NO. 15-15257

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA VAN DUSEN et. al.,
Plaintiffs -Appellees,

v.

SWIFT TRANSPORTATION CO., INC., et. al.,
Defendants -Appellants.

On Appeal from the United States District Court
for the District of Arizona, Case No. CV 10-899-PHX-JWS
Judge John W. Sedwick

APPELLEES' ANSWERING BRIEF

SUSAN MARTIN
JENNIFER KROLL
MARTIN & BONNETT, PLLC
1850 N. Central Ave. Suite 2010
Phoenix, AZ 85004
Telephone: (602) 240-6900
smartin@martinbonnett.com
jkroll@martinbonnett.com

DAN GETMAN
LESLEY TSE
GETMAN & SWEENEY PLLC
9 Paradies Lane
New Paltz, NY 12561
Telephone: (845) 255-9370
dgetman@getmansweeney.com
ltse@getmansweeney.com

EDWARD TUDDENHAM
228 W. 137th St.
New York, New York 10030
(212) 234-5953
etudden@prismnet.com

Attorneys for Plaintiffs -Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page(s)

Statutes

Rules

JURISDICTIONAL STATEMENT

Appellants Swift Transportation Co., et al., (Swift) assert that the Court has jurisdiction to consider this appeal pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. § 16(b)(1)(B), because the district court's order denying Swift's motion to set aside the court's scheduling order, Doc 605, is tantamount to an order denying arbitration. It is not; it is nothing more than a refusal to modify the previously entered scheduling order and cannot confer jurisdiction under 9 U.S.C. § 16(b)(1)(B). The underlying scheduling order, Doc 546/548 with its provision for discovery and a five-day trial, does not deny arbitration either. Regardless, to the extent Swift is attempting to appeal that order, Swift's appeal is untimely. For either or both of those reasons, the appeal should be dismissed for lack of jurisdiction.

STATEMENT OF THE ISSUE

Swift's statement of the issue on appeal asks whether the district court erred in ordering "merits discovery and a full trial to determine the entire *relationship* between the parties. . ." Swift Opening Brief, DktEntry 16-1, at 4 (emphasis in original). At this point, the only issue that is ripe for consideration by this Court, although the Court lacks jurisdiction to consider it, is:

> Did the district court err in entering a scheduling order, pursuant to § 4 of the FAA that allows for discovery and a trial of the § 1 exemption issue.

STATEMENT OF THE CASE

Swift's statement of the case is incomplete. In *Van Dusen v. Swift Transportation Co*, this Court ordered the district court to "determine whether the Contractor Agreements between each [Plaintiff Driver] and Swift are exempt under § 1 of the FAA before it may consider Swift's motion to compel [arbitration]." 544 Fed. Appx. 724 (9th Cir. 2013) cert. den. ___U.S.___, 134 S.Ct. 2819 (2014).

After receiving the mandate from *Van Dusen v. Swift*, on June 24, 2014, the district court ordered the parties to confer and file a notice indicating the matters to be addressed on remand and proposing a schedule for their resolution. Doc 536, Supplemental Excerpts of Record ("SER") 27. The Plaintiff Drivers responded that the proper method of resolving the § 1 exemption issue was through a trial of the issue as provided by § 4 of the FAA and proposed a schedule that made provision for discovery and dispositive motions as well as other pre-trial filings. Doc 543 SER 33-42. Swift responded by making the same arguments they now make on appeal—that Plaintiffs' proposal was improper because it focused on the wrong issue and would result in the court deciding the merits of their claims. Doc 542, at 3-4 SER 31-32. Swift also argued, as it does here, that the language in § 4 of the FAA stating that "[i]f the making of the arbitration agreement . . . be in issue, the court shall proceed summarily to the trial thereof," did not authorize the court to conduct a trial of the § 1 exemption issue. *Id.* Swift proposed that the court

resolve the exemption issue based on an examination of the four-corners of the parties' Contractor Agreement ("Agreement") and nothing else. *Id.* at 2 SER 30.

On July 21, 2014, the court entered an order finding that "the plaintiffs' approach to what is required by the remand order is correct, while defendants' contention that the issue may be resolved on the basis of the existing papers lacks merit." Doc 546 at 2 SER 44. The next day the court entered its scheduling order setting forth dates for completion of discovery, dispositive motions and filing of pre-trial orders and setting a five-day trial. Doc 548 Excerpts of Record ("EOR") 548. The preface to the scheduling order states unequivocally that "[i]f the court determines that [Plaintiffs] are independent contractors, this matter will be resolved by arbitration." *Id.* at 1. More than two months later Swift filed a "Motion to Determine Appropriate Standard for Resolution of Section 1 Exemption Issue." Doc 566 ("Motion To Determine Standard") EOR 566. That motion repeated the arguments previously made by Swift in Doc 542 that the scheduling order's provisions for discovery and trial asked the wrong question and would result in deciding the merits of the plaintiff drivers' claims. The district court characterized Swift's "Motion to Determine Standard" as a motion "to set aside the scheduling and planning order at Docket 548 and set a briefing schedule," and denied it on January 22, 2015. Doc. 605 EOR 605. In its order, the district court explained that,

> [t]he question of whether an agreement is a contract of employment is not simply a question of the stated intent of the

> parties. If that were the case, then the use of the term "independent contractor" would govern the issue. Whether the parties formed an employment contract – that is whether the plaintiffs were hired as employees – necessarily involves a factual inquiry apart from the contract itself.

Doc 605 at 5. On February 10, Swift filed a notice claiming to appeal the court's January 22 order denying Swift's motion to set aside the scheduling order, Doc 617, but which actually appeals the scheduling order itself filed on July 22, 2014. Swift subsequently filed a Petition for Writ of Mandamus, No. 15-70592, that also challenges the lawfulness of the court's scheduling order.

Swift's motion for a stay of the scheduling order pending appeal, Dkt 6-1, was denied by this Court. Dkt 15. The Plaintiff Drivers' motion to dismiss this appeal, Dkt 8-1, was denied without prejudice to renewal when the merits were briefed. Dkt 15.

SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction to consider this appeal. An order that merely declines to alter a previously entered scheduling order cannot possibly be considered an order denying arbitration for purposes of 9 U.S.C. § 16(b)(1)(B) and, thus, that order confers no jurisdiction on this Court.

According to Swift "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."

Id., at 10. Swift cites nothing to support these intemperate assertions and the alleged issue is not presented by this case. The district court's scheduling order is designed for the sole purpose of resolving the FAA § 1 exemption issue as this Court directed and says nothing about discovery or trial of the merits of the Plaintiff Drivers' claims, except as necessary to resolve the § 1 issue.

ARGUMENT

I. STANDARD OF REVIEW

As the district court realized, Swift's "Motion to Determine Standard," Doc 566, is, in reality, a motion "to set aside the scheduling and planning order at docket 548." Doc 605 at 1. A motion to modify a scheduling order is reviewed pursuant to an abuse of discretion standard. *C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 983 (9th Cir. 2011), *cert. denied sub nom. C.F. v. Corbett*, —— U.S. ——, 132 S.Ct. 1566, (2012) (motion to amend scheduling order is reviewed for abuse of discretion); *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (same).

Whether the underlying scheduling order, Doc 548, is tantamount to a denial of a petition for arbitration is a legal question that this Court would review *de novo* if the court had jurisdiction to review that order, which it does not.

II. THIS COURT LACKS JURISDICTION TO CONSIDER THIS APPEAL

This Court lacks jurisdiction over this interlocutory appeal. Swift asserts that it is appealing the order denying its "Motion to Determine Standards," Doc 605, and that this Court has jurisdiction to review that order because it is tantamount to an order denying arbitration subject to interlocutor review pursuant to 9 U.S.C. § 16 (a)(1)(B). It is not. It is a motion's substance, not the label affixed to it, that determines whether it is appealable. *See Catz v. Chalker,* 566 F.3d 839, 849 (9th Cir. 2009); *Hasbrouk v. Texaco Inc.,* 879 F.2d 632, 635 (9th Cir. 1989), and the district court made clear that the "Motion to Determine Standards" is nothing more than a motion "to set aside the scheduling and planning order at Docket 548." Doc 605 at 1. An order that merely declines to alter a previously entered scheduling order cannot possibly be considered an order denying arbitration for purposes of 9 U.S.C. § 16(b)(1)(B) and, thus, that order confers no jurisdiction on this Court.

It is the underlying scheduling order at Doc 548, with its provision for discovery and trial, that Swift claims has effectively denied its motion to compel arbitration and that is the real subject of Swift's appeal. Swift's brief describes the issue on appeal as follows: "[D]oes 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?" Swift Brief, at 4. It is, of course, the scheduling order that requires discovery and a trial, not the motion refusing to modify the scheduling order. Swift's Brief also repeatedly focuses its arguments on the scheduling order, not the court's refusal to modify the scheduling order. *See* Swift Brief, at 2 ("district court order setting full merits discovery, pretrial proceedings and trial effectively moots any later arbitration."); *id.*, at 10 ("[t]he 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."); *id.*, at 17 (discussing five factors set forth in July 21, 2014 Order, Doc 546, that court indicated it would consider in order to decide the § 1 issue); *id.*, at 20 ("the lower court violated this Court's discussion in *Simula* by setting a merits discovery schedule and a week-long trial."). Essentially, the entire thrust of Swift's appeal is its complaint that the scheduling order errs by allowing discovery and trial of facts outside the confines of the Contractor Agreement.

Contrary to Swift's contention, however, the scheduling order is not tantamount to an order denying arbitration. This Court directed the district court to "determine whether the Contractor Agreements between each appellant and Swift are exempt under § 1 of the FAA *before* it may consider Swift's motion to compel [arbitration]." *Van Dusen*, 544 Fed.Appx. at 724 (emphasis added). Setting a schedule for carrying out that mandate cannot possibly be a denial of arbitration.

To the contrary, the scheduling order conditionally *grants* Swift's arbitration motion indicating that "[i]f the court determines that [Plaintiffs] are independent contractors, this matter will be resolved by arbitration." Doc 548 at 1. Recognizing this, Swift attempts to manufacture a basis for appealing the scheduling order by contending that it "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." Swift Brief, at 10. But Swift cites nothing to support that assertion, nor can it. As explained in more detail below, the record, taken as a whole, reveals that the district court is well aware that its mandate is limited to determining whether the Agreements are contracts of employment and that it has no intention of deciding anything other than that issue.

To be sure, deciding the § 1 issue may overlap to some extent with the merits of the Plaintiff Drivers' employment based claims, but this Court has already considered that fact and concluded that it does not affect the district court's antecedent duty to decide the Section 1 exemption issue. *See In re Van Dusen*, 654 F.3d 838, 841 (9th Cir. 2011) (finding that district court had duty to decide § 1 issue despite the fact that "'whether an employer/employee relationship exists between the plaintiffs and [Swift]. . . 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 unconsionability'"). Thus, the mere fact that the

district court may have to decide merits issues in the course of determining whether the Agreement is a contract of employment does not render the scheduling order an order denying arbitration appealable under 9 U.S.C. § 16(b)(1)(B).

Even if the Court's scheduling order were appealable under 9 U.S.C. § 16(a)(1)(B), this Court would lack jurisdiction because the appeal of that order is untimely. The scheduling order was entered on July 22, 2014. Doc 548. Swift's notice of appeal was not filed until more than six months later on February 10, 2015. That plainly fails to comply with the 30-day jurisdictional time limits set forth in Fed. R. App. P. 4(a)(1)(A).

Nor can Swift rely upon its "Motion to Determine Standard," Doc 566, to extend the time for appealing the scheduling order. That motion was filed on September 24, 2014, more than two months after the scheduling order was entered and thus, regardless of whether it is viewed as a Rule 59 motion to alter or amend the scheduling order or a Rule 60 motion for relief from the scheduling order, it was not timely filed and therefore does not qualify to extend the time for appealing the scheduling order under Fed. R. App. P. 4(a)(4). *See Straw v. Bowen*, 866 F.2d 1167, 1171 (9th Cir. 1989) (untimely motion for reconsideration does not toll time for appeal under Rule 4(a)(4); *Sierra-on-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1419 (9th Cir. 1984) (same). Nor can Swift use its notice of appeal from the denial of the "Motion to Determine Standard" – *i.e.*, its motion to set

aside the scheduling order -- to re-start the 30-day appeal period for issues that were decided in the scheduling order. Doc 548. To allow Swift to do so would effectively eviscerate the requirements of Rule 4. As the Court in *Lora v. O'Heaney* explained,

> First the "timely files" requirement of Rule 4(a)(4)(A)(i) would become meaningless; a party would be allowed to toll the appeal deadline for months and appeal from the merits ruling at any time up to thirty days after the ruling on the motion for reconsideration, even if the motion for reconsideration was not timely. Second, the scheme set out in Rule 4(a)(5) for extensions of time to file a notice of appeal would be unnecessary in many situations. Rather than filing a motion to extend time to appeal, and having to satisfy the district court that "excusable neglect or good cause" exists, a party seeking to extend the time within which to appeal could simply file a motion for reconsideration and await the ruling on that motion—thereby often obtaining an even longer extension of the appeal deadline than Rule 4(a)(5) permits. We cannot countenance such results.
>
> Permitting circumvention of Rule 4 would increase the number of interlocutory appeals and the associated delays. Such delays are inconsistent with the purpose of the final judgment rule, which seeks "to avoid the waste of time and the delay in reaching trial finality which ensue when piecemeal appeals are permitted." *Nelson v. Unum Life Ins. Co. of Am.*, 468 F.3d 117, 119 (2d Cir. 2006) (quoting *Paliaga v. Luckenbach S.S. Co.*, 301 F.2d 403, 406–7 (2d Cir.1962) (internal quotation marks omitted)). We see no reason to bend Rule 4 in order to expand the availability of interlocutory appeals to parties who have failed to timely appeal from an appealable collateral order.

602 F.3d 106, 112 (2d Cir. 2010). The Plaintiff Drivers recognize that the district court did not regard Swift's "Motion to Determine Standard" as an untimely motion for reconsideration because the scheduling order was not entered pursuant

to a motion, Doc 605 at 4, and instead viewed it as a motion to set aside the scheduling order. *Id.*, at 1. However, simply because the district court viewed the "Motion to Determine Standard" as a "proper motion," *id.*, at 4, that does not change the fact that the Scheduling Order, 548, set forth the district court's plan for resolving the § 1 issue. To the extent Swift believes that the schedule effectively denies Swift's motion to compel arbitration, Swift should have appealed the schedule within the time limits set forth in Rule 4. Its failure to do so is fatal to this appeal.

For either of both of these reasons, this Court lacks jurisdiction over this appeal.

III. THE DISTRICT COURT PROPERLY ORDERED A TRIAL AND PRE-TRIAL DISCOVERY PURSUANT TO § 4 OF THE FAA

A. The District Court's Scheduling Order Is Directed Toward Resolving the Proper Issue

Swift contends that the district court's scheduling order is designed to produce "substantive rulings on issues that are central to the underlying merits of Plaintiffs' claims but extraneous to the threshold section 1 exemption question." Swift Brief, at 10. Swift claims the district court is focused on the wrong issue throughout its brief. *See, e.g., id.*, at 1, 2, 3, 10, 25. Remarkably, Swift cites nothing in the record to support these claims – nor can it.

The district court's order refusing to modify the scheduling order makes

clear that the scheduling order is designed to "determine whether the Contractor Agreements between each appellant and Swift are exempt under § 1 of the FAA"—precisely what the Ninth Circuit directed it to decide. Doc 605, at 3 (quoting *Van Dusen*, 544 Fed.Appx. at 724). In discussing the need for discovery, the district court states that "[t]he question of whether an agreement is a contract of employment is not simply a question of the stated intent of the parties." *Id.*, at 5 (emphasis added). It also stated that "[w]hether the parties formed an employment contract – that is whether plaintiffs were hired as employees –necessarily involves a factual inquiry apart from the contact itself." *Id.* (emphasis added). Swift concedes that this is the proper formulation of the § 1 issue. Swift Brief, at 17. Thus, contrary to Swift's assertions that the district court is focused on the wrong issue, the district court has repeatedly stated that discovery and trial are limited to the issue of whether the parties formed a contract of employment.

B. The District Court Correctly Found that Resolution of the § 1 Issue Requires Consideration of Evidence Extrinsic to the Agreement

As the district court explained both when it entered the scheduling order and when it refused to modify the order, discovery and a trial are necessary because "whether an agreement is a contract of employment is not simply a matter of the stated intent of the parties," Doc 605 at 5, because "the distinction between independent contractors and employees is highly factual," *id.*, and because classifying the agreement "requires the court to consider numerous fact-oriented

details, such as the employer's right to control the work, the individual's opportunity to earn profits from the work, the individual's investment in equipment and material needed for the work, whether the work requires a specialized skill, and whether the work done by the individual is an integral part of the employer's business." Doc 605, at 5-6; Doc 546, at 1.

Swift concedes that the district court is correct in its view that "contractual labels" do not determine the Section 1 issue, Swift Brief, at 16, and that "the distinction between independent contractors and employees is 'highly factual.'" *Id.* (quoting the district court, Doc. 605, at 5 *(*quoting *Hardin v. Roadway Package Systems Inc.*, 249 F.3d 1137, 1141 (9th Cir. 2001))). Swift even concedes that the examples of "fact oriented details" the court indicated it would consider, Doc 546, at 1, Doc 605, at 5, are relevant to the question of whether the Agreement is a contract of employment. Swift Brief, at 17-18.

Swift's only disagreement with the district court's scheduling order is that Swift believes that the "highly factual" "fact oriented details" cited by the district court should be determined solely from an examination of the four corners of the Agreement, and that the words of the Agreement should not be supplemented or explained by evidence extrinsic to the Agreement. While the Agreement itself is the starting point, it is plainly not the end of the analysis. Basic contract law teaches that where provisions of a contract are ambiguous or uncertain, extrinsic

evidence, including evidence of the parties' course of performance under the contract, is relevant to assist a court in determining the meaning of the contract. *See* Ariz. Rev. Stat. § 47-2202 (course of performance is admissible to explain or supplement contract provisions). Indeed, Arizona, whose law is deemed to govern interpretation of the Agreement, (Van Dusen Agreement ¶ 24 EOR 162-8 (Doc 162-8); Sheer Agreement ¶ 24 EOR 162-11 (Doc 162-11)), holds that extrinsic evidence is admissible to interpret a contract even in the absence of an ambiguity. *Taylor v. State Farm Mut. Auto Ins. Co.,* 854 P.2d 1134, 1140 (Ariz. 1993) (en banc).[1]

There can be no question that some provisions of the Agreement, relevant to deciding whether it is a contract of employment, are ambiguous. For example, Agreement, states that Swift may terminate the Agreement for cause if a Driver "violates any material provision of the Agreement or any COMPANY policy." Van Dusen Agreement ¶ 16A EOR Doc 162-8; Sheer Agreement ¶ 17A EOR Doc 162-11. The Agreement does not spell out what those company policies are, but they are likely highly relevant to the degree of control Swift exercises over the Drivers. Accordingly, under ordinary contract interpretation principles, discovery regarding what company policies are referenced in that paragraph and what they

[1] Swift ignores the governing law provision in the Agreement and disingenuously cites to two cases applying California law to support its argument regarding what is relevant to the interpretation of the Agreement. Swift Brief, at

mean in terms of control is relevant to the Section 1 exemption issue. Similarly, the Agreement provides that Drivers have the right to reject loads offered by Swift. Van Dusen Agreement ¶ 1 EOR Doc 162-8; Sheer Agreement ¶ 1 EOR Doc 162-11. The significance of that provision to the question of control and driver independence depends in large part on the consequences that follow from exercising the option. *See Bell v. Atlantic Trucking Co.*, 3:09-cv-406-J-32MCR, 2009 WL 4730564 at *5 (M.D. Fla. Dec. 7, 2009) (adverse consequences imposed by company in response to drivers who turn down loads support finding of FAA § 1 exempt contract of employment). The Agreement is silent as to the consequences of turning down loads, but the Agreement does give Swift total discretion over the assignment of loads as well as the right to terminate a driver for no reason at all. *See* Van Dusen Agreement ¶¶ 1, 16A EOR 162-8 (Doc 162-8); Sheer Agreement ¶¶1, 17A EOR 162-11 (Doc 162-11)). Thus delaying or reducing new assignments in response to a driver's exercise of the option to turn down a load would be consistent with Swift's rights under the Agreement and the Drivers have alleged precisely that sort of retaliation. *See, e.g.,* Van Dusen Declaration ¶ 7 SER 2 (Doc 80 ¶ 7); Sheer Declaration ¶ 10 SER 9 (Doc 81 ¶ 10).[2] To resolve

---

14-15.

[2] This and the other affidavits cited in the paragraph below were cited in Plaintiffs' opposition to Defendants' motion to compel, *see* Doc 188, at 13-14, and the district court was aware of them when it determined that discovery and a trial were necessary to resolve the § 1 issue.

what bearing the provision allowing Drivers to turn down loads has on the employee/independent contractor question, it is necessary to look beyond the words of the Agreement itself to the parties' course of performance implementing the provision.

To give another example, the Agreement provides that a Driver may drive for other carriers under certain specified conditions, (Van Dusen Agreement ¶ 5b EOR 162-8 (Doc 162-8); Sheer Agreement ¶ 5A EOR 162-11 (Doc 162-11)), a provision that may be highly relevant to their alleged independent contractor status, if it can realistically be exercised. *See CC Eastern, Inc. v. NLRB*, 60 F.3d 855, 860 (D.C. Cir. 1995) ("If a company offers its workers entrepreneurial opportunities that they cannot realistically take, then that does not add any weight to the Company's claim that the workers are independent contractors."). Whether, as a practical matter, a driver could meet those conditions is not apparent from the face of the Agreement, however. In addition, the Lease Agreement, which must be signed at the same time as the Contractor Agreement and must be construed along with it, Doc 546 at 1, only permits a driver to enter into an operating agreement with Swift. Sheer Lease ¶2 SER 15-16 (Doc. 81-3 ¶ 2). This would appear to preclude driving for any other carrier and Drivers have submitted affidavits indicating that that is the case. *See, e.g.*, Van Dusen Declaration ¶ 14 SER 4 (Doc 80 ¶ 14); Sheer Declaration ¶ 12 SER 9 (Doc 81 ¶ 12). Given these conflicting

provisions, it is impossible to know from the face of the Agreement whether the right to drive for other carriers is real or illusory, making consideration of the parties' course of performance necessary in order to determine the import of this aspect of the Agreement. These are but two of many examples of provisions in the Agreement that require elucidation from the parties' course of performance to determine their relevance for the employee/independent contractor question.

Moreover, some of the factors that Swift agrees are relevant to deciding whether the Agreement is one of employment necessarily require examination of facts beyond the words of the Agreement no matter how clear the Agreement itself is. For example, whether the Drivers were engaged in a distinct occupation requiring specialized skill is often resolved by looking to how admitted employees who perform similar jobs are treated. *See Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981, 995 (9th Cir. 2014) (finding that drivers were not engaged in a distinct business because they "look like FedEx employees, act like FedEx employees, and are paid like FedEx employees."). Swift has employee drivers but how their working arrangement compares to the one set forth in the Drivers' Agreement is not apparent from the face of the Agreement. The only way to determine whether the Drivers' Agreement actually calls on them to fulfill a role distinct from employee drivers is to inquire into the facts regarding Swift's treatment of employee drivers.

These are but a few examples of the many facts extrinsic to the Agreement that the district court must consider in determining whether the Agreement is a contract of employment. They also serve to illustrate why Swift's attempt to draw a distinction between the whether the Agreement is one of employment and whether the relationship created by the Agreement is one of employment is ultimately a distinction without a difference. The parties' course of performance under their Agreement necessarily informs the court's understanding of whether the Agreement is properly characterized as one of employment or not.

Swift rejects the idea that course of performance is relevant to understanding the intent of the parties' Agreement because, in its view, any evidence of the parties' performance under the contract is necessarily evidence of a relationship different from the one created by the Agreement. *See, e.g.*, Swift Brief, at 26 ("[w]hether an employer-employee relationship later develops in practice, *after* the agreement was signed and over time, is not the issue to be decided") (emphasis in original). But there is no allegation that the Plaintiff Drivers worked under any contract other than the Agreement at issue and, in moving for arbitration, Swift asserted that all of the Plaintiffs' claims are "disputes arising out of or relating to the relationship created by the Agreement." Doc 128 at 7. Thus, there is no reason to believe that considering evidence of the parties' performance under the Agreement in order to explicate the Agreement will produce an answer to the

employee/independent contractor question different from examining the Agreement alone.

Moreover, it should be pointed out that the Agreement gives Swift the right to terminate the Agreement for any or no reason on 10 days notice, Van Dusen Agreement ¶ 16A EOR Doc 162-8; Sheer Agreement ¶ 17A EOR Doc 162-11, which automatically places a Driver in default of his Lease Agreement, Sheer Lease ¶ 12(g) SER 19 (Doc. 81-3), and triggers immediate acceleration of all remaining Lease payments. *Id.* ¶ 13(b). Plaintiffs argue that the right to impose this draconian financial burden effectively gives Swift the ability to amend the Agreement at will. Drivers who resist a change are threatened with financial ruin – as Driver affidavits attest. *See, e.g.,* Van Dusen Declaration ¶ 9 SER 2-3 (Doc 80 ¶ 9). If the Court agrees that the Agreement effectively gives the Swift the right to amend at will, then even subsequent modifications of the Agreement are simply evidence of the right to control the Agreement grants to Swift.

Swift makes a number of other contract interpretation arguments that are easily disposed of. For example, Swift argues that looking beyond the express terms of the Agreement will lead to absurd results. As an example, it posits that the degree of control the company exercises over a driver could develop and change over time such that a claim brought at an earlier stage in a driver's relationship with Swift could lead to a different result than one brought at a later

stage. Swift Brief, at 25-26. Swift offers no evidence of this theoretical possibility. Regardless, its argument reflects a misunderstanding of employee/independent contractor law. In determining whether an agreement is one of employment or not, the issue is not the actual control exercised by the company over a particular employee at any given moment in their relationship, but the *right* to control permitted by their agreement. *See Santiago v. Phoenix Newspapers Inc.*, 794 P.2d 138, 143 (Ariz. 1990) (en banc). Because all drivers have been operating under essentially the same Agreement throughout the course of this litigation, variations over time in the *actual* control exercised by Swift simply illustrate the different kinds of controls that the Agreement gives Swift the right to exercise. Since the range of possible controls is the same for all Plaintiff Drivers, the variations posited by Swift should not lead to different results.

Similarly, Swift argues that considering extrinsic evidence of the parties' performance under the Agreement will lead to different results for different drivers and gives as an example two drivers operating under the same Agreement, one of whom has a longer relationship with Swift than the other. Swift posits that consideration of this extrinsic fact could result in the former driver being found to be an employee while the latter is found to be an independent contractor. Swift Brief, at 27. Again, this argument reflects Swift's misunderstanding of the factors applicable to determining employment status. The relevant issue is the length of

the relationship contemplated by the Agreement. If the parties' performance shows that the relationship created by the Agreement is indefinite or automatically renewable on satisfactory performance, that tends to indicate that the contract is one of employment, regardless of whether some individuals choose to terminate sooner than others. *See Alexander*, 765 F.3d at 996 (automatic renewal for successive one-year terms on satisfactory performance weighs in favor of employee status); *Narayan v. EGL Inc.*, 616 F3d 895, 902-03 (9th Cir. 2010) (when contracts signed by the plaintiff drivers contained automatic renewal clauses and could be terminated by either party on thirty-days notice or upon breach of the agreement, "[s]uch an agreement is a substantial indicator of an at-will employment relationship.").

C. Section 4 of the FAA Provides For Trial of Section 1 Issue

In addition to accusing the district court of inquiring into the wrong issue, Swift argues that there is no authority under the FAA for the court to permit discovery and conduct a trial. That argument, too, is lacking in merit.

As this Court found in *In re Van Dusen*,

> the FAA, and Section 4's authority to compel arbitration, do not extend to all arbitration agreements. As Section 2 makes clear, the Act applies only to contracts 'evidencing a transaction involving commerce,' or arising from a 'maritime transaction.' 9 U.S.C. § 2. Section 1, titled 'exceptions to operation of title' imposes a further limit on the Act's scope, stating '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.

654 F.3d at 842-43. Because of this structure, the Supreme Court has held that the district court's power under § 3 of the Act to stay litigation "upon being satisfied that the issued involved in such suit or proceeding is referable to arbitration under [a written] agreement" does not apply to any written agreement for arbitration, but only to one that falls within the coverage of §§ 1 and 2:

> 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 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.

Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 201 (1956). Similarly, the district court's power to compel arbitration under § 4 of the FAA, upon being satisfied that "the making of the agreement for arbitration is not in issue," refers to the making of an arbitration agreement within the purview of the FAA – *i.e.*, one involving a maritime transaction or commerce that is not exempt under § 1. *In re Van Dusen,* 654 F.3d at 844.

If the making of such an arbitration agreement within the purview of the FAA is in dispute, Section 4 makes clear that "the court shall proceed summarily to the trial there of." 9 U.S.C. § 4. Trials conducted by federal district courts are governed by the Federal Rules of Civil Procedure, Fed. R. Civ. P. 1, and the trial

required by § 4 is no exception. (Indeed § 4 specifically references the Rules in discussing the summary trial). Courts have long recognized that the usual trial and pre-trial procedures established by the Rules of Civil Procedure, including discovery, apply to § 4 trials. *See Simula Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999) ("The FAA provides for discovery and a full trial in connection with a motion to compel arbitration only if 'the making of an arbitration agreement . . . be in issue.'"); *Guidotti v. Legal Helpers Debt Resolution, LLC,* 716 F.3d 764, 776 (3d Cir. 2013) ("if the plaintiff has responded to a motion to compel arbitration with additional facts sufficient to place the agreement to arbitrate in issue, then 'the parties should be entitled to discovery on the question of arbitrability before a court entertains further briefing on [the] question.'") (alteration in original); *Deputy v. Lehman Bros., Inc.,* 345 F.3d 494, 511 (7th Cir. 2003) (finding that party must be afforded opportunity for discovery on issues to be tried pursuant to FAA § 4). *See, e.g., Caseras v. Tejas de Brazil (Orlando) Corp*., No. 6:13-cv-1001-Orl-37KRS, 2013 WL 5921539 (MD Fla. Nov. 4 2013) (ordering parties to confer and submit a case management plan for discovery upon finding that § 4 trial was necessary); *Dassero v. Edwards,* 190 F.Supp.2d 544, 557 (W.D.N.Y. 2002) (setting hearing regarding length and scope of discovery after determining § 4 trial was necessary); *Rush v. Oppenheimer & Co.,* 638 F.Supp. 872, 876 (S.D.N.Y. 1986) (setting discovery deadline and pre-trial order submission date for § 4 trial). Thus, the

district court's scheduling order to resolve whether the agreement in this case is within the purview of the FAA is fully consistent with the mandate of § 4.

Swift disagrees with this analysis and argues that § 4 only authorizes trials relating to the "making" of an arbitration agreement – *i.e.*, whether one was signed or whether the signatures thereon are valid or forged. Swift Brief, at 18-20. That reading of the phrase "[i]f the making of the arbitration agreement . . . be in issue" might be persuasive if § 4 applied to any arbitration agreement. But that is not the case as the Supreme Court made clear in *Bernhardt.* When the FAA § 4 states that disputes about the "making of an arbitration agreement" are to be tried, the statute is clearly referring not just to disputes about the "making" of the agreement, but also to disputes about whether the "arbitration agreement" falls within the purview of § 4.

D. Swift's Examples Of § 1 Issues Decided Without Trial Are Irrelevant

Swift cites a number of cases in which the Section 1 issue was decided without a trial. Those cases are easily distinguishable from the present one as the district court recognized. Doc 605 at 7. In *Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co.*, 288 F. Supp. 2d 1033 (D. Ariz. 2003), the court resolved the Section 1 issue as part of the motion to compel arbitration by noting that the plaintiff drivers had failed to come forward with any evidence sufficient to put the Section 1 exemption issue "in dispute." Thus, the question of how a § 4 trial should

be conducted never arose. *Carney v. JNJ Express, Inc.*, 10 F.Supp.3d 848 (W.D. Tenn. 2014); *Port Drivers Fed'n 18, Inc., v. All Saints,* 757 F.Supp.2d 463, 472 (D.N.J. 2011); and *Owner-Operator Indep. Drivers Assn., Inc. v. United Van Lines, LLC,* No. 06-219, 2006 WL 5003366 (E.D. Mo. Nov. 15, 2006), are similar. In none of those cases did the plaintiffs offer any evidence to create a fact issue as to whether the agreements in issue were, in fact, exempt contracts of employment.[3] While the plaintiffs in *OOIDA v. Swift* and its progeny failed to show a need for a § 4 trial, it is worth noting that those cases recognized, contrary to Swift's argument on appeal, that once the Section 1 question is put in issue, it must be decided "based on the terms of the [driver's] contract and the circumstances of their working relationship with M.S. Carriers." *OOIDA v. Swift*, 288 F.Supp.2d at 1035 (emphasis added).

E. If the Court's Scheduling Order Renders Arbitration Moot That Is a Function of the FAA Not a Result of The Court's Scheduling Order

In a final challenge to the district court's scheduling order, Swift argues that the order will render arbitration moot because, if the court finds the Agreement to

[3] The plaintiffs in those cases apparently relied solely on cases such as *Owner-Operator Indep. Drivers Assn v. C.R. England, Inc.*, 325 F. Supp.2d 1252, 1257 (D. Utah 2004), which held that contract drivers were employees as a matter of law. Once the courts in those cases rejected *C.R. England's* holding, there was no issue to try. Here, by contrast, Plaintiffs do not rely on *C.R. England*, but instead submitted substantial affidavits setting forth facts to support their claim that the Contractor Agreements are contracts of employment. Doc 188 at 6 fn 4, 13-14.

be a contract of employment, the FAA does not apply, and, if it finds it is not a contract of employment, the Drivers will have lost on the merits of their employment based claims leaving nothing left to arbitrate with respect to those claims.[4] Why Swift isn't satisfied with such a victory and, instead, insists on devising a way to decide the § 1 issue that will allow Swift to continue litigating Plaintiffs' employment based claims before an arbitrator (even after the district court has found them to be without merit) is a mystery of no small proportions. Be that as it may, Swift's concern about mooting arbitration does not undermine the district court's scheduling order for a number of reasons.

First, the Ninth Circuit has already rejected Swift's argument. The *In re Van Dusen* opinion, noted the Drivers' concession that "[t]he issue of whether an employer/employee relationship exists between the plaintiffs and the 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." 654 F.3d at 841. Despite that overlap, this Court concluded that FAA § 4 required the district court to decide the exemption issue. *Id.* at 844. The next time the case came to the Ninth Circuit Swift again argued that allowing the district court to decide the

---

[4] Not all of the Drivers' claims turn on being employees. Their claims for unconscionability, unjust enrichment, and forced labor violations are not dependent on being employees and would be subject to arbitration if the district court found the Agreements not to be FAA exempt contracts of employment.

§ 1 issue would "require the court to decide the ultimate issue in the case: whether Drivers should be classified as employees or independent contractors." No. 11-17916, Dkt.Entry 18-1, at 6. The Ninth Circuit again rejected that argument and ordered the district court to determine the § 1 issue regardless of the overlap with the merits. *Van Dusen,* 544 Fed. Appx. at 724. If the overlap between the § 1 issue and the merits was irrelevant to the question of who was to decide the § 1 issue, it is equally irrelevant to the question of how that issue is decided.

Second, even apart from this Court's prior rulings, nothing in FAA § 4's command that when the "making of an arbitration agreement" covered by the FAA is "in issue," "the court shall proceed summarily to the trial thereof" remotely suggests that the procedures applicable to such a trial should be different depending on whether or not the issue to be tried overlaps with the merits of the case. Section 4 speaks of a "trial," not different kinds of trials.

Third, it must be assumed that Congress was aware when it created the § 1 exemption for contracts of employment, that resolving that issue would likely overlap with the merits of employment claims brought by workers asserting the § 1 exemption. Nevertheless, Congress adopted the exemption and, as this Court has found, required the district court to decide the issue before considering whether to compel arbitration. Thus, even accepting Swift's contention that deciding the § 1 issue will render arbitration moot and undermine the FAA's policy in favor of

arbitration, that is a function of Congress's decision to exempt contracts of employment; it is not a function of the district court's scheduling order. Nor is it appropriate for this Court rewrite the FAA, as Swift demands, to create a special § 4 procedure for situations where the § 1 issue overlaps with the merits of a claim.

CONCLUSION

For all of the foregoing reasons, this Court should dismiss this appeal for lack of jurisdiction. In the event the Court reaches the merits of the appeal, the District Court's Scheduling Order should be affirmed in all respects.

Respectfully submitted this 22nd day of July, 2015.

MARTIN & BONNETT, PLLC

By: s/Susan Martin
Susan Martin
Jennifer Kroll
1850 N. Central Avenue, Suite 2010
Phoenix, Arizona 85004
Telephone: (602) 240-6900

GETMAN & SWEENEY, PLLC
Dan Getman
Lesley Tse
9 Paradies Lane
New Paltz, NY 12561
Telephone: (845) 255-9370

Edward Tuddenham
1339 Kalmia Rd. NW
Washington, DC 20012

Attorneys for Plaintiffs-Appellees

STATEMENT OF RELATED CASES

A related case, Case No. 15-70592, is pending in this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, I certify that Appellees' Answering Brief is proportionally spaced, has a typeface of 14 points, and contains 7,131 words.

Dated: July 22, 2015

MARTIN & BONNETT, PLLC

By: s/Susan Martin
Attorney for Plaintiffs-Appellees

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 July 22, 2015.

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.

Dated this 22th day of July 2015.

MARTIN & BONNETT, PLLC

By: s/Susan Martin

Attorney for Plaintiffs-Appellees