U.S. COURT OF APPEALS CASE NO. 15-70592
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE SWIFT TRANSPORTATION CO., INC.; INTERSTATE EQUIPMENT LEASING, INC.; CHAD KILLEBREW; and JERRY MOYES
Defendants and Petitioners

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA
Respondent

VIRGINIA VAN DUSEN, JOSE MOTOLINIA, JOSEPH SHEER, VICKII SCHWALM, and PETER WOOD
Plaintiffs and Real Parties in Interest

PLAINTIFFS/REAL PARTIES IN INTERESTS' OPPOSITION TO PETITION FOR MANDAMUS

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

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Now come Virginia Van Dusen, Jose Motolinia, Mark Joseph Sheer, Vickii Schwalm, and Peter Wood. (hereafter "Drivers") and file this opposition to the petition for mandamus filed by Defendants Swift Transportation Co. of Arizona, LLC (fka as Swift Transportation Co., Inc.), Interstate Equipment Leasing, LLC (fka Interstate Equipment Leasing, Inc.), Jerry Moyes, and Chad Killebrew, (hereafter collectively referred to as "Swift").

Swift's petition for mandamus argues that the district court committed a clear error of law when it ruled that the trial mandated by §4 of the Federal Arbitration Act (FAA), and ordered by this Court's order in *Van Dusen v. Swift*, 544 Fed. Appx. 724 (9th Cir. 2013), would be conducted pursuant to the pre-trial and trial procedures of the Federal Rules of Civil Procedure. Needless to say, Swift cites no law supporting such a remarkable assertion. Instead, Swift's petition makes a policy argument in favor of what it believes would be "the best process for determining a section 1 exemption" Petition at 13,-- a process that Swift considers better than the Federal Rules, which FAA §4 specifically mentions. Swift then asks this Court to issue a writ of mandamus compelling the district court to follow its proposed *ad hoc* procedure. Nothing in the FAA or federal jurisprudence gives this Court the authority to create new trial procedures out of whole cloth as Swift requests, let alone the authority to impose such procedures through a writ of mandamus. Accordingly, the petition should be denied.

I. FACTS

After the Respondent Drivers filed this action in the district court, Petitioner Swift moved to compel arbitration pursuant to FAA §4. Respondents opposed the motion, *inter alia*, because they contended that the Contractor Agreements containing the arbitration clause were, in fact, contracts of employment exempt from compelled arbitration pursuant to FAA §1. To support their §1 exemption

argument, the Drivers submitted the affidavits of more than fifty drivers.[1] The district court held that whether the Section 1 exemption applied was for the arbitrator to decide and compelled arbitration. Docs 223, 229. The Drivers filed a petition for mandamus arguing that the district court had no authority to compel arbitration until it had first determined that the contracts in question were covered by the FAA—i.e. until it determined that the contracts were not exempt under §1. (emphasis added). Swift recognized that, if the district court decided the Section 1 issue, it would have to be decided by a "summary trial and limited discovery" but argued the arbitrator was better suited to address the issue. Mandamus DkEntry 7-1 at 15. Swift also opposed the Drivers' mandamus petition because "the question of Plaintiffs' employee status is a critical element of Plaintiffs' causes of action and is inseparable from the merits of Plaintiffs' claims." *Id.* at 21-22. The Court of Appeals, in deciding the Drivers' mandamus petition, recognized that the question of employee status is "a central element of all of Plaintiffs substantive claims other than unconscionability" and that resolving that question would require "fact-finding on the amount of control exerted over petitioners by Defendants." *In re Van Dusen,* 654 F.3d 838, 841-842 (9th Cir. 2011) (Swift I). Despite that, this Court found that the FAA required the district court to determine the Section 1 exemption issue *before* ordering arbitration pursuant to Section 4. *Id.* at 843-845. However, because the Court found that the district court's error did not rise to the level of clear error, it denied the petition for mandamus. *Id.* at 845-46.

The Drivers then moved the district court for reconsideration of the order compelling arbitration in light of *In re Van Dusen*. The district court denied reconsideration but certified its order compelling arbitration for interlocutory

[1] *See* Plaintiffs' Opposition to Motion to Compel Arbitration, Doc 188 at 6-7 referencing affidavits of drivers filed at Docs. 187-1 to 187-4, 162-2, 162-7 through 162-39, 162-42 through 162-56.

appeal. The Drivers appealed urging that the FAA analysis in *In re Van Dusen* required the district court to resolve the §1 exemption issue before ruling on the motion to compel arbitration. Swift again argued that the district court should not decide the §1 issue because it would "require the court to decide the ultimate issue in the case: whether Drivers should be classified as employees or independent contractors." Dkt.Entry 18-1 at 6. The Ninth Circuit again rejected that argument and held that *In re Van Dusen* was law of the circuit, reversed the order compelling arbitration and remanded to the district court "to determine whether the Contractor Agreements between each appellant and Swift are exempt under §1 of the FAA." *Van Dusen v. Swift Transp. Co., Inc.,* 544 Fed. Appx. 724 (9th Cir. 2013) (*Swift II*).

Swift filed a petition for certiorari in which it once again argued that in order to resolve the Section 1 issue, "the district court would have to look beyond merely the language of the contract to determine whether the relationship between the parties instead was an employment relationship. . . . The test that must be applied to determine the parties' in fact relationship is a multi-factor, highly individualized, fact based test." Cert. Pet. At 19 (emphasis added). That petition was subsequently denied. ____U.S. ___, 134 S.Ct. 2819, 189 L.Ed.2d 785, no. 13-936 (June 16, 2014).

Once *certiorari* was denied and the mandate of the Ninth Circuit issued, Judge Sedwick ordered the parties to confer and "advise the court as to those matters that need to be addressed to resolve this litigation and suggesting a schedule." Doc 536. Swift responded by changing its strategy, and asking the court to determine the Section 1 question, not by trial, but simply by reviewing the four corners of the Contractor Agreement. Doc 542. The Drivers argued that the Contractor Agreements must be interpreted "in light of the parties intentions as reflected by their language and in view of all of the circumstances." Doc 543 at 5, quoting *Smith v Melson,* 659 P.2d 1264, 1266 (Ariz. 1983). Plaintiffs proposed a

schedule for discovery, dispositive motions, and trial in compliance with the Federal Rules of Civil Procedure. The district court found that Plaintiffs approach was the proper one, stating that,

> resolving whether an employer-employee relationship exists would require an analysis of the Contractor Agreement as a whole, as well as the Lease and evidence of the amount of control exerted over plaintiffs by defendants." (Doc. 223 at 19) Indeed, to sort out whether an individual is an employee rather than an independent contractor generally requires consideration of numerous factors, including the employer's right to control the work, the individual's opportunity to earn profits from the work, the individual's investment in equipment and material needed for the work, whether the work requires a specialized skill, and whether the work done by the individual is an integral part of the employer's business. *Real v. Driscoll Strawberry Associates, Inc*., 603 F.2d 748, 754 (9th Cir. 1979).

Doc. 546 at 1-2. The court subsequently issued the scheduling order that is the subject of the current petition for mandamus. Doc 548. Contrary to Swift's contentions, however, the district court's order does not "order[] the parties to engage in full merits discovery," Petition at 6, but instead limited discovery and trial to the "issues relating to Plaintiffs' status as employees or independent contractors." Doc 548 at 1. The court also limited depositions to five per side. *Id.*

After the district court issued its scheduling order, Swift filed a motion to determine the appropriate standard for determining the Section 1 Exemption, repeating the arguments it made in Doc 542 that the court should decide the §1 issue by considering only the four-corners of the Contractor Agreement without discovery or trial. Doc 566. Swift urged this procedure because Swift seemed to belief it would avoid deciding the merits of the Drivers' claim. Doc 566. The district court denied that motion finding,

> The question of whether an agreement is a contract of employment is not simply a question of the stated intent of the parties. If that

> were the case, then the use of the term "independent contractor" would simply govern the issue.10 Whether the parties formed an employment contract—that is whether plaintiffs were hired as employees—necessarily involves a factual inquiry apart from the contract itself. That analysis will require the court to consider the "Contractor Agreement as a whole, as well as the lease and evidence of the amount of control exerted over plaintiffs by defendants."11 Indeed, the distinction between independent contractors and employees is "highly factual."12 Classifying the arrangement requires the court to consider numerous fact-oriented details, such as the employer's right to control the work, the individual's opportunity to earn profits from the work, the individual's investment in equipment and material needed for the work, whether the work requires a specialized skill, and whether the work done by the individual is an integral part of the employer's business.13 Plaintiffs should be provided an opportunity to discover evidence that would affect the court's analysis regarding the parties' intent in this regard.

Doc 605 at 5. Swift then appealed from this Order (Swift III) and shortly thereafter filed the instant petition for mandamus. (Swift IV).

II. PETITIONER SWIFT HAS NOT SHOWN A CLEAR ERROR OF LAW

Swift argues that the district court erred as a matter of law in ordering discovery and a trial pursuant to the Federal Rules of Civil Procedure on the question of whether the FAA §1 exemption for contracts of employment of transportation workers applies to this case. As an alternative to the Federal Rules, Swift puts forward a "proposed process," Petition at 16, that it considers "the best process" for determining the Section 1 exemption, Petition at 13. That process asks the district court "to determine the section 1 exemption issue without discovery and trial and based only on an analysis of the Contractor Agreements" regardless of the existence of factual disputes over the meaning of those Agreements or the factors to be considered in determining whether those Agreements are contracts of employment. Petition at 7. There are several problems

with Swift's "proposed process." First, it directly contradicts the clear language of §4 of the FAA. Second, there is no legal support for the proposal. Third, the underlying premise for Swift's proposal – that special procedures must be devised for this case in order to ensure that the district court does not decide the merits of the case in the process of deciding the §1 issue – has already been rejected by this Court.

A. The District Court's Scheduling Order Complies With The FAA

In its first opinion in this case, the Ninth Circuit held that, "[t]he FAA, and Section 4's authority to compel arbitration, do not extend to all arbitration agreements. As Section 2 makes clear, the Act applies only to contracts 'evidencing a transaction involving commerce,' or arising from a 'maritime transaction.'" *In re Van Dusen,* 654 F.3d at 842, quoting FAA §2. Moreover, even when the Section 2 criteria are met, Section 1 exempts from the FAA arbitration agreements contained in "contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.SC. §1. *See In re Van Dusen,* 654 F.3d at 843. Consequently, the authority §4 of the FAA gives to a district court to compel arbitration "upon being satisfied that the making of [an] agreement for arbitration . . . is not in issue" does not refer to any agreement for arbitration, but only those agreements that involve 'transaction involving commerce' or 'maritime transactions' and that are not contained within "contracts of employment of . . . workers engaged in foreign or interstate commerce." *In re Van Dusen,* 654 F.3d at 844-845.

Here, the "the making of [an] arbitration agreement" covered by the FAA was placed "in issue" when Plaintiffs asserted the Section 1 exemption in opposition to Swift's motion to compel arbitration and supported that claim with

affidavits from more than 50 interstate truck drivers.[2] *See* Plaintiffs' Opposition to Motion to Compel Arbitration, Doc 188 at 6-7 referencing affidavits of drivers filed at Docs. 187-1 to 187-4, 162-2, 162-7 through 162-39, 162-42 through 162-56. (Defendants offered opposing affidavits. Doc 199 at 8 (referencing affidavits at Doc. 165)). This Court agreed that the making of a non-exempt agreement to arbitrate covered by the FAA was "in issue" and remanded to the district court to resolve the Section 1 exemption question. *Van Dusen v. Swift,* 544 Fed. Appx. 724 (9th Cir. 2013).

Where "the making of the arbitration agreement . . . [is] in issue," Section 4 of the FAA commands that "the court shall proceed summarily to the trial thereof." 9 U.S.C. §4 (emphasis added). The district court complied with that command by following the usual pre-trial procedures specified by the Federal Rules, including issuing the a pre-trial scheduling order setting discovery and other deadlines in preparation for the §4 trial. That was clearly the proper way to proceed. All civil trials of disputed facts conducted by federal district courts, are governed by the Federal Rules of Civil Procedure. Fed. R. Civ. P., Rule 1. The trial required by Section 4 of the FAA is no exception as is made explicit when it indicates that, upon a timely jury demand, "the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose." 9 U.S.C. §4. Courts conducting "trials" pursuant to § 4 of the FAA have long recognized that the usual panoply of procedures set forth in the Fed. R. Civ. P., including discovery, apply to such trials.

[2] Generally courts hold that a party may place "the making of an arbitration agreement" covered by the FAA "in issue" by coming forward with some evidence to substantiate the existence of a triable issue of fact. *Reilly v. W.M. Financial Services Inc.,* 95 Fed. Appx. 851, 852 (9th Cir. 2004); *Doctor's Asso. Inc. v. Stuart,* 85 F.3d. 975, 984 (2d Cir. 1996); *Dillard v. Merrill Lynch, Pierce, Fenner & Smith Inc.,* 961 F.2d 1148, 1154 (5th Cir. 1992).

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) ("if the plaintiff has responded to a motion to compel arbitration with facts sufficient to place the agreement to arbitrate in issue, then 'the parties should be entitled to discovery on the question of arbitrability before a court entertains further briefing on [the] question."); *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). *See, e.g., Caseras v. Tejas de Brazil (Orlando) Corp*.,6:10cv1001Orl, 2013 WL 5921539 (Nov. 4 2013) (ordering parties to confer and submit a case management plan for discovery upon finding that §4 trial was necessary); *Dassero v. Edwards,* 190 F.Supp2d 544, 557 (W.D.N.Y. 2002) (setting hearing regarding length and scope of discovery after determining §4 trial was necessary); *Rush v. Oppenheimer,* 638 F.Supp. 872, 876 (S.D.N.Y. 1986) (setting discovery deadline and pre-trial order submission date for §4 trial).

To be sure, the scope of discovery in a Section 4 trial will depend on the precise reason the "making of an agreement to arbitrate" covered by the FAA is in issue. But as the above cases make clear, the normal pre-trial procedures established by the Federal Rules of Civil Procedure, including discovery, apply to §4 trials just as they would to any other trial. Accordingly, where discovery requests are oppressive or irrelevant to the triable issues, a party may seek a protective order from the district court pursuant to Rule 26(b), and where discovery shows that there is no genuine issue of material fact, summary judgment pursuant to Rule 56 is available. *See, e.g., Grosvenor v. Qwest Corp.,* 733 F.3d 990 (10th Cir. 2013) (dismissing for lack of jurisdiction appeal from summary judgment

ruling on §4 issue). In short, the district court's scheduling order setting discovery deadlines, a dispositive motion deadline, and a trial of the Section 1 exemption issue, far from being a "clear error of law" subject to mandamus, is precisely the way the FAA and the federal rules command a district court to proceed.

B. Swift's Arguments In Favor Of Its *Ad Hoc* Procedure Are Unpersuasive

Swift ignores §4's command that a trial be held and urges its own *ad hoc* procedure for resolving the Section 1 issue, but it offers no statutory support for the unprecedented procedure it proposes. Instead it cites to a number of FAA §1 cases that it contends followed procedures similar to the one it is urging. Petitioner mis-reads those cases. In *Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co.,* 288 F. Supp. 2d 1033 (D. Ariz. 2003), the court merely held that the plaintiff drivers had failed to come forward with any evidence sufficient to put the Section 1 exemption issue "in dispute." Thus, the question of how a § 4 trial should be conducted never arose. *Carney v. JNJ Express, Inc.,* 10 F.Supp. 3d 848 (W.D. Tenn. 2014); *Port Drivers Fed'n 18, Inc., v. All Saints Express, Inc.,* 757 F.Supp.463, 472 (D.N.J. 2011); and *Owner-Operator Indep. Drivers Assn., Inc. v. United Van Lines, LLC,* No. 06-219, 2006 WL 5003366 (E.D. Mo. Nov. 15, 2006), are similar. In none of those cases did the plaintiffs offer evidence to create a factual issue as to whether the agreements in issue were, in fact, exempt contracts of employment.[3] While the plaintiffs in *OOIDA v. Swift* and its progeny failed to show a need for a §4 trial, it is worth noting that those cases recognized, contrary to Petitioners mandamus argument, that once the question of whether an agreement

[3] The plaintiffs in those cases apparently relied solely on cases such as *Owner-Operator Indep. Drivers Assn v. C.R. England, Inc.,* 325 F. Supp.2d 1252, 1257 (D. Utah 2004), which held that contract drivers were employees as a matter of law. Once the courts in those cases rejected *C.R. England's* holding, there was no issue to try. Here, by contrast, Plaintiffs do not rely *C.R. England*, but instead submitted substantial affidavits setting forth facts to support their claim that the Contractor Agreements are contracts of employment.

is a contract of employment is in issue, it must be decided "based on the terms of the [driver's] contract and the circumstances of their working relationship with M.S. Carriers." *OOIDA v. Swift,* 288 F.Supp.2d at 1035 (emphasis added).

Swift also tries to support its proposed *ad hoc* procedure for deciding the Section 1 issue by citing standard contract interpretation law for the proposition that "[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Petition at 14 quoting *WYDA Associates v. Merner,* 42 Cal.App. 4th 1702, 1709 (1996). That statement is true, as far as it goes, and many contract interpretation cases are, in fact, resolved on summary judgment as a result. However, it is also true that, when the terms of a contract are ambiguous, extrinsic evidence may be offered at trial to resolve such ambiguities after a period of discovery, and, in Arizona it can be offered without showing an ambiguity. *Taylor v. State Farm Mut. Auto Ins. Co.,* 854 P.2d 1134, 1140 (Ariz. 1993) (en banc).

Moreover, the issue here is not simply a question of determining the meaning of the words in the Agreements. If it were, the clear and unambiguous statement in the Agreements that the Respondent truck drivers are "independent contractors" would have resolved the issue and the Ninth Circuit would not have remanded to the district court to consider the issue. Even Swift recognizes that the independent contractor label in the Contractor Agreement does not control the question of whether the Agreements are contracts of employment. Petition at 17 ("the district court seemed 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.**") (citation omitted, emphasis added). Swift is clearly correct in conceding that point. When Congress used the phrase "contracts of employment" in §1 of the FAA it must be assumed that it was referring to the common law definition of

employment. *See Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 324 (1992) (when Congress uses a term like employee with an established common law meaning, it must be assumed that Congress intended to incorporate the common law meaning unless the statute indicates otherwise). As the Supreme Court explains in *Darden,* the common law test of employment requires a court to analyze a number of factors outside the four-corners of the Agreement itself, including:

> the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; the tax treatment of the hired party.

Darden, 503 U.S. at 323. *Darden* references additional factors listed in the Restatement (Second) of Agency § 220(2) (1958), and notes that the common law agency test contains "no shorthand formula or magic phrase that can be applied to find the answer, [thus] <u>all of the incidents of the relationship must be assessed and weighed with no one factor being decisive</u>." *Darden,* 503 U.S. at 323 (citation omitted, emphasis added). The Restatement factors make clear that, although the parties' view of their relationship as recited in their agreement is a factor to be considered, it is not controlling.[4] *See Corp. Exp. Delivery Sys. v. NLRB,* 292 F.3d

[4] Once it is recognized that the labels in a contract do not determine whether it is a contract of employment, Swift's attempt to draw a distinction between a contract of employment and the relationship created by a contract being one of employment falls apart. A contract is a contract of employment, not because of the words of the contract examined in isolation, but because the relationship created by the contract, analyzed using the Restatement factors cited in *Darden,* demonstrates the employer has sufficient control to establish that the relationship is one of employment . That was the common law even before the passage of the FAA. *See e.g.* ,

777, 780 n * (D.C.Cir. 2002) (affirming the Board's determination that, although drivers "were described in their contract as 'independent contractors,' " they were actually employees); *Schwieger v. Farm Bureau Ins. Co.,* 207 F.3d 480, 483 (8th Cir. 2000).

Swift concedes that these common law factors are the pertinent issues to be addressed in determining the Section 1 exemption, but insists that they can be determined "based solely on briefing that interprets the Contractor Agreements." Petition at 17-18. That argument is directly contrary to the position Swift argued in the Supreme Court, where it stated in its petition for *certiorari* that in order to resolve the Section 1 issue, "the district court would have to look beyond merely the language of the contract to determine whether the relationship between the parties . . . was an employment relationship."[5] Cert. Pet. At 19. Swift should not be permitted to play so fast and loose with the courts. Having argued that it is necessary to go beyond the language of the contracts, it should not be heard to change its tune. Even if Swift were permitted to change its position and argue that there are no disputed facts raised by the Section 1 exemption, the district court has already ruled, after examining the affidavits filed in support of and in opposition to the motion to compel arbitration, that "resolving the question of whether an

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Homewood Rice Land Syndicate v. Suhs, 142 Ark. 619, 219 S.W. 333, 335 (1920) ("the language of the above contract is ambiguous, then the above testimony [about exercise of control] clearly shows that it was not the intention of the appellant to make the appellee an independent contractor".);*Watson v. Hecla Min. Co.*, 79 Wash. 383, 387, 140 P. 317, 318 (1914)(" Notwithstanding the fact that the contract was in writing, the respondent had the right to introduce evidence showing what the real relation of the parties thereto was.").

[5] Swift made similar representations in this Court when it opposed the Drivers mandamus petition with the argument that the § 1 issue "requires the application of a variety of complex factors" and an "in depth factual analysis" that was sufficiently complex that it did not "lend[] itself to the summary trial and limited discovery contemplated by the FAA." 9th Cir. Dkt 10-73780, DkEntry 7-1 at 14-15.

employer employee relationship existed would require analysis of the ICOAs as a whole, as well as fact-finding on the amount of control exerted over [the Drivers] by [Swift]," Doc 223 at 19. The district court reiterated that point when it adopted the challenged scheduling order. Doc 605 at 5.

In sum, Swift offers no legal justification for the *ad hoc* procedure it asks this Court to impose on the district court. No cases endorse such an approach and the disputed factual issues, which even Swift has acknowledged must be resolved in order to decide the Section 1 issue, render it impossible for the district court to rule on the basis of the "Contractor Agreements" alone. Certainly the district court's decision to conduct the trial mandated by Section 4 using the usual process for trials set forth in the Federal Rules of Civil Procedure (including pre-trial discovery, dispositive motions deadlines, and trial) cannot be characterized as a "clear legal error."

C. Swift's Policy Argument Is Without Basis

Swift's only argument in favor of the *ad hoc* procedure it proposes is its policy argument that, because the Section 1 issue – whether the Agreements at issue create an employment relationship -- overlaps with the merits of the Drivers' claims (which also depend upon a showing that the Drivers are employees), the court's decision to allow for discovery and a trial ought to be viewed as improper because it will effectively decide the merits of the case and obviate the need for arbitration. Leaving aside the fact that the purpose of a mandamus petition is to correct clear errors of law, not to make policy arguments about the "best" way for a district court to decide an issue, there are several problems with Swift's proposal.

First, the Ninth Circuit has already rejected Swift's argument. In its *In re Van Dusen* opinion, this Court noted the Drivers' concession that "[t]he issue of whether an employer/employee relationship exists between the plaintiffs and the defendants . . . is not only central to the question of exemption from arbitration, it

is also a central element of all of Plaintiffs' substantive claims other than unconscionability." 654 F.3d at 841. Despite that overlap, the Court concluded that FAA § 4 required the district court to decide the exemption issue. *Id.* at 844. The next time the case came to the Ninth Circuit Swift again argued that allowing the district court to decide the §1 issue would "require the court to decide the ultimate issue in the case: whether Drivers should be classified as employees or independent contractors." Dkt.Entry 18-1 at 6. The Ninth Circuit again rejected that argument and ordered the district court to determine the §1 issue regardless of the overlap with the merits. *Van Dusen v. Swift Transp. Co., Inc.,* 544 Fed. Appx. 724 (9th Cir. 2013). If the overlap between the §1 issue and the merits was irrelevant to the question of who was to decide the §1 issue, it is equally irrelevant to the question of how that issue is decided.

Second, even apart from this Court's prior rulings, nothing in FAA §4's command that when the "making of an arbitration agreement" covered by the FAA is "in issue," "the court shall proceed summarily to the trial thereof" remotely suggests that the procedures applicable to such a trial should be different depending on whether the issue to be tried overlaps with the merits of the case. Section 4 speaks of a "trial," not different kinds of trials. Moreover, contrary to Swift's notions of what would be the "best" procedure, it must be assumed that Congress was aware when it directed the district courts to conduct trials of disputes over Section 1 exemptions that that issue would overlap with the merits of claims brought by workers claiming to be employees. Even if, as Swift contends, deciding the §1 issue will render arbitration moot and undermine the FAA's policy in favor of arbitration, that is a function of the way Congress drafted the FAA and its decision to allow a "trial" when the applicability of the exemption is in issue. It is not Swift's place to demand that this Court rewrite the FAA to create a special §4 procedure for situations where the Section 1 issue overlaps with the merits of a

claim. Nothing in §4 of FAA and nothing in the long history of the Federal Rules of Civil Procedure supports the proposition that a "trial" should proceed under different rules or in an *ad hoc* fashion simply because the issue to be tried overlaps with a merits issue.

CONCLUSION

For all the foregoing reasons, the petition for mandamus should be denied.

Respectfully submitted this 10th day of June, 2015.

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STATEMENT OF RELATED CASES

A related case, Case No. 15-15257, is pending in this Court.

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 June 10, 2015.

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: June 10, 2015

MARTIN & BONNETT, PLLC
By: s/Susan Martin
Susan Martin
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