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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

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| Virginia Van Dusen, et al.,<br><br>Plaintiffs,<br><br>vs.<br><br>Swift Transportation Co., Inc., et al.,<br><br>Defendants. | **No. CV 10-899-PHX-JWS**<br><br>**PLAINTIFFS' MOTION TO LIFT STAY AND VACATE ORDER COMPELLING ARBITRATION BASED ON NEW FACTS** |

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## INTRODUCTION

In ordering arbitration in this case, the Court rejected Plaintiffs' arguments that the arbitration agreement imposes unconscionable costs, finding that "the arbitration agreement provides a mechanism for waiving Plaintiffs' arbitration fees." Doc. 223 p. 12. However, Plaintiffs' attempts to utilize that mechanism have hit a brick wall. Although Plaintiffs filed individual declarations establishing the substantial hardship they face and requested a ruling that they be allowed to arbitrate without payment of fees, the AAA will not assign an arbitrator to adjudicate Plaintiffs' hardship applications until the parties pay substantial filing fees and a deposit for the arbitrator's fee. Because the Arbitration Agreement contains a provision that requires Defendants to pay all the costs of arbitration if those costs would impose a hardship on Plaintiffs, and because Defendants took the position before this Court that this hardship procedure operated like a district court *in forma pauperis* proceeding where hardship is adjudicated *before* any fees must be paid, Plaintiffs asked Defendants to pay the initial fees necessary to secure a ruling on their hardship applications. However, Defendants have now changed their interpretation of the Arbitration Agreement and contend that Plaintiffs must first pay half of the filing fees and arbitrator's deposit if they want to obtain a ruling that paying such fees would impose a substantial hardship. Exh. A, Getman and Bronchetti e-mails Feb. 9-11, 2011 (referencing Exh. I-1). Frustrated with Defendants' change of position, Plaintiffs requested an administrative waiver of the fees from the AAA, but the AAA has refused to grant such a waiver. Exhs. K-3. As a result, Plaintiffs' efforts to vindicate their statutory rights in the arbitral forum are at a dead end because Plaintiffs simply cannot afford to pay the fees necessary to obtain a ruling on their hardship waiver applications. Exh. D, hardship declarations provided to AAA. Based on these new factual developments, Plaintiffs now move the Court, pursuant to Local Rule 7.2, to reconsider its ruling compelling arbitration pursuant to Section 4 of the FAA. Absent court intervention, Plaintiffs will be left with no forum in which to prosecute their claims.

## FACTS RELEVANT TO THE MOTION

### a. Proceedings in this Court.

Plaintiffs' complaint in this Court alleged claims for unpaid minimum wages and overtime, as well as other claims, against Swift Transportation Company and Interstate Equipment Leasing, two interrelated companies (hereafter referred to as "Swift"), that Plaintiffs allege acted as their employers. Defendants moved to compel arbitration pursuant to the Arbitration Agreement contained in each Plaintiff's "Independent Contractor Operating Agreement." Doc. 127. Over Plaintiffs' opposition, Doc. 188, the Court granted Defendants' motion to compel arbitration and stayed proceedings in the district court by Order of September 30, 2010. Doc. 223.

### b. Swift/IEL Arbitration Clause and the Applicable AAA Rules

The arbitration clause at issue in this case reads:

> Arbitration. All disputes and claims arising under, arising out of or relating to this Agreement, including an allegation of breach thereof, and any disputes arising out of or relating to the relationship created by the Agreement, including any claims or disputes arising under or relating to any state or federal laws, statutes or regulations, and any disputes as to the rights and obligations of the parties, including the arbitrability of disputes between the parties, shall be fully resolved by arbitration in accordance with Arizona's Arbitration Act and/or the Federal Arbitration Act. **Any arbitration between the parties will be governed by the Commercial Arbitration Rules of the American Arbitration Association (the "Rules").** The parties specifically agree that no dispute may be joined with the dispute of another and agree that class actions under this arbitration provision are prohibited. In the event of conflict between the Rules and the provisions of this Agreement, the provisions of this Agreement shall control.
>
> **Exceptions/clarifications of the Rules include**: (i) the proceedings shall be conducted by a single, neutral arbitrator to be selected by the parties, or, failing that, appointed in accordance with the Rules, (ii) the substantive law of the State of Arizona shall apply, and (iii) the award shall be conclusive and binding. The place of the arbitration herein shall be Maricopa County, Arizona. Both parties agree to be fully and finally bound by the arbitration award, and judgment may be entered on the award in any Arizona court having jurisdiction thereof. **The parties agree that the arbitration fees shall be split between the parties, unless CONTRACTOR shows that the arbitration fees will impose a**

> **substantial financial hardship on CONTRACTOR as determined by the Arbitrator, in which event, COMPANY will pay the arbitration fees.**

Exh. B at 9 (emphasis added). Pursuant to this Agreement, the AAA's "commercial rules" apply to all disputes, even disputes, such as this one, that assert that plaintiffs were deprived of their rights as employees. Under the AAA's commercial rules the parties must pay an "initial filing fee," a "final fee," and a deposit of the arbitrator's fees before an arbitration can commence. Exh. C, AAA Commercial Rules at 17. The initial filing fee is pegged to the amount in controversy, ranging from $775 for very small claims up to $10,200 for claims in excess of $5 million. Exh. C at 17-18. When no amount can be specified a fee of $10,200 is required. *Id.* Moreover where, as here, an arbitration demand includes a claims for non-monetary relief the minimum filing fee is $3350. *Id.* The "final fee," (which despite its name must be paid before the first arbitration hearing can be scheduled[1]), is also tied to the amount of the claim and ranges from $200 for small claims to $4000 for claims over $5 million. The arbitrator's deposit is set at the arbitrator's discretion once the arbitrator has been chosen. Exh. C, AAA Commercial Rule, R-51-52, *see also* Exh. F-3, e-mail from Tatum.

The AAA commercial rules provide that the AAA (not an arbitrator) may waive or defer the filing fees owed by a party if paying the filing fee would pose "extreme hardship." Exh. C, AAA Commercial Rule, R-49. However, the AAA will not allow the arbitrator's deposit to be waived or deferred. As an "exception" to the AAA rules, the Arbitration Agreement calls for an arbitrator to determine whether paying half of the costs of arbitration will cause the Plaintiffs to suffer "substantial hardship" in which case the company must pay all of the arbitration costs. Exh. B at 9, Arbitration Agreement.

**c. Proceedings before the AAA.**

After this Court entered its stay of this action and compelled arbitration, Plaintiffs filed a demand for arbitration for Plaintiff Joseph Sheer and subsequently filed dozens of

[1] *See* Ex. C,, AAA Commercial Rules, R49 - R 52 and "administrative fee schedule."

additional demands with the AAA. Pursuant to the terms of the Arbitration Agreement, many of the Plaintiffs prepared a hardship declaration for the AAA and a request that an AAA arbitrator determine whether paying half the costs of arbitration would cause them "substantial hardship."[2] These affidavits describe in detail the financial straits in which the Plaintiffs find themselves. For example, S. and D. B. currently owe Swift and IEL $27,000, according to the defendants. They have no income, savings, investments or health insurance. They lost their home in February of 2011 and have received no pay since August 2010. Their only asset is a 1996 Dodge Caravan. Exh. D at 7-8.

R. B. is currently employed by Tyson Food earning $525 per week. He has no money in the bank or retirement investments. As a result of the forced labor with Swift and IEL, he lost his home. He pays $625 a month in rent, $314 for health insurance, $305 for other insurance, and $715 in child support/alimony (total $1,959). He owes $7,500 to the IRS and $2,100 for state taxes. Exh. D at 6.

C. M. was terminated by Swift "for being injured" and is on disability. He has $125 in the bank and makes $700 per week. He has no savings or investments. He owes $14,500 for student loans and owes $18,000 in back taxes. He has outstanding medical bills of $2,391. He pays $270 per month in rent. He owns no car or property. He lost his home in 2008. Exh. D at 19.

S. C. has six dependents. He is unemployed. His home is in foreclosure ($85,000 mortgage remaining). He is on food stamps. He has no savings or investments. He has no other assets besides a 1995 Ford Explorer. Defendants claim that he still owes $46,000 on his truck. He lost his home in July 2010 and declared bankruptcy in August 2010. Exh. D at 12.

The AAA stated that it would "defer to the parties agreement regarding the determination of a financial hardship to be made by an arbitrator." Exh. E, Letter of Patrick Tatum, January 13, 2011. Nevertheless, before the AAA would agree to appoint

[2] The hardship declarations are filed herewith as Exh D. Plaintiffs have moved to file Exh D under seal.

an arbitrator to consider Plaintiffs' hardship claims, the AAA insisted on payment of an initial filing fee of $10,200 per arbitration. Exh. F-1, Shoneck letter, February 2, 2011; *see also* Exh. F-2 Tatum e-mail Feb.15, 2011, Exh. F-3, Tatum e-mail April 21, 2011. The fee was set at $10,200 because, in the absence of discovery, Plaintiffs were unable to state a specific amount or a range of damages. *See* Exh. G, Getman letter February 2, 2011. The final fee would be $4,000 for that same reason. *See* Ex. C, Commercial Arbitration rules. Thus each Plaintiff must pay $7100 in filing fees (1/2 of $10,200 + $4000), *in addition to* the arbitrator's deposit to obtain a hearing on his hardship claim. Even if Plaintiffs were to agree to limit their damages to a range of $75,000 to $150,000, *or even less*, the minimum filing fee would be still be $3350 with a final fee of $1250 because Plaintiffs seek declaratory and injunctive relief.[3] *See* Exh. C at 17-18 (fees for non-monetary claims); Ex. N (6.10.11 Tatum to Getman email confirming that arbitration demands that include damages and non-monetary relief require a minimum filing fee of $3350). Thus regardless of the size of their damage claims, each Plaintiff would still have to pay $2300 (1/2 of $3350 + $1250), *in addition to* the arbitrator's deposit just to get a hearing on his hardship claim. Plaintiffs are no more able to afford that amount than the $7100 currently being demanded.

The AAA could not tell Plaintiffs what the arbitrator's deposit would be for each arbitration, since the deposit is set at the discretion of each arbitrator, but it did indicate that commercial arbitrator fees in a matter such as this will run between $300/hour and $500/hour. Exhs. H-1, e-mail From Tatum, Getman letter, April 21, 2011, H-2, Getman letter, April 21, 2011. The deposit is designed to ensure that the arbitrator's fee and travel expenses for arbitration are paid. Exh. C, AAA Commercial Rules, R-52. Even if the arbitrator were willing to accept an initial deposit limited to the amount necessary to

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[3] Of course, Plaintiffs should not be required to limit their potential damages just to make arbitration possible. *See Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1246-1248 (9th Cir. 1994) (arbitration clause that limits remedies is unenforceable); *Wernett v. Service Phoenix, LLC*, No. CIV 09-168, 2009 WL 1955612 at *5 (D. Ariz. July 6, 2009) (same).

decide the hardship question only, the deposit could still be a significant amount given the importance of the issue. After all, a finding of substantial hardship will mean that Defendants have to bear the full cost of the entire arbitration – a sum that could well exceed $50,000 per arbitration given the number and complexity of issues involved.[4] If the Defendants contest hardship they could demand discovery and a hearing on the issue, which would increase the arbitrator's time and deposit significantly. *See, e.g., Blair v. Scott Specialty Gases*, 283 F.3d 595, 608-609 (3d Cir. 2002) (remanding case to district court for discovery on "estimated costs of arbitration and the claimant's ability to pay" those costs). In light of this, it would not be unreasonable to assume that an arbitrator charging $300 to $500 per hour, would demand a deposit in excess of $1000 just to make the hardship determination.

Moreover, there is no guarantee that the arbitrator would be agreeable to limiting the deposit to the hardship issue. An arbitrator has discretion to demand a deposit sufficient to cover all preliminary issues, or the entire arbitration. As noted above, there are a host of complex preliminary issues to be resolved and, if a deposit is required to

[4] The preliminary issues include, *inter alia*, the legal invalidity of the class and collective action waivers under the NLRA and FLSA, whether the arbitrator has jurisdiction to decide the case under FAA §1 (which requires deciding whether the Plaintiffs are employees of Defendants or independent contractors) and whether the substantive and procedural unconscionability of the arbitration agreement and the contract as a whole render the arbitration agreement unenforceable. The merits of Plaintiffs' individual causes of action also pose numerous, complex issues. The employer-employee issue alone will require an extensive factual analysis of the relationship between the drivers and Defendants. Other issues include, *inter alia*, whether the payments Plaintiffs made for tolls, gas, insurance, truck maintenance, bonds, etc., were for the benefit and convenience of the Defendants or the Plaintiffs, whether Defendants failed to pay Plaintiffs the minimum wage under the FLSA and applicable state wage hour laws, whether Defendant violated the prohibition on forced labor, and whether the Defendants' lease and ICOA were unconscionable, insofar as they 1) permit Defendants to unilaterally change the contracts (under the coercion of being placed in default, having their trucks repossessed and being held liable for all remaining lease payments), 2) permit Defendants to place Plaintiffs in default for any reason or no reason yet hold them liable for all remaining lease payments, and 3) permit treating, Plaintiffs as independent contractors when they must be deemed to be employees as a matter of law and fact.

cover all of those issues, the arbitrator's pre-hearing hours could range from 20 to 60 hours, resulting in a total deposit of $6,000 to $30,000, one half of which would be each Plaintiff's responsibility. The arbitrator has complete discretion to set his own deposit and the AAA has informed Plaintiffs that the arbitrator's deposit cannot be waived or deferred. Exh. H-2, Getman letter April 21,2011; Exh. K-1 at 5, letter from Tatum, April 21,2011. Plaintiffs thus anticipate that each Plaintiff's individual share of the deposit for the arbitrator's pre-hearing time could run between $500 and $15,000, and no Plaintiff can know what his deposit will be until after he has either paid or contractually guaranteed payment of half of the initial filing fee of $10,200.

The Arbitration Agreement itself provides that Defendants will pay the full cost of the arbitration if it would be a substantial hardship for a plaintiff to pay for half. See Exh. B at 9. Pursuant to Defendants' representation that this hardship clause establishes an *in forma pauperis*-like procedure (where hardship is decided *before* any fees must be paid), Plaintiffs requested that the Defendants pay the filing fees and deposit necessary to obtain a ruling on Plaintiff's financial hardship applications. Exh. A Getman and Bronchetti e-mails Feb. 9 through 11, 2011; Exh. L-1 Shoneck and Bronchetti e-mails Feb.11, 2011; Exh. L-2 Shoneck letter Feb. 11, 2011. Defendants refused, promising to pay half of the filing fees and deposit only. Ex. I 1-2, Bronchetti letters, Feb. 7 and 14, 2011. Defendants tendered half the filing fees for Plaintiff Sheer ($5,100) but did not do so for any other demand. Exh J, Shoneck letter, Feb. 25, 2011. Swift took the position that it would only pay half of the initial filing fee and arbitrator's deposit in each arbitration and that each individual driver would have to pay the other half of the fees if he wanted an arbitrator assigned to determine whether the payment of such fees would pose a hardship. *See* Exhs. I 1-2, Bronchetti letter Feb.7 and Feb. 14, 2011 and Exh. A. In light of Defendants' refusal to pay the full filing fee and deposit, and Plaintiffs' inability to pay half of those amounts, the AAA dismissed Sheer's arbitration stating once again that "the entire filing fee must be paid before this matter can move to arbitrator selection. Should the parties choose to pay the entire fee, we will proceed with the matter; otherwise it will

unfortunately remain closed." Exh. L-1 at 1, Feb. 11, 2011 email from Shoneck.

Frustrated by Defendants' refusal to abide by the terms of the Arbitration Agreement they drafted, Plaintiffs then requested the AAA to grant a waiver of Plaintiffs' portion of the AAA filing fee, and deposit, pursuant to AAA Rule 49, so that an arbitrator could be appointed. The AAA responded by stating that in cases such as this, the AAA does not grant a "waiver" of the filing fees. Instead, the AAA's policy with respect to commercial arbitrations is that it will only grant a deferral of the claimant's portion of the filing fee, and it will grant that deferral only if the claimant first executes a contractual guarantee to pay the AAA the deferred filing fee. Exhs. K 1-3, emails between Tatum and Getman. The AAA also indicated that under no circumstances would it defer or waive the deposit for the arbitrator's fees. *Id.* Plaintiffs are no more able to honestly sign a binding contractual agreement to pay the filing fees than they are to pay the fees. And, even if a Plaintiff could in good faith afford to sign such an agreement, he or she would still be obligated to pay an unknown amount to cover the arbitrator's deposit – an amount that could well exceed a thousand dollars – before a hardship determination could be made. If that unknown deposit ultimately proved too expensive to pay, the Plaintiff would have to drop out of the case without obtaining a hardship determination. Nevertheless, he or she would still be bound by his written guarantee to pay the filing fee.

In sum, Plaintiffs are unable to pay filing fees of $7,100 nor are they able, in good conscience, to obtain a deferral of those filing fees by signing a guarantee that they know they are presently unable to make good on. Neither are they able to pay an arbitrator's deposit which will likely exceed $500. The only way that they can obtain a ruling on their hardship applications as promised in the Arbitration Agreement they signed is for Defendants' to pay those initial fees. But Defendants have refused to do so, effectively preventing Plaintiffs from pursuing their claims in arbitration.

Accordingly, Plaintiffs now ask the Court to rule that Defendants have waived their right to arbitrate by refusing, in breach of the Arbitration Agreement, to pay the initial filing fee and deposit so that Plaintiffs can obtain the hardship determination

provided for in the Arbitration Agreement. Alternatively, in the event that the Court finds that Defendants did not breach the Arbitration Agreement, Plaintiffs seek an order that the Arbitration Agreement is unenforceable because it imposes fees and costs that effectively prevent Plaintiffs from vindicating their statutory rights.

**STATEMENT OF BASIS FOR RECONSIDERATION IN COMPLIANCE WITH LOCAL RULE 7(g)**

Local Rule 7(g) makes clear that motions for reconsideration are proper on "a showing of new facts."[5] The new facts that give rise to this motion are:

1. Defendants refusal to pay the costs necessary for Plaintiffs' to pursue the hardship provision of the arbitration agreement despite having characterized that provision as allowing for an "*in forma pauperis*" like proceeding;

2. The AAA's refusal to waive any of the fees and deposits necessary to obtain a hardship ruling and requirement of a guarantee before granting a wiaver; and,

3. The amount of the fees and costs which Plaintiffs will have to incur in order to obtain a ruling from an arbitrator that paying fees and costs would pose a substantial hardship.

None of these facts were known or could have been known at the time Plaintiffs initially opposed Defendants' motion to compel arbitration. Plaintiffs have now pursued their options for avoiding prohibitive costs and the reality of how those mechanisms play out in practice turns out to be significantly different from what was presented to the Court in the motion to compel arbitration. In these circumstances reconsideration is appropriate. *Garcia v. Regis Corp.*, CV09–1282–PHX–DGC, 2011 WL 1843268, at * 4 (D.Ariz. May 16, 2011) .

**ARGUMENT**

The Supreme Court has stated that arbitration is acceptable as an alternative to litigation in court because it is simply a "different forum"—one with somewhat different and simplified rules—but nonetheless one in which the basic mechanisms for obtaining justice permit a party to "effectively vindicate" his or her rights. *E.g.*, *Gilmer v.*

[5] Plaintiffs do not believe that this motion is, in fact, a motion to reconsider subject to Local Rule 7(g). Nevertheless, the requirements of Rule 7(g) are clearly met.

*Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)( "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function"). That said, the Supreme Court has also recognized that "[t]he existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum." *Green Tree Financial Corp. v. Randolph,* 531 U.S. 79, 90 (2000). In such cases, the underlying justification for sending parties to an arbitral forum is lost and such agreements are unenforceable under the FAA. *See, e.g., Circuit City v. Adams,* 279 F.3d 889, 894 (9th Cir. 2002) (requiring employee to pay any portion of arbitrator's fees would deter employees from vindicating their rights rendering arbitration agreement unenforceable).

The Arbitration Agreement as drafted by Defendants attempted to accommodate these concerns by providing that Defendants would pay all of the costs of arbitration if an arbitrator determined that splitting the costs would cause "substantial hardship" for a plaintiff. However, as set forth below in Section I, Defendants have refused to honor that Agreement and have, thereby, waived their right to compel Plaintiffs' to arbitrate.

In Section II below, Plaintiffs argue, alternatively, that if the Agreement is not read to require Defendants to pay the fees necessary to allow Plaintiffs to obtain a hardship determination, the Agreement cannot be enforced because Plaintiffs cannot obtain a waiver of excessive arbitration costs without first paying the very expenses they cannot afford to pay. In these circumstances the Agreement is unenforceable under *Green Tree* and the stay of proceedings should be lifted.

## I. BY REFUSING TO COMPLY WITH THE ARBITRATION AGREEMENT DEFENDANTS HAVE WAIVED THEIR RIGHT TO ARBITRATE

The Arbitration Agreement, as drafted by Defendants, calls for the parties to split the costs of any arbitration equally. Defendants no doubt recognized that such a provision, standing alone, could preclude a litigant with limited financial resources from

vindicating his statutory rights in violation of *GreenTree*. Thus, in order to ensure the enforceability of the arbitration agreement, Defendants chose to add an "exception" to the AAA rules whereby the Company would assume all of the costs of arbitration if an arbitrator found that dividing the costs would pose a substantial hardship on a worker. In their reply brief in support of compelling arbitration, Defendants characterized that provision as satisfying *Green Tree*'s concerns because it would operate "much like a Motion To Proceed *In Forma Pauperis*," Doc. 199 at 16-17, clearly implying that Plaintiffs would be able to obtain a hardship determination *before* incurring substantial fees. Based on this characterization, the Court cited this "mechanism for waiving plaintiffs' arbitration fees" in enforcing the arbitration agreement over Plaintiffs' objections. Doc 223 at 12.

However, once Defendants obtained their order compelling arbitration they changed their interpretation of the Arbitration Agreement. Now, rather than allowing for an *in forma pauperis*-like proceeding before any costs must be paid, Defendants have interpreted the Agreement as requiring Plaintiffs to pay half of the substantial administrative and arbitrator fees demanded by the AAA *before* the hardship mechanism set forth in the Arbitration Agreement can be invoked.[6] Such an interpretation must be rejected. Not only does it contradict Defendants' prior representation to the Court, it also renders the "substantial hardship" proviso in the Agreement meaningless: In order to obtain a waiver of the costs they cannot afford, Plaintiffs must first pay the very costs they can't afford. The net result of Defendants' interpretation of the Agreement is that those Plaintiffs who are in financial difficulty cannot arbitrate their claims.

Even if the agreement were viewed as ambiguous on the question of who must pay the costs necessary to get an arbitrator appointed, the ambiguity would have to be

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[6] Plaintiffs recognize that, in their brief in opposition to arbitration, they assumed that Defendants would interpret the agreement as potentially forcing Plaintiffs to pay fees before they got a ruling on substantial hardship. But Defendants put forth a different interpretation in their reply brief and the Court apparently accepted Defendants' interpretation by holding that there was a mechanism for waiver of fees.

resolved against Swift and in favor of Plaintiffs because it was drafted by Swift. *Darner Motor Sales, Inc. v. Universal Underwriters Insurance Co.*, 140 Ariz. 383, 400, 682 P.2d 388, 396-97 (1984) (holding that under Arizona Law, ambiguous terms in a contract are to be construed against the drafter and that the reasonable expectations of a party to a standardized type agreement should apply). For all of these reasons, the Arbitration Agreement should be construed to have imposed a duty on Swift to pay the initial filing fees for those Plaintiffs claiming substantial hardship.

Defendants' refusal to pay the initial filing fees and arbitrator deposit so that Plaintiffs could have their claims of financial hardship heard represents a clear violation of the terms of the Arbitration Agreement and the Ninth Circuit has repeatedly held that such a violation constitutes a waiver of the right to arbitrate. For example, in *Brown v. Dillards*, 430 F.3d 1004 (9th Cir. 2005), Dillards refused to pay the arbitration fee as required by the arbitration agreement so the employee brought suit in district court. Dillards then filed a motion to compel arbitration and indicated that it would pay the fees if its motion were granted. The district court denied the motion and the Ninth Circuit affirmed on two distinct grounds finding that Dillards' refusal to pay the filing fee constituted a default of its obligation to arbitrate as well as a waiver of the right to arbitrate. Similarly, in *Sink v. Aden Enters., Inc.*, 352 F.3d 1197, 1201 (9th Cir. 2003), an employer obtained an order compelling arbitration and staying further proceedings in the district court. However, once it had obtained that order, the employer claimed it was unable to pay the filing fee required by the arbitration agreement. The employee then returned to court with a motion to lift the stay of proceedings. At that point, the employer stated that it now had the funds to pay the filing fee and requested that the case be remanded to arbitration. The district court denied that motion and the Ninth Circuit affirmed holding that once the employer had defaulted on the original arbitration, the FAA precluded the district court from remanding the case to arbitration a second time. *See also Noodles Development LP v. Latham Noodles, LLC*, No. CV-09-01094-PHX-NVW, 2011 WL 204818 (D. Ariz. Jan. 20, 2011) (after granting franchisees' motion to

compel arbitration, franchisees failed to pay their share of the filing fee. The franchisor's subsequent motion to lift the stay of proceedings in the district court was granted on the grounds that defendants had waived their right to arbitrate despite their promise to pay the filing fees if the matter was again referred to arbitration).

Under this clear Ninth Circuit authority, Defendants' refusal to pay the initial fees as required by the Agreement so that an arbitrator could be appointed to adjudicate Plaintiffs' hardship claims constitutes a default of the obligation to arbitrate as well as a waiver of arbitration. In these circumstances, the Court should lift the stay of proceedings in the district court and vacate its order compelling arbitration.

## II. IF THE ARBITRATION AGREEMENT DOES NOT COMPEL DEFENDANTS TO PAY THE INITIAL FEES THE AGREEMENT IS UNENFORCEABLE

If the Arbitration Agreement is not read to require Defendants to pay the fees necessary for Plaintiffs to obtain a ruling on their hardship applications, then *Green Tree* requires the Court to determine whether, in light of Plaintiffs' financial circumstances, the fees being imposed on Plaintiffs will deter them from vindicating the statutory rights that Congress has conferred upon them.

As *Green Tree* makes clear, whether the fees are sufficiently great to deter litigants from vindicating their statutory rights is a question to be decided under the FAA principles; it is not, properly speaking, a question to be analyzed under the principles of unconscionability. 531 U.S. at 90-92. *See, e.g., Camacho v. Holiday Homes, Inc.*, 167 F.Supp.2d 892, 896 n. 2 (W.D. Va. 2001).

The Ninth Circuit takes the position that *any* fees imposed on employees that exceed the filing fees for federal court have a deterrent effect on employees and are, therefore, prohibited. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 at 894 n.5. Inasmuch as Plaintiffs have plead that they are employees and their claims depend upon proving that status, *Adams* controls this case. Other Circuit Courts have also applied a *per se* rule against shifting the costs of arbitration to employees. *See Shankle v. B-G Maint. Mgt. of Col., Inc.*, 163 F.3d 1230, 1235 (10th Cir. 1999)(requiring employee to pay

half of arbitrator's fees is unenforceable); *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997) (refusing to enforce any agreement that called on employees to pay any portion of arbitrator's fee).

Outside the employment context, courts have followed a case-by-case approach to the question of whether the costs of arbitration are sufficiently onerous to render arbitration unenforceable under the FAA. *See, e.g. Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 663-665 (6th Cir. 2003) (en banc); *Spinetti v. Service Corporation International*, 324 F.3d 212, 216-218 (3d Cir. 2002); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001); *Williams v. Cigna Financial Advisors, Inc.*, 197 F.3d 752, 763-64 (5th Cir. 1999). In making this case-by-case determination, courts focus on "the claimant's ability to pay the arbitration fees and costs, the expected costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims." *Bradford*, 238 F.3d at 556. Recognizing that federal employment laws serve a deterrent as well as a remedial function, the court in *Morrison* held that a court should not base its decision exclusively on the named plaintiff's ability to pay but should also consider whether the fees are likely to deter others. "[A] court considering whether a cost-splitting provision is enforceable should consider similarly situated potential litigants for whom costs will loom as a larger concern, because it is, in large part, their presence in the system that will deter discriminatory practices." *Morrison*, 317 F.3d at 663. The fact that a litigant might be reimbursed for the costs of arbitration if he ultimately succeeds is beside the point. The question is whether the need to pay costs in the first instance will have the effect of deterring litigants. *Id.* at 663-665. Finally, while the case-by-case approach focuses on a litigant's ability to pay the costs at issue, "*Green Tree* 'does not necessarily mandate a searching inquiry into an employee's bills and expenses.'" *Morrison*, 317 F.3d at 663-664, *quoting Giordano v. Pep Boys-Manny, Moe & Jack, Inc.*, 2001 WL 484360 at *6 (E.D. Pa. March 29, 2001); *Alexander v. Anthony Intl.*, 341 F.3d 256, 269 (3d Cir. 2003) (same).

With these principles in mind it is obvious that requiring each Plaintiff to pay a minimum of $7100 in filing fees plus an arbitrator's deposit of $500 or more before he can obtain a ruling on his hardship waiver not only will, but, indeed, has, deterred Plaintiffs from pursuing their claims. Defendants will, no doubt, argue that if Plaintiffs would specify a low range of damages that would have the effect of lowering the amount of the filing fee and make it more affordable. But until Plaintiffs have conducted some discovery they are not in a position to estimate their damages. *See* Exh. G, Getman letter February 2, 2011. Moreover, even if Plaintiffs could specify a lower damage amount, their non-monetary claims would still require them to pay minimum filing fees of $2300 plus the arbitrator's deposit of $500 or more which, as a practical matter, is no more able affordable than the $7100 currently being demanded.

Nor does the fact that the AAA has offered to defer Plaintiffs' portion of the filing fees make arbitration affordable. Plaintiffs are in no position to promise to pay those fees and asking them to sign a guarantee for money they cannot pay is asking them to engage in fraud. Even if a Plaintiff were confident of ultimately winning the hardship determination, signing a guarantee represents a significant gamble because a Plaintiff must sign the guarantee before he knows what the arbitrator's deposit will be. If the deposit turns out to be unaffordable, the plaintiff would be unable to move forward to a hardship determination, but would still liable on his guarantee of the filing fees. *Morrison* rejected a similar deferral procedure as likely to deter litigants from pursuing arbitration. 317 F.3d at 669-670. In that case, Morrison's arbitration agreement required the employer to advance all costs of arbitration except for a $75 fee, but if the employee lost he would have to reimburse the employer for the fees up to a maximum of 3% of his annual salary ($1622 in Morrison's case). The court held that that procedure would deter workers from ever filing an arbitration claim because it asked litigants to "risk [their] scarce resources in hopes of an uncertain benefit." *Id.* at 669-670. The Tenth Circuit reached the same conclusion in *Shankle*, 163 F.3d 1230 , where the employer offered to advance the employee's share of the costs of arbitration with the understanding the

employee would remain liable for those costs if he lost. *Id.* at 1231. The court concluded, "[w]e fail to see how this language lessens the financial burden on the employee." *Id.* at 1234 n.4. The AAA's deferral policy presents a similar problem. *See also Gutierrez v. AutoWest Inc.*, 114 Cal.App.4th 77, 92 (Cal. App. 2003) (finding AAA fee deferral procedures ineffective to ensure arbitration is are affordable). Besides, even if the filing fees were not a problem, the AAA will not defer or waive the arbitrator's deposit and that alone is sufficiently high to deter Plaintiffs.

The barrier posed by the costs Plaintiffs are being asked to pay is obvious when compared to the fact that each Plaintiff would only have to pay $350 if he or she were to file in federal court, and even that sum could be waived if a plaintiff qualified for *in forma pauperis* status. Given the precarious financial condition of the Plaintiffs, the difference between a $350 federal filing fee and paying 8 to 21 times that amount[7] just to obtain a hardship ruling in arbitration is enough to make the arbitral forum inaccessible when compared to litigation.

In similar situations, courts have had no hesitation in finding arbitration agreements unenforceable when they require payment of fees comparable to those demanded of Plaintiffs here. For example, *Morrison v. Circuit City Stores*, 317 F.3d 636, 669-670, 676-678 (6th Cir. 2003) (en banc), involved two consolidated cases similar to this one. In the first, the Sixth Circuit held that an arbitration agreement that required a plaintiff, who had a bachelor's degree in engineering from the U.S. Air Force Academy and a master's degree in administration and who was terminated from a managerial position at Circuit City, to pay $1622 in arbitration costs was unenforceable because it "would deter a substantial number of employees similarly situated . . . from seeking to vindicate their statutory claims." *Id.* at 669. The second case involved a worker employed as a mechanic and salesperson by PepBoys who was required to pay an arbitrator's deposit between $1125 and $3000 to arbitrate his claim. The court held that "[e]ven

[7] Filing fees of $2300 to $7100 plus a $500+ arbitrator's deposit represents a range 8 to 21 times greater than a $350 filing fee.

without a searching inquiry into Shankle's income and overall financial situation, we conclude that such a provision would deter a substantial number of similarly situated potential litigants from seeking to vindicate their statutory rights in the arbitral forum." *Id.* at 676. In *Camacho*, 167 F.Supp.2d at 896-897, the court refused to enforce an arbitration agreement which required a plaintiff who purchased a manufactured home to pay $2000 for filing fees. Moreover, even if she were able to obtain a waiver of that amount from the AAA, the court held that the arbitrator's deposit, estimated at $600 to $4100, was enough to render the arbitration agreement unenforceable. *See also, Shankle*, 163 F.3d 1230 (agreement that imposed costs of $1875 to $5000 on janitorial shift manager was unenforceable); *Wernett*, 2009 WL 1955612 at *7 (arbitration agreement that makes no provision for reducing or deferring fees for plaintiff of "limited income" is unenforceable); *Rodriguez v. Wet Ink, LLC*, No. 08-cv-00857, 2011 WL 1059541 (D.Colo. Mar. 22, 2011) (agreement that required a plaintiff to pay more than she earns in a week for a single hour of arbitration is unenforceable); *Arnold v. Goldstar Financial Sys., Inc.*, No. 01 C 7694, 2002 WL 1941546 (N.D. Ill. Aug 22, 2002) ($2250 in costs is prohibitive for plaintiffs with debt problems); *Giordano*, 2001 WL 484360 (where plaintiff earned $400/wk, requiring payment of $2000 filing fee and $600-$900 for a day of arbitration was "an easy case" for finding agreement unenforceable).

**CONCLUSION**

For all of the foregoing reasons, Plaintiffs' motion for reconsideration and to lift the stay of proceedings and vacate the order compelling arbitration should be granted.

Respectfully submitted this 13th day of June, 2011.

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 13, 2011, 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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