No. 21-328

IN THE
Supreme Court of the United States

ROBYN MORGAN,
Petitioner,
v.
SUNDANCE, INC.
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its 75-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

AAJ is concerned that the lower court's decision, if allowed to stand, effectively invites parties to use strategic delay to game the system for their advantage before choosing whether or not to exercise their contractual arbitration provisions.

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[1] The parties have consented to *Amicus Curiae* filing this brief, and their letters of consent have been filed with the Clerk. No party or party's counsel authored this brief, in whole or in part, or contributed money intended to fund preparing or submitting this brief. No person other than *Amicus Curiae* and its counsel contributed money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

Undergirding this Court's arbitration jurisprudence has been the understanding that Congress passed the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq*., in 1925 after concluding that private arbitration offered a speedier and less expensive forum in which to resolve certain disputes. This Court has extolled speed and efficiency as essential benefits of arbitration, repeatedly rejecting proceedings that might in any way interfere with or present an obstacle to achieving these goals.

Despite this clear intent, a serious procedural problem has developed which impairs this desired speed and efficiency. Parties to litigation, including Sundance here, have not immediately moved for arbitration as Congress had surmised that they would. Instead, many have spent months, if not years, expending judicial resources while extracting information out of the opposing party before moving to compel arbitration — and then generally only after an adverse result. This has developed into a litigation strategy, and the appellate record is replete with such tactics occurring in every Circuit.

This gamesmanship can defeat any semblance of the efficiency and timeliness underpinning this Court's arbitration jurisprudence. The problem is that, although the FAA provides expedited time constraints for a court's handling of motions for arbitration, for the most part there are no clear timeliness

rules as to when parties are first required to file a motion to enforce an arbitration agreement.

This problem can be remedied by simply requiring arbitration to be pled at the earliest stage of a case. The most expeditious way is by motion before an answer is filed, or, barring that, at the time affirmative defenses are pled. This is not an onerous obligation. Parties to contracts invariably know the substance of the contracts they have drafted or knowingly entered into, as well as whether those contracts include an arbitration provision. Indeed, in the case at bar, the arbitration clause was published on Sundance's own website.

This solution is consistent with the rule in the D.C. Circuit where a party forfeits the right to arbitration when it fails to exercise that right at the earliest available opportunity. *See Zuckerman Spaeder, LLP v. Auffenberg*, 646 F.3d 919, 922-23 (D.C. Cir. 2011). Whether the underlying basis for such a timeliness rule is waiver or forfeiture, clear guidance from this Court is necessary as to when a motion to stay and compel arbitration must be brought. Absent this, the waste of court time and resources, the excessive delay, the abuse of opposing parties, and the inefficiency will continue.

ARGUMENT

I. THIS COURT HAS CONSISTENTLY HELD THAT AN UNDERLYING BASIS FOR ITS ARBITRATION JURISPRUDENCE IS ARBITRATION'S SPEED AND EFFICIENCY.

Foundational to this Court's arbitration jurisprudence has been the understanding that Congress passed the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq*., in 1925 because it had concluded that private arbitration was a speedier and less expensive forum in which to resolve certain disputes. In support of this premise, this Court has repeatedly cited the 1924 Senate Report (S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924)), which stated that arbitration would counter "the delay and expense of litigation," and the 1924 House Report (H. R. Rep. No. 96, 68th Cong., 1st Sess., 2 (1924)), which stated that "the costliness and delays of litigation . . . can be largely eliminated by agreements for arbitration." *See, e.g., Wilko v. Swan*, 346 U.S. 427, 431 (1953) ("The reports of both Houses on that Act stress the need for avoiding the delay and expense of litigation . . ."); *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, 404 (1967); *AT&T Mobility LLC v. Concepcion*, 563, U.S. 333, 345 (2011).

Repeatedly, this Court has itself extolled speedier process and lowered costs as benefits of arbitration. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995); (arbitration "is usually cheaper and

faster than litigation"); *Preston v. Ferrer*, 552 U.S. 346, 357-58 (2008) ("A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'"(quoting *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.,* 473 U.S. 614, 633 (1985)); *AT&T Mobility LLC v. Concepcion*, 563 U.S. at 345 ("the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.") (citations omitted).

In order to achieve this intended speed and efficiency, this Court has concluded that Congress drafted the FAA procedures with the express goal of moving the parties "out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). Congress did this by providing for a stay of litigation to enforce an arbitration agreement, 9 U.S.C. § 3, and the authority to issue an order to compel arbitration, *id.,* § 4, both of which were designed to fulfill Congress's intent that an agreement to arbitrate would result in an expeditious hearing and timely resolution. *Id.* In order to further facilitate this speed and efficiency, this Court has repeatedly rejected proceedings that might interfere with or present an obstacle to achieving this goal: 1) giving arbitration precedence over state agency action, *Preston v. Ferrer,* 552 U.S. at 357-58 ("A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results,'" which would be "frustrated" by an agency first hearing the dispute); 2) holding that the FAA preempts state law

rules that stand as an obstacle to its objectives, *AT&T Mobility LLC v. Concepcion*, 563 U.S. at 348; ("class arbitration . . . makes the process slower [and] more costly"), and 3) not allowing a court to weigh in on the arbitrator's decision regarding remedies, *United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc.,* 484 U.S. 29, 38 (1987) ("If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined.") In sum, this Court has steadfastly ruled against any procedure that might present an obstacle to achieving the FAA's underlying goals of speed and efficiency.

II. ALLOWING BELATED REQUESTS FOR ARBITRATION RESULTS IN INEFFICIENCY AND UNNECESSARY DELAY.

While the FAA mandates that the trial court handle arbitration motions as speedily and efficiently as possible, there is a serious procedural glitch impairing that speed and efficiency. Although time constraints are given for a court's handling of motions for arbitration, for the most part there appear to be no equivalent timeliness constraints imposed on parties who choose to enforce an arbitration agreement. Without express direction as to when the request for arbitration must be made, motions for arbitration in the lower courts have become a procedural Wild West. Litigants have spent months, if not years, expending judicial resources while extracting information out of the opposing party before moving to

compel arbitration—and then usually only after an adverse ruling. Although the underlying issue before this Court may be the split in the Circuits as to the retrospective analysis needed to show waiver by the litigation conduct that occurred before the arbitration request was made, there is little guidance as to when the motion to compel arbitration should be made in the first place. The real underlying problem appears to be the lack of any bright line rule or guidance to the district courts and parties that is designed to preserve and maintain the efficiency fundamental to this Court's arbitration jurisprudence.

In the case of Sundance, Inc., this lack of a bright line rule or guidance is readily apparent. Sundance should have been required to make its request at the first instance—before the court and Ms. Morgan engaged in substantial litigation, and well before an arbitrator was ultimately asked by Sundance to start from scratch. Instead, after Ms. Morgan filed her complaint, Sundance chose to move to dismiss or stay the suit, JA 19-43, without stating either that the claims were subject to a mandatory arbitration provision or moving to compel that arbitration. After its motion was denied, Sundance filed an answer, this time without listing arbitration as an affirmative defense. JA 71-73. Extensive discovery was subsequently exchanged and mediation took place. Pet. App. 17. It was only after Ms. Morgan's case did not settle that Sundance moved for arbitration. JA 75-76. Under the present state of arbitration procedure, Sundance felt it could engage in substantial litigation

despite the fact that its own form contract on its website included an arbitration provision. Pet. App. 14, 26. The bottom line is that Sundance chose to litigate Ms. Morgan's case for eight months before strategically deciding to request arbitration.

Such is the present state of the rules that Sundance's delay in requesting arbitration is far from unique. The appellate record is replete with examples of parties that have similarly exploited the litigation process by prolonging pre-trial proceedings before concluding it was no longer to their advantage to refrain from pulling the arbitration trigger. Below are just a few of the many cases where this has occurred, with examples provided from each Circuit. They are described here not for the purpose of arguing the Circuit split at issue but to illustrate the fundamental endemic problem of delay that counteracts the desired time savings and expediency undergirding the FAA.

In the First Circuit, in *Restoration Preservation Masonry, Inc. v. Grove Europe Ltd.*, 325 F.3d 54, 61-62 (1st Cir. 2003), defendants engaged in four years of state court litigation before seeking removal to federal court "less than two months before trial" in order to compel arbitration—participating in "at least five depositions and thirteen pre-trial conferences." In *Joca-Roca Real Estate, LLC v. Brennan*, 772 F.3d 945, 948-49 (1st Cir. 2014), plaintiff waited eight months to pursue arbitration with the close of discovery "hard at hand," "more than a dozen depositions,

interrogatories, document production and conferences" completed, a summary judgment motion pending, and trial less than two months away.

In the Second Circuit in *Com-Tech Associates v. Computer Associates Intern., Inc.*, 938 F.2d 1574, 1576-77 (2d Cir. 1991), the defendants deposed the plaintiffs and raised arbitration "eighteen months after answering the complaint and only four months before the scheduled trial date," doing so in an omnibus motion for judgment on the pleadings and summary judgment. In *Cotton v. Slone*, 4 F.3d 176, 179-80 (2d Cir. 1993), before requesting arbitration the defendant initiated "at least two depositions," made several substantive motions, including for summary judgment, "repeatedly invoked and submitted himself to the powers and procedures of the district court," sought extensions of time and revisions of the discovery schedule. and at least twice sought protective orders that had been denied before. In *Kramer v. Hammond*, 943 F.2d 176, 179 (2d Cir. 1991), the defendant waited four years to raise arbitration as a bar only after it "engaged in extensive pretrial litigation," moved for dismissal in state court, appealed the denial of that motion after losing in the state supreme court, and then moved to stay proceedings while in the process of appealing to the U.S. Supreme Court. In *PPG Industries, Inc. v. Webster Auto Parts, Inc.*, 128 F.3d 103, 106-07 (2d Cir. 1997), PPG filed the complaint in its first action, sought a prejudgment remedy, participated in discovery, and sought additional time to respond to counterclaims after

which PPG filed four dispositive motions along with a motion to compel arbitration, all the while in a second action, PPG continued discovery and moved for partial summary judgment.

In Third Circuit, in *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 223 (3rd Cir. 2007), the defendant waited four years before seeking arbitration, after engaging in extensive discovery, including several sets of interrogatories, requests for production of documents, expert witness reports, and "depositions of numerous witnesses," and then filing a motion for summary judgment and a motion to "implead a third party defendant," submitting a joint stipulation certifying readiness for trial, and seeking a continuance of the trial date and proposed new trial dates. In *Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 925-26 (3d Cir. 1992), defendants waited eleven months before seeking arbitration, participated in numerous pretrial proceedings, filed a motion to dismiss for failure to state a claim, filed a motion to disqualify plaintiffs' counsel, took depositions of named plaintiffs, failed to respond adequately to discovery, which forced plaintiffs to file motions to compel that defendants then opposed, consented to consolidation of three cases, filed a lengthy opposition to plaintiffs' motion for class certification, and filed a motion to compel after its motion to dismiss was denied and plaintiffs' motion to compel discovery was granted. In *In re Pharmacy Ben. Managers Antitrust Litigation*, 700 F.3d 109, 118-22 (3d Cir. 2012), there was a ten-month delay in seeking arbitration

and then arbitration was only sought after filing a motion to dismiss for failure to state a claim, filing a motion for reconsideration after the motion to dismiss was denied, moving for certification of an interlocutory appeal, and participating in scheduling conferences and hearings on motions.

In the Fourth Circuit, in *Degidio v. Crazy Horse Saloon and Restaurant, Inc.*, 880 F.3d 135, 141 (4th Cir. 2018), there was a three-year delay in seeking arbitration after multiple motions for summary judgment, discovery was served, and the district court was twice asked to certify questions of state law to the state supreme court. In *Microstrategy, Inc. v. Lauricia*, 268 F.3d 244, 250 (4th Cir. 2001), a complicated case bouncing between federal and state courts, defendant finally sought arbitration after extensive litigation on state law trade secret claims, including more than 50 "motions, responses, and other procedural maneuvers."

In the Fifth Circuit, in *International Energy Ventures Management, L.L.C. v. United Energy Group, Ltd.*, 999 F.3d 257, 266-68 (5th Cir. 2021), plaintiff sued in state court, demanding a jury trial. Following removal, plaintiff filed a motion to remand to state court and appealed denial of that motion. It defended personal jurisdiction in Texas, appealed the district court's personal jurisdiction dismissal, sought rehearing after the appellate court affirmed the district court's removal and jurisdictional holdings, and only sought arbitration after the appellate court de-

nied a rehearing petition—more than three years after it had first filed suit. In *Miller Brewing Co. v. Fort Worth Distributing Co., Inc.*, 781 F.2d 494, 497-98 (5th Cir. 1986), arbitration was requested after more than a three-year period, and after proceedings were initiated in state trial and appellate courts and in federal district and appellate courts and "numerous depositions were taken" that went to the merits of the claims. In *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1158-59 (5th Cir. 1986), over a seventeen-month period Drexel "initiated extensive discovery, answered twice, filed motions to dismiss and for summary judgment, filed and obtained two extensions of pre-trial deadlines, all without demanding arbitration."

In the Sixth Circuit, in *Hurley v. Deutsche Bank Trust Co. Americas*, 610 F.3d 334, 338-39 (6th Cir. 2010), defendants responded to actions taken by the plaintiffs, filed multiple dispositive and non-dispositive motions, including motions to dismiss, motions for summary judgment and a motion to change venue, and only requested arbitration two years later, after the district court entered an unfavorable ruling. In *Johnson Associates Corp. v. HL Operating Corp.*, 680 F.3d 713, 718-19 (6th Cir. 2012), defendant failed to raise arbitration as an affirmative defense in its answer, but rather asserted a counterclaim and actively scheduled and requested discovery, including depositions, before eight months later requesting arbitration. In *Manasher v. NECC Telecom*, 310 Fed. App'x. 804, 806 (6th Cir. 2009), de-

fendant waited a year after plaintiffs filed their complaint to seek arbitration, and only did so after "actively" participating in litigation.

In the Seventh Circuit, in *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co., Inc.*, 969 F.2d 585, 589-91 (7th Cir. 1992), defendant filed interrogatories and requests to admit, participated in two depositions of principal witnesses, filed a motion to dismiss or for summary judgment, all before seeking arbitration ten months later, and then only after its summary judgment motion was denied. In *Smith v. GC Services Limited Partnership*, 907 F.3d 495, 499-500 (7th Cir. 2018), defendant failed to raise arbitration in its answer, waiting thirteen months to file for arbitration and then only after it lost motions to dismiss and for class certification.

In the Eighth Circuit, in *Lewallen v. Green Tree Servicing, L.L.C.*, 487 F.3d 1085, 1091-93 (8th Cir. 2007), defendant propounded lengthy interrogatories and requests for production of documents, sought an extension to respond to the complaint, sought an extension to respond to discovery requests, joined in a motion to continue the trial date only to first raise the issue of arbitration eleven months later in a motion to dismiss. In *Messina v. North Cent. Distributing, Inc.*, 821 F.3d 1047, 1050-51 (8th Cir. 2016), there was an eight-month delay in seeking arbitration, during which defendant removed the case to federal court, filed an answer, failed to raise arbitration as a defense, participated in a pretrial hear-

ing, filed a scheduling report that recommended a trial date and discovery deadlines, and filed a motion to transfer venue, all the while "consistently indicat[ing] that it was prepared to take the case to trial in federal court."

In the Ninth Circuit, in *Flores v. Adir International, LLC*, 788 Fed. App'x. 496, 497 (9th Cir. 2019), defendant had filed motions to dismiss the complaint and amended complaint and "made an intentional decision to refrain from filing a motion to compel arbitration" until a year after appellate reversal of the district court's dismissal. In *Martin v. Yasuda*, 829 F.3d 1118, 1126-28 (9th Cir. 2016), before requesting arbitration the defendants spent seventeen months litigating the case, including filing "a joint stipulation structuring the litigation, filing a motion to dismiss on a key merits issue, entering into a protective order, answering discovery, and preparing for and conducting a deposition," while telling the court and opposing counsel that defendants "were likely 'better off' in federal court."

In the Tenth Circuit, in *In re Cox Enterprises, Inc. Set-top Cable Television Box Antitrust Litigation*, 790 F.3d 1112, 1116-17 (10th Cir. 2015), only after the trial court "read literally thousands of pages of briefs, conducted several hearings, including a class certification hearing, and issued dozens of Orders, including rulings on Motions to Dismiss, *Daubert* Motions, Class Certification, and recently a Motion for Summary Judgment," and Cox had appealed the

certification decision, did Cox move to compel arbitration on the very same day it moved for summary judgment.

In the Eleventh Circuit, in *Davis v. White*, 795 Fed. App'x. 764, 768-70 (11th Cir. 2020), defendant filed motions to dismiss for failure to state a claim, opposed plaintiffs' motions to amend as futile, took appeals from denials of their motions to dismiss, and then only sought arbitration eighteen months later, after it had failed to have three lawsuits dismissed. In *Garcia v. Wachovia Corp.*, 699 F3d 1272, 1277-78 (11th Cir. 2012), defendant actually refused the court's invitations to move to compel arbitration, and instead conducted discovery for more than a year, including depositions, serving and answering interrogatories and producing approximately 900,000 pages of documents—all before moving to compel arbitration. In *Stone v. E.F. Hutton & Co., Inc.*, 898 F.2d 1542, 1543-44 (11th Cir. 1990), after twenty months of being "engaged in discovery typical of a party preparing for trial," defendant requested arbitration.

In the Federal Circuit, in *Cajun Services Unlimited, LLC v. Benton Energy Service Co.*, 850 Fed. App'x. 766, 771-73 (Fed. Cir. 2021), defendant did not raise arbitration on the non-contract claims until after trial, and on the contract claims defendant filed "two answers with affirmative defenses and counterclaims, filed a joint motion for a protective order (without seeking to limit discovery to the issue of

contract validity), engaged in full-fledged discovery, and filed a motion for summary judgment."[2]

In summary, this procedural Wild West has allowed parties to exploit the current lack of explicit direction in the Federal Rules or guidance from this Court as to when a motion to compel arbitration must be filed. A few parties raise their right to arbitration in their answers only to sit on that right for months before moving to compel. Even more raise the issue of arbitration only after filing multiple substantive motions, conducting extensive discovery, and, at times, even after appealing orders resolving the questions of the case on the merits of the claims.

To be sure, in a number of the cases above, courts ultimately did find that the movant had waived the right to arbitration, just as in a number of others courts found that they had not. However, the list has been provided not to demonstrate the ultimate disposition of each individual case, but rather to illustrate the breadth of the problem. Whether or not the moving party ultimately is found to have waived the right to arbitration through litigation conduct, each action was still delayed while expending precious judicial resources—and, if the belated motion is successful, the now long-delayed arbitration will proceed *ab initio* before a newly selected arbitrator with no obligation to even consider the work that had already taken place while the dispute was before the trial court.

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[2] The D.C. Circuit will be discussed in Section III below.

Additionally, for every case described above, the delay was demonstrably increased by the contentious and time-consuming appellate process with judges being required to conduct intimate reviews of the record. The bottom line is that the efficiencies and time savings Congress intended are entirely lost when parties are permitted to engage in pre-trial litigation until they belatedly make their request to have the proceeding moved to their now-preferred alternative arbitration forum whether or not that request is successful.

III. AS A RULE, ARBITRATION REQUESTS SHOULD BE MADE EARLY BY MOTION BUT NO LATER THAN AS PART OF THE FILING OF AFFIRMATIVE DEFENSES, CONSISTENT WITH THE PROCEDURES IN PLACE IN THE D.C. CIRCUIT.

The conduct described above completely defeats any semblance of the efficiency and timeliness undergirding this Court's arbitration jurisprudence. A significant problem is that most Circuit court decisions provide no bright line or clear guidance for future litigants as to when it is too late to ask for arbitration, or even to what extent a party may extract benefits out of the litigation process before making such a request. The only guidance future litigants are being given by these Circuit courts is that if their request is deemed waived, after a strategic delay at worse they will remain in the jurisdiction where they have already been litigating for months, if not years. Moreover, as a result of this lack of guidance and

consequence, parties are almost encouraged to game the system.

To paraphrase Justice Breyer, writing for the Court in *Allied-Bruce Terminix Cos. supra,* at 278, why would Congress intend a procedure that risks the very kind of costs and delay through litigation that Congress wrote the Act to help the parties avoid? Clearly, Congress did not, as it no doubt surmised that parties would make their requests expeditiously. The current practice in most Circuits of allowing the parties unfettered control as to when they choose to push the arbitration lever places an undue and unnecessary burden on the courts and is "clearly at odds with . . . the FAA's 'statutory policy of rapid and unobstructed enforcement of arbitration agreements.'" *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.,* 529 U. S. 193, 201 (2000) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.,* 460 U. S. 1, 23 (1983)). "Such a preliminary litigating hurdle . . . undoubtedly destroy[s] the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure." *American Express v. Italian Colors*, 570 U.S. 228, 239 (2013).

Meanwhile, the trial court, whether it be state or federal, is burdened with all of the obligations and time commitments necessary to supervise pre-trial discovery and prepare a case for trial. This reality impairs another factor that has buttressed much of the arbitration jurisprudence—the notion that arbitration can relieve the burden on overburdened

courts. *See Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 410 (2d. Cir. 1959) ("Finally, any doubts as to the construction of the Act ought to be resolved . . . to help ease the current congestion of court calendars."); *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 125 n.2 (2001) (Stevens, J., dissenting) ("And before the Senate, the chairman of the New York Chamber of Commerce, one of the many business organizations that requested introduction of the bill, testified that it was needed to 'enable *business men* to settle their disputes expeditiously and economically, and will reduce the congestion in the Federal and State courts.'"(Quoting Hearing on S. 4213 and S. 4214 Before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong. 2 (1923)) (emphasis in original). Instead, parties have been allowed to burden courts with impunity.

This is a problem that can be remedied by simply requiring that the right to arbitration be pled at the earliest stage of a case. The most expeditious way is by motion before an answer is filed. At the very latest, arbitration should be pled as an affirmative defense in the answer to a complaint. There is indeed no good explanation for why the existence of an arbitration agreement should not be pled at this time. Although the Federal Rules of Civil Procedure do not expressly include a right to arbitration as a delineated affirmative defense, the list of affirmative defenses has never been exclusive. *See* Fed. R. Civ. P. 8(c)(1) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative de-

fense, *including* . . ." (emphasis added)). *See also Dollar v. Smithway Motor Xpress, Inc.*, 710 F.3d 798, 808 (8th Cir. 2013) ("the list of enumerated defenses is exemplary rather than exclusive"); *Renfro v. City of Emporia*, 948 F.2d 1529, 1539 (10th Cir. 1991) (FLSA exemptions are affirmative defenses that must be pled).[3]

If Rule 8(c)(1) leaves any doubt as to the necessity of timely pleading affirmative defenses, Fed. R. Civ. P. Rule 12(b) makes it clear that the answer must include every defense except seven specifically enumerated defenses: "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required." Affirmative defenses thus must be set forth as required by Rules 8(b), 8(c) and 12(b) or they may not be asserted at all. As the Wright and Miller treatise observes, "it is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule of Civil Procedure 8(c) results in the waiver of that defense."

[3] There are many types of affirmative defenses. Some are issues handled at trial. Others, often decided before trial, include ones for preemption or statute of limitations that can be case-terminating and end the jurisdiction of any court over the controversy before the parties can contest the merits. Referral to arbitration falls in between—it might end the court's jurisdiction, but it still preserves the merits of the controversy for adjudication.

5 Charles Alan Wright & Arthur Miller, Federal Practice & Procedure § 1278 (4th ed. 2021).

This requirement is not onerous. Parties to contracts invariably know the substance of the contracts they have drafted or knowingly entered into, as well as whether those contracts include an arbitration provision. Indeed, in the case at bar, the arbitration clause was published on Sundance's own website. But in the unlikely event that a party does not know, responsive pleading deadlines certainly afford parties the time to find the contract and review it. Therefore, consistent with the intended speed and efficiency of the FAA, this Court should require that a motion for arbitration be expeditiously made in conformity with the FAA's mandate for timeliness and efficiency. *See, e.g., LSREF2 Baron, L.L.C. v. Tauch*, 751 F.3d 394, 402 (5th Cir. 2014); *Ingraham v. United States*, 808 F.2d 1075, 1079 (5th Cir. 1987) ("A defendant should not be permitted to 'lie behind a log' and ambush a plaintiff with an unexpected defense."); *Dole v. Williams Enterprises, Inc.*, 876 F.2d 186, 189 (D.C. Cir. 1989) (a party's failure to plead an affirmative defense generally results in waiver and exclusion of defense from the case).

In the rare circumstance in which a party might argue an inability to find or read the contract until sometime later, the Rules have a remedy. They require courts to conduct their own inquiry into the circumstance of the delay. Specifically, when a party attempts to interject a new, belated affirmative de-

fense, the Rules already place the burden on the party seeking the amendment. The legal literature is replete with examples of moving to amend, long after a party has squandered the court's time and resources.[4] Indeed, this Court has already anticipated that Rule 15(a) would allow district courts to engage in an analysis of a motion for leave to amend for "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." before leave to amend is granted. *Forman v. Davis*, 371 U.S. 178, 182 (1962).

This Court has been clear regarding its interpretation and the purpose of the Rules. They are by "design[]," *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), and "paramount command," *Dietz v. Bouldin*, 579 U.S. 40, 45 (2016), and are clear: courts should construe, administer, and employ the Rules to secure "the just, speedy, and inexpensive resolution of disputes," *id.* (citing Fed. R. Civ. P. 1). It is incumbent on this Court to harmonize the purpose of the Rules with the FAA to ensure that the right to arbitration is identified as early as possible in the process so that

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[4] Axiomatically, plaintiff by filing the case has made the choice to have a court handle the dispute. However, on very rare occasions, two of which are described above, plaintiffs have moved subsequently to seek arbitration. The same scrutiny suggested here for defendants should be applied to any plaintiff request for arbitration. *See*, *e.g.,*, *GEOMC Co., Ltd. v. Calmare Therapeutics Inc.*, 918 F.3d 92 (2d Cir. 2019).

the resources of the parties and the courts are not wasted and the purposes of both the Rules and the FAA to achieve just, speedy and efficient resolution of claims can be achieved. As this Court said in *Prima Paint Corp. v. Flood & Conklin Mfg.* Co., 388 U.S. 395, 404 (1967) (albeit about another matter): [This would] "not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts."

The procedure advocated for is akin to the procedure that has already been applied by the D.C. Circuit during the past decade. In *Zuckerman Spaeder, LLP v. Auffenberg*, 646 F.3d 919 (D.C. Cir. 2011), the Circuit was confronted with defendant's "months-long delay" before seeking arbitration, and then it was only sought after the defendant served discovery requests, filed an amended answer with counterclaims, and participated in mediation. Rather than waiver, the court instead found that the right to move for arbitration had been forfeited by defendant's dilatory tactics:

> First, to be technically correct as well as clear, we note forfeiture, not waiver, is the appropriate standard for evaluating a late-filed motion under Section 3 of the FAA. Forfeiture is the "failure to make a timely assertion of a right" and, unlike waiver, entails no element of intent. *Olano*, 507 U.S. at 733, 113 S.Ct. 1770.

> A party who fails timely to invoke his right to arbitrate is "necessarily 'in default'" when he later attempts to proceed with arbitration under Section 3. See *Cornell & Co.*, 360 F.2d at 513 14 (emphasizing congressional intent to prevent "dilatoriness and delay").

Id. at 922. In so deciding, it seems apparent the D.C. Circuit Court had become tired of the gamesmanship that has plagued courts: "By this opinion we alert the bar in this Circuit that failure to invoke arbitration at the first available opportunity will presumptively extinguish a client's ability later to opt for arbitration." *Id*. at 924.

Gamesmanship has thus been curtailed, if not eliminated, in the D.C. Circuit. In *Kelleher v. Dream Catcher, L.L.C.*, 263 F. Supp. 3d 253 (D.D.C. 2017), the ability to go to arbitration was deemed forfeited where arbitration was never pled as an affirmative defense and was not raised until six months after the initiation of the suit. *Id*. at 256. In *Cho v. Mallon & McCool, LLC*, 263 F. Supp. 3d 226 (D.D.C. 2017), it was plaintiff's motion that was deemed dilatory after plaintiff had participated in thirteen months of law and motion practice before requesting arbitration. The court held that plaintiff's right to arbitration had been forfeited when it was not raised at the first available opportunity. *Id*. at 229.

At the same time, district courts within the D.C. Circuit have appropriately granted motions for

arbitration when a moving party has filed the motion at the earliest available time or not engaged in adversarial litigation before seeking to compel arbitration. In *Flynn v. Omni Hotels Management Corp.,* No. 1:19-CV-01239, 2020 WL 1643659 (D.D.C. Apr 2, 2020), the case was moved to arbitration when the only action initiated by defendant before defendant's motion to compel arbitration and stay litigation was a request for an extension of time. In *Sakyi v. Estée Lauder Companies, Inc.*, 308 F. Supp. 3d 366 (D.D.C. 2018), defendants' motion was granted because arbitration was moved for just two weeks after defendants first learned of the arbitration agreement from a third newly-joined defendant that had the agreement. *Id.* at 383.

Whether based upon forfeiture or waiver, the rule employed by the D.C. Circuit fully supports and is in perfect harmony with the speed and efficiency that is fundamental to the FAA. The rule is not designed to curtail the movement of cases to an arbitral forum, but rather to encourage parties to move to compel arbitration expeditiously and cease the litigation gamesmanship that is antithetical to the FAA. Accordingly, amicus AAJ urges this Court to make this common sense rule a national policy. Absent clear guidance from this Court as to the necessary timing for a motion to stay and compel arbitration, the waste of precious court time and resources, the abuse of opposing parties' time, and the wide-spread inefficient delays will continue.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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