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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' MOTION FOR RECONSIDERATION OF THIS COURT'S DECISION TO REFER TO THE ARBITRATOR THE QUESTION WHETHER THE COURT HAS AUTHORITY TO REFER THIS CASE TO ARBITRATION, OR ALTERNATIVELY TO CERTIFY AN INTERLOCUTORY APPEAL UNDER 28 U.S.C. §1292(b)**

ARGUMENT

THIS COURT SHOULD DETERMINE WHETHER SECTION 1 OF THE FAA BARS SENDING THIS DISPUTE TO ARBITRATION UNDER THE FAA

Plaintiffs moves this Court to reconsider its Order of September 30, 2010 referring to the arbitrator the question of whether the Court has the authority to refer this matter to arbitration, in light of the exemption contained in Section 1 of the Federal Arbitration Act, 9 U.S.C. §1 and the exemption contained in the Arizona Arbitration Act, Ariz. Rev. Stat. §12-1517.

In their opposition to Defendants' motion to compel arbitration, Plaintiffs argued that the Independent Contractor Operating Agreement (ICOA), the document containing the arbitration clause, is exempt from arbitration because it is a "contract[] of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. §1. Plaintiffs argued that the question of whether the exemption applies – i.e. the question whether Plaintiffs are employees or independent contractors – was for the Court to decide. The Court held, however, that "whether an employer-employee relationship exists between the parties falls within the scope of the arbitration agreement," Doc 223 at 19, and that "[w]hen the threshold question of arbitrability is before the district court, the district court considers only the validity and scope of the arbitration clause itself and not the contract as a whole." *Id.* Accordingly, the Court referred the question of whether the contract was a "contract of employment"– and hence the question of the applicability of the FAA §1 exemption – to the arbitrator. *Id.* Plaintiffs ask the Court to reconsider this ruling because it represents manifest error.

In their opposition, Plaintiffs cited several cases in which courts held that it was for the court to decide whether the contracts at issue were exempt contracts of employment and thus whether the Court had the authority to send the case to an arbitrator despite Section 1. *See Owner-Operator Indep. Drivers Assn. Inc. v. Swift Transportation*

1 *Co., Inc.,* 288 F.Supp.2d 1033, 1035 (D. Ariz. 2003) (finding exemption did not apply);
2 *Bell v. Atlantic Trucking Co.,* 2009 WL 4730564 (M.D. Fla. 2009) (finding exemption
3 applies); *Gagnon v. Service Trucking, Inc.,* 266 F.Supp.2d 1361, 1365-1366 (M.D. Fla.
4 2003) (finding exemption applies). Numerous other Court decisions hold that it is the
5 Court which must determine whether it has the power under the FAA to send the case to
6 arbitration.[1] No reported decisions anywhere hold that a Court may refer FAA exemption
7 issues to an arbitrator for resolution. That the Court, rather than the arbitrator, should
8 decide this issue is evident: The FAA was passed to overcome the common law barriers
9 to arbitration by providing courts statutory authorization to compel arbitration. *Gilmer v.*
10 *Interstate/Johnson Lane Corp.,* 500 U.S. 20, 23 (1991). But in giving the Court the
11 authority to compel arbitration, Congress exempted certain agreements from that
12 authority, namely contracts of employment for seamen, railroad workers and other
13 classes of workers engage in interstate commerce. FAA §1. As to those workers, it is as
14 if the FAA did not exist and the court lacks the power under the FAA to compel
15 arbitration. Thus, the question of whether or not the FAA exemption applies is a predicate
16 question that must be answered *by the court* before it can proceed to determine
17 arbitrability and compel arbitration pursuant to the FAA.
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19 This Court cited *Chiron Corp. v. Ortho Diagnostic Systems, Inc.,* 207 F.3d 1126,
20 1130 (9th Cir. 2000), for the proposition that the Court's authority under the FAA is
21 limited to deciding whether there is a valid agreement to arbitrate and whether the dispute
22 falls within the scope of that agreement. That is true, but even *Chiron Corp.* recognizes
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24 [1] Although Plaintiffs did not believe it necessary in their opposition brief to cite
25 additional authority, other cases can be cited for the proposition that the court must
decide the exemption issue. *See, e.g., Davis v. Larson Moving,* 2008 WL 4755835 (D.
26 Minn. 2008) (finding exemption inapplicable); *Owner-Operator Assn v. Landstar*
27 *Systems,* 2003 WL 23941713 (M.D. Fla. 2003) (finding exemption applicable). Plaintiff
is aware of no cases where the exemption question was referred to an arbitrator to decide.
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that there is a predicate question that must be answered first. In *Chiron Corp.,* the Court first noted that "[t]he FAA provides that any arbitration agreement *within its scope* shall be valid, irrevocable, and enforceable." *Id.* (emphasis added). If an agreement is *within the scope* of the FAA, "[t]he court's role under the Act is therefore limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute in issue." *Id.* (emphasis added). But the court must first decide whether the agreement is within the scope of the FAA.

There is a difference between the exemption issue under FAA Section 1 and the question of arbitrability which asks whether the clause itself is valid and covers the dispute. *Rent-A-Center, West, Inc. v. Jackson*, -- U.S. --, 130 S.Ct. 2772 (2010), dealt only with arbitrability questions and not the exemption question.[2] There the Supreme Court held that where there is a valid delegation clause in an arbitration clause covered by the FAA, challenges to the validity of an agreement to arbitrate must be submitted to the arbitrator:

> We have recognized that parties can agree to arbitrate "gateway" questions of "arbitrability," such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. See, *e.g., Howsam,* 537 U.S., at 83-85, 123 S.Ct. 588; *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444, 452, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003) (plurality opinion). This line of cases merely reflects the principle that arbitration is a matter of contract.FN1 See *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.

Id., at 2777-8. Thus, whether the FAA exemption applies is not one of the gateway questions identified by the Supreme Court as delegable. *Rent-A-Center* in fact requires

[2] The Supreme Court in *Rent-A-Center,* specifically noted that "The question before us, then, is whether the delegation provision is valid under § 2," not whether the delegation provision applies to determine exemptions under FAA, Section 1. *Id., at 2788.*

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the federal court "to enforce" a delegation clause if and only if "the FAA operates on this additional arbitration agreement just as it does on any other." *Id.* The question of whether the FAA operates to enforce the delegation clause, must be determined by the Court.

It makes no sense to argue, as the Defendants did in their reply brief,[3] Doc 199, that the court can compel arbitration under the FAA in order to allow an arbitrator to decide whether the dispute is within the scope of the FAA and therefore subject to compulsory arbitration. An arbitrator has no authority to act, and the court has no authority to compel arbitration, unless and until the *Court* decides that the FAA applies. If the FAA does apply, then the Court's authority is narrowly confined to the two issues cited in *Chiron Corp.*, but the Court must first decide whether the FAA applies.[4] To make the error of referring the question to the arbitrator clear, if the arbitrator were to determine that the FAA exemption barred arbitration, the arbitrator would not even have the jurisdiction to render a decision.

For the above reasons, this Court should reconsider its order and decide the issue of whether the FAA exemption applies. As explained in Plaintiffs' opposition brief, Doc. 188 at 10-11, because the exemption question is inseparable from the merits question of whether Plaintiffs are employees, *Roberts v. Corrothers,* 812 F.2d 1173, 1177 (9th Cir. 1987), requires the Court to apply a 12(b)(6) standard to the question of the whether the exemption applies – i.e., the Court should review whether Plaintiffs' Second Amended Complaint alleges a basis for the exemption taking all well-pleaded facts as true and

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[3] Since Defendants' argument was stated in their Reply Brief, Plaintiffs had no opportunity to respond.

[4] For the same reasons, the exemption to the Arizona Arbitration Act must also be decided by the Court as a threshold issue before considering whether the dispute is arbitrable under the AAA. *See, e.g., North Valley Emergency Specialists LLC v. Santana,* 93 P.3d 501 (Ariz. 2004) (court determination that contract fell within exemption to the AAA).

construing them in the light most favorable to Plaintiffs. Plaintiffs clearly fit within the exemption under that standard. Even if a stricter Rule 56 standard were applied, Plaintiffs have established that a fact question exists regarding the applicability of the exemption since they submitted numerous affidavits and evidence supporting their employee status and Defendants submitted no evidence whatsoever, beyond the ICOA itself, to substantiate their position that Plaintiffs are independent contractors.

Alternatively, if the Court denies the request for reconsideration, Plaintiffs request the Court to certify for immediate appeal pursuant to 28 U.S.C. §1292(b), the question of who decides the applicability of the FAA §1 exemption where, as here, that question raises disputed fact issues going to the merits of the claims. This question is a controlling issue of law as to which the Court may believe there is a substantial ground for difference of opinion. Moreover, an immediate appeal of that question may materially advance the ultimate termination of this litigation in that it would make little sense for the parties to expend the time and resources necessary to pursue arbitration if, after the arbitration is complete, a court were to hold that the question of the applicability of the exemption should have been decided by the Court in the first instance and potentially rendering the entire arbitration process moot.[5]

…

…

[5] The certification requirement of § 1292(b) is met if (1) there is a controlling question of law, (2) there are substantial grounds for a difference of opinion and (3) immediate appeal may materially advance the ultimate termination of the litigation. *In Re Cement Antitrust Litigation,* 673 F.2d 1020, 1026 (9th Cir. 1982). An issue is controlling if "resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *Id. And see Kuehner v. Dickinson & Co.* 84 F.3d 316,319(9th Cir. 1996): "in *Cement Litigation* we stated that "issues collateral to the merits" may be the proper subject of an interlocutory appeal. 673 F.2d at 1027 n. 5. We agree with the district court that an order may involve a controlling question of law if it could cause the needless expense and delay of litigating an entire case in a forum that has no power to decide the matter. A contrary holding would render meaningless the acknowledgment in 9 U.S.C. § 16(b) that an interlocutory order pursuant to the Federal Arbitration Act may in some circumstances satisfy the requirements of 28 U.S.C. § 1292(b)."

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Respectfully submitted this 14th day of October, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 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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