DOCKET NO. 11-17916

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA VAN DUSEN, et al.,
Plaintiffs-Appellants,

v.

SWIFT TRANSPORTATION CO., INC., INTERSTATE EQUIPMENT LEASING, INC., CHAD KILLIBREW and JERRY MOYES,
Defendants-Appellees,

ON PETITION FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA, PHOENIX
DISTRICT COURT CASE 2:10-CV-00899-PHX-JWS

DEFENDANTS-APPELLEES' ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(b), Defendants-Appellees state that Interstate Equipment Leasing, LLC (fka Interstate Equipment Leasing, Inc.) is 100% owned by Swift Transportation Company, Inc., which is a publicly traded company. Swift Transportation Co. of Arizona, LLC (fka as Swift Transportation Co., Inc.) is wholly owned by Swift Transportation Co., LLC which is not publicly traded.

DATED: April 16, 2012

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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I. JURISDICTIONAL STATEMENT

The District Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, 1367. Appellants perfected their appeal on December 19, 2011, the date the District Court received the fees required by Federal Rules of Appellate Procedure 5(d). (ER 3:535-536). Appellees agree with the remainder of Appellants' jurisdictional statement.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

The District Court certified for appeal the "issue of whether a district court should assess whether a Section 1 exemption applies where that question raises disputed facts going to the merits of plaintiffs' claims and the contracting parties have agreed to arbitrate questions of arbitrability, as well as any disputes arising out of or relating to the relationship created by the [parties'] Agreement." (ER 6-7.)

Except for the following, all applicable statutes, etc., are contained in the addendum of Appellants: Pertinent provision of the American Arbitration Association Commercial Arbitration Rules.

III. STATEMENT OF THE CASE

In December 2009, Plaintiff Sheer, in contravention of the terms of the arbitration provision in his Independent Contractor Operating Agreement ("ICOA") with Defendant Swift Transportation Co., Inc. ("Swift"), filed the underlying complaint commencing this purported hybrid Rule 23/Section 216(b)

action in the United States District Court for the Southern District of New York. In his complaint, Sheer claimed he was an employee of Swift and alleged violations of the federal Fair Labor Standards Act, New York Labor Law, and the California Labor Code. Sheer subsequently added Van Dusen as a plaintiff who also claimed to be an employee of Swift (hereafter "Drivers"). Drivers' claims, except for the eighth cause of action, hinge on the single contention they were employees and not independent contractors. Thus, an individual and highly fact-specific determination of employee status is a prerequisite for determining liability on all but one claim.

On April 5, 2010, the case was transferred to the U.S. District Court for the District of Arizona in accordance with the forum selection clauses contained in the ICOAs. This matter was officially received by the Arizona District Court on April 26, 2010. (ER 3:512.) The ICOA is governed by Arizona law. *See* ICOA ¶ 24. (ER 3:444.) On May 21, 2010, Appellees filed their Motion to Compel Arbitration in the District Court of Arizona. (ER 3:516.)

On September 30, 2010, the Honorable Judge John W. Sedwick, of the District Court of Arizona, issued a 22-page order compelling arbitration. (ER 1:27-48.) In a detailed decision, Judge Sedwick carefully considered Drivers' argument that the Court was first required to resolve whether they were employees or independent contractors before ordering arbitration. Ultimately, the Court

concluded that its authority under well-established case law was to determine whether a valid arbitration agreement existed and whether the agreement covered the dispute. *Id.* at 1:34-36. The District Court held that "deciding whether an employer-employee relationship exists between the parties falls within the scope of the arbitration agreement, because the arbitration agreement explicitly includes" a delegation clause. *Id.* at 1:36.

The District Court also correctly reasoned that Drivers' specific challenge to the relationship between the parties required resolution of the merits of the underlying dispute. *Id.* After completing its analysis, the District Court ruled: "Because a valid arbitration agreement exists and Plaintiffs' claims are within the scope of the arbitration agreement, the court must refer the action to arbitration…" *Id.* at 1:38. The District Court mindfully stayed the action pending the results of arbitration because "[u]nnecessary delay of the arbitral process through appellate review is disfavored." *Id.* at 1:47.

On October 14, 2010, Drivers sought to certify for immediate appeal the question of who decides the applicability of the Federal Arbitration Act ("FAA") § 1 exemption. The District Court denied Drivers' motion.[1] (ER 1:25.) Drivers subsequently filed a writ of *mandamus*.

[1] The District Court's November 16, 2010 Order erroneously stated that it denied "Defendants' Motion." It should have stated it was denying "Plaintiffs' motion."

On July 27, 2011, the Ninth Circuit denied Drivers' writ of *mandamus* regarding the exact issue now presented on appeal. The *Van Dusen* panel held that there was no clear error and although the Court went on to discuss its view of the Section 1 exception, such comments were *dicta*. On remand, the District Court acknowledged the *Van Dusen* panel's comments, but stated:

> This court continues to believe its original opinion and order at docket 223 is correct, particularly in light of the fact that the parties agreed to arbitrate questions of arbitrability, as well as "any disputes arising out of or relating to the relationship created by the [Contractor Agreement.]"

(ER 1:6.) For the reasons discussed below, respectfully, the District Court is correct.

IV. STATEMENT OF THE FACTS

On or about August 7, 2006, Sheer contracted with Swift as an Owner/Operator, the common term for independent contractors in the trucking industry. (SER 1 at ¶ 4; 3-15.) The precise terms of his relationship with Swift were documented in his ICOA, which he signed, and which included an arbitration provision. (SER 1 at ¶ 5; 3-15 generally; 11 at ¶ 24.) Van Dusen entered into an ICOA with Swift on March 3, 2009, which also included an arbitration provision. (SER 1 at ¶ 8; 18-33 generally; 25 at ¶ 24.) By its express terms, the ICOA is explicitly not a "contract of employment."

Both Sheer and Van Dusen agreed to arbitrate all disputes arising out of their independent contractor relationship with Swift. The arbitration provision in both ICOAs is broad in scope and states, in pertinent part:

> 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 Rules of the American Arbitration Association.

(SER 11 at ¶ 24; 25 at ¶ 24) (emphasis added.)

V. SUMMARY OF ARGUMENT

This Appeal should be denied because in accordance with Supreme Court precedent the parties delegated questions of arbitrability, including the Section 1 exception question, to the arbitrator. *Rent-A-Center West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010). Indeed, faced with the exact same argument presented here and citing *Rent-A-Center*, the Eighth Circuit recently concluded that the Section 1 exception "is a threshold question of arbitrability" that the parties can delegate to the arbitrator. *Green v. Supershuttle*, 653 F.3d 766, 769 (8th Cir. 2011). "The standard for demonstrating arbitrability is not high." *Simula Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir. 1999). Whether categorized as a question of

arbitrability or jurisdiction, the Section 1 exception issue was properly delegated to the arbitrator.

Furthermore, granting this Appeal would impermissibly require the District Court to decide the ultimate issue in the case: whether Drivers should be classified as employees or independent contractors. The Supreme Court has repeatedly admonished that courts are not to resolve the merits of the case in determining arbitrability. *AT & T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 649-450 (1986). Similarly, courts are not to decide challenges to the contract as a whole. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Rent-A-Center*, 130 S.Ct. at 2778. In this case, determining whether Drivers' were employees would require an analysis of the contract as a whole, which is prohibited.

Finally, Drivers' argument produces absurd results, including forever preventing arbitration of the employee/independent contractor dispute for transportation workers under the FAA, as well as unduly limiting private parties' rights to agree to arbitration as a method to resolve disputes. Those results are contrary to the federal presumption in favor of arbitration, the language of the FAA and Supreme Court precedent. Accordingly, the Appeal should be denied.

VI. ARGUMENT

A. Law Of The Case.

Contrary to Drivers' argument, the law of the case doctrine does not apply because the prior panel's mandamus decision was based upon the special circumstances of the writ, and not on the merits of the case. *PowerAgent v. Electronic Data Systems*, 358 F.3d 1187, 1190-91 (9th Cir. 2004) ("denial of a mandamus decision usually does not constitute the law of the case, because of the special circumstances on granting such a writ.") Thus, this Court is not constrained by the panel's prior *dicta* statements.[2] Instead the standard of review is *de novo*. *Simula*, 175 F.3d at 719. Although the *Van Dusen* panel suggested that Drivers had the better argument, the panel ultimately stated that it was a close call and it was uncertain whether or not the District Court's interpretation would ultimately withstand appeal. *In Re Van Dusen*, 654 F.3d 838, 846 (9th Cir. 2011). The Panels' acknowledgement that an appeal was likely to follow suggests the panel too believed it was not deciding the underlying matter.

B. The Court May Not Decide The Merits.

The issue certified for appeal is "whether a Section 1 exemption applies

[2] The law of the case doctrine does not apply to *dicta*. *See, e.g., Trent v. Valley Elec. Ass'n, Inc.*, 195 F.3d 534, 537 (9th Cir. 1999) (finding doctrine did not apply to the prior panel's statement that the "evidence would seem to compel a judgment in her favor" because the statement was *dicta* and not a decision on the merits).

where that question raises disputed facts going to the merits of plaintiffs' claims." It is well-established that "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT & T Techs.*, 475 U.S. at 650.[3] However, that is exactly what would occur here if the court determines the applicability of the Section 1 exemption. Drivers admit that the "only dispute regarding the application of the exemption is whether [Drivers] were in fact employees of the Defendants." (Drivers' Brief at 3.) This question is inseparable from the underlying merits. The Supreme Court has declared that in deciding whether to compel arbitration the courts may not rule on the merits and Drivers' request to violate that rule should be denied.

C. The Section 1 Exception Question – Whether It Is Phrased As A Question Of Arbitrability Or Jurisdiction – Was Delegated To The Arbitrator.

1. Questions Of Arbitrability May Be Delegated To The Arbitrator Because Arbitration Is A Matter Of Contract.

Whether an agreement to arbitrate is enforceable within the scope of the FAA is a "threshold" or "gateway" issue that may be delegated to the arbitrator. *Rent-A-Center*, 130 S.Ct. at 2777. ("We have recognized that parties can agree to

[3] The *Van Dusen* panel recognized this long-standing rule, but did not address it. "We acknowledge, however, that the law's repeated admonishments that district courts refrain from addressing the merits of an underlying dispute can be read to favor the District Court's decision." *In Re Van Dusen*, 654 F.3d at 846.

arbitrate "gateway" questions of "arbitrability") (citing *Howsam v. Dean Witter Reynolds,* 537 U.S. 79, 83-85 (2002); *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444, 452 (2003) (plurality opinion). The Supreme Court explained that: "This line of cases merely reflects the principle that arbitration is a matter of contract." *Rent-A-Center*, 130 S.Ct at 2777 (citing *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943 (1995)). The Supreme Court has repeatedly stated that courts must "rigorously enforce" arbitration agreements according to their terms because arbitration is a matter of "consent not coercion." *Volt Info. Sciences v. Bd. of Trustees,* 489 U.S. 468, 479 (1989). Parties are "free to structure their arbitration agreements as they see fit" and courts must "give effect to the contractual rights and expectations of the parties." *Id.* For example, where the parties have stipulated that the contract involves interstate commerce, "the court must, and will, enforce the stipulation and apply the FAA to the arbitration agreement" without further inquiry. *Staples v. The Money Tree, Inc.,* 936 F. Supp. 856, 858 (M.D.Ala. 1996). As the Supreme Court explained:

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.

United Steelworkers of America, v. American Manufacturing Co. 363 U.S. 564, 567-68 (1960). Thus, the court's function on a motion to compel arbitration is to interpret the contract "on its face" to determine whether the parties agreed that the arbitrator decide the disputed issue. Here, at the time of contracting, the parties expressly agreed to delegate issues of "arbitrability" including disputes regarding the Section 1 exception.

2. The Section 1 Exception Is A Question Of Arbitrability.

The Supreme Court defines "questions of arbitrability" as "whether the parties have submitted a particular dispute to arbitration." *Howsam*, 537 U.S. at 83. "Arbitrability" encompasses "threshold" or "gateway" issues regarding whether a matter can be arbitrated. *Rent-A-Center*, 130 S.Ct. at 2777. Stated another way, questions of arbitrability decide which forum, court or arbitrator, has jurisdiction to hear the merits of the dispute.

The Section 1 exception is a gateway question of arbitrability. The question for the court is simply: Did the parties agree to have an arbitrator decide whether the ICOA is a contract of employment? The answer, as already decided by the District Court, is emphatically "yes."

The analysis is no different than the unconscionability argument addressed in *Rent-A-Center*, which the Supreme Court held could be delegated. In *Rent-A-Center* the plaintiff argued that the arbitration agreement was unconscionable and

that the court must first decide the unconscionability argument before it could compel arbitration. If the arbitration agreement was unconscionable it would be void and there would be no arbitration agreement from which to compel arbitration. Thus, deciding whether the arbitration agreement was unconscionable would determine which forum had jurisdiction to hear the underlying dispute. The Supreme Court held that whether the arbitration agreement was unconscionable was a question of arbitrability and, as such, it could be delegated to the arbitrator.

3. The Parties Delegated The Section 1 Exception Question To The Arbitrator.

The starting point is that arbitrability, is "an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise." *Howsam*, 537 U.S. at 83. However, "[p]arties are free to contract around this default rule by assigning the determination of arbitrability to an arbitrator." *Anderson v. Pitney Bowes, Inc.*, 2005 WL 1048700, *2 (N.D. Cal. May 4, 2005) (citing *AT&T Techs.*, 475 U.S. at 649 and *First Options*, 514 U.S. at 944). That is the purpose of a delegation clause: "The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement." *Rent-A-Center*, 130 S.Ct. at 2777. That is exactly what the parties did here.

It is undisputed that a delegation clause exists and that it covers the dispute at issue. The parties' arbitration clause expressly states that "arbitrability of

disputes" and "disputes arising out of or relating to the relationship created by the Agreement" are delegated to the arbitrator. (SER 1 at ¶¶ 5, 8; 11 at ¶ 24; 25 at ¶ 24, emphasis added.) Thus, the District Court was correct to compel arbitration of the Section 1 exception because it involves the question of what relationship was created by the ICOA. Drivers do not cite a single case in support of their proposition that the court may determine this question of arbitrability when the underlying contract unquestionably empowers an arbitrator with this authority.[4]

4. The Parties Expressly Delegated Jurisdiction.[5]

In addition to delegating issues of arbitrability, the parties also expressly delegated questions of jurisdiction. They did this in three ways, by delegating: 1) "arbitrability" (which includes jurisdiction); 2) disputes related to federal statues; and 3) by incorporating the AAA Commercial Rules.

The rule in the Ninth Circuit is that jurisdiction is a question of arbitrability. Recently in *Fadal Machining Centers v. Compumachine*, No. 10-55719, 2011 WL 6254979 (9th Cir. Dec. 15, 2011) the court was confronted with a similar issue

[4] Arizona Courts take the same approach to arbitrability: "who decides arbitrability is like any other contract interpretation question: it depends on what the parties agreed to." *Wages v. Smith Barney Harris Upham & Co.*, 188 Ariz. 525, 529-530 (Ariz. App. 1997).

[5] The *Van Dusen* panel treated the parties' dispute regarding the Section 1 exception as one of jurisdiction by stating that the parties could not "confer authority" on the District Court to compel the Section 1 dispute to arbitration. 654 F.3d at 844.

regarding the arbitrability of the District Court's jurisdiction. In that matter, the Court held "the arbitration clause clearly and unmistakably delegated the question of arbitrability to the arbitrator" by the parties' incorporation of AAA Commercial Rules, which provide that "'[t]he arbitrator shall have the power to rule on his or her own jurisdiction.'" (emphasis added). Indeed, the courts have repeatedly stated that jurisdiction is a question of arbitrability and that an arbitrator can be authorized to determine his or her own jurisdiction. *Ariza v. Autonation, Inc*., 317 F. App'x. 662 (9th Cir. 2009); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) ("the arbitration provision's incorporation of the AAA Rules … constitutes a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator."); *Green*, 653 F.3d 766 (same); *Anderson*, 2005 WL 1048700 at *2-3 ("There is a presumption that the parties did not agree to submit questions regarding the arbitrator's jurisdiction to that same arbitrator. … However, if the parties "clearly and unmistakably" empowered an arbitrator to determine arbitrability, the Court must compel arbitration of the gateway issues as well." (citing *AT&T Techs.,* 475 U.S. at 649) (emphasis added)).[6] Thus, where "arbitrability" has been delegated to the arbitrator, as it was here, the arbitrator decides jurisdiction by determining whether there is an enforceable arbitration

[6] The AAA Rules are also valid and enforceable under Arizona law. *Harrington v. Pulte Home Corp.*, 1119 P.2d 1044 (Ariz. App. 2006).

agreement within the scope of the FAA.

If there was any doubt that delegating "arbitrability" was sufficient to delegate jurisdiction, the parties clearly and unmistakably evinced their intention to grant the arbitrator the authority to determine jurisdictional questions, including the Section 1 exception, by incorporating the American Arbitration Association ("AAA") Commercial Rules into their arbitration agreement.[7] (SER 1 at ¶¶ 5, 8; 11 at ¶ 24; 25 at ¶ 24.)

Finally, by also delegating "disputes arising under or relating to any state or federal … statutes" the parties expressly delegated the Section 1 exception, which is a dispute related to the application of a federal statute.

5. The Only Cases That Have Dealt Directly With The Section 1 Exception (Where Arbitrability Was Delegated) Have Held That It Is A Threshold Question Of Arbitrability And Have Compelled Arbitration.

In *Green*, 653 F.3d 766, the Eighth Circuit recently decided the exact issue presented by this Appeal and held:

> Application of the FAA's transportation worker exception is a threshold question of arbitrability. . . . Parties can agree to have arbitrators decide threshold questions of arbitrability.

Green, 653 F.3d at 769 (citing *Rent-A-Center*, 130 S.Ct. at 2777).

[7] Rule 7 of the AAA's Commercial Rules provides: "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." (emphasis added).

Green is factually and legally very similar to the instant case. In *Green,* drivers asserted that they were misclassified as franchisees rather than employees. The drivers argued the district court lacked jurisdiction to compel arbitration because Section 1 of the FAA exempts transportation workers. *Id.* at 769. The Eighth Circuit rejected that argument and reasoned that because the parties specifically incorporated the AAA Rules, which provide "that an arbitrator has the power to determine his or her own jurisdiction over a controversy" "the parties agreed to allow the arbitrator to determine threshold questions of arbitrability." *Id.* at 769. Equating jurisdiction with arbitrability, the Eighth Circuit concluded:

> Green therefore agreed to have the arbitrator decide whether the FAA's transportation worker exemption applied, and thus the district court did not err in granting the motion to compel arbitration.

Green, 653 F.3d at 769.

The Eighth Circuit also took the additional step and analyzed how the case may progress depending on what the arbitrator could decide:

> In this case, it is not clear all of the contested issues between the parties will be resolved by arbitration. The arbitrator may very well determine the transportation worker exemption applies. If such happens, Green and the other drivers may be prejudiced by the dismissal of the district court action because the statute of limitations may run and bar them from refiling complaints in state or federal court.

Id. at 770.

Thus, the Eighth Circuit held that it was appropriate to stay the action pending completion of the arbitration to protect the plaintiff. That is exactly what the Arizona District Court did in this case when it stayed the proceedings and referred the Section 1 exception question to the arbitrator.

The same result was also reached in *Reid v. SuperShuttle International, Inc*., No. 08-CV-4854 (JG) (VVP) (E.D.N.Y. Mar. 22, 2010) (order granting in part motion to compel arbitration and dismiss). Based on the same facts as *Green*, the District Court compelled arbitration because the arbitration agreement governed all aspects of the plaintiffs' relationship with defendant, "including their claims that they were employees rather than independent contractors." *Id.* at *10.

These cases demonstrate the broad applicability of the rule espoused in *Rent-A-Center* and a resulting consensus that the arbitrator should decide the Section 1 exception issue when it has been delegated. Indeed, Swift is unaware of any case, and Drivers cite to none, where the Section 1 exception issue was decided by the court in circumstances where arbitrability or jurisdiction was delegated to the arbitrator as is the case here.

D. The Arbitrator Must Decide The Dispute Because It Is A Challenge To The Contract As A Whole.

A further independent reason to compel arbitration of the Section 1 exception is because Drivers challenge the ICOA as a whole. *Prima Paint*, 388

U.S. 395 (allegation that contract was fraudulently induced was issue for arbitrator to decide as it went to contract as a whole). As the dissent described in *Rent-A-Center*, this rule necessarily results in a concept that can be difficult to accept:

> The notion that a party may be bound by an arbitration clause in a contract that is nevertheless invalid may be difficult for a lawyer – or any person – to accept, but this is the law of *Prima Paint*.

130 S.Ct. at 2787.[8] Stated another way, the "cart is put before the horse" – because if the arbitrator finds that the contract is void, the contract never existed and the court never had authority to compel arbitration. The dissent in *Prima Paint* disagreed with the majority's ruling for that very reason: "If there has never been any valid contract, then there is not now and never has been anything to arbitrate." 388 U.S. at 425. However, the law of *Prima Paint* mandates that the arbitrator first decides this issue: "It is true. . . that the *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void." *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 448-449 (2006). This principle was recently confirmed by the Supreme Court in *Rent-A-Center*: "Section 2 operates on the specific 'written provision' to 'settle by arbitration a

[8] "It reflects a judgment that the 'national policy favoring arbitration' outweighs the interest in preserving a judicial forum for questions of arbitrability – but only when questions of arbitrability are bound up in the underlying dispute. When the two are so bound up, there is actually no gateway matter at all: The question "Who decides" is the entire ball game." *Rent-A-Center,* 130 S.Ct. at 2787-2788.

controversy' that the party seeks to enforce. Accordingly, unless [plaintiff] challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator." 130 S.Ct. at 2779.

Drivers' challenge is to the contract as a whole because, now, after working for Swift as independent contractors and presumably not satisfied with their inability to profit as independent business owners, they argue they were illegally and fraudulently classified as independent contractors and instead should have been classified as employees. Regardless of how they now characterize the relationship, that does not change that at the time of contract formation, both the Drivers and Swift agreed that they were entering into an independent contractor relationship and agreed to arbitrate all disputes arising out of that relationship. It is well settled that contracts are interpreted with respect to the parties' intention at the time they signed the agreement. *Malad v. Miller*, 219 Ariz. 368, 372 (Ariz. Ct. App. 2008) ("We interpret a contract based on the parties' intent upon entering the agreement, not their intent after the fact"). Given that at the time of contract formation, all parties agreed that Drivers would be independent contractors under the ICOA, the only way for Drivers to overcome this conclusion is to challenge the legitimacy of the independent contractor agreement as a whole. As the District Court ruled: "the question of whether an employer-employee relationship existed

would require analysis of the ICOAs as a whole." (ER 1:36.) Therefore, distinct from the question of arbitrability, under the *Prima Paint* rule, which requires challenges to a contract as a whole be determined by an arbitrator, an arbitrator must decide the Section 1 exception question of whether the ICOA is a contract of employment.

E. Drivers' Argument Is Not Supported By Any Authority And Produces Absurd Results.

1. The Issue Of Who Should Decide Arbitrability Turns On What The Parties Agreed To In Their Contract.

Drivers conflate two separate issues: 1) *who* decides arbitrability; and 2) *whether* a dispute is actually arbitrable. "The dispositive issue is *who* should decide arbitrability: the Court or an arbitrator." *Anderson*, 2005 WL 1048700 at *2. As the Supreme Court has commented, "the answer to the "who" question [ ] is fairly simple." *First Options*, 514 U.S. at 943.

> Just as the arbitrability of the merits of a dispute depends on whether the parties agreed to arbitrate that dispute [ ], so the question "who has the primary power to decide arbitrability" turns upon what the parties agreed about *that* matter.

If there is a dispute over *who* decides, the court must determine if the parties unambiguously vested this authority with an arbitrator.

> When a court concludes that the parties clearly empowered an arbitrator with this decision, … it would defy logic, tread on the prerogative of the arbitrator, and deprive the parties of their

> contract if a court were then to turn around and decide this very issue itself.

Anderson, 2005 WL 1048700 at *4 (citing *United Steelworkers of America*, 363 U.S. at 567-68 and *AT & T Techs*, 475 U.S. at 649-50).

However, Drivers ask the court to ignore the terms of the parties' agreement and skip the question of *who* decides arbitrability. Contrary to Drivers' position, the court does not have authority to decide the Section 1 exception because to do so would ignore the clear language of the ICOA and Supreme Court precedent. Such an argument would impermissibly allow the court to decide the merits before reaching a decision on whether it has jurisdiction over the dispute to begin with; violate the rule that challenges to the contract as a whole must go to the arbitrator; disregard the parties' express delegation clause; and would be contrary to the principle that the FAA favors arbitration.[9] The Drivers' argument also ignores Ninth Circuit law that holds parties can delegate questions of jurisdiction by incorporating the AAA Rules. Drivers do not dispute any of these issues.

2. *Bernhardt* Is Not Controlling Because It Did Not Address The Question Of What Issues May Be Delegated To An Arbitrator.

Drivers' rely primarily on *Bernhardt v. Polygraphic Co. of America,* 350 U.S. 198 (1956)**,** a fifty-year old case, to support their argument that the Section 1

[9] The FAA is a "congressional declaration of a liberal policy favoring arbitration agreements." *Moses H. Cone Mem. Hosp. v. Mercury Construction Corp.,* 460 U.S. 1, 24 (1983).

exception question cannot be delegated. *Bernhardt* is old law that is inapplicable in the modern arbitration context. "The law of arbitrability was nascent in 1956 and has evolved and maturated extant." *Thornton v. Trident Medical Center, L.L.C.*, 357 S.C. 91, 98 (S.C. App. 2003). Indeed, *Bernhardt* itself recognized that "law does change with times and circumstances." 350 U.S. at 209. Notably, none of the recent Supreme Court cases analyzing arbitration agreements even mention *Bernhardt*. *See AT&T Techs*, 475 U.S. 643; *First Options*, 514 U.S. 938; *Howsam*, 537 U.S. 79; *Green Tree Financial*, 539 U.S. 444; *Buckeye*, 546 U.S. 440; *Rent-A-Center*, 130 S.Ct. 2772; *Granite Rock Co. v. Intl. Bro. of Teamsters*, 130 S.Ct. 2847 (2010); *Stolt Neilsen v. Animalfeeds Int'l. Corp.*, 130 S.Ct. 1758 (2010); *AT&T Mobility LLC v. Concepcion,* 131 S.Ct. 1740 (2011).[10] The reason why *Bernhardt* is not cited in any of these Supreme Court cases is because *Bernhardt* did not involve a delegation issue.[11]

The same is true of the other cases cited by Drivers. There was no delegation clause in *Prima Paint,* 388 U.S. 395*; Harden v. Roadway Package Sys., Inc.*, 249 F.3d 1137 (9th Cir. 2001)*;* or *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469 (9th Cir. 1991). Thus, Drivers' cases are inapposite because

[10] *Green*, 653 F.3d 766, also did not cite to *Bernhardt*.
[11] The law regarding the parties' ability to delegate issues of arbitrability has evolved exponentially over the past 50 years so that *Bernhardt* is inapposite.

they did not address the question of *who* (arbitrator or court) should decide the Section 1 exception issue when that issue has been delegated to the arbitrator. It is undisputed that a court decides issues that have not been delegated to the arbitrator. *Howsam*, 537 U.S. at 83 (arbitrability, is "an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise."). Thus, in the absence of a delegation provision, the question of *who* decides the Section 1 exception issue is moot: the court decides because the parties did not clearly and unmistakably provide otherwise.[12] Drivers' fail to cite a single case that stands for the proposition that jurisdiction of the court cannot be delegated to an arbitrator—that is because no such case exists.

Moreover, *Bernhardt* expressly did not reach the Section 1 exception. 350 U.S. at 201. Rather, *Bernhardt* overturned the Appeals Court because it erroneously concluded that Section 3 of the FAA covered "all arbitration agreements" even though there was no evidence that the agreement in question involved interstate commerce. The Appeals Court did not delegate the issue to the arbitrator to decide. Instead, the commerce requirement was ignored completely. The extent of *Bernhardt's* holding is that interstate commerce must be engaged for

[12] The exception to this rule is where a determination of the merits is required. In *Bernhardt* and *Prima Paint*, deciding threshold issues under Sections 1 and 2 did not determine the merits.

the FAA to apply. *Bernhardt* did not address *who* should decide that question and thus, *Bernhardt* does not inform the present analysis.[13]

3. *Rent-A-Center* Is Controlling – Jurisdiction Can Be Delegated.

Despite the Supreme Court's ruling in *Rent-A-Center,* Drivers argue that the court lacks jurisdiction to compel arbitration until it has decided whether the ICOA is exempt under Section 1. However, under Drivers' theory, the court would also be required to first determine the unconscionability argument in *Rent-A-Center* because if no valid arbitration agreement exists the court lacks jurisdiction to compel arbitration. By contrast the Section 1 exception asks the more limited question regarding the type of contract that was created. Because the question of whether a contract exists at all can be delegated, the more narrow question of the type of contract that exists certainly can be as well.

4. There Is No Reason, And No Authority, To Interpret Section 1 Differently Than Sections 2-4.

Section 2 of the FAA provides that "a contract … to settle by arbitration a controversy thereafter arising … shall be valid, irrevocable, and enforceable." The Supreme Court has ruled that the question of whether a Section 2 controversy is covered by an arbitration agreement can be delegated to the arbitrator. *Rent-A-Center*, 130 S.Ct. at 5-6 (citing § 2, finding parties' "'written provision[s]' to 'settle

[13] The 9th Circuit in *Harden* also did not address this issue because it refused to consider the Section 1 argument because it was raised for the first time on appeal.

by arbitration a controversy'" delegated "controversy" of whether arbitration agreement was unconscionable to the arbitrator). Similarly, Section 3 of the FAA provides that "the court" must first be satisfied that the issue involved is referable to arbitration under the arbitration agreement before it may act.[14] Despite this clear language stating that "the court" must first decide this issue, it is undisputed that whether a dispute is within the scope of the agreement can be delegated. *First Options*, 514 U.S. at 943 ("[j]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute . . . who has the primary power to decide arbitrability" turns upon what the parties agreed.")

By contrast, Section 1 does not mandate that the court must first decide anything. Given that Sections 1-4 are to be read together as an "integrated whole" it is illogical that Section 1 cannot also be delegated. There is no authority to support treating these integrated sections by different standards.

5. Delegation Clauses Require The Arbitrator To Determine Which Forum Should Decide The Underlying Dispute.

The *Van Dusen* panel's objection to delegating the Section 1 exception was that it "puts the cart before the horse." 654 F.3d at 844. However, delegation

[14] *See, e.g., EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (citing sections 3 and 4, stating that "the language of the contract defines the scope of disputes subject to arbitration," and "nothing in the statute authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement.").

clauses always "put the cart before the horse" because they require the court to compel arbitration in circumstances where ultimately the court may not have had authority to do so. That is the very purpose of delegation clauses. *Rent-A-Center* addressed that exact issue. In *Rent-A-Center* the arbitrator was asked to determine if a valid arbitration agreement existed or if the parties' agreement was unconscionable. If the arbitration agreement was unconscionable, the court would have no authority to compel arbitration. Thus, in *Rent-A-Center,* the parties invoked the authority of the FAA to decide the question of *whether the parties could invoke the authority of the FAA*. As noted by the dissent in *Rent-A-Center*, this may be "difficult to accept" but it springs from the fact that arbitration is a matter of contract. 130 S.Ct. at 2776. Here, arbitrability and jurisdiction were delegated to the arbitrator. No case, including *Bernhardt*, says that the parties cannot do that. The Supreme Court cases hold the opposite and that is why they do not cite to *Bernhardt*.

The fact is, whenever the court compels arbitration of a threshold issue, whether the court actually had authority to do so is unknown until the arbitrator has decided the threshold issue. For example, in *Prima Paint*, if the arbitrator holds that the agreement was fraudulently induced, at the very moment he makes that decision, he also effectively rules that the court never had jurisdiction to compel arbitration in the first place – because there was no valid agreement. The same

result is reached in *Buckeye*; if the arbitrator holds that the contract was illegal, there was never any basis for the court to order the parties to arbitration. In these situations, the "cart is before the horse" and the arbitrator gets to decide even though the court may not have had authority to compel arbitration in the first place. The reason for this is simple: the strong public policy favoring arbitration. *Simula*, 175 F.3d at 719 ("[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.") (quoting *Moses H. Cone*, 460 U.S. at 24-25).

6. Drivers' Theory Produces Absurd Results.

The Court has a duty to construe statutes to avoid absurd results. *In Re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 693 (9th Cir. 2011). Drivers' position is that before compelling arbitration, the court must always decide any dispute as to whether an employee or independent contractor relationship existed. This would mean that parties involved in interstate commerce could never agree to arbitrate issues related to employment status because the court would always decide that issue. In a statutory framework strongly favoring arbitration that cannot be the intended outcome. *Simula*, 175 F.3d at 719 ("The FAA embodies a clear federal policy in favor of arbitration.)

Additionally, according to Drivers, whether a dispute is referable to arbitration changes depending on the particular facts of each individual's relationship with the putative employer at the time of the dispute – despite the fact

that the terms of the contract never change. Drivers' conclusion would result in identical terms in identical contracts being interpreted differently and their underlying disputes handled in different forums. Those individuals who were found to be independent contractors would be compelled to arbitration and those with an employment relationship would not (although there would be nothing left to decide since the merits of the dispute turns on whether Drivers were properly classified as independent contractors).[15] This result is absurd because the court's role is one of contract interpretation – different results should not be produced by identical terms in identical contracts. *Samson v. NAMA Holdings*, 637 F.3d 915, 929-931 (9th Cir. 2011) (interpreting identical terms consistently in settlement and operating agreements signed by plaintiffs in ruling on motion to compel arbitration). The only way to avoid the conundrum caused by Drivers' argument is to conclude that Drivers' are wrong.

F. The Only Inquiry For The Court Is Whether A Contract Was Formed.

Drivers argue that before the District Court can compel arbitration it must first decide the Section 1 exception by conducting a class action and full trial of the

[15] Arbitrators are bound by prior federal court decisions under the doctrines of collateral estoppel and *res judicata*. *See Aircraft Braking Systems Corp. v. Local 856*, 97 F.3d 155 (9th Cir. 1996) (court vacated arbitration decision where arbitrator found there was no enforceable agreement to arbitrate and stated the district court's prior order to the contrary was "not binding upon this arbitrator").

merits of the underlying dispute. However, neither the FAA or any case permits such a trial. Rather, the FAA provides only for summary trials related to the "making" of the arbitration agreement. 9 U.S.C. § 4. The FAA's legislative history establishes that the word "making" refers to the physical execution of a "paper." Arb. of Interstate Comm. Disputes: Joint Hrgs. on S. 1005 and H.R. 646 before Senate & House Subcomm. of the Comms. on the Jud., 68th Cong., at 17 (1924). Case law confirms this legislative intent.[16] Thus, the FAA sanctions summary trials only to determine if a contract was made, not if the contract was one of employment. Here, there is no dispute that a contract was made or that it was signed. Instead, the dispute is over whether Drivers' are employees or independent contractors. That is a question for the arbitrator.

VII. CONCLUSION

The Section 1 exception is a question of arbitrability that has been delegated to the arbitrator. Whether labeled as a question of arbitrability or one of jurisdiction, arbitrators are permitted to determine their own jurisdiction – where

[16] *See Deputy v. Lehman Bros.*, 345 F.3d 494 (7th Cir. 2003) (summary trial only to determine validity of signature on arbitration agreement); *Chastain v. Robinson-Humphrey Co., Inc.*, 957 F.2d 851 (11th Cir. 1992) (trial on issue of whether an arbitration agreement was formed); *T&R Enterprises v. Continental Grain Co.*, 613 F.2d 1272 (5th Cir. 1980) (refusing to grant a section 4 trial where contracts containing arbitration clauses were signed by both parties, thus the existence of an arbitration agreement was not "in issue.").

that question has been delegated as is the case here. To accept Drivers' argument requires the court to violate the rule against deciding the underlying merits of the dispute and the *Prima Paint* rule regarding challenges to the contract as a whole. It also produces absurd results and contradicts the federal policy favoring arbitration.

For all the foregoing reasons, Drivers' Appeal should be denied.

Dated: April 16, 2012

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, I certify that Defendants-Appellees' Answering Brief is proportionately spaced, has a typeface of 14 points, and contains 6,203 words.

Dated: April 16, 2012

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STATEMENT OF RELATED CASES

Defendants-Appellees' are aware of the following related case pending before this Court:

Michael Sanders v. Swift Transportation Company, et. al., Ninth Circuit Case Number 12-15329 (on appeal from the U.S. District Court for Northern California, D.C. No. 3:10-cv-03739-NC).

s/Ronald J. Holland

ADDENDUM

American Arbitration Association, Commercial Arbitration Rules

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on this 16th day of April 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellant CM/ECF system.

I further certify that on this 16th day of April 2012, I caused to be delivered via hand service, a copy of Defendants-Appellees' Answering Brief and Addendum to:

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