Case No. 10-73780

IN THE UNTIED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: VIRGINIA VAN DUSEN, JOHN DOE 1 and JOSEPH SHEER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED PERSONS,
Plaintiffs
v.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA
Respondent,
SWIFT TRANSPORTATION CO., INC., INTERSTATE EQUIPMENT LEASING, INC. CHAD KILLIBREW and JERRY MOYES,
Real Parties of Interest

On Petition from an Order of the United States District Court
For the District of Arizona
Case No. CV-10-899-PHX-JWS

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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Petitioners seek supervisory mandamus to compel the district court to carry out its non-delegable duty to determine whether the arbitration agreement at issue in this case falls within the coverage of the Federal Arbitration Act (FAA), or is excluded from it under §1 of the Act. Respondents' argument that courts have no clear duty to determine the applicability of the FAA before compelling arbitration is contrary to the language of the FAA and Supreme Court interpretations of that language. Their argument that the court properly compelled the parties to arbitrate whether their agreement falls within the FAA pursuant to a delegation clause is similarly misplaced as the FAA confers no authority on a court to compel any arbitration until the court has first determined that the agreement falls within FAA coverage. Respondents' arguments regarding the other *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654-655 (9th Cir. 1977) mandamus factors are also unsupported and contrary to law.

I. THE DISTRICT COURT HAD A CLEAR DUTY TO DETERMINE WHETHER THE AGREEMENT WAS COVERED BY THE FAA

The FAA does not make *all* arbitration agreements "valid, irrevocable, and enforceable," only written agreements contained in "maritime transactions" or "transactions involving commerce." 9 U.S.C. §2. Moreover, Section 1 of the Act further narrows the coverage of the FAA by stating that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other

class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Because the FAA only applies to certain arbitration agreements, a court's authority to stay judicial proceedings under Section 3 of the Act and to compel arbitration under Section 4 can only be exercised *after* a court satisfies itself that the agreement at issue is covered by the Act.

Respondents' arguments in opposition to this commonsense reading of the FAA are not persuasive.

1. According to Respondents, the Section 4 requirement that the court must be "satisfied that the making of the agreement for arbitration . . . is not in issue" prior to compelling arbitration merely requires the court to determine whether an agreement was "made" – i.e. physically executed – but does not require the court to determine whether the executed "agreement for arbitration" is actually covered by the FAA as defined by Sections 1 and 2 of the Act. In other words, Respondents read Section 4's reference to the "making of the agreement for arbitration" as applying to *any* agreement for arbitration completely independent of the limitations imposed by Sections 1 and 2. DktEntry 7-1 at 19-20 (11-12). That is clearly incorrect. Sections 1, 2, 3, and 4 of the FAA form an integrated whole and the requirement that the district court satisfy itself "that the making of the agreement for arbitration . . . is not in issue," clearly imposes on the court a duty to find not just that an agreement was made, but that an "arbitration agreement" covered by

the FAA was "made." This was the Supreme Court's reading of the FAA in *Bernhardt v. Polygraphic Company of America*, 350 U.S. 198 (1956). The issue in *Bernhardt* was whether the reference to arbitration agreements in Section 3 of the Act, which authorizes a court to stay a federal proceeding pending arbitration, referred to arbitration agreements of any kind or only to arbitration agreements as defined by Sections 1 and 2. The Court could not have been clearer that the FAA must be construed as a whole:

> Sections 1, 2, and 3 are integral parts of a whole. To be sure, § 3 does not repeat the words 'maritime transaction' or 'transaction involving commerce', used in §§ 1 and 2. But §§ 1 and 2 define the field in which Congress was legislating. Since § 3 is a part of the regulatory scheme, we can only assume that the 'agreement in writing' for arbitration referred to in § 3 is the kind of agreement which §§ 1 and 2 have brought under federal regulation. There is no intimation or suggestion in the Committee Reports that §§ 1 and 2 cover a narrower field than § 3. On the contrary, S.Rep. No. 536, 68th Cong., 1st Sess., p. 2, states that § 1 defines the contracts to which 'the bill will be applicable.'

Id. at 201. The same reasoning holds true with respect to Section 4. It is an integral part of the whole Act, and although it does not repeat the words "maritime transaction" or 'transaction involving commerce," in stating that the court must be "satisfied that the making of the agreement for arbitration . . . is not in dispute," it is clearly referring to an agreement for arbitration as defined and limited by Sections 1 and 2. Thus, prior to compelling arbitration, a court must satisfy itself

both that an agreement was made and that it is "the kind of agreement which §§ 1 and 2 have brought under federal regulation." *Bernhardt*, 350 U.S. at 201.

2. Respondents try to bolster their strained reading of Section 4 by citing a number of cases where trials were held to determine whether an agreement was "made." DktEntry 7-1 at 21. But simply because trials are held for that reason does not mean that they must not also be held when the question whether an "arbitration agreement" is covered by the FAA is "in issue." 9 U.S.C. §4. None of the cases cited by Respondents remotely suggests that trials under Section 4 to determine FAA coverage are improper.

3. Respondents argue that determining the applicability of the exemption will involve a detailed fact inquiry. That may be true, but nothing in Section 4's requirement of a trial where "the making of the arbitration agreement . . . [is] in issue" suggests an exception to that requirement based on the complexity of facts that are in dispute. Trials are designed to resolve factual issues and Congress clearly anticipated that when it provided for a trial to resolve whether an agreement fell within the FAA. Moreover, Respondents vastly overstate the complexity of the determination that the Court here must try under Section 4. This is a class action on behalf of workers characterized by Swift as "owner operators" who collectively contend that the class is similarly situated insofar as they were legally employees who were misclassified as independent contractors. Plaintiffs filed their case as a

Rule 23 class action and as an FLSA collective action precisely because the question of whether their uniform contracts create an employer/employee relationship is appropriately decided on a class-wide basis. Employer/contractor misclassification issues are routinely determined on a classwide basis. *See Norris Watson v. DeltaT Group*, 270 F.R.D. 596 (S.D. Cal. 2010) (certifying class of healthcare professionals alleging they were misclassified as independent contractors); *Dalton v. Lee Publications*, 270 F.R.D. 555 (S.D. Cal. 2010) (same, class of home delivery newspaper carriers certified); *Phelps v. 3PD*, 261 F.R.D. 548 (D. Or. 2009) (same, class of truck drivers certified); *Smith v. Cardinal Logistics Corp.*, 2008 WL 4156364 (N.D. Cal. 2008) (same, class of truck drivers certified).

4. Respondents argue that the Section 1 exemption question is a question of arbitrability that the parties delegated to the arbitrator to decide. Parties are clearly free to delegate questions of arbitrability to an arbitrator, but the question of whether an agreement falls within the coverage of the FAA, or is exempt therefrom, is NOT a question of arbitrability. A "question of arbitrability" refers to "[t]he question whether the parties have submitted a particular dispute to arbitration." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). Such questions have to do with what the parties agreed to. But the question of whether an agreement falls within the exemption created by Congress, when it drafted

Section 1 of the FAA, has nothing to do with what the parties may or may not have agreed to; it is a question about the applicability of the Act itself and whether the Act confers authority on a district court to compel arbitration. The fact that the parties may have agreed to a delegation clause does not change the fact that the district court must first determine whether the FAA applies before it has the authority to send any issues to arbitration, whether gateway issues of arbitrability or the merits of a dispute. As the Court explained in *Rent-A-Center West v. Jackson,* "[w]e have recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability' . . . . An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration *asks the federal court to enforce*." 130 S.Ct. 2772, 2777 (2010) (emphasis added). But before a federal court can grant such enforcement, it must first determine whether it has authority to do so – i.e. it must determine whether the arbitration agreement (along with its delegation clause) falls within the definitions in Section 2 and whether the Section 1 exemption applies. Only after the court is satisfied that the agreement falls within the FAA may the court compel the parties to take their gateway issues of arbitrability to an arbitrator.[1]

[1] Respondents point out that *Granite Rock Co. v. Int'l. Bro. of Teamsters*, ___U.S. ___, 130 S.Ct. 2847 (2010), qualifies the district court's duty to determine whether an agreement is legally enforceable with the phrase "absent a provision clearly and validly committing such issue to an arbitrator." However, *Granite Rock*

To put it another way, by including the exemption provision in Section 1, Congress indicated its intent to prohibit courts from sending agreements falling within the exemption to arbitration. Private parties cannot, through a delegation clause or otherwise, confer on a district court powers that Congress chose to withhold.

Respondents wrongly claim that none of the many cases which determined the exemption question prior to compelling arbitration involved delegation clauses. Respondents' contention is not true. In *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 746 (5th Cir. 1996), the arbitration agreement contained a delegation clause: "any action contesting the validity of this Agreement, the enforcement of its financial terms, or other disputes shall be submitted to arbitration pursuant to the American Arbitration Association in Ft. Lauderdale, Florida." And the Court there decided the exemption question first. *Id.*

The existence of a delegation clause does not change the requirement to determine the §1 exemption first. Nothing in any of the cases cited by Petitioners suggests that the presence of a delegation clause would have made any difference, as the question before the court is whether the §1 exemption permitted ANY delegation to an arbitrator by the court. And because a delegation clause "is simply

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was a case about arbitrability – issues which clearly can be delegated – it was not a case about FAA coverage or the Section 1 exemption, which cannot be delegated.

an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce," *Rent-A-Center West v. Jackson,* 130 S.Ct. at 2777, the FAA has no different or greater application to delegation clauses than to arbitration clauses in general.

5. Respondents' argument that *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967), rejects the notion that the court must always decide the exemption question is incorrect. As the opinion notes, the "**first question**" that the Court had to decide was whether the arbitration agreement was one of the "two kinds of contracts specified in §§ 1 and 2 of the Act." 388 U.S. at 401 (emphasis supplied). It was only *after* the Court "determined that the contract in question is within the coverage of the Arbitration Act," *id.* at 402, that it could go on to decide the issue that *Prima Paint* and its progeny such as *Rent-A-Center,* 546 U.S. at 448-449, are famous for – i.e. that challenges to the validity of a contract as a whole are for the arbitrator to decide. In other words, the *Prima Paint* rule enforcing arbitration agreements and the *Rent-a-Center* rule enforcing delegation clauses can only come into play *after* a court has determined that an agreement falls within §2 and is not excluded by §1 – precisely what the trial court failed to do in this instance.

6. Respondents cite *AT&T Techs., Inc. v. Communication Workers of America*, for the proposition that in determining "whether the parties have agreed

to submit a particular grievance to arbitration, the court is not to rule on the potential merits of the underlying claim." 475 U.S. 643, 649 (1986). But the issue here is not whether the parties' agreement submitted the claims at issue to arbitration. The issue here is whether the trial court has the authority to compel arbitration of those claims or whether the arbitration agreement falls within the exemption to the FAA. Nothing in *AT&T Techs.* or any of the other cases cited by Respondents, and certainly nothing in the FAA itself, suggests that a court is precluded from determining whether the Section 1 exemption applies when this issue coincidentally overlaps with issues to be decided on the merits. Indeed, if the court were to determine that the exemption applies, then it is precisely the court, and not the arbitrator, that should be determining the merits of the dispute.

7. Respondents' reliance on various other "principles" of arbitration set forth in *AT&T Techs.* is similarly misplaced. The issue in *AT&T Techs.* was who should decide whether the parties had agreed to arbitrate a dispute, the court or an arbitrator. The principles set forth in the court's holding – that arbitration is a matter of contract, that questions of arbitrability may be delegated, that merits should not be considered, and that there is a presumption in favor of arbitration – are all principles for deciding arbitrability questions like those posed in *AT&T*

Techs.[2] They are not the principles applicable to deciding the Section 1 exemption question or who should decide that question.

8. Respondents' argument regarding the Arizona Arbitration Act (AAA) is flawed for the same reason that its argument regarding the FAA is flawed. The AAA, like the FAA, defines the kinds of agreements covered by the Act in Ariz. Rev. Stat. §12-1501, but makes clear that all employment contracts are exempt from the Act. Rev. Ariz. Stat.§12-1517.[3] Section 12-1502 authorizes the court to enforce arbitration only upon a showing of an agreement covered by §12-1501. Since employment contracts are excluded from the scope of §12-1501, by virtue of §12-1517, a court cannot compel arbitration until it has determined that the exemption does not apply. *Stevens/Leinweber /Sullens, Inc. v. Holm Dev. & Mgt, Inc.*, 165 Ariz. 25, 28 (Ariz. Ct. App. 1990), the case relied upon by Respondents, is not to the contrary, as it clearly states that §12-1502 requires the court to

[2] Respondents erroneously state that these are principles which "guide the District Court's proper conclusion to compel arbitration." DktEntry 7-1at 18. In fact as the *AT&T* Court makes clear, they are specifically for use in deciding whether the parties agreed to arbitrate a particular issue – i.e. arbitrability -- which can only be decided after the court determines that the agreement is covered by the FAA.

[3]Ariz. Rev. Stat. §12-1517 states "This article shall have no application to arbitration agreements between employers and employees or their respective representatives."

determine whether a "valid arbitration provision exists" and that necessarily requires a determination of whether the exemption applies.

Respondents' attempt to distinguish *North Valley Emergency Specialists v. Santana*, 208 Ariz. 301 (2004), in which the Arizona Supreme Court granted mandamus to compel a trial court to apply the §12-1517 exemption, is unavailing. Nothing in that case suggests that the result would have been any different had there been a delegation clause in the arbitration agreement or if the employer/employee question had been in dispute. The Court would have been without authority to compel arbitration under a delegation clause to the same degree as a general arbitration clause, because the AAA simply does not apply to employment contracts.[4]

[4] In a footnote, Respondents argue that even if the FAA and AAA don't apply, the court must compel arbitration as a matter of state law. The district court struck that argument when Respondents raised it below. *See* Doc. 213. Moreover, in this case, the FAA and AAA provide the only valid basis upon which the Court may order arbitration. Even assuming, *arguendo*, that general common law principles could be said to allow specific performance of an agreement that both statutes specifically exempt from arbitration, such principles are not legally cognizable and cannot be enforced in Arizona. *See* Ariz. Rev. Stat. § 1-201 ("The common law only so far as it is consistent with …, and not repugnant to or inconsistent with the … laws of this state…, is adopted and shall be the rule of decision in all courts of this state.").

II. THE OTHER *BAUMAN* FACTORS FOR MANDAMUS ARE SATISFIED

As set forth in the Petition, Petitioners face the same possibility of prejudice absent mandamus as the petitioners in *Douglas v. U.S. Dist. Ct.*, 495 F.3d 1062 (9th Cir. 2007) – i.e. if they are "forced to arbitrate, [they] have no adequate means of ensuring that [they] will be able to continue as class representatives. This would prejudice Petitioners in a way not correctable on appeal." *Id.* at 1068. This is so because if they are successful in arbitration, their individual claims will be moot and they will not be able to pursue the class allegations they raised in court (which they are prohibited from pursuing in arbitration). In addition, it is doubtful they could appeal an order confirming an award in their favor, leaving them with no opportunity to appeal the order compelling arbitration. *Id.* at 1068-1069. Respondents' assertion that this discussion of prejudice in *Douglas* was mere *dicta* is clearly wrong as a finding regarding the first and second *Bauman* factors was necessary to the decision to grant mandamus in that case.

Respondents' attempt to distinguish *Douglas* on the facts is similarly without merit. The issue on mandamus in *Douglas* was whether the district court properly ordered arbitration – precisely the issue raised here. The reason why the order compelling arbitration is erroneous in this case may be different from the reason in *Douglas*, but the existence of prejudice and the unavailability of other

means of relief flows from the improper order to arbitrate and does not depend on the reasons why the order was improper. Thus, *Douglas* is squarely on point.

Respondents' discussion of *Bauman* factors one and two also ignores the fact that Petitioners seek supervisory mandamus which can be granted "even if *Bauman*'s second factor – that the error cannot be corrected on appeal – is absent." *In re Gonzalez,* 623 F.3d 1242, 1246 (9th Cir. 2010). Respondents make no attempt to distinguish *Gonzalez* or to argue that this is not a supervisory mandamus case.

Finally, Respondents argue that Petitioners have failed to meet *Bauman* factor 5 (order raises new and important issues of first impression) by repeating their arguments that Section 4 of the Act only requires the court to find an agreement was "made" and that the question of whether the agreement is covered by the Act can be delegated to an arbitrator. Those arguments are unavailing for the reasons set forth above and in Petitioners' petition. The fact remains that the question of whether a district court or an arbitrator must decide the Section 1 exemption question is an important issue of first impression regarding "the proper judicial administration of the federal system."[5] *Labuy v. Howes Leather Co*, 352

[5] Respondents citation to *Green v. Supershuttle Int'l., Inc.*, 2010 Wl 3702592 (D. Minn. 2010), a case, like this one, where, without analysis, the trial court referred the Section 1 exemption question to the arbitrator, only serves to support Petitioners' contention that the district courts are confused on this issue

U.S. 249, 259-260 (1957) (granting supervisory mandamus to compel court not to refer judicial matters to a special master).

CONCLUSION

For all of the foregoing reasons, Petitioners satisfy the *Bauman* factors and mandamus should issue compelling the district court to determine, prior to ordering arbitration, whether the contract at issue here falls within the coverage of the FAA or is exempt from the provisions thereof.

Respectfully submitted this 2nd day of March, 2011.

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and that it is important for this Court to exercise its supervisory mandamus jurisdiction.

9th Circuit Case Number(s) 10-73780

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