No. 17-15102

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA VAN DUSEN et. al.,
Plaintiffs –Appellees

v.

SWIFT TRANSPORTATION CO., INC., et. al.,
Defendants –Appellants

On Appeal from the United States District Court
for the District of Arizona, Case No. CV 10-899-PHX-JWS
Judge John W. Sedwick

APPELLEES' ANSWERING BRIEF

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INTRODUCTION

This Court directed the district court to determine whether the contracts of the truck driver Plaintiffs ("Drivers") are exempt from the Federal Arbitration Act (FAA) under Section 1, which states "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. The district court found that the Contractor Agreement and Lease signed by the Drivers together formed a "contract of employment" that was exempt under §1; alternatively, it found that the Contractor Agreement alone, when clarified by extrinsic evidence, constituted an exempt contract of employment. Swift does not challenge the fact that the documents, singly or together, made the Drivers employees. Its appeal merely argues that the court should not have interpreted the Contractor Agreement and Lease together, or, alternatively, should not have clarified the meaning of the Contractor Agreement with extrinsic evidence.

Swift's appeal should be denied for several reasons. First, Swift violated Circuit Rule 30-1.4 by filing a deficient and misleading record designed to preclude review of the documents cited by the district court and to obfuscate the fact that the Drivers' Contractor Agreements and Leases referred to each other and were frequently paginated together as a single contract.

Second, Swift invited the alleged errors it raises on appeal and thus waived those "errors." Swift never argued in its summary judgment papers, as it does on appeal, that the district court should have examined the Contractor Agreement in isolation, nor did it ever explain how doing so would result in a finding that the Drivers were not exempt under §1. Instead, it urged the court to resolve the §1 issue based on a combination of the Lease, the Contractor Agreement, and extrinsic evidence. Having done so, it cannot now complain that the district court did what it requested.

Third, if the appeal is not dismissed for the above reasons, the district court's opinion should be affirmed because its finding that the Contractor Agreement and Lease together formed a "contract of employment" was supported by substantial evidence. The court found that the two instruments "were entwined and clearly designed to operate in conjunction . . ." 1 Excerpts of Record ("EOR") at 23, and that both contained terms and conditions of employment. *Id.* at 25. In addition the two documents were paginated consecutively as a single contract and the Contractor Agreement's integration clause incorporated the Lease as part of the Agreement. Given those facts, the court's conclusion that the two documents together formed the contract was not clearly erroneous. Even if it were, the district court's decision to construe the Contractor Agreement in light of the Lease was

legally correct because Arizona contract law requires documents signed contemporaneously as part of a single transaction to be construed together.

Fourth, the district court's alternative basis for finding the Contractor Agreement exempt, which relied upon extrinsic evidence to clarify terms of the Agreement, was also legally correct. Contrary to Swift's view, consideration of extrinsic evidence is permissible under Arizona law to determine the parties' intentions at the time of signing and reference to such evidence does not mean that the court interpreted the relationship "as it developed." Swift's additional argument that consideration of extrinsic evidence is improper because it involves the court in deciding the merits of an arbitration case has been rejected by this Court and the Supreme Court. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 209 (1991) (court's duty to decide whether case is arbitrable trumps the duty not to avoid reaching the merits).

Fifth, the district court's order should also be affirmed because, as the First Circuit recently held, the term "contracts of employment" as used in the FAA §1 refers to all work agreements of transportation workers without regard to the status of the worker as an employee or independent contractor. *Oliveira v. New Prime, Inc.*, 857 F.3d 7, 15-24 (1st Cir. 2017). Under that construction of the term "contracts of employment," the district court's order finding the Drivers exempt

under §1 must be affirmed whether or not the district court's approaches to determining that Plaintiffs were common-law employees were proper.

STATEMENT OF JURISDICTION

The Drivers agree with Appellants' statement of jurisdiction.

STATEMENT OF THE ISSUES ON APPEAL

Swift's "issue on appeal" wrongly states that the district court "refus[ed]" to follow this Court's instructions. The court did no such thing. Swift's actual issues on appeal are quite narrow:

1. Did the district court err in construing the Contractor Agreement and the Lease together to determine the complete terms and conditions of the working arrangement when both documents were signed contemporaneously as part of a single transaction, were explicitly intertwined and designed to operate in conjunction with each other, and were, in many instances, paginated consecutively as a single contract.

2. Alternatively, did the district court err in following Arizona law by considering extrinsic evidence to interpret the Contractor Agreement.

The Drivers' Brief presents three additional issues:

3. Should Swift's deliberate failure to comply with Circuit Rule 30-1.4, including its intentional omission of documents relied upon by the district court

and critical to review of the issues on appeal, result in the dismissal of their appeal or other sanctions.

4. Did Swift waive the alleged errors at issue in this appeal by inviting the district court to resolve the §1 issue by considering the Contractor Agreement, the Lease and extrinsic evidence, by failing to argue on summary judgment that the court should analyze the Contractor Agreement terms in isolation, and by failing to argue how such an analysis would resolve the §1 exemption issue in its favor.

5. Regardless of the district court's interpretation of the Contractor Agreement, should its finding that the Contractor Agreement is a "contract of employment" be affirmed on the grounds that, when the FAA was adopted, the term "contract of employment" referred to work agreements of both common law employees and independent contractors.

STATEMENT OF THE CASE

Plaintiffs are interstate truck drivers who began working for Swift Transportation Co. by signing a hiring package that consisted of two documents: a "Lease" by which each Driver obtained a truck from Interstate Equipment Leasing ("IEL"), and a "Contractor Agreement" by which each Driver agreed to drive the leased truck for Swift Transportation Co. 1 EOR 25. IEL is a wholly-owned subsidiary of Swift Transportation Co. that is publicly traded as part of the Swift

umbrella of companies.[1] *Id*. The Lease and the Contractor Agreement were both drafted by Swift's attorneys,[2] and were often paginated together as a single contract with the same person signing on behalf of IEL and Swift.[3] Moreover, the Lease was explicitly conditioned on the Driver signing the Contractor Agreement. SER 441, 444; 552, 555. Lease ¶¶2(e), 12(g).

The Drivers' complaint alleged violations of both the Lease and the Contractor Agreement. 2 EOR 158-187. Swift moved to compel arbitration of all claims based on the arbitration provision in the Contractor Agreement portion of the hiring package arguing that the Lease was "ancillary" to the Contractor Agreement. 2:10-cv-00899-JWS Doc 128 at 12-13. The Drivers opposed that motion on the grounds that they were employees of Swift exempt from the Federal Arbitration Act ("FAA"), pursuant to §1 (exempting from the Act "contracts of employment" of transportation workers) and from the Arizona Arbitration Act

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[1] *See* Supplemental Excerpts of the Record ("SER") 92 (Fact 2).

[2] *See* SER 93 (Fact 73).

[3] *See* SER 441-501 (Van Dusen Lease and Contractor Agreement numbered 3 of 63 through 63 of 63); SER 519-550 (Motolinia Lease and Contractor Agreement numbered 3 of 57 through 34 of 57 (35-57 were never produced by Swift)); SER 552-596 (Schwalm Lease and Contractor Agreement paginated 3 of 64 through 46 of 64 (47-64 of 64 were never produced by Swift)). In many instances the same person, Chad Killibrew, signed the Lease on behalf of IEL and the Contractor Agreement on behalf of Swift Transportation. *Compare* SER 533 *with* 543; SER 586 *with* 592; SER 640 *with* 650.

("AAA") pursuant to A.R.S. §12-1517 (exempting arbitration agreements between "employers and employees."). 2:10-cv-00899-JWS Doc 188. The district court ordered arbitration leaving it to the arbitrator to decide the exemption questions. 2:10-cv-00899-JWS Doc 223. After a petition for mandamus, *In re Van Dusen, ("Van Dusen I")*, 654 F.3d 838 (9th Cir. 2011), and an appeal, *Van Dusen v. Swift Transportation Co., Inc. ("Van Dusen II")*, 544 Fed.Appx 724 (9th Cir. 2013), this Court held that the district court had a duty to decide the exemption questions before it could rely on the FAA or the AAA to compel arbitration.

On remand, the district court entered a scheduling order consistent with the FAA §4 and the Arizona Arbitration Act which provided for discovery, dispositive motions, and, if necessary, a trial to resolve the FAA and AAA exemption issues.[4]

[4] FAA §4 provides in relevant part that "[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to trial thereof." This Court previously held that the "arbitration agreement" referred to in §4 refers to "the kind of agreement which §§1 and 2 [of the FAA] have brought under federal regulation." *Van Dusen I,* 654 F.3d at 844, *quoting Bernhardt v. PolyGraphic Co. of Am.*, 350 U.S. 198, 201 (1956). Thus, where, as here, there is a dispute as to whether an agreement to arbitrate falls within §1, the district court is authorized by §4 to proceed summarily to a trial of that question. Discovery is appropriate in §4 proceedings. *See Simula Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999) ("The FAA provides for discovery and a full trial in connection with a motion to compel arbitration only if the making of an arbitration agreement . . . be in issue."); *Guidotti v. Legal Helpers Debt Resolution, LLC*, 716 F.3d 764, 776 (3d Cir. 2013) (same); *Deputy v. Lehman Bros., Inc.*, 345 F.3d 494, 511 (7th Cir. 2003) (finding that party must be afforded opportunity for discovery on issues to be tried pursuant to FAA §4). Although the Drivers have found no Arizona cases indicating whether discovery is appropriate when the applicability of the AAA is in dispute, other states that, like Arizona,

2:10-cv-00899-JWS Doc 735. Swift appealed and filed a petition for mandamus alleging that the district court's scheduling order improperly allowed discovery and that the §1 exemption question should be decided solely on briefing. The appeal was dismissed for lack of jurisdiction. *Van Dusen v. Swift Transportation Co., Inc.*, (*"Van Dusen III")*, 830 F.3d 893 (9th Cir. 2016). The mandamus petition was also rejected in a *per curiam* opinion by Judges Thomas and Hurwitz that found the scheduling order not to be "clearly erroneous . . . . if, indeed it is an error at all." *In Re Swift Transportation ("Van Dusen IV")*, 830 F.3d 913, 917 (9th Cir. 2016).

Judge Ikuta dissented from the denial of mandamus. In her view, the scheduling order suggested that the district court intended to determine the Drivers' status as employees using the FLSA "economic realities" test set forth in *Real v. Driscoll Strawberry*, 603 F.2d 748, 754 (9th Cir. 1979). *Van Dusen IV*, 830 F.3d at 919. Judge Ikuta noted that the district court was not called upon to address "whether there is an employer-employee relationship between the parties for purposes of the FLSA." *Id.* Rather, the district court "should have first defined 'contract of employment' for purposes of the FAA using standard tools of statutory construction" and then "determined whether the contract includes terms and

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have adopted the Uniform Arbitration Act have held that discovery on the arbitration issue is appropriate. *See Glassman, Edwards, Wyatt, Tuttle & Cox*, 404 S.W.3d 464 (Tenn. 2013) (construing Tennessee arbitration provision identical to A.R.S. §1502A as allowing discovery to resolve arbitrability issue); *Kindred Healthcare, Inc. v. Peckler*, 2006 WL 1360282 at *3-4 (Ky. May 16, 2006) (same, Kentucky arbitration act).

conditions of employment," the definition of employment contract utilized in *Modzelewski v. Resolution Trust Corp.*, 14 F.3d 1374 (9th Cir. 1994). *Id.* at 920. Judge Ikuta thought that this information should be clear "on the face of the contract," but "in no event is there a need to conduct discovery and a trial to consider 'economic realities' of the relationship of the parties to the contract." *Id.*

Although Judge Hurwitz joined the *per curiam* majority opinion, he noted in a separate concurrence that "[i]f this were a direct appeal from a district court order denying Swift's motion to compel arbitration, *I might agree* with Judge Ikuta that the issue before the district court is one of law not requiring discovery."[5] *Id.* at 918 (emphasis added).

While the mandamus petition was pending, the parties completed discovery and filed cross-motions for summary judgment with respect to the §1 issue. SER 1241-1262; 2:10-cv-00899-JWS Docs 752, 758, 764, 769, 771. Neither in its own summary judgment motion nor in opposition to the Drivers' motion did Swift argue that the FAA or the AAA exemption issues should be decided solely on the

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[5] Swift's brief mischaracterizes the mandamus decision, falsely stating that "the majority agreed that the district court erred by ordering merits discovery." Doc 20 at 16. In fact, the *per curiam* opinion, in which Judge Hurwitz joined, was the majority opinion, and it stated that the court's scheduling order is "not clearly erroneous . . . if it is an error at all." *Van Dusen IV*, 830 F.3d at 917. Swift also misrepresents Judge Hurwitz' concurrence by deleting the critical words "I might agree" when it quotes him, leaving the impression that he had definitively agreed with Judge Ikuta. Doc 20 at 16.

face of the Contractor Agreement. *Id.;* SER 32-62. Instead it urged the court to resolve the §1 issue based on the Contractor Agreement, the Lease and extensive extrinsic evidence. [6]

On January 6, 2017, the district court granted the Drivers' motion, finding the arbitration agreement to be part of a contract of employment of transportation workers exempt from the FAA pursuant to §1 and an agreement between "employers and employees" exempt from the AAA pursuant to ARS §12-1517.[7] 1 EOR 25. In reaching that conclusion the district court followed the *Van Dusen IV* opinions. In accord with Judge Ikuta's dissent, the court defined a "contract of employment" for purposes of the FAA as a contract that sets forth "terms and conditions" of work for common-law employees. 1 EOR 13. The court then

[6] The introduction to Swift's opposition to Plaintiff's motion for summary judgment argued that "[u]pon examination of all of the evidence, including Plaintiff's own deposition admissions and the plain language of Plaintiffs' ICOAs and Equipment Leasing Agreements they signed with Defendant [IEL] it is clear that Plaintiffs' were properly classified as independent contractors." SER 37. The introduction to Swift's own motions for summary judgment began similarly. *See, e.g.*, SER 1246-1247 at 1-2 ("As is clear from Schwalm's deposition testimony, as well as the language of her ICOA and Equipment Leasing Agreement she signed with Defendant [IEL] there is no aspect of Schwalm's work as an Owner-Operator that is indicative of an employment relationship and she was properly classified as an independent contractor during her time as an Owner-Operator.").

[7] Swift has not appealed the court's finding that the arbitration agreement in the Contractor Agreement was an "agreement[] between employers and employees" exempt from the Arizona Arbitration Act, A.R.S. §12-1517, and that Act is no longer at issue in this case.

analyzed the terms of the Contractor Agreement in light of the multi-factor test for employee status set forth in *Nationwide Mut. Ins. v. Darden,* 503 U.S. 318, 322-3 (1992).[8] 1 EOR 13 & fn. 30. The court found various provisions weighed in favor of employee status, *id.* at 14-18, and others that weighed in favor of independent contractor status. *Id.* at 18-20. The court found, however, that the terms of the Contractor Agreement "cannot be read in isolation and do not provide the complete terms and conditions of their working arrangement." *Id.* at 20. Instead, the court noted that each Driver "also executed an accompanying IEL lease on the same day as the Contractor Agreement." *Id.* at 20. The district court found that the two documents refer to each other, *id.* at 24 & fn. 62, and that the two "are explicitly entwined and clearly designed to operate in conjunction for those drivers who leased equipment from IEL for the purpose of becoming contract drivers with Swift." *Id.* at 23. The Lease "essentially restrict[s] the purported autonomy allowed in the Contractor Agreements . . ." *Id.* at 25. Moreover,

> [i]t is undisputed that both agreements were presented to Plaintiffs together and were unilaterally drafted by Swift's attorneys. It is also undisputed that IEL is a wholly-owned subsidiary of Swift that is

[8] Swift used this definition in its own motion for summary judgment, *see* SER 1255, in opposition to the Drivers motion, SER 1262, and continues to rely on it on appeal. *See* Doc 20 at 40 (evaluating Contractor Agreement in light of the *Darden* factors). However, as will be seen below, a recent 1st Circuit case makes clear that, properly construed, 'contracts of employment' for purposes of §1 refers to work contracts of both employees and independent contractors, *Oliveira v. New Prime, Inc.*, 857 F.3d 7, 15-24 (1st Cir. 2017), making it unnecessary to determine whether the Drivers were common-law employees or independent contractors.

> publically traded as part of the Swift umbrella of companies, is located at the same location as Swift, and share Swift's computer systems.

Id. at 25. Swift does not challenge any of these findings on appeal. Based upon them, the district court concluded that "the contractual terms and conditions of Plaintiffs' agreements with Swift were set forth in both the Contractor Agreements and the IEL Leases and should be considered together when determining whether Plaintiffs operated under a contract of employment." *Id.* Construing the terms of the two documents together in light of the *Darden* common-law employment factors, the court concluded that the Drivers' work contracts treated them as common-law employees rendering the contracts exempt from arbitration under the FAA and the AAA. 1 EOR at 25.

Having defined and analyzed the contract documents on their face as suggested by Judge Ikuta's dissent, the court then engaged in an alternative analysis of the terms of the Contractor Agreement considering extrinsic evidence to explain certain terms whose significance for the employee/independent contractor inquiry was unclear. 1 EOR at 25-35. For example, while ¶1 of the Contractor Agreement gave Drivers the right to turn down loads, it was unclear whether that provision actually accorded the Drivers meaningful control over their work. Similarly, while ¶5A of the Agreement permitted Drivers to work for other carriers if certain conditions were met, it was unclear whether a driver could

realistically satisfy those conditions. Based on the testimony of Swift's 30(b)(6) witness, the court found that neither provision afforded drivers any independence. As the witness explained, drivers were offered one load at a time and were given no information about other loads so that turning down a load simply risked receiving a worse load or no load at all for some period of time. His testimony also revealed that the conditions set forth in ¶5A posed such significant barriers to driving for other carriers that Swift was unaware of any driver ever having satisfied them. 1 EOR at 27-29, 30-31. The Contractor Agreement was also ambiguous as to the degree of daily control Swift was authorized to exercise. The district court clarified this point by examining Swift policy manuals referenced in the Contractor Agreement (which, properly speaking, are not extrinsic to the Agreement, but are incorporated in it) that made clear the high degree of daily control contemplated by the Contractor Agreement. *Id.* at 26-27. With clarifications such as these, the district court concluded that the terms of the Contractor Agreement made the Drivers common-law employees and the Agreement was, therefore, a contract of employment exempt under §1 of the FAA. *Id.* at 25.

Swift does <u>not</u> challenge the court's conclusion that the Contractor Agreement, when read in light of the Lease (or, alternatively, when clarified by extrinsic evidence) treated the Drivers as common-law employees. Nor does Swift challenge the factual findings that led the court to treat the Lease as part of

the contract of employment or any of the fact inferences it drew from the extrinsic evidence. Swift's only argument on appeal is that Arizona law and this Court's prior opinions precluded consideration of the Lease and/or extrinsic evidence. Its arguments are without merit.

SUMMARY OF THE ARGUMENT

The district court's order denying arbitration should be upheld for five independent reasons:

1. Swift's appeal should be dismissed because it deliberately violated Circuit Rule 30-1.4(a)(x) and (c)(ii) by submitting Record Excerpts that included none of the exhibits relied upon by the district court in its opinion and by submitting incomplete and unrelated versions of the Contractor Agreements and Leases signed by the Drivers that deliberately obscure the fact that those documents referenced each other and were often paginated as a single contract.

2. Swift waived its issues on appeal by failing to argue in its summary judgment briefing that the district court should analyze only the four corners of the Contractor Agreement, and by completely failing to make that analysis. Instead Swift relied on the Contractor Agreement, the Lease, and extrinsic evidence (including testimony by IEL regarding the Lease terms) in an effort to convince the court that the Driver's contract of employment properly classified them as independent contractors. Having pursued a strategy of inviting the district court to

consider the Lease and extrinsic evidence Swift cannot now change positions and argue that the court erred in analyzing the very things urged upon it by Swift. Nor can it fault the district court for failing to take into consideration things, such as the integration clause in the Agreement, that Swift never mentioned to the district court. By deliberately inviting alleged error in this way, Swift has rendered its issues unreviewable and its appeal should be dismissed.

3. The district court determination that the Contractor Agreement and Lease together formed the Drivers' contract of employment was supported by substantial evidence. Both documents were drafted by Swift's attorneys, both referenced and were dependent on each other, both were presented to Drivers as a package and in many cases were paginated together to form a single contract. Both contained terms that the Drivers were expected to comply with as a condition of continued employment and the integration clause in the Contractor Agreement included the Lease as part of the "entire agreement between the parties."

Even if the Contractor Agreement alone were viewed as the "contract of employment," the district court's decision to interpret it in light of the Lease was correct as a matter of law. Arizona requires instruments signed contemporaneously as part of a single transaction, such as the Contractor Agreement and Lease, to be construed together in order to ensure that the parties' intent with respect to both instruments can be carried out. It does not matter that the parties to the two

contemporaneous instruments are not identical where, as here, all parties were aware of both instruments and intended both to be effective. The Supreme Court has made clear that the meaning of instruments signed contemporaneously and contingent on each other cannot be determined by looking at each in isolation, but must be determined from the transaction as a whole, just as the district court did here. *Helvering v. Le Gierse*, 312 U.S. 531, 540-541 (1941).

Swift's arguments against construing the Contractor Agreement in light of the Lease are meritless. Swift does not challenge the factual findings that led the court to view the contract of employment as encompassing both documents. Nor does it offer any justification for exempting this case from the rule that contemporaneously-signed documents should be construed together. Nothing in this Court's prior opinions required the district court to focus exclusively on the Contractor Agreement, let alone to ignore fundamental principles of contract interpretation.

4. The district court's alternative method of interpreting the Contractor Agreement, which looked to extrinsic evidence to discern the intention of the parties at the time of signing and clarify ambiguous terms of the Agreement, was also legally correct. Most of the evidence considered by the court consisted of policy statements which, properly speaking, were not extrinsic at all, but were part of the Agreement itself by virtue of ¶17A which stated that Drivers could be

summarily terminated if they failed to comply with "any COMPANY policies." SER 428, 462 (Van Dusen); 509 (Sheer); 540 (Motolinia); 574 (Schwalm at ¶16A). Even with respect to the evidence that was extrinsic, Arizona contract interpretation rules mandate consideration of such evidence when it is consistent with the terms of an agreement, with or without a finding of ambiguity.

Swift does not claim that the evidence considered by the court was inconsistent with the Agreement, nor does it challenge any of the factual inferences the court drew from that evidence. It simply asserts, in direct violation of Arizona law, that consideration of extrinsic evidence was *per se* improper. According to Swift, consideration of extrinsic evidence means the court is evaluating the parties' "overall relationship as it developed after the [hiring documents] were signed," instead of the parties' intent at the time of signing. Doc 20 at 23.[9] That argument reflects a fundamental misunderstanding of the law. Since at least the time of Lord Coke, courts have recognized that extrinsic evidence of the parties' course of dealing after signing a contract is the "best evidence" of their intent at the time of signing. *Brown v. Cowden Livestock Co.*, 187 F.2d 1015, 1019 (9th Cir. 1951); *Taylor v. State Farm Mut. Auto Ins* 854 P.2d 1134, 1143 (Ariz. 1993) (en banc) (explaining that the defendants' "subsequent conduct may shed light on its understanding of what was covered by the agreement" and citing *Darner Motor*

[9] All citations to a Document number refer to the docket in this proceeding (17-15102) unless otherwise indicated.

Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388, 398 (Ariz. 1984). Absent some change in the contract terms, and Swift does not claim there was one, there is no reason why extrinsic evidence of the parties' conduct under the Agreement should not be considered to clarify the parties' intent at the time of signing.

Swift's argument that consideration of extrinsic evidence was improper under *Modzelewski*, the case cited in Judge Ikuta's dissent, is similarly in error. 14 F.3d 1374. *Modzelewski* said nothing about extrinsic evidence. The *Modzelewski* plaintiffs were admittedly employees. *Id.* Thus, whether the documents at issue were contracts of employment turned solely on whether they contained "terms and conditions" of work—a relatively simple inquiry that the court happened to answer from the face of the documents. *Id.* at 1377. This case presents the opposite problem: The Contractor Agreement clearly contains terms and conditions of work; the question is whether those terms and conditions allowed Swift to control the Drivers as employees—a far more complicated question that required the court to interpret the contract terms consistent with Arizona law and evaluate them using the *Darden* common-law employment factors. Nothing in *Modzelewski* addresses how that determination should be made and it certainly doesn't preclude reference to extrinsic evidence.

Swift's argument that considering extrinsic evidence improperly involves the court in deciding the merits of the case is similarly in error. Both this Court in *Van Dusen I* and *II,* and the Supreme Court have made clear that a court cannot avoid its duty to decide the §1 issue simply because doing so may require the court to decide the underlying merits of the claim.

5. Alternatively, regardless of the district court's interpretation of the Contractor Agreement, the First Circuit's recent decision in *New Prime Inc.,* 857 F.3d at 15-24, makes clear that, when Congress adopted the FAA in 1925, the term "contract of employment" was used to refer to all work contracts of transportation workers, without regard to the status of the worker as an employee or independent contractor. Should this Court agree with the First Circuit's analysis, the district court's order finding the Drivers exempt from the FAA must be upheld whether or not the district court properly considered the Lease, or alternatively extrinsic evidence, in interpreting the Contractor Agreement.

ARGUMENT

I. STANDARD OF REVIEW

a. Contract Interpretation. Swift concedes that the question of whether the contract treats the Drivers as common-law employees presents a question of contract interpretation, *see* Doc 20 at 24 ("strictly applying the rules of contract interpretation to the Contractor Agreements . . . is the only rational approach."); *id.*

at 26 ("the court's role is one of contract interpretation."), and in particular Arizona contract interpretation law. *See* Contractor Agreement ¶23 (SER 510; 576 (¶24); 541 (¶23) 612 (¶24) (agreement is to be "governed by the law of Arizona"); Doc 20 at 23-24, 37-38 (arguing Arizona law of contract interpretation).[10]

This Court's standard for review of contract interpretation questions involving mixed questions of fact and law as presented here is set forth in *L.K. Comstock & Co. Inc. v. United Engineers & Constructors Inc.*, 880 F.2d 219, 221 (9th Cir. 1989): "In general, factual findings as to what the parties said or did are reviewed under the 'clearly erroneous' standard while principles of contract interpretation applied to the facts are reviewed de novo." *Id.* "If the district court relies upon extrinsic evidence to interpret an ambiguous contract, that interpretation is a factual determination reversible only if the district court's

[10] The Drivers agree, although, unlike the usual contract interpretation case, the parties' stated intent to establish an "independent contractor" relationship is not controlling if other terms in the contract show a worker to be an employee. Simply because a contract states that a party is an independent contractor does not make it so in the eyes of the law. *Ward v. Atlantic Coast Line RR*, 362 U.S. 396, 400 (1960); *Holt v. Winpisinger*, 811 F.2d 1532, 1538-39 (D.C. Cir. 1987). Swift conceded this in its mandamus petition where it said "the district court seems to think that Defendants were asking it to find the Contractor Agreements are not employment agreements solely because of the Contractor Agreements' use of the term 'independent contractor.' Not so. The terms of the Contractor Agreement determine whether it is an independent contractor agreement or a contract of employment, and Defendants rely on the terms of the contracts themselves, not merely the labels used." No. 15-70592, Doc 1-2 at 17.

construction is clearly erroneous or if the court applied an incorrect legal standard." *Id.*

b. Statutory Interpretation: Whether the phrase "contract of employment" as used in §1 of the FAA includes contracts with employees and independent contractors is a question of statutory construction reviewed *de novo. J & G Sales, Ltd. v. Truscott,* 473 F.3d 1043, 1047 (9th Cir. 2007).

II. SWIFT'S APPEAL SHOULD BE DISMISSED BECAUSE IT DELIBERATELY SUBMITTED DEFICIENT EXCERPTS OF THE RECORD

The Excerpts of the Record ("EOR") submitted by Appellants fails to comply with Circuit Rule 30-1.4(a)(x) and (c)(ii). Those two rules require, *inter alia*, that Swift include in its Excerpts the exhibits that the district court relied upon to resolve the FAA §1 issue challenged in this appeal. Swift's EOR includes only one of the 27 exhibits the district court cited to support its opinion. *Swift's EOR does not even include the Contractor Agreements and Leases of the Named Plaintiffs discussed in the district court's opinion*. Swift's omission of these exhibits is especially egregious since it knows they are critical to the resolution of the appeal.

Instead of including the Contractor Agreements and Leases cited by the district court, Swift's EOR includes *pieces* of other versions of those documents. For example, Swift's EOR includes the first 8 pages of Plaintiff Van Dusen's

January 21, 2010 Contractor Agreement, 2 EOR 40-47, and pages 3-7 (of 63 pages) of her Lease from a different period of time. 2 EOR 37-39. The district court's opinion did not rely on either of those incomplete documents, but, instead, cited to and analyzed a complete Lease and Contractor Agreement of Plaintiff Van Dusen[11] *See, e.g.*, 1 EOR at 3 fn. 4, 6. Swift's Record Excerpts reflect the same substitution of incomplete and unrelated Contractor Agreements and Leases for the other named Plaintiffs as well.[12]

This failure to include the exhibits actually cited by the district court makes it impossible to find the specific pages of the documents that the court relied upon. In addition, by submitting incomplete documents, Swift misrepresents the record by omitting important pieces of the Contractor Agreements and Leases.[13] For example, while Swift's appeal contends the Lease is totally separate from the

[11] The Drivers signed multiple Leases and Contractor Agreements over the course of their careers with Swift. While all had the same or similar language their pagination varied somewhat making it difficult to find the matters referenced by the district court in the versions in Swift's EOR. 1 EOR at 5 fn. 1.

[12] Swift did include the copy of Plaintiff Sheer's Lease that was cited by the district court, 2:10-cv-00899-JWS Doc 765-4, but even with respect to that document Swift's EOR only includes the first 8 pages of the 12-page document cited by the district court. *Compare* 2 EOR 48-51 *with* 2:10-cv-00899-JWS Doc 765-4.

[13] This is not the first time that Swift has endeavored to misrepresent the record. The district court also found that Swift had misrepresented the record in its brief to the district court by quoting partial lease provisions and leaving out critical language. See 1 EOR at 23 fn. 59 ("Defendants misrepresent the record . . ." by asserting "an incomplete representation" of a lease provision.)

Contractor Agreement, it fails to include in its Record Excerpts the portions of the Contractor Agreements that the district court found explicitly referenced the Lease. 1 EOR 24 fn. 62.

But that is not all. Swift's substitution of different documents for those relied upon by the district court deliberately obscures the fact that the Leases and Contractor Agreements were frequently paginated as a single contract. For example, the version of Ms. Van Dusen's form Lease and Contractor Agreement cited by the district court was paginated consecutively as a single document, with her Lease appearing as pages "1-18 of 63" and the Contractor Agreement as pages "19-63 of 63" of the document. *See, e.g.* 1 EOR at 3 fn. 4, 6 citing SER 420-501. The versions of Plaintiff Motolinia's and Schwalm's hiring documents cited by the district court were also paginated as single contracts. *Id.* citing SER 518-550, 551-603. The Leases and Contractor Agreements in Swift's EOR are not paginated consecutively because they relate to different time periods.

Plaintiffs are submitting Supplemental Excerpts of the Record ("SER") pursuant to Local Rule 30-1.7 which include the documents cited by the district court. However, given Swift's deliberate violation of Circuit Rule 30-1.4(a)(x) and (c)(ii) Swift's appeal should be summarily dismissed. *In re O'Brien*, 312 F.3d 1135, 1337 (9th Cir. 2002) (dismissing appeal for, *inter alia*, deficient excerpts of record). At the very least monetary sanctions should be imposed.

III. SWIFT WAIVED ITS ISSUES ON APPEAL

"The doctrine of invited error prevents a defendant from complaining of an error that was his own fault." *U.S. v. Reyes Alvarado*, 963 F.2d 1184, 1187 (9th Cir. 1992). Under the doctrine, an error is waived and therefore unreviewable if the defendant has both (1) invited the error, and (2) relinquished a known right. *U.S. v. Perez*, 116 F.3d 840, 843 (9th Cir. 1997). Here Swift invited the error it now faults the district court for by failing to raise on summary judgment any of the arguments it now urges on appeal. It did not argue, either in its own motion or in its opposition to the Drivers' motion, that interpreting the Contractor Agreement in light of the Lease was improper, or that considering extrinsic evidence was improper. It did not mention the integration clause that it now relies upon, nor did it make any effort to apply the *Darden* factors to the face of the Contractor Agreement as it does in its appeal brief. Doc 20 at 39-43. Swift knew it could have raised these arguments but it chose not to. Instead, Swift's summary judgment submissions urged the court to find the Drivers were properly classified as independent contractors based on the Contractor Agreement, the Lease, and extrinsic evidence. *See e.g.* SER 37; SER 1246-1247; 2:10-cv-00899-JWS Doc 764 at 1.

To be sure, Swift did object to the Court's scheduling order a year and a half before the summary judgment motions were filed, 2:10-cv-00899-JWS Doc 566,

but that objection merely argued that permitting discovery was improper and that the §1 issue should be decided on briefing alone. While Swift asserted that the Contractor Agreement was the document the briefing should analyze, it offered no arguments to support that assertion and consideration of Contractor Agreement in light of the Lease terms on their face would have been consistent with Swift's call for briefing regarding the Contractor Agreement. Swift's current argument that the Agreement must be viewed in complete isolation because of its integration clause is an argument made for the first time on appeal. Moreover, Swift did not renew its objections to discovery in its summary judgment papers.[14]

By failing to argue in its summary judgment papers why the Contractor Agreement should be viewed in isolation or how the *Darden* factors apply to it, even as an alternative basis for finding the Drivers' contract non-exempt under §1, and by inviting the court to consider the Lease and extrinsic evidence, Swift waived any right to present the arguments it now raises on appeal. This is not a

[14] Swift did state in a footnote in its summary judgment reply brief that the court should "vacate the pending summary judgment motions and determine whether Plaintiffs' ICOAs are exempt from arbitration based solely on the four corners of the agreements themselves" SER 4, n.1. But that request is not an argument and even if it were, "[i]ssues raised for the first time in the reply brief are waived." *Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996); *Marlyn Nutraceuticals Inc. v. Improvita Health Products*, 663 F.Supp.2d 841, 848 (D. Ariz. 2009). Nothing prevented Swift from raising its mandamus arguments in its opening summary judgment brief.

situation where Swift could rely on its objection to the scheduling order to preserve its argument that examining the face of the Contractor Agreement alone was the proper procedure. To the contrary, this Court made clear when it denied Swift's mandamus petition that the "remedy" for the issues Swift raised in that petition was to "urg[e] its position before the district court in dispositive motions and, if the district court is adverse to Swift, [file a] direct appeal following the issuance of a final order." *Van Dusen IV,* 830 F.3d at 917. Swift did not do that and instead invited the district court to commit the very alleged errors it now claims justify reversal. Had Swift presented the arguments it now raises, the district court would have had the opportunity to evaluate and address those arguments and do so in light of the entire summary judgment record. Even if the court had not agreed with Swift's arguments, it would have had the chance to explain its reasons for rejecting them. As it is, neither the district court nor plaintiffs had that opportunity.

Swift attempts to justify abandoning its prior position by claiming that the district court forced it to do so, citing the court's order of July 15, 2015 (2:10-cv-00899-JWS Doc 645). Doc 20 at 17 fn. 5. However, that order simply admonished Swift for failing to comply with discovery that the court had previously authorized; nothing in that order dictated what arguments Swift could or could not raise on summary judgment. Having invited the errors of which it now complains and having failed to present any arguments that the Contractor Agreement analyzed

alone is not exempt under §1, Swift's appeal is unreviewable and should be dismissed.

IV. THE DISTRICT COURT DID NOT ERR IN FINDING THE DRIVERS EXEMPT FROM ARBITRATION

A. The District Court Properly Considered the Lease In Interpreting the Drivers' Contract of Employment

1. The Court's Factual Conclusion That the Contractor Agreement and Lease Together Formed the Drivers' Contract of Employment Was Not Clearly Erroneous

The district court concluded that the Contractor Agreement and the Lease together formed the Drivers' contract of employment, based on several findings: The Lease contains terms and conditions of work affecting the Drivers' working arrangement with Swift, including, *inter alia*, requiring them to work exclusively for Swift and limiting their ability to utilize substitute drivers. 1 EOR at 20-25. In addition, the "terms of the two agreements are explicitly intertwined and clearly designed to operate in conjunction for those drivers who leased equipment from IEL for purposes of becoming a contract driver for Swift." 1 EOR at 23. Drivers were obligated to comply with the terms of both the Lease and the Contractor Agreement in order to continue their employment with Swift and Swift could use the draconian consequences of default under the lease as leverage to ensure that the Drivers submitted completely to its control. 1 EOR at 22. Swift does not dispute any of these findings and they are more than sufficient to support the district

court's conclusion that the two documents together formed the contract of employment.[15] *See, Brown v. Nabors Offshore Corp.*, 339 F.3d 391, 392 (5th Cir. 2003) (employer's letter informing seamen of a new mandatory arbitration policy became part of their contract of employment exempt under §1); *In re Oil Spill by Oil Rig Deepwater Horizon*, MDL No. 2179, 2010 WL 4365478 at *3 (E.D. La. Oct. 25, 2010) (document signed as a condition of continued employment is part of the driver's contract of employment exempt under §1); *Shanks v. Swift Transportation Co., Inc.*, No. L-07-55, 2008 WL 2513056 at *3 (S.D. Tex. June 19, 2008) (mandatory injury benefit plan is part of driver's contract of employment exempt under §1); *Carr v. Transam Trucking Inc.*, 2008 WL 1776435 (N.D. Tex. Apr. 14, 2008) (agreement to arbitrate signed as a "condition of my commencing or continuing employment" is, by definition, a part of the workers contract of employment contract exempt under §1).

Although not mentioned by the district court, its conclusion that the two documents together formed the contract of employment is further supported by the integration clause in the Contractor Agreement. That clause (which Swift's brief

[15] The facts found by the district court distinguish the Lease in this case from the typical car lease referenced by Swift. Doc 20 at 36. A typical car lease is not conditioned on working for a specific employer and typically is not shared with the employer. It certainly is not drafted by the employer nor does it give the employer the right to condition continued employment on complying with the lease terms as is the case here.

fails to quote in full) states that, "This Agreement, **and any other documents specifically referred to or contemplated by this Agreement**, constitute the entire Agreement and understanding between the parties." *See, e.g.* SER 576 ¶22 (Schwalm integration clause). Because the Lease is "specifically referred to" in the Contractor Agreement it falls squarely within the integration clause.[16] *See* 1 EOR 24 fn. 62 (noting reference to Lease in Contractor Agreement). Not only were the two documents integrated, but Swift frequently paginated the two as a single contract and intermingled the two documents by placing parts of one in the other.[17] Given all of these facts, the court's conclusion that the Agreement and the Lease together formed the Drivers' contract was correct as a matter of law and certainly was not clearly erroneous.

2. Even if the Contractor Agreement and Lease are Separate Contracts the Court Properly Interpreted the Agreement in Light of the Lease

[16] The conclusion that the Lease and Contractor Agreement together formed the Drivers' contract was further supported by "Pre-CABs training course," a document that was explicitly included in the Agreement. SER 484. That document stated that "there are new documents you will have to sign to get started as an independent contractor for Swift . . . including your Contractor Agreement and Lease Agreement. . . . By signing each of these documents you will be starting a new career . . ." SER 714.

[17] The "Addendum to the Contractor Agreement" (which authorized Swift to deduct all monies owed under the Lease from payments owed by Swift to the Drivers) was paginated as part of the Lease. *See* SER 450 (Van Dusen Contractor Agreement addendum paginated as page 12 of 63 of Lease); SER 528 (Motolinia Contractor Agreement addendum paginated as page 12 of 57 of Lease); SER 561 (Schwalm Contractor Agreement addendum paginated as page 12 of 64 of Lease).

Even if the Contractor Agreement alone were viewed as the "contract of employment" and the Lease as a separate agreement, the district court was still correct as a matter of law to consider the terms of the Lease in interpreting the Contractor Agreement. That is because Arizona law adheres to the common-law principle that contemporaneous documents signed as part of a single transaction should be construed together to ascertain the actual intention of the parties. *See Phoenix Title and Trust Co. v. Stewart*, 337 F.3d 978 (9th Cir. 1964) (under Arizona law "substantially contemporaneous instruments will be read together to determine the nature of the transaction between the parties"); *Childress Buick Co. v. O'Connell*, 11 P.3d 413 (Ariz. App. 2000) ("Instructive here is the principle that substantially contemporaneous documents are to be read together to determine the nature of the transaction."); *Pearl v. Williams*, 704 P.2d 1348, 1351 (Ariz. App. 1985) (same). *See also* 3 Williston §628 ("When two documents do not form the separate parts of a single agreement, this does not mean that one of them may not be relevant to the construction of the other; a contemporaneous writing known to the parties may shed light on the interpretation of a contract without being part of the contract."). This principle of contract construction is so deeply ingrained in the law that this Court has called it "elemental." *In re Steen*, 509 F.2d 1398, 1403 (9th Cir. 1975).

Interpreting contemporaneous documents in light of each other is particularly important here where the execution of the Lease was contingent on the execution of the Contractor Agreement.[18] *See Helvering,* 312 U.S. at 540-541 (requiring contracts contingent on each other to be construed together); *Dakota Gasification Co. v. Natural Gas Pipeline of America,* 964 F.2d 732, 735 (8th Cir. 1992) (hinging one contract on another heightens the need for interpreting them together).

This rule of interpretation applies even though the parties executing the contracts differ, as long as all parties are aware of the contents of the several contracts. *Paracor Finance Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151 (9th Cir. 1996) (citations omitted); 3 Williston, Contracts §628. Nor does it matter if the two contracts do not internally reference each other, although here they clearly do. *Id.*

The reason for this "elemental" rule of contract interpretation is obvious: When parties sign two agreements as part of a single transaction and intend both to be effective, the only way to ensure that their intention can be carried out is to interpret the documents in light of each other:

> Construing contemporaneous instruments together means simply that if there is any provision in one instrument limiting, explaining or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged

[18] The Lease required execution of the Contractor Agreement and termination of the Contractor Agreement automatically terminated the Lease. SER 441, 444; 552, 555 (Lease ¶¶2(e), 12(g)).

> with notice so that the intent of the parties may be carried out and the whole agreement actually made may be effectuated.

3 Williston §628; 17A Am.Jur. Contracts §388 (same). *See also Basile v. Cal. Packing Corp.*, 25 F.2d 576 (9th Cir. 1928) ("several instruments relating to the same time are to be read together in arriving at the real intent and agreement of the parties."); *Kurz v. U.S.*, 156 F.Supp. 99, (S.D.N.Y. 1957) ("The rationale of the rule is that by construing the instruments together, the intent of the parties can be perceived and enforced.").

Construing contemporaneous agreements together also serves the salutary purpose of ensuring that parties who intend to benefit from the net effect of two contemporaneous agreements do not evade the legal obligations that go along with that net benefit by strategically dividing terms between the two. That was the basis for the Supreme Court's ruling in *Helvering*, 312 U.S. at 540-541, in which the Court was confronted with a contract which, standing alone, appeared to create a non-taxable "insurance risk." The Court nevertheless found the contract taxable because the "insurance risk" contained in it was effectively neutralized by a second contemporaneously signed contract. Even though each contract studiously avoided referring to the other, the Court did not hesitate to find that "[t]he two contracts must be considered together. To say they are distinct transactions is to ignore actuality. . . . Failure, even studious failure, in one contract to refer to the other cannot be controlling." *See also Smith v. Superior Equipment Co.*, 428 P.2d 998,

1002 (Ariz. 1967) (construing two contemporaneous agreements together and noting that separating the transaction into two instruments "is but a patent attempt to circumvent the requirements imposed . . . under the law of this state . . .").

This case presents a textbook example of contemporaneous documents that should be construed together and of the nefarious consequences that can occur if they are not. It is undisputed that each Driver signed a Lease and Contractor Agreement on the same day and that the two documents were part of a single hiring package (often paginated as a single contract). It is also undisputed that Swift and IEL were aware of the terms of both documents and expected compliance with both instruments as a condition of continued work for Swift. (Both documents were drafted by Swift's attorneys and the same person frequently signed the Lease on behalf of IEL and the Contractor Agreement on behalf of Swift, *see supra* fn. 6). In these circumstances, it would have been an error of law for the district court not to interpret the two documents in light of each other.

Moreover, by urging this Court to ignore the undisputed fact that, upon signing the Lease and Contractor Agreement, the Drivers became employees of Swift, Swift is engaging in precisely the subterfuge that the Supreme Court condemned in *Helvering*. Just as the defendant in *Helvering* expected to benefit from her combined insurance policies, Swift expected to and did benefit from the control that the Lease/Contractor Agreement package allowed it to exercise over

the Drivers' work. And, just as the defendant in *Helvering* sought to avoid the consequences of her net agreement by insisting the contracts be interpreted in isolation, Swift seeks to avoid the consequences of its net agreement (i.e. avoid the fact that the Lease/Contractor Agreement together made the Drivers employees exempt from arbitration) by insisting that this Court interpret each of the instruments in isolation as if the other did not exist. As in *Helvering*, to do so would "ignore actuality"; Swift's efforts, even studious efforts, to separate the hiring package into the two distinct documents "cannot be controlling." 312 U.S. at 540.

Courts frequently invoke the rule that contemporaneous agreements be read in light of each other to decide whether to compel arbitration and it was appropriate to apply that rule here. *Dakota Gasification,* 964 F.2d at 734-736 (deciding motion to compel arbitration by applying rule that two simultaneously executed documents must be construed together); *Fuqua v. Kenan Advantage Group, Inc.,* 2012 WL 2861613 *5 (D. Ore. Apr. 13, 2012) (rejecting an employer's attempt to evade the FAA §1 exemption by placing its arbitration agreement in a separate contract signed simultaneously with employment contract on grounds that contemporaneous agreements must be construed together); *AZ Holding, LLC v. Frederick,* 2010 WL 500443 at *8-9 (D. Ariz. Feb. 10, 2010) (holding that arbitration agreement applies to Lease, without regard to whether one

references the other, because two agreements were signed contemporaneously); *Am. Graphics Institute, Inc. v. Darling*, 2003 WL 21652246 at *8 (E.D. Pa. May 22, 2003) (applying rule that contemporaneous documents should be construed together to hold that arbitration agreement applies to separate but contemporaneously signed employment agreement).

One final point should be made. The Supreme Court noted in *Darden* that, while "the traditional agency law criteria offer no paradigm of determinancy[,] . . . their application generally turns on factual variables generally within the employer's knowledge." *Darden*, 503 U.S. at 327. Here, Swift was plainly knowledgeable about the terms of both the Lease and the Contract (having drafted both) and intended to benefit from the combined effect of those terms when it hired the Drivers. It was both fair and reasonable, therefore, for the district court, in attempting to discern whether the parties intended to create a contract of common-law employment, to construe the Contractor Agreement in light of the Lease.

3. Swift's Objections To Construing The Two Documents Together Are without Merit

Swift faults the court for not citing "authority" to support its decision to read the Lease and Contractor Agreement together. Of course, because the parties' summary judgment papers urged the court to consider both documents, the court had no reason to think its approach was particularly controversial and in need of

citations. Nevertheless, the court's conclusion fully comports with Arizona law as explained above.

Swift claims the district court misapplied Arizona contract law based on two cases addressing when a document is "incorporated by reference" in a contract. *Idearc Media LLC v. Plamisano & Assocs.*, 929 F. Supp.2d 939, 944 (D. Ariz. 2013); *United Cal. Bank v. Prudential Ins. Co.*, 140 Ariz 238, 259 (Ct. App. 1983). These cases miss the mark. The district court did not interpret the Contractor Agreement in light of the Lease solely, or even primarily, because the Lease was referenced in the Contractor Agreement, but because the two documents were signed contemporaneously as part of one transaction, were intended to operate together, and could be used by Swift in conjunction with each other to control the Drivers' work. These factual findings, as well as Arizona law, required the documents to be interpreted together as explained above.

Swift next claims that, under Arizona law, the "integration" clause in the Contractor Agreement precluded consideration of the Lease. But Swift misrepresents the integration clause by omitting the part that states "any other document specifically referred to or contemplated by this Agreement" is part of the entire Agreement of the parties. Doc 20 at 18. Because the Lease was specifically referred to by the Agreement, it is part of the Contractor Agreement under the express language of the integration clause. 1 EOR 24 fn. 62 (discussing reference

to the Lease in the Contractor Agreement). Even if the Lease were not part of the Contractor Agreement by virtue of the integration clause, the Arizona Supreme Court has made clear that an integration clause does not preclude consideration of antecedent understandings and negotiations as part of the interpretation process. *Taylor*, 854 P.2d at 1138-1141. If antecedent understandings and negotiations can be considered, *a fortiori* contemporaneous agreements signed as part of the same transaction can, and should, be considered as an aid to interpreting an integrated contract.

Finally, Swift falsely claims that this Court's decision in *Van Dusen I* and *II* required the district court to consider only the Contractor Agreement and not the Lease. Although the prior appellate decisions referenced the Contractor Agreement, none actually addressed the question of which document(s) constituted the "contract of employment" or how those document(s) should be interpreted. Those opinions examined only who should decide the §1 question and whether discovery was appropriate. The factual details of what constituted the hiring document(s) was not briefed by the parties until the summary judgment motions were filed. Thus, the *per curiam* opinion in *Van Dusen IV* stated that "in neither *Van Dusen I* nor *Van Dusen II* did we instruct the district court to make the §1 determination in a certain way," and *Van Dusen IV* gave no additional direction as to the proper method for determining the §1 issue, other than to note that the

court's plan to consider extrinsic evidence "was not clearly erroneous . . . . if indeed it [was] an error at all." *Van Dusen IV,* 830 F.3d at 917. Similarly, nothing in Judge Ikuta's dissent limited the district court to examining the Contractor Agreement alone. Rather, she urged the court to define the 'contract of employment' as an initial matter. *Id.* at 920. Her concern was that the "contract of employment," however defined, should not be analyzed in light of the FLSA "economic realities," which it was not. *Id.*

For all of these reasons, the district court's decision to interpret the Contractor Agreement in light of the Lease was neither clearly erroneous nor an error of law and that remains true whether the two documents together form the "contract of employment" or are considered separate, contemporaneous contracts.

B. Alternatively the District Court Properly Considered Extrinsic Evidence In Construing The Contractor Agreement

The district court held, in the alternative, that the Contractor Agreement terms, as clarified by extrinsic evidence, also required a finding that the Agreement was a contract of employment. Swift does not challenge that conclusion, nor does it challenge any of the specific evidence cited by the court or the factual inferences it drew from that evidence; it simply asserts that clarifying the Agreement with extrinsic evidence was improper under Arizona law.

1. Arizona Law Permits Consideration of Extrinsic Evidence

This Court recently summarized Arizona contract interpretation law as follows:

> The Arizona Supreme Court has made clear that "in Arizona, a court will attempt to enforce a contract according to the parties' intent." *Taylor v. State Farm Mut. Auto Ins.*, 175 Ariz. 148, 854 P.2d 1134, 1138 (1993) (en banc). Moreover, under Arizona law, "a court may consider surrounding circumstances, including negotiation, prior understandings, and subsequent conduct." *Id.* at 1139. Further, courts applying Arizona contract law are not required to find ambiguity in the contractual language before they may entertain extrinsic evidence bearing on the parties' intents. *Id.* at 1140. Rather, we are instructed "first [to] consider[ ] the offered evidence and, if [we] find[ ] that the contract language is 'reasonably susceptible' to the interpretation asserted by its proponent, the evidence is admissible to determine the meaning intended by the parties." *Id.* Such practice is permissible so long as the evidence "is being offered to explain what the parties truly may have intended." *Id.*

Pure Wafer Inc. v. City of Prescott, 845 F.3d 943, 954-955 (9th Cir. 2017). Thus, under Arizona law, a district court may consider extrinsic evidence, including evidence of surrounding circumstances and subsequent conduct, to determine the intended meaning of a contract so long as that evidence is consistent with the language of the contract. No finding of ambiguity is required.

Both the Contractor Agreement, ¶23, and the FAA required the court to follow Arizona contract law in interpreting whether the Drivers' contract was a contract of employment. "A court may not . . . in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes non-arbitration agreements under state

law." *Perry v. Thomas,* 482 U.S. 483, 492 fn. 9 (1987). *See also First Options of Chicago Inc. v. Kaplan,* 514 US. 938, 944 (1995) ("[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."). Because Arizona contract law unequivocally permits consideration of extrinsic evidence, the district court's alternative holding was manifestly correct.

2. Much of the Evidence Considered By The District Court Was Not "Extrinsic" But Part of the Agreement

A significant portion of the evidence considered by the district court in the second part of its opinion consisted of Swift policy manuals. SER 803-991 (Swift Contracted Driver Manual); SER 992-1095 (Swift Driver Manual). Strictly speaking these manuals were not extrinsic evidence at all, but part of the contract itself by virtue of ¶17A of the Contractor Agreement. That paragraph states that a Driver may be terminated "for violation of any company policy." *See* SER 428, 462 (Van Dusen); 509 (Sheer); 540 (Motolinia); 574 (Schwalm at ¶16A). Policies that a driver must comply with as a condition of continued employment are, by definition, part of the contract of employment. *See Shanks*, 2008 WL 2513056 at *3 (injury benefit plan signed as a condition of continued employment is part of driver's contract of employment); *Carr*, 2008 WL 1776435 (agreement to arbitrate signed as a "condition of my commencing or continuing employment" is, by

definition, a part of the workers contract of employment contract exempt under §1). *See also Leikvold v. Valley View Comm. Hosp.*, 688 P.2d 170, 174 (Ariz. 1984) (personnel manuals become part of a contract if the employer's words encourage reliance thereon).

Thus, even if review of extrinsic evidence had otherwise been improper, which it was not, it was proper for the district court to consider Swift's policy manuals in determining whether the Contractor Agreement treated the Drivers as employees. The district court found that Swift's polices gave it the right to exercise control over the Drivers throughout the day: Drivers were required to report arrivals and departures from shippers and give estimated times of arrival. Swift had access to data showing whether loads were running on time, and that Swift could determine a driver's location and availability at frequent intervals. 1 EOR at 34-35; *See* SER 1014, 1016, 1053 (Swift Driver Manual); SER 913, 915, 954 (Swift Contracted Driver Manual).

The court also looked to the policy manuals to clarify the extent to which Drivers were expected to work for Swift. The "Contracted Driver Manual" confirmed that solo drivers, whether Lease Operators or employee drivers, were expected to drive 2100-2500 miles per week for Swift—an amount that the court found precluded Drivers from driving for any other carrier. [19] 1 EOR 26-27.

Although not mentioned by the district court, the Contracted Driver manual also sets forth many other policies controlling the manner in which Drivers were to perform their work including mandatory safety procedures, limits on speed, rules on the handling of high-value loads, procedures for coupling and uncoupling trailers and policies mandating use of special locks for trailers. *See* SER 94-100.

All of these policy manuals were properly considered by the district court, not as extrinsic evidence of the meaning of the Contractor Agreement, but as part of the Contractor Agreement itself.

3. Consideration of Extrinsic Evidence was Important to the Application of The *Darden* Factors

The actual "extrinsic" evidence discussed by the district court, such as the admissions contained in Defendants' 30(b)(6) depositions and the un-contradicted testimony of Plaintiffs, was properly considered under Arizona law. *See Pure Wafer, Inc.*, 845 F.3d at 954-955; *Taylor*, 854 P.2d at 1138-9. Such evidence was critical to the court's §1 analysis:

For example, Contractor Agreement ¶1 gave drivers the right to turn down loads offered by Swift. Swift argued that this term indicated independent status, but the actual significance of the provision was ambiguous without some clarification of what Drivers were told about loads. Accordingly, the court

[19] SER 913 (Ex. 12 Contracted Driver Manual at DEF 1683); SER 1014 (Driver Manual at DEF 5058).

considered the testimony of Swift's 30(b)(6) witness who explained that drivers were generally offered one load at a time and were not given access to information about other available loads. SER 1189. That testimony was consistent with the words of the contract and the court concluded, based on that testimony, that the right to turn down loads afforded Drivers no independence at all "because there was no way to know if doing so would result in a better or worse load . . . or when the next load would be offered,"[20] 1 EOR at 28. *See City of Glendale v. Nat. Union Fire Ins. Co. of Pittsburgh PA*, 2013 WL 1296418 at *6 (D. Ariz. March 29, 2013) (considering testimony of the defendant's 30(b)(6) witness in interpreting the contract at issue). Swift does not challenge that conclusion.

Contractor Agreement ¶5B gave a Driver the right to work for other carriers provided he complied with certain pre-conditions including, *inter alia,* "remov[ing] from the Equipment any and all identification devices, licenses and base plates pertaining to COMPANY and [] return[ing] them to COMPANY" SER 423 (¶5B). Here again, Swift argued that this provision on its face indicated worker independence. But in order to evaluate that term under the *Darden* factors, the

[20] That conclusion was further supported by the Pre-CABs training document incorporated in the Contract. SER 790 (Ex. 11 at DEF 3073) ("Owner-operators who run rather than sit usually fare better than those who often wait for a "better load." Swift has invested a lot of time and resources into understanding the logistics of managing their loads and their drivers and it's in their best interests that you be profitable. Trust Swift. Trust their system. Trust your Driver Manager.")

court needed to understand whether a driver could realistically comply with those pre-conditions. For a court not steeped in the details of licenses, base plates, and identification devices, extrinsic evidence to explain the conditions was necessary. Accordingly, the court considered the testimony of Swift's 30(b)(6) witness regarding the ¶5B pre-conditions, and, based on his testimony, concluded that the pre-conditions were so onerous as to render the right to drive for other carriers meaningless. 1 EOR at 28-31.[21] Swift does not challenge that finding either.

Although Swift does not dispute the accuracy or, for that matter, the importance of the clarifications the district court gained from examining extrinsic evidence, it insists that the district court should not be permitted to consider such evidence. That is tantamount to saying that the court must not only consider the terms of the contract on their face, but at face value. That is clearly not the law, for if it were, the provision in the Agreement reciting that Drivers are "independent contractors" would be controlling, which it is not. *See Ward*, 362 U.S. at 400.

4. Swift's Objections To Consideration of Extrinsic Evidence Are Without Merit

[21] The 30(b)(6) testimony was also consistent with the information Swift provided to drivers in the Pre-CABs training manual incorporated in the contract. SER 484 at DEF001423, Van Dusen Agreement referencing course. The Manual states, as an example, that the net cost of changing carriers is $10,440 and notes that "[i]t can take three weeks between winding down at your old carrier and getting up to speed at the new carrier. It takes time to turn in the trailer, the base plate, permit book, etc. . . ." SER 791-793.

Swift asserts four reasons why it was error for the district court to consider extrinsic evidence, none of which has merit.

(1) Swift argues that consideration of extrinsic evidence was improper under Arizona law because, by looking to such evidence, the court was "evaluating the overall relationship that developed *after* the agreements were signed," rather than the parties' intentions at the time of signing. Doc 20 at 23. That argument reflects a fundamental misunderstanding of contract law. How parties conduct themselves after they have signed a contract—their "course of dealing"—is not only admissible evidence of the parties' intent at the time of signing, it is the "best evidence" of their intent. *Cowden Livestock Co.*, 187 F.2d at 1019. *See Taylor*, 854 P.2d at 1139, 1140 (noting that a court should "give effect to the intention of the parties at the time the contract was made," but recognizing that that may be done by considering "subsequent conduct.").

More fundamentally, the distinction Swift attempts to draw between the relationship created by the terms of a contract at the time of signing and the parties "overall relationship" after signing is specious. Assuming parties are acting in compliance with their contract—and no one in this case contends otherwise—the parties' actions under their contract *is* the relationship created by the terms of the contract. The words of a contract cannot describe every detail of the parties' interaction; such details are inevitably filled in by conduct that is consistent with

the words of the contract and the parties' intent at the time of signing. A contract whose words do not explicitly say who will control the manner of work is still a contract of common-law employment if the parties, through their subsequent actions, show they intended the contract terms to allow the employer to control the work. That is why course of dealing evidence is often so critical to understanding a contract and why the distinction between the intent at the time of signing and the "overall relationship" is fundamentally false. As the Arizona Supreme Court emphasized: "[C]ontracts are not merely printed words. . . . It is important to recognize that, 'although the writing may be coextensive with the agreement, it is not the agreement but only evidence thereof.'" *Darner,* 682 P.2d at 395 (citations omitted). As *Darner* recognizes, understanding the full meaning of a contract may require evidence in addition to the words of the agreement. *Id.*

(2) Swift tries to support its argument that Arizona contract law does not permit consideration of extrinsic evidence to determine whether a contract is one of employment with the claim that the majority of courts deciding the §1 issue do not consider extrinsic evidence. To the contrary, all the cases cited by Swift agree that drivers may establish the §1 exemption by showing they are employees "based on the terms of the contract and the circumstances of their working relationship with [the carrier]." *Owner-Operator Indep. Drivers Ass'n. v. Swift Transp. Co.,*

Inc., 288 F.Supp.2d 1033, 1035 (D. Ariz. 2003).[22] Many other courts have also found that extrinsic evidence of the parties conduct under a contract may be considered in deciding the §1 issue.[23]

(3) Swift quotes Judge Ikuta's statement that whether a contract includes terms and conditions of employment should be "clear on the face of the contract." *Van Dusen IV*, 830 F.3d at 920. Reading Judge Ikuta's comment in context, it is not clear whether she meant that extrinsic evidence should never be considered in deciding a §1 question. If she did, she offered no rationale for that position under Arizona law or the FAA; she simply cited *Modzelewski*, a case in which extrinsic evidence was not an issue. The *Modzelewski* plaintiffs were admittedly employees. 14 F.3d at 1374. Thus, whether the documents in that case were contracts of employment turned solely on whether they contained terms and conditions of

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[22] All of the other cases cited by Appellants cite *Owner-Operator Indep. Drivers Assn. v. Swift* and follow its approach. *OOIDA v. United Van Lines*, 2006 WL 5003366 at *4 (E.D. Mo. Nov. 15, 2006); *Carney v. JNJ Express, Inc.*, 2014 WL 1370036 at *5 (W.D. Tenn. 2014); *Letourneau v. FedEx Ground Package Sys. Inc.*, 2004 WL 758231 at *1 (D.N.H. Apr. 7, 2004).

[23] *Diaz v. Michigan Logistics, Inc.*, 2016 WL 866330 at *4 (E.D. N.Y. Mar. 1, 2016) (holding that "the economic reality of the parties' relationship—a highly factual question" determines the §1 exemption question); *Aviles v. Quik Pick Express, LLC*, 2015 WL 9810998 at *3-4 (C.D. Ca. Dec. 3, 2015) (considering declarations and contract to determine whether plaintiffs were exempt under §1 based on "economic realities, not contractual labels."); *Garcia v. Superior Court*, 236 Cal.App.4th 1138, 1147-1149 (2015) (finding evidence submitted by plaintiff regarding relationship with carrier sufficiently showed employee status to justify remanding to district court for further proceedings).

work—a relatively simple inquiry that the court answered from the face of the documents; the need for extrinsic evidence never came up. *Id.* at 1377. The issue here is the reverse: The Contractor Agreement undoubtedly contains terms and conditions of work; the question confronting the district court was whether those terms and conditions made the Drivers common-law employees in the eyes of the law.[24] That is a much more complicated question and *Modzelewski* does not purport to offer guidance on how it should be answered. In some instances, as when the district court analyzed the Contractor Agreement and Lease together, employee status may be clear from the face of a contract. But in most cases, as when the district court looked at the Contractor Agreement in isolation, the terms of a contract are less clear and resort to extrinsic evidence is necessary. For example, *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981, 988 (9th Cir. 2014), presented the question whether FedEx drivers' Operating Agreement made them employees. This Court applied California contract law and, based on the Operating Agreement and "[t]o the extent it is ambiguous, the extrinsic evidence," held that the Agreement gave FedEx the right to control its drivers as employees. The Court engaged in the same analysis, applying Oregon contract law, in *Slayman*

[24] Of course if this Court agrees with the First Circuit that FAA §1 exempts all work contracts of transportation workers including those of independent contractors, then the only question would be whether the Contractor Agreement contains terms and conditions, just as it was in *Modzelewski*. The Drivers agree that that question can be answered from the face of the Agreement.

v. FedEx Ground Package System, Inc., 765 F.3d 1033, 1042 (9th Cir. 2014). The analysis of the terms of the Operating Agreements in *Alexander* and *Slayman*, supplemented with extrinsic evidence to clarify certain terms, is the normal contract interpretation procedure followed by courts everywhere. Swift has offered no principled reason under Arizona law or the FAA why that same procedure is not appropriate for interpreting the contract at issue here for purposes of §1.

(4) Finally, Swift argues that considering extrinsic evidence to clarify the meaning of the Contractor Agreement is improper because it involves the court in deciding the merits. Swift apparently believes that the directive to avoid deciding the merits in arbitration cases trumps a court's obligation *accurately* to assess whether there is a contract of employment for purposes of §1. In Swift's world it is better to artificially limit a court's ability to understand a contract's meaning by forcing it to rule on the face of the contract even when the terms are ambiguous than to risk an accurate assessment of the contract that might decide a merits issue. The suggestion that Congress, in adopting §1, intended courts to determine whether a contract was exempt without fully understanding the contract under consideration is unconvincing. Such a position flies in the face of Supreme Court precedent which holds that the duty to rule on a motion to compel arbitration trumps the duty to avoid deciding merits issues. *See Litton*, 501 U.S. at 208-209 (when a court is called upon to "determine whether the parties agreed to arbitrate

[a] dispute [] we cannot avoid that duty because it requires us to [decide an aspect of merits of the claim]."); *Communication Workers of Am. v. Avaya, Inc.*, 693 F.3d 1295, 1300 (10th Cir. 2012) ("where the merits of a claim are bound up with the question of arbitrability . . . the court's duty to determine whether the party intended the dispute to be arbitrable trumps its duty to avoid reaching the merits."); *Rite Aid of Pa. Inc. v UFCW Union Local 1776*, 595 F.3d 128, 136-137 (3d Cir. 2010) (same). Swift's argument is also contrary to the holding of this court in *Van Dusen I* and *II* which made clear that the district court had a duty to decide the §1 issue even if that meant deciding merits questions. Swift tries to argue the opposite by citing a portion of a sentence from the *Van Dusen I* opinion regarding "the law's repeated admonishments that district court's refrain from addressing the merits of an underlying dispute." *Van Dusen I,* 654 F.3d at 848. Doc 20 at 34. But, once again Swift has taken a quote out of context. The quoted phrase appears at the end of *Van Dusen I* in a sentence intended to explain why the Court, having found the district court's refusal to decide the §1 issue erroneous, did not find it "clearly erroneous." What the Court said was,

> For reasons previously discussed, we believe the best reading of the law requires the district court to assess whether a Section 1 exemption applies before ordering arbitration. 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. This factor, along with the lack of controlling precedent, render the question relatively close. Whether or not the district court's interpretation ultimately withstands appeal, we

> cannot find it "clearly erroneous" as that term is used in the mandamus analysis.

654 F.3d at 848. The complete quote makes clear that, in the Court's view, the law required the district court to decide the §1 issue even if it must decide the merits in the process. Of course, if the Court were to adopt the 1st Circuit's view that §1 applies to independent contractors as well as employees, this problem ceases to exist.

C. The District Court Must Be Affirmed Because §1 of the FAA Applies To Contracts Of Employment Of Independent Contractors As Well As Employees

In dissenting from the denial of mandamus, Judge Ikuta stated that the district court "should . . . first define[] 'contract of employment' for purposes of the FAA using standard tools of statutory construction" *Van Dusen IV*, 830 F.3d at 920. Throughout this litigation the parties have *assumed*, without analysis, that "contract of employment" as used in §1 refers to contracts that treat workers as common-law employees. However, in a recent case published after the district court's ruling, the First Circuit applied the "standard tools of statutory construction" to the phrase "contracts of employment," as Judge Ikuta counseled, and concluded that, in 1925 when the FAA was adopted, the phrase "contracts of employment" referred generally to "agreements to do work" regardless of whether the work was performed by employees or independent contractors. *New Prime, Inc.*, 857 F.3d at 15-24. In construing federal statutes, courts are to "look to the

ordinary meaning of a term . . . at the time Congress enacted the statute." *Perrin v. United States,* 444 U.S. 37, 42 (1979). *Id.* at 19. With that in mind, the Court examined dictionaries and treatises from the era of the FAA's enactment and concluded that all of them regarded "contracts of employment" as encompassing work agreements with employees and independent contractors. *Id*. at 20. The Court also cited numerous cases from the 1910-1925 era that similarly used the phrase "contract of employment" to encompass agreements with independent contractors and employees. *Id.* at 21 fn. 20. To those cases can be added the Ninth Circuit's opinion in *Childers v. C.I.R.,* 80 F.2d 27 (9th Cir. 1935), in which this Court noted "[t]he books are replete with instances where the term 'employer' or 'employ' is used in connection with the hiring of an independent contractor." *See also CIR v. Boeing,* 106 F.2d 305, 307 (9th Cir. 1939), in which the court referred to a contract with loggers acting as independent contractors as a "contract of employment."

Perhaps even more persuasively, treating "contracts of employment" as encompassing work agreements with transportation workers regardless of their status is consistent with the purpose of §1. As explained by the Court in *Circuit City v. Adams,* 532 U.S. 105, 121-120 (2001) the exemption was enacted out of "concern with transportation workers and their necessary role in the free flow of goods." But the "free flow of goods" may be disrupted just as easily by independent transportation workers as employees. Thus limiting the §1 exemption

to employees would undermine the fundamental purpose of the exemption. *New Prime, Inc.*, 857 F.3d at 22. In addition, as the *Circuit City* Court noted, by the time the FAA was adopted Congress had established statutory alternative dispute schemes for specific kinds of transportation workers and excluded such workers from the FAA because it "did not wish to unsettle" those schemes. *Id.* at 120-121. As demonstrated by the briefs in *New Prime* those statutory alternative dispute schemes covered independent contractors as well as employees. *See New Prime,* No. 15-2364, Doc 00117026215, *Amicus brief of Professor Richard H. Frankel* at 11-23 (filed July 8, 2016); Doc 00117012966, *Brief of Plaintiff-Appellee* at 23-38 (filed July 8, 2016). Thus, the purpose of preserving those schemes also supports the conclusion that the "contracts of employment" referenced in §1 were intended to encompass contracts with employees and independent contractors.

There is no dispute that the Drivers here were transportation workers who had contracts to do work for Swift. Thus, under *New Prime*, the district court's order that §1 precludes ordering arbitration must be upheld regardless of whether the district court properly determined that the Drivers' contract made them common-law employees.

The Drivers did not raise this issue below as *New Prime* was not decided until after the court issued its ruling. However, "it is abundantly settled that an appellee may support the judgment by any reasoning from the facts disclosed in the

record." *Spokane County v. Air Base Housing Inc.*, 304 F.2d 494, 499 (9th Cir. 1962). Whether the §1 exemption applies to work contracts of employees and independent contractors presents a question of statutory interpretation that may properly be considered to support the judgment of the district court.

V. IF THIS COURT FINDS THE CONTRACTOR AGREEMENT MUST BE INTERPRETED IN ISOLATION THAT ISSUE SHOULD BE REMANDED TO THE DISTRICT COURT

In the unlikely event this Court permits Swift to proceed with this appeal, rejects the First Circuit's decision in *New Prime*, and agrees with Swift that §1 requires the court to evaluate the Contractor Agreement terms in isolation, this Court should remand the case to the district court to make that evaluation. As noted, whether the Contractor Agreement on its face gives Swift the control of an employer vis à vis the Drivers has never been briefed by any of the parties. The issue is complicated as it involves application of the *Darden* factors not only to the Contractor Agreement but also to the incorporated policy manuals. Remand to the district court to consider these issues in the first instance is the proper way to proceed. *See Bates v. Dow Agrosciences LLC*, 544 US 431, 453 (2005) (remanding legal questions to lower court "because we have not received sufficient briefing on the issue."); *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1044 (9th Cir. 2009) (remanding question of law to district court where parties had not briefed it in the district court).

CONCLUSION

For all of the foregoing reasons, this Court should affirm the Order of the district court finding that Plaintiffs are exempt from arbitration pursuant to §1 of the FAA.

Respectfully submitted this 24th day of July, 2017.

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STATEMENT OF RELATED CASES

Appellees are not aware of any related cases pending before this court.

Dated this 24th day of July, 2017.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) of the Federal Rules of Appellate Procedure and the Ninth Circuit Rule 32-1, I certify that Plaintiffs-Appellees' Answering Brief is proportionally spaced, has a typeface of 14 points, and contains 13,935 words.

Dated this 24th day of July, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed Appellees' Answering Brief 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 July 24, 2017.

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

Dated this 24th day of July, 2017.

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