U.S. COURT OF APPEALS CASE NO. 15-15257

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE SWIFT TRANSPORTATION CO., INC.; INTERSTATE EQUIPMENT LEASING, INC.; CHAD KILLEBREW; and JERRY MOYES
Defendants and Petitioners

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA
Respondent

VIRGINIA VAN DUSEN, JOSE MOTOLINIA, JOSEPH SHEER, VICKII SCHWALM, and PETER WOOD
Plaintiffs and Real Parties in Interest

PETITION FOR WRIT OF MANDAMUS

On Appeal From the United States District Court
For the District of Arizona
District Court Case CV 10-899-PHX-JWS
Honorable John W. Sedwick

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(b), petitioners state as follows:

Petitioner Interstate Equipment Leasing, LLC (fka Interstate Equipment Leasing, Inc.) has as its sole member, Swift Transportation Company, which is a publicly traded company. Swift Transportation Co. of Arizona, LLC (fka as Swift Transportation Co., Inc.) has as its sole member Swift Transportation Co., LLC. Swift Transportation Co., LLC has as its sole member, Swift Transportation Company, which is a publicly traded company.

Petitioners Chad Killebrew and Jerry Moyes are individuals.

Dated: February 25, 2015

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By *s/ Ronald J. Holland*
RONALD J. HOLLAND

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Petitioners/Defendants Swift Transportation Co. of Arizona, LLC (f.k.a. Swift Transportation Co., Inc.) ("Swift"), Interstate Equipment Leasing, LLC (f.k.a. Interstate Equipment Leasing, Inc.) ("IEL"), Chad Killebrew and Jerry Moyes (collectively, "Petitioners or Defendants") respectfully submit the following Petition for Writ of Mandate and Other Appropriate Relief (Petition).

INTRODUCTION

In earlier appellate proceedings, this Court ruled that before the district court may consider Swift's motion to compel arbitration of the Plaintiffs' misclassification claims, it "must determine whether the Contractor Agreements between each appellant and Swift are exempt under § 1 of the FAA [Federal Arbitration Act]." Every case addressing the section 1 exemption in the past has been decided solely on briefing by the parties. Not so here. Construing the Court of Appeals' admonition on remand, the district court issued its customary litigation scheduling order for full merits discovery, expert exchange, motion practice (including dispositive motions and motions in limine), and an estimated five-day trial.

Not believing that this was the process envisioned by the Ninth Circuit to resolve the narrow section 1 exemption issue, Defendants moved the district court to determine the exemption solely on briefing, without discovery and trial. The court denied the motion on January 22, thus allowing discovery to move forward.

Plaintiffs have initiated extensive merits discovery, including special interrogatories, numerous and expansive document requests, and deposition notices for persons most knowledgeable at both Swift and IEL, describing so many proposed categories and subcategories of testimony that the depositions likely will take days to complete.

The considerable discovery and a five-day trial might be reasonable if this Court had ordered the parties to litigate the *merits* of their dispute. But it did not. Instead, this Court only remanded for the district court to determine a "threshold" issue—whether the section 1 exemption precludes arbitration of the merits of the case. After that threshold issue is determined, this Court anticipated that the *merits* of the case would still be addressed, either in arbitration if the exemption did not apply, or in litigation if it did.

Quite simply, the district court has ordered the parties to go beyond the mere threshold issue of whether a particular type of *contract* exists and litigate instead whether despite the character of the contract, a particular type of *relationship* was later formed after the contract was executed. As a consequence, under the district court process here, both issues get litigated and nothing ever gets arbitrated. This result violates the FAA, which holds parties' private agreements to arbitrate sacrosanct.

The effect of the January 22 district court Order is to deny Defendants' motion to compel arbitration on the merits, making the Order directly appealable under the law. Accordingly, Defendants appealed from the Order on February 10, 2015. However, the district court specifically found in its Order that the Order is not appealable. For that reason, Defendants also file this Petition for Writ of Mandamus.

FACTUAL AND PROCEDURAL BACKGROUND

Virginia Van Dusen, Joseph Sheer, Jose Motolinia, Vickii Schwalm, and Peter Wood are interstate truck drivers, each of whom entered into an Independent Contractor Operating Agreement ("Contractor Agreement") with Swift. Dkt. 128, pp. 3-4.[1] The express terms of the Contractor Agreements demonstrate they are not contracts of employment. Although the language of the contracts varies slightly, it carries the same import in each. The language of Sheer's Contractor Agreement states: "18. Independent Contractor. CONTRACTOR shall be considered an Independent Contractor and not an employee of COMPANY. . . . The CONTRACTOR shall determine the method, means and manner of performing services under this Agreement." Dkt. 128, Exh. 1-A, ¶ 18.

[1] All citations to the record in this Petition are to documents on file with Respondent Court. Citation is made to the district court docket as follows: "Dkt. [No.], p. __:[lines or ¶]."

The Contractor Agreements contain arbitration provisions whereby the Plaintiffs each agreed to arbitrate all disputes arising out of their independent contractor relationship with Swift. They also delegate to the arbitrator issues related to the "arbitrability of disputes between the parties." The broad arbitration provision in the Contractor Agreements states, in pertinent part:

> All disputes and claims arising under, arising out of or relating to this Agreement, including an allegation of breach thereof, and any disputes arising out of or relating to the relationship created by the Agreement, including any claims or disputes arising under or relating to any state or federal laws, statutes or regulations, and any disputes as to the rights and obligations of the parties, including the arbitrability of disputes between the parties, shall be fully resolved by arbitration in accordance with Arizona's Arbitration Act and/or the Federal Arbitration Act. Any arbitration between the parties will be governed by the Commercial Rules of the American Arbitration Association . . . .

Dkt. 128, Exh. 1-A, ¶ 24; *see also* Dkt. 128, p. 2:4-8.

In December 2009, Sheer filed suit in the United States District Court for the Southern District of New York. Dkt. 1; *See also* Dkt. 223, p. 5:3-7. The lawsuit includes claims brought under the Fair Labor Standards Act, New York Labor law, and the California Labor Code. (*Id*.) All but one of those claims hinge on the single contention that Sheer and Van Dusen were employees of Swift and not independent contractors. The district court had jurisdiction over the matter under 29 U.S.C. §216(b), 28 U.S.C. §1331, and 28 U.S.C. §1337.

The district court in New York transferred the action to the U.S. District Court for the District of Arizona. Dkt. 223, p. 6:6-9. Shortly after the case was transferred, Petitioners moved to compel arbitration pursuant to the arbitration provisions. (*Id*.) Sheer and Van Dusen opposed the motion, claiming, among other things, that the Contractor Agreements were exempt from arbitration under section 1 of the FAA ("section 1"). Dkt. 223, p. 8. Section 1 exempts "contracts of employment . . . of workers engaged in foreign or interstate commerce" from the FAA. 9 U.S.C. § 1. The district court issued its order compelling arbitration. Dkt. 223, p. 22.

Plaintiffs petitioned the Ninth Circuit for mandamus relief, asserting that the court, not the arbitrator, should determine the section 1 exemption. *In re Van Dusen*, 654 F.3d 838, 840 (9th Cir. 2011). This Court denied Plaintiffs' petition because there was no *clear* error in the district court's decision to compel arbitration. *Id.* at 845. On remand, the district court denied Plaintiffs' motion for reconsideration of the order compelling arbitration and the order was certified for appeal. Dkt. 229. This time, the Ninth Circuit reversed and remanded, relying on the earlier denial of the writ petition as law of the case. The Court ordered: "On remand, the district court must determine whether the Contractor Agreements between each appellant and Swift are exempt under § 1 of the FAA before it may

consider Swift's motion to compel." *Van Dusen v. Swift Transp. Co.*, 2013 U.S. App. LEXIS 22540, 2013 WL 5932450 (9th Cir. 2013).

Swift petitioned the Supreme Court for a writ of certiorari. *Swift Transp. Co. v. Van Dusen*, 134 S.Ct. 2819 (2014). The Supreme Court denied the petition on June 16, 2014. *Id.*

On remand, the district court issued a scheduling order on July 22, 2014, ordering the parties to engage in full merits discovery and a trial regarding whether Plaintiffs had an employer-employee relationship with Defendants, including:

- Pre-discovery disclosure exchange by the parties
- Compliance with disclosure requirements of FRCP 7.1
- Motions to amend pleadings or add parties
- Exchange of witness lists
- Expert witness disclosure by all parties
- All discovery to be completed
- All motions, including dispositive motions and motions in limine, to be served and filed.

Dkt. 548, pp. 1-9. In short, the court ordered the parties to litigate the section 1 exemption issue by setting the same discovery and trial plan as if no arbitration will *ever* take place on the merits of Plaintiffs' claims, despite the arbitration agreement between the parties and Defendants' motion to compel arbitration.

Consequently, Defendants moved the district court "for an order setting a briefing schedule to determine the section 1 exemption issue without resort to discovery and trial, and to stay proceedings, including discovery, pending resolution of the section 1 exemption issue." Dkt. 566, p. 7:2-5. The district court denied Defendants' motion on January 22, 2015. Dkt. 605, p. 9:8-9.[2]

ISSUE PRESENTED

Whether, in determining a section 1 exemption issue under the FAA, the district court must allow for full merits discovery and trial on the *relationship* between the Plaintiff and the Defendants, or whether instead the district court must decide the exemption issue based on motion only, addressing whether the Contractor Agreements are "contracts of employment?"

RELIEF SOUGHT

To maintain the proper parameter of the section 1 exemption while at the same time enforce the parties' agreement to arbitrate their claims, Defendants request that the Court issue a Writ of Mandamus, ordering the district court to determine the section 1 exemption issue without discovery and trial and based only on an analysis of the Contractor Agreements according to the parties' intent at the time of contracting.

[2] A copy of the Order and Opinion of the court is also attached hereto. ("Op.")

Defendants also seek a stay from the Court of Appeals pursuant to Federal Rules of Appellate Procedure, rule 8. On February 6, 2015, Defendants moved the district court for an immediate stay of the district court proceedings pending appellate review. Dkt. 612. The district court denied that request. Dkt. 622, p. 1-2. A stay is necessary to avoid the significant costs of discovery and trial that will be incurred unnecessarily by the parties and the court should this Court determine that discovery and trial are not appropriate in a section 1 exemption proceeding.

LEGAL STANDARD

This Court weighs five factors in determining whether to grant a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (3) The district court's order is clearly erroneous as a matter of law. (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. (5) The district court's order raises new and important problems, or issues of law of first impression.

Douglas v. U.S. Dist. Court, 495 F.3d 1062, 1065-66 (9th Cir. 2007) (quoting *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977)) (internal quotation marks omitted). Not every element of the mandamus standard must be satisfied in order to warrant a writ. *Valenzuela–Gonzalez v. U.S. Dist. Court*, 915 F.2d 1276, 1279 (9th Cir. 1990) ("all five factors need not be satisfied at once"). "Exercise of [the Court's] supervisory mandamus authority is particularly

appropriate when an important question of law would repeatedly evade review because of the collateral nature of the issue." *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1304 (9th Cir. 1982).

ARGUMENT

I. The "Full Discovery/Full Trial" Process for Determining the Section 1 Exemption Will Harm the Parties and Evade Effective Appellate Review Absent Mandamus

The posture in which a threshold section 1 exemption issue often arises—in a case where the merits issue involves a determination of whether the *relationship* between the parties is one of employee/employer—dictates that the procedure and standard for deciding the exemption is a matter that will evade effective appellate review if left until the ultimate conclusion of the case. In the meantime, the parties will be harmed because they will be compelled to engage in time-consuming and expensive discovery and trial, where what they bargained for was the speed and relative frugality of arbitration. Individual plaintiffs raising their individual claims who want these benefits of arbitration will be particularly prejudiced.

Because the district court has ordered the parties to proceed through full merits discovery, the finalization of pleadings to include all claims and parties, motion proceedings (including dispositive motions and motions in limine), and a five-day court trial, the result is that litigation of the section 1 exemption issue will

determine the ultimate issue raised by Plaintiffs' claim. By expanding what should be only a preliminary finding on the section 1 exemption issue into full litigation and trial on the merits, the district court has entered an order denying Defendants their right to the arbitration for which they have contracted.

An order requiring parties to litigate issues they have agreed to arbitrate is an appealable order, as it has the same practical effect of denying a motion to compel arbitration. *See, e.g., Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 730 (4th Cir. 1991) ("an order that favors litigation over arbitration . . . is immediately appealable [under] 9 U.S.C. § 16(a)"); *see also Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 363 (7th Cir. 1999); *Microchip Tech. Inc. v. U.S. Philips Corp.*, 367 F.3d 1350, 1355 (Fed. Cir. 2004); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 103-04 (3d Cir. 2000). Because of this legal principle, Defendants filed a notice of appeal from the district court's January 22, 2015 Order on February 10, 2015. (See Ninth Circuit Case No. 15-15257.) However, in its January 22 Order, the district court found that the Order is not appealable. For that reason, Defendants also file this Petition for Writ of Mandate, in the event this Court finds the January 22, 2015 Order is not directly appealable.

If the Court finds the January 22, 2015 Order is not directly appealable, then this writ petition is Defendants only real remedy. Waiting to appeal from the result of the court trial ordered by the court is not an effective remedy for Defendants

because at that point, the parties will have incurred the time and expense of full litigation in court where they contracted for the economic and other benefits of arbitration. In addition, the merits of the parties' dispute will have been adjudicated by the court, leaving nothing left to arbitrate.

II. The District Court's New "Full Discovery/Full Trial" Process Is Clearly Erroneous as a Matter of Law But the Issue Has Not Yet Been Decided by an Appellate Court

A. The FAA Favors Arbitration

The Federal Arbitration Act ("FAA") strongly favors arbitration. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). "The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983). This same principle has been reiterated by the district courts of Arizona: "courts construing arbitration agreements must broadly construe them and must resolve any ambiguities in an arbitration clause and any doubts concerning the scope of arbitrable issues in favor of arbitration." *Owner-Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co.*, 288 F. Supp. 2d 1033, 1036 (D. Ariz. 2003)) ("*OOIDA v. Swift*").

B. Section 1 Exempts "Contracts of Employment"

Against this backdrop favoring arbitration, the FAA contains a limited exemption in section 1, providing that "nothing herein contained shall apply to contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The analysis of the section 1 exemption issue, however, must be conducted in accordance with the strong policy favoring arbitration and any close call must be resolved in favor of arbitration. *See Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir. 1999) ("[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.") (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25).

C. Litigation of the Threshold Issue of the Section 1 Exemption Must Be Narrowly Construed

Exemptions to the FAA are narrowly construed. *Veliz v. Cintas Corp.*, 2004 U.S. Dist. LEXIS 32208 (N.D. Cal. 2004) (citing *Circuit City v. Adams*, 532 U.S. 105, 119 (2001)). This Court has previously held that the district court here must determine whether the Contractor Agreements are exempt from arbitration under section 1 "*as a threshold matter*." *Van Dusen v. Swift Transp. Co.*, 2013 U.S. App. LEXIS 22540, 2013 WL 5932450 (9th Cir. 2013) (emphasis added) (*Van Dusen II*); see also *In re Van Dusen*, 654 F.3d 838, 843-45 (9th Cir. 2011) (*Van Dusen I*). Thus, the Court instructed the district court to "determine whether the Contractor Agreements between each appellant and Swift are exempt under § 1 of the FAA

before it may consider Swift's motion to compel." *Van Dusen II*, 2013 U.S. App. LEXIS 22540, 2013 WL 5932450 (emphasis added).

Implicit in the Court's holding and instructions is the conclusion that litigation of the exemption issue should not completely overlay litigation of the ultimate merits of Plaintiffs' claims. If the two issues are completely congruent, then the section 1 exemption issue would not be a "threshold" matter at all. Nor would there ever be need for the district court to consider Swift's motion to compel, regardless of how the court rules on the exemption issue. Even if the district court were to find the section 1 exemption does not apply, by making the section 1 exemption issue congruous with litigation of the merits of Plaintiffs' claims that they were improperly classified as independent contractors, then any further litigation after the section 1 exemption is determined would be moot. Such a result would violate the FAA.

But that is the result that will occur here, unless this Court grants review and sets the appropriate standard and procedure for the district court to follow in resolving the section 1 exemption issue. As discussed below, the best process for determining the section 1 exemption while at the same time preserving the parties' rights to arbitration if the exemption does not apply, is to decide the exemption by analyzing the Contractor Agreements, as this Court ordered. The test is properly stated as whether the Contractor Agreements, interpreted according to the mutual

intention of the parties at the time the contracts were formed, are independent contractor agreements or contracts of employment.

D. Litigation of the Section 1 Exemption Should be Limited to Consideration of the Intent of the Parties at the Time of Contracting

"The interpretation of a contract must give effect to the 'mutual intention' of the parties . . . at the time the contract was formed." *Sony Computer Entm't Am., Inc. v. Am. Home Assurance Co.*, 532 F.3d 1007, 1012 (9th Cir. 2008); *U.S. Cellular Inv. Co. of L.A. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 934 (9th Cir. 2002); *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1264 (1992). "[T]he rule of interpretation is stated to be that the intention of the parties as derived from the language used within the four corners of the instrument must prevail." *Darner Motor Sales v. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 387-88 (1984) (emphasis added) (citing *Rodemich v. State Farm Mutual Auto Insurance Co.*, 130 Ariz. 538, 539 (1981)). "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible." *WYDA Associates v. Merner*, 42 Cal. App. 4th 1702, 1709 (1996) (internal citations omitted); *see also Dingley v. Oler*, 117 U.S. 490 (1886); *Reed v. Ins. Co.*, 95 U.S. 23, 30 (1877) ("A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often

necessary to prevent the court in construing their language, from falling into mistakes and even absurdities"). Likewise, the court has a duty to construe statutes to avoid absurd results. *In Re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 693 (9th Cir. 2011).

In the arbitration context, the U.S. Supreme Court has reaffirmed that a court's role in determining whether to compel arbitration is a functional one: to interpret the parties' agreement according to its terms. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1742, 1748 (2011). The Supreme Court's approach is rational—to hold otherwise could lead to absurd results because the same contract could produce different outcomes depending upon potentially fluctuating circumstances in the relationship between the parties at the time a dispute arises. For example, in the section 1 exemption context, if the contract containing the arbitration agreement is an independent contractor agreement and *not* a contract of employment at the time it was signed, a claim that arises immediately would be arbitrated. If, however, a claim under the same contract is made one year later, when the *relationship* between the parties may have fluctuated to include indicia of an employment relationship, a court may determine the section 1 exemption applies, even though the *contract* is still not a contract of employment under section 1. This approach acutely contradicts the U.S. Supreme Court's repeated mandate that arbitration agreements must be enforced according to their terms. *Id.*

Whether an employer-employee relationship developed *after* the agreement was signed is a separate question and one that should be decided by the arbitrator, particularly where, as here, it is the ultimate question of the parties' dispute.

This proposed process, of interpreting the express terms of the Contractor Agreements according to the parties' intent at the time of contracting also protects the benefits of arbitration, should the court find the section 1 exemption does not apply. The parties will not have wasted months and months, and tens or hundreds of thousands of dollars on discovery, motions, and trial on the merits of the litigation if the case ultimately is sent to the streamlined and more economical process of arbitration. This result is also consistent with the Ninth Circuit's previous holdings and instructions, that the section 1 exemption issue is a "threshold matter" for the district court, and the district court must examine the Contractor's Agreements for exemption *before* it determines whether the case may be arbitrated. *See Van Dusen II*, *supra*, 2013 U.S. App. LEXIS 22540, 2013 WL 5932450 (9th Cir. 2013) (emphasis added); see also *Van Dusen I*, *supra*, 654 F.3d at 843-45. Finally, this process is consistent with the plain language of the section 1 exemption itself: "nothing herein contained shall apply to *contracts* of employment." 9 U.S.C. §1 (emphasis added).

E. The District Court's Questions Relevant to the Exemption Issue Can Be Answered by Interpreting the Contractor Agreements

In its Order, the district court seemed to think that Defendants were asking it to find the Contractor Agreements are not employment agreements solely because of the Contractor Agreements' use of the term "independent contractor." Dkt. 605, p. 5:7-9. Not so. The terms of the Contractor Agreements determine whether it is an independent contractor agreement or a contract of employment, and Defendants rely on the terms of the contracts themselves, not merely the labels used in them.

In its decision, the court overstated the scope of the section 1 exemption analysis. First, appropriately, the court framed the issue as "[w]hether the parties formed an employment contract—that is whether plaintiffs were hired as employees." *Id*., p. 5:9-11. The "facts" that the court indicates are relevant to a determination of the issue, however, are set by the terms of the Contractor Agreements. For example, the court indicates that determination of this issue would require the court to consider "the employer's right to control the work" (set by the Contractor Agreements), "the individual's opportunity to earn profits from the work" (also set by the Contractor Agreements), "the individual's investment in equipment and material needed for the work" (set by the Contractor Agreements), "whether the work requires a specialized skill" (set by the Contractor Agreements), and "whether the work done by the individual is an integral part of the employer's business." *Id.*, p. 5:15-20. These issues are all conducive to determination based

on briefing that interprets the Contractor Agreements. No discovery or trial is necessary or appropriate.

The cases relied on by the district court do not change that conclusion. One of the two Ninth Circuit cases cited by the court in this analysis did not arise in the context of a section 1 exemption decision at all, but rather arose as part of a merits analysis of whether the plaintiff strawberry growers were employees who could invoke the protections of the Fair Labor Standards Act. *Id.*, p. 5:7-9 and fn. 10, citing *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748 (9th Cir. 1979). While the other Ninth Circuit case involved the section 1 exemption, the Court of Appeals found the defendant had waived its argument that the plaintiff was an independent contractor. Dkt. 605 (Op.), p. 5:14-15 and fn. 12, citing *Harden v. Roadway Package Systems, Inc.*, 249 F.3d 1137, 1141 (9th Cir. 2001). The Ninth Circuit has not yet held what process should be employed in addressing the section 1 exemption issue, including whether that process should allow for merits discovery and trial.

F. The Section 1 Exemption Universally Has Been Determined by Interpreting the Parties' Contract, Without Discovery and Trial

The plethora of district court cases cited by the court in its Order also does not justify the district court's decision here. Dkt. 605 (Op.), p. 6:1-12 and cases cited in fns. 15, 16. None of those cases instituted discovery or involved a trial. *See id.* Instead, the terms of the contract are the prime consideration. *Id.*

Although the court also mentioned looking to "the circumstances of their working relationship," there is no indication that doing so involved either discovery or trial. *Id.* In fact, what can be gleaned from the cases is that a plaintiff has the burden of establishing that the FAA does not apply to their claims. *See, e.g., OOIDA v. Swift*, 288 F. Supp.2d at 1035. But none of these cases involved either discovery or trial. *Id.* at 1034 ("Having considered the parties' memoranda, the Court finds that the motion [to compel arbitration] should be granted.").

When considering whether the section 1 exemption applied, the district court decisions relied on by the trial court here consistently looked to the terms of the parties' contract, as advanced by the parties' briefing, to resolve the issue:

> While neither the Supreme Court nor the Third Circuit has determined whether an owner-operator who is an independent contractor is covered by this exemption, other district courts have found that unless the party can affirmatively establish that the FAA does not apply, the court should apply the characterization of the employment relationship described in the contract.

Port Drivers Fed'n 18, Inc. v. All Saints Express, Inc., 757 F. Supp. 2d 463, 472 (D.N.J. 2011) citing *OOIDA v. Swift, supra*, 288 F. Supp. 2d 1033.

In *Owner-Operator Indep. Drivers Ass'n, Inc. v. United Van Lines, LLC*, 2006 U.S. Dist. LEXIS 97022 (E.D. Mo. 2006) ("*United Van Lines*"), the court explained why the District Court of Arizona's approach in *OOIDA v. Swift* was correct:

> A split of authority has developed about the meaning of 'contract of employment' in the context of owner-operators. At issue is whether an owner-operator who is classified as an independent contractor in his lease is exempted or not. One line of cases holds that, unless the non-moving party proves to the court that the FAA does not apply, the court should apply the characterization of the relationship described in the agreement and find that an owner-operator characterized as an independent contractor does not have a contract of employment with the carrier.

Id., citing *OOIDA v. Swift*; *Letourneau v. FedEx Ground Package Sys., Inc.*, 2004 U.S. Dist. LEXIS 6165 (D.N.H. 2004); *Roadway Package Sys., Inc. v. Kayser*, 1999 U.S. Dist. LEXIS 15768, fn. 4 (E.D. Pa. Oct. 13, 1999).

The court in *United Van Lines* continued:

> Other cases have come to the opposite conclusion, but only one, *Owner-Operator Indep. Drivers Assn' v. C.R. England, Inc.* [325 F. Supp. 2d 1252, 1257 (D. Utah 2004)], has articulated a reason for its conclusion. In *C.R. England*, the court made two pertinent holdings. First, it held, without citing any authority, that the parties' characterization of their relationship was not dispositive . . . Second, it held that the lease at issue was a contract of employment because it "cover[ed] the owner-operator's agreement to perform … certain functions related to the operation of the equipment for C.R. England's business, namely to operate the equipment together with all necessary drivers and labor to transport freight on the company's behalf."

2006 U.S. Dist. LEXIS 97022 at *8.

To follow *C.R. England,* however, would mean that drivers would always be employees. *See Carney v. JNJ Express, Inc.*, 10 F. Supp. 3d 848, 853 (W.D. Tenn. 2014) ("The court in *C.R. England* did not explain why it held that the agreement was an employment contract based on the operation of the equipment in

furtherance of C.R. England's business. All such agreements would be employment contracts if that were the only requirement."). The court in *Port Drivers* also rejected *C.R. England* as it provided "no substantive analysis or guidance concerning its decision." *Port Drivers*, 757 F. Supp. 2d at 472. The court in *United Van Lines* held:

> Upon consideration, the Court adopts the *Swift* standard because it better effectuates the FAA's goals. *Swift's* reasoning not only furthers the complementary policies of favoring arbitration and narrowly construing the FAA's exceptions, but also provides a sound methodology, having the non-moving party prove the FAA does not apply, for *determining whether an agreement* qualifies as a contract of employment.

United Van Lines, 2006 U.S. Dist. LEXIS 97022 at 9-10 (emphasis added). The *United Van Lines* court analyzed the Independent Contractor Operating Agreement and concluded it was not a contract of employment under the FAA.

Despite its outlier conclusion, the decision in *C.R. England* nonetheless supports a conclusion that the determination of the section 1 exemption should be made based only upon the papers: "The issue, however, is whether the Operating Agreements involved are within the scope of the exemption." *C.R. England*, 325 F. Supp. 2d at 1258. To make this determination, "the Court considers the Operating Agreements to determine whether or not they are 'contracts of employment.'" *Id.* The *C.R. England* court then analyzed the terms of the

Operating Agreements and found they were contracts of employment.[3] No discovery or trial was conducted.

Thus, the District Court of Arizona is not the only district court that has endorsed and followed the approach of determining the section 1 exemption based solely on the papers. *See also Carney*, *supra*, 10 F. Supp. 3d at 853 ("The opinions in *Swift* and *United Van Lines* are persuasive"; court analyzed the terms of a lease agreement to resolve that the section 1 exemption did not apply and therefore the court compelled arbitration).[4]

In *Davis v. Larson Moving & Storage Co.*, 2008 U.S. Dist. LEXIS 87251, 15-18 (D. Minn. 2008), the court considered the common law factors for determining whether an individual had been hired as an employee and applied them to the parties' Independent Contractor Operating Agreement. The court concluded that the plaintiff had not established that he was an employee and thus exempt from the FAA under section 1: "Under these circumstances [as set forth in the parties' agreement], the Court concludes that Plaintiff has not established that

[3] The conclusion in *C.R. England* has been widely disregarded by other courts as to follow its logic would always result in drivers being classified as employees.

[4] The court found: "The Leases do not give JNJ exclusive control over the Carneys' equipment. The Carneys are responsible for the equipment, its repairs, maintenance, and insurance. That shift in responsibility is a significant change from the Carneys' relationship with JNJ before executing the Leases. As in *United Van Lines*, the Carneys control the means of their performance under the Leases. The Carneys . . . are independent contractors." *Carney*, 10 F. Supp. 3d at 854.

he was functionally an employee of Defendant." This approach was also approved and adopted in *Letourneau v. FedEx Ground Package Sys., Inc.*, *supra*, 2004 U.S. Dist. LEXIS 6165, where the court rejected the plaintiff's argument that the contract was exempt under section 1, relying on "Judge Rosenblatt's well-reasoned decision in" *OOIDA v. Swift*, 288 F. Supp 2d 1033. *Id.*at *2. Once again, the court considered no evidence beyond the contract itself in reaching this conclusion.

In *OOIDA v. Swift*, *supra*, a dispute arose as to whether the section 1 exemption applied. After reviewing the parties' agreement, the court held: "Given the strong and liberal federal policy favoring arbitral dispute resolution, the Court cannot conclude on this record that § 1 bars the enforcement of the arbitration provision at issue." 288 F. Supp. 2d at 1040. In reaching this decision, the Arizona District Court did not order discovery or a trial regarding the section 1 exemption.

The district court here erred in departing from this established practice and ordering merits discovery and a lengthy trial on the section 1 exemption. Instead, this Court should mandate the district court to decide the section 1 exemption based on briefing regarding the Contractor Agreements, without discovery or trial.

G. The District Court Erred in Ordering a Five-Day Trial That Necessarily Will Decide the Merits of the Case

This Court remanded this case to the District Court to decide the section 1 exemption issue, not the merits of the litigation. It is long-established that "in

deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT & T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 649-50 (1986). The Court's "role is strictly limited to determining arbitrability and enforcing agreements to arbitrate**,** leaving the merits of the claim and any defenses to the arbitrator." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1131 (9th Cir. 2000).

In this Court's previous review in this case, it did not address the proper course by which the district court is to determine the section 1 exemption without running afoul of the law against ruling on the merits of an arbitrable claim. The issue, however, can be reconciled: if the district court analyzes the four corners of the Contractor Agreements, it will decide the section 1 exemption issue without deciding the merits of the case. *See Van Dusen II*, *supra*, LEXIS 22540, 2013 WL 5932450 (remanding for the district court to determine whether the "Contractor Agreements" are exempt under section 1).

If, contrary to controlling precedent, the parties are compelled to litigate in an evidentiary trial whether an employer-employee relationship developed after the Contractor Agreements were signed, the district court's decision on the issue will at the same time determine the merits of the case. According to Plaintiffs, whether an employer-employee relationship existed, is the "central element of all of

Plaintiffs' substantive claims other than unconscionability." Dkt. 188, p. 8, fn. 5 (Plaintiffs' Opposition to Defendants' Motion to Compel Arbitration states: "The issue of whether an employer/employee relationship exists between the plaintiffs and defendants is not only central to the question of exemption from arbitration, it is also a central element of all of Plaintiffs' substantive claims other than unconscionability.") Thus, by allowing substantial discovery and conducting a lengthy trial on the issue of whether an employer-employee relationship existed at any time after the Contractor Agreements were signed, the parties' arbitration agreement will not be enforced, even if the court ultimately finds the section 1 exemption does not apply.

If parties are always compelled to litigate the merits of the case in court in the guise of a section 1 exemption analysis, parties would forever forego the possibility of arbitrating a misclassification case in the transportation industry as the court would always decide the merits. The parties' contractual agreement to arbitrate their claims would become a nullity. Such an outcome is contrary to the federal policy favoring arbitration, the language of the FAA and U.S. Supreme Court precedent. To the contrary, courts have routinely compelled arbitration of misclassification cases involving the transportation industry. *See, e.g., Reid v. SuperShuttle International, Inc.*, No. 08-CV-4854 (JG) (VVP) (E.D.N.Y. Mar. 22, 2010) (court compelled arbitration because arbitration agreement governed all

aspects of relationship, including claim that drivers were employees rather than independent contractors); *OOIDA v. Swift, supra*, 288 F.Supp.2d at 1040 (court compelled arbitration and found that agreement to arbitrate reached all of plaintiffs' claims).

If instead, the district court simply analyzes the four corners of the Contractor Agreements, it would decide the section 1 exemption issue without also deciding the merits of the case. This process would accord with "the law's repeated admonishments that district courts refrain from addressing the merits of an underlying dispute." *Van Dusen I, supra*, 654 F.3d at 846.

CONCLUSION

The Ninth Circuit ordered this Court to "determine whether the Contractor Agreements between each appellant and Swift are exempt under § 1 of the FAA before it may consider Swift's motion to compel." The only way to do so without violating established legal authority is through an examination of the contracts themselves, and not through merits discovery and a trial. Defendants respectfully request that the Court issue a writ of mandamus, ordering the district court to resolve the section 1 exemption issue in this case without discovery and trial, but only on the basis of the Contractor Agreements and the briefing of the parties.

Dated: February 25, 2015

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By *s/ Ronald J. Holland*
RONALD J. HOLLAND
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SWIFT TRANSPORTATION CO. OF ARIZONA, LLC; INTERSTATE EQUIPMENT LEASING, LLC; CHAD KILLEBREW; and JERRY MOYES

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Defendants state that the following past appellate decisions in this case are closely related to the present appeal:

Van Dusen v. Swift Transp. Co. (No. 11-17916), 2013 U.S. App. LEXIS 22540, 2013 WL 5932450 (9th Cir. 2013)

In re Van Dusen (No. 10-73780), 654 F.3d 838 (9th Cir. 2011)

CERTIFICATE OF COMPLIANCE

This brief complies with the 30-page length limit set forth at Federal Rules of Appellate Procedure, rule 21(d). The brief's type size and typeface comply with Federal Rules of Appellate Procedure, rule 32(a)(5) and (6).

Dated: February 25, 2015

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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ORDER AND OPINION

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

John Doe 1, *et al.*, **Plaintiffs,** **vs.** **Swift Transportation Co., Inc., *et al.*,** **Defendants.**	**2:10-cv-00899 JWS** **ORDER AND OPINION** **[Re: Motion at Docket 566]**

I. MOTION PRESENTED

At docket 566 defendants filed a motion asking the court to stay the proceedings and determine the appropriate resolution of the Federal Arbitration Act ("FAA") exemption issue. Specifically, they ask the court to set aside the scheduling and planning order at docket 548 and set a briefing schedule where the parties can put forth their arguments as to why the plaintiffs' contractor agreements are not contracts of employment within the meaning of Section 1 of the FAA. Plaintiffs respond at docket 572. Defendants reply at docket 578. Oral argument was requested but would not be of additional assistance to the court.

II. BACKGROUND

The background facts in this action are set forth in full at docket 223. Suffice it to say the plaintiffs are truck drivers who entered into contractor operating agreements ("Contractor Agreements") with Defendant Swift Transportation Co. ("Swift"). In 2009, the plaintiffs filed a complaint against Swift and Defendant Interstate Equipment Leasing, Co., Inc. alleging various labor law claims and putting the status of the employment relationship between the plaintiffs and Swift at the heart of the lawsuit. Defendants moved to compel arbitration based on the terms of the Contractor Agreements, but plaintiffs opposed arbitration based in part on Section 1 of the FAA, which exempts "contracts of employment of . . . workers engaged in foreign or interstate commerce."[1] By order dated September 30, 2010, the court granted defendants' motion to compel arbitration and stay this action pending completion of arbitration. The court concluded that the applicability of the exemption was a question for the arbitrator to decide in the first instance.[2] Plaintiffs filed a motion for reconsideration of the court's order, or alternatively, to certify for immediate appeal pursuant to 28 U.S.C. § 1292(b), "the question of who decides the applicability of the FAA § 1 exemption where . . . that question raises disputed fact issues going to the merits of the claims."[3] The court denied the plaintiffs' motion.[4]

Plaintiffs subsequently filed a petition for writ of mandamus with the Ninth Circuit Court of Appeals. In their petition, plaintiffs argued that the district court committed clear error by "refusing to resolve their claim of exemption from arbitration under Section 1 of the [FAA] and Section 12-1517 of the Arizona Arbitration Act . . . before

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[1]9 U.S.C. § 1.

[2]Doc. 223.

[3]Doc. 226.

[4]Doc. 229.

compelling arbitration pursuant to those acts."[5] The Ninth Circuit concluded that a district court must first determine whether the agreement at issue is exempt as a contract of employment pursuant to Section 1 before ruling on a motion to compel arbitration. It nonetheless denied plaintiffs' petition for mandamus relief on the grounds that it was not satisfied that the district court committed clear error because the issue was one of first impression and because of "the law's repeated admonishments that district courts refrain from addressing the merits of an underlying dispute."[6]

After the Ninth Circuit's denial of mandamus, plaintiffs requested that the court again reconsider its order compelling arbitration or, alternatively, to certify an interlocutory appeal under 28 U.S.C. § 1292(b). The court granted the request to certify an interlocutory appeal because, based on the Ninth Circuit's order, there was a substantial ground for difference of opinion on the issue of whether a district court should assess a Section 1 exemption issue where it raises disputed facts going to the merits of the plaintiff's claims and the contracting parties have agreed to arbitrate questions of arbitrability. On appeal, the Ninth Circuit stated that its opinion in *Van Dusen* was the law of the circuit and remanded the case, instructing the district court to "determine whether the Contractor Agreements between each appellant and Swift are exempt under § 1 of the FAA" before ruling on the motion to compel arbitration.[7]

The court issued an order asking the parties to file a notice outlining what needed to be done to conclude the case. On July 15, 2014, both parties simultaneously filed separate notices. Defendants' notice at docket 542 essentially contended that the only thing to be done was for the court to review the four corners of the Contractor Agreements to determine if they were contracts of employment. Plaintiffs' notice at docket 543 set forth a comprehensive schedule for discovery

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[5] *In re Van Dusen*, 654 F.3d 838, 840 (9th Cir. 2011) ("*Van Dusen I*").

[6] *Id.* at 846.

[7] *Van Dusen v. Swift*, 544 Fed. Appx. 724 (9th Cir. 2013) ("*Van Dusen II*").

needed to determine what facts bear on plaintiffs' status as employees or independent contractors. The court, believing plaintiffs' approach was correct given the Ninth Circuit's rulings, set forth a scheduling and planning order in conformity with plaintiffs' suggested schedule.[8]

Defendants then filed the motion at issue. Again, they assert that the court should only look at the terms of the Contractor Agreements to determine whether they are contracts of employment. They argue that the court cannot authorize discovery and a trial on the issue of whether the Contractor Agreements are employment contracts because that would necessarily require the court to decide the merits of the underlying case, which would effectively be the same as denying arbitration.

III. DISCUSSION

A. Proper motion

Plaintiffs oppose the motion based in part on the argument that defendants are improperly asking the court for reconsideration of its prior order at docket 546. Defendants correctly point out, however, that the order at docket 546 was not in response to a motion; it was an order related to scheduling. The parties had simultaneously filed notices in response to the court's order at docket 536, which asked for a summary of "those matters which need to be addressed to resolve this litigation." Plaintiffs' notice included legal argument as to why discovery was appropriate, but given the simultaneous nature of the filings, defendants did not have an opportunity to fully brief the issues raised by plaintiffs. The court will consider defendants' motion.

B. Discovery warranted

Defendants argue that discovery on the issue of whether the Contract Agreements were contracts of employment for purposes of Section 1 is not warranted because the court need only consider the four corners of the agreements. Defendants cite the Ninth Circuit's mandate to "determine whether the Contract Agreements

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[8]Doc. 548.

between each appellant and Swift are exempt under § 1 of the FAA before it may consider Swift's motion to compel."[9] They argue that the mandate instructs the court to look only at the terms of the agreements and not the working relationship between the parties. In other words, defendants assert that the issue of whether plaintiffs entered into contracts of employment is distinct from the issue of whether plaintiffs were employees. The court disagrees.

The question of whether an agreement is a contract of employment is not simply a question of the stated intent of the parties. If that were the case, then the use of the term "independent contractor" would simply govern the issue.[10] Whether the parties formed an employment contract—that is whether plaintiffs were hired as employees—necessarily involves a factual inquiry apart from the contract itself. That analysis will require the court to consider the "Contractor Agreement as a whole, as well as the lease and evidence of the amount of control exerted over plaintiffs by defendants."[11] Indeed, the distinction between independent contractors and employees is "highly factual."[12] Classifying the arrangement requires the court to consider numerous fact-oriented details, such as the employer's right to control the work, the individual's opportunity to earn profits from the work, the individual's investment in equipment and material needed for the work, whether the work requires a specialized skill, and whether the work done by the individual is an integral part of the employer's business.[13] Plaintiffs should be provided an opportunity to discover evidence that would affect the court's analysis regarding the parties' intent in this regard.

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[9] *Van Dusen II*, 544 Fed. Appx. 724, at **1.

[10] *See Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 755 (9th Cir. 1979) (noting that contractual labels alone do not determine employment status).

[11] Doc. 223 at p. 19.

[12] *Harden v. Roadway Package Sys., Inc.*, 249 F.3d 1137,1141 (9th Cir. 2001).

[13] *Real*, 603 F.2d at 754.

Even the cases relied upon by defendants support this conclusion. In *Owner-Operator Independent Drivers Association, Inc. v. Swift*,[14] the court looked at whether the Section 1 exemption would apply to truck drivers classified as independent contractors under the applicable contractor agreement. It held that the characterization of the relationship described in the agreement governs under a Section 1 exemption analysis *unless* the non-moving party can prove through the "terms of the contract *and the circumstances of [the plaintiffs'] working relationship with [defendant]*" that they had a contract of employment.[15] Indeed, contrary to defendants' assertion that the issue of whether plaintiffs entered into contracts of employment is distinct from the issue of whether plaintiffs were employees, the cases defendants rely upon, as well as other cases addressing the Section 1 exemption issue, do not make this distinction and instead frame the issue in terms of the plaintiff's employment status.[16]

Defendants also argue that discovery and trial is only appropriate if there is a dispute regarding the "making of the agreement" pursuant to Section 4 of the FAA. Defendants cite cases where discovery has been permitted on the issue of whether

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[14]288 F. Supp. 2d 1033 (D. Ariz. 2003).

[15]*Id.* at 1035 (emphasis added); *See also Carney v. JNJ Express, Inc.*, 10 F. Supp. 3d 848, 853-54 (W.D. Tenn. 2014); *Owner-Operator Indep. Drivers Ass'n, Inc. v. United Van Lines, LLC*, 2006 WL 5003366, at *3 (E.D. Mo. Nov. 15, 2006).

[16]*See, e.g., Carney*,10 F. Supp. 3d at 853-54 (examining whether the plaintiffs were actually employees and how much control the defendant had over plaintiffs' performance); *Port Drivers Fed'n 18, Inc. v. All Saints*, 757 F. Supp. 2d 463, 472 (D. N.J. 2011) (concluding that plaintiffs failed to establish that they were employees rather than independent contractors); *Davis v. Larson Moving & Storage Co.*, 2008 WL 4755835, at *5-6 (D. Minn. Oct. 27, 2008) (examining whether plaintiff was functionally an employee of the defendant); *Flinn v. CEVA Logistics U.S., Inc.*, 2014 WL 4215359, at * 5 (S.D. Cal. Aug. 25, 2014) (examining whether plaintiff had an employment relationship with defendant); *Cilluffo v. Central Refrigerated Services, Inc.*, 2012 WL 8523507, at * 3 (C.D. Cal. Sept. 24, 2012) (noting that the Section 1 exemption issue turns on whether the plaintiffs are independent contractors or employees); *Bell v. Atl. Trucking Co.*, 2009 WL 4730564, at *4 (M.D. Fla. 2009) (examining whether plaintiff was an independent contractor or an employee).

there was an agreement to arbitrate in the first place but disallowed as to the merits of the underlying claims. Such cases are irrelevant here. None of the cases cited specifically hold that discovery is inappropriate when the merits are intertwined with the Section 1 exemption issue, as is the case here. Indeed, whether or not the parties entered into an employment agreement could conceivably fit within the confines of Section 4's allowance for discovery and trial because it involves a dispute about the nature of the agreement made between the parties.

Defendants also argue that the Section 1 exemption issue is always determined without discovery and trial, but again the cases cited are not directly on point. None of the cases specifically address whether or not discovery is appropriate. Furthermore, other courts looking at the Section 1 exemption issue have not limited their analysis to the four corners of the agreement.[17] Moreover, the cases relied on by defendants do not involve a situation where the exemption issue and the substantive issues are so intertwined that the question of exemption is dependent on the resolution of factual issues going to the merits. In such situations, if analogizing to a Rule 12(b)(1) motion to dismiss based on subject matter jurisdiction—which is often the vehicle used for raising motions to compel arbitration—the exemption determination should await a determination of the relevant facts on either a motion going to the merits or at trial.[18]

Finally, defendants again argue that under the FAA the court is prohibited from determining the merits. This is precisely what defendants argued to the Ninth Circuit as a reason why the Section 1 exemption issue should be heard by the arbitrator and what

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[17] *See, e.g., Carney*, 10 F. Supp. 3d at 853-54 (relying in part on plaintiffs' declarations). *Flinn*, 2014 WL 4215359, at * 5-7 (relying on plaintiff's declaration); *Bell*, 2009 WL 4730564 (M.D. Fla. 2009) (relying on the text of the contract as well as the allegations in the plaintiffs' complaint).

[18] *See Augustine v. United States,* 704 F.2d 1074, 1077 (9th Cir.1983) (holding that for a 12(b)(1) motion "where the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial.")

caused district court to rule in favor of arbitration in the first place. The Ninth Circuit nonetheless ordered the district court to decide the issue despite "the law's repeated admonishments that district courts refrain from addressing the merits of an underlying dispute."[19]

C. Order not appealable

Defendants argue that if the court proceeds with the schedule set forth at docket 548, then it will have effectively denied arbitration in favor of litigation, and thus the order is appealable under Section 16(a) of the FAA. Defendants cite to *Koveleskie v. SBC Capital Markets, Inc.*[20] In *Koveleskie* the district court had refused to compel arbitration, concluding that discovery was appropriate before a decision could be reached on the arbitration issue. The Seventh Circuit stated that the district court's order was appealable under Section 16(a) as an ordering denying arbitration because the court was effectively foreclosing arbitration by proceeding to discovery.[21] Defendants also cite *Sandvik AB v. Advent International Corp.*[22] In *Sandvik* the court also held that it had jurisdiction to hear an interlocutory appeal under Section 16(a) after the district court indicated that it would delay a ruling on arbitration until it determined the validity of the underlying contract. The court noted that the district court effectively declined to compel arbitration and thus forced the defendant to face the possibility of enduring a full trial on the underlying controversy before it would receive an answer about whether it was legally obligated to participate in such a trial in the first place.[23]

While *Koveleskie* and *Sandvik* support a conclusion that orders delaying a ruling on arbitrability are immediately appealable under Section 16, the situation presented

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[19] *Van Dusen I*, 654 F.3d at 846.

[20] 167 F.3d 361, 363 (7th Cir. 1999).

[21] *Id.*

[22] 220 F.3d 99, 103-04 (3rd Cir. 2000).

[23] *Id.*

here is distinguishable. The court has been specifically instructed to decide the Section 1 issue, which as noted above necessarily involves some questions of fact, before it considers Swift's motion to compel. Again, the Ninth Circuit was aware that the exemption issue and the substantive issues are so intertwined that the question of exemption is dependent on the resolution of factual issues going to the merits. It nonetheless directed the court to proceed.

V. CONCLUSION

Based on the preceding discussion, defendant's motion at docket 566 is DENIED.

Due to the passage of more than two months from the time the scheduling order at docket 548 was entered until the filing of the motion at docket 566, plus the length of time it has taken the court to resolve the motion at docket 566, the schedule set in the order at docket 548 is no longer workable. Accordingly, each of the deadlines in the order at docket 548 is extended by 7 months.

DATED this 22nd day of January 2015.

/s/ JOHN W. SEDWICK
SENIOR UNITED STATES DISTRICT JUDGE