SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
Including Professional Corporations
RONALD J. HOLLAND, Cal. Bar No. 148687 *(Pro Hac Vice)*
rholland@sheppardmullin.com
ELLEN M. BRONCHETTI, Cal. Bar No. 226975 *(Pro Hac Vice)*
ebronchetti@sheppardmullin.com
PAUL S. COWIE, Cal. Bar No. 250131 *(Pro Hac Vice)*
pcowie@sheppardmullin.com
Four Embarcadero Center, 17th Floor
San Francisco, California 94111-4109
Telephone: 415-434-9100
Facsimile: 415-434-3947

Attorneys for Defendants
SWIFT TRANSPORTATION CO., INC.,
INTERSTATE EQUIPMENT LEASING, INC.,
CHAD KILLEBREW AND JERRY MOYES

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Virginia Van Dusen; John Doe 1; and Joseph Sheer, individually and on behalf of all other similarly situated persons,

Plaintiffs,

v.

Swift Transportation Co., Inc.; Interstate Equipment Leasing, Inc.; Chad Killibrew; and Jerry Moyes,

Defendants.

Case No. CV 10-899-PHX-JWS

DEFENDANTS' MOTION TO DETERMINE APPROPRIATE STANDARD FOR RESOLUTION OF THE SECTION 1 EXEMPTION ISSUE AND TO STAY PROCEEDINGS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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Defendants Swift Transportation Co., Inc., Interstate Equipment Leasing, Inc., Chad Killebrew, and Jerry Moyes, ("Defendants") hereby move this 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. This Motion is made and based upon the accompanying Memorandum of Points and Authorities, all pleadings and papers on file in this matter, and any arguments which this court may entertain.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The issue presented is what procedure this court must follow to determine the section 1 exemption under the Federal Arbitration Act in the context of a motion to compel arbitration. This court proposes to do what no other court has ever done – require the parties' to litigate the merits of Plaintiffs' claims *before* determining whether to compel arbitration. No court has ordered merits discovery or a trial to make the section 1 determination. This is because such a process would violate the well-established principle that courts must not decide the merits when ruling on a motion to compel arbitration. Rather, courts faced with the section 1 exemption analysis, including those from the District of Arizona, have exclusively decided it based on the papers and without discovery or a trial of the merits.

The section 1 exemption does not raise the question of whether Plaintiffs were employees or independent contractors, instead the question under section 1 is whether the parties entered into "contracts of employment." This is what the Ninth Circuit 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." This is consistent with the rule that contracts must be interpreted according to the mutual intention of the parties *at the time the contract was formed*. Indeed, the Court of Appeal was careful not to suggest that the determination rested on whether the individual was converted into an employee *after* signing the

"contract."

To require the parties' to litigate in court the merits of the very dispute that is the subject of their arbitration agreement would have the same impact as an order denying arbitration and would be an appealable order. Accordingly, Defendants request the court set a briefing schedule to determine the section 1 exemption without resort to merits discovery and two trials (five trials if Plaintiffs' Third Amended Complaint is accepted).

II. PROCEDURAL BACKGROUND

Plaintiffs Virginia Van Dusen and Joseph Sheer filed a class action complaint alleging that they were misclassified under the Fair Labor Standards Act ("FLSA"), New York Labor Law, California Labor Code, and additional causes of action for declaratory judgment, unjust enrichment, forced labor, and violations of New York Uniform Commercial Code and the California Civil Code. After transferring the case to the U.S. District Court for the District of Arizona, on May 21, 2010 Defendants filed a Motion to Compel Arbitration and to Stay Proceedings, which was granted by this court. On December 10, 2010, Plaintiffs filed a Writ of Mandamus to the Ninth Circuit asserting that the court, not the arbitrator, should determine the section 1 exemption. Plaintiffs' Writ was denied because there was no *clear* error in this court's decision to compel arbitration. Plaintiffs then directly appealed, and the Ninth Circuit reversed and remanded, relying exclusively on the Writ decision as law of the case. The Ninth Circuit 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). In a Scheduling Order dated July 22, 2014, this court ordered the parties to engage in full merits discovery and a trial regarding whether Plaintiffs had an employer-employee relationship with Defendants, including:

- Pre-discovery disclosure exchange by the parties.
- Compliance with disclosure requirements of FRCP 7.1.
- Motions to amend pleadings or add parties.
- Preliminary Witness Lists exchange by the parties.

- Expert witness disclosure by plaintiff(s).
- Expert witness disclosure by defendant(s).
- Final Witness list disclosure served and filed.
- If assistance needed in settlement efforts, judge to be notified.
- Rebuttal reports due.
- All discovery to be completed.
- Serious settlement negotiations.
- Motions to be served and filed.
- Motions in limine to be served and filed.
- Dispositive motion to be served and filed.

The court ordered the parties to litigate the misclassification dispute by setting the same discovery and trial plan *as if no Motion to Compel Arbitration had been filed*. As this is an independent contractor misclassification case, resolution of whether an employment relationship existed will determine the merits of the case. Accordingly, the court has effectively denied arbitration. Defendants now bring this Motion to challenge the court's proposed method of resolving the section 1 exemption.[1]

III. LEGAL STANDARD – THE FAA SECTION 1 EXEMPTION

A. The FAA Favors Arbitration.

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

[1] Plaintiffs have now filed a proposed Third Amended Complaint to identify three new Plaintiffs. Consequently, if the court denies this Motion, separate discovery and five independent trials would be needed to resolve the section 1 exemption, with the prospect of different outcomes for each named Plaintiff.

arbitration." Owner-Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co., 288 F. Supp. 2d 1033, 1036 (D. Ariz. 2003). Consequently, the analysis of the section 1 exemption issue must be conducted in accordance with this policy and any close call must be resolved in favor of arbitration. Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 719 (9th Cir. 1999) "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25).

B. Section 1 Exempts "Contracts of Employment."

The FAA provides: "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. Therefore, in accordance with the Ninth Circuit's order, this court should determine whether the Contractor Agreements between each Plaintiff and Swift are exempt contracts of employment under § 1 of the FAA.

IV. ARGUMENT

A. Contracts Are Interpreted According To The Intention Of The Parties At The Time They Entered Into The Agreement.

"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) (emphasis added); Miller v. Glenn Miller Prods., 454 F.3d 975, 989 (9th Cir. 2006); U.S. Cellular Inv. Co. of L.A. v. GTE Mobilnet, Inc., 281 F.3d 929, 934 (9th Cir. 2002); Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1264 (1992). "The rule of interpretation is stated to be that the **intention of the parties as derived from the language used within the four corners of the instrument** must prevail." Darner Motor Sales v. Universal Underwriters Ins. Co., 140 Ariz. 383, 387-88 (1984) (emphasis added) (citing Rodemich v. State Farm Mutual Auto Insurance Co., 130 Ariz. 538, 539 (1981)). "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible." WYDA Associates v. Merner, 42 Cal. App. 4th 1702, 1709

(1996); see also Dingley v. Oler, 117 U.S. 490 (1886); Reed v. Ins. Co., 95 U.S. 23, 30 (1877) ("A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the court in construing their language, from falling into mistakes and even absurdities"). Likewise, the court has a duty to construe statutes to avoid absurd results. In Re Korean Air Lines Co., Ltd., 642 F.3d 685, 693 (9th Cir. 2011).

In the arbitration context, the U.S. Supreme Court has reaffirmed that the court's role in determining whether to compel arbitration is a functional one: to interpret the parties' agreement according to its terms. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1742, 1748 (2011). This is the only rational approach in the arbitration context, as to hold otherwise would lead to absurd results because it would produce different outcomes depending upon *when* in the relationship a dispute arises. For example, in the 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, this court proposes that a different outcome is possible, based upon an analysis of how the parties' *relationship* may have developed 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. Id. If the terms of the agreement have not changed, the contractual right to compel arbitration would remain the same. Whether an employer-employee relationship developed *after* the agreement was signed is a separate question and one that should be decided by the arbitrator, particularly where, as here, it is the ultimate question of the parties' dispute.

For the same reasons, the proposed approach of conducting merits discovery and trial regarding the parties' relationship to determine retroactively whether the Contractor Agreements were employment contracts, will also lead to different results for different drivers based on the same contractual language. Despite signing the same arbitration provision, each individual driver will need to undertake months of discovery and a trial

before the court could determine whether to compel arbitration. In a statutory framework strongly favoring arbitration that cannot be the intended outcome. Plaintiffs' conclusion would result in identical terms in identical contracts being interpreted differently and the underlying disputes resolved in different forums. This result is absurd because the court's role is one of contract interpretation – different results should not be produced by identical terms in identical contracts. 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). Accordingly, here, the court should limit its determination of the section 1 exemption to the Contractor Agreements at issue.

Indeed, that is precisely what the Ninth Circuit ordered, a review of the "Contractor Agreements," not the parties' relationship: "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) (emphasis added.) To ignore the Ninth Circuit's express use of the capitalized term: "Contractor Agreements," would ignore the explicit instruction of the Court of Appeal. 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. That, however, is not what the Ninth Circuit ordered. Rather, the Ninth Circuit's order is consistent with the statutory language. The section 1 exemption does not raise the question of whether the workers were employees or independent contractors, rather the question is whether they entered into *contracts of employment*: "nothing herein contained shall apply to contracts of employment." FAA §1. Consistent with this statutory language, and with the rule that courts should interpret contracts to give effect to the mutual intention of the parties at the time the contract was formed, this court's review should be appropriately limited.

B. No Court Has Ordered Merits Discovery And A Trial To Determine The Section 1 Exemption Issue – Discovery And Trial Is Only Permitted If The Making Of The Arbitration Agreement Is In Issue.

"[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 were such an issue, it was for the arbitrator to decide. 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).

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.[2] Thus, the FAA sanctions summary trials only to determine if a contract was made, not if the contract was one of employment.

Indeed, the cases cited by Plaintiffs in their opposition to Defendants' Motion to Compel Arbitration further confirm that discovery is limited to the making of an agreement. See 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;" Fitz v.

[2] *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.").

Islands Mechanical Contractor, Inc., 2010 WL 2384585 (D.V.I. 2010) "the Court . . . orders that this case proceed to trial *on the issue of fraudulent inducement* of the arbitration agreements;" 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;" Town of Amherst v. Custom Lighting Services, LLC, 2007 WL 4264608 (W.D.N.Y. 2007) challenge to arbitration based upon making of agreement where Town Supervisor was allegedly not authorized to sign it and/or Supervisor was fraudulently induced to sign it (in any event no discovery or trial was ordered); Bettencourt v. Brookdale Senior Living Communities, Inc., 2010 WL 274331 (D. Or. 2010)—genuine issue of material fact existed as to whether the employee and employer formed an agreement to arbitrate because the employer failed to sign the employment agreement containing the arbitration provision. For these reasons, the court deferred ruling on defendant's motion to compel arbitration pending trial *as to whether the parties actually formed* an arbitration agreement.

Moreover, courts have expressly rejected requests for merits discovery. Coneff v. AT&T Corp., 2007 U.S. Dist. LEXIS 20502, at *8-10 (W.D. Wash. Mar. 9, 2007) (allowing 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 (The court held that "Plaintiff may conduct limited discovery on the issue of unconscionability" and that "**merits discovery is surely inappropriate at this stage of the proceedings**.") (emphasis added). 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. v. Mercury Constr. Corp., 460 U.S. 1, 22-23 (1983).

Here, there is no dispute as to the *making of the agreement* because a contract was made and signed. Thus, the court's proposed year-long discovery schedule and week-long trial contradicts this authority and violates the rule against determining the merits.

C. The Section 1 Exemption Has Been Universally Determined Without Discovery And Trial.

Exemptions to the FAA are narrowly construed. Veliz v. Cintas Corp., 2004 U.S. Dist. LEXIS 32208 (N.D. Cal. 2004) ("Circuit City mandates that the § 1 exemption be narrowly construed. Circuit City v. Adams, 532 U.S. 105, 119 (2001)"). Accordingly, where a dispute arises as to whether the section 1 exemption applies, courts have consistently looked to the terms of the parties' contract to resolve this 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 Owner-Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co., 288 F. Supp. 2d 1033 (D. Ariz. 2003) ("OOIDA v. Swift").

In Owner-Operator Indep. Drivers Ass'n, Inc. v. United Van Lines, LLC, 2006 U.S. Dist. LEXIS 97022 (E.D. Mo. 2006), 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."

Citing OOIDA v. Swift; Letourneau *infra*; Roadway Package Sys., Inc. v. Kayser, *infra*. The United Van Lines court continued:

> Other cases have come to the opposite conclusion, but only one, Owner-Operator Indep. Drivers Assn' v. C.R. England, Inc., has articulated a reasons 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." Id. at *8.

To follow C.R. England, however, would mean that drivers were always employees. Carney v. JNJ Express, Inc., 2014 U.S. Dist. LEXIS 49940, 11-12 (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 at 472. The court 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.

Id., 9-10. 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 also supports 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." Id. at 1258. To make this determination: "the Court considers the Operating Agreements to determine whether or not they are 'contracts of employment.'" Id. The C.R. England court then analyzed the terms of the Operating Agreements and

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

Thus, not only has it been the District Court of Arizona's approach to determine the section 1 exemption for at least a decade, but other district and circuit courts have followed and endorsed this same approach. See also Carney v. JNJ Express, Inc., 2014 U.S. Dist. LEXIS 49940, 12-15 (W.D. Tenn. 2014) "The opinions in Swift and United Van Lines are persuasive" (analyzing the terms of the lease agreement to resolve that the section 1 exemption did not apply and compelling arbitration).[4]

In Davis v. Larson Moving & Storage Co., 2008 U.S. Dist. LEXIS 87251, 15-18 (D. Minn. Oct. 27, 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, and concluded that the plaintiff did not establish 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., 2004 U.S. Dist. LEXIS 6165 (D.N.H. 2004) 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. Once again, no evidence beyond the contract itself was considered.

In OOIDA v. Swift, 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." Specifically, the

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

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

Arizona District Court did not order discovery or a trial regarding the section 1 exemption. This court should not depart from this long-established precedent and should instead set a briefing schedule to resolve the section 1 exemption without discovery and trial.

D. 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, 450 (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) (emphasis added). The Van Dusen panel also recognized this long-standing rule, but did not address it. "We acknowledge, however, that the law's repeated admonishments that district courts refrain from addressing the merits of an underlying dispute can be read to favor the District Court's decision." In Re Van Dusen, 654 F.3d at 846. It is perhaps this failure that has resulted in the present question regarding the role of the court in determining the section 1 exemption. The issue, however, can be reconciled: if the district court analyzes the four corners of the Contractor Agreements, as ordered by the Van Dusen Court, it will decide the section 1 exemption issue without deciding the merits of the case. Van Dusen, LEXIS 22540, 2013 WL 5932450 (9th Cir. 2013).

This court's Scheduling Order, requiring Defendants to participate in merits discovery and then trial to determine whether the relationship between the parties was that of employer-employee in order to retroactively determine if the Contractor Agreements were contracts of employment, ignores this binding precedent by impermissibly becoming enmeshed in the merits.

E. A Determination Of Whether Plaintiffs Were Employees Or Independent Contractors Will Determine The Merits Of The Case, Mooting Arbitration.

If, contrary to controlling precedent, this court orders the parties to litigate whether

an employer-employee relationship developed after the Contractor Agreements were signed, it will simultaneously determine the merits of the case. According to Plaintiffs, whether an employer-employee relationship existed, is the "central element of all of Plaintiffs' substantive claims other than unconscionability." (Dkt #188 Plaintiffs' Opposition to Defendants' Motion to Compel Arbitration: "The issue of whether an employer/employee relationship exists between the plaintiffs and defendants is not only central to the question of exemption from arbitration, it is also a central element of all of Plaintiffs' substantive claims other than unconscionability.") Thus, by determining whether an employer-employee relationship existed, this court will be foregoing the possibility of arbitrating Plaintiffs' substantive claims.

Indeed, forcing the parties to litigate the merits of the case in court, would forego the possibility of arbitrating a misclassification case in the transportation industry as the court would always decide the merits. It would usurp any role of an arbitrator and ignore the parties' contractual agreement to arbitrate their claims. Such outcome 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. Reid v. SuperShuttle International, Inc., No. 08-CV-4854 (JG) (VVP) (E.D.N.Y. Mar. 22, 2010) – court compelled arbitration because arbitration agreement governed all aspects of relationship, including claim that drivers were employees rather than independent contractors; OOIDA v. Swift, 288 F.Supp.2d 1033 (D. Ariz. 2003) – court compelled arbitration and found that agreement to arbitrate reached all of plaintiffs' claims.

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." Van Dusen supra. This is also consistent with controlling precedent that contracts are determined at the time they are formed.

F. An Order Favoring Litigation Over Arbitration Is An Appealable Order.

Numerous courts have held that a court order requiring parties to engage in litigation, rather than arbitration, is an appealable order, as it has the same practical effect of denying a motion to compel arbitration. 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 § 16(a)."[5] In Koveleskie v. SBC Capital Mkts., Inc., 167 F.3d 361 (7th Cir. 1999), the plaintiff employee brought sexual discrimination claims against the defendant employer. Defendant moved to dismiss the complaint and to compel arbitration. In a minute order, the district court refused to compel arbitration, concluding that "under recent authority, the discovery sought by plaintiff is appropriate before a decision can be reached on the arbitration issue." The circuit court accepted the appeal and reversed and remanded holding that, despite the district court's indication that "discovery was needed 'before a decision can be reached on the arbitration issue,' there is no doubt" that the order effectively denied the motion to compel arbitration, and was thus appealable:

> As an initial matter, we find jurisdiction for this appeal under section 16(a)(1)(C) of the Federal Arbitration Act ("FAA"), which provides that appeal may be taken from an order denying a motion to compel arbitration. 9 U.S.C. § 16(a)(1)(C). While the district court's order stated that discovery was needed "before a decision can be reached on the arbitration issue," there is no doubt from the record that the district court denied the defendant's motion and clearly meant to foreclose arbitration. Thus, in such a setting, this appeal was appropriate under the FAA. Id. at 363.

Similarly, in Microchip Tech. Inc. v. U.S. Philips Corp., 367 F.3d 1350, 1355 (Fed. Cir. 2004) the court held:

> We agree with our sister circuits that section 16 allows for appeal of orders denying motions to compel arbitration **even when the issue of arbitrability has not been finally decided**. In Snowden v. Checkpoint Check Cashing, 290 F.3d 631 (4th Cir. 2002), the Fourth Circuit held

[5] 9 U.S.C. § 16 provides (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.

> that it possessed appellate jurisdiction under section 16 to consider an order denying a motion to compel arbitration. There the district court denied a motion to compel arbitration and stay proceedings without prejudice and 'stated its intention to revisit the ruling at a later time.' Id. at 635. The Fourth Circuit noted that this 'triggered alarm bells of a premature appeal,' but concluded that it possessed jurisdiction because 'the FAA expressly permits an immediate appellate challenge to a district court's denial of a motion to compel arbitration and stay proceedings.' Id." (emphasis added.)

The court of appeals in Sandvik AB v. Advent Int'l Corp., 220 F.3d 99, 103-04 (3rd Cir. 2000) reached the same conclusion, finding jurisdiction under Section 16 to review the denial of a motion to compel arbitration where the district court indicated that it could not order arbitration until it determined the validity of the underlying contract:

> … even if a district court does not feel itself ready to make a definitive decision on whether to order arbitration and therefore denies a motion to compel, an appeal may be heard of its denial order…. [J]urisdiction comports with the purposes of the FAA. Refusing Advent's appeal could circumvent the FAA's clear purpose of enforcing binding arbitration agreements. Indeed, the facts of this matter demonstrate the importance of reading 9 U.S.C. § 16 to reach Advent's appeal. The question whether there was a binding arbitration clause is quite possibly inextricably bound with the underlying merits of the case – that is, the question whether the parties entered into the underlying contract. Both appear to turn on the legal effect of Huep's signature on behalf of Advent…. Were we to refuse to hear Advent's appeal, Advent faces the possibility of enduring a full trial on the underlying controversy before it can receive a definitive ruling on whether it was legally obligated to participate in such a trial in the first instance. For the reasons set forth above, we are of the view that the FAA's text and the precedents interpreting it militate against such a result.

Thus, these cases consistently demonstrate that an order which would require "the possibility of enduring a full trial on the underlying controversy before [Defendants] can receive a definitive ruling on whether [they were] legally obligated to participate in such a trial in the first instance" would violate "FAA's text and the precedents interpreting it." Should this court deny this Motion, Defendants intend to appeal and therefore request a stay to seek guidance from the Ninth Circuit on this critical issue.

G. Ninth Circuit Law That Looks Beyond The Contract To Determine If Plaintiffs Were Employees Or Independent Contractors Is Irrelevant In The Context Of Determining Whether To Compel Arbitration.

In Plaintiffs' Status Report filed on July 15, 2014, Plaintiffs assert, without citing any authority in support, that the correct method for determining the section 1 exemption is by litigating the employer-employee relationship pursuant to the FRCP, including the right to discovery, expert testimony, dispositive motions, and trial. (Dkt at 543.) On its face, Plaintiffs' argument is contrary to the very purpose of arbitration, to avoid litigation in the courts. If the parties must first separately litigate the merits of each plaintiffs' dispute in successive federal court trials, nothing would remain for arbitration.

Furthermore, and significantly, none of the cases cited by Plaintiffs regarding the test to determine whether an employer-employee relationship exist are in the arbitration context. For example, Real v. Driscoll Strawberry Associates Inc., 603 F.2d 748, 755 (9th Cir. 1979) involved an appeal of summary judgment decision dismissing plaintiffs' claims against a farmer under the FLSA on the grounds that they were independent contractors and not employees.

As to the cases Plaintiffs cite that do determine the section 1 exemption issue, none ordered discovery *of any kind* and none ordered a trial. Even C.R. England, which the majority of courts have found unpersuasive, looked only to the terms of the parties' Operating Agreements. OOIDA v. C.R. Eng., Inc.,325 F. Supp. 2d 1252, 1255 (D. Utah 2004). There is simply no authority to support ordering discovery and trial regarding the section 1 exemption issue. To the contrary, in each case cited by Plaintiffs, the court looked only at the papers filed in support of and against compelling arbitration.

H. Defendants Request A Stay Of Litigation Pending Resolution Of The Section 1 Exemption Issue, As Discovery Is Improper And Contrary To The Parties' Agreement To Arbitrate.

In conjunction with this Motion to Determine the Appropriate Standard for Resolution of the Section 1 Exemption Issue, Defendants seek a stay of proceedings, including discovery into the merits. The Ninth Circuit applies a two-part test when evaluating a request for a stay. "First, the pending motion must be potentially dispositive

of . . . the issue at which discovery is aimed. Second, the court must determine whether the pending, potentially dispositive motion can be decided absent additional discovery. If the moving party satisfies these two prongs, the court may issue a protective order." Mlejnecky v. Olympus Imaging Am., Inc., 2011 U.S. Dist. LEXIS 16128 (E.D. Cal. 2011).

Here, both prongs are satisfied because the instant Motion is to determine whether merits discovery is appropriate at all. If the court grants Defendants' motion, no discovery will be permitted and the motion will be dispositive as to the discovery issue. Second, no discovery is needed to resolve this Motion regarding whether discovery and a trial is appropriate to resolve the section 1 exemption issue as it involves a question of law. Requiring the parties to litigate prior to determining if merits discovery is permissible, violates the parties' agreement and prejudices the parties through being forced to act contrary to the terms of their contract and also the improper expenditure of resources. Consequently, a stay should be granted until this Motion is resolved.

V. CONCLUSION

The Ninth Circuit ordered this Court to: "determine **whether the Contractor Agreements** between each appellant and Swift are exempt under § 1 of the FAA before it may consider Swift's motion to compel." The only way to do this without violating binding authority is through an examination of the papers, and not through merits discovery and a trial.

Dated: September 24, 2014 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____

RONALD HOLLAND
ELLEN M. BRONCHETTI
PAUL S. COWIE
Attorneys for Defendants
SWIFT TRANSPORTATION CO., INC.,
INTERSTATE EQUIPMENT LEASING, INC.,
CHAD KILLEBREW AND JERRY MOYES

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2014, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic filing to the following CM/ECF registrants:

Susan Joan Martin
Jennifer Lynn Kroll
Martin & Bonnett PLLC
1850 N. Central Ave.; Ste. 2010
Phoenix, AZ 85004

Dan Getman
Edward John Tuddenham
Lesley Tse
Getman & Sweeney, PLLC
9 Paradies La.
New Paltz, NY 12561

Attorneys for Defendants

s/ Paul Cowie