No. 23A567

IN THE SUPREME COURT OF THE UNITED STATES

TUG HILL OPERATING, LLC,

Applicant,

v.

LASTEPHEN ROGERS, individually and for others similarly situated,

Respondent.

RESPONDENT'S RESPONSE IN OPPOSITION TO APPLICATION FOR STAY PENDING DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE JOHN ROBERTS, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

INTRODUCTION

Respondent Lastephen Rogers respectfully requests Applicant/Petitioner Tug Hill Operating, LLC's application for a stay pending disposition of a petition for a writ of certiorari be denied.

Tug Hill is seeking to have this Court create contractual arbitration agreements with Rogers out of thin air, despite no such contract ever being formed. While Rogers contracted with Tug Hill for employment, the two never agreed to arbitrate *any* disputes with *each other*. Not happy with the agreements it did make, Tug Hill nonetheless tries to force Rogers into arbitration by relying on an arbitration agreement in a separate contract Rogers signed with RigUp. Tug Hill is not a party to the Rogers/RigUp contract, the arbitration clause in that contract (with its delegation clause) explicitly only applies to disputes between RigUp and Rogers, and the RigUp contract disclaims *any* intent to benefit employers such as Tug Hill.

In pursuing certiorari, Tug Hill seeks a ruling from this Court that Rogers, by agreeing to arbitrate arbitrability issues with RigUp, necessarily agreed to arbitrate arbitrability issues (such as whether Tug Hill is entitled to compel arbitration of its dispute with Rogers) with Tug Hill. In other words, Tug Hill asks the Court to hold that if a plaintiff has signed an arbitration agreement containing a delegation clause with *anyone*, anyone else can force them into arbitration—*without* having to show the plaintiff agreed to arbitrate anything with them—under the theory that the delegation clause (with someone else) *might* cover their dispute, even if it is clear

from the text of the agreement that it does not. The Fourth Circuit correctly rejected that argument. After its belated requests to stay and recall mandate were denied below, Tug Hill now seeks a stay from this Court while it pursues certiorari.

There is no reasonable probability that certiorari will be granted, and, if it is, there is at least a fair prospect the decision below will be affirmed. In any event, any likelihood of irreparable harm from granting a stay will be borne by Rogers. Because none of the factors this Court considers when granting a stay support the application, the application should be denied.

First, Tug Hill is unlikely to win a reversal of the court of appeals' decision even if this Court grants review. This Court's precedent is clear: "a court may order arbitration of **a particular dispute** only where **the court** is satisfied that **the parties** agreed to arbitrate *that dispute*." *Granite Rock Co. v. International Broth. of Teamsters,* 561 U.S. 287, 297 (2010) (citations omitted; bold added, italics in original). Unlike other questions regarding the enforceability of agreements to arbitrate, it is "well settled" that arbitration formation issues are questions for the court to resolve as a prerequisite to compelling arbitration. *Id*. at 287. This is equally, if not more so, true in deciding whether parties formed an agreement to delegate gateway questions to an arbitrator, which requires evidence of a "clear and unmistakable" agreement to delegate gateway questions. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

Here, the court of appeals first concluded, based on its review of the language of the Rogers/RigUp agreement, that Rogers did not form an agreement with Tug Hill

to delegate to an arbitrator the question of whether Rogers had agreed to arbitrate its disputes with Tug Hill. That decision was both procedurally correct under *Granite Rock* and substantively correct under the language of the contract as "the arbitration clause itself limits its applicability to disputes between Rogers and RigUp." Appl. Ex. A at 18a. Thus, even if this Court grants review, both this Court's precedents and the clear contractual language at issue make it unlikely that the decision below will be reversed.

Second, Tug Hill's petition for certiorari will likely be denied. Tug Hill's claim of a circuit split is exaggerated. Upon examination, the purported split amounts to differing results by different courts based on different facts rather than a disagreement over what legal test should govern. Moreover, to the extent lower courts have differed in their application of settled legal principles in some close cases, the clear contractual language in this case, mandating the conclusion that Tug Hill cannot benefit from either the delegation clause or the arbitration clause, in the entirely separate contract between Rogers and RigUp, makes this a poor vehicle for resolving those differences. And, because parties can simply draft arbitration agreements that explicitly include the non-signatories they wish to benefit, there is no compelling need for this Court to weigh in and rewrite agreements to make them enforceable by non-signatories.

Third, Tug Hill's claims of a likelihood of irreparable harm fall short. Tug Hill claims irreparable harm will befall it if it is forced to litigate this case in the district court while this Court considers this case. However, Tug Hill does not challenge the

Fourth Circuit's conclusion that the underlying dispute is not subject to arbitration. Thus, even if this Court rules that an arbitrator must decide whether Tug Hill and Rogers agreed to arbitrate this dispute, it has not and cannot show that that it is likely that the arbitrator will reach a different conclusion than the Fourth Circuit did, given the clear contractual language. For the reasons detailed by the court of appeals, nothing in the agreement between Rogers and RigUp gives Tug Hill the right to compel arbitration. Thus, even if this Court reverses, Tug Hill will not be able to force Rogers into individual arbitration on the merits of his claim, no matter who decides that threshold issue. As such, a stay will not eliminate whatever harm Tug Hill claims it will suffer if Rogers is permitted to litigate his claim in federal court.

In addition, Tug Hill's delays in seeking a stay lighten any weight this Court should otherwise give to Tug Hill's purported irreparable harm and raise the inference that it is seeking litigation advantage in seeking a stay.

Finally, granting Tug Hill's requested stay will harm both the public interest generally and the interests of Rogers and putative members of the collective action specifically. Rogers' underlying claim is that Tug Hill violated the Fair Labor Standards Act by not properly paying Rogers and other similarly situated employees overtime. Rogers' civil suit to recover those unlawfully withheld wages has already been delayed for two years. That is even more important here because, unlike Rule 23 class actions, the statute of limitations continues to run for the FLSA putative collective action plaintiffs. *See, infra,* pp. 34–35. Moreover, a delay while this Court considers this case will likely restrict members of the collective class from joining this

case and bringing their claims. In passing the FLSA, Congress recognized the importance of promptly paying employees the wages they are due and expressly sought to enact a remedy "to correct and *as rapidly as practicable* to eliminate" the pay practices forbidden under the Act. 29 U.S.C. § 202(b) (emphasis added). Thus, denying the stay will serve the purposes of the FLSA by preventing Tug Hill from further delaying paying the wages that Rogers and similarly situated employees are owed. The stay Tug Hill seeks will result in irreparable harm to Rogers, putative members of the collective action, and to the public interest that the FLSA was designed to protect.

Balancing these factors, Tug Hill is not entitled to a stay.

STATEMENT

Rogers entered into an agreement with RigUp, an intermediary employment broker that assists workers in finding work in the oil and gas industry. Appl. Ex. A at 4a. The terms of Rogers' agreement with RigUp were clear that only Rogers and RigUp had any rights under the contract, and that the contract did not apply to disputes between Rogers and any employer who ultimately hired him.

For example, RigUp's agreement explained that Rogers and the matched third-party company would "'solely negotiate and determine . . . when and where [Rogers] [would] perform [p]rojects' and that 'any interactions or disputes between [Rogers] and a Company [would be] solely between [Rogers] and that Company.'" Appl. Ex. A at 4a–5a. RigUp agreed that Rogers "and the company [would] solely negotiate and determine "any additional bonuses or gratuities." Appl. Ex. E at 73a.

The agreement's "Interactions with Companies" paragraph distinguished disputes with RigUp from disputes with third-party companies (like Tug Hill), clarifying that "[a]ny interactions or disputes between you and a Company are solely between you and that Company. RigUp … shall have no liability, obligation, or responsibility for any interaction between [Rogers] and any company. *Id.* It also "expressly stated that 'RIGUP WILL NOT BE A PARTY TO DISPUTES OR NEGOTIATIONS OF DISPUTES, BETWEEN [ROGERS] AND COMPANIES." *Id.* at 75a.

The agreement included a dispute resolution provision, which provided: "the terms of this agreement are subject to section 24 of the Terms [of Service]." *Id.* Section 24(a) of RigUp's Terms of Service contained an arbitration clause, under which Rogers and RigUp agreed:

> *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 …*

Appl. Ex. A at 5a. (bold added; italics by Court). The same section included a class action waiver that provided further evidence that the arbitration clause applied only to disputes between Rogers and RigUp:

> 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.

Id. (emphasis added). Section 24(h) of the Terms of Service also included a delegation provision: "Enforceability. The arbitrator has exclusive authority to resolve any

dispute relating to the interpretation, applicability, or enforceability of this binding arbitration agreement." *Id.* at 5a–6a.

Thus, although RigUp could have drafted its contracts with Rogers and other workers to require them to arbitrate their disputes with the employers that ultimately hired them, it chose not to. Instead, it expressly limited the agreement to disputes between the worker and RigUp, leaving it up to the third-party companies to separately negotiate contracts with workers referred by RigUp. Indeed, recently, RigUp changed its contract with employees like Rogers to explicitly give rights to employers like RigUp. *Rogers v. Tug Hill Operating, LLC*, No. 22-1480, Appellant's Reply Brief at 2 (4th Cir. 2023) ("any disputes between you and Workrise or you and Company--an intended third party beneficiary of this Dispute Resolution Section … shall be resolved by binding arbitration.").

In January 2019, RigUp placed Rogers with Tug Hill. As anticipated by RigUp, Tug Hill and Rogers entered into an employment contract, which did not include an arbitration provision. After Rogers was placed with Tug Hill, RigUp was not involved in any aspect of Rogers' employment. Rogers worked for Tug Hill until July 2020. While Rogers regularly worked more than 80 hours a week, he was not paid overtime.

In December of 2021, Rogers filed suit against Tug Hill under the Fair Labor Standards Act ("FLSA") alleging illegal withholding of overtime compensation by Tug Hill. Appl. Ex. C at 26a. Rogers alleged he "and other workers like him regularly worked for Tug Hill over 40 hours each week" and that "these workers never received overtime compensation." *Id.* Rogers further alleged Tug Hill's classification of Rogers

and workers like him as independent contractors to avoid overtime pay violated the FLSA. Appl. Ex. A at 3a.

Tug Hill moved to dismiss Rogers' complaint claiming it was entitled to compel arbitration under the contract between Rogers and RigUp. The district court compelled arbitration and granted Tug Hill's motion to dismiss holding that Rogers' claims "relate or refer to the work that plaintiff performed or the terms under which he agreed to perform such work [and] are subject to arbitration." Appl. Ex. C at 51a. The district court did not address Rogers' formation challenge to the delegation clause. Instead, the district court concluded that "the fact [that] defendant Tug Hill [was] not a signatory" to the RigUp agreement was "of no moment" because, under the FAA, any question of arbitrability had to be decided by the arbitrator based on the "delegation clause" in the arbitration agreement. *Id.* at 53a.

Rogers then appealed. There, the Fourth Circuit framed the issue as "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." Appl. Ex. A at 10a. The court of appeals recognized that Rogers challenged the delegation clause on formation grounds. *Id.* at 9a ("It cannot be, he maintains, that a person like him who has executed 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)." (cleaned up)).

After examining the contractual language, the Fourth Circuit held as a matter of state contract law, that the delegation clause applied to "arbitration only between

Rogers and RigUp." *Id.* at 18a. The court rejected Tug Hill's attempt to rely on the delegation clause in the Rogers/RigUp agreement on formation grounds:

> 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.

Id. at 14a.

After finding that no delegation clause was formed between Tug Hill and Rogers, the Court proceeded to determine whether Tug Hill was entitled to compel arbitration of Rogers' dispute with Tug Hill. The Court engaged in a thorough analysis of the arbitration clause and the contract – highlighting the provisions noted above. As the Court concluded:

> 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." **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.**"

Id. at 18a–19a (bold added; italics by Court).

Based on these conclusions, the Fourth Circuit reversed the district court order dismissing Rogers' claims and compelling arbitration and remanded the case back to district court.

Tug Hill did not request a stay of either the mandate or the decision below before the Fourth Circuit's mandate issued. Therefore, as a matter of course, the Fourth Circuit's mandate issued on August 29, 2023.

Tug Hill first sought a stay from the district court on October 25, 2023—nearly two months after the district court regained jurisdiction over the case. That request was filed on the eve of the district court's scheduling conference that was calendared more than a month prior. Appl. Ex. D at 61a–70a. In the two months between the case returning to district court and Tug Hill's initial request for a stay, Tug Hill engaged in litigation before the district court, including filing a joint stipulation setting Tug Hill's responsive pleadings deadline, filing a Joint Motion for an Extension of the Time to File a Rule 26(f) Report, and answering Rogers' complaint.

The district court denied Tug Hill's belated request for a stay and entered a scheduling order on October 26, 2023. Appl. Ex. D at 70a. Then, Tug Hill waited almost another month before moving the Fourth Circuit to recall its mandate and stay the district court proceedings on November 20, 2023. *Rogers v. Tug Hill Operating, LLC*, No. 22-1480, Appellee's Mot. to Recall Mandate (4th Cir. 2023). The Fourth Circuit denied Tug Hill's motion on November 29, 2023. Appl. Ex. B at 23a.

Tug Hill describes the district court's scheduling order as "expedited." Appl. at 2. In reality, the scheduling order (which, again, was entered in October) sets the

following deadlines: "Joinder & Amendments due by 12/31/2023; Discovery due by 4/30/2024; Motions due by 5/17/2024; Responses due by 7/7/2024; Replies due by 7/17/2024; Joint Pretrial Order due by 8/5/2024; Final Pretrial Conference set for 8/15/2024 . . . Jury Selection/Jury Trial set for 8/20/2024. Appl. Ex. D at 61a–62a. Thus, if there are no further delays, Rogers will finally be able to try his case nearly fifty-six months after filing his complaint. This case is certainly not on a "rocket docket."

REASONS FOR REJECTING THE APPLICATION

"A stay is an 'intrusion into the ordinary processes of administration and judicial review' and accordingly 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [this Court's] discretion." *Id.* at 433–434. Where, as here, "the applicant's requests for stay have previously been denied by lower courts, the burden is 'especially heavy.'" *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers).

To obtain a stay in this Court, Tug Hill has the burden to "demonstrate (1) 'a reasonable probability' that this Court will grant certiorari, (2) 'a fair prospect' that the Court will then reverse the decision below, and (3) 'a likelihood that irreparable harm will result from the denial of a stay.'" *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (brackets and citation omitted).

For the reasons noted below, Tug Hill has not met its heavy burden to demonstrate any of the three factors.

I. This Court Is Unlikely To Reverse The Fourth Circuit's Decision.

A. Under This Court's Clear Precedents, A Court May Order Arbitration Of A Particular Dispute Only Where The Court Is Satisfied That The Parties Agreed To Arbitrate That Dispute.

The power of a Court to force submission of a dispute to arbitration is premised on the concept of consent. Consent is the "first principle that underscores all of [this Court's] arbitration decisions." *Granite Rock,* 561 U.S. at 298; *see also id.* ("Arbitration is strictly "'a matter of consent'" (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989))). Thus, arbitration "'is a way to resolve those disputes – *but only those disputes* – that the parties have agreed to submit to arbitration.'" *Granite Rock*, 561 U.S. at 298; (footnote omitted; emphasis by Court) (quoting *First Options,* 514 U. S. at 943). As such, disputes over whether the parties have formed an agreement to arbitrate and consent to submit any dispute to arbitration must be resolved by "the court." *Granite Rock,* 561 U.S. at 299–300 ("Where a party contests [the formation of the parties' arbitration agreement], 'the court' must resolve the disagreement." (quoting *First Options, supra*)); *see also id.* at 287 (characterizing holding that arbitration formation issues are questions for the courts as "well settled").

This Court has not limited the types of formation questions that must be resolved by a court to claims that no contract exists at all between the parties. To the contrary, in *Granite Rock,* the parties had undisputedly agreed to a collective

bargaining agreement but disputed the date on which the agreement was ratified and therefore whether it covered their dispute. This Court concluded that, even though the parties had formed a contract, the question of the effective date of that contract was an issue that was "always" for the court to decide:

> Under [our precedents], a court may order arbitration of a particular dispute only where the court is satisfied that **the parties** agreed to arbitrate *that dispute*. To satisfy itself that such agreement exists, **the court must resolve any issue that calls into question the formation . . . of the specific arbitration clause** that a party seeks to have the court enforce.

561 U.S. at 297 (citations omitted; bold added, italics in original). Likewise, here, although it is undisputed that Rogers and *RigUp* agreed to an arbitration agreement with a delegation clause, the question whether that agreement somehow covers the dispute between *Tug Hill* and Rogers is a question about the "formation" of the agreement that must be decided by a court. *Id.*

B. The Requirement That A Court May Order Arbitration Of A Particular Dispute Only Where The Court Is Satisfied That The Parties Agreed To Arbitrate That Dispute Applies Equally If Not More So To Whether The Parties Have Formed An Agreement to Delegate Gateway Questions To The Arbitrator.

Granite Rock's rule that questions of formation are "always" for a court to decide applies equally when the formation challenge is to a delegation clause in a larger arbitration agreement. That is because a delegation clause "is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 70 (2010). Under

this Court's clear precedent, when a party specifically challenges a delegation clause, the court—not an arbitrator—must decide whether the delegation clause was validly formed and can be enforced. *Id.* at 72. Thus, here, the Fourth Circuit correctly analyzed as a threshold matter whether Tug Hill and Rogers had entered into an agreement to delegate disputes about arbitrability to the arbitrator.

The holding in *Rent-A-Center* that a delegation clause is simply a separate and severable arbitration agreement is grounded in the text of the FAA, which provides "that a 'written provision' 'to settle by arbitration a controversy' is 'valid, irrevocable, and enforceable' *without mention* of the validity of the contract in which it is contained." *Id.* at 70 (quoting 9 U.S.C. § 2; emphasis in original). "[A] party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing *a specific agreement to arbitrate*." *Id.* (emphasis added). Consequently, "as a matter of substantive federal arbitration law, *an arbitration provision* is severable from the *remainder* of the contract." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) (emphasis added). Because "[a]pplication of the severability rule does not depend on the substance of the remainder of the contract," clauses delegating gateway questions to the arbitrator are also subject to the same severability analysis, and thus a court, not an arbitrator, must decide any specific challenge to the delegation clause. *Rent-A-Center*, 561 U.S. at 72.

But even in the absence of a specific challenge to the enforceability of a delegation clause, a court still cannot force the parties to arbitrate their disputes

about arbitrability when they never formed an agreement to do so in the first place. *Rent-A-Center* presupposed the existence of a contract between the parties and noted that the "issue of the agreement's 'validity' is different from the issue of whether any agreement between the parties 'was ever concluded.'" *Rent-A-Center*, 561 U.S. at 63, n.2; *Buckeye Check Cashing,* 546 U.S. at 444, n.1 (citing cases). In short, the requirement that a party challenge the enforceability of a delegation clause separate from the rest of the agreement does not do away with the threshold requirement that "the court [be] satisfied that **the parties** agreed to arbitrate *that dispute"* – in this case that the parties agreed to arbitrate disputes about arbitrability. *Granite Rock,* 561 U.S. at 297 (citations omitted; bold added, italics in original).

Finally, the requirement a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute is subject to a heightened showing when the dispute is over whether the parties agreed to delegate gateway questions to the arbitrator. As this Court noted in *First Options*:

> [G]iven the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

514 U.S. at 945. Thus, "*[c]ourts* should not assume that *the parties agreed* to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *Id.* (emphasis added).

C. The Fourth Circuit Correctly Held That Rogers Did Not Agree To Delegate Gateway Questions To The Arbitrator.

Tug Hill attempts to portray the decision below as wholly ignoring the delegation clause. This is simply not true. The court below engaged in the appropriate two-step analysis by first deciding whether Tug Hill and Rogers agreed to delegate disputes about arbitrability to the arbitrator and then, only after finding they did not, proceeding to determine the applicability of the arbitration clause to Rogers' claims against Tug Hill. Upon review, it is clear that both the Fourth Circuit's method and resulting determination are correct.

The court of appeals first recognized that before gateway questions could be delegated to an arbitrator, it was necessary for the court to find that the parties agreed to do so. Appl. Ex. A at 11a–12a. For the reasons noted in the preceding section, this conclusion was mandated by this Court's clear precedent.

The court of appeals thereafter engaged in an analysis of the contract at issue and rejected the claim that Rogers and Tug Hill had agreed to delegate threshold issues to an arbitrator:

> In making [the delegation] 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.

Appl. Ex. A at 13a (emphasis in original); *see also id.* at 18a ("Finally, and perhaps most tellingly, the arbitration clause itself limits its applicability to disputes between Rogers and RigUp. [noting provisions quoted above] 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)").

Notably, Tug Hill does not challenge the substances of the Fourth Circuit's actual conclusion that no agreement between Tug Hill and Rogers was formed to delegate threshold issues.

* * * *

It is Tug Hill's arguments—that the question of the formation of a delegation clause between two parties cannot be decided by the court—that put the cart before the horse and involve circular reasoning. Before a court can enforce a delegation clause (or any arbitration agreement) it must satisfy itself that the parties agreed to arbitrate the dispute over whether the parties agreed to delegate threshold questions. Here, the court of appeals correctly held that Tug Hill and Rogers clearly did not. Based both on this Court's precedents and on the clear contractual language at issue, it is unlikely that this Court would reverse the judgment below.

II. This Court Is Unlikely To Grant Certiorari.

This Court is also unlikely to grant certiorari for at least four reasons.

First, as described above, the Fourth Circuit's decision is entirely consistent with this Court's well-settled precedent regarding challenges to the validity and enforceability of delegation clauses.

Second, Tug Hill exaggerates the extent to which circuits are split on the application of that well-settled precedent. Tug Hill argues certiorari is reasonably

probable because, in its view, there is a circuit split because two circuits agree with the court below and five circuits have adopted contrary holdings. Appl. at 11–12. While the cited decisions do reach different results regarding whether to compel arbitration, those results are driven by the differing facts at issue. The question in most all of these cases is not whether "a court may interpret a nonsignatory's rights under an arbitration agreement notwithstanding a delegation of questions of arbitrability to the arbitrator" nor is it whether "a delegation of questions of arbitrability empowers the arbitrator to interpret a contract to decide the rights of nonsignatories." *Id.* at 11. Rather, the question is whether the parties established that they *did* or *did not* agree to delegate the gateway questions in the particular dispute.

Third, this case is a factual outlier because the agreement at issue contains particular language disclaiming any rights by a non-signatory, making it a poor vehicle to resolve whatever split exists on the application of this Court's precedent to closer cases.

Fourth, it is clear that intervention by this Court—is unnecessary. If the parties to these agreements wish to arbitrate disputes (or arbitrate the arbitrability of disputes) with nonsignatories, all they need to do is clearly say so in their contracts. There is no compelling federal interest at issue.

A. The Circuit Courts All Correctly Apply The Rule That a Court Must Decide Whether a Delegation Clause Exists between the Parties.

As noted above, this Court has set forth clear guideposts: (1) a court may order arbitration of a particular dispute only where the court is satisfied that *the parties* agreed to arbitrate *that dispute*; *Granite Rock, supra.* and (2) parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by "clear and unmistakable" evidence. *Henry Schein*, 139 S. Ct. at 530; *First Options*, 514 U. S. at 944; *see also Rent-A-Center*, 561 U.S. at 69. All of the circuits including the Court below, address the question of a nonsignatory's right to compel arbitration by applying these two guideposts. That they reach different results does not stem from the courts applying different legal rules; rather, the different results stem from the different facts in the cases.

Perhaps the clearest example of the fealty to these rules is in the Fifth Circuit. The panel opinion in *Newman* began by recognizing both the formation and delegation guideposts. *Newman v. Plains All Am. Pipeline, L.P.*, 23 F.4th 393, 398 (5th Cir. 2022). The *Newman* Court then determined that the question of whether a nonsignatory was entitled to compel arbitration was a question for the court as it was a "first-step, formation question" even in the presence of a delegation clause. *Id.* at 399. *Newman* contrasted the court's prior decision in *Britannia-U Nig., Ltd. v. Chevron USA, Inc.*, 866 F.3d 709, 712 (5th Cir. 2017), where the court permitted the nonsignatory to enforce a delegation clause based on its agency relationship with the signatories. 23 F.4th at 400. Finding no agreement with the non-signatory nor any

agency relationship as was present in *Brittania,* the *Newman* Court held that the gateway question was for the court and, thereafter affirmed the refusal to compel arbitration. *Newman* illustrates the fact-bound nature of these cases. Indeed, as *Newman* noted, *Brittania* relied on the Second Circuit's opinion in *Contec Corp. v. Remote Sol. Co.*, 398 F.3d 205, 209 (2d Cir. 2005), which according to Tug Hill is one of the cases on the other side evidencing the circuit split. Appl. at 12.

In *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128 (9th Cir. 2013), the Court found, similar to the Fourth Circuit here, that "the parties to this litigation did not agree to arbitrate arbitrability" because under the language of the contract, "Plaintiffs only agreed to arbitrate arbitrability—or any other dispute—with the [contract signatories]." Similarly, *Ngo v. BMW of N. Am., LLC,* 23 F.4th 942, 945–47 (9th Cir. 2022), was not about who decides threshold questions of arbitrability at all, although it factually supports the Fourth Circuit's decision here on the scope of the arbitration agreement.

Supposedly contrary decisions from the First, Second, Eighth, and Tenth Circuits are actually consistent with the decisions of the Fourth, Fifth, and Ninth Circuits and do not support Tug Hill's contention that there is a circuit split. These courts do not enforce a delegation provision unless they are satisfied that both parties agreed to it.

The Tenth Circuit's decision in *Casa Arena Blanca LLC v. Rainwater*, No. 21-2037, 2022 U.S. App. LEXIS 7473, at *14–15 (10th Cir. Mar. 22, 2022), follows this familiar analysis. After noting that courts, "should not assume that the parties agreed

to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so," *id.* at *11, the court specifically affirmed the district court's implicit finding that an enforceable delegation clause had been formed with the nonsignatory party.[1] *Rainwater* did not relieve a court of the obligation of deciding whether the parties to the litigation had entered into the delegation clause in the first place. Indeed, it recognized that it had previously held in *Fedor v. United Healthcare, Inc.*, 976 F.3d 1100, 1103 (10th Cir. 2020), that challenges to the formation of a delegation clause are for the court, finding it "distinguishable" on the facts:

> In *Fedor*, a former employee filed a collective suit against her former employer. The employer sought to compel arbitration based on four arbitration policies, but the fourth policy from 2016 was the only one that contained a delegation provision. The plaintiffs argued the first three policies were void as illusory and that the 2016 policy was irrelevant because none of them saw or signed it. The district court nevertheless compelled arbitration based on the 2016 agreement because the plaintiffs did not challenge the delegation provision specifically. The lead plaintiff argued on appeal that a court must first determine whether an agreement to arbitrate was formed before sending the case to an arbitrator. *Id. We agreed, explaining that the lead plaintiff "raised an issue of formation which . . . cannot be delegated to an arbitrator."* [976 F.3d] at 1106-07.

Rainwater, 2022 U.S. App. LEXIS 7473, at *13–14 (internal citations omitted; emphasis added). Because here, Rogers argued that no delegation clause was formed between him and Tug Hill, that issue "cannot be delegated to an arbitrator" under

[1] 2022 U.S. App. LEXIS 7473, at *14–15 ("Moreover, by initially discussing the Arbitration Agreement's delegation provision and rejecting the Estate's challenge to that provision, the district court necessarily concluded that an arbitration agreement was formed between Ms. Burris and the Facility. Had the district court found that no agreement had been formed, there would have been no need to determine whether the Arbitration Agreement contained an enforceable delegation provision.").

Tenth Circuit precedent, and this case would have the same outcome under *Fedor* as it did in the Fourth Circuit.

As for the Second Circuit, in *Contec Corp., supra,* the court of appeals noted:

> As an initial matter, we recognize that *just because a signatory has agreed to arbitrate issues of arbitrability with another party does not mean that it must arbitrate with any non-signatory*. In order to decide whether arbitration of arbitrability is appropriate, *a court* must first determine whether the parties have a sufficient relationship to each other and to the rights created under the agreement.

398 F.3d at 209 (citing *First Options*, 514 U.S. at 944–45; emphasis added). The Second Circuit compelled arbitration after *it* decided "a sufficient relationship existed between the parties to permit [the nonsignatory] to compel arbitration [of the gateway issues] even if, in the end, an arbitrator were to determine that the dispute itself was not arbitrable." 398 F.3d at 211.

Apollo Comput. v. Berg, 886 F.2d 469, 473–74 (1st Cir. 1989) was decided prior to *Granite Rock* and the other decisions of this Court which clarified the law that formation questions were for the court and could not be delegated to an arbitrator. *See, supra,* pp. 11–15. Moreover, in *Berg,* the court found the delegation clause governed where the nonsignatory defendants claimed the right to arbitration was validly assigned to them and the delegation clause explicitly required only a "*prima facie* [showing] of the existence of such an agreement to arbitrate."[2]

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[2] In *Berg*, the arbitration clause incorporated the broad International Chamber of Commerce Rules of Arbitration, which provided, in relevant part: the arbitrator "shall continue to have jurisdiction, even though the contract itself may be inexistent or null and void, to determine the respective rights of the parties and to adjudicate upon their claims and pleas." 886 F.2d at 473; *see also Gibbs v. Haynes Invs., LLC.*, 967

Despite Tug Hills' arguments to the contrary, the rule in the Eighth Circuit is no different. Tug Hill cites *Eckert/Wordell Architects, Inc. v. FJM Props. of Willmar, LLC*, 756 F.3d 1098 (8th Cir. 2014) in support of its claim of a circuit split. The *Eckert* district court refused to stop ongoing pre-trial arbitration proceedings (commenced almost three years prior) based on a late claim by the respondent in arbitration that the claimant in the arbitration was a different corporate party than the party who signed the arbitration clause. The Eighth Circuit agreed with both the district court and the arbitrator and found under the AAA rules, the parties had agreed to delegate this dispute over arbitrability to the arbitrator. *Id.* at 1100. The substance of the court's entire opinion consists of two paragraphs and lacks analysis or explanation in a case with relatively unique facts.[3] The affirmed district court opinion, however, evidences a familiar analysis. The district court, relying on *Contec,* acknowledged as a prerequisite to invoking delegation, "a *court must first determine* whether the parties have a sufficient relationship to each other and to the rights created under the agreement" and found that "[t]hat is the case here." 2013 U.S. Dist. LEXIS 66261, at *7–9 n.8 (quoting *Contec,* 398 F.3d at 209).

F.3d 332, 344 n.10 (4th Cir. 2020) (distinguishing international arbitration agreements).

[3] In *Eckert,* an architect who was a signatory to an arbitration agreement invoking the rules of the American Arbitration Association entered a tolling agreement with the claimant property owner to let a privately selected arbitrator (rather than the AAA) resolve their dispute. *Eckert/Wordell Architects, Inc. v. FJM Props. of Willmar, LLC*, No. 12-968 (RHK/JJG), 2013 U.S. Dist. LEXIS 66261, at *4 (D. Minn. May 8, 2013). The tolling agreement's recitals expressly provided that the claimant was the owner of the property subject to the dispute and that both the claimant and architect were "bound [by the Contract] to arbitrate any dispute between them arising from the design of the" clinic. *Id*.

Subsequent decisions from the Eighth Circuit make it clear that that circuit law requires a judicial determination of whether a nonsignatory is entitled to compel arbitration even when a delegation clause is alleged to govern. *Burnett v. Nat'l Ass'n of Realtors*, 75 F.4th 975, 983 (8th Cir. 2023) ("As the district court [distinguishing *Eckert*] concluded, this "narrow, party-specific language . . . does not clearly and unmistakably delegate to an arbitrator threshold issues of arbitrability between nonparties"); *cf. Sitzer v. Nat'l Ass'n of Realtors*, 12 F.4th 853, 855 (8th Cir. 2021) (in a case with a delegation clause, determining as a threshold matter that "courts—not arbitrators—determine whether a party has waived its right to arbitration through default"); *see also Ill. Cas. Co. v. Kladek, Inc.,* No. 22-3214 (DWF/DJF), 2023 U.S. Dist. LEXIS 131677, at *8 (D. Minn. July 31, 2023) (distinguishing *Eckert* and holding: "And here, the parties only agreed to submit to arbitration disputes between ICC and an "insured." . . . Because Models do not have standing to bring a motion to compel arbitration, their motion is dismissed.").

Finally, the two Sixth Circuit cases cited by Tug Hill turned on on the supposed failure of the party opposing arbitration to specifically challenge the delegation clause. *Swiger v. Rosette*, 989 F.3d 501, 505 (6th Cir. 2021) (compelling arbitration because "[o]nly a specific challenge to a delegation clause brings arbitrability issues back within the court's province."); *Becker v. Deltek US Energy, Inc.*, 39 F.4th 351, 356 (6th Cir. 2022) (finding the court was "forced" to consider the delegation provision valid because "a party's challenge to a delegation clause must rest, in part, on different factual or legal grounds than the ones supporting its challenge to the

arbitration agreement as a whole"). Here, there was a specific challenge to the delegation clause, so this case likely would have come out the same in the Sixth Circuit as it did in the Fourth Circuit—the court would have addressed the formation of the delegation clause.

And even if the case would come out differently because the Sixth Circuit has added a requirement that the specific challenge to formation of the delegation clause be on grounds that are different from the challenge to the arbitration agreement as a whole, that is simply contrary to this Court's established precedent. *See, e.g., Rent-A-Center,* 561 U.S. at 63 (same unconscionability challenge which would be improper if directed at entire contract could be used to challenge delegation clause if challenge was directed specifically at the delegation clause). And, in any event, that is not the question addressed by the Fourth Circuit here or presented by Tug Hill's petition for certiorari. This Court has often noted that it is not a "court of error correction." *Martion v. Blesing*, 571 U.S. 1040, 1043 (2013) (Alito, J., respecting the denial for the petition of certiorari). In this case, it is unlikely to grant Tug Hill's petition to correct the decision of another circuit on an issue not discussed by the court of appeals below.

B. This Case Is A Poor Vehicle To Resolve The Purported Circuit Split Because The Only Arbitration Agreement Rogers Signed Disclaimed The Interest Tug Hill Asserts.

As described above, there is no circuit split on the application of this Court's rule that specific challenges to the formation of a delegation clause must be decided by a court. To the extent some courts have wrongly held that some challenges to a delegation clause are not sufficiently specific, this Court should not grant certiorari

because deciding this case will not fully resolve that disagreement. Further, this is not a case where the formation question is close such that reasonable courts could disagree on whether the delegation clause was formed between the parties. Thus, granting certiorari will not resolve any outstanding questions that arise in cases where it is less clear whether a non-signatory has the right to enforce the delegation clause.

Indeed, Tug Hill's factual recitation ignores the very facts relied upon by the Fourth Circuit to reach its conclusion; the same facts that distinguish this case from those comprising Tug Hill's preferred side of the "split." For example, RigUp's agreement explained that Rogers and the matched third-party company would "'solely negotiate and determine . . . when and where [Rogers] [would] perform [p]rojects' and that 'any interactions or disputes between [Rogers] and a Company [would be] solely between [Rogers] and that Company.'" Appl. Ex. A at 4a–5a. The agreement further clarified that "RigUp . . . shall have no liability, obligation or responsibility for any interaction between [Rogers] and any Company." *Id.* at 5a. It also "expressly stated that 'RIGUP WILL NOT BE A PARTY TO DISPUTES OR NEGOTIATIONS OF DISPUTES, BETWEEN [ROGERS] AND COMPANIES." *Id.* And finally, the arbitration provision incorporated through RigUp's Terms of Service affirmed:

> 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. . . .

Id. (emphasis added). The specific limitations of this agreement, and challenges related thereto, are determinative here and draw a sharp contrast with the terms of the agreements and the issues presented in many of the cases discussed above.

C. Judicial Intervention By This Court Is Unnecessary.

This Court has already made it clear that parties to an agreement wishing to delegate gateway questions to an arbitrator, have a high burden: "questions of arbitrability may be delegated to the arbitrator, so long as the delegation is clear and unmistakable." *Rent-A-Center*, 561 U.S. at 79 (cleaned up); *see also AT&T Techs. v. Communs. Workers of Am.*, 475 U.S. 643, 649 (1986) (same); *First Options,* 514 U.S. at 944 ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.").

If the parties to these agreements wish to arbitrate disputes (or arbitrate the arbitrability of disputes) with nonsignatories, all they need to do is clearly say so in their contracts. Alternatively, Tug Hill, like any number of employers, could condition employment of employees like Rogers to an agreement that disputes (including arbitrability) between the two of them are subject to arbitration.

There is no great national interest in the judicial rewriting of unclear contracts to reach results that either could have been or in the future could be specifically agreed to by the parties. As the Ninth Circuit noted in *Ngo*:

> Nor is our conclusion disturbed by the fact that BMW was neither a stranger to the transaction nor "some random third party," as the district court put it. To the contrary, BMW's relative proximity to the contract confirms that the parties easily could have indicated that the contract was intended to benefit BMW—but did not do so.

23 F.4th at 948; *cf. Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1234 (9th Cir. 2013) (noting that a signatory that named an entity other than the one seeking arbitration as a third-party beneficiary "clearly knew how to provide for a third-party beneficiary if it wished to do so"). This is particularly true when it comes to agreements like the ones here that are drafted by parties with access to counsel. *Cf. JPay, Inc. v. Kobel*, 904 F.3d 923, 939 (11th Cir. 2018) ("At the absolute least, [the arbitration rule's] significance would have been obvious to the JPay attorneys who drafted the Terms of Service"). Indeed, as noted above, RigUp has modified its contract to explicitly make pay disputes between employers like Tug Hill and employees like Rogers subject to arbitration under the contract is requires employees like Rogers to sign.

III. Tug Hill Cannot Show Any Irreparable Harm That Would Be Remedied By A Grant Of A Stay.

This Court should only grant the requested stay if Tug Hill can demonstrate a likelihood that it will face irreparable harm absent relief. *Nken*, 556 U.S. at 432; *see also Ross v. Nat'l Urban League*, 141 S. Ct. 18, 20 (2020) (Sotomayor, J. dissenting from grant of stay) ("[r]egardless of the merits . . . [failure to demonstrate irreparable harm] alone, requires denying the requested stay.").

Tug Hill complains of two reasons it faces "serious and irreparable prejudice[:]" (1) the district court's scheduling order and (2) the potential for increased liability because of Rogers' collective action. Appl. at 26. Neither constitutes irreparable harm in this case. First, both assume without any showing that the arbitrator will find Tug Hill is entitled to arbitration of Rogers' claims—a showing it has not and cannot make. Second, neither purported harm outweighs the procedural infirmities resulting

from Tug Hill's delay in seeking relief. Finally, balancing the interests, including both Rogers' interest and the public's, supports denying the stay.

A. Tug Hill Has Failed To Show That Success In This Court Will Avoid Litigation In The District Court On The Merits of Rogers' Individual And Collective Claims.

Tug Hill claims a likelihood of irreparable harm if it is forced to litigate this case in the district court while this Court considers this case. While generally, a party forced to litigate when it has the right to demand arbitration may be harmed if litigation is not stayed while the right to arbitration addressed on appeal, those cases presume a favorable resolution of the appeal could lead to arbitration of the merits of the dispute. *See, e.g., Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915 (2023).

Here, the issue on appeal is *who* decides whether the merits of Rogers' dispute with Tug Hill is subject to arbitration. Tug Hill will bear whatever burdens come from the litigation over the question of who decides regardless of whether this Court grants a stay. In order to establish the irreparable harm it claims, however, Tug Hill must show that a favorable decision from this Court will inevitably lead it to arbitration of the merits of Rogers' claims, because if the arbitrator agrees with Rogers that Tug Hill has no right to arbitrate, the parties will be back to district court and the supposed harms of civil litigation will befall Tug Hill.

Thus, Tug Hill, as the party seeking a stay, has the burden of showing that the Fourth Circuit's conclusion that Tug Hill is not entitled to compel arbitration is wrong. Even if it succeeds in convincing this Court that the court of appeals should not have reached the ultimate question of its entitlement to arbitration of its dispute

with Rogers, the court's contract-based rejection of Tug Hill's right to arbitration is compelling. Tug Hill makes only a passing claim that Rogers agreed "that every dispute arising in connection with these Terms will be resolved by binding arbitration." Appl. at 6 (quoting Ex. A at 5a (emphasis omitted)). Tug Hill makes no effort to challenge the court of appeals' detailed interpretation of the agreement as limiting Rogers' agreement to arbitrate to disputes with RigUp. Appl. Ex. A at 5a *("you and RigUp agree* that every dispute arising in connection with these Terms will be resolved by binding arbitration") (emphasis added); *Id.* ("*you and RigUp* are each waiving the right to trial by jury") (emphasis added); *Id.* ("[a]ny arbitration *between you and RigUp* will be settled under the Federal Arbitration Act") (emphasis added).

Thus, even if this Court rules that the decision over whether Tug Hill can force arbitration is for the arbitrator, it has not and cannot show that given the clear contractual language here the arbitrator will not reach the same conclusion as the Fourth Circuit did below.

Tug Hill argues that "when an agreement commits threshold questions of arbitrability to the arbitrator, the 'court may not decide the arbitrability issue' even if it thinks an issue is 'frivolous.'" Appl. at 17 (quoting *Henry Schein*, 139 S. Ct. at 530–31). But, by arguing that it will be prejudiced by litigation in the district court, it has in this stay application put at issue the merits of the arbitrability question. In the end, to show irreparable harm, Tug Hill, as the party seeking a stay, must show that if it is successful in this Court, it is likely that the arbitrator will decide to reject

the thoughtful analysis of the court of appeals rejecting Tug Hills right to arbitration. This it cannot do and has not even tried to do.

B. Tug Hill's Purported Irreparable Harm Is A Direct Consequence Of Its Own Strategic Delay.

The Fourth Circuit's mandate in this case issued on August 29, 2023. Inexplicably, Tug Hill did not seek a stay from the district court until October 25, 2023—just one day before the district court's scheduling conference, a conference that was calendared more than a month in advance. Then, almost a month passed before Tug Hill moved the Fourth Circuit to recall its mandate and stay the district court proceedings, which it filed on November 20, 2023.

When "[t]here is simply no plausible explanation for the delay other than litigation strategy[,]" this Court has "recently and repeatedly sought to discourage" the "proliferation of dilatory litigation strategies" like that of Tug Hill here. *Price v. Dunn*, 139 S. Ct. 1533, 1538 (2019). Thus, "it is a wise rule in general that a litigant whose claim of urgency is belied by its own conduct should not expect discretionary emergency relief from a court." *W. Va. v. B.P.J.*, 143 S. Ct. 889, 889 (2023) (Alito, J., dissenting from denial of application to vacate injunction). Justices of this Court have rejected applications for stays in cases with similar, and even less intrusive, delays than Tug Hill's delays here. *Beame Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers) (twenty-day delay); *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1318 (1983) (Blackmun, J., in chambers) (seven-week delay); *Foster v. Gilliam*, 515 U.S. 1301, 1303 (1995) (Rehnquist, J., in chambers) ("several weeks" delay). This Court should view Tug Hill's allegations of irreparable harm

through the lens of its strategic delays in both the district court and the court of appeals. *Cf. Morland v. Sprecher*, 443 U.S. 709, 710 (1979) ("In view of [the applicant's] conduct . . . we conclude that petitioners have effectively relinquished whatever right they might otherwise have had to expedited consideration.").

Tug Hill argues it will suffer irreparable harm from "litigating in expedited fashion a putative collective action" and from "imminently disclosing still-confidential information that creates additional litigation risks regardless of whether this Court ultimately grants certiorari and reverses." Appl. at 25. Neither argument overcomes this Court's "norm" of denying "in-chambers stay applications; relief is granted only in 'extraordinary cases.'" *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (citation omitted).

Here, the district court's scheduling order is not "expedited" or anything close. Appl. at 25. Rogers brought the underlying claim two years ago in December of 2021. Discovery is set to conclude in April of 2024, and trial, notwithstanding any future delays, remains eight months away. Appl. Ex. D at 60a–70a.

Tug Hill has not argued in any court that the district court's schedule does not permit sufficient time to fairly litigate this dispute. Other than its motions to stay proceedings in their entirety, Tug Hill did not object to the court's scheduling order at the conference or otherwise challenge the schedule as providing insufficient time for the case in either of the courts below or in the instant application.

"Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244

(1980) (citation omitted); *Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough."). Still, Tug Hill believes it is entitled to dodge the "gamut of decreased 'efficiency,' extra 'expense[s]' and 'intrusive discovery[,]'" pending resolution of its petition. Appl. at 26 (citing *Bielski*, 143 S. Ct. at 1921). But much of that benefit Tug Hill has already enjoyed, through its successful motion to dismiss. In *Bielski*, this Court held an appeal from the *denial* of a motion to compel arbitration stayed proceedings in the district court, reasoning:

> A right to interlocutory appeal of the arbitrability issues without an automatic stay of the district court proceedings is therefore like a lock without a key, a bat without a ball, a computer without a keyboard—in other words, not especially sensible.

Id. In contrast to filing a notice of appeal as of right on an arbitrability issue, seeking discretionary relief from this Court, through a petition for certiorari or a stay, "does not divest the court of appeals or district court of jurisdiction." *United States v. Sears*, 411 F.3d 1240, 1242 (11th Cir. 2005); *Bielski*, 143 S. Ct. at 1923 (analogizing stays in arbitration proceedings to stays in qualified immunity and double jeopardy proceedings). Thus, Tug Hill's reliance on *Bielski* is misplaced, and its position exposes the preferential treatment Tug Hill requests this Court apply to arbitration contracts. *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022) (holding arbitration contracts are "as enforceable as other contracts, but not more so").

C. The Balance Of The Equities And The Public Interest Do Not Favor A Stay.

Rogers and the public each have an interest in the prompt resolution of the claims by both Rogers and the collective class he represents. These factors strongly favor denying the application.

Rogers filed this suit in December of 2021, and more than two years later, a final resolution of his case on the merits remains months away, if not more. "Orderly and expeditious resolution of disputes is of great importance to the rule of law. By the same token, delay in reaching the merits, whether by way of settlement or adjudication, is costly in money, memory, manageability, and confidence in the process." *Allen v. Bayer Corp.*, 460 F.3d 1217, 1227 (9th Cir. 2006). Rogers is eager to litigate his claims, and the district court agreed the time to do so was now, denying Tug Hill's initial stay request. The Fourth Circuit concurred.

The public interest also counsels against delay. It is no coincidence that Tug Hill filed its application for stay in the district court the day before a scheduling conference that would set dates for class certification, discovery, and other pre-trial matters. Under the FLSA, "[p]utative class members must 'opt-in,' i.e., affirmatively notify the court of their intention to become parties to the collective action." *Nieddu v. Lifetime Fitness, Inc.,* 977 F. Supp. 2d 686, 689 (S.D. Tex. 2013) (citing 29 U.S.C. § 216(b)). "An… action is [not] considered 'commenced' for statute of limitations purposes [until] a plaintiff's written consent to become a party plaintiff is filed with the court." *Vanzzini v. Action Meat Distributors, Inc.,* 995 F. Supp. 2d 703, 718 (S.D. Tex. 2014) (citing 29 U.S.C. § 256). Thus, the statute of limitations "is not tolled for

any individual class member who is not named in the complaint until that individual has filed an opt-in notice." *Nieddu,* 977 F. Supp. 2d at 689.

Simply put, Tug Hill wants to delay notice of this collective action as long as possible. The default limitations period for an unpaid overtime claim brought under the FLSA is two years from the date that the cause of action accrued—i.e., from the date that the overtime payment became due. *Young Chul Kim v. Capital Dental Tech. Lab., Inc.,* 279 F. Supp. 3d 765, 769 (N.D. Ill. 2017) (citing 29 U.S.C. § 255(a)). For willful violations, the limitations period extends to three years. *Id.* at 769–770. The limitations period stops running on an FLSA plaintiff's claims only once he files a complaint or joins an existing lawsuit." *Id.* at 770 (citing 29 U.S.C. § 256(a) & *Robinson v. Doe*, 272 F.3d 921, 922 (7th Cir. 2001)). "The statute of limitations … continues to run on opt-in plaintiffs' claims until they give their consent to join the suit." *Id.* (citing 29 U.S.C. § 256(b) & *Davis v. Vanguard Home Care, LLC*, No. 16-CV-7277, 2016 WL 7049069, at *2 (N.D. Ill. Dec. 5, 2016)). That means the longer Tug Hill delays notice, the more liability it can escape. *Arthur Anderson LLP v. Carlisle*, 556 U.S. 624, 634 (2011) (Souter, J., dissenting) (expressing concern over "intentional delay by savvy parties who seek to frustrate litigation by gaming the system"). If this Court enters a stay, with each day the pool of class members with timely claims shrinks.

For that reason, it is imperative that putative class members be notified of a pending FLSA collective action as soon as possible to prevent their claim from wasting away. Because Tug Hill's dilatory litigation strategy centers around

exhausting applicable statutes of limitations for potential claimants, putative class members or not, it undermines the alleged irreparable harms.

There is a Congressionally recognized public interest in promptly paying employees the salary they are due, and Congress in enacting the FLSA sought to enact a remedy "to correct *and as rapidly as practicable* to eliminate" the pay practices forbidden under the Act. 29 U.S.C. § 202(b) (emphasis added). This is because "wages are not ordinary debts," and "because of the economic position of the average worker . . . it is essential to the public welfare that he receive his pay when it is due." *Carrillo v. Schneider Logistics, Inc.*, 823 F. Supp. 2d 1040, 1045 (C.D. Cal. 2011) (citations and internal quotations omitted).

Similarly, in the FLSA Congress expressly provides for collective actions like Rogers brings in this case. 29 U.S.C. § 216(b). Rogers' collective action claims serve "broad remedial goal[s] of the statute [and] should be enforced to the full extent of its terms." *Hoffmann-La Roche v. Sperling*, 493 U.S. 165, 173 (1989).

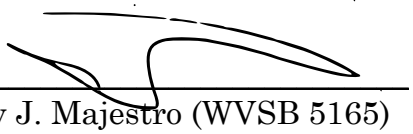
Finally, this Court should not disrupt the district court's authority to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants[.]" *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). District courts plainly have an interest in the "just, speedy, and inexpensive determination" of its cases, Fed. R. Civ. P. 1, and the public has a similar interest. *El Encanto, Inc. v. Hatch Chile Co., Inc.*, 825 F.3d 1161, 1162–63 (10th Cir. 2016) (Gorsuch, J.).

Rogers' and the Public's interest outweighs that of Tug Hill.

CONCLUSION

Tug Hill's application for a stay pending disposition of a petition for a writ of certiorari should be denied.

Respectfully submitted,



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