in Tug Hill's position, making clear that RigUp would *not* be involved in such disputes as a third party, RigUp cannot now opportunistically claim that intervention is necessary to protect its interest. Similarly, before permitting a party to intervene under Rule 24(b), a district court is required to "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights," Fed. R. Civ. P. 24(b)(3), an inquiry that here required consideration of the Agreement's provision that Rogers would litigate any dispute he had with a company like Tug Hill without RigUp's being "a party to [that] dispute[]."

The district court accordingly abused its discretion by allowing RigUp's intervention notwithstanding the Agreement's plain terms.

* * *

The judgment of the district court is reversed, and the case is remanded for further proceedings between Rogers and Tug Hill, consistent with this opinion.

REVERSED AND REMANDED

EXHIBIT B

FILED: November 29, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1480
(5:21-cv-00199-JPB)

LASTEPHEN ROGERS, Individually and for others similarly situated

Plaintiff - Appellant

v.

TUG HILL OPERATING, LLC; RUSCO OPERATING, LLC

Defendants - Appellees

O R D E R

Upon consideration of submissions relative to the motion to recall the mandate or to stay district court proceedings, the court denies the motion.

Entered at the direction of the panel: Judge Niemeyer, Judge King, and Judge Harris.

For the Court

/s/ Nwamaka Anowi, Clerk

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

LASTEPHEN ROGERS, Individually
and for Others Similarly Situated,

Plaintiff,

v.

Civil Action No. 5:21-CV-199
Judge Bailey

TUG HILL OPERATING, LLC,

Defendant.

MEMORANDUM OPINION AND ORDER GRANTING MOTION TO INTERVENE AND GRANTING MOTION TO DISMISS

Pending before this Court is a Motion to Intervene [Doc. 15] filed by RUSCO Operating, LLC on January 27, 2022. Following a deadline extension, Defendant Tug Hill Operating, LLC filed a Response to Motion to Intervene [Doc. 23] on February 24, 2022. That same day, plaintiff filed a Memorandum in Opposition to Motion to Intervene [Doc. 24]. On March 10, 2022, RUSCO Operating, LLC filed a Reply [Doc. 30].

Additionally, pending before this Court is defendant Tug Hill Operating, LLC's Motion to Dismiss Plaintiff's Complaint Pursuant to Federal Rules of Civil Procedure 12(b)(1), (6), and (7) [Doc. 21] and accompanying Memorandum in Support [Doc. 22], filed on February 24, 2022. Following a deadline extension, plaintiff filed a Response in Opposition [Doc. 31] on March 17, 2022. Defendant Tug Hill Operating, LLC filed a Reply [Doc. 32] on March 24, 2022.

Based on the extensive briefing on both Motions, each is ripe for adjudication. For the reasons contained herein, the Motion to Intervene will be granted, and the Motion to Dismiss will be granted.

BACKGROUND

Plaintiff Lastephen Rogers ("plaintiff") filed his complaint [Doc. 1] on December 3, 2021, seeking to recover alleged unpaid overtime wages and other damages under the Fair Labor Standards Act ("FLSA") against defendant Tug Hill Operating, LLC ("defendant Tug Hill"). [Id. at ¶ 1]. Plaintiff brings this action on behalf of himself and all other similarly situated workers paid by defendant Tug Hill's day-rate system. [Id. at ¶ 9].

According to plaintiff, defendant Tug Hill operates an oil and natural gas exploration and production company operating in West Virginia and Texas. [Id. at 17]. Plaintiff contends that while working for defendant Tug Hill as a drilling and completions consultant, he, along with similarly situated workers, was paid a flat amount for each day worked with no overtime for hours worked in excess of 40 hours in a workweek in violation of the FLSA. [Id. at 9–13].

Non-party RUSCO Operating, LLC ("RUSCO") operates an online platform ("the application" or "the app"), which is used by oil and gas operators and independent contractors who provide freelance services for those operators. [Doc. 15-1 at 1–2]. According to RUSCO, its app is used to facilitate and connect independent contractors to particular projects run by oil and gas operators nationwide. [Id.]. Beyond the matchmaking function between operators and independent contractors, RUSCO's app also provides independent contractors with administrative functions like payment, insurance, and record-keeping. [Id. at 4]. After a contractor, like plaintiff, performs work, RUSCO then pays the contractor in

accordance with an invoice submitted by the contractor, less a percentage known as the "split" that compensates RUSCO for its service. [Id.]. Operators like defendant then pay RUSCO the balance invoiced. [Id.].

Underlying the foregoing relationship between plaintiff and RUSCO is an independent contractor agreement, which states that the agreement between RUSCO and plaintiff "constitutes a binding agreement between you, an independent professional . . . and [RUSCO] . . . governing your use of the Service . . . to provide freelance services to third party companies." *See* [Doc. 15-4]. Throughout the independent contractor agreement, plaintiff confers several benefits on defendant and RUSCO, including:

- Rights regarding the work to be performed: "You and [Tug Hill] solely negotiate and determine (x) when and where you perform Projects, (y) what you wear while performing projects, and (z) any additional bonuses or gratuities arising out of such Projects."
- Waiver of workers compensation: "As an independent professional, you are assuming the responsibilities of an employer for the purpose of a Project, and you hereby affirm you are not entitled to, and are hereby waiving, any claim for workers compensation benefits under either [RUSCO]'s or [Tug Hill's] workers' compensation insurance policy."
- Confidentiality: "You must keep [RUSCO]'s confidential information absolutely confidential, except as required or provided by law, including but not limited to information about other [Tug Hill] Projects . . ."

[Id.]. Plaintiff also agreed to abide by certain terms of service, which contain a dispute resolution provision; importantly, RUSCO's dispute resolution provision reads as follows:

> Generally, in the interest of resolving disputes between you and [RUSCO] in the most expedient and cost effective manner, you and [RUSCO] agree that every dispute arising in connection with these Terms will be resolved by binding arbitration. . . . This agreement to arbitrate disputes includes all claims arising out of or relating to any aspect of these Terms, whether based in contract, tort, statute, fraud, misrepresentation, or any other legal theory, and regardless of whether a claim arises during or after the termination of these Terms. YOU UNDERSTAND AND AGREE THAT, BY ENTERING INTO THESE TERMS, YOU AND [RUSCO] ARE EACH WAIVING THE RIGHT TO A TRIAL BY JURY OR TO PARTICIPATE IN A CLASS ACTION.

[Doc. 15-6]. Further, the terms state that claims will be administered by and in accordance with the Rules of the American Arbitration Association, and that "[t]he arbitrator [shall have] exclusive authority to resolve any dispute relating to the interpretation, applicability, or enforceability of this binding arbitration agreement." [Id.].

LEGAL STANDARDS

I. Intervention

"The Fourth Circuit favors 'liberal intervention' and preventing the 'problem of absent interested parties.'" ***Deutsche Bank v. Mountain West Hospitality, LLC***, 2017 WL 6420280, at *2 (N.D. W.Va. Dec. 15, 2017) (Keeley, J.) (citing ***Friend v. REMAC Am., Inc.***, 2014 WL 2440438, at *1 (N.D. W.Va. May 30, 2014) (Groh, J.) (quoting ***Feller v. Brock***, 802

F.3d 722, 729 (4th Cir. 1986))). "Prospective intervenors bear the burden of demonstrating their right to intervene." ***Deutsche Bank***, 2017 WL 6420280, at *2 (citing ***In re Monitronics Int'l, Inc.***, 2015 WL 12748330, at *1 (N.D. W.Va. June 3, 2015) (Keeley, J.) (citing ***Richman v. First Woman's Bank***, 104 F.3d 654, 658 (4th Cir. 1997))). Under Fed. R. Civ. Pro. 24, this Court has discretion to allow intervention either as a matter of right or on a permissive basis. ***Stuart v. Huff***, 706 F.3d 345, 349 (4th Cir. 2013).

A. Intervention by Right

In the Fourth Circuit, "liberal intervention is desirable to dispose of as much of a controversy 'involving as many apparently concerned persons as is compatible with efficiency and due process.'" ***Feller***, 802 F.2d at 729 (4th Cir. 1986) (quoting ***Nuesse v. Camp***, 385 F.2d 694, 700 (D.C. Cir. 1967)).

This Court must grant a timely motion to intervene if the movant "claims an interest relating to the property or transaction that is the subject of the action and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interests, unless existing parties adequately represent that interest." Fed. R. Civ. Pro. 24(a). The Fourth Circuit recognizes that, to intervene as a matter of right, the movant must satisfy four requirements:

> (1) the application must be timely; (2) the applicant must have an interest in the subject matter sufficient to merit intervention; (3) the denial of intervention would impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the existing parties to the litigation.

Scardelletti v. Debarr, 265 F.3d 195, 202 (4th Cir. 2001).

1. Timeliness

Under either Rule 24(a) or 24(b), the application for intervention must be timely. *See* Fed. R. Civ. Pro. 24(a) & 24(b) (requiring "timely application"); ***Gould v. Alleco, Inc.***, 883 F.2d 281, 286 (4th Cir. 1989) ("Both intervention of right and permissive intervention require timely application."). Although Rule 24 "requires that the motion to intervene be 'timely,' it does not attempt to define the term or specify rigid time limits." ***United States v. South Bend Community Sch. Corp.***, 710 F.2d 394, 396 (7th Cir. 1983); *see* ***Black v. Central Motor Lines Inc.***, 500 F.2d 407, 408 (4th Cir. 1974) (noting that "Rule 24 is silent as to what constitutes a timely application and the question must therefore be answered in each case by the exercise of the sound discretion of the court"). "The purpose of the requirement is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal." ***South Bend***, 710 F.2d at 396. "To determine whether an application for intervention is timely, we examine the following factors: how far the suit has progressed, the prejudice that delay might cause other parties, and the reason for the tardiness in moving to intervene." ***Gould***, 883 F.2d at 286. Where intervention is of right, "the timeliness requirement of Rule 24 should not be as strictly enforced as in a case where intervention is only permissive." ***Brink v. DaLesio***, 667 F.2d 420, 428 (4th Cir. 1981).

2. Interest in Subject Matter

A potential intervenor's interest in the subject matter of the litigation must be "a significantly protectable interest." ***Teague v. Bakker***, 931 F.2d 259, 261 (4th Cir. 1991) (citations omitted). An interest is a "significantly protectable interest in an action if [a party]

'stand[s] to gain or lose by the direct legal operation' of a judgment in that action." ***Oplaihio Valley Envtl. Coal., Inc. v. McCarthy***, 313 F.R.D. 10, 18 (S.D. W.Va. 2015) (Chambers, C.J.) (quoting ***Teague***, 931 F.2d at 261). But "[s]tanding to gain or lose by direct operation of a judgment may not be a necessary condition for an interest to be significantly protectable." ***Id.*** This Court has observed that "it requires only that [the movant] show that the disposition of the action 'may as a practical matter' impair their interests." ***United States v. Exxonmobil Corp.***, 264 F.R.D. 242, 245 (N.D. W.Va. 2010) (Keeley, J.) (quoting ***Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist.***, 738 F.2d 82, 84 (8th Cir. 1984)).

3. Impaired Ability to Protect Interests

Courts in the context of this sort of litigation have recognized that a signatory to an arbitration agreement should have an ability to protect its interests in the enforcement of the agreement warranting intervention as of right. *See, e.g.,* ***Nesser v. MAC Acquisitions, LLC***, 2021 WL 2636743, at *4 (N.D. N.C. 2021) (Whitney, J.) ("[T]his Court finds [intervenor] as a contracting party with a significantly protectable interest at risk–the arbitration agreement–should be allowed to intervene to protect said interest."); ***Becker v. Delek US Energy, Inc.***, 2020 WL 4604544, at *8 (M.D. Tenn. 2020) (Trauger, J.) (staffing company permitted to intervene based on "its interest in resolving the question of whether the arbitration clause . . . extend[s] to [worker's] claims against [operator]"); ***Bock v. Salt Creek Midstream LLC***, 2020 WL 3989646, at *4 (D. N.M. July 15, 2020) ("[S]eeking to vindicate it's A[rbitration] A[greement] with [workers] is a legitimate interest for [staffing company] to protect."); ***Altenhofen v. S. Star Central Gas Pipeline, Inc.***, 2020 WL 3547947, at *4 (W.D. Ky. June

30, 2020) (same); ***Ferrell v. SemGroup Corp.***, 2020 WL 4281302, at *3 (N.D. Okla. June 12, 2020) (same).

4. Adequacy of Representation by Named Party

A potential intervenor's burden to show that its interests will not adequately be represented by a named party is "'minimal,' and it is enough to show that the representation 'may be' inadequate." ***Kane County, Utah v. United States***, 928 F.3d 877, 892 (10th Cir. 2019). "The possibility of divergence need not be great in order to satisfy th[is] burden. An intervenor need only show the *possibility* of inadequate representation. Only when the objective of the applicant for intervention is identical to that of one of the parties is representation considered to be adequate." ***Barnes v. Security Life of Denver Ins. Co.***, 945 F.3d 1112, 1124 (10th Cir. 2019).

B. Permissive Intervention

Fed. R. Civ. Pro. 24(b)(1) provides that, "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Although whether to allow permissive intervention is within the sound discretion of the district court, it must "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *See* ***Smith v. Pennington***, 352 F.3d 884, 892 (4th Cir. 2003); Fed. R. Civ. Pro. 24(b)(3).

II. Motion to Dismiss

A. 12(b)(1)

A party may move to dismiss an action for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The burden of proving subject matter jurisdiction on a Rule 12(b)(1) motion to dismiss is on the party asserting federal jurisdiction. A trial court may consider evidence by affidavit, deposition, or live testimony without converting the proceeding to one for summary judgment. ***Adams v. Bain***, 697 F.2d 1213, 1219 (4th Cir. 1982); ***Mims v. Kemp***, 516 F.2d 21 (4th Cir. 1975). Because the court's very power to hear the case is at issue in a Rule 12(b)(1) motion, the trial court is free to weigh the evidence to determine the existence of its jurisdiction. No presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. *See* ***Materson v. Stokes***, 166 F.R.D. 368, 371 (E.D. Va. 1996). Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. *See* Fed. R. Civ. P. 12(h)(3).

B. 12(b)(6)

A complaint must be dismissed if it does not allege "enough facts to state a claim to relief that is plausible on its face." ***Bell Atl. Corp. v. Twombly***, 550 U.S. 544, 570 (2007); *see also* ***Giarratano v. Johnson***, 521 F.3d 298, 302 (4th Cir. 2008) (applying the ***Twombly*** standard and emphasizing the necessity of *plausibility*). When reviewing a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must assume all

of the allegations to be true, must resolve all doubts and inferences in favor of the plaintiff, and must view the allegations in a light most favorable to the plaintiff. ***Edwards v. City of Goldsboro,*** 178 F.3d 231, 243–44 (4th Cir. 1999).

When rendering its decision, the Court should consider only the allegations contained in the Complaint, the exhibits to the Complaint, matters of public record, and other similar materials that are subject to judicial notice. ***Anheuser-Busch, Inc. v. Schmoke***, 63 F.3d 1305, 1312 (4th Cir. 1995). In ***Twombly***, the Supreme Court, noted that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . ." ***Twombly***, 550 U.S. at 555, 570 (upholding the dismissal of a complaint where the plaintiffs did not "nudge[ ] their claims across the line from conceivable to plausible.").

This Court is well aware that "[M]atters outside of the pleadings are generally not considered in ruling on a Rule 12 Motion." ***Williams v. Branker***, 462 F. App'x 348, 352 (4th Cir. 2012). "Ordinarily, a court may not consider any documents that are outside of the Complaint, or not expressly incorporated therein, unless the motion is converted into one for summary judgment." ***Witthohn v. Fed. Ins. Co.***, 164 F. App'x 395, 396 (4th Cir. 2006). However, the Court may rely on extrinsic evidence if the documents are central to a plaintiff's claim or are sufficiently referred to in the Complaint. ***Id***. at 396–97.

C. 12(b) and Arbitration

A motion to compel arbitration may be pursued pursuant to Rule 12(b)(1) or 12(b)(6) of the Federal Rules of Civil Procedure. In either instance, courts should apply the dismissal (rather than summary judgment standard) if the challenge is a facial attack to the allegations

of the complaint. ***Price v. West Virginia Air National Guard, 130TH Airlift Wing***, 2016 WL 3094010, at *2 (S.D. W.Va. June 1, 2016) (Johnston, J.) (stating that a motion to dismiss under Rule 12(b)(1) can be either facial or factual, with the former challenging whether the allegations of the complaint are facially sufficient to sustain the court's jurisdiction).

Where the challenge is facial, the court must accept the allegations as true and proceed to consider the motion as it would a motion to dismiss for failure to state a claim under Rule 12(b)(6). ***Id.*** A challenge can be facial and thus subject to the motion to dismiss standard even if the defendants attach the arbitration agreement to their filing. *See* ***Salmons v. CMH of Ky., Inc.***, 2019 WL 3884038 (S.D. W.Va. Aug. 16, 2019) (Copenhaver, J.).

D. 12(b)(7)

A court may dismiss an action for failure to join a party. *See* Fed. R. Civ. Pro. 12(b)(7) (stating that "a party may assert the following defenses by motion . . . failure to join a party under Rule 19"). The movant bears the burden of demonstrating that dismissal for non-joinder is appropriate.

In analyzing a motion to dismiss under Rule 12(b)(7), courts conduct a two-step inquiry. *See* ***West Virginia Advocates, Inc. v. Mitchell***, 2007 WL 1088850, at *3 (N.D. W.Va. Mar. 30, 2007) (Stamp, J.). First, a court must determine whether a party is necessary within the meaning of Rule 19(a). ***Id.*** Under Rule 19(a)(1), a party is necessary where:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a

practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject toa substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

If the party is necessary but cannot feasibly be joined, the court proceeds to the second prong of the inquiry, which asks whether the action can continue absent the party, or whether the party is "indispensable" under Rule 19(b). ***Id***.

In deciding whether a party is indispensable, the court considers four factors: (1) the extent to which a judgment rendered in the party's absence might prejudice that party or the other parties; (2) the extent to which any prejudice could be ameliorated; (3) whether a judgment rendered in the party's absence would be inadequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder. Fed. R. Civ. Pro. 19(b). If the absent party is both necessary and indispensable, then the litigation should be dismissed. Fed. R. Civ. P. 12(b)(7).

DISCUSSION

As noted above, there are two pending Motions, which have been briefed extensively by the parties. Accordingly, this Court will first address the Motion to Intervene before turning to a discussion of the Motion to Dismiss.

I. RUSCO's Motion to Intervene

RUSCO argues that plaintiff has improperly excluded it from the pending litigation through selective pleading despite the fact that plaintiff had an actual agreement concerning his independent contractor status with RUSCO. [Doc. 15-1 at 1]. According to RUSCO, plaintiff signed this contract including the aforementioned arbitration agreement in which

plaintiff promised to arbitrate claims like the ones asserted here. [Id.]. RUSCO avers that intervention is warranted as a right because RUSCO's contractual right to arbitration cannot be fully protected if it is absent from this litigation. [Id. at 2]. Absent intervention, RUSCO states that it could potentially be liable to defendant Tug Hill based on the outcome of the case. [Id.]. Alternatively, RUSCO argues it should be granted permissive intervention because the enforcement of its contractual rights share common questions of law and fact raised herein, and an inability to participate in this lawsuit could impair its business model and subject it to liability. [Id.].

Defendant Tug Hill filed a Response to the Motion to Intervene. *See* [Doc. 23]. Therein, defendant Tug Hill joins in RUSCO's request, and further argues that RUSCO *must* be joined in the ongoing litigation based on, *inter alia*, the language of the aforementioned arbitration clause. [Id. at 1–2].

Plaintiff filed a Memorandum in Opposition to Motion to Intervene [Doc. 24] advancing several arguments against RUSCO's intervention[1]. First, plaintiff contends that RUSCO does not have a significantly protectible interest in this lawsuit against defendant Tug Hill. [Id. at 8]. In support of this position, plaintiff asserts that RUSCO's business model is not at issue, its interest in arbitration alone is not significantly protectible, and it cannot be liable for the result of this lawsuit either as a joint employer or a potential indemnitor to defendant Tug Hill. [Id. at 8–14]. Further, plaintiff argues that resolving his claims against defendant Tug Hill will not

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[1]Plaintiff identifies that RUSCO is a wholly owned subsidiary of Workrise Technologies, Inc. f/k/a RigUp, Inc., and uses the two interchangeably. For the sake of clarity, this Court will identify the entity as "RUSCO."

impair or impede RUSCO's alleged interests. [Id. at 16]. Further, plaintiff avers that defendant Tug Hill adequately represents RUSCO's alleged interest in this matter. [Id. at 17]. As a final, alternative argument, plaintiff contends that permissive intervention is also inappropriate. [Id. at 18].

RUSCO filed a Reply in which it reasserts its arguments for both intervention by right and permissive intervention. [Doc. 30].

A. RUSCO is entitled to intervention as a matter of right.

Based on consideration of the arguments asserted by the parties, this Court concludes that RUSCO is entitled to intervene in this matter by right.

1. The Motion is timely.

Turning to the first factor under the Fourth Circuit's analysis, the subject Motion is clearly timely. In fact, plaintiff does not assert an argument that the Motion is somehow untimely in his Response. Here, plaintiff filed his original complaint on December 3, 2021. *See* [Doc. 1]. Defendant Tug Hill has not even filed a responsive pleading to the complaint pending the resolution of its Motion to Dismiss. Further, no discovery has taken place, and this Court has yet to issue even an initial scheduling order. Accordingly, there can be no question that RUSCO's motion is timely considering these facts, and it therefore satisfies the first prong to intervene by right.

2. RUSCO's Interest in this Litigation is Significantly Protectible.

RUSCO argues that its interest in this litigation is significantly protectible because it has a legitimate interest in the enforcement of its arbitration agreement with plaintiff. [Doc. 15-1 at 10]. Plaintiff concedes that RUSCO identified at least three interests it seeks

to protect by intervening, but plaintiff contends that none of these three interests are "significantly protectible." This Court disagrees.

a. The Business Model

First, and as previously mentioned, RUSCO contends that its business model is directly challenged by the potential outcome of this litigation. [Id. at 10–11]. In Response, plaintiff raises virtually identical arguments to those raised in New Mexico litigation involving RUSCO, which were rejected by that Court. *See* ***Martin v. Tap Rock Resources, LLC***, 2022 WL 278874, at *2 (D. N.M. Jan. 31, 2022) (granting RUSCO's motion to intervene and rejecting the same arguments raised by the same plaintiff's counsel here).[2] As the ***Martin*** court noted, "no matter how Plaintiffs' characterize the situation, they cannot reasonably argue that an adverse decision *would not* adversely impact RUSCO's business model." 2022 WL 278874, at *7. Looking at the economic realities of the case, the ***Martin*** court recognized the significance of RUSCO's interest and noted "[a] determination against Tap Rock classifying

[2]In fact, the ***Martin*** court noted in footnote 4:
As the Court previously recognized in ***Bock v. Salt Creek Midstream LLC***, "there is a growing body of intervention jurisprudence among district courts in similar cases, with the trend decidedly in favor of granting intervention." 2020 WL 3989646, at *7 (D. N.M. July 15, 2020) (same Plaintiff's counsel as instant action) (listing several additional cases with same Plaintiff's counsel), *adopted by* 2020 WL 5640669 (D. N.M. Sept. 22, 2020); *see also* ***Becker v. Delek US Energy, Inc.***, 2020 WL 4604544 (M.D. Tenn. Aug. 11, 2020); ***Altenhofen v. S. Star Cent. Gas Pipeline, Inc.***, No. 4:20CV-00030-JHM, 2020 WL 3547947, at *1 (W.D. Ky. June 30, 2020) (intervention granted to staffing agency that employed plaintiffs pursuant to arbitration agreements, but which was not named in FLSA class action) (plaintiff's counsel included Plaintiffs' counsel in instant action); ***Ferrell v. SemGroup Corporation, et al.***, 485 F.Supp.3d 1334 (N.D. Ok. 2020) (same) (counsel again overlap), *overruled on other grounds at* 2021 WL 5576677 (10th Cir. Nov. 30, 2021); ***Robertson v. Enbridge (U.S.) Inc.***, 2020 WL 2104911, at *1 (W.D. Pa. May 1, 2020) (same) (counsel again overlap); ***Snow v. Silver Creek Midstream Holdings, LLC***, 467 F.Supp.3d 1168 (D. Wyo. 2020) (same) (counsel again overlap).

Plaintiffs as 'employees' and not 'independent contractors' would turn that same business model on its head and arguably threaten RUSCO's financial security. From its standpoint, RUSCO has asserted a financial interest worth protecting." ***Id.***

Again, plaintiff makes the same rejected arguments here. Plaintiff minimizes, but never particularly disputes, the ongoing relationship between himself and RUSCO, which continues after an independent contractor accepts a project. This is especially critical here, where defendant Tug Hill indicated the possibility of seeking indemnification from RUSCO based on plaintiff's claims. *See* [Doc. 15-1 at 6].

The only law relied upon by plaintiff in his argument against RUSCO's interest in the litigation is that "Tug Hill has an independent duty, separate and apart from the duty owed by [RUSCO]." [Doc. 24 at 11]. But this contention, while correct, is not relevant to the inquiry on the pending Motion, i.e. whether RUSCO has a significant interest in this dispute. Though its conclusions are broad, plaintiff's Response fails to demonstrate plaintiff's claims do not impact the contractual relationship between RUSCO and defendant Tug Hill. In fact, defendant Tug Hill has affirmatively confirmed RUSCO's possible liability based on the alleged failure of RUSCO's representations as to plaintiff's independent contractor status. *See* [Doc. 22].

As identified by RUSCO, the Fourth Circuit permits intervention where, as here, the prospective intervenor has advocated purely economic interests in ongoing litigation. *See, e.g.,* ***Feller v. Brock***, 802 F.2d 722, 729–30 (4th Cir. 1986) (potential for increased wages was sufficient interest to allow apple pickers intervention of right in case seeking to compel United States Department of Labor to issue permits for foreign workers); ***JLS, Inc. v. Public Service Comm'n of West Virginia, et al.***, 321 F.App'x 286, 289–90 (4th Cir. 2009)

(potential for increased competition was sufficient interest to support intervention by motor transport companies in suit to determine proper regulator for the transportation of railroad employees.).

Plaintiff's Response seeks to divert this Court from this conclusion by citing two cases for the proposition that a "vague" or "remote" possibility that an interest may be affected is not sufficient to warrant intervention. *See* [Doc. 24 at 12–13]. First, plaintiff cites ***Ohio Valley Env't Coalition v. McCarthy***, 313 F.R.D. 10, 22 (S.D. W.Va. 2015) (Chambers, C.J.). In ***McCarthy***, the court denied the West Virginia Coal Association's request to intervene in an environmental advocacy group's litigation against the Environmental Protection Agency because there were "too many steps involving nebulous goals and discretion of EPA and state agency between potential judgment in organizations' favor and any possible adverse consequence to association members' interests in property, coal reserves, or water treatment costs from potentially more stringent effluent limitations on members' national pollution discharge elimination system (NPDES) permits." ***Id.*** at 20. The ***McCarthy*** court noted that "[i]n ruling on motions for intervention of rights, courts could not function properly if they were required to find significantly protectable interests based on multiple layers of contingency." ***Id.*** at 25. This case is inopposite to the subject analysis because there are no layers of contingency here. Both defendant Tug Hill and RUSCO have detailed specific and direct possible consequence they may face as a result of the outcome of litigation.

Plaintiff also cites ***Talbot 2002 Underwriting Cap. Ld. v. Old White Charities, Inc.*** 2015 WL 6680892 (S.D. W.Va. Oct. 30, 2015) (Berger, J.) for the proposition that RUSCO's interest is too vague. [Doc. 24 at 13]. This Court is not persuaded by plaintiff's argument

based on ***Talbot***, where Judge Berger *granted intervention* by finding the economic interest asserted sufficient for purposes of intervention by right. More specifically, the ***Talbot*** court found that "if the Plaintiff succeeds in obtaining a declaratory judgment, [intervenor] will face a greater likelihood of claims for indemnification, and findings of the Court in this case may limit the ability of [intervenor] to defend such claims." ***Id.***, at *2.

b. Arbitration

In addition to the possible effects on its business model, RUSCO argues, throughout its briefing, that its interest in arbitration constitutes a significantly protectible interest. *See* [Doc. 15-1]. In Response, plaintiff contends that arbitration alone is not a significantly protectible interest and relies on a variety of cases in support. [Doc. 24 at 13–16]. This Court is not persuaded by plaintiff's argument in this regard.

Initially, and as previously discussed, arbitration is but one of RUSCO's asserted interests in this case. Next, as noted in the "Legal Standards" section of this Order, various courts in this context have found that seeking to enforce an arbitration agreement constitutes a significantly protectible interest thereby warranting intervention.

Further, this Court finds the legal support offered by plaintiff to deviate from the aforementioned opinions to be unpersuasive. First, plaintiff cites to ***Field v. Andarko Petro. Corp.***, 2022 WL 203256 (S.D. Tex. Jan. 24, 2022) against intervention. There, the Court ultimately denied RUSCO's motion to intervene; however, the decision in ***Field*** was based on circumstances different from the case at bar, because

> [RUSCO did] not argue that it faces potential liability under either a joint-employer theory or an agreement to indemnify Anadarko. ***Hinkle v. Phillips***

> ***66 Co.***, No. PE:20-CV-00022-DC-DF, 2020 WL 10352346, at (4 (W.D. Tex. Nov. 13, 2020) (granting intervention as a of right under similar circumstances because, *inter alia*, "the specter of joint and several liability hanging over" the intervenor's relationship with the defendant warranted a "place at the table because any liability assessed to Defendant may have a direct impact on intervenor)."

Field, at *4. The situation here is exactly opposite, where defendant Tug Hill has demanded indemnity fro RUSCO, thus making the potential for RUSCO's liability clear.

Similarly, plaintiff cites ***Hiser v. Nzone Guidance, LLC***, 799 F.App'x 247 (5th Cir. 2020) in support of its argument against intervention based on arbitration. [Doc 24 at 8]. However, in ***Hiser***, RUSCO did not attempt to intervene; rather, RUSCO's customer attempted to enforce the arbitration agreement as a third-party beneficiary. ***Id.*** at 248. Here, RUSCO is seeking to intervene and enforce its own agreement. As ***Hiser*** demonstrates, intervention is a proper avenue for RUSCO to protect its interest in arbitration.

c. Liability

Plaintiff argues that RUSCO cannot intervene on the basis that it might be liable as his joint employer. [Doc. 24 at 16]. However, defendant Tug Hill's demand for indemnity provides RUSCO an interest in this litigation sufficient to intervene. *See* ***Ferrell v. SemGroup Corp.***, 2020 WL 4281302, at *4 (N.D. Okla. June 12, 2020) (granting intervention as of right; "[Intervenor's] potential obligation constitutes a direct financial interest in this litigation, which may be impaired if [intervenor] is not permitted to intervene and defend itself"); ***Altenhofen v. Southern Star Cent. Gas Pipeline, Inc.***, 2020 WL 3547947, at *4 (W.D. Ky. June 30,

2020) (granting intervention as of right; "Courts agree that an intervenor has a sufficient interest in the litigation where it may be required to indemnify a customer"); ***Bock v. Salt Creek Midstream LLC***, 2020 WL 3989646 (D. N.M. July 15, 2020) (granting intervention as of right; "[B]ecause of the specter of potential indemnification . . . this Court finds that [intervenor] has a sufficiently direct economic interest in this case and impairment of its interest is possible if intervention is denied"); ***Becker v. Delek US Energy***, 2020 WL 4604544, at *10 (M.D. Tenn. Aug. 11, 2020) (granting intervention as of right; find an indemnity demand "amplified" the propriety of intervention); ***Hinkle v. Phillips 66 Co.***, 2020 WL 10352346, at *4 (W.D. Tex. Nov. 13, 2020) (granting intervention as of right and holding "the undersigned finds [intervenor] has adequately stated an interest in this suit based on potential indemnity to Defendant").

Despite this persuasive authority, plaintiff goes on to argue against defendant Tug Hill's potential indemnity case and declares "[c]ourts around the Country (including this Court) have rejected employers' attempts to seek contractual contribution or indemnification for FLSA claims." [Doc. 24 at 17]. This argument is misplaced.

First, plaintiff cites to ***Gustafson v. Bell Atlantic***, 171 F.Supp. 2d 311 (S.D. N.Y. 2001). In ***Gustafson***, the district court, relying on ***Herman v. RSR Security Services***, 172 F.3d 132, 143 (2d Cir. 1999), held that even in a joint employment situation, a claim for contractual indemnification under the FLSA is "still absent." ***Id.*** at 328. However, in ***Herman***, the Second Circuit held only that no common law right to indemnification or contribution exists under the FLSA absent a contract. ***Herman***, 172 F.3d at 144. Here, a contract exists giving rise to the indemnification claim and defendant Tug Hill is not claiming a common law right.

Notably, plaintiff's citations to Fourth Circuit precedence fair no better for his argument. In ***Lyle v. Food Lion***, 954 F.3d 984 (4th Cir. 1992), defendant Food Lion filed a third-party complaint against its own employee on the grounds that he breached his contract with defendant Food Lion and his fiduciary duty to the company by himself violating and allowing plaintiff Lyle to violate company policy while under supervision. ***Id***. Essentially, defendant Food Lion sought to indemnify itself for its own violation of the FLSA by shifting the blame to its employee, which is distinguishable from the allegations here.

Similarly, ***McDougal v. G & S Tobacco Dealers, L.L.C.***, 712 F.Supp.2d 488 (N.D. W.Va. 2010) (Kaull, M.J.) is not persuasive. In ***McDougal***, the issue before the court was whether the prior employer owed a duty to the successor employer to defend against FLSA claims made concerning wages paid before the business changed hands. Ultimately, the court in ***McDougal*** granted the successor employer's motion for summary judgment, finding that the original employer owed a duty of indemnity for FLSA claims prior to the sale of the business. ***Id.*** at 500–01.

Plaintiff's recitation of ***McDougal*** comes from an earlier part of the decision where the court determined the original employer was not liable to indemnify damages after the date of closing. In any event, this Court is not persuaded by ***McDougal*** because RUSCO does not need to try its case to support intervention.

Accordingly, this Court finds that RUSCO's potential liability in this matter weighs in favor of intervention by right.

3. RUSCO's Interest Will Be Impaired Absent intervention.

As identified, a nonparty seeking intervention as of right must establish that the instant lawsuit could potentially impair its interests. Having found that the litigation affects RUSCO's interests (namely, its business model, interest in arbitration, and potential liability), RUSCO clearly satisfies this prong in favor of intervention by right.

4. Defendant Tug Hill cannot adequately represent RUSCO's interests.

Having found at least three potential interests in this matter, this Court too finds that Defendant Tug Hill cannot adequately represent RUSCO's interests in the event this Court were to disallow intervention by right. Plaintiff argues that allowing RUSCO to intervene would effectively render the "adequate representation" element of the prerequisite threshold to intervene superfluous. [Doc. 24 at 20]. Plaintiff further states that defendant Tug Hill and RUSCO's interests are fundamentally aligned. [Id.]. This Court cannot agree.

As articulated by RUSCO, a finding of liability against defendant Tug Hill alone would implicate RUSCO in several ways. For example, if plaintiff were to establish liability, RUSCO could be required to indemnify defendant Tug Hill on plaintiff's substantive claims. Further, if plaintiff were to succeed on his substantive claims against defendant Tug Hill, plaintiff could theoretically pursue RUSCO for damages as a joint employer. In this circumstance, plaintiff would undoubtedly make every attempt to leverage findings of fact *in this litigation* in the hypothetical RUSCO litigation, even though RUSCO would not have had an opportunity to contest those facts here. Moreover, if plaintiff is ultimately unsuccessful in this litigation against Tug Hill absent RUSCO as a party, plaintiff could theoretically pursue virtually the

same claims against RUSCO in a second stage of litigation. Additionally, and as a practical matter, discovery in this matter would necessarily require disclosure of facts and circumstances surround the signing of the independent contractor agreement between plaintiff and RUSCO, the terms of the agreement, the negotiations and/or discussions between the parties, and evidence of the parties' intent. It would also require the disclosure of the hours work by plaintiff and the fee remitted to him, both of which are matters known exclusively to RUSCO.

Based on the foregoing, this Court finds that RUSCO is entitled to intervention as a matter of right pursuant to Fed. R. Civ. Pro. 24(a).

B. Even assuming *arguendo* that intervention by right is improper, RUSCO would be entitled to permissive intervention.

The parties agree that in order to permissibly intervene, a non-party must timely show either that it has a conditional right to intervene by a federal statute, or that it has a claim or defense that shares a common question of law or fact with the main action. *See* Fed. R. Civ. Pro. 24(b). In exercising its discretion to permit a party to intervene, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. Pro. 24(b)(3). "[A] challenge to the court's discretionary decision to deny leave to intervene must demonstrate a *clear* abuse of discretion in denying the motion." ***N. Carolina State Conf. of NAACP v. Berger***, 999 F.3d 915, 938 (4th Cir. 2021) (quoting ***McHenry v. Comm'r***, 677 F.3d 214, 219 (4th Cir. 2012)).

Here, RUSCO does not claim it has a conditional right to intervene by federal statute. *See* [Doc. 15-1 at 15–16]. Instead, RUSCO's timely motion asserts, correctly, that

intervention in this matter will not prejudice either party, and that the matter involves common questions of fact and law–namely, whether plaintiff is an independent contractor under the FLSA. Plaintiff and Rusco have a written contractual agreement on this very issue, and finds on that question could potentially subject RUSCO to liability as either a joint employer or indemnitor. Accordingly, and in addition to intervention by right, RUSCO is entitled to permissive intervention.

II. Defendant Tug Hill's Motion to Dismiss

Defendant Tug Hill asserts this matter should be dismissed based on Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 12(b)(7). This Court will examine each basis for dismissal in turn.

A. Dismissal pursuant to Fed. R. 12(b)(1) is warranted because plaintiff entered into a valid and enforceable arbitration agreement covering the claims at issue in this case.

Defendant Tug Hill begins its argument by asserting that plaintiff voluntarily agreed to pursue any disputes in arbitration arising out of his relationship with RUSCO or the work performed for the benefit of defendant Tug Hill. [Doc. 22 at 12–13]. Plaintiff counters by asserting that plaintiff never agreed to arbitrate his claims against defendant Tug Hill when he entered into the subject agreement with RUSCO concerning arbitration. [Doc. 31 at 6–7]. Moreover, plaintiff contends that the language in RUSCO's arbitration agree does not confer upon defendant Tug Hill the right to compel arbitration. [Id. at 7].

1. Arbitration in the Fourth Circuit

This Court notes that arbitration, for better or worse, is highly favored by federal courts. ***Adkins v. Labor Ready, Inc.***, 303 F.3d 496, 500 (4th Cir. 2002) (citing ***Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.***, 460 U.S. 1, 24 (1983). "Motions to compel

arbitration . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." ***Zandford v. Prudential-Bache Sec., Inc.***, 112 F.3d 723, 727 (4th Cir. 1997) (citations omitted). Unless the "scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." ***Peoples Sec. Life. Ins. Co. v. Monumental Life Ins. Co.***, 867 F.2d 809, 812 (4th Cir. 1989) (citing ***United Steelworkers of Am. v. Warrior & Gulf Navigation Co.***, 363 U.S. 574, 582 (1960)). The "liberal federal policy favoring arbitration agreements" applies equally in the employment context. *Cf.* ***Shadahan v. Macy's Corp. Servs., LLC***, 2021 WL 357055, at *2 (N.D. W.Va. Sept. 21, 2021) (Groh, C.J.).

Courts in the Fourth Circuit look to see if the party seeking to compel arbitration can satisfy each of the following four factors: (1) whether there is a dispute between the parties; (2) whether there exists a written agreement that includes an arbitration provision which purports to cover the dispute; (3) the relationship of the transaction, which is evidence by the agreement, to interstate or foreign commerce; and (4) the failure, neglect or refusal of [a party] to arbitrate the dispute. ***Id.***, at *2[3]. When a court considers these factors, it must be "mindful of the 'clear federal directive in support of arbitration.'" *See* ***Hightower v. GMRI, Inc.***, 272 F.3d 239, 241 (4th Cir. 2001).

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[3]This Order does not address the first and fourth factor, as the satisfaction of these considerations is evidenced by the simple fact that plaintiff has filed a complaint against defendant Tug Hill.

2. The Claims at Issue

Plaintiff's agreement to arbitrate with RUSCO expressly states that "every dispute arising in connection with these Terms will be resolved by binding arbitration. . . . This agreement to arbitrate disputes includes all claims arising out of or relating to any aspect of these Terms. . . ." *See* [Doc. 15-6].

Courts have found the use of these key phrases–"every dispute" and "arising out of"–evidences the parties' intent to give their arbitration clause an expansive reach. *See* ***Polyflow, LLC v. Specialty RTP, LLC*** 993 F.3d 295, 303–04 (5th Cir. 2021) (finding that "arising out of" demonstrated that the arbitration clause had expansive reach); ***Altenhofen v. Southern Star Central Gas Pipeline, Inc.***, 2020 WL 6877575, at *6 (W.D. Ky. Nov. 23, 2020) (finding that an agreement to arbitrate "all claims that have arisen or will arise out of Employee's employment with or termination from [his employer]" encompassed FLSA claims that were later prused not against the employer but against its customer); ***Snow v. Silver Creek Midstream Holdings, LLC***, 467 F.Supp.3d 1168, 1170 (D. Wyo. 2020) (same).

Here, without entering into the independent contractor agreement, which expressly incorporates the terms of service including the arbitration provision, plaintiff would not have performed work on defendant Tug Hill's projects through RUSCO. This agreement not only services as the condition precedent to work with customers, like defendant Tug Hill, who contract with RUSCO; it also defines all of the parties' respective commitments, rights, and obligations related to the performance of that work. For example, with regard to his classification, the agreement provides: "[RUSCO] and you intend for you to provide services to [defendant Tug Hill] strictly as an independent professional and not as an employee, worker,

agent, joint venture, partner, or franchisee of [RUSCO] or [Tug Hill]." *See* [Doc. 15-4]. With regard to his compensation for services rendered, "[t]he fee charged to [defendant Tug Hill] on your behalf shall be the fee described in the Project Details unless you and [defendant Tug Hill] notify [RUSCO] in writing prior to the completion of the Project that you and [defendant Tug Hill] have negotiated a different fee. . . . [RUSCO's] role in the payment process is solely limited to payment processing and transmission between you and [defendant Tug Hill]. [Id.]. Plaintiff even agreed to indemnify defendant Tug Hill if a court were to find that he was–as he now alleges–an employee. [Id.]. Most notably, the terms of service provided a mechanism to resolve disputes over these commitments, rights, and obligations–plaintiff agreed that every dispute arising in connection with these terms would be resolved by binding arbitration.

According to the Supreme Court of the United States, even if there is ambiguity as to the scope of the arbitration provision, the ambiguity must be resolved in favor of arbitration. *See* ***Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.***, 460 U.S. 1, 24–25 (1983) (explaining that "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," including questions about the "construction of the contract language itself").

Here, plaintiff's claim arises out of work performed through RUSCO on defendant Tug Hill's projects. Plaintiff's agreement to the aforementioned terms, including the arbitration provision, was a precondition to the performance of work on defendant Tug Hill's projects. Thus, the claims that relate or refer to the work that plaintiff performed or the terms under which he agreed to perform such work are subject to arbitration.

3. Interstate Commerce

The arbitration agreement here also evidences a transaction involving interstate commerce. The Supreme Court of the United States has broadly interpreted the Federal Arbitration Act's requirement that, to fall within its purview, a contract must "evidence a transaction involving commerce." 9 U.S.C. § 2. "The word 'involving,' the Supreme Court said, is indeed the functional equivalent of 'affecting.'" *See* ***King v. IBEX Glob.***, 2015 WL 6159492 (S.D. W.Va. Oct. 20, 2015) (Goodwin, J.) (citing ***Allied-Bruce Terminix Cos. v. Dobson***, 513 U.S. 265, 274 (1995)). Congress thus intended to "provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause." ***Perry v. Thomas***, 482 U.S. 483, 490 (1987).

Here, plaintiff has indisputably alleged a link to interstate commerce by averring that he worked for defendant Tug Hill in Marshall and Wetzel Counties in West Virginia, that defendant Tug Hill is a "Texas company," and that plaintiff was engaged in commerce or in the production of goods for commerce. Here, it would seem, that defendant Tug Hill has clearly satisfied the aforementioned factors to warrant compelled arbitration.

B. Plaintiff's valid and enforceable arbitration agreement delegates threshold questions of arbitrability to the arbitrator.

The Supreme Court of the United States instructs that "if a valid 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 and White Sales, Inc.***, 139 S.Ct. 524, 530 (2019). This is so even in extreme cases where "the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." ***Id.*** at 529.

Here, the arbitration provision found in the terms of service contains an express delegation clause, stating "[t]he arbitrator has exclusive authority to resolve any dispute relating to the interpretation, applicability, or enforceability of this binding agreement." [Doc. 15-6]. This Court declines to usurp the parties' delegation of authority in this respect.

In support of this conclusion, this Court finds the opinion of Judge Volk highly persuasive. "Our Court of Appeals and a majority of its colleague tribunals have held that the incorporation of the American Arbitration Association Rules or similar" constitutes the "clear and unmistakable" evidence required to conclude that the parties agreed to have an arbitrator decide issues of arbitrability. ***Brown v. Equitrans Midstream Corp.***, 2020 WL 7409533, at *7 (S.D. W.Va. Dec. 17, 2020) (Volk, J.) (citations omitted). According to Judge Volk, a clause providing that the arbitration panel "shall have exclusive authority to resolve disputes of any kind or nature, including enforcement of this Arbitration Agreement" is an "explicit directive reserving questions of arbitrability to the arbitrator." ***Id.*** at 11.

Here, because the parties have expressly delegated threshold questions to the arbitrator, this Court is of the opinion to grant defendant Tug Hill's Motion to Dismiss and to compel arbitration.

C. Defendant Tug Hill does not need to be a signatory for the threshold question of arbitrability to be delegated.

In consideration of the arguments asserted by the parties and the respective authorities associated therewith, this Court finds that the fact defendant Tug Hill is not a signatory to the independent contractor agreement to be of no moment. "[T]he question of whether a purported nonsignatory can enforce an arbitration agreement concerns a question of

arbitrability and, thus, must be decided by the arbitrator." ***Grabowski v. Platepass, LLC***, 2021 WL 1962379, at *4 (N.D. Ill. May 17, 2021) (citing ***Swiger v. Rosette***, 989 F.3d 501, 507 (6th Cir. 2021); ***Eckert/Wrodell Architects v. FJM Props. of Willmar, LLC***, 756 F.3d 1098, 1110 (8th Cir. 2014)).

To be clear, numerous courts have had opportunity to consider whether a delegation clause applies to non-signatories. In ***Robertson v. Enbridge (U.S.) Inc.***, 2020 WL 137375, at *8–9 (W.D. Pa. July 31, 2020), *report and recommendation adopted*, 2020 WL 5702419 (Sept. 24, 2020), the court emphatically rejected the assertion to the contrary:

> This Court is unpersuaded by Plaintiff's arguments which would necessarily require the Court to do an end run around their agreements with [the inspection company] and deprive the [inspection company] of the benefit of its bargain. Instead of initially suing [the inspection company], Plaintiffs sue [the customer of the inspection company]. Plaintiff may only recover against [the customer] if they can show that it acted as the Plaintiffs' 'joint employer' under the FLSA and was responsible for [the inspection company]'s alleged failure to pay overtime. Yet, Plaintiffs attempt to downplay their relationship with [the inspection company] in an apparent effort to avoid their agreement to arbitrate. In light of ***Henry Schein*** and the clear language of the Arbitration Agreement, whether [the customer] may enforce the Arbitration Agreement against Plaintiffs is a question for the arbitrator.

See also **Doucet v. Boardwalk Pipelines, L.P.**, 2021 WL 3674975 (S.D. Tex. Mar. 18, 2021) (finding that the question of whether a non-signatory could enforce the arbitration

agreement was one of arbitrability which had been delegated to the arbitrator); ***Altenhofen v. Energy Transfer Partners, LP***, 2020 WL 7336082, at *1 (W.D. Pa. Dec. 14, 2020) (holding, in FLSA case where plaintiffs sued non-signatory client of their employer: "[w]hether [client defendant] may enforce the agreements, as a non-signatory, is a question reserved for arbitration," and that "Plaintiffs cannot avoid their arbitration agreements by omitting claims against CIS, CEM-TIR or any like 'staffing' company"); ***Snow v. Silver Creek Midstream Holdings, LLC***, 467 F.Supp. 3d 1168, 1170 (D. Wyo. 2020) (holding that the worker's arbitration agreement "as a matter of law . . . covers [the worker's] claim against [defendant]," even though defendant was a non-signatory, because the claim arose out of his employment).

In determining that defendant Tug Hill can enforce the independent contractor agreement and the arbitration provision therein, this Court is required to examine state law contract principles.[4] ***First Options of Chicago, Inc. v. Kaplan***, 514 U.S. 938, 944 (1995); ***Hightower v. GMRI, Inc.***, 272 F.3d 239, 242 (4th Cir. 2001); ***Hightower v. GMRI, Inc.***, 272 F.3d 239, 242 (4th Cir. 2001).

Here, the independent contractor agreement does not contain a choice of law or venue provision. Accordingly, this Court must determine which law applies to the contract enforcement question, just as it would if this Court's jurisdiction was based on diversity of citizenship. Since the case was filed in federal court in West Virginia, West Virginia's choice

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[4]Courts should "apply ordinary state law principles that govern the formation of contracts . . . and the federal substantive law of arbitrability." ***Int'l Paper Co. V. Schwabedissen Maschinen & Anlagen GMBH***, 206 F.3d 411, 417 n.4 (4th Cir. 2000). In other words, federal substantive law applies to questions of arbitrability, while state law governs questions of contract formation.

of law principles for contracts dictate which state law applies. *See* ***Klaxon Co. v. Stentor Elec. Mfg. Co.***, 313 U.S. 487, 496 (1941), *superseded by statute on other grounds.*

The Supreme Court of Appeals of West Virginia states that in contract cases: "[o]ur traditional contract conflict rule gives substantial deference to the state where the contract is made and where it is to be performed, assuming both incidents occurred in the same state." ***Joy v. Chessie Employees Fed. Credit Union***, 186 W.Va. 118, 411 S.E.2d 261 (1991). The rule is subject to two qualifications: (1) that the parties have not made a choice of applicable law in the contract itself; and (2) the law of the other state does not offend West Virginia's public policy. ***Id.***

Here, plaintiff electronically signed the arbitration agreement and subsequently performed work in West Virginia. When the subject dispute emerged, he sought relief in federal court in West Virginia. Therefore, West Virginia law should govern whether defendant Tug Hill, a non-signatory, can enforce the arbitration agreement.

1. Defendant Tug Hill is a third-party beneficiary to the underlying agreement.

Third-party beneficiaries have standing to recover under a contract clearly intended for their benefit. West Virginia law provides that if a "covenant or promise be made for the sole benefit of a person with whom it is not made . . . such person may maintain, in his own name, any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise." W.Va. Code § 55-8-12. *See* ***Ohio Cty. Dev. Auth. v. Pederson & Pederson, Inc.***, 2010 WL 391616 (N.D. W.Va. Jan. 26, 2010) (Stamp, J.) (refusing to dismiss on standing grounds

where it was alleged that the defendant contractor would provide services and materials to another contractor for the benefit of plaintiff-owner). Even if a contract is not made specifically for the benefit of a non-party, the non-party may enforce it where the surrounding circumstances suggest that there was no other reason for the contract to have been made. ***Hatfield v. Wilson***, 2012 WL 2888686, at *3 (S.D. W.Va. July 13, 2012) (Chambers, J.).

Furthermore, the contract does not need to be made only for the benefit of the third-party beneficiary; rather, a party may be a third-party beneficiary to a contract if the contract was made and intended to be for the benefit of a class of persons definitely and clearly shown to come within the terms of the contract and the third-party beneficiary party is a member of that class. ***Slone v. State Auto Prop. & Cas. Ins. Co.***, 2021 WL 190938 (S.D. W.Va. Jan. 19, 2021) (Copenhaver, J.) (finding that a provision in an insurance contract allowing for recovery of medical expenses in the event of injury on property owner's premises benefitted the non-policy holding guest injured on the property).[5]

Here, the independent contractor agreement demonstrates an intent to make defendant Tug Hill a third-party beneficiary.[6] The very first sentence in the independent

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[5]The parties, as well as RUSCO, are engaged in a quibble as to whether West Virginia law or Texas law should apply on this point. While this Court has found that West Virginia law governs, the same result would be reached in the event this Court were to apply Texas law. *See* ***First Bank v. Brumitt***, 519 S.W.3d 95, 102 (Tex. 2017) (finding where the signatories intended to secure a benefit to a third party and entered into a contract for the third party's benefit, the third party may enforce the agreement as a third-party beneficiary).

[6]This Court finds plaintiff's reliance on ***Hiser v. Nzone Guidance, LLC***, 799 F.App'x 247 (5th Cir. 2020) in an attempt to refute this finding to be unpursuasive. Notably, that case is distinguishable because RUSCO did not attempt to intervene and the client there, Nzone Guidance, LLC, raised different arguents--most notably, the issue of arbitrability was not even before the court.

contractor agreement establishes as much. "This Agreement . . . constitutes a binding agreement . . . to provide freelance services to third party companies (each a 'Company' or collectively the 'Companies')" with whom RUSCO contracted. [Doc. 15-4]. Moreover, defendant Tug Hill is provided numerous rights and benefits by virtue of the agreement, which only defendant Tug Hill could enforce, including work performance, indemnification rights, and rights related to confidentiality. [Id.].

Because the independent contractor agreement provides specific–and significant–benefits to defendant Tug Hill, it is a third-party beneficiary under West Virginia law. Accordingly, defendant Tug Hill should be permitted to enforce plaintiff's agreement to resolve "every dispute" arising out of his work on defendant Tug Hill projects, through RUSCO, in binding arbitration.[7] [8]

CONCLUSION

For the foregoing reasons, the Motion to Intervene [**Doc. 15**] is **GRANTED**. The Clerk is instructed to note RUSCO Operating, LLC as a defendant party in this matter. Additionally, defendant Tug Hill Operating, LLC's Motion to Dismiss Plaintiff's Complaint Pursuant to Federal Rules of Civil Procedure 12(b)(1), (6), and (7) [**Doc. 21**] is **GRANTED**. Accordingly,

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[7]Defendant Tug Hill also raises the argument that the doctrine of estoppel prevents plaintiff from circumventing his obligation to arbitrate wage and hour claims. *See* [Doc. 22 at 24]. Having found arbitration required and appropriate on the other grounds addressed herein, this Court need not evaluate the propriety of this argument.

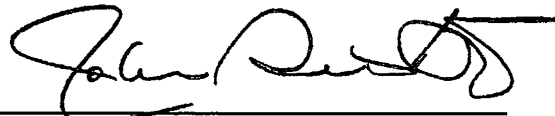
[8]Defendant Tug Hill argues that the above-captioned matter should be subject to dismissal for plaintiff's failure to join an indispensable party pursuant to Fed. R. Civ. Pro. 12(b)(7). Having granted RUSCO's Motion to Intervene, this argument is moot.

this matter is hereby **DISMISSED**, and the parties are hereby **COMPELLED TO ARBITRATION** for resolution of the subject claims.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record in this matter.

DATED: April 12, 2022.



JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

LASTEPHEN ROGERS, Individually
and for Others Similarly Situated,

Plaintiffs,

v.

CIVIL ACTION NO. 5:21-CV-199
Judge Bailey

TUG HILL OPERATING, LLC,

Defendant.

SCHEDULING ORDER

Pursuant to Federal Rules of Civil Procedure ("FED. R. CIV. P.") 16(b) & 26(f), and the Local Rules of Civil Procedure ("LR CIV P"), it is hereby **ORDERED** that the below listed dates be adopted subject to the definitions following hereinafter:

1. Intermediate Pretrial Conference: **At Parties' Request**

2. Mediation on or Before: **July 1, 2024**

3. Joinder & Amendments: **December 31, 2023**

4. Expert Disclosures:
   a. With Burden: **January 31, 2024**
   b. Without Burden: **February 28, 2024**

5. Examination/Inspection Deadline: **N/A**

6. Discovery Completion: **April 30, 2024**

*To the extent bifurcated discovery was requested by defendant, that request is denied.

7. Motion Practice/Dispositive Motions: **May 17, 2024**
   a. Responses: **June 7, 2024**
   b. Replies: **June 17, 2024**

Motion for Conditional Certification **December 13, 2023**
   a. Responses: **January 3, 2024**
   b. Replies: **January 10, 2024**

8. FED.R. 26(a)(3) Disclosures: **July 15, 2024**
   a. Objections: **July 29, 2024**

9. Voir Dire, Jury Instructions, and Verdict Form: **July 15, 2024**
   a. Objections: **July 29, 2024**

10. Motions in Limine: **July 15, 2024**
    a. Objections: **July 29, 2024**

11. Biographical Sketches: **July 15, 2024**

12. Joint Pretrial Order: **August 5, 2024**

13. Final Pretrial Conference: **August 15, 2024, at 2:00 p.m., in Wheeling, WV**

14. Jury Trial: **August 20, 2024, at 9:00 a.m., in Wheeling, WV**

1. Intermediate Pretrial Conference: At parties' request.

2. Mediation: The parties shall have mediated this matter in good faith on or before **July 1, 2024**. If the parties employ a private mediator, lead counsel for the plaintiff (or an attorney representing a defendant if the plaintiff is appearing *pro se*) shall instruct the private mediator to complete the mediation report form (which is available at this Court's website at www.wvnd.uscourts.gov/documents/forms) and submit the completed mediation report form to the appropriate clerk's office within **ten** (10) days following the mediation.

3. Joinder and Amendments: Motions to join additional parties, motions to amend pleadings, and any crossclaim or counterclaim and the reply thereto, as well as any similar motions, shall be fully effected by **December 31, 2023**.

4. Expert Disclosures: The party bearing the burden of proof on an issue (normally the plaintiff) shall make the disclosures required by FED. R. CIV. P. 26(a)(2)(A) and (B) for that issue to all other parties or their counsel no later than **January 31, 2024.**

The party not bearing the burden of proof on an issue (normally the defendant) shall make the disclosures required by FED. R. CIV. P. 26(a)(2)(A) and (B) for that issue to all other parties or their counsel no later than **February 28, 2024.**

The disclosures described in FED. R. CIV. P. 26(a)(2)(B) shall not be required of physicians and other medical providers who examined or treated a party or party's decedent unless the examination was for the sole purpose of providing expert testimony in the case. However, their testimony shall be limited to the medical records unless designated as expert witness for the purpose of giving opinion testimony (i.e. permanent disability, future medical treatment, etc.).

Upon by leave of this Court may parties provide disclosures or any evidence that is intended solely to contradict or rebut evidence on the same issue identified by another party under FED. R. CIV. P. 26(a)(2)(B).

5. Examinations/Inspections: Pursuant to FED. R. CIV. P. 34 and 35, all independent physical or mental examinations or inspection of property shall be completed by **N/A**.

6. Discovery Completion: All discovery shall be fully served and completed by **April 30, 2024**. "Completed discovery" as used in FED. R. CIV. P. 16(b) means that all discovery requests are to be filed far enough in advance to be completed as required by the rules before the discovery deadline. Objections, motions to compel and all other motions relating to discovery in this civil action should be filed as soon as the problem arises, but are to be filed no later than one week after the discovery completion date. The Court will not consider any untimely filed discovery related motions.

The term "all discovery" in the preceding definition of "completed discovery" includes the disclosures required by FED. R. CIV. P. 26(a)(1), (2), and (b)(5), but does not include the disclosures required by FED. R. CIV. P. 26(a)(3).

Parties have a continuing obligation to supplement their responses beyond the discovery cut-off date as provided in FED. R. CIV. P. 26(e). The parties should refer to LR Civ P 5.01, LR Civ P 26.01-26.04, LR Civ P 33.01, LR Civ P 34.01, LR Civ P 36.01, LR Civ P 37.02 for further instructions on discovery practice.

Motions to compel are generally referred to the Magistrate Judge. However, the Court, if available, is open to conducting telephone hearings if serious disagreements threaten to terminate the conduct of depositions or examinations. If a motion to compel is pending for a decision more than thirty (30) days after filing, the burden is upon the moving party to inform the Court as to whether this status will interfere with other deadlines contained in this Scheduling Order.

The conduct of any discovery which would require a later time limit shall be permitted only on the order of the Court or by filed stipulation of the parties, and only in cases that will not be delayed for trial thereby.[1] The parties should be aware that a stipulation to the continuance of discovery anticipates no discovery dispute and, therefore, this Court will not hear discovery disputes arising during the stipulated continuance.

7. <u>Motion Practice / Dispositive Motions</u>:

a. Motion Practice before the Court is controlled by LR CIV P 7.02. Review this rule for more specific detail of the Northern District's motion practice. Motions shall be concise and no longer than five (5) pages. Supporting memoranda of law shall be no

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[1] Extension of the discovery deadline does not change the other deadlines set forth herein nor shall it be a basis for seeking extension of those deadlines. In particular, the deadline for dispositive motions generally cannot be changed without affecting the trial date. In considering to extend discovery, the parties should give thought as to any possible impact on contemplated dispositive motions.

longer than twenty-five (25) pages. As this Court intends to review all cases cited, counsel must ensure that the cases relied upon stand for the proposition, legal or factual, for which they are cited. The Court takes this requirement very seriously and will impose sanctions for willful violations.

b. All Dispositive Motions, as well as deposition transcripts, admissions, documents, affidavits, and any other such matters in support thereof, shall be filed no later than **May 17, 2024**.

Dispositive motions that are mature for decision may be made at any earlier time. Any such motion must be supported by a memorandum at the time the motion is filed with the Clerk. All Counsel are instructed that dispositive motions should be filed as soon as the matter is mature. The above date is a "no-later-than" date.

Memoranda in opposition to such motions filed on the deadline date shall be delivered to the Clerk with copies served upon opposing counsel on or before **June 7, 2024**. Supporting memoranda of law shall be no longer than twenty-five (25) pages.

Any reply memoranda shall be delivered to the Clerk with copies served upon opposing counsel on or before **June 17, 2024**. All dispositive motions unsupported by memoranda will be denied without prejudice. LR Civ P 7.02. Supporting memoranda of law shall be no longer than fifteen (15) pages.

Factual assertions made in memoranda should be supported by specific references to affidavits, depositions or other documents made a part of the record before the Court. Copies of the supporting documents, or relevant portions thereof, should be appended to the memoranda. The parties may refer to LR Civ P 7.02 for details on motion practice

before this Court.

8. Pretrial Disclosures FED. R. CIV. P. 26(a)(3): Final pretrial disclosures, to include trial witness list, depositions and interrogatories for use at trial, and trial exhibit lists as further defined by FED. R. CIV. P. 26(a)(3) shall be filed and exchanged on or before **July 15, 2024**. A trial exhibit binder from each party will be exchanged and sent to the Judge's law clerk on the same date, with exhibits marked and tabbed in numerical sequence. Original exhibits shall be submitted to the Clerk at trial and should not be tendered to the Clerk prior to trial.

a. **Objections:** Objections to the above must be filed in writing and submitted by **July 29, 2024**, for consideration at the Final Pretrial Conference.

9. Jury Instructions, Voir Dire, and Verdict Form: Proposed jury instructions of law are to be provided on substantive theories of recovery or defense, on damages and on evidentiary matters peculiar to the case, together with citation to pertinent statutory and/or case authority (and along with a copy of the specific page reference attached thereto). The instructions are to be numbered consecutively to identify the party submitting them, to have a title setting forth the subject matter of the instruction and to be set forth on separate pages. No more than twenty (20) instructions are to be submitted unless leave is granted by the Court. Special interrogatories and verdict forms, if any are appropriate to the case, will also be provided as well as all proposed voir dire questions requested by counsel for submission to the jury by the Court and shall be exchanged by counsel and delivered to the Clerk no later than **July 15, 2024**. These three items should not be filed in a combined document but should be filed individually with specific document titles and

a case style.

a. **Objections:** Objections to all of the above must be filed separately in writing with a specific document title and case style no later than **July 29, 2024.** In addition, the Court will not accept instructions after the Final Pretrial Conference unless such instructions result from amending those previously submitted.

(If the instructions and voir dire in this case are typed on a computer, counsel are requested to provide to the court a disk labeled with the case name and the party proposing the instructions in a format compatible with WordPerfect 12. The envelope containing the disk should be marked "Contains Disk -- Do Not X-Ray -- May Be Opened for Inspection." The disk will be returned to counsel if requested.)

10. Motions in Limine: All motions in limine must be accompanied by short statements (generally not more than a paragraph) of applicable memoranda of law and filed with the Clerk not later than **July 15, 2024**. All motions in limine must be numbered consecutively with a title listing the subject matter of the motion.

a. **Responses:** Responses to such motions, which also must be accompanied by a short statement of applicable law, shall be filed by counsel on or before **July 29, 2024.**

11. Biographical Sketches: Biographical sketches of any proposed expert witness shall be filed with the Court and with opposing counsel by **July 15, 2024.**

12. Joint Pretrial Order: A joint pretrial order (meaning that the parties combine their presentations into one document) shall be submitted to the Court not later than **August 5, 2024.** The joint pretrial order **shall contain ONLY the matters set forth below, unless additional items are added by joint agreement of the parties,** in the

following order:

(1) the pretrial disclosures required by FED. R. CIV. P. 26(a)(3), including witness and exhibit lists and any objections thereto;

(2) contested issues of law requiring a ruling before trial;

(3) a realistic, brief statement by counsel for plaintiff(s) and third-party plaintiff(s) of essential elements that must be proved to establish any meritorious claim remaining for adjudication and the damages or relief sought, accompanied by supporting legal authorities;

(4) a realistic, brief statement by counsel for defendant(s) and third-party defendant(s) of essential elements that must be proved to establish any meritorious defense(s), accompanied by supporting legal authorities. Corresponding statements must also be included for counterclaims and cross-claims;

(5) a brief summary of the material facts and theories of liability or defense;

(6) a single listing of the contested issues of fact and a single listing of the contested issues of law, together with case and statutory citations;

(7) stipulations;

(8) suggestions for the avoidance of unnecessary proof and cumulative evidence;

(9) suggestions concerning any need for adopting special procedures for managing potentially difficult or protracted aspects of the trial that may involve complex issues, multiple parties, difficult legal questions or unusual proof problems;

(10) a statement of all damages claimed, including an itemized list of special damages;

(11) a statement setting forth a realistic estimate of the number of trial days

required; and

(12) any other matters relevant for pretrial discussion or disposition, including those set forth in FED. R. CIV. P. 16.

13. Final Pretrial Conference: The Final Pretrial Conference shall be held on **August 15, 2024, at 2:00 p.m., in Wheeling, West Virginia**. The conference shall be attended by lead trial counsel for each represented party and all unrepresented parties. Counsel shall be prepared to participate fully and to discuss all aspects of the case as well as the matters set forth in the Joint Pretrial Order previously submitted.

At least one of the attorneys for each party and all unrepresented parties participating in the Pretrial Conference, or any conference before trial, shall have authority to make decisions as to settlement, stipulations and admissions on all matters that participants reasonably anticipate may be discussed. Counsel and parties are subject to sanctions for failure to comply with this requirement and for lack of preparation specified in FED. R. CIV. P. 16(f) and LR CIV P 37.01 respecting pretrial conferences or orders.

14. Jury Trial: Jury selection in this action shall be held on **August 20, 2024, at 9:00 a.m., in Wheeling, West Virginia**. Trial will commence upon the completion of jury selection.

Testing of any courtroom technology, if intended to be used at trial, shall be conducted at least **three (3) business days before** the commencement of trial.

The Court's practice is to keep side-bar conferences to the absolute minimum and will generally allow objections to be more fully explained on the record after testimony for the day has concluded and the jury has been released.

A party or parties requesting a continuance must contact all other parties to determine three possible dates to which to move the deadline or hearing. The moving party must specify these three possible dates within the motion to continue. LR Gen P 88.02. If any party or parties object to a continuance, that fact shall be noted in the motion.

15. Deadlines Final: The time limitations set forth above shall not be altered except as set forth in LR Civ P 16.01(f).

16. Finality of Scheduling Order: Unless authorized by the Court, the above dates and requirements of this Scheduling Conference Order are **FINAL**. Therefore, **NO** additional evidence developed as a result of deviations from the above will be admissible at trial, and no untimely motions will be considered.

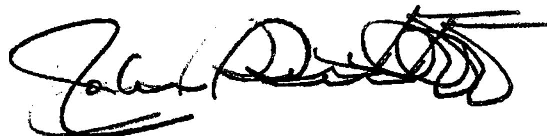
All dates for submissions, deliveries, and filings with the Clerk of the District Court refer to the date the materials must be actually received and not the mailing date.

As a final matter, defendant's Motion to Stay [**Doc. 49**] is **DENIED**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: October 26, 2023.



JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

EXHIBIT E

AGREEMENT BETWEEN INDEPENDENT PROFESSIONAL & RIGUP FOR USE OF RIGUP SERVICE

This Agreement Between Independent Professional & RigUp For Use Of RigUp Service (the "Agreement") constitutes a binding agreement between you, an independent professional ("you") and RUSCO Operating, LLC, a wholly owned subsidiary of RigUp, Inc. ("RigUp" "us" or "we") governing your use of the Service (as defined in the RigUp Terms of Service at https://www.rigup.com/tos) to provide freelance services to third party companies (each a "Company" or collectively the "Companies"). You hereby agree: (a) to comply with this Agreement; and (b) that you have read, understand, and agree to (i) the RigUp Terms of Service located at https://www.rigup.com/tos ("Terms"), (ii) the RigUp Privacy Policy located at https://www.rigup.com/privacy (the "Privacy Policy"), each of which are incorporated into this Agreement by reference. If there is a conflict between this Agreement and the Terms or Privacy Policy, then this Agreement will govern with respect to the conflicting terms only. Capitalized terms used but not defined in this Agreement have the meaning specified in the Terms. The parties hereby agree as follows:

1. **Independent Professional.** By signing this Agreement, you are asserting that you are an independent professional and entrepreneur who wishes to: (a) digitize and modernize your business; (b) be introduced to new clients by RigUp; and (c) engage RigUp for its Service to accomplish these entrepreneurial goals.

2. **General.** RigUp provides the Service to digitize and market your business, including connecting you with Companies. RigUp does not provide professional services. RigUp offers information and a method for Companies to obtain, and you to provide, services, but does not and does not intend to provide such services. RigUp and you intend for you to provide services to Companies strictly as an independent professional, and not as an employee, worker, agent, joint venture, partner or franchisee of RigUp or any Company for any purpose.

3. **Project.**
    1. From time to time, Companies will post proposed projects via the Service, setting forth the nature of the services required (the "Project"). A Project proposed may include desired skills, location, date, start time (as applicable), project length (as applicable), proposed pay rate, invoicing terms and any required certifications ("Project Details"). If a Project becomes available in the location you have indicated on the Service, then you may be notified of the availability of the Project via the Service. You may express interest in such Project and if the Company accepts your expression of interest, then you will be notified via the Service and you will be responsible for completing the Project at the time, on the date, and at the place specified in the Project Details, unless otherwise agreed between you and the Company. RigUp does not guarantee any minimum number of Projects

will be available to you at any time during the term of this Agreement.

2. You agree that your name, phone number, and other contact information will be made available to Company by RigUp after the Project is confirmed. Projects may not last for as long as originally set forth in the Project Details.

3. RigUp is here to serve you – not vice-versa. Accordingly, RigUp has no control or any right to determine (a) when you use the Service, (b) if and when you log into the Service, (c) for which Projects you express interest or accept, if any, (d) what you charge for Projects (unless you fail to designate a fee, in which case the default fee is used), and (e) the manner or means by which you complete Projects. You and the Company solely negotiate and determine (x) when and where you perform Projects, (y) what you wear while performing projects, and (z) any additional bonuses or gratuities arising out of such Projects. You are solely responsible for costs or expenses incurred by you in connection with the performance of Projects.

4. **Fees.** The fee charged to a Company on your behalf shall be the fee described in the Project Details unless you and the Company notify RigUp in writing prior to the completion of the Project that you and the Company have negotiated a different fee ("Professional Fee"). Separate from, or in addition to, the Professional Fee, RigUp may also charge a fee for using the Services. You are responsible for the costs of any background checks, drug tests, or other similar expense items required by Companies in order for you to work on a Project, and such fees shall be deducted from any amounts owed to you. Unless otherwise directed by you in writing, RigUp will invoice the Company on your behalf for the Professional Fee according to the terms agreed to in the Project Details. RigUp will forward you the Professional Fee minus RigUp's service charge for your use of the Service (the "Service Fee"). The Service Fee shall be a percentage of the invoice amount. The applicable percentage can be found in your onboarding packet for the applicable project, unless you and RigUp negotiate and memorialize in a signed writing a different service charge. RigUp's role in the payment process is solely limited to payment processing and transmission between you and the Company. Accordingly, you accept the sole risk that a Company will not pay the Professional Fee for Projects completed.

5. **Interactions with Companies.** Any interactions or disputes between you and a Company are solely between you and that Company. RigUp and its licensors shall have no liability, obligation or responsibility for any interaction between you and any Company.

6. **License.** You grant RigUp a license to use your name, image, voice and/or likeness in connection with RigUp's Services to advertise and promote the Service, in order to identify you to Companies, and for any other purpose deemed appropriate by RigUp in its

reasonable discretion (except to the extent prohibited by law).

7. **Text Messaging.** You agree to RigUp's sending SMS text messages directly to you in order to facilitate the performance of Projects. Standard call or message charges or other charges from your phone carrier may apply to calls or text (SMS) messages RigUp sends to you. You may opt-out of receiving text (SMS) messages from RigUp by replying with the word "STOP" to a text message from RigUp, but you acknowledge that opting out of text (SMS) messages may impact your ability to use the Service.

8. **Relationship.** Neither this Agreement, nor your completion of Projects will create an association, partnership, joint venture, or relationship of principal and agent, master and servant, or employer and employee, between you and RigUp. Without limiting the generality of the foregoing, you are not authorized to bind RigUp to any liability or obligation or to represent that you have any such authority. You acknowledge and agree that you are obligated to report as income all compensation received by you from Companies arising out of or related to the Service. You agree to and acknowledge the obligation to pay all self-employment and other taxes on such income.

9. **Representations and Warranties.** You represent and warrant to RigUp that (a) you have the legal right to perform Projects as contemplated by this Agreement in the United States, (b) you are fully-licensed and/or certified (to the extent required by law) and authorized to complete Projects within the jurisdiction in which you intend to work, and have the required skill, experience, and qualifications to complete Projects, (c) you will perform Projects in a professional and diligent manner in accordance with best industry standards for similar services, and (d) you will perform Projects in accordance with all applicable laws, rules, and regulations. You affirm under penalty of perjury that you are an incorporated entity or sole proprietorship that operates an independent business performing work the same as or similar to the Projects offered via the Service and, prior to engaging RigUp for the Service, you had multiple clients for which you performed projects the same as or similar to the Projects offered via the Service. As an independent professional, you are assuming the responsibilities of an employer for the performance of a Project, and you hereby affirm you are not entitled to, and are hereby waiving, any claim for workers compensation benefits under either RigUp's or a Company's workers' compensation insurance policy.

10. **Indemnification.** You will indemnify and hold the RigUp Parties and Company harmless from and against all losses, damages, liabilities, deficiencies, actions, judgments, interest, awards, penalties, fines, costs or expenses (including reasonable legal fees) arising out of or resulting from (a) bodily injury, death of any person, theft or damage to real or tangible, personal property resulting from your acts or omissions, (b) bodily injury, death or property damage suffered by you or your employees, (c) your breach of any representation or warranty in this Agreement, (d) any negligent, reckless or intentionally wrongful act by you or your assistants, employees, contractors or agents, (e) a

determination by a court or agency that you are an employee of RigUp or a Company, or (f) any claim by a Company arising from or related to you or your assistants, employees, contractors or agents services for such Company.

11. **Disclaimer.** You are solely responsible for completing Projects. RigUp is not responsible or liable for the actions or inactions of a Company or other third party in relation to Projects as completed by you. You understand, therefore, that by using the Service, you will be introduced to third parties for whom RigUp has not conducted any background check, that may be potentially dangerous, and that you use the Service at your own risk. RIGUP HAS BEEN ENGAGED BY COMPANIES TO INTRODUCE YOU TO THEM FOR THE PURPOSES OF COMPLETING PROJECTS. RIGUP WILL NOT ASSESS THE SUITABILITY, LEGALITY OR ABILITY OF ANY PROJECTS OR COMPANIES AND YOU EXPRESSLY WAIVE AND RELEASE RIGUP FROM ANY AND ALL LIABILITY, CLAIMS OR DAMAGES ARISING FROM OR IN ANY WAY RELATED TO PROJECTS OR COMPANIES. RIGUP WILL NOT BE A PARTY TO DISPUTES OR NEGOTIATIONS OF DISPUTES, BETWEEN YOU AND COMPANIES. RESPONSIBILITY FOR THE DECISIONS YOU MAKE REGARDING PROJECTS OFFERED VIA THE SERVICE (WITH ALL THEIR IMPLICATIONS) RESTS SOLELY WITH YOU. RIGUP WILL NOT ASSESS THE SUITABILITY, LEGALITY OR ABILITY OF ANY SUCH THIRD PARTIES AND YOU EXPRESSLY WAIVE AND RELEASES RIGUP FROM ANY AND ALL LIABILITY, CLAIMS, CAUSES OF ACTION, OR DAMAGES ARISING FROM YOUR USE OF THE SERVICE, OR IN ANY WAY RELATED TO THE THIRD PARTIES INTRODUCED TO YOU BY THE SERVICE.

12. **Term; Termination.** This Agreement will be effective as of the date you indicate your acceptance by clicking “I AGREE”, and will remain in effect until terminated as set forth in this Section. You or RigUp may terminate this Agreement by deleting your account on the Service, with or without notice. Sections 1, 2, and 8 – 16 will survive termination of this Agreement.

13. **Assignment.** You may not assign this Agreement without RigUp’s prior, written consent. RigUp may assign its rights and obligations under this Agreement at any time.

14. **Dispute Resolution.** You acknowledge and agree that the terms of this Agreement are subject to Section 24 of the Terms.

15. **Confidential Information.** You must keep RigUp’s confidential information absolutely confidential, except as required or provided by law, including but not limited to information about other Companies, Projects, Project Details and RigUp’s business model. This section does not apply to information that: (a) was publicly known and made generally available in the public domain prior to the time of disclosure by RigUp; (b) becomes publicly known and made generally available after disclosure by RigUp to you through no action or inaction on your part, (c) is already in your possession at the time of disclosure, as shown by your files and records; or (d) is obtained by you from a third

party without a breach of the third party's obligations of confidentiality.

16. **Miscellaneous.** If any provision of the Agreement is held to be invalid or unenforceable, such provision shall be struck and the remaining provisions will be enforced to the fullest extent under law. RigUp's failure to enforce any right or provision in this Agreement will not constitute a waiver of such right or provision unless acknowledged and agreed to by RigUp in writing. This Agreement, with the Terms and the Privacy Policy, comprises the entire agreement between you and RigUp and supersedes all prior or contemporaneous negotiations, discussions or agreements, whether written or oral, between the parties regarding the subject matter contained in this Agreement.

workrise™

Digital Record of Independent Professional Agreement Acceptance

Name	**Email**	**Sign Up**
Lastephen C. Rogers	stevodrillingconsultant93@yahoo.com	January 25, 2019

*On **January 25, 2019**, Lastephen C. Rogers reviewed and agreed to the Workrise Independent Professional Agreement (**Version 2**) through the Workrise platform.*

Exhibit 3

EXHIBIT F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA
WHEELING DIVISION

LASTEPHEN ROGERS, Individually and for Others Similarly Situated, v. TUG HILL OPERATING, LLC	Case No. 5:21-cv-199 (JPB) Jury Trial Demanded FLSA Collective Action

BRIEF IN SUPPORT OF ROGERS'S MOTION FOR CONDITIONAL CERTIFICATION

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ATTORNEYS FOR PLAINTIFF AND THE PUTATIVE CLASS MEMBERS

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TABLE OF EXHIBITS

Exhibit No.	Description
1	Proposed Notice and Consent Forms
2	Proposed Email, Text, and Phone Scripts
3	Declaration of Lastephen Rogers
4	Tug Hill Discovery Responses
5	RigUp Invoices

1. Introduction.

Rogers filed this collective action on behalf of himself and other Tug Hill Company Men paid a day rate without overtime in violation of the Fair Labor Standards Act (FLSA). Doc. 1. Rogers claims Tug Hill uniformly misclassified he and other Tug Hill Company Men as independent contractors and failed to pay them overtime as required by the FLSA. Rogers moves for conditional certification and notice to be sent (via mail, email, and text message) to:

> **All company men employed by or performing work on behalf of Tug Hill classified as independent contractors and paid a day-rate without overtime during the past three years (the "Day Rate Company Men").**

As shown below, Rogers easily satisfies his modest burden. The Court should thus grant this motion and authorize Rogers to send notice of this lawsuit to the Day Rate Company Men.

2. Relevant Facts and Background.

"Tug Hill Operating is a privately held, independent oil & gas exploration company focused on drilling and producing oil and clean-burning natural gas in the continental United States." https://tughilloperating.com/about-us/ (last visited December 4, 2023). Tug Hill employs company men to "oversee the rig site[s] and make sure the operations [are] being performed in accordance with Tug Hill's procedures and instructions." Doc. 1 ¶ 24.

Rogers was employed by Tug Hill as a company man from January 2019 until July 2020. Ex. 3 ¶ 3. Rogers says Tug Hill hired, fired, supervised and controlled, set pay, determined hours, and approved time sheets with respect to Rogers and the Day Rate Company Men. Doc. 1 ¶¶ 19-21, 28, 31-33, 35, 40-41, 43; Ex. 3 ¶¶ 6, 8-9, 18-19. Instead of being paid a guaranteed salary (or hourly with time and a half for overtime), Rogers and the Day Rate Company Men were paid a day rate regardless of the number of hours worked over 40 in a workweek. Ex. 3 ¶¶ 5-7. Rogers and the Day Rate Company Men "never received any guaranteed amount of money for the weeks [they] worked." *Id.* ¶ 8. They were "not paid for days [they] did not work." *Id.* ¶¶ 8, 14-16. They

"[were] only paid based on the number of days [they] worked." *Id.* The only documents Tug Hill has produced thus far also confirm Rogers was paid a day rate as he says. *See* Ex. 4. And by trying to push the blame onto RUSCO,[1] Tug Hill admits it doesn't have any evidence that contradicts how Rogers says he and the Day Rate Company Men were paid. *See* Ex. 4 at 6 (Interrogatory No. 2), 8 (Interrogatory No. 3), 13 (Interrogatory No. 6), 15 (Interrogatory No. 7), 16 (Interrogatory No. 8), 18 (Interrogatory No. 9), 18 (Interrogatory No. 10), 21 (Interrogatory No. 12), 23 (Interrogatory No. 14).

In fact, the only reason Tug Hill gave for why Rogers and the other Day Rate Company Men are not similarly situated is that they "*may have* contracted with different entities at different times to perform work at different locations subject to different compensation arrangements." *Id.* at 26 (Interrogatory No. 16) (emphasis added). Even though FLSA compliance is Tug Hill's responsibility (*see Schultz,* 466 F.3d at 305 (quoting 29 C.F.R. § 791.2(a)), It says it "does not have sufficient information regarding the putative collective to know the details, but it expects that there will be differences[.]" *Id.* But Rogers definitively says (based on his personal knowledge) that he and the Day Rate Company Men were all paid the same way "regardless of the particular job duties or job location. Ex. 3 ¶ 7. And the class is defined as only those Company Men who were paid a day rate, so they were (by definition) all paid the same way.

At bottom, Rogers says he and the Day Rate Company Men are similarly situated because they were all paid the same way: a day rate without overtime. *Id.* ¶¶ 5-7. Rogers and the Day Rate

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[1] As the parties and this Court (Doc. 33 at 13 n.1) have done in the past, Rogers refers to Workrise Technologies, Inc. f/k/a RigUp, Inc. as RUSCO. Moreover, any attempt by Tug Hill to say it is not responsible for FLSA compliance is wrong because "[a]ll joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the [FLSA], including the overtime provisions." *Schultz v. Cap. Int'l Sec., Inc.,* 466 F.3d 298, 305 (4th Cir. 2006) (quoting 29 C.F.R. § 791.2(a)).

Company Men customarily worked more than 40 hours a week. *Id.* ¶¶ 9, 15, 18. Despite regularly working more than 40 hours per week, they were paid a flat daily rate regardless of the number of hours worked. Ex. 3 ¶¶ 5-7. The Supreme Court recently held day-rate workers (like Rogers and the Day Rate Company Men) are entitled to overtime. *Helix Energy Sols. Grp., Inc. v. Hewitt,* 598 U.S. 39, 44 (2023)). Tug Hill admits it doesn't have any evidence to contradict how Rogers says he and the Day Rate Company Men were paid. *See* Ex. 4 (Tug Hill's Interrogatory Answers). The Court should thus grant Rogers's motion and authorize notice.

3. Legal Standard.

A. The standard for conditional certification (step one) is fairly lenient.

"Under the FLSA, plaintiffs may institute a collective action against their employer on their own behalf and on the behalf of other employees." *Purdham v. Fairfax Cnty. Pub. Sch.,* 629 F. Supp. 2d 544, 547 (E.D. Va. 2009) (citing 29 U.S.C. § 216(b)). "The Supreme Court has held that, in order to expedite the manner in which collective actions under the FLSA are assembled, 'district courts have discretion in appropriate cases to implement ... § 216(b) ... by facilitating notice to potential plaintiffs.' *Id.* (quoting *Hoffmann–La Roche, Inc. v. Sperling,* 493 U.S. 165, 169 (1989)); *see also Shaffer v. Farm Fresh, Inc.,* 966 F.2d 142, 147 (4th Cir.). "[C]ourts generally follow a two-stage approach when deciding whether the named plaintiffs in an FLSA action are 'similarly situated' to other potential plaintiffs...." *Id.* (quoting *Parker v. Rowland Express, Inc.,* 492 F.Supp.2d 1159, 1164 (D.Minn.2007)). "The 'notice stage' comes first; if the court makes the preliminary determination that notice should be given to potential class members, it 'conditionally certifies' the class and potential class members can then 'opt-in.'" *Id.* (citing *Parker,* 492 F.Supp.2d at 1164 & *Hipp v. Liberty Nat'l Life Ins. Co.,* 252 F.3d 1208, 1218 (11th Cir.2001)). "After most of the discovery has taken place and the matter is ready for trial, the defendant can initiate the second

stage of inquiry by moving to 'decertify' the class. At that point, the court makes a factual determination as to whether the class is truly 'similarly situated.'" *Id.*

The first stage (where this case is now) involves conditionally certifying a class for notice purposes using a low standard of proof. *Hargrove v. Ryla Teleservices, Inc*., No. 2:11CV344, 2012 WL 489216, at *1 (E.D. Va. Jan. 3, 2012), *adopted,* No. 2:11CV344, 2012 WL 463442 (E.D. Va. Feb. 13, 2012). The "fairly lenient standard" is appropriate because courts typically have only minimal evidence at this stage as discovery is not yet complete. *Choimbol v. Fairfield Resorts, Inc.*, 475 F. Supp. 2d 557, 562 (E.D. Va. 2006). Plaintiffs "seeking conditional certification need only make a modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law." *Id*. at 564. At the notice stage, "courts appear to require nothing more than substantial allegations that the putative class members were together the victims" of a common policy or plan. *LaFleur v. Dollar Tree Stores, Inc.,* No. 2:12-CV-00363, 2012 WL 4739534, at *3 (E.D. Va. Oct. 2, 2012). The inquiry at the notice stage is "necessarily limited because the exact contours of the representative class members is largely unknown." *Choimbol*, 475 F. Supp. 2d at 563. "Specifically, the Court will examine whether the plaintiffs raise a similar legal issue as to coverage, exemption, or nonpayment or minimum wages or overtime arising from at least a manageably similar factual setting with respect to their job requirements and pay provisions, but their situations need not be identical." *Id*. (internal quotations and citations omitted). This determination is usually made based only on the pleadings and affidavits. *Calderon v. Geico Gen. Ins. Co*., No. RWT 10CV1958, 2011 WL 98197, at *3 (D. Md. Jan. 12, 2011); *see also Williams v. Long*, 585 F.Supp.2d 679, 685 (D. Md. 2008) (granting Plaintiffs' motion for conditional certification) ("[T]his Court will adhere to the practice set forth in Montoya and accept the declarations of Ms. Sachs and Ms. Stuck as evidence supporting the

Plaintiffs' Motion."); *Montoya v. S.C.C.P. Painting Contractors, Inc.*, 2008 WL 554114, *2 (D. Md. Feb. 26, 2008) ("factual evidence by affidavits or other means" is acceptable to show plaintiffs are similarly situated).

Again, the standard for conditional certification is light. It is not until the second, more stringent step of the certification process (which follows the completion of the opt-in process and discovery), where courts analyze whether plaintiffs are "similarly situated" to determine whether the collective action proceeds to trial or whether the class is decertified. *Choimbol*, 475 F. Supp. at 563. So "[a]t this early stage … the Court does not resolve factual disputes, decide substantive issues going into the ultimate merits, or make credibility determinations." *Byard v. Verizon W. Va., Inc.*, 287 F.R.D. 365, 371 (N.D.W. Va. 2012) (internal quotations omitted); *see also Young v. Act Fast Delivery of W. Va., Inc.*, 2017 WL 3445562, at *3 (S.D.W. Va. Aug. 10, 2017) (same); *Essame v. SSC Laurel Operating Co. LLC,* 847 F. Supp. 2d 821, 825-26 (D. Md. 2012) (finding the "salient flaw" with defendant's arguments is that they "delve[] too deeply into the merits of the dispute; such a steep plunge is inappropriate for such an early stage of a FLSA collective action" and refusing the make credibility determinations because the "are usually inappropriate for the question of conditional certification"); *Chado v. Nat'l Auto Inspections, LLC*, 2019 WL 1981042, at *2 (D. Md. May 3, 2019) ("The case's merits are not considered when a court rules upon conditional certification of an FLSA collective action."); *Gregory v. Belfor USA Grp., Inc.*, 2012 WL 3062696, at *5 (E.D. Va. July 26, 2012) ("[A]t this state, the Court declines Defendant's invitation to engage in resolving factual disputes, decide substantive issues going to the merits of the case, or make credibility determinations."). Rather, "a plaintiff must only present a similar legal issue as to coverage, exemption, or nonpayment of minimum wages or overtime." *Blake v. Broadway Servs., Inc.*, 2018 WL 4374915, at *3 (D. Md. Sept. 13, 2018); *see also Westfall v.*

Kendle Int'l, CPU, LLC, No. 1:05-CV-00118, 2007 WL 486606, at *8-10 (N.D.W. Va. Feb. 15, 2007).

B. The Court should not consider the merits of Rogers's claims or Tug Hill's exemption defenses.

For this reason, courts should grant conditional certification without making factual determinations as to the merits of an employers' exemption defenses because exemption defenses are merits-based defenses to FLSA claims that courts in the Fourth Circuit typically hold to be irrelevant at the initial, notice stage of the case. *See, e.g., Essame*, 847 F. Supp. 2d at 826; *Houston v. URS Corp*., 591 F. Supp. 2d 827, 834-35 (E.D. Va. Dec. 17, 2008) ("At this stage in the proceedings, this Court is not in a position to determine the applicability of this exemption, nor is it necessary to do so prior to conditionally certifying a class. The applicability of this exemption and its effect on the Court's ability to adjudicate Plaintiffs' claims on a class basis is most appropriately addressed on summary judgment or in a motion to decertify."); *Schilling v. Schmidt Baking Co., Inc*., 2018 WL 3520432, at *4 (D. Md. July 20, 2018) ("the potential that certain [potential class members] are not eligible for FLSA overtime is a merits-based question that need not be resolved at this stage" and granting conditional certification); *Anthony v. Full Citizenship of Md., Inc*., 2015 WL 6773716, at *3 (D. Md. Nov. 4, 2015) (rejecting employer's argument that plaintiff an the putative class members were exempt employees under the FLSA and performed two separate and distinct jobs because such arguments "relate to the merits of certain aspects of Plaintiff['s] claims, which are not appropriate to resolve at the conditional certification stage" and granting conditional certification); *Gregory*, 2012 WL 3062696, at *5 ("At this stage, the Court simply is not in a position to determine whether Plaintiffs were properly classified" as exempt).

Likewise, the Day Rate Company Men's employment classification (i.e., whether they were Tug Hill employees) does not preclude conditional certification. *See, e.g., Westfall,* 2007 WL

486606, at *9 (conditionally certifying a class of independent contractors and emphasizing "[t]he uniform classification of its workers as independent contractors points toward the conclusion that the putative members of the collective action were subject to a single plan of the defendants."); *Young*, 2017 WL 3445562, at *3 (conditionally certifying a class of independent contractors and rejecting as premature defendants' arguments that the Court must engage in a particularized and fact-intensive inquiry of these workers' employment status); *see also Mondragon v. Scott Farms, Inc.,* No. 5:17-CV-00356-FL, 2019 WL 489117, at *9 (E.D.N.C. Feb. 7, 2019); *Presson v. Recovery Connections Community*, 2019 WL 3047114, at *4 (E.D.N.C. July 11, 219). This is because whether these workers were actually Tug Hill's employees is a merits determination inappropriate for the Court's notice decision. *Id*.

C. Courts routinely certify collective actions based on day rate pay practices.

Uniformity of a pay practice justifies conditional certification in cases involving day rate. This employment scheme is often utilized by companies to evade the requirements of the FLSA. Courts around the country grant conditional certification in cases where defendants have obtained employees or independent contractors through staffing companies or vendors, where the class is defined by a common violative pay practice, such as a day rate pay plan or a straight time for overtime pay plan. *See, e.g.*, *O'Quinn v. TransCanada USA Servs., Inc.*, No. 2:19-CV-00844, 2020 WL 3497491, at *6 (S.D.W. Va. June 29, 2020) (conditionally certifying a nationwide class of inspectors paid a day rate); *Hancock v. Lario Oil & Gas Co*., No. 2:19-cv-02140-JAR-KGG, 2019 WL 3494263, at *2 (D. Kan. Aug. 1, 2019)(certifying a class of day rate company men who were employed by various staffing companies); *Romero v. Clean Harbors Surface Rentals USA, Inc*., 368 F. Supp. 3d 152 (D. Mass. 2019) (conditionally certifying case in which plaintiff alleged that he and other oil & gas workers were paid a day rate with no overtime in violation of FLSA, where the defendant contracts with third-party staffing companies to supply workers for certain projects);

Kolasa v. BOS Sols., Inc., CV 17-1087, 2018 WL 3370675, at *7 (W.D. Pa. May 10, 2018), *adopted,* CV 17-1087, 2018 WL 3361269 (W.D. Pa. July 10, 2018) (despite argument by defendant named plaintiffs each only worked for one of the five staffing vendors, and that vendors treated their technicians differently, the court found evidence they were all subject to the same day rate policy and granted class of all current and former solids control technicians); *Boykin v. Anadarko Petroleum Corp.*, No. 17-CV-02309-MSK-STV, 2018 WL 1406878, at *1 (D. Colo. Mar. 21, 2018) (conditionally certifying class of rig welders hired through third party service companies who were misclassified as independent contractors and paid straight time for overtime); *see also Tamez v. BHP Billiton Petroleum (Americas), Inc.*, No. 5:15-CV-330-RP, 2015 WL 7075971, at *3 (W.D. Tex. Oct. 5, 2015) (where the alleged FLSA violations of a day rate pay practice did not turn on the character of the work performed, differences among the plaintiffs' job titles and duties could not prevent conditional certification); *Baucum v. Marathon Oil Corp.*, No. CV H-16-3278, 2017 WL 3017509, at *7 (S.D. Tex. July 14, 2017) (same); *see, e.g.*, *Stallings v. Antero Res. Corp.*, No. 1:17-CV-01939-RM-NYW, 2018 WL 1250610 (D. Colo. Mar. 12, 2018), *adopted,* No. 17-CV-01939-RM-NYW, 2018 WL 2561046 (D. Colo. Apr. 16, 2018) (conditionally certifying case in which plaintiff alleged that he and other Solids Control Operators and Pipeline Inspectors were paid a day rate with no overtime in violation of FLSA); *Halle v. Galliano Marine Serv., LLC*, No. CV 15-5648, 2018 WL 1757343 (E.D. La. Apr. 12, 2018) (conditionally certifying case in which plaintiff alleged that he and other ROV workers were paid a day rate with no overtime in violation of FLSA); *Ganci v. MBF Inspection Servs., Inc.*, 323 F.R.D. 249 (S.D. Ohio 2017) (certifying class action under Ohio state overtime law in case in which plaintiff alleged that he and other oilfield inspectors were paid a day rate with no overtime); *Whitlow v. Crescent Consulting, LLC*, 322 F.R.D. 417 (W.D. Okla. 2017) (conditionally certifying case in which plaintiff alleged that he and

other drilling consultants were paid a day rate with no overtime in violation of FLSA); *Lockwood v. CIS Servs., LLC*, No. 3:16-CV-965-J-39PDB, 2017 WL 6335955 (M.D. Fla. Sept. 26, 2017) (conditionally certifying case in which plaintiff alleged that she and other adjusters were paid a day rate with no overtime in violation of FLSA); *Kibodeaux v. Wood Group Production*, 2017 WL 1956738 (S.D. Tex. May 11, 2017) (day rate wellsite consultants); *Hernandez v. Taylor Safety Consulting, LLC*, No. 2:16-cv-00198, Min. Entry dated Jan. 11, 2017 (S.D. Tex. Jan. 11, 2017) (day rate safety technicians).

4. Rogers satisfies the lenient standard required to issue notice.

Rogers presents ample evidence to meet the modest factual showing required demonstrating he and the Day Rate Company Men together were victims of a common policy or plan alleged to violate the law. *LaFleur,* 2012 WL 4739534 at *10. Courts have frequently granted conditional certification of classes similar in scope to Rogers's proposed class. *See e.g., Bowser*, No. 2:16-cv-00482, DKT Nos. 59, 60; *Curtis v. Time Warner Entm't-Advance/Newhouse P'ship*, 2013 WL 1874848, *5-*6 (D. SC May 3, 2013). Indeed, the record contains substantial allegations showing Rogers and the Day Rate Company Men are similarly situated because they all:

- were Tug Hill Company Men, Ex. 3 ¶ 3;
- were paid a day rate regardless of the hours worked over 40 in a workweek, *id.* ¶¶ 5-6;
- were never guaranteed any amount of pay per week irrespective of days or hours worked, *id.* ¶ 8;
- regularly worked in excess of 40 hours a week, *id.* ¶¶ 9, 15, 18; and
- were not paid overtime for hours worked in excess of 40 hours in any given week, *id.* ¶¶ 15-17.

The pleadings, declaration, and timesheets attached to this Motion demonstrate Rogers and the Day Rate Company Men were paid a by day rate by Tug Hill's staffing companies and did not

receive overtime despite regularly working more than 40 hours a week. *See, generally,* Ex. 3, Ex. 4, Ex. 5. This evidence is more than sufficient to meet Rogers's modest factual burden at the initial stage of conditional certification. *Allen v. Cogent Commun., Inc.*, 1:14CV459 JCC/TRJ, 2014 WL 4270077, at *5 (E.D. Va. Aug. 28, 2014) (granting motion for conditional certification where plaintiffs were all paid on a salary plus commission basis); *Houston*, 591 F. Supp. 2d at 834 (E.D. Va. 2008) (plaintiffs sufficiently alleged a "common policy or plan" where, *inter alia*, the defendant classified all inspectors as independent contractors rather than employee); *see also Gregory*, 2:12CV11, 2012 WL 3062696, at *6 (citing *Houston,* 591 F. Supp. 2d at 834 & *Black v. Settlepou, P.C.,* No. 3:10–CV–1418– K, 2011 WL 609884 (N.D. Tex. Feb. 14, 2011) (for proposition that a conditional certification should be granted where the only common policy is the plaintiffs' FLSA classification status). For the reasons stated herein, the Court should conditionally certify the class as requested and authorize notice.

5. Tug Hill's defense that it wasn't Rogers's employer cannot prevent conditional certification because it's a merits-based argument.

Tug Hill will undoubtedly argue that it was not a joint employer of Rogers and the Day Rate Company Men. But that merits-based argument is not appropriate at this stage. *See Choimbol,* 475 F. Supp. 2d at 564. In *Choimbol*, defendant argued that before granting certification, the Court must determine whether it was a joint employer as to each potential plaintiff and putative member. *Id*. Specifically, the defendant said that issue underscored the need for a highly individualized fact-intensive examination demonstrating the inappropriateness of conditional collective certifications. *Id*. The court disagreed. *Id*. It reasoned that "[r]esolution of the issues raised by Defendants, though certainly pivotal to the Court's ultimate determination of whether Plaintiffs will proceed to trial as a collective class, is not essential to 'stage one' analysis for conditional certification." *Id*. In the same way, this Court should disregard any merits-based argument Tug Hill may make and grant

this motion.

6. The court should approve Rogers's proposed notice and schedule.

Rogers's proposed notice and consent forms, attached as Ex. 1, are accurate, simple to understand, and convey all information necessary at this stage. "Absent reasonable objections by either the defendant or the Court, plaintiffs should be allowed to use the language of their choice in drafting the notice." *Sylvester v. Wintrust Fin. Corp.,* No. 12 C 01899, 2013 WL 5433593, at *1 (N.D. Ill. Sept. 30, 2013). "The only thing that matters to the Court is that the notice of lawsuit and consent form convey accurately and fairly all the necessary information at this stage." *Id.* Rogers further proposes the following distribution plan and Notice schedule:

DEADLINE	SUBJECT
10 Days from Order Approving Notice to Putative Class Members	Tug Hill shall disclose the names, current or last known addresses, current or last known e-mail address(es) (non-company address if applicable), phone numbers, and dates of employment of all Day Rate Company Men to be notified in a usable electronic format.
20 Days from Order Approving Notice to Putative Class Members	Rogers's Counsel shall send the Court approved Notice and Consent Forms to the Day Rate Company Men via U.S. First Class Mail, email, and text message.
30 Days from Mailing of Notice and Consent Forms to Putative Class Members	Rogers's Counsel is authorized to send a second, identical copy of the Notice and Consent Forms to the Day Rate Company Men via mail, email, and text.
60 Days from Mailing of Notice and Consent Forms to Putative Class Members	The Day Rate Company Men shall have 60 days to return their signed Consent forms to Rogers's Counsel for filing with the Court.

A. Courts routinely require the production of names, addresses, email addresses, and phone numbers and allow notice be sent via U.S. mail, Email, and job postings.

Rogers requests the Court order Tug Hill to provide his counsel with the names, current or last known physical addresses, email addresses (both personal and work, if available), and

telephone numbers for Day Rate Company Men and to allow notice to be disseminated through U.S. Mail, Email, text message, and posting at Tug Hill's jobsites. Doing so will ensure the Day Rate Company Men receive notice of this collective action and are given an adequate opportunity to join. Production of this information and sending notice in the manner proposed by Rogers is routine in FLSA cases and helps ensure the potential class members will receive "accurate and timely notice" of the pending collective action, as necessary to effectuate the remedial purposes of the FLSA. *Hoffmann-LaRoche Inc.*, 493 U.S. at 169; *see also Choimbol,* 475 F. Supp. 2d at 565.[2]

B. Rogers should be allowed to send an identical reminder notice.

Rogers's request for a 60-day notice period is reasonable. *See e.g., Schroeder*, CA 3:12-cv-00183-JAG-MHL, ECF No. 13 at *5 (60 days); *Cephas, et al., v. City of Richmond, Virginia*, CA 3:15-cv-00332-JAG, ECF No. 35 at *2 (E.D. Va. Oct. 15, 2015); *see Butler v. DirectSAT USA, LLC,* 876 F. Supp. 2d 560, 566 (D. Md. 2012) (90 days). Rogers seeks to send an identical reminder notice to all potential opt-in plaintiffs half-way through the notice period in the same manner described above. People lead busy lives and may forget about returning consent forms with a

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[2] *See also Regan v. City of Hanahan*, 2017 WL 1386334, 2:16-cv-1077, at *3 (D.S.C. Apr. 17, 2017) ("Mail, email and text message notice is reasonable because, in today's mobile society, individuals are likely to retain their mobile numbers and email addresses even when they move."); *Irvine v. Destination Wild Dunes Mgmt*., Inc., 132 F.Supp.3d 707, 711 (D.S.C. 2015) ("The request that notice be distributed via direct mail, email and text messaging appears eminently reasonable to the Court. This has become a much more mobile society with one's email address and cell phone number serving as the most consistent and reliable method of communication…[and] traditional methods of communication via regular mail and land line telephone numbers quickly [have] become obsolete."); *Grosscup v. KPW Management, Inc*., 261 F.Supp.3d 867, 880 (N.D. Ill. 2017) (authorizing notice be sent by email because "communication by email is the norm" and "enhances the chance potential plaintiffs receive the notice."); *Boltinghouse v. Abbot Labs., Inc.,* 196 F.Supp.3d 838, 844 (N.D. Ill. 2016) (permitting notice to be sent by both mail and email because doing so advances the remedial purposes of the FLSA by increasing the likelihood that all potential opt-in plaintiffs will receive notice); *Blakes v. Ill. Bell Tel. Co., No. 11 C 336, 2011 WL 2446598, at *10 (N.D. Ill. Jun. 15, 2011)* (authorizing the posting of notice "wherever other employment related postings are placed"); *Landry v. Swire Oilfield Servs*., No. 16-621, 2017 WL 1709695, at *39-40 (D.N.M. May 2, 2017) (granting text message notice); *Martin v. Sprint/united Mgmt. Co*., No. 15–CV–5237, 2016 WL 30334, at *19 (S.D.N.Y. Jan. 4, 2016) (same).

seemingly distant deadline, may misplace consent forms, and/or may be gone from their homes for extended periods of time. For these reasons, courts routinely authorize reminder notices to be sent. *See e.g., Cephas, et al.*, CA 3:15-cv-00332-JAG, ECF No. 35 at *2; *Lewis*, CA 3:14-cv-00213-JAG-DJN, ECF No. 55 at *2; *see also Boltinghouse,* 196 F.Supp.3d at 844 (N.D. Ill. 2016) (finding the sending of a reminder notice "reasonable" and authorizing plaintiffs to send a reminder notice); *Knox v. Jones Grp*., 208 F.Supp.954, 964-65 (S.D. Ind. 2016) (authorizing a reminder notice and finding no "harm will result from potential class members being informed of their rights twice," and that reminder notices are "commonplace and will not appear to endorse the merits of the case.").

C. Rogers should be allowed to send text message notice.

The transitory nature of the Day Rate Company Men work necessitates the Court authorize text notice. Courts across the country have recognized that "[c]ommon sense dictates that the transitory nature of [potential plaintiffs] jobs makes notice via text message entirely appropriate." *Rosebar v. CSWS, LLC*, No. 18-C-7081, 2020 WL 43015, at *3 (N.D. Ill. Jan. 3, 2020) (citing *Brashier v. Quincy Prop., LLC*, No. 17-C-3022, 2018 WL 1934069, at *6-7 (C.D. Ill. April 24, 2018) (text-message notice is appropriate if workforce is transitory); *Desio v. Russell Road Food & Beverage, LLC*, No. 15-C-1440, 2017 WL 4349220, at *5 (D. Nev. Sept. 29, 2017) (finding text-message notice appropriate due to the transient nature of potential plaintiffs' jobs); *Bhumithanarn v 22 Noodle Mkt. Corp.*, No. 14-C-2625, 2015 WL 4240985, at *5 (S.D.N.Y. July 13, 2015) (finding that text-message notice was "likely to be a viable and efficient means of communicating with many prospective members of this collective action")); *Irvine*, 132 F. Supp. 3d at 711 ("The request that notice be distributed via direct mail, email and text messaging appears eminently reasonable to the Court. This has become a much more mobile society with one's email address and cell phone number serving as the most consistent and reliable method of

communication."); *Self, Jr. v. Quinn's Rental Services (USA), LLC*, No. 4:15-cv-01569, Min. Entry dated Feb. 29, 2016 (S.D. Tex. Feb. 29, 2016) (approving text message notice and noting that text message notice "[s]eems … to be the natural extension of the cases that say you can certainly do this by email").

This is why courts in the Fourth Circuit routinely authorize plaintiffs to send notice via text message. *See*, *e.g.*, *Gagliastrate v. Capt. George's Seafood Restaurant, LP*, 2018 WL 9848232, at *5 (E.D. Va. Mar. 13, 2018) (authorizing notice via mail, email, and text message); *Regan*, 2017 WL 1386334, at *3 (same). Accordingly, this Court should do the same.

D. Rogers should be allowed to follow up by phone.

Rogers requests the certification schedule accommodate the follow-up to certain Day Rate Company Men by telephone (proposed scripts attached as Ex. 2) if the Notice and Consent Forms sent to such individuals are returned as undeliverable. Employees who have left the employment of a company frequently do not provide their former employer with up-to-date contact information. This Court has allowed follow-up calls to potential collective class members whose mail is returned undeliverable. *Davies v. Tri-Dim Filter Corporation,* No. 3:15-cv-00426, Doc. 9 at *2 (E.D. Va. Sept. 29, 2015).

7. Conclusion.

For these reasons, Rogers respectfully requests the Court conditionally certify the class and authorize notice be sent to the Day Rate Company Men as requested.

Respectfully submitted,

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ATTORNEYS IN CHARGE FOR PLAINTIFF

CERTIFICATE OF SERVICE

On December 13, 2013, I served a copy of this document on all registered parties and/or their counsel of record, via the Court's CM/ECF system in accordance with the Federal Rules of Civil Procedure.

/s/ Anthony J. Majestro
Anthony J. Majestro