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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Virginia Van Dusen, et al.,

Plaintiffs,

vs.

Swift Transportation Co., Inc., et al.,

Defendants.

No. CV 10-899-PHX-JWS

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DETERMINE APPROPRIATE STANDARD FOR RESOLUTION (DOC 566)

Now come Plaintiffs and file their opposition to Defendants' "Motion to Determine Appropriate Standard for Resolution Of the Section 1 Exemption Issue and to Stay Proceedings" (Doc 566). Despite its name, Defendants' motion is, in reality, an untimely motion for reconsideration of the Court's Order of July 21, 2014. Doc 546. The July 21 Order already determined the appropriate standard for resolving the Section 1 issue and Defendants' motion merely asks the Court to alter that prior Order. As set forth below Defendants' motion fails to comply with Local Rule 7.2(g) governing motions for reconsideration: It is untimely, fails to raise new facts or legal authority that could not have been brought to the Court's attention prior to the July 21, 2014 Order through reasonable diligence, and fails to show manifest error in the July 21 Order.

STANDARD OF REVIEW

Local Rule 7.2(g) states in pertinent part that motions for reconsideration will ordinarily be denied

> absent a showing of manifest error or a showing of new facts or legal authority that could not have been brought to [the Court's] attention earlier with reasonable diligence. Any such motion shall point out with specificity the matters that the movant believes were overlooked or misapprehended by the Court, any new matters being brought to the Court's attention for the first time and the reasons they were not presented earlier, and any specific modifications being sought in the Court's Order. No motion for reconsideration of an Order may repeat any oral or written argument made by the movant in support of or in opposition to the motion that resulted in the Order. Failure to comply with this subsection may be grounds for denial of the motion.

Local Rule 7.2(g)(1). The Local Rule also makes clear that a motion for reconsideration must be filed within 14 days of the Order to be reconsidered. Local Rule 7.2(g)(2). As set forth below, Defendants' motion fails to satisfy any of these requirements and they cannot sidestep them simply by disingenuously calling their motion something else.

I. DEFENDANTS' MOTION IS AN UNTIMELY AND IMPROPER MOTION FOR RECONSIDERATION

The Ninth Circuit's opinion in this case 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." *Van Dusen v. Swift*, 544 Fed. Appx. 724 (9th Cir. 2013). After Defendants' petition for a writ of certiorari was denied and the mandate from the Court of Appeals issued, this Court ordered the parties to confer and advise the court "of those matters which need to be addressed to resolve this litigation and suggesting a schedule." Order of June 26, 2014. Doc 536. In response, Plaintiffs demonstrated that resolving the exemption issue required consideration not only of the Contractor Agreements and Lease but also evidence outside the four corners of those documents regarding the actual degree of control those documents allowed Defendants to exert over Plaintiffs. Doc 543 at 3-7. Plaintiffs urged the Court to allow discovery and then proceed to a trial of the exemption issue as required by § 4 of the FAA. *Id.* Defendants argued that the Court should resolve the exemption issue simply by "review[ing] the [Agreements]" because, in Defendants' view, "[n]o further briefing or evidence is required for the Court to make [the §1] determination." Doc 542 at 2. Defendants further argued that "the relevant question . . . is whether the ICOAs are contracts of employment when they were signed, not after," that "[w]hether an employer-employee relationship developed after the ICOAs were signed is a separate question . . . that should be decided by the arbitrator . . . ." *Id.* at 3. Defendants also argued that Plaintiffs' proposal improperly "ask[ed] the Court to resolve the merits of the case before determining whether it is appropriate to compel arbitration." *Id.* at 2-3.

In an Order entered July 21, 2014, the Court held that "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. The Court noted that,

> In this Court's original order requiring arbitration, the court explained that "resolving whether an employer-employee relationship exists would require an analysis of the Contractor Agreement as a whole, as well as the Lease and evidence of the amount of control exerted over plaintiffs by defendants." (Doc 223 at 19). Indeed to sort out whether an individual is an employee rather than an independent contractor generally requires consideration of numerous factors, including 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 specialized skill, and whether the work done by the individual is an integral part of the employer's business.

Doc 546 at 1. The Court subsequently issued an Order, entered July 22, 2014, setting forth a schedule for discovery and the trial of this matter. Doc 548. Following entry of the scheduling order, on August 4 Defendants requested a telephonic conference, *inter alia*, to "clarify whether an appeal is appropriate and/or necessary from these orders." S*ee* email to the Gail Morgan, Clerk, dated August 5, 2014 attached hereto as Exhibit A. The Court granted the telephonic conference, and on August 8, 2014, heard further argument from Defendants as to why they contended discovery and a trial on the exemption issue was improper. The Court adhered to its July 22, 2014 scheduling order with a brief extension for serving initial disclosures. (Dkt. 552)

After initial disclosures and written discovery were served pursuant to the Court's scheduling order, and more than two months after the Court issued its July 21 and July 22

Orders, Defendants filed the instant motion again asking the Court 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." Doc 566 at 1. This motion is, in all but name, a motion to reconsider the Court's July 21 Order holding that the Section 1 exemption should be determined after discovery and a trial. Defendants' motion argues *the very same points* set forth in their July 15 submission, Doc 542, that the Court rejected in its July 21 Order – i.e. that the § 1 exemption should be determined from the four corners of the Agreements, Doc 566 at 4; that those documents should be interpreted based on the parties' intent at the time the documents were entered into, not after, Doc 566 at 4, 6; that "[w]hether an employer-employee relationship developed *after* the agreement was signed is a separate question," *id.* at 5; and that proceeding with a trial and discovery is improper because it involves the court in resolving the merits of the case, *id.* at 7-13. The only difference between the arguments in the current motion and the arguments that Defendants made in their July 15 submission is that the current motion cites more legal authority – although all of the cited cases were readily available to Defendants when they filed their July 15 submission and when the Court permitted a telephonic conference on August 8. In short, the current motion is nothing more than a more detailed version of the arguments that this Court rejected in its July 21st and 22nd Orders.

Such a motion for reconsideration clearly violates Local Rule 7.2(g). The motion is untimely having been filed 64 days after the July 21 Order, far beyond the 14-day limit provided for in the Rules. The motion does not present any new facts and the cases cited

in support of Defendants' arguments could easily have been presented when Defendants made the same arguments in their July 15 submission. Defendants offer no excuse for having failed to bring the cases they now cite to the Court's attention in their earlier filing. Defendants do not argue that the Court overlooked or misapprehended any of their arguments when it issued its July 21 Order, nor could they as the Order makes clear that the Court fully understood their arguments but found them unpersuasive. Finally, as set forth below, Defendants have not shown, nor can they, that the Court committed "manifest error" in ordering discovery and a trial of the Section 1 exemption issue.

II. DEFENDANTS HAVE NOT SHOWN ANY ERROR IN THE JULY 21 ORDER

1. Defendants' argument that the Court's July 21 Order is in error because a contract is to be interpreted based solely on the intent of the parties at the time the contract was formed is without merit. The question of whether an agreement is a contract of employment is not simply a question of the stated intent of the parties. If it were, then the mere recitation that a party is an independent contractor would control, which it clearly does not. *See Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 754-55 (9th Cir. 1979) (economic realities, not contractual labels, determine employment status); Restatement 3d., Employment §1.01 comment b (label used in agreement is not controlling of existence of employment relationship).. The Ninth Circuit was fully aware that the agreements in question recited that Plaintiffs were independent contractors. *See, e.g.*, Opinion on Plaintiffs' Petition for Writ of Mandamus (Case No. 10-73780, Doc 15 at 3) ("Petitioners Joseph Sheer ('Sheer') and Virginia Van Dusen ('Van Dusen') (collectively 'Petitioners') are interstate truck drivers who entered independent contractor

operating agreements ('ICOAs') with Swift Transportation Co., Inc. ('Swift').") If the Ninth Circuit had viewed that statement in the ICOAs as controlling, there would have been no point in remanding the case to the district court to determine whether the Agreements were contracts of employment.

The common law of agency makes clear that whether an agreement creates an employment relationship is to be determined from "all the incidents of the relationship . . . with no one factor being decisive." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323-324 (1992) (listing factors); *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 754-55 (9th Cir. 1979) (listing factors)

2. Defendants' claim that whether an employer-employee relationship developed after an agreement was signed is a separate question from what the agreements establish is without merit for the same reason. If the question of whether an agreement establishes an employment relationship is to be determined from "all of the incidents of the relationship . . . with no one factor being decisive." *Darden*, 503 U.S. at 324, then the manner in which the parties carry out their agreements has to be relevant to the determination.

Under Arizona principles of contract interpretation, courts must always look beyond the mere terms of the written agreements; the meaning of a contract must be determined "in light of the parties' intentions as reflected by their language and in view of all the circumstances." *Smith v. Melson*, 659 P.2d 1264, 1266 (1983). In *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 395 (1984), the Arizona Supreme Court made clear that "contracts are not merely printed words." The written

document is "not the agreement but only evidence thereof." The *Darner* court announced a "general rule of contract law," in cases such as this, involving "contracts containing boilerplate provisions which are not negotiated and often not even read by the parties." *Id.* at 396. The court adopted the approach contained in Section 211 of the Restatement (Second) of Contracts and the comments thereto and the approach taken by Corbin on Contracts with respect to negotiated agreements, "that account should always be taken of all the surrounding circumstances to determine the extent of integration *and* the interpretation of the agreement." *Id.* (citing 3 Corbin, *Contracts* § 582). Noting that Arizona had followed the modern trend and adopted the Corbin view with respect to negotiated agreements, the court indicated that its ruling would apply to standardized agreements regardless of whether they are negotiated stating:

> In Arizona, therefore, the interpretation of a negotiated agreement is not limited to the words set forth in the document. Evidence on surrounding circumstances, including negotiation, prior understandings, subsequent conduct and the like, is taken to determine the parties' intent with regard to integration of the agreement; once the court is able to decide what constitutes the "agreement," the evidence may be used to interpret the meaning of the provisions contained in the agreement. This method obtains even though the parties have bargained for and written the actual words found in the instrument.

Id. In extending the Restatement and Corbin view to standardized agreements the *Darner* court added:

> It would be anomalous, indeed, to follow this view for contracts with bargained terms but to cling to the rejected rule in cases involving standardized form contracts. It would be even more anomalous if reasonable expectations induced by promises or conduct of a party are to be considered in determining integration or interpreting the words of a negotiated boiler-plate agreement but disregarded when dealing with boilerplate, so that regardless of intent or even actual agreement, the parties are bound by provisions that were never discussed, examined, read or

understood.

Id. at 398. Accordingly, under Arizona law and Ninth Circuit authority, the question of whether the Section 1 exemption applies is a mixed question of law and fact that this Court properly found should be determined after the record is more fully developed through discovery and further briefing and through a summary hearing on any factual disputes if necessary.

3. Defendants' claim that it is improper for the Court to allow discovery and conduct a trial on the Section 1 issue is also without merit. Where the making of an arbitration agreement covered by the FAA is disputed, Section 4 of the FAA calls for a "trial" to resolve the dispute: "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." 9 U.S.C. § 4." Here, the making of an agreement to arbitrate covered by the FAA is the issue that the Ninth Circuit has ordered the Court to determine and Section 4 procedures, which direct that a trial of the issue is appropriate, should be applied. Utilizing the Section 4 procedures is consistent with the Supreme Court's dictates to read the Federal Arbitration Act as a whole. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956). *See also Van Dusen v. Swift*, 654 F.3d 838, 842-843 (9th Cir. 2011) (noting that Section 4 of FAA must be read in conjunction with Section 1).

Nothing in the cases that Defendants have belatedly cited to the Court leads to a different conclusion. *Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co.*, 288 F. Supp. 2d 1033 (D. Ariz. 2003), the primary case relied upon by Defendants, actually supports the Court's July 21 Order for discovery and trial. In that case the Court rejected

the § 1 exemption because the plaintiffs did not present the Court "with any analysis that the owner operators who signed the M.S. Carriers' contract at issue should in fact be considered employees based on the terms of the contract and the circumstances of their working relationship with M.S. Carriers." *Id.* at 1035 (emphasis added). This latter phrase is directly contrary to Defendants' position that the only relevant evidence is the Agreements themselves. Unlike the plaintiffs in *Swift*, Plaintiffs here did provide evidence of the circumstances of their relationship with Defendants which supports their claim that they were employees, Docs 188-1, 188-2, 188-3, 188-4, 188 at 2-15, evidence that Defendants have disputed. Docs 164, 165-1 through 165-22. It is precisely to resolve those disputed factual issues regarding the 'plaintiffs working relationship' with Swift that the Court's ordered discovery and a trial.

Most of the other cases relied upon by Defendants adopt the "*Swift* standard" – i.e. they recognize that evidence of the circumstances of the working arrangement between the parties is relevant. *See Carney v. JNJ Express, Inc.*, 13-2935, 2014 WL 1370036 at *4-5 (W.D. Tenn. April 4, 2014); *Port Drivers Fed'n 18, Inc. v. All Saints Express, Inc.*, 757 F. Supp. 2d 463, 471-472 (D.N.J. 2011); *Owner-Operator Indep. Drivers Ass'n v. United Van Lines, LLC*, 4:06cv219, 2006 WL 5003355 at *3 (E.D. Mo. Nov. 15, 2006). To be sure, the plaintiffs in those cases did not come forward with sufficient evidence to create a triable fact issue as to their employee status, but none of those cases supports Defendants' claim that, even where there are disputed facts regarding the Section 1 exemption, discovery and a trial is, nevertheless, improper.

4. Defendants also err in arguing that the Court's July 21 Order is in error

because, by allowing discovery and a trial of the Section 1 exemption, the Court will, necessarily, be deciding the merits of the case. Defendants raised the same point with the Ninth Circuit as a reason why the § 1 exemption issue should be heard by the arbitrator. Case No. 11-17916, Doc 18 at 7-8. The Ninth Circuit rejected that argument when it ordered the district court to decide the §1 issue despite the fact that such a ruling will, of necessity, decide a major merits issue. The Ninth Circuit's decision is law of the case. Moreover, the cases cited by Defendants for the proposition that a court should not rule on the potential merits of a claim are taken out of context. When *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 450 (1986), spoke about a court not deciding the merits of a claim, it was referring to the fact that even if a claim appeared to be frivolous, the court should still refer the case to arbitration if it found the arbitration clause valid and enforceable; that is, a court should not make a preliminary determination that a claim has merit before deciding the arbitration motion. The quote from *Chiron Corp. v. Ortho Diagnostics Sys., Inc.*, 207 F.3d 1126, 1131 (9th Cir. 2000), cited by Defendants, makes the same point that the Court's function is to decide whether to compel arbitration first. But neither of those cases purports to limit what a court may consider in deciding whether an arbitration agreement is enforceable under the FAA. Here, the Ninth Circuit has made crystal clear that the Court is to determine whether the Agreements constitute contracts of employment exempted under § 1 before it can consider Defendants' motion to compel arbitration. If resolution of that question incidentally decides some merits issues, that is an unavoidable consequence of the Appellate mandate. No case has ever held that a court can ignore an appellate mandate in

an arbitration case simply because carrying out that mandate may require consideration of a merits issue.

III. DEFENDANTS' STAY MOTION AND APPEAL ARE WITHOUT MERIT

Defendants' contention that the Court's July 21 Order is immediately appealable is baseless and, as a result, their request for a stay is also baseless. Defendants claim that the Court's July 21 Order effectively denies their motion to compel arbitration. But it does no such thing. Rather the Court's order merely carries out the mandate of the Ninth Circuit that it decide whether the Section 1 exemption applies "*before it may consider Swift's motion to compel [arbitration].*" *Van Dusen v. Swift*, 544 F.Appx. 744 (9th Cir. 2013) *cert den.* 134 S.Ct. 2819 (2014) (emphasis added). Defendants cite no authority, nor can they for the proposition that a court order carrying out such a mandate constitutes a denial of a motion to compel arbitration. Defendants disingenuously cite *Stedor Enterprises, Ltd. v. Armtex, Inc.*, 947 F.2d 727, 730 (4th Cir. 1991) for the proposition that "an order that favors litigation over arbitration . . . is immediately appealable under § 16(a)" of the FAA. But the Court's July 21 Order is not favoring litigation over arbitration; it merely sets forth the procedures for determining whether the Agreements at issue fall within the FAA – a necessary step before the Court can decide whether to invoke the FAA to compel arbitration.

Defendants' reliance on *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999) is similarly misplaced. In *Koveleskie*, the Court of Appeals for the Seventh Circuit found that the district court's order stating that discovery was needed "before a decision can be reached on the arbitration issue" was appealable because "there

is no doubt from the record that the district court denied the defendant's motion and clearly meant to foreclose arbitration." *Id.* at 363. Here, the record clearly shows that this Court has not denied Defendants' motion to compel arbitration and has in no way foreclosed arbitration. *Microchip Tech. Inc. v. U.S. Philips Corp.*, 367 F.3d 1350, 1355 (Fed. Cir. 2004), also cited by Defendants, makes clear that for an order to be appealable under § 16, even when the issue of arbitrability has not been finally decided, there must be an actual denial of a motion to compel. Indeed, the court states that "district courts might be well advised to defer acting on a motion to compel arbitration until the issues of arbitrability are finally resolved." Likewise, in *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 100 (3d Cir. 2000), there was an actual denial of the motion to compel by the district court. Here, the Court has not denied Defendants' motion to compel.

Even if the July 21, 2014 Order denied arbitration, which it does not, the time for appealing that order has long since passed and Defendants cannot restart the time for filing an appeal with an untimely motion for reconsideration. *Classic Concepts Inc. v. Linen Source, Inc.*, 716 F.3d 1282, 1285 (9th Cir. 2013) (filing of untimely motion for reconsideration has no tolling effect on appeal time limits).

As the Court's July 21 Order is not appealable, Defendants' request for a stay pending appeal is without merit. Their request for a stay of discovery pending resolution of the Section 1 issue is similarly improper. This Court has already decided that discovery and a trial is the appropriate manner to determine the Section 1 exemption. Defendants argue that a stay of discovery may be appropriate when there is a dispositive motion pending citing *Mlejnecky v. Olympus Imaging America, Inc.*, 2011 WL 489743

(E.D. Cal. Feb. 7, 2011). But here there is no dispositive motion pending with respect to the Section 1 exemption issue. Accordingly there is no basis for a stay of discovery.

CONCLUSION

For all of the foregoing reasons, Defendants' Motion to Determine Appropriate Standard for Resolution of the Section 1 Exemption Issue and to Stay Proceedings should be denied.

Respectfully submitted this 14th day of October, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 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:

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