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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' OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION**

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

OTHER:

Defendants' motion to dismiss the complaint and compel arbitration should be denied for four independent reasons: (1) Even if there were an arbitration provision in this case, which there is not, it is exempt from enforcement under the Federal Arbitration Act or the Arizona Arbitration Act because it is part of a contract for employment of workers engaged in interstate commerce; (2) Defendants have failed to establish the existence of a clear contractual agreement to arbitrate the claims in this case because the two documents out of which those claims arise contain conflicting dispute resolution provisions: The Lease agreement requires disputes to be resolved exclusively in a court of law and the Operating Agreement (ICOA) provides for arbitration; (3) the arbitration agreement is unconscionable and therefore unenforceable; and (4) Defendants have waived their right to demand arbitration and are estopped from denying that the "exclusive" judicial remedies mandated by the Lease control this case.

I. STATEMENT OF THE CASE AND PENDING MOTION

Plaintiffs are interstate truck drivers. Plaintiffs allege that Defendant Swift Transportation Co., Inc. ("Swift"), the largest truckload carrier in the world, and Defendant Interstate Leasing Co., Inc. ("IEL") are interrelated privately held companies owned and operated by the same principal, Defendant Jerry Moyes. Plaintiffs allege that Defendants have crafted a circular scheme in which they lease trucks to Plaintiffs and other similarly situated drivers and then immediately require drivers to lease the trucks back and drive for Swift as "independent contractors." Count One of the Second Amended Complaint, Doc. 62, alleges that Plaintiffs and other similarly situated drivers were employees of Defendants and that Defendants violated the Fair Labor Standards Act (FLSA) by failing to pay Plaintiffs and other drivers the statutorily mandated minimum wage because of deductions taken from Plaintiffs' wages for Defendants' business expenses. Counts Two and Three allege that Defendants' contracts with drivers' are unconscionable entitling Plaintiffs to a declaratory judgment that the contracts are unenforceable. Counts Four

through Seven claim that drivers in New York and California were employees of Defendants and that Defendants violated various state labor laws applicable to employees. Finally, Count Eight seeks damages for violation of the federal forced labor statute.

After Plaintiffs filed their Complaint in the Southern District of New York on December 22, 2009 and a First Amended Complaint on February 11, 2010, Defendants filed a letter brief moving to dismiss under Rule 12(b)(6) or alternatively, seeking a transfer of venue based, *inter alia,* on the Lease's forum selection clause. *See* Defendants' letter dated February 17, 2010, (Doc. 72) attached hereto as Exhibit 1. After the Court held a scheduling conference, Plaintiffs filed a motion for a preliminary injunction and served discovery on Defendants. On March 10, 2010 Defendants filed a letter with the Court indicating that they would seek to compel arbitration and it was not until the case was transferred to the District of Arizona that Defendants moved to compel arbitration of the claims in the second amended complaint based on the arbitration provision in one of the two contract documents at issue. Doc 127. That motion was supported by two affidavits, one setting forth the employment history of each plaintiff and another stating in a single conclusory sentence that IEL does not employ truckers. As set forth below, Defendants' motion should be denied.

II. STATEMENT OF FACTS RELEVANT TO THE MOTION

A. The Relevant Contract Documents

Plaintiffs' claims arise out of two documents signed by each Plaintiff, a lease agreement with Defendant Interstate Equipment Leasing, Inc. (IEL) and an independent contractor operating agreement (ICOA) with Defendant Swift Transportation Co., Inc. *See* e.g. Doc. 162-16, Ex. H-2 ("Sykes Lease"); Doc 162-15, Ex.H-1, ("Sykes ICOA"); 162-55 Exhibit U, ("Motolinia/Doe Lease & Contract")[1]. These two documents are presented to

[1] Throughout this brief, the Sykes Lease and ICOA will be used as representative of all Plaintiffs' Leases and ICOAs .

drivers as a single package (in many cases with consecutively numbered pages) which workers must sign as a package. No driver can sign the lease agreement without signing the ICOA as is made clear in paragraph 2(e) of the lease. Sykes Lease ¶2(e).[2]

Swift and IEL are closely-related, privately held corporations owned and operated by Defendant Jerry Moyes. Defendant Chad Killibrew, Moye's brother-in-law, is both President of IEL and Vice President of Swifts's Owner-Operator Division. As far as drivers are aware, IEL had no separate existence from Swift: Drivers are recruited to sign the two documents by Swift recruiters and the documents are presented to drivers in recruitment offices at Swift terminals throughout the country. In many instances, the same Swift official, Defendant Killibrew, signs both documents: the lease on behalf of IEL and the ICOA on behalf of Swift. *See* Doc. 162-55, Motalinia Lease & Contract at p. 8 and p. 26.

The lease identifies the truck to be leased, and sets forth the lease period (usually 4 years) and the lease payments due. Sykes Lease ¶ 2. It requires the driver to execute an ICOA with Swift, *id.* ¶ 2(e), and imposes on the driver all costs associated with insuring, operating and maintaining the truck, *id.* ¶¶ 6, 11, including rent, excess mileage charges, and all licenses, taxes, and operating expenses. *Id.* ¶¶2, 6(b). It requires the driver to comply with standards for maintenance and repair of the equipment. *Id.* ¶6(c). The driver assumes all liability for loss although title to the vehicle remains with IEL as does the right to claim depreciation on the truck and other tax write-offs. *Id.* ¶ 7, 10. The lease clearly requires that any dispute "arising from or in connection with this agreement" must be brought "exclusively in the state or federal courts of Arizona." *Id.* ¶ 21.

The ICOA obligates the driver to furnish his leased truck to Swift to transport freight for Swift and to operate the truck under Swift's operating authority and control,

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[2] Defendants point out that a driver who owned his own truck outright could sign the ICOA without signing the Lease agreement, but such drivers, if they exist, are not included in Plaintiffs' proposed class and are not part of this action. This action only deals with drivers who signed the lease, and therefore had to sign the ICOA.

Sykes ICOA, ¶¶ 1, 5A.[3] It gives Swift the right to seize the driver's truck and complete deliveries that it, in its sole discretion, believes have not been properly or timely delivered. *Id.* ¶5C. It gives Swift the right to terminate the ICOA on ten days notice for any reason or no reason. *Id.* ¶17A. Finally, the ICOA provides that disputes arising under the ICOA shall be resolved by arbitration. *Id.* ¶24.

Not only are the lease and the ICOA presented to drivers as a package, but they operate together as a single document. The lease specifically requires execution of the ICOA and execution of an assignment authorizing deductions from a driver's pay:

> Lessee shall execute an "Authorization and Assignment" (in the form attached hereto) in favor of Lessor authorizing and directing the motor carrier ("Carrier") with which Lessee has entered into an independent contractor operating agreement (ICOA) – which shall be Swift Transporation Co., Inc. – to deduct weekly the Overall Lease Payments from Lessee's earned and available settlement compensation under the ICOA …

Sykes Lease at ¶ 2(b). The lease also makes the ICOA with Swift a mandatory condition of the lease by defining the termination of the ICOA, whether by Swift or the driver, as a "default" of the lease agreement by the driver. *Id.* ¶12. This provision means that Swift's power to terminate the ICOA, with or without cause, Sykes ICOA ¶17A, has the effect of automatically placing a driver in default of his lease. Sykes Lease ¶12. The default remedies specified in the lease are draconian, including the right to seize the truck *and* demand full and immediate payment of all remaining lease payments through the end of the lease as well as payment of various other charges. *Id.* ¶13. These interlocking provisions give Defendants effective control over all aspects of drivers' work because drivers know that if they do not comply with Swift's demands, they can almost instantly lose their trucks and be subjected to crushing debt.

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[3] ¶5B allows drivers to provide services to other carriers, but only if the driver removes all Swift equipment, identification, licenses, and plates *and* returns them to Swift. These requirements, coupled with Swift's ability to place a driver in default for any or no reason (*see infra)*, make driving for another carrier an illusory right.

B. **Plaintiffs' Claims Arise Out Of Both Documents**

Whether the Lease and ICOA are viewed as a single contract, or as two related contracts, Plaintiffs' claims arise from the provisions of both documents.

1. FLSA claim: Plaintiffs FLSA claim alleges that IEL and Swift formed a single enterprise for purposes of the FLSA and that they exercised sufficient control over the drivers through the Lease/ICOA contract to be an employer of Plaintiffs for purposes of the FLSA. Under the FLSA, an employer may take deductions from a worker's wages for food, lodging and similar expenses, but may not take deductions for items that are "primarily for the benefit or convenience of the employer" if such deductions bring a worker's wages below the FLSA minimum. *See* 29 C.F.R. §§ 531.32(c) and 531.35 (deductions from wages and payments made by an employee for the benefit of the employer violate the FLSA to the extent they bring a worker's wage below the FLSA minimum). Plaintiffs contend that the expenses imposed on drivers by virtue of the Lease agreement, and deducted from their pay pursuant to the Lease, are primarily for the benefit and convenience of Defendants and violated the FLSA in each work week in which those costs brought a driver's wages below the FLSA minimum.

2. Unconscionability Claim: Plaintiffs allege that the Lease is unconscionable. Specifically, Plaintiffs allege that the remedies for a breach of the Lease Agreement are unconscionable insofar as they allow Defendants not only to seize the vehicle, but also to demand payment of the full lease amount. Sykes Lease ¶13. *See, e.g., McKesson Automated Healthcare, Inc. v. Brooklyn Hospital Center,* 779 N.Y.S.2d 765, 770 (Kings Co. 2004) (allowing lessor to accelerate all payments due under the lease of hospital equipment *and* seize the equipment "would impose an unconscionable forfeiture and penalty . . . and contravene public policy."). The unconscionability of that provision is compounded by the fact that the Lease deems a termination of the ICOA, even a termination by Swift without cause, to be a default of the Lease by the driver. Sykes

Lease ¶12. Thus, Defendants can, at any time, impose the draconian financial penalties of a default on drivers for any or no reason at all.

3. State Employment Law Claims: Plaintiffs' claims under California and New York law, like their FLSA claim, are grounded in the fact that the Lease and ICOA, taken together, allow Defendants to exercise so much day to day control over drivers as to establish Defendants as employers of Plaintiffs.

4. Forced Labor Claim: Plaintiffs' claim under the federal forced labor statute, 18 U.S.C. §1589, is also grounded on the assertion that the Lease and ICOA, and in particular the draconian default remedies of the Lease, and the way the two documents interact to allow Defendants to place drivers in default for no reason, allow Defendants to extract labor from drivers through threats of serious harm.

Thus, Plaintiffs' unconscionability claims arise out of the lease, and their remaining claims arise out of both the Lease Agreement and the ICOA agreement. Defendants admit this fact in their motion. *See* Doc. 128 at 8 ("the dispute in question raises allegations of substantially interdependent and concerted misconduct by both [IEL] and [Swift]"); at 11 ("Because Plaintiffs' claims against Swift and IEL and the individual defendants are intentionally, and inherently, intertwined . . .").

C. Plaintiffs Are Employees Of Defendant

In support of this opposition to Defendants' motion to compel arbitration, Plaintiffs have submitted evidence of an employer employee relationship between Plaintiffs and Defendants. In addition to the Lease/ICOA contract itself, (*e.g.* Sykes Lease and Sykes ICOA), Plaintiffs have submitted declarations from truck drivers, many of whom worked for Defendants as both employee drivers and as Owner-Operators under the challenged Lease/ICOA contract.[4] As set forth in detail *infra*, the Lease/ICOA contract and these

[4] Docs 187-1 through 4, Declarations of M. Fairley (second decl.), J. Hansen, J. Tyler, and B. Ziegenhorn are attached hereto. Plaintiffs also incorporate by reference the

declarations demonstrate clearly that Defendants exercised complete control of the manner and means by which Plaintiffs performed their jobs such that an employer-employee relationship existed between Defendants and Plaintiffs under the common law.

ARGUMENT

I. STANDARD OF REVIEW

Section 4 of the FAA provides that upon the filing of a petition to compel arbitration,

> The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement or the failure, neglect or refusal to perform same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default . . . the court shall hear and determine such issue.

9 U.S.C. §4. Plaintiffs assert that no arbitration agreement enforceable under Section 4 has been made in this case and that would be exempt in any event.

Courts generally evaluate a motion to compel arbitration under Section 4 using a summary judgment standard. *See, e.g., Bensadoun v. Jobe-Rait*, 316 F.3d 171, 175 (2d Cir. 2003); *Fitz v. Islands Mechanical Contractor, Inc.*, 2010 WL 2384585, 3 (D.V.I. 2010); *Ernest v. Lockheed Martin Corp.*, 2008 WL 2958964, 3 (D. Colo. 2008); *Town of Amhjerst v. Custom Lighting Services, LLC*, 2007 WL 4264608, 4-5 (W.D.N.Y. 2007). *See also Bettencourt v. Brookdale Senior Living Communities, Inc.*, 2010 WL 274331 (D. Or. 2010) (finding unresolved factual disputes precluded entry of order compelling arbitration and ordering discovery and trial of issue). As in a summary judgment motion, Defendants bear the initial burden of setting forth sufficient evidence to demonstrate that an arbitration agreement subject to the FAA exists. *Fitz*, 2010 WL 2384585, 3. Once the moving party

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declarations and exhibits attached to their motion for preliminary injunction (Doc 162) as attachments 162-2, 162-6, 162-7 through 162-39, 162-42 through 162-56.

points to evidence demonstrating a basis for compelling arbitration, the non-moving party has the duty to come forward with evidence showing a genuine issue of material fact exists with regard to the existence of that agreement. *Id.* If the plaintiff establishes a genuine issue of material fact exists, a trial on the existence of the arbitration agreement is required.

The above summary judgment procedure is followed when the "jurisdictional issue is separable from the merits of the case." *Jones v. General Motors Corp.*, 640 F.Supp.2d 1124, 1128 (D. Ariz. 2009) *quoting Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). However, where, as here, the disputed factual issues relating to the court's jurisdiction to hear the case are not separable from the merits, the court should follow a procedure similar to a Rule 12(b)(6) motion – that is, assume the truth of the allegations in the complaint, unless controverted by undisputed facts in the record.[5] *Corrothers*, 812 F.2d at 1177. "If a district court cannot determine jurisdiction on the basis of a threshold inquiry analogous to a 12(b)(6) motion, the court may assume jurisdiction and go on to determine the relevant jurisdictional facts 'on either a motion going to the merits or at trial.'" *Id.* at 1178.

Defendants take the position that a 12(b)(6) standard applies to their motion as is evident from their arguments that "[a]ssum[e] the numerous factual and legal allegations Plaintiffs make in their 174 paragraph complaint are true . . ." Doc. 128 at 10.

II. THIS CONTROVERSY IS EXEMPT FROM ARBITRATION UNDER BOTH FEDERAL AND STATE LAW

Even if there were an agreement to arbitrate this case, which as explained in Section III below, there is not, the agreement would not be enforceable under either the

[5] Plaintiffs' contend that the arbitration agreement in the ICOA, if it applies to this dispute, is exempt from both the Federal and Arizona Arbitration Acts because it is part of a contract of employment of workers engaged in interstate commerce. 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, under *Corrothers*, the exemption issue should be evaluated under a 12(b)(6) standard.

Federal Arbitration Act (FAA) or the Arizona Arbitration Act (AAA) because it relates to an exempt contract of employment of workers engaged in interstate commerce.

A. The Federal Arbitration Act Expressly Excludes Arbitration of These Disputes.

The Federal Arbitration Act expressly exempts all "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. There is no question that the Plaintiffs who drive freight interstate are a "class of workers engaged in foreign or interstate commerce" for purposes of Section 1. *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2nd Cir. 1972) (limiting Sec.1 exclusion to workers in the transportation industry or those in, or closely related to, the actual movement of goods in interstate commerce). *See, e.g., Owner-Operator Independent Drivers v. C.R.England, Inc.*, 325 F.Supp. 1252, 1258 (D. Utah 2004) (applying exemption to interstate truck drivers); *Gagnon v. Service Trucking, Inc.*, 266 F.Supp.2d 1361, 1364 (M.D. Fla. 2003) (same). The only question is whether the Lease/ICOA contract is a contract of employment for purposes of the exemption.

Where a federal statute refers to the term "employee" without defining it, the common law agency test applies. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992); *Community For Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989). Courts interpreting the FAA have followed this approach, rejecting reliance on the "independent contractor" labels in a contract in favor of an analysis of common law factors. For example, in *Bell v. Atlantic Trucking Co.*, 2009 WL 430564 (M.D. Fla. 2009), the court held that notwithstanding the fact that the plaintiff driver's operating agreement labeled him an "independent contractor," viewing the operating agreement in light of traditional common law agency principles required a finding that the operating agreement constituted a contract of employment exempt from arbitration. *Id.* at 6. Similarly in *Owner-Operator Independent Drivers v. C.R.England*, 325 F.Supp. at 1258, the court held that an independent contractor label in an operating agreement was not

controlling, and that the operating agreements, in fact, constituted contracts of employment for purposes of the FAA Section 1 exemption. *See also Gagnon*, 266 F.Supp.2d at 1365-1366 (evaluating independent contractor lease agreement under common law agency factors and concluding that interstate truck driver was a common law employee despite independent contractor label). *Owner-Operator Indep. Drivers Assn., Inc. v. Swift Transportation Co., Inc.*, a case relied upon by Defendants, is in accord with this approach. 288 F.Supp. 1033, 1035 (D. Arizona 2003). Although that case found the Section 1 exemption inapplicable to drivers working under an independent contractor agreement, it did so only after noting that the drivers did not,

> present[] the Court with any analysis showing that the owner-operators who signed the M.S. Carrier's 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.

As set forth above, because the question of Plaintiffs' employee status is a critical element of Plaintiffs' causes of action and is inseparable from the merits of Plaintiffs' claims, *Corrothers*, 812 F.2d at 1177, requires this Court to evaluate the question of Plaintiffs' employee status under a 12(b)(6) standard – i.e. whether Plaintiffs' Second Amended Complaint alleges a basis for the exemption taking as true all allegations of material fact stated in the complaint and construing them in the light most favorable to Plaintiffs. *See Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Even a cursory review of the Second Amended Complaint reveals numerous specific factual allegations establishing that Plaintiffs are employees of Defendants. *See* Doc. 62 ¶¶ 3, 13, 77, 78, 85-88, 90-94, 108, 109, 112, 113. Accordingly, Plaintiffs have more than satisfied the 12(b)(6) standard for the assertion of the Section 1 exemption from the

FAA and Defendants' motion to refer this case to arbitration must be denied.[6]

Even if the Court were to apply a summary judgment standard to the question of Plaintiffs' employee status, Plaintiffs have clearly submitted sufficient evidence to create a fact issue necessitating a trial, particularly in light of the fact that Defendants have submitted no evidence whatsoever to support their bald assertion that Plaintiffs are not employees. *See* Doc 128 at 6.

As set forth in *Bell*, 2009 WL 4730564 at 4, and cases cited therein, application of traditional common law agency principles focuses primarily on the "hiring party's right to control the manner and means by which the product is accomplished." *Comm. For Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989). *See also Radio City Music Hall Corp. v. U.S.*, 135 F.2d 715, 717 (2d Cir. 1943) (law of agency looks to "the degree to which the principal may intervene to control the details of the agent's performance."). The Lease/ICOA contract, itself, is strong evidence of Defendants' ability to control every aspect of a driver's performance. Under the ICOA, drivers perform integral functions in Swift's business, both transporting goods for Swift and training employee drivers. Sykes ICOA ¶¶1, 2D. The ICOA obligates a driver to lease his truck to Swift and operate under Swift's operating authority and control, ¶5A, "a key indicia of an employment relationship." *Gagnon*, 266 F.Supp.2d at 1366. The Lease/ICOA also requires drivers to

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[6] There is a very good reason for applying the 12(b)(6) standard as required by *Corrothers* and deferring the question of whether Plaintiffs can prove their allegations that they are employees to the trial of this case. Because the employer/employee issue goes to the merits of Plaintiffs' claims, Plaintiffs should be allowed to complete full discovery before the issue is determined. To attempt to resolve the issue now, even using a summary judgment standard, risks dismissal of Plaintiffs' claims before they have had an opportunity to engage in any discovery at all – a clear due process violation. Referring the exemption issue to an arbitrator to decide would lead to an absurd result. If an arbitrator were to find Plaintiffs were employees, he would have no jurisdiction to enter an award and if he or she did enter an award, it could not be enforced in Court because it would be exempt under Section 1.

drive exclusively for Swift while under Swift's operating authority.[7] *Id.* ¶5A. The ICOA gives Swift the right to seize the driver's truck and complete deliveries that Swift, in its sole discretion, believes have not been properly or timely delivered. *Id.* ¶5C. Defendants control the routes taken by drivers and the number of miles they can drive in any given period of time through the Lease's excess mileage charge. Sykes Lease ¶2(c). Defendants even control the speed at which drivers are permitted to drive. Sykes ICOA ¶5A. Defendants determine when repairs are made on trucks. Sykes Lease ¶6(c). Moreover, all maintenance expenses have to be approved by Defendants and performed in locations approved by Defendants. Sykes Lease ¶6(c). If a driver does not meet Defendant's maintenance requirements, Defendants can take control of the vehicle, make the repairs, and charge the driver. *Id.* Only Defendants, not the driver, are permitted to make alterations, additions or improvements to the equipment. *Id.* ¶6(d). All substitute drivers and passengers must be pre-approved by Defendants. *Id.* ¶6(a). Defendants retain the right to assign the truck lease but specifically prohibit the driver from exercising any such right. Sykes Lease ¶15; Sykes ICOA ¶27. The ICOA automatically renews from year to year, Sykes ICOA ¶17A, suggesting the relatively permanent relationship of an employee, *see Darden*, 503 U.S. at 323 (citing duration of relationship between the parties as a factor in common law employment), while at the same time, Swift retains the right to terminate the operating agreement on 10 days notice with or without cause, just as any employer of an at-will employee would. Sykes ICOA ¶17A. Moreover, because termination of the ICOA by Swift constitutes a "default" of the lease by the driver, with all of the draconian financial consequences flowing from a default, Swift's ability to terminate the ICOA is perhaps the strongest evidence of Defendants' ability to exercise control over every aspect of a driver's

[7] ¶5B allows drivers to provide services to other carriers, but only if the Driver removes all Swift equipment, painted on identification, licenses, and plates *and* returns them to Swift. The cost of complying with these requirements, coupled with Swift's ability to place a driver in default for any or no reason, makes driving for another carrier an illusory right as is clear in the affidavits' of Plaintiffs filed with this opposition.

performance. Any action by a driver that deviates from Defendants' directives, or even questions them, risks financial ruin.

In addition to ICOA and Leases, Plaintiffs have submitted numerous affidavits that elaborate on the circumstances of their working relationship with Swift. As those affidavits indicate, Swift uses both "employee" drivers as well as owner-operators such as the Plaintiffs in this case. A comparison of the two demonstrates clearly that the Plaintiff owner-operators are "independent contractors" in name only. All drivers, employees and owner-operators, must conform to the same set of work rules and procedures set forth in Swift's 200+ page Driver's Manual (Docs. 162-32 to 38). *See* 162-10, Sheer Decl. Doc., ¶11; Doc 162-14, Sykes Decl. ¶9; Doc. 162-19, Hoffman Decl. ¶10. These work rules control virtually all aspects of a driver's operations down to such minutia as where to park a truck and how and when locks must be placed on a trailer.[8] Swift even sets rules for personal appearance and demeanor. *See* Docs. 162-32 to 162-38, Swift Manual Excerpts, (Doc.162-39 is a list of instructions culled from the manual). Defendants' orientation and training classes are the same regardless of a driver's status. Doc. 188-1, Fairley Decl. ¶5; Doc. 188-2, Hansen Decl ¶5. Indeed, Swift uses owner-operators to train its employee drivers in Swift's policies and procedures. Doc. 188-1, Fairley Decl. ¶5, 6; Doc. 188-4, Doc. 188-4, Zeigenhorn Decl. ¶8; Doc. 188-3 Tyler Decl. ¶9. Procedures for picking up and delivering loads and hiring extra help to assist with loading and unloading are the same for employees and owner-operators, Doc. 188-1, Fairley Dec. ¶¶ 7, 11; Doc. 188-4, Zeigenhorn ¶¶ 15-16, and all drivers, regardless of their designation, are required to follow the same paperwork procedures and procedures for staying in contact with the dispatch office and driver manager. Doc. 188-1, Fairley Dec. ¶¶ 9, 10; Doc. 188-3, Tyler ¶¶ 13-14.

Even the few rights accorded to owner-operators under the Lease/ICOA contract

[8] A violation of the work rules is a specific basis for terminating the ICOA and putting the driver in default. *See e.g.*, Sykes ICOA ¶17(A).

that purport to give drivers independent control are illusory. For example, the contract purports to give owner-operators the right to refuse loads, but as the affidavits make clear, a driver who turns down a load is subject to discipline which renders the right meaningless. *See, e.g.*, Fairley Dec. ¶8; Doc. 162-7, Van Dusen Decl., ¶7; Doc. 162-10, Sheer Decl., ¶10; Doc. 162-14, Sykes Decl. ¶ 8; Doc 162-19, Hoffman Decl. ¶ 9. *See also* Doc. 162-30, Qualcomm Message re. Loads. The contract also purports to allow drivers to choose their own routes but, in fact, drivers hauling time-sensitive loads are required to conform to Swift's designated route, and even with regular loads, they face discipline if they do not conform to Swift's route. *See* Doc.162-7, Van Dusen Decl., ¶12; Doc. 162-10, Sheer Decl., ¶10; Doc. 162-14, Sykes Decl., ¶8; Doc. 162-19, Hoffman Decl., ¶ 9*;* Doc 162-31, Qualcomm Messages re Route. Finally, although the ICOA gives drivers the right to drive for other companies, ICOA ¶5B, Swift makes clear that drivers may NOT exercise that right. Doc 162-7, Van Dusen Decl. ¶16; Doc. 162-10, Sheer Decl. ¶12; Doc 162-19, Hoffman Decl. ¶9, 15; Doc. 162-46, Grogan Decl ¶ 5, Doc 162-51, Carpenter Decl. ¶ 9. As with other aspects of their employment, drivers who fail to conform to Defendants' demands face termination of their ICOA, with all of the devastating financial consequences that result from that termination being declared a "default" of the Lease. Doc 162-7, Van Dusen Decl. ¶¶ 9, 16 (Defendant told driver that driving for other companies or refusal to agree to unilateral contract changes would result in termination).

Taken as a whole, the lease and ICOA documents coupled with the affidavits of the Plaintiff drivers are more than sufficient to create a fact issue as to whether Plaintiffs' are common law employees of Defendants. *See, e.g., Estrada v. FedEx Ground Package System, Inc.*, 64 Cal.Rptr.3d 327 (Ca. App. 2d Dist. 2007) (finding Fedex drivers who signed independent contractor operating agreements to be common law employees of FedEx); *In re Wright*, 58 A.D.3d 988, 871 N.Y.S.2d 459 (3 Dept. 2009) (finding drivers to be common law employees not independent contractors); *Steinert v. Arkansas*

Workers' Compensation Com'n, --- S.W.3d ----, 2009 WL 3643446 (Ark.App. 2009) (same). *See also, Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1012 (9th Cir. 1997) (workers who signed agreements stating they were independent contractors "performed services for Microsoft under conditions which made them employees"). Accordingly under Section 4 of the FAA, this court cannot enforce the arbitration agreement in the ICOA, but must proceed to a trial of the employer-employee issue after Plaintiffs have had an opportunity to engage in discovery. *See Simula Inc. v. Autoliv, Inc.*, 175 F3d 716, 726 (9th Cir. 1999) (FAA Section 4 provides for discovery and full trial).

B. The Arizona Arbitration Act Does Not Apply

Plaintiffs are also exempt from the Arizona Arbitration Act, Ariz. Rev. Stat. §12-1501 to 1518 (2003). That Act provides that it shall have "no application to arbitration agreements between employers and employees or their respective representatives." Ariz. Rev. Stat. §12-1517. The Arizona Supreme Court has held that this exclusion applies to all contracts of employment. In *North Valley Emergency Specialists v. Santana,* 93 P.3d 501 (Ariz. 2004), the Arizona Supreme Court held it was error for the court to order arbitration on the basis of an arbitration provision in contracts of employment concerning physicians and physician assistants:

> In sum, the plain language of A.R.S. § 12-1517 exempts all employer and employee employment agreements from the provisions of Arizona's arbitration act. Accordingly, the trial court erred in ordering that this matter proceed to arbitration.

Id. at 501. As set forth above, Plaintiffs have alleged that they are employees and that the Lease/ICOA create contracts of employment and they have submitted sufficient evidence to create a fact issue with regard to that question. Accordingly, this Court must deny the motion to compel arbitration under both the AAA and the FAA, and proceed with discovery and a full trial of the merits of Plaintiffs' claims as well as the exemption issue.

III. THERE IS NO CLEAR, ENFORCEABLE AGREEMENT TO ARBITRATE

Arbitration is a matter of contract and the enforceability of [an] agreement to

arbitrate is determined by principles of general contract law. *Broemmer v. Abortion Services of Phoenix, Ltd.*, 840 P.2d 1013, 1015 (Ariz. 1992). A party cannot be compelled to submit to arbitration absent a clear contractual agreement to do so. *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986); *Allstate Ins. Co. v. Cook*, 519 P.2d 66 (1974); *Van Ness Townhouses v. Mar Industries Corp.* 862 F.2d 754, 759 (9th Cir. 1988) (district court erred in granting motion to compel arbitration, *inter alia*, because the parties never agreed to arbitrate those claims). The intent of the parties, as ascertained by the language used, must control the interpretation of the contract. *Park Central Development Co. v. Roberts Dry Goods, Inc.*, 461 P.2d 702, 704 (Ariz. 1969).

As noted above, counts two and three of the Second Amended Complaint allege that the Lease is unconscionable. As such, those claims clearly "aris[e] from and in connection" with the Lease and are therefore controlled by the exclusive *judicial* dispute resolution clause in the Lease:

> THE PARTIES AGREE THAT ANY CLAIM OR DISPUTE ARISING FROM OR IN CONNECTION WITH THIS AGREEMENT, WHETHER UNDER FEDERAL, STATE, LOCAL, OR FOREIGN STATUTES, REGULATIONS OR COMMONLAW (INCLUDING BUT NOT LIMITED TO 49 C.F.R. PART 376), SHALL BE BROUGHT EXCLUSIVELY IN THE STATE OR FEDERAL COURTS SERVING PHOENIX, ARIZONA.

See Doc. Sykes Lease ¶21 (emphasis in original).

Plaintiffs other claims arise under both the Lease agreement and the ICOA, as Defendants have acknowledged. Those two documents, both of which were drafted by Defendants, contain conflicting dispute resolution provisions. The lease, in the language quoted above, requires that disputes arising out of the lease be brought *exclusively* in State or federal court, Sykes Lease ¶21, while the ICOA requires disputes arising out of the ICOA to be arbitrated. ICOA . Sykes ICOA ¶24. Whether these two documents are viewed as a single contract or as two separate but related agreements, general principles of

contract law require that the two documents, which are presented to drivers as a single package, be harmonized, if at all possible. *Employers Liability Assurance Corp. v. Lunt*, 313 P.2d 393 (Ariz. 1957) (single contract); *Childress Buick v. O'Connell*, 11 P.3d 413, 415 (Ariz. App. Div. 1 2000) (multiple contracts). The two provisions are easily harmonized with respect to claims that relate solely to one or the other agreement, such as Plaintiffs' claim that the lease is unconscionable. However, with respect to the remainder of Plaintiffs' claims, which arise under both documents, there is a clear conflict between the two provisions: Did the parties intend disputes arising out of both documents to be controlled by the exclusive court resolution provision of the lease? by the arbitration provision of the ICOA? or did their silence regarding the resolution of disputes arising under both agreements – a situation that was clearly foreseeable – indicate that the parties simply did not agree to provide for any particular method of resolving such claims?

Although these diametrically opposed provisions are not easily reconciled, there are two possible ways of harmonizing them. First, each of the dispute resolution provisions could be read as applying to disputes arising solely out of the document in which the particular provision appears, but as having no application to disputes arising out of both agreements. Plainly, Defendants were aware when they drafted the documents that disputes relating to both agreements were likely to arise. Their failure to address that obvious possibility can reasonably be interpreted as an affirmative choice not to impose any particular dispute resolution method in those circumstances. This is the reading adopted by the Arizona Supreme Court in a similar case of conflicting dispute resolution clauses. *See Clarke v. Asarco, Inc.*, 601 P.2d 587, 589 (Ariz. 1979) (agreement to arbitrate disputes arising out paragraph 30 of an agreement did not clearly commit plaintiff to arbitrate a dispute arising out of both paragraph 30 and another paragraph in the agreement which contained no mandatory dispute resolution provision).

Second, the Court could find that the Lease's exclusive judicial dispute resolution

provision applies to claims arising under both documents because the lease, as drafted by Defendants, incorporates the ICOA and requires drivers to sign the ICOA. Thus, Defendants knew when they drafted the Lease that all drivers would also be signing the ICOA and that disputes could easily involve both documents. It is reasonable to assume, therefore, that their insistence that all disputes connected with the lease be resolved exclusively by a court included disputes touching on both the Lease and the ICOA. The ICOA, by contrast, makes no reference to the Lease and does not require that a Lease be executed, so that there is no textual basis whatsoever for finding that the arbitration provision in the ICOA trumps the judicial provisions in the Lease when disputes arise out of both documents. Moreover, the "exclusive" court jurisdiction provision of the Lease affirmatively precludes an arbitrator from exercising jurisdiction over disputes touching on the lease. By contrast, the ICOA, does not (nor could it) divest a court from interpreting the ICOA. Because the language of the Lease allows a court to construe both documents, but the language of the ICOA only allows an arbitrator to construe the ICOA, it must be presumed that the parties intended the court resolution provisions of the Lease to apply to disputes arising out of both documents.

Alternatively, if neither of these attempts to harmonize the agreements is adopted, the two provisions must be viewed as hopelessly contradictory when applied to disputes arising out of both documents. In that situation, the two provisions must be construed against the drafters – i.e. the Defendants – and read not to require arbitration of the present controversy or, at the very least, read not to evidence a clear contractual agreement to arbitrate the dispute.[9] *See, e.g., Luke v. Gentry Realty Ltd.*, 96 P3d 261 (Hawaii 2004) (where contract contained conflicting dispute resolution provisions, one requiring

[9] Under Arizona law, ambiguities in a contract are construed against the drafter, *Covington v. Basich Bros. Constr. Co.*, 233 P.2d 837 (Az. 1951), particularly where, as here, "a party is attempting to impose an obligation on another where otherwise such an obligation would not exist." *United California Bank v. Prudential Insurance Co. of America*, 681 P.2d 390, 412 (Ariz. App. Div. 1 1984).

arbitration and the other requiring judicial resolution, ambiguity would be construed against the drafter and arbitration would not be compelled). *See also, Mulcahy v. Nabors Well Services, Co.*, 2010 WL 1881846 (D. Mont. 2010) (employment contract that contained conflicting provisions, one requiring arbitration and the other arguably preserving right to a jury trial, would be construed against employer who drafted it and motion to arbitrate denied); *Stephens v. TES Franchising*, 2002 WL 1608281 (D. Conn. 2002) (where agreement contained two inherently conflicting provisions, one requiring arbitration and other submission of disputes to Connecticut courts, arbitration would not be compelled "because the existence of an agreement to arbitrate has not been established"); *Reihl v. Cambridge Court GF, LLC*, 226 P.3d 581 (Mont. 2010) (contract with conflicting provisions, one preserving right to jury and other requiring arbitration, was ambiguous and did not provide basis for compelling arbitration); *Victoria v. Superior Court*, 710 P.2d 833, 838-839 (Ca. 1986) (construing ambiguity in scope of arbitration clause against drafter and denying motion to compel arbitration). *See also* 11 Richard A Lord, Williston on Contracts § 32:12 (4th ed. 2010 supp.) ("Since the language is presumptively within the control of the party drafting the agreement, it is a generally accepted principle that any ambiguity in that language will be interpreted against the drafter.").

Defendant cannot argue that the arbitration agreement in the ICOA can somehow be grafted onto disputes, like the present one, that arise, in part, under the Lease with its mandatory judicial remedies. An arbitration agreement in one document cannot be grafted onto another simply because the subject matter may overlap. *See Allstate Ins. Co. v. Prosser*, 2006 WL 463873 (D.AK 2006). In *Allstate*, the court stated:

> The two insurance contracts include UM coverage, one explicitly and the other by operation of law, but only one of them has an arbitration clause. The contracts' subject matter overlaps, but it is not co-extensive. For example, some risks insured by the Umbrella policy are not risks insured by the Auto Policy. Prosser cites no authority which holds that a court can import a provision from one contract into another contract merely because they include some overlapping subject matter. The court is not aware of any authority authorizing it to insert an

> arbitration provision into a contract which contains none. It seems particularly inappropriate to take an arbitration provision from one contract and insert it into a second contract when, to make the provision effective in the second contract, the court first has to rewrite the provision in the first contract.

Id. For that same reason, Defendants' estoppel arguments must also be rejected. Courts have recognized that, under certain circumstances, non-signatories to an arbitration agreement can compel compliance with the agreement using an estoppel theory. However, all of the estoppel cases cited by Defendants are predicated on (1) a clear contractual agreement to arbitrate the dispute and (2) the absence of any contractual agreement with the non-signatories. Accordingly, the only issue in those cases was whether the non-signatories could take advantage of the arbitration agreement. Those cases have no application here where Plaintiffs' claims arise out of two documents signed by Defendants that contain diametrically opposed provisions for dispute resolution. As a result, there is no clear agreement to arbitrate which Plaintiffs could be estopped from denying. Defendants could easily have drafted such an agreement had they wanted to but, for whatever reason, they did not. In the absence of a clear agreement to arbitrate disputes arising out of both documents, the question of estoppel never arises.

For all of the foregoing reasons, there is no clear contractual agreement to arbitrate the disputes at issue here and the motion to compel arbitration must be denied.

IV. THE ARBITRATION CLAUSE IS UNCONSCIONABLE AND UNENFORCEABLE

If the Court were to find an agreement to arbitrate the claims at issue in this case subject to the FAA and AAA, Plaintiffs contend that that arbitration agreement is unconscionable and unenforceable for a variety of reasons.[10] Previously, those allegations

[10] Plaintiffs contend that the arbitration clause is lacking in mutuality because Swift can pursue self-help deductions from the drivers' wages and bond for any claim it may have, *see, e.g.* Sykes ICOA ¶¶ 4, 5(c), 6, 10, 11, 13 -15, while drivers must arbitrate. *See C.R. England, Inc.*, 325 F.Supp.2d at 1263-64 (finding similar lack of mutuality in trucker ICOA unconscionable). Plaintiffs also contend that the arbitration clause is unconscionable because the limitations imposed on the arbitration, including the prohibition on class

would be determined by the Court in the first instance. However, recently, the Supreme Court held that where an arbitration agreement contains a "delegation provision," i.e. "an agreement to arbitrate threshold issues concerning the arbitration agreement," the alleged unconscionability of the arbitration agreement is for the arbitrator to decide unless the Court finds that the delegation provision, itself, is unconscionable. *Rent-A-Center, West, Inc. v. Jackson*, ___U.S. ___, 2010 WL 2471058 at *4 (2010). As set forth below, the delegation provision in this case is unconscionable for a variety of reasons.[11]

A. The Class Action Prohibition Renders the Delegation Clause Unconscionable.

The delegation provision is subject to the prohibition on class actions and joinder of claims contained in the ICOA arbitration provision. Sykes IOCA, ¶ 24. *See Rent-A-Center,* 2010 WL 2471058, 7. That means that in order to present Plaintiffs' challenges to arbitrability, the delegation clause requires each and every driver to file his own individual arbitration action. Such a requirement will preclude drivers from proceeding with their claims. Not only would the costs of such actions far exceed anything that the Plaintiff drivers, who did not even earn minimum wage, could afford, *see infra*, but the extraordinary time involved in pursuing hundreds of repetitious actions alleging the same unconscionability and public policy challenges to the same Lease/ ICOA contracts would

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actions, joinder, and the use of the Commercial Arbitration Rules which impose prohibitive costs and preclude discovery, will make it impossible for Plaintiffs to vindicate their rights in arbitration. *See Id.* at 1262 (finding costs unconscionable). Plaintiffs also contend that the arbitration provision is unenforceable as contrary to public policy insofar as it unlawfully shortens the statute of limitations of Plaintiffs' claims to one year, Sykes ICOA ¶29, and imposes attorneys fees on Plaintiffs if they fail to win arbitration, Sykes ICOA ¶30, both of which provisions are violative of the FLSA and other statutes Plaintiffs seek to enforce. Finally, Plaintiffs contend that the arbitration agreement and the entire Lease/ICOA agreement are procedurally and substantively unconscionable, contrary to law, and unenforceable. *See* Plaintiffs Preliminary Injunction Motion, Doc. 162.

[11] If the Court concludes that the delegation provision is unconscionable, it can then decide the question whether the arbitration provision itself is unconscionable or unenforceable for the reasons set forth in the prior footnote.

effectively preclude Plaintiffs from obtaining legal counsel. No counsel could possibly invest the time to pursue all the challenges to arbitrability in this case, let alone the merits of the case, in hundreds of individual actions. It is only through the mechanism of a class action, or joinder of claims in a single arbitration, that the issues of arbitrability could be pursued. Courts have long recognized that prohibitions on class actions and joinder of claims are unconscionable where, as here, the operate as "exculpatory clauses-i.e., when they operate to insulate a party from liability or when they make it very difficult for those injured by unlawful conduct to pursue a legal remedy." *Jackson v. S.A.W. Entertainment Ltd.*, 629 F.Supp.2d 1018, 1025 (N.D.Cal. 2009); *see also Cooper v. QC Financial Services, Inc.* 503 F.Supp.2d 1266, 1289 -1290 (D.Ariz. 2007); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1175 (9th Cir. 2003). The ability to proceed through a class action or joinder is particularly important in employment cases. Not only do those devices allow individuals of modest means to spread their costs and obtain competent counsel, but they also allow workers to obtain some measure of protection from retaliation and provide a mechanism for protecting the claims of workers ill-informed about their rights. *Jackson*, 629 F.Supp.2d at 1026-1028. Depriving workers of the protections of these devices and forcing them to pursue arbitrability issues in hundreds of individual actions is, therefore, unconscionable. *See, e.g., id.* at 1026-1028; *Hopkins v. New Day Financial*, 643 F.supp.2d 704, 719 (E.D. Pa. 2009) (denying motion to compel arbitration of FLSA case because of unconscionable class action waiver); *Murphy v. Check 'N Go of Cal., Inc.*, 156 Cal.App.4th 138, 148, 67 Cal.Rptr.3d 120 (2007); *Gentry v. Superior Court*, 165 P.3d 556, 561 (Cal. 2007).

B. The Costs Imposed By the Delegation Provision Are Unconscionable.

The ICOA delegation provision is governed by the AAA Commercial Arbitration Rules. These rules are so onerous with regard to fees that they will effectively prevent individual drivers from pursuing their arbitrability challenges, not to mention the merits

of their claims.[12] Under Commercial Rules, the fees are split between the parties and are much higher than fees under the Employment Rules – rules that are clearly more suited to the employment law claims raised by Plaintiffs. For example, each driver would be obliged to pay a half of a filing fee ranging from $775 to over $10,000, depending on the size of the claim, just to commence an action and present his allegations regarding unconscionability and lack of mutuality under the delegation clause. *See* Commercial Rules at O-8, Fee Schedule.[13] Each driver would also have to pay half of the arbitrator's fees (of several thousand dollars per day) and costs, as well as a sliding case service fee. In *Dreher v. Eskco, Inc.*, Nos. 3:08-cv-325, 3:09-cv-209, 2009 WL 2176060, 18 (S.D.Ohio July 21, 2009), the Court held that in an employment case, the requirement that arbitration occur pursuant to the Commercial Rules rather than Employment Rules was unenforceable because of the unconscionable costs imposed by the Commercial Rules.

The provision in the arbitration agreement allowing an arbitrator to relieve a driver of the obligation to pay fees if the arbitrator determines that they would impose a "substantial financial hardship" does not ameliorate the unconscionable barriers to relief imposed by the Commercial Rules. Each individual driver would still have to come up with the cash for the filing fee and pay the arbitrator's hourly rate for the time it takes the arbitrator to decide "substantial hardship" – a determination that presumably would not be made until after the arbitrator determined whether he had jurisdiction (i.e. after he considered the delegation issues of unconscionability, lack of mutuality and public policy challenges raised by Plaintiffs) – all of which are complex issues likely to involve

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[12] In this case, procedural unconscionability results from the imposition of Commercial Rules because while the rules were specified in the arbitration agreement, they were never provided to drivers. *See Harper v. Ultimo*, 113 Cal.App.4th 1402, 1406, 7 Cal.Rptr.3d 418, 422 (2003); *Fitz v. NCR Corp.*, 118 Cal.App. 4th 702, 721 (2004); *Dunham v. Environmental Chemmical Corp.*, 2006 WL 2374703, 11 (N.D.Cal. Aug. 16, 2006).

[13] The Commercial Rules are available at http://www.adr.org/sp.asp?id=22440 . The Employment Rules are available at http://www.adr.org/sp.asp?id=32904 .

considerable arbitrator time and fees. Even if a driver could front the money until the "substantial financial hardship" question was considered, there is no guarantee that a plaintiff will be reimbursed for fees due to hardship. Waiver of arbitration fees is extremely rare in practice and fees to pay the arbitrator for time, travel and accommodation expenses are not subject to waiver or deferral for "extreme hardship." Further, the AAA does not provide formal standards for granting hardship, and its accounting department actually determines who is afforded "extreme hardship" status. *See Camacho v. Holiday Homes, Inc.*, 167 F.Supp.2d 892, 897 (W.D.Va. 2001) (finding arbitration provision imposing Commercial Rules to be unconscionable because they effectively made arbitral forum financially inaccessible despite possibility of waiver).

C. Limits On Discovery Render the Delegation Provision Unconscionable.

Because the 'gateway' issues of arbitrability overlap so extensively with the merits of Plaintiffs claims, a considerable amount of discovery will be needed just to arbitrate those issues under the delegation clause. The unconscionability issues going to the enforceability of the arbitration agreement overlap completely with the merits of Counts Two and Three regarding the unconscionability of the Lease/ICOA contracts and, if the FAA Section 1 exemption issue is referable to arbitration under the delegation clause (which it is not), the need for discovery would be even greater as the question of common law employment is a highly fact intensive question requiring extensive discovery. Yet the Commercial Rules (unlike the Employment Rules) make no provision for discovery or depositions. *Compare* Employment Rule 9 *with* Commercial Rule 21. At most, the arbitrator has discretion to allow exchange of documents "consistent with the expedited nature of the arbitration." Commercial Rule 21. The complete lack of depositions and limited document exchange in a complex employment case is unconscionable both as applied to the delegation issues as well as to the merits of Plaintiffs' claims. In most employment cases, discovery is driven by depositions with document-discovery tending to

refute or confirm the deposition testimony. *Dreher v. Eskco, Inc*. 2009 WL 2176060, 17 (S.D.Ohio 2009). The most significant documents, moreover, are often in the defendant/employer's possession, rather than employee's possession. *Id.* In *Dreher*, the court held that, an agreement's reliance on the AAA's Commercial Rules rather than its Employment Rules works an unfair advantage to the employer and potentially prejudiced Plaintiff's ability to support her claims and to challenge defenses. It found that "although some limitations on discovery are expected during arbitration," *see Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001), "a wholesale preclusion of the taking of depositions is unenforceable." *Dreher*, 2009 WL 2176060 at 17; c*f. Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 387-88 (6th Cir.2005) (under the circumstances at issue in *Walker*, limitation to one deposition as of right substantively unconscionable); *Roderick v. Mazzetti & Associates, Inc., No.* C 04-2436 MHP, 2004 WL 2554453, 6 (N.D. Cal. Nov. 9, 2004) (finding Commercial Rules inappropriate compared to Employment rules with regard to discovery, access to evidence, power to subpoena witnesses).

D. The One Year Limit On Bringing Arbitration Renders the Delegation Clause Unconscionable.

Paragraph 29 of the ICOA provides that all disputes brought under the arbitration provision must be brought within one year. This shortening of the statute of limitations applies to all aspects of arbitration including arbitration of "gateway" issues under the delegation provision. It will effectively preclude Plaintiffs from obtaining a ruling on those gateway issues, as well as the merits of their claims, if their claims are more than one year old. Such a dramatic shortening of the FLSA statute of limitations, 29 U.S.C. §255 (2 year, 3 years for willful claims), is contrary to public policy and unconscionable. *Davis v. O'Melveny & Myers* 485 F.3d 1066, 1076 -1077 (9th Cir. 2007).

E. The Provision for Fees To The Prevailing Party Places An Unconscionable Burden on Plaintiffs.

Paragraph 31 of the ICOA provides that in any arbitration, the prevailing party

will be entitled to recover costs and attorneys fees. This provision which does not appear in any of the statutory claims asserted by Plaintiffs places an unconscionable burden on Plaintiffs' ability to vindicate their rights, or even to have the gateway issues of unconscionability decided. *Pokorny v. Quixtar, Inc*., 601 F.3d 987, 1004 (9th Cir. 2010).

F. The Provisions in the Arbitration Clause Serve to Exculpate Defendants, are Unconscionable, Unenforceable and Not Severable.

In sum, it is patently obvious that Defendants specified the commercial arbitration rules, rules which apply to the delegation provision, for the sole purpose of making it impossible for drivers to arbitrate their claims, or even arbitrate whether the arbitration clause is unconscionable, lacking in mutuality, or otherwise unenforceable. Such transparent attempts to insulate themselves from liability are unconscionable, unenforceable and not severable. *Ingle*, 328 F.3d at 1180; *Graham Oil Co. v. ARCO Products Co., a Div. of Atlantic Richfield Co.*, 43 F.3d 1244, 1249 (9th Cir. 1994).

V. DEFENDANTS' DELAY WAIVED THEIR RIGHT TO SEEK ARBITRATION

Defendants waived any claim to compel arbitration through their delay and substantial litigation before moving to compel arbitration. *See, e.g., Bain v. Jackson*, __ F.Supp.2d __, 2010 WL 1837704 at *2 (D.D.C. May 7, 2010) (failure to raise arbitration issue in first filing which moved to dismiss on basis of release, "invoked the judicial process to such an extent that their right to arbitrate has been waived"). As in *Bain*, Defendants filed a Rule 12 motion to dismiss on the basis of improper venue, participated in a scheduling conference in which the court issued a scheduling order and set discovery deadlines, causing Plaintiffs to serve discovery. Defendants' forum shopping wasted judicial resources and caused inappropriate delay and prejudice to Plaintiffs.[14] Accordingly, Defendants have waived their right to compel arbitration.

[14] There was no need to change venue to move for arbitration. 9 U.S.C. § 4 states that a motion to compel arbitration must be brought in a court that has jurisdiction, and Defendants never challenged the New York court's jurisdiction. If Defendants really thought arbitration

VI. BY RELYING UPON THE EXCLUSIVE JURISDICTION PROVISION OF THE LEASE TO OBTAIN A TRANSFER OF VENUE, DEFENDANTS ARE JUDICIALLY ESTOPPED TO DENY THAT THIS COURT HAS EXCLUSIVE JURISDICTION TO RESOLVE THIS DISPUTE.

Defendants relied on Paragraph 21 of the Lease, which states that, "any claim or dispute arising from or in connection with this agreement . . . shall be brought exclusively in the state or federal court serving Phoenix, Arizona . . ." in support of their successful motion to transfer venue. *See* Ex. 1 (Letter of Feb. 17, 2010). Having relied on that paragraph to transfer venue of Plaintiffs' claims, Defendants are estopped from denying that that same paragraph, with its mandatory requirement that disputes be decided in a *judicial* forum, also controls their motion to compel arbitration of Plaintiffs' claims. Defendants are not permitted to rely on the judicial resolution provisions of paragraph 21of the Lease when it suits their purposes and then deny the applicability of that same provision when it does not. Defendants' reliance on the forum selection/dispute resolution clause in the Lease is particularly telling in light of their acknowledgement that Plaintiffs' claims involve "substantially interdependent misconduct by both IEL and Swift." Doc. 128 at 10. Defendants were not arguing in their motion to transfer that the Lease provisions apply only to the Lease or that the ICOA provisions somehow trumped the Lease (as they do now). Rather, fully aware that the dispute in this case involves interdependent conduct of IEL and Swift arising out of both the Lease and the ICOA, Defendants chose to seek a transfer of venue by citing to the Lease. Having done, so they cannot deny that the Lease's requirement of judicial resolution also applies to Plaintiffs' interdependent claims.

CONCLUSION

For all foregoing reasons, Defendants' motion to dismiss and to compel arbitration should be denied and the parties ordered to proceed with discovery and trial preparation.

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was required, they should have brought a motion to compel arbitration at the outset. *See, e.g., Legacy Wireless Services, Inc. v. Human Capital, L.L.C.*, 314 F.Supp.2d 1045, 1058 (D.Or. 2004) (rejecting claim that arbitration could not be compelled if venue was improper).

Respectfully submitted this 22nd day of July, 2010.

s/Dan Getman

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2010, 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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