SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
Including Professional Corporations
RONALD J. HOLLAND, Cal. Bar No. 148687 *(Pro Hac Vice)*
rholland@sheppardmullin.com
ELLEN M. BRONCHETTI, Cal. Bar No. 226975 *(Pro Hac Vice)*
ebronchetti@sheppardmullin.com
PAUL S. COWIE, Cal. Bar No. 250131 *(Pro Hac Vice)*
pcowie@sheppardmullin.com
Four Embarcadero Center, 17th Floor
San Francisco, California 94111-4109
Telephone: 415-434-9100
Facsimile: 415-434-3947

Attorneys for Defendants
SWIFT TRANSPORTATION CO., INC.,
INTERSTATE EQUIPMENT LEASING, INC.,
CHAD KILLEBREW AND JERRY MOYES

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Virginia Van Dusen; John Doe 1; and Joseph Sheer, individually and on behalf of all other similarly situated persons,

Plaintiffs,

v.

Swift Transportation Co., Inc.; Interstate Equipment Leasing, Inc.; Chad Killibrew; and Jerry Moyes,

Defendants.

Case No. CV 10-899-PHX-JWS

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO LIFT STAY AND VACATE ORDER COMPELLING ARBITRATION

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I. INTRODUCTION

Over eight months after this Court ordered arbitration, Plaintiffs ask this Court for a second time to "reconsider" its decision to compel arbitration. As an initial matter, Plaintiffs' motion is untimely and should be dismissed because Plaintiffs have failed to show good cause for the months of delay in filing their motion. If Plaintiffs can overcome that procedural hurdle, their motion should still be denied because it fails to present any new facts that were not before this Court when it Ordered the parties to arbitration. In a desperate attempt to get this matter back into federal court as a class action, Plaintiffs allege that the costs of arbitration are too high and claim Defendants have refused to honor the parties' arbitration agreement. Plaintiffs' legal theories are not new, nor are they based on new facts.

Even if Plaintiffs' stated facts were new, they do not change the result. Plaintiffs' theory, that the arbitration agreement is unenforceable because the costs of arbitration are prohibitively high so as to be unconscionable, regurgitates the exact same argument advanced by Plaintiffs in opposition to Defendants' Motion To Compel Arbitration, which this Court already considered and rejected. The law in Arizona has not changed and well-established Arizona precedent holds that the AAA Commercial Rules and fees are not unconscionable and provide an adequate means by which Plaintiffs can vindicate their rights. *See Harrington v. Pulte Home Corp.*, 119 P.2d 1044, 1055-56 (Ariz. App. 2006).

Moreover, contrary to Plaintiffs' assertions, Defendants have not refused to comply with the terms of the arbitration agreement, but have complied with their contractual obligations in full by duly tendering their portion of the arbitration fees. Finally, the AAA has not refused to waive or defer Plaintiffs' filing fees and has made no specific determination in that regard. This is because Plaintiffs have not requested either waiver or deferral.

Thus, in the absence of any new facts or a change in law, Plaintiffs' motion for reconsideration should be denied.

II. FACTS

A. Plaintiffs Have Deliberately Refused To Pursue Arbitration.

The parties' arbitration agreement provides that an arbitrator will decide the issue of hardship and whether Swift will be responsible for payment of the costs of arbitration:

> The parties agree that the arbitration fees shall be split between the parties, unless CONTRACTOR shows that the arbitration fees will impose a substantial financial hardship on CONTRACTOR as determined by the Arbitrator, in which event Swift will pay the arbitration fees. (Pls' Exh. B ¶ 24.)

As discussed in the parties' briefing on the original Motion To Compel Arbitration, ("MTC Arbitration") to initiate arbitration the AAA requires payment of a filing fee, the amount of which depends on the range of damages asserted by Plaintiffs. (See, for example, Plaintiffs' Opposition to MTC Arbitration, Doc. 188 at 22:24-24:10.) The AAA's rules, however, separately provide that the filing fees may be waived or deferred by the AAA under Rule 49. The parties' agreement does not affect that Rule. (Declaration of Paul Cowie ("Cowie Dec.") ¶¶ 2 and 3 Exh. A ¶ 4.)

After this Court compelled arbitration, Plaintiff Sheer filed a purported class arbitration on December 20, 2010 with the AAA, but did not estimate his range of damages or submit payment for his portion of the filing fees. On January 13, 2011, Patrick Tatum, Assistant Vice President of the AAA, wrote to Plaintiffs' counsel stating that "the AAA cannot administer this matter as currently filed." (See Pls' Exhs. B ¶ 24 and E.) This was because Plaintiffs sought to pursue class arbitration, which was prohibited by the terms of the parties' agreement. Mr. Tatum also pointed out that "the minimum filing requirements have not been met." *Id.*

On January 21, 2011, Plaintiff Sheer filed another demand for arbitration with the AAA. However, Plaintiff again did not submit any filing fee with that demand and did not estimate the amount or range of his damages. (See Pls' Exh. M.) On January 25, 2011, the AAA wrote to Plaintiffs' counsel again explaining that the filing fee requirements must be met before the demand could be administered. (Declaration of Ellen Bronchetti ("Bronchetti Dec.") ¶ 2 Exh. A.) The AAA's letter reiterated that a range of damages

needed to be estimated so that it could set the amount of the filing fees. Sheer, however, refused to provide a reasonable range for the amount of his claims. On February 2, 2011, Plaintiff's counsel responded to AAA's request for a range of damages asserting that: "Claimants are unable to state an upper limit or range with respect to the damages claimed for Mr. Sheer… Claimants have not had any opportunity to conduct discovery and therefore cannot even begin to assess damages until the respondents provide information with respect to the wages and hours Claimants worked." (Pls' Exh. G.) Moreover, despite the parties' class action waiver and the AAA's prior recognition of that waiver, Plaintiffs asserted: "it is unknown whether Mr. Sheer's arbitration will result in collective or class action claims being resolved." *Id.* Because Plaintiffs refused to estimate their damages within any range, pursuant to its rules, the AAA set the filing fee at the maximum of $10,200 based on a damages claim of up to $10,000,000.[1]

After refusing to provide a range of damages, Plaintiffs took the position that Defendants should pay the entire filing fee. (See Pls' Exh. A.) In a series of correspondence that followed, Defendants made clear that they intended to comply with the terms of the arbitration agreement and did in fact tender their portion of the filing fees. (See, Pls' Exhs. I-1 and I-2.) Thereafter, Plaintiffs continued to refuse to pay any fees and the AAA closed its file as of February 11, 2011. (See Pls' exhibits L-1 and L-2.)

On February 24, 2011, Defendants wrote to Plaintiffs' counsel to explain why Plaintiffs' position was unreasonable and why this was a situation of their own making. (Bronchetti Dec. ¶ 3 Exh. B.) In that letter, Defendants set forth that the reason arbitration was not proceeding was because Plaintiffs had failed to comply with the terms of the parties' arbitration agreement by not paying Plaintiffs' portion of the filing fees. Moreover, Defendants explained that the reason the filing fees were artificially inflated was because of Plaintiffs' refusal to estimate a range of damages. Defendants explained that if Plaintiffs

[1] Indeed, Plaintiffs' position did not change after the US Supreme Court issued its decision in *AT&T Mobility LLC v. Concepcion*, ___ U.S. ___, 131 S.Ct. 1740 (2011), which categorically upheld the validity of class action waivers in arbitration agreements. (See MPA 6:17-18, fn 4.).

estimated a range of damages up to $500,000 (a figure well in excess of their likely individual damages, if any) the filing fee would be reduced to $2,175 per party. More realistically, the estimated damage amount should be set in the $75,000 range, which would reduce the filing fee to only $487.50 per party. Additionally, Defendants pointed out that the unreasonableness of Plaintiffs' position was demonstrated by their insistence that they could not estimate their likely damages because their demand for arbitration may result in class arbitration. Defendants concluded: "it is the individual plaintiff's refusal to reasonably state the amount of their claims and refusal to pay any filing fee that has prevented proceeding with these arbitrations." *Id.*

Subsequently, Plaintiffs' counsel continued to file demands for arbitration with the AAA on behalf of other individuals not parties to this action. In response, the AAA acknowledged receipt of the demands, but did not process them because Plaintiffs did not estimate a range of damages or pay their portion of the filing fees. (Pls' Exh. F-2.) Thereafter, Plaintiffs engaged in ex parte communications with the AAA, through telephone calls, emails and letters, to discuss the application of the AAA's own hardship waiver and deferral process, which now form the basis of Plaintiffs' alleged new facts. As part of those communications, on April 21, 2011, the AAA explained that "each application would be reviewed by our Corporate Finance department and a determination would be made on whether to defer or waive the fees." (Pls' Exh. F-3)(emphasis added.) The AAA also explained that the amount of the filing fees are "subject to increase or decrease" acknowledging that if Plaintiffs estimated lower damages resulting in a lower filing fee, Plaintiffs' estimate of damages could be increased at a later time. Citing to the AAA Rules, the letter noted that "fees are subject to increase if the amount of a claim…is modified." *Id. See also* Cowie Dec. ¶ 3 Exh. A ¶ 7. In subsequent correspondence, on May 19, 2011, the AAA explained that, generally, the majority of hardship requests decided by the AAA are placed under deferral rather than a total waiver of administrative fees. (Pls' Exh. K-2.) However, the AAA reiterated that waiver by the AAA remained a possibility. Indeed, the AAA has subsequently confirmed that the AAA has not refused to

waive the filing fees for Mr. Sheer or any of the other individuals represented by Plaintiffs' counsel. (Cowie Dec. ¶ 3 Exh. A ¶¶ 1 and 2.) In practice, the AAA often defers fees rather than waiving them so as to preserve the possibility of collecting fees should the individual's financial circumstances change. *Id.* at 4.

Plaintiffs now file the instant motion alleging that these are new facts that warrant a change in the Court's Order compelling arbitration. In support of their motion Plaintiffs have filed tens of hardship declarations, but only one is on behalf of a named Plaintiff. That hardship declaration does not provide details of current income, but instead states only income from 2009, without explanation. The declaration is also undated and makes only conclusory statements without any supporting evidence. (See Pls' Exh. D page 51.)

III. LEGAL ARGUMENT

A. Plaintiffs' Motion For Reconsideration Is Procedurally Deficient.

1. Plaintiffs Acknowledge That This Is A Motion For Reconsideration.[2]

Plaintiffs' Motion To Lift Stay and Vacate Order Compelling Arbitration is by its very nature a motion for reconsideration because it asks this court to "vacate" its prior decision and asks it to do so based on alleged new facts. This inescapable fact is acknowledged by Plaintiffs throughout their brief: "Plaintiffs now move the Court, pursuant to Local Rule 7.2, to reconsider its ruling compelling arbitration…," "In these circumstances reconsideration is appropriate" and "Plaintiffs' motion for reconsideration." (MPA 1:25; 9:19; 17:20)(emphasis added.) Furthermore, this Court ordered that the action be stayed "pending the outcome of arbitration." (Order p. 22.) Consequently, a motion to lift the stay would only be proper had arbitration been concluded.[3]

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[2] Defendants understand that a response to a motion for reconsideration is not permitted without a court order. However, due to Plaintiffs' characterization of their motion, Defendants contacted the court clerk who advised that a response should be filed.

[3] Plaintiffs cite to *Sink v. Aden Enterprises, Inc.*, 352 F.3d 1197 (9th Cir. 2003) to suggest that a motion to lift the stay is a procedurally proper mechanism. But *Sink* is distinguishable. In *Sink*, the arbitrator had granted a default against defendant, after defendant failed to pay its portion of the arbitration fees. Only then did plaintiff move to lift the stay. Unlike the defendant in *Sink*, Defendants here have paid their portion of the arbitration fees and no default has been entered by an arbitrator against Defendants.

2. Plaintiffs' Motion For Reconsideration Is Untimely.

Under Local Rule 7.2(g), a motion for reconsideration must be brought within 14 days of the original decision absent good cause. " 'Good cause' primarily considers a party's diligence in filing the motion." *N'Genuity Enterprises Co. v. Pierre Foods, Inc.*, Case No. 09-cv-385, 2010 WL 94248, *1 (D. Ariz. Jan. 5, 2010). Absent such a showing, the motion must be denied because it is untimely. (*Hernandez v. Arpaio*, Case No. 07-cv-1712, 2009 WL 113787, *1 (D. Ariz. Jan. 16, 2009) (first motion for reconsideration filed six months late and second motion filed seven months late denied where no good cause shown for delay in filing).

Over eight months have elapsed since this Court's Order compelling arbitration. Nearly four months have passed since Plaintiffs supposedly learned about the "new" evidence which is the basis for their motion. Sheer did not file his arbitration demand until January 21, 2011 and the AAA closed it's file on February 11, 2011 after Sheer refused to state a range of damages or pay his portion of the filing fees. Plaintiffs provide no explanation, however, as to why they waited months to file Sheer's demand for arbitration and then waited several more months to file this motion. To the extent that Plaintiffs argue that they did not receive the AAA's last correspondence until June 6, 2011, that does not explain why it took Plaintiffs four months to get the information that they now assert constitutes new facts. Plaintiffs have failed to demonstrate good cause for the timely filing of their motion. Accordingly, the motion should be denied.

B. Plaintiffs' Motion For Reconsideration Is Unsupported By Any New Facts.

Should the Court reach the merits of Plaintiffs' motion, it should, in any event, be denied. Motions for reconsideration are: "disfavored and should be granted only in rare circumstances." *Garcia v. Regis Corp*. Case No. 09-cv-1282, 2011 WL 1843268 at *1 (D. Ariz. May 16, 2011). "A party should not file a motion to reconsider to ask a court to rethink what the court had already thought through, rightly or wrongly." *Medical Protective Co. v. Pang*, Case No. 05-cv-2924, 2010 WL 4572723, *1 (D. Ariz. Nov. 5, 2010). Indeed, a motion for reconsideration must be denied unless there is a showing of

manifest error or the discovery of new facts or legal authority that "could not have been brought to [the Court's] attention earlier with reasonable diligence." *Garcia* at *1.

Here, Plaintiffs rely solely on the assertion that new facts support a change in the Court's previous ruling.[4] Plaintiffs' motion is premised on their assertion that there are three new facts warranting "reconsideration" of the Order to compel arbitration: 1) Defendants refused to pay the costs of arbitration; 2) the AAA refused to waive fees; and 3) the amount of the fees and costs impose a substantial hardship. (MPA 9:6-14.) None of these so called new facts are sufficient to support Plaintiffs' motion.

1. Defendants Have Complied With Their Contractual Obligations.

Agreements to arbitrate are to be enforced according to their terms. *Rent-A-Center, West Inc. v. Jackson,*—U.S.—, 130 S. Ct. 2772, 2776 (2010). By the terms of the parties' agreement, the "fees shall be split between the parties, unless [Plaintiff] shows that the arbitration fees will impose a substantial financial hardship on [Plaintiff] as determined by the Arbitrator, in which event, [Defendants] will pay the arbitration fees." Contrary to Plaintiffs' false assertions, Defendants have complied with the terms of the parties' arbitration agreement in full by tendering their portion of the filing fees and expressly stating that they will comply with the terms of the parties' agreement. (Pls' Exhibit I-1 and I-2.) There is nothing in the agreement or in the AAA Rules which obligates Defendants to advance the fees in order for Plaintiffs to have their hardship claims heard by the arbitrator and there is no evidence that Defendants have refused to pay any fees or costs that the arbitration agreement requires them to pay. Moreover, there is nothing to suggest that this Court contemplated that Defendants would front the costs of arbitration. Indeed, the AAA agrees that "Defendants have done nothing to prevent arbitration from proceeding." (Cowie Dec. ¶ 3 Exh. A ¶ 8.)

Plaintiffs' attempt to mislead this Court regarding Defendants' use of the phrase "*In*

[4] Plaintiffs' motion should be dismissed because their purported evidence is unsupported by any authenticating declarations and, thus, is inadmissible. (See Defendants' Objections To Evidence filed concurrently herewith.)

Forma Pauperis," to suggest a change in Defendants' position with regard to payment of fees, lacks support. A cursory reference to what Defendants actually stated shows that Plaintiffs' mischaracterization is simply not true. In their MTC Arbitration Reply Brief, after discussing how arbitration fees could be reapportioned if an arbitrator found hardship, Defendants stated: "Contrary to Plaintiffs' theory, an application to reapportion arbitral fees would most certainly be made immediately upon assignment of the case to an arbitrator, much like a Motion To Proceed In Forma Pauperis." (Doc. 199 16:22-17:1.) By definition, to "reapportion" requires that fees must first have been paid. Thus, there has been no changed circumstances and there are no new facts to support Plaintiffs' motion.

2. The AAA Has Not Refused To Waive Fees – No Plaintiff Has Obtained A Hardship Determination Or Requested A Fee Waiver Or Deferral.

It is Plaintiffs who have failed to comply with the terms of the arbitration agreement by refusing to pay their portion of the arbitration fees or otherwise obtain a deferral or waiver of fees from the AAA under Rule 49. Plaintiffs' unauthenticated emails filed in support of their motion shed no light on the fee waiver or deferral issue because they provide no specifics regarding Plaintiffs' hardship requests or the reasons for the AAA's position. The purported evidence presented by Plaintiffs does not include any evidence that they actually requested a waiver or deferral of the filing fees by the AAA or that such determination was ever made. It was not. (Cowie Dec. ¶ 3 Exh. A ¶ 5 and 10.) To the contrary, waiver of filing fees remains a possibility. *Id.* at ¶ 2. Moreover, the AAA has made no express finding with respect to any individual's waiver or deferral of the initial filing fees. *Id.* at ¶ 5. Plaintiffs' exhibits K-l to K-3 discuss only the AAA's general procedures and policies and the likely outcome of any request for waiver or deferral of fees. *Id.* at ¶ 10. There is no record evidence that Plaintiffs requested a waiver or deferral of fees. In the context of Plaintiffs' motion, such general analysis lacks the specificity required for this Court to overturn its prior decision. *See Harrington supra at* 1055-56—it is plaintiffs' burden to show that arbitration would be prohibitively expensive through "specific facts." There are certainly no facts before this Court to find that the AAA refused

to waive any of Plaintiffs' filing fees. They did not. (Cowie Dec. ¶ 3 Exh. A ¶ 1.)

3. Plaintiffs' Claim That The Arbitration Fees Are Prohibitive Was Rejected By The Court In The Original Motion To Compel.

The amount of the fees was known to Plaintiffs when they opposed the MTC Arbitration and it was contemplated that they would be required to pay those fees before obtaining a hardship determination from the arbitrator. Plaintiffs' argument here mirrors their argument in opposition to Defendants' MTC Arbitration. (Compare MPA 13:10-17:18 to Plaintiffs' Opposition, Doc. 188 at 22:24-24:11.) Plaintiffs recognize that they have made this exact same argument before, but suggest that they get to argue it again because the Court must not have been persuaded the first time. (MPA 11:25-28 fn 6.) In their Opposition to the MTC Arbitration, Plaintiffs argued that they would be obliged to pay a filing fee of between $775 to over $10,000. (Opp. Doc. 188, 23:3-4.) Plaintiffs now argue the filing fees are $7,100, an amount well within Plaintiffs' original estimate. (MPA 15:2.) Plaintiffs' original Opposition also cited to the AAA's fee schedule and provided the hyperlink to the AAA's Rules containing that fee schedule. (Opp. Doc. 188, 23:6-7.) Indeed, as stated in *Harrington,* "the fee schedule is clearly available if the signing party attempted to check his rights." *Id.* at 1057. Thus, Plaintiffs present nothing new regarding the amount of the fees.

Plaintiffs also argue that they have now discovered that they would be required to pay an unknown amount as a deposit for the arbitrator's fees. However, in their Opposition to Defendants' MTC Arbitration, Plaintiffs already made that argument too:

> The provision in the arbitration agreement allowing an arbitrator to relieve a driver of the obligation to pay fees if the arbitrator determines that they would impose a "substantial financial hardship" does not ameliorate the unconscionable barriers to relief imposed by the Commercial Rules. Each individual driver would still have to come up with the cash for the filing fee and pay the arbitrator's hourly rate for the time it takes the arbitrator to decide "substantial hardship." (Opp. Doc. 188, 23:13-19.)

In considering and rejecting this argument, the Court ruled that "the arbitration

agreement provides a mechanism for waiving Plaintiffs' arbitration fees." (Order p. 12.)

Furthermore, this Court also ruled: "Plaintiffs … do not provide individualized evidence supporting their argument that such fees would be prohibitively expensive based on their particular financial situations." (Order p.14.) Plaintiffs' financial situations were known to them at the time they opposed Defendants' MTC Arbitration. Indeed, Sheer's hardship declaration, submitted for the first time in support of this motion, contains only information from 2009. Because this information "could … have been brought to [the Court's] attention earlier with reasonable diligence" it does not constitute new facts. *Garcia* at *1. Moreover, because the information is from 2009, it also cannot constitute the individualized evidence necessary to demonstrate the fees are prohibitively expensive.

C. Even If Plaintiffs Facts Were New, Arizona Law Still Compels Arbitration.

Realizing that their alleged "new facts" argument is likely to fail, Plaintiffs dedicate the second half of their brief rearguing that fee-splitting in arbitration is unlawful and that the costs imposed by the AAA's Commercial Rules are prohibitively expensive so as to be unconscionable. However, Plaintiffs ignore the controlling law of Arizona and once again apply the wrong law from other jurisdictions that simply does not apply here.[5]

1. Arizona Law Applies And Compels Arbitration.

Arizona law applies to this dispute. The parties' arbitration agreement expressly provides, and this Court held, that the "substantive law of the State of Arizona shall apply." (Plaintiffs' Ex. B, ¶ 24; Order p. 11.) Under Arizona law, "arbitration agreements are enforceable in the absence of individualized evidence to establish that the costs of arbitration are prohibitive." *Harrington* at 1055 (emphasis added) citing to *Green Tree Financial Corp.-Alabama v. Randolph,* 531 U.S. 79, 91-92 (2000)(the case principally relied on by Plaintiffs as the basis of their motion for reconsideration). Indeed, *Green Tree*

[5] Plaintiffs' challenge is only to the validity of the delegation provision of their arbitration agreement. As discussed in detail by this Court in its Order, and as *Rent-A-Center* points out, "challenging a delegation clause based on a theory of prohibitive costs may be more difficult to establish because the issue of enforceability is far more narrow than the overall merits of the dispute." (Order p. 14.)

acknowledges that in determining whether fees imposed under an arbitration agreement are unconscionable, a "case-by-case approach" should be adopted. *Id.* at 92. (See also, Order p. 14.) Further, it is Plaintiffs' burden to establish that arbitration would be "prohibitively expensive" through "specific facts." *Harrington* at 1055-56 citing to *Green Tree* at 92. Thus, the question before the Court is not whether Plaintiffs can demonstrate hardship, but whether the costs of arbitration are prohibitively high. Both *Harrington* and *Jones* have expressly upheld the legitimacy of the costs under the AAA Rules. *Harrington* at 1055-1056; *Jones* at 1132. Indeed, as this Court recognized: "Arbitration under the FAA is a matter of consent and parties are generally free to structure their agreement as they see fit." (Order p.13-14) "Where the parties have agreed to abide by particular rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA." *Id.* Here, Plaintiffs fail to present the individualized evidence necessary to establish that the costs of arbitration are prohibitively high and provide no other basis to challenge the fee structure chosen by the parties.

2. *Harrington* Is The "Proper Arizona Authority."

Harrington, relied on by this Court in compelling arbitration, is directly on point, as it considered facts very similar to those at issue here and analyzed those facts in the context of whether the fee provisions of the AAA's Rules were prohibitive.[6] In rejecting the plaintiffs' argument that the fees were prohibitively expensive, the Arizona court held that plaintiffs had failed to meet their burden because: 1) the costs were small ($11,750, plus arbitrator compensation and room rental) when compared to the amounts they sought to recover (between $500,000 and $1,000,000) and the amounts they would have to pay in litigation costs; 2) the AAA's rules provided for the deferral or reduction of the administrative fees; 3) there was the possibility that their attorneys would take the case on contingency and advance the fees; and 4) the affidavits offered in support of their motion

[6] The arbitration agreement in *Harrington* incorporated the AAA's Construction Industry Rules, which has a fee schedule exactly the same as the Commercial Rules at issue in this case. *Harrington* also involved plaintiffs of low fixed income.

offered only conclusory statements that the arbitration costs were prohibitive. *Id.* at 1056 Moreover the *Harrington* court reached its conclusion despite the fact that, unlike the instant case, the arbitration provision did not provide the additional protection of an express cost-shifting to defendant upon a showing of hardship by plaintiffs.

(1) The Arbitration Costs Are Small Compared To The Amounts Plaintiffs Seek To Recover And The Costs Of Litigation.

Applying the *Harrington* analysis to the present case, even assuming a $7,100 filing fee, those costs are small compared to the $5 million to $10 million value placed on Sheer's case because of his refusal to set a range of damages. Moreover, those costs are tiny compared to the costs associated with litigating a nationwide class action: it is evident that Plaintiffs are disingenuously advancing an argument that they cannot afford to pay in an attempt to avoid arbitration, but if the Court accepted that argument they would somehow find the finances necessary to fund a nationwide class action.

Furthermore, the reason why the fees have been set at the current level is because of Plaintiffs' unreasonable refusal to estimate a range of their damages in an attempt to manipulate facts to support this motion. Plaintiffs concede that they could specify a low range of damages with the effect of lowering the amount of the filing fee, but refuse to do so until they have conducted some discovery. (MPA 15:4-7.) According to Plaintiffs, estimating damages at the outset of a case is impossible. That position defies common sense, particularly here, where Plaintiffs assert that they cannot estimate damages until they have information about the "wages and hours Claimants worked." (Plaintiffs' Exhibit G.) Surely this is information they have or at least can estimate.

Although Plaintiffs argue that they should not be required to limit their potential damages, they do not argue that they would be prevented from stating a low range of damages and then increasing it after a hardship determination has been made. Indeed, as pointed out by Mr. Tatum in his April 21, 2011 correspondence to Plaintiffs' counsel: "Fees are subject to increase if the amount of a claim … is modified." (Plaintiff's Exhibit F-3.) Additionally Rule 43 of the AAA Commercial Rules authorizes an arbitrator to

award an amount that is "just and equitable." (Plaintiffs' Exhibit C.) Thus, there is nothing preventing Plaintiffs from estimating a low range of damages to get the hardship issue before an arbitrator. The AAA practically invited them to do so. (Cowie Dec. ¶ 3 Exh. A.)

Similarly, Plaintiffs' assertion that they must pay a minimum filing fee of $3,350 because they seek declaratory and injunctive relief is also disingenuous because Plaintiffs no longer contract with Defendants and, therefore, lack standing to seek prospective injunctive relief. (*Colson v. Avnet, Inc.*, 687 F.Supp.2d 914, 922 (D.Ariz. 2010) (former employee lacks standing to seek an injunction on behalf of current employees).) Once again, this demonstrates Plaintiffs' lack of good faith in seeking arbitration.

Moreover, Plaintiffs acknowledge that the arbitrator's deposit may be as little as $500. (MPA 15:2.) In reality, Plaintiffs could apply for a waiver or deferral of the filing fees from the AAA and then seek a hardship determination from an arbitrator. To determine hardship is unlikely to require more than an hour of an arbitrator's time. At $300 to $500 per hour (MPA 5:20-21, Exh. H-1), Plaintiffs' share of the fees are more likely to be in the range of $150 to $250. Such fees are not prohibitive by any standard.

Speculative costs are also insufficient to make a finding that the costs of arbitration are prohibitively expensive. Notably, *Green Tree*, as in *Harrington*, deemed the "risk of prohibitive costs 'too speculative' to justify invalidation of the arbitration agreement" because the record was absent any proof of these costs. *Id.* at 91. More recently, the Arizona District Court in *Tierra Right of Way Services, Ltd v. Abengoa Solar Inc.*, Case No. 11-cv-00323, 2011 WL 2292007 (D. Ariz. June 9, 2011) (decided under New York law) reaffirmed that speculative claims regarding the amounts of the arbitrator's fees is insufficient to make a finding that the costs of arbitration are prohibitively expensive. Likewise, Plaintiffs here argue that the arbitrator's fees *could* be exorbitant but present no evidence why this is the case. Not knowing the arbitrator who would preside, Plaintiffs merely speculate that the deposit for the arbitrator's fees could be up to $30,000 just to determine the hardship issue. Plaintiffs' hyperbole is entirely conjecture and certainly not the specific, individualized, evidence that is required under Arizona law. In the absence of

such evidence, Plaintiffs cannot meet their burden and their motion should be denied.

(2) The AAA's Commercial Rules Are Not Unconscionable.

The AAA's Commercial Rules provide for the same deferral or reduction of the administrative fees as the AAA's Construction Rules which were considered and approved in *Harrington*. To accept Plaintiffs' argument would be to hold that no case could ever proceed under the AAA Commercial Rules because the fees and the mechanism for waiver or deferral of those fees are unconscionable. That view is contrary to the controlling authority of *Harrington* and *Jones*, both of which hold that the costs of the AAA's Commercial Rules are not prohibitively expensive under Arizona law.

(3) The Availability Of Contingency And Advancement Of Fees Means That The Arbitration Costs Are Not Prohibitive.

Not only is there the possibility that Plaintiffs' attorneys would take this case on a contingency basis and advance the fees, there is a very high likelihood that is exactly what they have already done. Indeed, if Plaintiffs' overtures regarding their financial peril are to be believed, that is the only reasonable conclusion. As the Arizona Court of Appeals noted in *Harrington*, "Appellees do not explain how they expect to litigate (as opposed to arbitrate) claims of $500,000 to $1,000,000 for less than $1,000 in costs." *Id.* at 1056. Here too, Plaintiffs have offered no basis on which they purport to litigate a nationwide class action on behalf of thousands of individuals when they claim that they cannot afford fees of $2,300 plus an arbitrator's deposit of $500. (MPA 15:9-11.) As the Court held with respect to the plaintiffs in *Harrington*, Plaintiffs here "do not even show arbitration will put them in any worse position than litigation in allowing them to pursue their claims." *Id.*

(4) Plaintiffs' Hardship Declarations Do Not Prove That The Costs Of Arbitration Are Prohibitive.

The only persons who have standing to challenge the Court's prior Order are named Plaintiffs, Sheer and Van Dusen because they are the only individuals named in the lawsuit. The unsupported evidence submitted on behalf of third parties, who have not filed

suit against Defendants, and who have not properly demanded arbitration, is irrelevant. Such individuals are not parties to Plaintiffs' motion and lack standing to challenge the Court's order compelling arbitration. (*More Light Investments v. Morgan Stanley DW Inc.*, Case No. 08-cv-580, 2008 WL 5044557, *2 (D. Ariz. Nov. 24, 2008) (non-party to arbitration does not have standing under the FAA to challenge arbitration award; *see also* FAA §§ 3 and 4—only a party can move to compel or stay arbitration.)

Plaintiffs' contention that the Court should take into account not only Plaintiffs' ability to pay, but also the deterrent effect on others, is not the law of Arizona, and *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003) is inapplicable. Rather "individualized evidence" is required. *Harrington* at 1056 (focusing on whether arbitration fees would present a hardship to the named plaintiffs). Other Circuits have also declined to consider the deterrent effect. *See Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549, 556 (4th Cir. 2001) ("the crucial inquiry . . . is whether the particular claimant has an adequate and accessible substitute forum in which to resolve his statutory rights . . ." (emphasis added)); *Rodriguez v. Wet Ink, LLC*, Case No. 08-cv-00857, 2011 WL 1059541, **6-7 (D. Colo. March 22, 2011) (rejecting Sixth Circuit approach and holding that under Tenth Circuit law, the inquiry is focused on the particular plaintiff and not the deterrent effect on others).

Focusing on the particular Plaintiffs here, Sheer and Van Dusen have failed to present any evidence related to their own circumstances that would in any way alter the Court's decision to compel arbitration. Conspicuous by its absence is a hardship declaration from Plaintiff Van Dusen. (Cowie Dec. ¶ 3 Exh. A ¶ 6.) As for Sheer, his hardship declaration does not provide any details of his current income, or even last year's income, but instead states only his income from 2009, without explanation. (See Plaintiffs' Exh. D page 51.) Sheer's declaration is also conclusory in that it is unsupported by any evidence. Some brief research has also shown that the limited information provided by Sheer is unreliable. For example, the value of the property owned by Sheer is double what he states in his declaration. (Bronchetti Dec. ¶ 4 Exh. C.) Such stale and conclusory

evidence does not meet the individualized and specific standards necessary under Arizona law to prove that the costs of arbitration are prohibitively expensive.

3. Arizona District Courts Apply The Same Standards.

In another case relied on by this Court in compelling arbitration, *Jones v. Gen'l Motors Corp.*, 640 F.Supp.2d 1124, 1132 (D. Ariz. 2009), the District Court of Arizona also approved and applied these same factors. *Jones*, like the instant case, addressed the AAA Commercial Rules and rejected the plaintiffs' argument that the cost splitting provision in the arbitration agreement was unconscionable where the arbitration fees ($12,000 to $15,000) were relatively small compared to the amount plaintiff might recover (over $1,000,000); the affidavit regarding financial hardship offered only conclusory statements; and the AAA Commercial Rules specifically allowed for waiver or deferral of fees. *Id.* at 1132-33. In concluding that the costs of arbitration under the AAA's Commercial Rules were not prohibitively expensive, the District Court in *Jones* noted that California and Arizona law differs on the issue of splitting arbitration costs.

Indeed, as Plaintiffs do in the instant case, the plaintiffs in *Jones* purported to rely on cases applying California law to support their argument that the arbitration agreement was unenforceable because it might require them to pay expenses that they might not have to pay in a judicial forum. Rejecting that argument, the *Jones* court made clear that *Harrington* was the "proper Arizona authority." *Jones* at 1132 and 1133. Here too, in granting Defendant's MTC Arbitration, this Court ruled: "Plaintiffs cite cases relying on California law, but California law does not apply here." (Order p. 13.) Indeed, if Plaintiffs' assertion that "*Adams* controls this case" and that "*any*" fees were prohibited, was correct, that raises the question of why Plaintiffs did not cite this 2002 case in opposition to Defendants' MTC Arbitration. The answer is simple: Plaintiffs did not rely on *Adams* because it applies different law from a different state and, thus has no application to the present case. See *e.g. Jones* at 1132 and 1133.

Here the parties' agreement designated Arizona law would control and, in accordance with this Court's ruling on that choice of law provision, that is the law that

must be applied. For the same reasons, the cases cited by Plaintiffs' from other jurisdictions should also be disregarded.

4. Arizona Law Permits Severance Of Any Offending Provisions.

In any event, even under Plaintiffs' theory that the cost-splitting provision is unconscionable, that would not change the outcome because Arizona law permits the severance of any such offending clause to compel arbitration. *Wernett v. Service Phoenix LLC*, Case No. 09-cv-168, 2009 WL 1955612 (D. Ariz. July 6, 2009). In *Wernett*, a case Plaintiffs suggest held an arbitration agreement unenforceable, the Court actually severed the multiple offending provisions and ordered arbitration. *Id.* at *9. In that case, the arbitration agreement limited available remedies, shifted attorneys' fees, shortened the statute of limitations, and allowed defendant (but not plaintiff) to seek certain judicial relief. *Id.* at *5-9. The Court also noted that the particular provision at issue did not allow the arbitrator to reduce or defer the fees. Despite these multiple restrictions, which distinguish *Wernett* from this case, the Court held that "an allocation scheme that splits the arbitrator's fees is not sufficient alone to render an arbitration agreement unenforceable." *Id.* at *7. The result in *Wernett*, where arbitration was compelled, emphasizes the strong policy in favor of arbitration under Arizona law.

Defendants do not believe severing the clause is appropriate here, for the reasons stated above. But, even if the Court were to agree with Plaintiffs, an order lifting the stay and allowing the action to proceed would not be warranted.

IV. CONCLUSION

Plaintiffs' Motion for Reconsideration is procedurally and substantively flawed. It was not timely filed and fails to present any new facts upon which this Court could reach a different conclusion. Plaintiffs already asserted these very same arguments in opposing this Court's Order to compel arbitration and for the reasons stated in its Order, this Court should not alter that decision. In any event, controlling Arizona law dictates a finding that the parties' arbitration agreement is enforceable and the stay should remain in effect.

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SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____

RONALD HOLLAND
ELLEN M. BRONCHETTI
PAUL S. COWIE
Attorneys for Defendants
SWIFT TRANSPORTATION CO., INC.,
INTERSTATE EQUIPMENT LEASING, INC.,
CHAD KILLEBREW AND JERRY MOYES

#403666252v1