IN THE UNTIED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOCKET NO. 11-17916

VIRGINIA VAN DUSEN, JOHN DOE 1 and JOSEPH SHEER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED PERSONS,

Plaintiffs-Appellants

v.

SWIFT TRANSPORTATION CO., INC., INTERSTATE EQUIPMENT LEASING, INC. CHAD KILLIBREW and JERRY MOYES,

Defendants-Appellees

On Petition from an Order of the United States District Court

For the District of Arizona

Case No. CV-10-899-PHX-JWS

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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JURISDICTIONAL STATEMENT

The district court has jurisdiction over this action pursuant to 29 U.S.C. §§216(b) and 28 U.S.C. §§ 1331, 1367. This Court has jurisdiction over the present appeal pursuant to 28 U.S.C. §1292(b). The district court certified its order compelling arbitration, (Doc. 223, Excerpts of Record Vol. 1, pp. 27-48),[1] for interlocutory review on September 7, 2011, (Doc. 321, ER 1:2-8), and this Court granted permission to appeal on December 8, 2011, (Doc. 342, ER 1:1). Plaintiffs/Appellants timely perfected their appeal on December 9, 2011, (Doc. 346).

ISSUE PRESENTED FOR REVIEW

1. Whether the district court erred in ordering arbitration under the Federal Arbitration Act (FAA or the Act), 9 U.S.C. § 1 *et. seq.*, without first determining if this action is exempt from arbitration under Section 1 of the Act , and the exemption provision of the Arizona Arbitration Act (AAA), Ariz. Rev. Stat. §12-1517.

Pertinent provisions of the FAA and the AAA are set forth in the addendum attached hereto.

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[1] References to the Excerpts of Record ("ER") will be designated by volume number first followed by a colon and then page number(s).

STATEMENT OF THE CASE

Appellants Virginia Van Dusen, John Doe I (previously identified on the record as Jose Motolinia), and Joseph Sheer (hereafter "Drivers") are interstate truck drivers who allege that they were employees of Defendants Swift Transportation Co, Inc.,[2] and Interstate Equipment Leasing, Co., interrelated privately held companies owned and operated by the same principals, Defendants Chad Killibrew and Jerry Moyes. (ER 3:451-486.) The Drivers sue under the Fair Labor Standards Act (29 U.S.C. § 206), the forced labor provisions of 18 U.S.C. §1589, state law wage and deduction statutes, and under the common law of contracts and unjust enrichment. The Drivers bring their FLSA claims as a collective action and their other claims as putative Rule 23(b)(3) class actions.[3]

On May 10, 2010, after this case was transferred to Arizona, Defendants moved to compel arbitration pursuant to Section 4 of the FAA, citing the arbitration agreement contained in each Driver's "Independent Contractor Operating Agreement" ("ICOA"). The Drivers opposed the motion arguing, *inter alia*, that the district court lacked authority to compel arbitration because the contracts containing the arbitration provision, the ICOA, are contracts of

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[2] Swift became publicly traded since this action began.

[3] There are 257 opt-in Plaintiffs in the lawsuit as of March 14, 2012.

employment exempted from the FAA pursuant to Section 1 of the Act. That Section states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. §1. There is no question that interstate truck drivers fall within this exemption. *Harden v. Roadway Package Systems, Inc.*, 249 F.3d 1137 (9th Cir. 2001). The only dispute regarding the application of the exemption is whether the Drivers were in fact employees of the Defendants.[4] The Drivers met their burden with respect to that issue by submitting affidavits and other evidence which showed that a triable issue of fact existed as to whether they were employees of the Defendants.[5] *Cf. Tinder v. Pinkerton Security*,

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[4] If the district court finds that the Drivers are not employees, it will have to decide whether the FAA §1 exemption applies to independent contractor work agreements. There is a split in the district courts as to whether the FAA §1 exemption applies to such agreements or is limited to agreements with workers who fit the common law definition of employee. *See OOIDA v. Swift Transporation Co. Inc.*, 288 F.Supp.2d 1033, 1035 fn 3 (D. Ariz. 2003).

[5] *See* declarations and documentary evidence of employment status submitted in support of Plaintiffs' opposition to Defendants' motion to compel arbitration, (Doc. 188-1 through 188-5, ER 2:49-72), and declarations and documentary evidence submitted in support of Plaintiffs' Motion for Preliminary Injunction, (Doc. 162-1 through Doc. 162-57, ER 2:73 through ER 3:450), which were incorporated by reference in Plaintiffs' opposition to the motion to compel arbitration. (Doc. 188 pp. 6-7 fn. 4.) These documents show that Defendants control virtually all aspects of a driver's operations. For example, Swift's owner operator manual sets rules for speed regardless of the actual speed limit; violations

305 F.3d 728 (7th Cir. 2002) (party opposing motion to compel arbitration has burden of producing specific facts showing that a triable issue of material fact exists).

In addition to alleging an exemption from the FAA, the Drivers argued that the arbitration provision in their contracts could not be enforced pursuant to the AAA because the AAA exempts all contracts of employment from arbitration. Ariz. Rev. Stat. §12-1517. The Drivers' arguments regarding the district court's duty to decide the FAA exemption question apply with equal force to the AAA exemption question.

By order dated September 30, 2010, the district court granted Defendants' motion to compel arbitration, ruling that the question of whether the Drivers' contracts were exempt from arbitration was an issue for the arbitrator to decide because it fell "within the scope of the arbitration agreement." (Doc. 223 at 17-19,

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result in counseling sessions and other disciplinary action. (ER 2:172.) Defendants require Drivers to send in "on duty" hours of service every day by 8:00 am. (ER 2:196.) Defendants also set rules for appearance, demeanor, (ER 2:196), and internet and email usage. (*See, e.g.*, ER 2:189.) Defendants even require that Drivers limit their personal telephone calls "to personal time," (ER 2:198), and check in when they stop to use the restroom. (ER 3:416 ¶ 10.) Defendants also prohibit Drivers from driving for other carriers. (ER 2:76 ¶ 12.) This evidence makes clear that Drivers, like Defendants' employee drivers, are not independent contractors. *See, e.g.*, *Vizcaino v. Microsoft Corp*., 120 F.3d 1006, 1012 (9th Cir. 1997); *Owner-Operator Independent Drivers v. C.R.England, Inc.*, 325 F.Supp. 2d 1252, 1258 (D. Utah 2004).

ER 1:43-45.) The Drivers moved for reconsideration, or alternatively, to certify an interlocutory appeal under 28 U.S.C. § 1292(b), arguing that the court had to determine whether the FAA applied to the controversy -- *i.e.*, the exemption question -- before it could invoke the authority of that Act to compel arbitration. The court denied the Drivers' motion for reconsideration by order dated October 28, 2010, (Doc. 229, ER 1:26), and denied their motion for certification of an immediate appeal by order dated November 17, 2010. (Doc. 237, ER 1:25.)

The Drivers then filed a petition for writ of mandamus. The petition was referred to a merits panel and on July 27, 2011 this Court issued an opinion which unanimously concluded that the FAA "requires the district court to assess whether a Section 1 exemption applies *before* ordering arbitration." *In Re: Van Dusen*, 654 F.3d 838, 846 (9th Cir. 2011) (emphasis added). The Court reasoned that,

> A district court's authority to compel arbitration arises under Section 4 of the FAA. Section 1 of the FAA, titled "exceptions to operations of this title," explicitly carves out a category of cases exempt from the provisions of the Act. **It follows that a district court has no authority to compel arbitration under Section 4 where Section 1 exempts the underlying contract from the FAA's provisions. . . .**

Id. at 843 (citations omitted, emphasis added).

> In essence, Defendants and the District Court have adopted the position that contracting parties may invoke the authority of the FAA to decide the question of *whether the parties can invoke the authority of the FAA*. This position puts the cart before the horse: Section 4 has simply no applicability where Section 1 exempts a contract from the FAA, and private contracting parties cannot, through the insertion of a

> delegation clause, confer authority upon a district court that Congress chose to withhold.

Id. at 844 (emphasis in original). Despite this clear holding, the Court of Appeals declined to grant mandamus. According to the Court, because the question of whether the district court had a duty to resolve the Section 1 exemption issue before compelling arbitration was an issue of first impression, and because certain language in the case law could be interpreted to lend support to the district court's position, the district court's error did not rise to the level of "clear error" required for mandamus relief. *Id.* at 845. '"[W]e will not grant mandamus relief simply because a district court commits an error, even one that would require reversal on appeal.'" *Id.* (quoting *Wilson v. U.S. Dist. Ct.*, 103 F.3d 828, 830 (9th Cir. 1996)).

Following the mandamus decision, the Drivers again moved the district court to reconsider its order compelling arbitration or, alternatively, to certify that order for interlocutory appeal pursuant to 28 U.S.C. §1292(b). The district court again denied reconsideration stating, "[t]his court continues to believe its original opinion and order at docket 223 is correct, particularly in light of the fact that the parties agreed to arbitrate questions of arbitrability, as well as 'any disputes arising out of or relating to the relationship created by the [Contractor Agreement].'" (Doc. 321 at 5, ER 1:6.) Nevertheless, in light of the Ninth Circuit's mandamus opinion, the district court concluded that an immediate appeal "may materially

advance the ultimate termination of this litigation" and certified its order compelling arbitration for immediate appeal. (*Id*.) This Court accepted the appeal. (ER 1:1.) The question of whether the district court must determine if the Drivers are exempt from the FAA *before* invoking the FAA to compel arbitration is now before this Court.

SUMMARY OF ARGUMENT

This Court's unanimous conclusion that the FAA requires the district court to assess whether the Section 1 exemption applies before it orders arbitration under Section 4 stands as the law of the case and should not be reconsidered.

Even if the Court were to reconsider its prior opinion, it is clear that the FAA requires a court to decide whether an arbitration agreement falls within the scope of the FAA, or is exempt under Section 1, before it can exercise authority under Section4 of the Act to compel arbitration. Sections 1-4 of the Act form an integrated whole. The power to stay proceedings under Section 3 and to compel arbitration under Section 4 exists only after the court finds that an arbitration agreement subject to the FAA exists – *i.e.*, that a valid agreement to arbitrate is contained in a maritime transaction or a contract involving commerce that is not exempt from the FAA under Section 1. The district court failed to make that determination and, accordingly, its order compelling arbitration was without legal authority.

The district court's view, that the parties' agreement to delegate the Section 1 exemption issue to the arbitrator gives the district court authority to compel arbitration under Section 4 without first determining whether the FAA applies to the agreement is without support. Delegation clauses are simply additional, antecedent arbitration agreements that the FAA operates on just as it does on any other arbitration agreement. Such agreements can be enforced through an order compelling arbitration, if the FAA applies to the contract at issue. But a court has no authority to compel arbitration of a delegation clause unless and until it determines that the contract is covered by the FAA. If, as is the case here, the contract is exempt under Section 1 of the Act, the court has no authority to compel arbitration under Section 4. In short, the existence of a delegation clause does not change the essential fact that the court must find that the FAA applies to a controversy before it may invoke the authority of the FAA to compel arbitration. The district court's approach of compelling arbitration first , and letting the arbitrator decide whether the contract is exempt from the FAA second, puts the cart before the horse.

Finally, the cases that the Court cited as lending some support to the district court's view, upon examination, do not offer any support at all. Those cases discuss the role of the district court and the right of parties to delegate questions of arbitrability to an arbitrator, but they do so in the context of arbitration agreements

that clearly fall within the scope of the FAA. The antecedent question of FAA coverage under Sections 1 and 2 was simply not an issue in any of those cases.

ARGUMENT

I. STANDARD OF REVIEW

The question presented is a pure question of law which this Court reviews *de novo.*

II. LAW OF THE CASE DOCTRINE REQUIRES THIS COURT TO FOLLOW THE PRIOR PANEL OPINION

The law of the case doctrine precludes a court "from reconsidering an issue previously decided by the same court, or a higher court in the identical case." *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000). "The law of the case doctrine is a judicial invention designed to aid in the efficient operation of court affairs." *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990). Under the doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case. *See id.* For the doctrine to apply, the issue in question must have been "decided explicitly or by necessary implication in [the] previous disposition." *Liberty Mutual Ins. Co. v. EEOC*, 691 F.2d 438, 441 (9th Cir. 1982). *See Leslie Salt Co. v. U.S.*, 55 F.3d 1388, 1393 (9th Cir. 1995) (applying law of the case to issue that was implicitly decided by the Court). The law of the case doctrine is

subject to three exceptions that may arise when "(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Old Person v. Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002).

There is no question that this Court explicitly decided the question of whether the FAA requires a district court to resolve whether the FAA Section 1 exemption applies before relying on Section 4 of the Act to compel arbitration. *In re Van Dusen*, 654 F.3d at 844-45. While the Court did not grant mandamus, it declined to do so based on its conclusion that the issue was one of first impression and confusing language in some decisions militated against a finding of "clear error" as required for mandamus relief. *Id.* at 845. But the Court need not have found "clear" error for the law of the case doctrine to apply. It is sufficient if the prior decision decided the legal issue either explicitly or by necessary implication, *Leslie Salt*, 55 F.3d at 1393, which the mandamus decision clearly did. Nor do any of the three exceptions to law of the case doctrine apply. The Court's decision is certainly not "clearly erroneous." It rests squarely on the language of the FAA and the construction given to that language by the Supreme Court in *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 199-201 (1956), and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967). No intervening

controlling authority has issued making reconsideration appropriate and neither the statute nor the precedent relied on by the Court has changed since the opinion was issued. Accordingly, under this Court's law of the case rules, the prior opinion addressing the question on appeal should be followed.

III. THE FAA REQUIRES A COURT TO DETERMINE WHETHER THE ACT APPLIES BEFORE INVOKING THE ACT TO COMPEL ARBITRATION

Even if this Court were to reject law of the case and consider the issue *de novo,* the Court's prior conclusion that the FAA requires a district court to determine whether the FAA Section 1 exemption applies *before* invoking the FAA to compel arbitration is clearly correct. Courts may not apply the FAA to disputes where Congress made the FAA inapplicable. And courts may not send a dispute to arbitration except under the FAA or perhaps under a state arbitration law permitting such enforcement.[6]

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[6] State law here does not supply any authority to enforce this arbitration clause as the AAA exempts any contract of employment from arbitration. Ariz. Rev. Stats. §12-1517. As the Court stated, "The AAA, like the FAA, exempts employment agreements from the Act's coverage….Given the similarities between the relevant sections of the FAA and AAA, we hold that our analysis of the issues raised under the former statute sufficiently addresses the same issues as raised under the latter." 654 F.3d at 842 n.3. The contract at issue here makes Arizona law applicable to this dispute. *See* ICOA, ¶24 "Governing Law. This Agreement shall be governed by the laws of the State of Arizona." (ER 3:444.) *See also* Lease, ¶21 "This Lease shall in all respects be governed by and construed in accordance with the laws of the United States and the State of Arizona without

Sections 1 through 4 of the FAA are integral parts of a whole. Section 2 is the "primary substantive provision of the Act." *Rent-A-Center West, Inc. v. Jackson*, ___U.S.___, 130 S.Ct. 2772, 2776 (2010), *quoting Moses H. Cone Mem. Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). It provides:

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

9 U.S.C. § 2. The scope of Section 2 is defined by Section 1. That section, which is entitled "'Maritime Transactions' and 'Commerce' Defined; Exceptions To Operation Of This Title," defines the "maritime transactions" and contracts involving commerce to which Section 2's substantive rule applies, but also explicitly exempts an entire category of contracts from the Act stating that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. §1. *See* S.Rep. No. 68-536, at 2 (1924) (stating that Section 1 defines the contracts to which "the bill will be applicable.").

Sections 3 and 4 establish the "procedures by which courts implement § 2's substantive rule" that arbitration agreements covered by the Act are irrevocable

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regard to the choice of law rules of Arizona or any other State." (ER 3:427.)

and enforceable. *Rent-A-Center West,* 130 S.Ct. at 2776. Section 3 allows a court to stay a suit upon finding that an agreement in writing for the arbitration of an issue exists and Section 4 gives the court power to compel arbitration where a party refuses to honor a written agreement to arbitrate.

Although Sections 3 and 4 do not explicitly refer back to Sections 1 and 2, it is clear that the power to stay under Section 3 and the power to compel arbitration under Section 4 apply only to written agreements that fall within the scope of Sections 1 and 2 of the Act. The United State Supreme Court held just that in *Bernhardt v. Polygraphic Co. of America,* 350 U.S. 198 (1956). In that case the court of appeals upheld a district court's decision to stay litigation pending arbitration under Section 3, although the contract containing the arbitration agreement did not evidence a transaction involving commerce as that term was defined in Section 1 and 2. The court reasoned that Section 3, unlike other provisions of the act covered "all arbitration agreements even though they do not involve . . . transactions in commerce." *Id.* at 201. The Supreme Court reversed, explicitly rejecting such an interpretation of Section 3:

> We disagree with that reading of the Act. Sections 1, 2, and 3 are integral parts of a whole. To be sure § 3 does not repeat the words "maritime transaction" or "transaction involving commerce", used in §§1 and 2. But §§1 and 2 define the field in which Congress was legislating. Since §3 is a part of the regulatory scheme, we can only assume that the "agreement in writing" for arbitration referred to in §3

> is the kind of agreement which §§ 1 and 2 have brought under federal regulation.

Id. at 201. *See also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401-402 (1967) (the "first" question for a court to determine before applying Section 3 is whether the arbitration provision is "within the coverage of the Arbitration Act" – *i.e.*, whether it is contained in a contract covered by Sections 1 and 2). The reasoning of *Bernhardt* and *Prima Paint* "applies with equal force in interpreting the relationship between Sections 1, 2, and 4." *In re: Van Dusen*, 654 F.3d at 844. *See also Harden v. Roadway Package Sys., Inc.*, 249 F.3d 1137, 1140 (9th Cir. 2001) (holding that "[t]he district court lacked the authority to compel arbitration . . .because the FAA is inapplicable to [employees] who are engaged in interstate commerce."); *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 476 (9th Cir. 1991) (a district court must make the threshold determination of whether a contract is a transaction involving commerce before compelling arbitration under Section 4). *Cf. Silk v. Aden*, 352 F.3d 1197, 1200-1201 (9th Cir. 2003) (structure of FAA requires Section 4 to be read and applied consistently with Section 3).

Given the fact that Sections 1-4 are integral parts of a whole, it follows that a district court must first determine whether an arbitration agreement is one covered by Section 2 of the Act and not otherwise exempt from the Act pursuant to Section

1 *before* it can invoke the FAA's authority to compel arbitration under Section 4. *See In re Van Dusen*, 654 F.3d at 843 (It follows from *Bernhardt* "that a district court may not compel arbitration pursuant to Section 4 unless the 'agreement for arbitration' is of a kind that Sections 1 and 2 have brought under federal regulation.").

Even after the mandamus opinion had issued, the district court continued to express its disagreement with the view that the Section 1 exemption must be decided before compelling arbitration. The district court stated, "[t]his court continues to believe its original opinion and order at docket 223 is correct, particularly in light of the fact that the parties agreed to arbitrate questions of arbitrability, as well as 'any disputes arising out of or relating to the relationship created by the [Contractor Agreement.]'" (Doc. 321 at 5, ER1:6.) The flaw in the district court's reasoning is that the Section 1 exemption is a limit on the court's authority that contracting parties have no power to expand. It is not a question of "arbitrability," that the parties can agree to delegate to an arbitrator to decide. "Questions of arbitrability" are defined by the Supreme Court as questions of "whether the parties have submitted a particular dispute to arbitration." *Howsam v. Dean Whitter Reynods, Inc.*, 537 U.S. 79, 83 (2002). As *Howsam* makes clear, "questions of arbitrability" are presumptively for the Court to decide. *Id.* at 84. Such questions include: which parties are bound by a particular arbitration clause,

First Options of Chicago v. Kaplan, 514 U.S. 938, 943-946 (1995); "whether the parties have a valid arbitration agreement at all," *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (plurality opinion); whether an arbitration clause in a concededly binding contract applies to a particular type of controversy, *see, e.g.*, *AT & T Technologies*, *supra*, at 651-652, 106 S.Ct. 1415; or whether the contract as a whole in which the arbitration clause is embedded is unconscionable, *Rent-A-Center*, 130 S.Ct. at 2777. Parties may, by clear and unmistakable agreement, delegate certain of these questions of arbitrability to an arbitrator to decide. *AT & T Techs.*, 475 U.S. at 649.

But an agreement to delegate gateway issues to an arbitrator does not change the fundamental structure of the FAA. A delegation agreement is "simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 130 S.Ct. at 2777-2778. That means that before enforcing a delegation clause, the court must first determine that the delegation clause is covered by the FAA – *i.e.*, whether it is part of a "contract evidencing a transaction involving commerce," 9 U.S.C. § 2, whether it is exempt from the FAA under Section 1, and whether it is valid "under such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Structurally, the FAA commits these questions to the court to determine and they cannot be

delegated to an arbitrator. That was the holding of *Rent-a-Center* where the Court itself set about determining whether the delegation clause was covered by Section 2. 130 S.Ct. at 2778. There was no question in that case that the contract in which the arbitration clause was imbedded involved commerce, nor was there any question as to a Section 1 exemption, so the Court had a relatively easy time finding the delegation clause enforceable under Section 2. *Id.* at 2779-2780. But the Court noted that "if a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the *federal court must consider the challenge* before ordering compliance with the agreement under § 4." *Id.* (emphasis added). The delegation clause at issue here must be analyzed in the same way: Before it can be enforced, the court must determine that it is an enforceable agreement within the scope of the FAA. That is, the court must determine that it is in a contract involving commerce under Section2, that is not exempted from coverage by Section 1, and that it is not subject to revocation on equitable or legal grounds.

While private parties may agree to delegate questions of arbitrability to an arbitrator, they cannot delegate to an arbitrator the fundamental question of whether their delegation provision is covered by the Act. As this Court noted, to do so would "put[] the cart before the horse: Section 4 has simply no applicability where Section 1 exempts a contract from the FAA, and private contracting parties cannot, through insertion of a delegation clause, confer authority upon a district

court that Congress chose to withhold." *In re: Van Dusen*, 654 F.3d at 844. Thus, the district court's reliance on the delegation clause in the parties' contract is unavailing. Regardless of that clause, the district court must still determine whether the contract at issue is covered by, or exempt from, the FAA *before* it can invoke Section 4 of the FAA to compel arbitration.[7]

Finally, while the Court noted that language in several prior decisions including *Simula Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999), *Chiron Corp. v. Ortho Diagnostics Sys., Inc.*, 207 F.3d 1126 (9th Cir. 2000), and *AT&T Techs,*

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[7] Just over a month after the Court issued its opinion on mandamus, the Eighth Circuit in *Green v. SuperShuttle International, Inc.*, 653 F.3d 766 (8th Cir. 2011), decided a case similar to this one in which a district court compelled arbitration without first deciding the plaintiffs' Section 1 exemption claim. The Eighth Circuit, like the district court in this case, concluded that because the parties agreed to delegate questions of arbitrability to the arbitrator, the district court did not err in leaving it to the arbitrator to decide whether the FAA's Section 1 exemption for transportation workers applied. The Eighth Circuit's analysis was perfunctory to say the least. It did not cite to, let alone distinguish, this Court's decision in *In re: Van Dusen* or either of the Supreme Court cases that this Court cited to support its result: *Bernhardt,* 350 U.S. 198, and *Prima Paint*, 388 U.S. 395. Nor did either party in *Green* brief *Bernhardt* or *Prima Paint* –the critical Supreme Court decisions governing this question. The only support the *Green* court cited for its conclusion that arbitration could be compelled before the applicability of the FAA Section 1 exemption was decided was *Rent-A-Center West, Inc.* which it cited for the proposition that parties can arbitrate "'gateway' questions of 'arbitrability'." 653 F.3d at 769. But, as noted above, issues of arbitrability do not include whether the FAA applies and *Rent-A-Center* actually supports the opposite conclusion -- that a federal court must decide whether an agreement falls within the scope of the FAA before compelling arbitration.

Inc. v. Communications Workers of America, 475 U.S. 643, 649-50 (1986), could be interpreted to lend support to the district court's opinion, on closer inspection none of those cases in fact supports the district court's position. *See In re Van Dusen*, 654 F.3d at 845-846.[8] For example, *Simula Inc.*, 175 F.3d 716, does state that "[t]he FAA embodies a clear federal policy in favor of arbitration" and goes on to state that "the district court can determine only whether a written arbitration agreement exists, and if it does, enforce it in accordance with its terms." *Id.* at 719-20. However, coverage under the FAA was not an issue in that case; the only issue was whether an arbitration agreement was intended to cover the particular dispute at issue. In those circumstances, federal policy may indeed favor arbitration, but that has nothing to do with the issues presented here. Similarly, *Chiron Corp.*, 207 F.3d 1126, states that the "court's role under the Act is . . . limited to determining (1) whether a valid agreement to arbitrate exists and, if it does (2) whether the agreement encompasses the dispute at issue." *Id.* at 1130. But earlier in the same paragraph the *Chiron* court makes clear that it is only talking about the court's role

[8] In determining that the "clear error" standard had not been met, the Court found first that the issue was one of first impression in any Court of Appeal. The Court went on to say "[W]e recognize that certain language appearing in the relevant doctrine could be interpreted to lend support to the District Court's position." *In re Van Dusen*, 654 F.3d 838, 845 (9th Cir. 2011). (ER 1:23.) The Court did not say that such language *actually* supports the district court's decision and it does not.

with respect to agreements that are within "the [FAA's] scope." *Id.* The court's role in deciding whether an agreement falls within the scope of Section 1 and 2 was not an issue in *Chiron Corp*. and was not discussed. The Court also cited *AT&T Techs, Inc.* 475 U.S. 643, 649-50 (1986), for the proposition 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." However, as in *Simula* and *Chiron*, the question of whether the parties have agreed to submit a particular grievance to arbitration is a question of arbitrability that arises only after the very different question of coverage by the FAA has been decided. Moreover, read in context, it is clear that quoted language from *AT&T* was simply making the point that a court has no business weighing the merits of a grievance in order to decide whether it is worth sending a matter to arbitration. If there is a valid agreement to arbitrate subject to the FAA, "[t]he agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *Id.* As noted by the Court, the language of these decisions help to explain why the district court made the error it did, and also explain why the error was not "clear error" as required for mandamus, but they do not actually support the result below

In short, the Court's decision – that the district court must determine whether the FAA applies to the dispute before applying the statute - was clearly correct.

CONCLUSION

For the foregoing reasons, the district court erred in compelling arbitration under Section 4 of the FAA before it determined whether the contract at issue was exempt from the FAA under Section 1. Accordingly, this Court should vacate the court's order compelling arbitration and remand the case to the district court to determine the Section 1 exemption question.

Respectfully submitted this 19th day of March, 2012.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit 32-1, I certify that this Plaintiffs-Appellants' Opening Brief is proportionally spaced, has a typeface of 14 points, and contains 5,357 words.

Dated this 19th day of March, 2012.

s/Susan Martin

STATEMENT OF RELATED CASES

Plaintiffs-Appellants are not aware of any related cases before this Court.

s/Susan Martin

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 19, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Dated this 19th day of March, 2012.

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