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

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VIRGINIA VAN DUSEN; JOHN DOE 1; and JOSEPH SHEER,
individually and on behalf of all other similarly situated persons,
Plaintiffs and Appellees,

v.

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

APPELLANTS' OPENING BRIEF

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, District Judge

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, appellants state as follows:

Appellant Interstate Equipment Leasing, LLC (fka Interstate Equipment Leasing, Inc.) has as its sole member Swift Transportation Company, which is a publicly traded company. Appellant Swift Transportation Co. of Arizona, LLC (fka 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: June 22, 2015

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Appellants/Defendants Swift Transportation Co. of Arizona, LLC (fka Swift Transportation Co., Inc.) ("Swift"), Interstate Equipment Leasing, LLC (fka Interstate Equipment Leasing, Inc.) ("IEL"), Chad Killebrew and Jerry Moyes (collectively "Appellants" or "Defendants") respectfully submit the following Opening Brief.

I. INTRODUCTION

This Court has ruled that before the motion to compel arbitration of defendant/appellant Swift can be decided, the district court first "must determine whether the Contractor Agreements between each [driver/plaintiff] and Swift are exempt under § 1 of the FAA [Federal Arbitration Act]." This direction comports with the language of the FAA itself, which exempts "*contracts* of employment" of workers engaged in interstate commerce.

The district court however has undertaken a much broader scope of litigation and intends to decide a very different question than the question this Court tasked it with answering. Rather than resolving the threshold issue of whether a particular type of *contract* exists, the district court intends to litigate instead whether a particular type of *relationship* was later formed after the contract was executed. To do so, the district court has ordered the completion of full merits-based and expert discovery, final determination of appropriate parties and claims, "serious settlement efforts," determination of motions in limine, and a five-day trial, by jury

if requested. In other words, under the district court process here, both the type of contract and the later developing relationship between the parties gets litigated and nothing gets arbitrated, even if the section 1 exemption is found not to apply .

To preserve the benefits of arbitration for which the parties contracted, Defendants moved to determine the exemption question solely on briefing, without discovery and trial. The district court denied Defendants' motion. In practice a denial of a motion to compel arbitration, the district court order is improper and should be reversed for two reasons.

First, the court seeks to litigate and decide the wrong question. This Court remanded for the district court only to determine the "threshold" issue whether the "Contractor Agreements" are exempt under section 1 of the FAA. Yet the lower court plans to litigate the much broader question of the *relationship* that developed between the parties after contracting. Focusing on this broader question is contrary to the statutory language in section 1, and to the law requiring contracts to be interpreted consistent with the parties' intent at the time of contracting. The Contractors' Agreements should be the only focus in deciding the threshold question.

Second, by focusing on the wrong question, the district court order setting full merits discovery, pre-trial proceedings and trial effectively moots any later arbitration. If the court finds the plaintiffs'/drivers' contracts are not exempt under

the FAA, the case will be sent to arbitration. By that point, however, the lower court already will have tried the issue of whether the relationship that developed over time between the drivers and Swift was an employment relationship. That is the ultimate issue in the case, but an issue unnecessary to the threshold exemption question. The arbitrator will have little to nothing left to decide, and the parties' agreement to arbitrate will be eviscerated.

Appellants therefore request that this Court reverse the district court order denying Appellants' motion for the section 1 exemption issue to be decided based only on an analysis of the Contractor Agreements. The Court instead should order the district court to decide the section 1 exemption issue without discovery and solely on briefing.

II. JURISDICTIONAL STATEMENT

The district court had jurisdiction over the underlying case under 29 U.S.C. §216(b), 28 U.S.C. §1331, and 28 U.S.C. §1337.

This Court has jurisdiction over this appeal under 9 U.S.C. §16(a)(1)(B) of the Federal Arbitration Act, which allows an interlocutory appeal to be taken from any order denying a motion to compel arbitration. *See, e.g., Bushley v. Credit Suisse First Boston,* 360 F.3d 1149, 1152-53 (9th Cir. 2004); *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)").

This appeal is timely brought in that the district court issued its order denying Swift's motion to compel arbitration on January 22, 2015, and Appellants filed their notice of appeal on February 10, 2015.

III. ISSUE PRESENTED

Where the FAA exempts "contracts of employment" of workers engaged in interstate commerce from arbitration, and where this Court ordered the district court and not the arbitrator to "determine whether the Contractor Agreements" are exempt from the FAA as a threshold matter (despite the existence of a delegation clause), does the district court err in requiring merits discovery and a full trial to determine the entire *relationship* between the parties instead, thus usurping the role of the arbitrator regardless of the outcome on the exemption issue?

The relevant sections of the FAA are attached as an Addendum.

IV. STATEMENT OF THE CASE

Respondents 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. 2 EOR 128, pp. 3-4.[1] Each of the Contractor Agreements set forth the terms of that party's working relationship with Swift. *Id.*; *see also* 2 EOR 162-8,

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[1] All citations to the record in this Appeal are to documents on file with the district court, as organized by the district court docket number in the excerpts of record. Citation is made as follows: "[volume] EOR [dkt. no.], p. __:[lines or ¶[]."

162-11. Although the language of the contracts varies slightly, it carries the same import in each. The language of Respondent Sheer's Contractor Agreement states that the Respondent driver "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." 2 EOR 162-11, p. 9, ¶ 18; *see also* 2 EOR 162-8, p. 9, ¶ 18 (Van Dusen contract).

The Plaintiffs and Swift expressly agreed in the Contractor Agreements to arbitrate any and all disputes arising out of their relationship and that such arbitration would be governed by Arizona's Arbitration Act and/or the Federal Arbitration Act. The parties further expressly delegated to the arbitrator issues related to the "arbitrability of disputes between the parties." The language of the arbitration provision, agreed to by each of the Plaintiff drivers, states:

> 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 . . .

2 EOR 162-11, p. 9, ¶ 24; *see also* 2 EOR 162-8, p. 10, ¶ 25.

After his Contractor Agreement was terminated in April 2009, Sheer filed suit against Swift and IEL in the United States District Court for the Southern

District of New York in December 2009.[2] 2 EOR 1; 1 EOR 223, p. 5. Sheer's suit alleges various employment-related claims under the Fair Labor Standards Act, New York labor law, and the California Labor Code. *Id.* Sheer's claims against Defendants presume that Sheer and Van Dusen were employees of Swift and not independent contractors. See 2 EOR 1, p. 1-19. 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 and transferred the case to the United States District Court for the District of Arizona. *See* 1 EOR 223, p. 6.

Defendants promptly moved to compel arbitration of the action pursuant to the arbitration provisions in Sheer's and Van Dusen's Contractor Agreements. *See* 1 EOR 223, p. 1. Plaintiffs opposed the motion, arguing that the Contractor Agreements were not subject to arbitration under the language of section 1 of the FAA, which exempts "contracts of employment . . . of workers engaged in foreign or interstate commerce." 9 U.S.C. §1; 1 EOR 223, p. 8. The District Court granted Defendants' motion and issued its order compelling arbitration. 1 EOR 223, p. 22.

Plaintiffs petitioned the Ninth Circuit for mandamus relief, asserting that the court, not the arbitrator, should determine the section 1 exemption. *See In re Van Dusen*, 654 F.3d 838, 840 (9th Cir. 2011) ["*Van Dusen I*"]. This Court denied

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[2] Sheer later filed a first amended complaint adding Van Dusen as a plaintiff, and a second amended complaint adding Jerry Moyes and Chad Killebrew as defendants. *See* 1 EOR 223, p. 5.

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. 1 EOR 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) ["*Van Dusen II*"].

Swift petitioned the Supreme Court for a writ of certiorari. *See 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 to "determin[e] issues relating to plaintiffs' status as employees or independent contractors." 1 EOR 548, pp. 1-9. The scheduling order requires all of the following:

- Pre-discovery disclosure exchange by the parties
- Compliance with disclosure requirements of Fed. R. Civ. Proc. 7.1
- Motions to amend pleadings or add parties

- Exchange of witness lists
- Expert witness disclosure by all parties
- Completion of all discovery, including up to five depositions per party
- "Serious settlement efforts"
- All motions, including dispositive motions and motions in limine, to be served and filed; and
- Five day trial by the court, or if requested, by jury.

1 EOR 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 fact that Defendants' motion to compel arbitration has yet to be decided and may still be granted.

To redirect the focus away from the parties' overall "relationship" and back to the correct matter of the terms of the Contractor Agreements, and to prevent the court from usurping the role of the arbitrator should the Plaintiffs' claims be found subject to arbitration, 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." 2 EOR 566, p. 7:2-5. The district

court denied Defendants' motion on January 22, 2015, and Defendants timely appealed.[3] 1 EOR 605, p. 9:8-9.

V. SUMMARY OF ARGUMENT

The district court's order highlights that the court is focused on the wrong question. This Court announced in very clear terms that on remand, the district court is to determine the gateway issue of "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" arbitration of the merits of Plaintiff's claims. *Van Dusen II*, 2013 U.S. App. LEXIS 22540. The wording of that directive parallels the language of the FAA exemption itself, which applies to "contracts of employment." 9 U.S.C. §1. This Court did not instruct the district court to examine the parties' relationship as a whole or to analyze their affiliation in any extrinsic context. Relying on the exact wording in this Court's remand order, the district court was charged solely with determining whether the *Contractor*

[3] Because the effect of the January 22 order and opinion is to deny Defendants' motion to compel arbitration on the merits, an order which is directly appealable, Defendants filed this appeal. However because that order and opinion contains language suggesting it was not appealable (*see* 1 EOR 605, pp. 8-9), Defendants also filed a Petition for Writ of Mandamus on February 25, which is pending before this Court as Case No. 15-70592. On May 13, this Court issued an order stating that the "petition for a writ of mandamus raises issues that warrant an answer." Plaintiffs (as real parties in interest) filed their answer to the petition on June 10. Defendants (as petitioners) have until June 24 to file a reply.

Agreements are exempt under the FAA, not whether the parties ultimately developed an employment relationship.

The district court's focus on the incorrect threshold question is not a harmless misapplication. The district court's ruling controlling discovery and settlement and setting a trial on the merits on the issue of the parties' overall relationship means that even if the Contractor Agreements are found to be subject to arbitration, the arbitrator's role will have been gutted in the process. Even if Defendants prevail, and the Plaintiffs' claims are held to be subject to arbitration under the FAA, it will be a hollow victory for Defendants – the district court already will have taken significant portions of the case and decision making authority away from the arbitrator. The scheduling order makes clear the court intends to issue substantive rulings on issues that are central to the underlying merits of Plaintiffs' claims but extraneous to the threshold section 1 exemption question. If Defendants' motion to compel arbitration later is granted, the arbitrator will have been stripped of his power to regulate these and other aspects of the case, even though none of these considerations is germane to the threshold question articulated by this Court and the FAA. If this error is not corrected, there is a risk that the District Court of Arizona will issue similar orders in future such disputes, effectively depriving Swift and like defendants from being able to arbitrate their worker disputes as they contracted to do.

Appellants request that this Court order 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.

VI. ARGUMENT

A. Standard of Review

"The district court's decision to grant or deny a motion to compel arbitration is reviewed *de novo*." *Bushley v. Credit Suisse First Boston*, 360 F.3d 1149, 1152 (9th Cir. 2004). The scope of an arbitration clause is reviewed *de novo* while underlying factual findings are reviewed for clear error. *See Cape Flattery Ltd. v. Titan Maritime, LLC*, 647 F.3d 914, 917 (9th Cir. 2011). "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Wagner v. Stratton Oakmont, Inc.*, 83 F.3d 1046, 1049 (9th Cir. 1996) (resolving any ambiguities as to the scope of arbitration in favor of arbitration).

B. The District Court Should Decide the Threshold Arbitrability Question Based Solely on the Written Contractor Agreements, and It Erred by Ordering the Parties to Litigate Their Relationship as a Whole

1. The FAA makes clear that the arbitrability exemption depends on whether there is a contract of employment

Plaintiffs have taken the position throughout this litigation that their claims need not be arbitrated despite the language in their Contractor Agreements because

the FAA exempts their contracts from arbitration. 1 EOR 223, p. 8. Consistent with that position, Plaintiffs must abide by the specific language of the section 1 exemption.

The FAA provides 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 FAA does not exempt "employment relationships" or use language to suggest that the exemption hinges on any other aspect of the parties' course of dealing. The section 1 exemption is not dependent on whether the workers were more akin to employees or independent contractors or whether such an employment relationship ultimately developed. Because the statute exempts *contracts of employment,* whether an employment contract was formed is the proper and only issue to be decided at this threshold stage.

2. Consistent with the language of the FAA, this Court directed the district court to analyze only the Contractor Agreements to determine whether the exemption applies

This Court's remand order is consistent with the statutory wording of the FAA exemption and specifically directs that the Contractor Agreements be analyzed to determine whether the FAA exemption applies. This 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 II*, 2013 U.S. App. LEXIS 22540 (emphasis added). This Court deliberately ordered the analysis of the "Contractor Agreements" by name and capitalized the title to give explicit instructions that the analysis to be undertaken by the lower court was of these particular documents.[4]

Likewise, the Court's remand order is significant for what it does not contain: nowhere is there any mention by this Court of the need to review anything beyond the Contractor Agreements themselves. The remand order does not direct the district court to analyze or even consider the parties' course of dealing, their oral communications, or their relationship in general. If the Ninth Circuit wanted the district court to go further, surely it understood how to order a determination of whether an employer-employee relationship was formed. Instead, this Court ordered the district court to determine the threshold question of FAA exemption by looking solely to the Contractor Agreements.

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[4] This order is consistent with the Court's analysis earlier in its opinion in *Van Dusen II*, when it characterized its holding in *Van Dusen I*: "our prior opinion in this case, *In re Van Dusen*, expressly held that a district court must determine whether *an agreement for arbitration* is exempt from arbitration under sec. 1 of the [FAA] as a threshold matter." *See Van Dusen II*, 2013 U.S. App. LEXIS 22540 (emphasis added).

3. Litigation of the threshold issue of the section 1 exemption must be narrowly construed

Exemptions to the FAA are narrowly construed. *Veil v. Cintas Corp.*, 2004 U.S. Dist. LEXIS 2208 (N.D. Cal. 2004) (citing *Circuit City v. Adams*, 532 U.S. 105, 119 (2001)). Thus, in carrying out this Court's direction to determine whether the Contractor Agreements are exempt under section 1 of the FAA "before it may consider Swift's motion to compel," (*Van Dusen II*, 2013 U.S. App. LEXIS 22540), the lower court should not try to expand on that instruction and determine issues beyond that expressly articulated by the Ninth Circuit.

4. Contracts are to be interpreted according to the intention of the parties at the time they entered into the agreement

In matters of contract interpretation, the court is required to ascertain what the parties intended at the time they entered into the contract and to interpret the contract consistently therewith. "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); *see also U.S. Cellular Inv. Co. of L.A. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 934 (9th Cir. 2002); *Miller v. Glenn Miller Prods.*, 454 F.3d 975, 989 (9th Cir. 2006); *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1264 (1992). "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").

This approach is consistent with the Supreme Court's affirmation that in the arbitration context, the court's role in determining whether to compel arbitration is a functional one, and the court must interpret the parties' agreement according to its terms. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1742, 1748 (2011); *see also Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

The district court's position that the parties' intention does not control because "then the use of the term 'independent contractor' would simply govern the issue" misses the point. *See* 1 EOR 605, p. 5:7-9. Appellants do not suggest that whether the parties have an employment contract or independent contractor agreement can be determined solely by looking to the title of the subject agreement or the labels used in it. Rather, Appellants advocate that the threshold issue of whether the Contractor Agreements constitute "contracts of employment" and are

thus exempt from the FAA should be determined by analyzing the Contractor Agreements in their entirety – including all of their provisions and not just relying on the labels used in them. Appellants agree that even if a contract referred to the worker as an "independent contractor," the rest of the agreement must be analyzed to confirm that it is consistent with the label chosen by the parties.

For that reason, the district court's reliance on *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 755 (9th Cir. 1979) for the principle "that contractual labels alone do not determine employment status" (1 EOR 605, p. 5:24-25) does not detract from Appellant's position.[5] Nor does *Harden v. Roadway Package Systems, Inc.,* 249 F.3d 1137, 1141 (9th Cir. 2001). While the court cited to *Harden* for the proposition that "the distinction between independent contractors and employees is 'highly factual' (1 EOR 605, p. 5:14-15), that factual analysis can and should be accomplished by referring to the provisions of the parties' agreement.[6] Only this approach is consistent with the mandate that a contract should be interpreted so as to give effect to the parties' intention at the time of formation.

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[5] Also, *Real* did not arise in the context of arbitration or a section 1 exemption decision, but instead 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. *Real*, 603 F.2d at 755.

5. The questions identified by the district court as relevant to the threshold issue of exemption can be answered by interpreting the Contractor Agreements

The district court's order sets forth five factors which it believes it is required to consider in order to decide the threshold question of FAA exemption – all of which can be ascertained by looking to the language of the Contractor Agreements. The court framed the section 1 exemption analysis as "[w]hether the parties formed an employment contract – that is whether plaintiffs were hired as employees." 1 EOR 605, p. 5:9-11. This initial articulation of the threshold question is the correct one: by focusing on whether an "employment contract" was "formed," the district court seems on track to carry out the judicial axiom of looking to the parties' intention at the time of formation in order to interpret the contract at issue.

The court's order then identifies five factors which it states it will consider to decide whether the parties formed an employment contract: 1) "the employer's right to control the work;" 2) "the individual's opportunity to earn profits from the work;" 3) "the individual's investment in equipment and material needed for the work;" 4) "whether the work requires a specialized skill;" and 5) "whether the work done by the individual is an integral part of the employers' business." 1 EOR

[6] In *Harden*, an FAA section 1 preemption case, this Court found the defendant had waived its argument that the plaintiff was an independent contractor. *Harden*, 249 F.3d 1137 at 1141.

605, p. 5-15:20. All of the factors on the court's list can be determined by looking to the provisions of the Contractor Agreements. As a result, the questions articulated by the district court as needing to be answered to decide the exemption question can be resolved without need for discovery or trial.

6. Discovery and trial are only permitted in a section 1 exemption case if the *making* of the arbitration agreement is in issue

This Court has made clear that the only time discovery and trial are appropriate to decide a motion to compel arbitration is where a dispute exists as to the *making* of the underlying agreement. "[T]he FAA provides for discovery and a full trial in connection with a motion to compel arbitration only if 'the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue.'" *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967). In *Simula*, the court affirmed the lower court's order denying pre-arbitration discovery because there was no issue regarding the making of the agreement, and stated that even if there was such an issue, it was for the arbitrator to decide. *Simula, Inc.,* 175 F.3d at 726.

Thus, courts will order limited discovery regarding only the making of the agreement if, for instance, forgery is alleged. *See, e.g., Deputy v. Lehman Bros. Inc.*, 345 F.3d 494, 502 (7th Cir. 2003) (in an action alleging securities fraud by one of defendant's brokers, the plaintiff claimed she had not signed the client

agreement including the arbitration provision. The Seventh Circuit permitted "the opportunity to conduct limited discovery on the narrow issue concerning the validity of Deputy's signature" only). *See also Bensadoun v. Jobe-Rait*, 316 F.3d 171 (2d Cir. 2003) ("if there is an issue of fact as to the making of the agreement for arbitration, then a trial is necessary"); *Ernest v. Lockheed Martin Corp.*, 2008 WL 2958964 (D. Colo. 2008) ("request for limited discovery on the issue of whether the arbitration agreement was executed by the Plaintiff was appropriate").

The FAA's legislative history establishes that the word "making" refers to the physical execution of a "paper." Arb. of Interstate Comm. Disputes: Joint Hrgs. on S. 1005 and H.R. 646 before Senate & House Subcomm. of the Comms. on the Jud., 68th Cong., at 17 (1924). Case law confirms this legislative intent.[7] Thus, the FAA sanctions summary trials only to determine if a contract was made, *not* if the contract was one of employment.

Moreover, courts have expressly rejected requests for merits discovery on issues beyond challenges to the making of the contract. *Coneff v. AT&T Corp.*, 2007 U.S. Dist. LEXIS 20502, at *8-10 (W.D. Wash. Mar. 9, 2007) (allowing

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[7] *See Chastain v. Robinson-Humphrey Co., Inc.,* 957 F.2d 851 (11th Cir. 1992) (trial on issue of whether an arbitration agreement was formed); *T&R Enterprises v. Continental Grain Co.*, 613 F.2d 1272 (5th Cir. 1980) (refusing to grant a section 4 trial where contracts containing arbitration clauses were signed by both parties, thus the existence of an arbitration agreement was not "in issue").

discovery requests related to the issue of unconscionability but not the merits of the parties' underlying dispute); *Hibler v. BCI Coca-Cola Bottling Co. of L.A.*, 2011 U.S. Dist. LEXIS 103707 (S.D. Cal. 2011) at 6 (holding "Plaintiff may conduct limited discovery on the issue of unconscionability" and that "merits discovery is surely inappropriate at this stage of the proceedings"). The U.S. Supreme Court has reiterated this limitation, holding that the FAA calls for "an expeditious summary hearing on [motions to compel arbitration], with only restricted inquiry into factual issues." *Moses H. Cone Mem'l Hosp., supra*, 460 U.S. at 22-23.

Here, there is no dispute as to the *making* of the Contractor Agreements, that is, that the Agreements exist and the signatures on them are valid. Because there is no challenge to the existence and formation of the Contractor Agreements, the lower court violated this Court's discussion in *Simula* by setting a merits discovery schedule and a week-long trial.

7. The section 1 exemption has been universally determined 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. See 1 EOR 605, 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.[8] *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., Owner-Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co.*, 288 F. Supp. 2d 1033, 1035 (D. Ariz. 2003)) ("*OOIDA v. Swift*"). 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

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[8] There is also no indication in any of these cases that the defendant argued that the "working conditions" should not be considered or that the court in fact considered such working conditions – as discovery and a trial did not take place in any of the cases cited by 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 automatically be found to 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. No discovery or trial was conducted.

Thus, the District Court of Arizona in *OOIDA v. Swift* 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).

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 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 order the district court to decide the section 1 exemption based on the Contractor Agreements alone, without discovery or trial.

8. Looking beyond the Contractor Agreements to determine the exemption question would lead to inconsistent and nonsensical outcomes

a. Whether the Contractor Agreements are subject to the FAA should not hinge on the timing of the parties' disputes

The examination of just the Contractor Agreements is the only rational and workable approach to determining FAA preemption, as to hold otherwise would lead to absurd results depending upon *when* in the relationship a dispute arises. For example, in the FAA section 1 exemption context, if an agreement

is *not* a contract of employment at the time it was signed, arbitration would be permissible should a claim arise immediately. If, however, a claim is made one year later, under the exact same contract, the court below would propose that a different outcome is possible based upon an analysis of how the parties' *relationship* may have developed and changed during that one-year period.

This approach acutely contradicts the U.S. Supreme Court's repeated mandate that arbitration agreements must be enforced according to their terms. *AT&T Mobility LLC*, 131 S. Ct. at 1748. It also runs afoul of section 1 of the FAA, this Court's remand order, and even the district court's own articulation of the relevant issue. All state (in different words but with consistent effect) that the district court must determine whether the Contractor Agreements are contracts of employment exempt under section 1. If the terms of those Agreements have not changed, the contractual right to compel arbitration must remain the same. Whether an employer-employee relationship later develops in practice, *after* the agreement was signed and over time, is not the issue to be decided by the lower court. Whether an employer-employee relationship later arose is a separate question that can be determined after the salient threshold question is answered, either by the court if the Agreements are held to be exempt, or by the arbitrator if they are not.

b. Nor should the analysis be influenced by variables that have no bearing on the parties' intent at the time of contracting

The inconsistencies in results would be further compounded by a host of other variables should the court consider factors beyond the terms of the written Contractor Agreements. Allowing discovery on the merits and a trial on the parties' relationship as it existed when the disputes arose will lead to different outcomes for different drivers even where the same contractual language appears in their respective Agreements. For example, the fact that one plaintiff's relationship with Swift was longer than another plaintiff's might be relied on by the court to find an employment relationship in the former case and a contractor relationship in the latter. Giving weight to the eventual length of the parties' contractual arrangement would be to violate the judicial rules of contract interpretation, which require that the parties' intent *at the time of formation* be given effect. *See, e.g., Sony Computer Entm't Am., Inc.*, 532 F.3d at 1012.

To allow merits discovery and a trial on the parties' overall relationship would open the door to inconsistent and even absurd results, as a wealth of factors and variables irrelevant to the terms of the contract would have influence on the ultimate outcome. 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). The court's role is one of contract interpretation – different results should not be produced where there are identical terms in identical contracts. *See Samson v.*

NAMA Holdings, 637 F.3d 915, 929-931 (9th Cir. 2011) (interpreting identical terms consistently in settlement and operating agreements signed by plaintiffs in ruling on motion to compel arbitration).

C. Allowing Merits Discovery and a Trial to Decide the Threshold Exemption Question Would Render Arbitration Moot

1. Arbitration is strongly favored

The 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, supra,* 460 U.S. at 24-25. 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." *OOIDA v. Swift,* 288 F. Supp. 2d at 1036.

Accordingly, the lower court's analysis of the section 1 exemption issue must be conducted in accordance with the strong policy favoring arbitration, and any close call must be resolved in favor of arbitration. *See Simula, supra,* 175 F.3d at 719 ("[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).

2. Courts are prohibited from determining the merits of the case when considering a motion to compel arbitration

"It is well-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). The district court is thus constrained by this precept when determining the threshold issue of section 1 preemption: it does not have free rein to make merits-based findings as part of its decision on preemption.

3. A determination of whether plaintiffs were employees or independent contractors will determine the merits of the case

Yet the lower court's scheduling order ignores this binding precedent and evinces the court's intent to become enmeshed in the merits. The court's order requires the parties to conduct and complete discovery, including expert discovery, and to participate in a five day trial to determine whether their relationship was that of employer-employee. The Plaintiffs have stated that this very question is the "central element" of nearly all of their underlying claims. 2 EOR 188, p. 15:25-27 (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."). To succeed on their claims under the Fair Labor Standards Act, New York Labor Law and California Labor Code, Plaintiffs are required to prove that that they were employees of Swift.

Thus, by holding the intended trial and by ruling on its intended question of *whether an employment relationship was created after the Contractor Agreements were signed,* the lower court will have adjudicated well beyond the threshold question and into the merits, ruling on a key issue at the heart of Plaintiff's claims. This result would violate the mandate of the Supreme Court and Ninth Circuit that when deciding initial questions of arbitrability, the court must not decide the potential merits of the underlying claims. *AT & T Techs.,* 475 U.S. at 649-650; *Chiron Corp.*, 207 F.3d at 1131. The district court will not run afoul of this precedent if this Court confines the analysis to the proper scope set forth by the FAA and this Court: whether the Contractor Agreements, not the parties' entire relationship as evolved over time, are contracts of employment and exempt from the FAA.

4. To allow the district court to follow through with its intended scheduling order would be to render arbitration moot

This is *not* a "no harm, no foul" situation. The scope of the discovery and trial in these circumstances matters and has farther reaching effects within the transportation industry. If the court orders the parties to litigate whether an employer-employee relationship developed after the Contractor Agreements were signed, it will simultaneously determine critical portions of the merits of the case. If it determines after trial that an employment relationship arose, it will find that the Contractor Agreements are exempt from arbitration under the FAA and that the court retains jurisdiction of the case. If, however, the court determines after trial that there was no employment relationship and the FAA exemption does not apply, the case will be subject to arbitration under the terms of the Contractor Agreements.

By that point, however, the arbitrator's role and authority to control the proceedings will have been severely gutted by the court's previous rulings on the subjects set out in the scheduling order. For example, the court already will have determined the proper parties and will have determined what the final, operative claims in the complaint are to be.[9] The court already will have made rulings on

[9] The district court gives no explanation in its order why it deems it appropriate for the court at this stage to take control of deciding the proper parties and claims in the suit or ordering serious settlement efforts, when the court has only been tasked with determining if the FAA exemption applies. *See* 1 EOR 548, p. 1-9.

discovery, covering the nature and extent, permissible areas, whether responses were sufficient, and conceivably monetary and/or issue sanctions. Through its rulings on motions in limine, the court already will have determined what evidence can and cannot be considered in deciding whether the parties had an employment relationship (again, the critical issue at the heart of Plaintiffs' claims). Likewise, the court already will have determined whether the parties' experts are qualified to testify and what portions of their respective testimonies are admissible. The court already will have set and enforced discovery and pre-trial parameters which potentially conflict with the procedures the arbitrator would have imposed under the FAA and/or AAA. And of course the parties will already have spent a great deal of time and money litigating these expansive issues before even getting to arbitration, frustrating the purpose of using arbitration to streamline the proceedings. *See, e.g., AT&T Mobility* LLC, 131 S. Ct. at 1749 ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. . . And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution") (citing *14 Penn Plaza LLC v. Pyett*, 556 U. S. ___, ___ (2009) (slip op., at 20); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

These judicial rulings and exercises of control, however, would completely usurp the authority of the arbitrator should the district court conclude at the end of this process that an employment relationship did not exist. In that instance, Defendants' motion to compel arbitration would be granted, and the arbitrator would take control over the case. However the parties, pleadings, discovery issues, experts and motions in limine would already have been determined by the court in the threshold question stage. As a result, moving the case to arbitration would be essentially a moot exercise, as the arbitrator would have no authority over key issues such as parties, pleadings, discovery, expert witnesses, motions in limine and more.

Indeed, forcing the parties to litigate the merits of the case in court to answer the threshold exemption question, as the district court proposes, would foreclose the possibility of ever arbitrating a misclassification case in the transportation industry. In every instance where a transportation company sought to enforce its arbitration agreement with a current or former driver, the company would never effectively be allowed to enjoy the benefit of its arbitration bargain, since the exemption issue would always be decided in a process by which the lower court ordered and supervised virtually every discovery and pre-trial aspect. By controlling all pre-trial rulings and by deciding the ultimate issue of employment vs. contractor status at trial, presumably as part of deciding the threshold

exemption issue, the court would usurp the role of the arbitrator every time. This result would ignore the parties' contractual agreement to arbitrate their claims and is contrary to the federal presumption in favor of arbitration, the language of the FAA and U.S. Supreme Court precedent. To the contrary, courts have routinely compelled arbitration of misclassification cases. *See Green v. SuperShuttle Intl., Inc.*, 653 F.3d 766, 769 (8th Cir. 2011) (holding arbitrator must decide whether FAA section 1 exemption applied); *Reid v. SuperShuttle Intl, Inc.*, No. 08-CV-4854 (JG) (VVP) (E.D.N.Y. Mar. 22, 2010) (compelling arbitration because arbitration agreement governed all aspects of relationship, including claim that drivers were employees rather than independent contractors); *OOIDA v. Swift*, 288 F.Supp.2d 1033 (D. Ariz. 2003) (compelling arbitration and finding that agreement to arbitrate reached all of plaintiffs' claims).

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 instead the district court analyzes the four corners of the Contractor Agreements, as directed by the Ninth Circuit, it would decide the section 1 exemption issue without also deciding the merits of the case. As noted by the Ninth Circuit, this would accord with "the law's repeated admonishments that district courts refrain

from addressing the merits of an underlying dispute" (*In re Van Dusen*, 654 F.3d at 846) and with controlling precedent that contracts are to be interpreted to give effect to the parties' intent at the time they are formed.

VII. CONCLUSION

This Court remanded this case to the district court to decide the section 1 exemption issue, not the merits of the litigation. The Ninth Circuit ordered the district court to "determine whether the Contractor Agreements between each [driver] 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. Otherwise, the court will usurp the arbitrator's role in handling and deciding the case should the motion to compel arbitration be granted, and inconsistent outcomes based on similar or identical contract language is sure to result. Appellants therefore request that the district court's January 22, 2015 order be reversed, and the district court be ordered 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.

Dated: June 22, 2015

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Appellants' Opening Brief is proportionately spaced, has a typeface of 14 points, and contains 8,605 words, according to the counter of the word processing program with which it was prepared.

Dated: June 22, 2015

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STATEMENT OF RELATED CASES

Appellants are aware of the following related case pending in this Court:

Swift Transportation Company I, et al. v. USDC-AZP, Case No. 15-70592.

Because the effect of the January 22, 2015 order and opinion that are the subject of the instant appeal is to deny Defendants' motion to compel arbitration on the merits, an order which is directly appealable, Defendants filed this appeal. However because that order and opinion contains language suggesting it was not appealable (*see* 1 EOR 605, p. 8:5, pp. 8:21-9:6), Defendants also filed a Petition for Writ of Mandamus on February 25, which is pending before this Court as Case No. 15-70592.

Dated: June 22, 2015

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ADDENDUM

Pursuant to Circuit Rule 28-2.7, Appellants provide the following statutes and rules:

1. 9 U.S.C. § 1.
2. 9 U.S.C. § 4.
3. 9 U.S.C. § 16.

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United States Code Annotated
Title 9. Arbitration (Refs & Annos)
Chapter 1. General Provisions (Refs & Annos)

9 U.S.C.A. § 1

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

Currentness

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but 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.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 670.)

Notes of Decisions (246)

9 U.S.C.A. § 1, 9 USCA § 1
Current through P.L. 114-9 approved 4-7-2015

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United States Code Annotated
Title 9. Arbitration (Refs & Annos)
Chapter 1. General Provisions (Refs & Annos)

9 U.S.C.A. § 4

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

Currentness

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.)

Notes of Decisions (1146)

9 U.S.C.A. § 4, 9 USCA § 4
Current through P.L. 114-9 approved 4-7-2015

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United States Code Annotated
Title 9. Arbitration (Refs & Annos)
Chapter 1. General Provisions (Refs & Annos)

9 U.S.C.A. § 16

§ 16. Appeals

Currentness

(a) An appeal may be taken from--

(1) an order--

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order--

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

9th Circuit Case Number(s) 15-15257

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