Case No. 10-73780

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA VAN DUSEN, et al.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA (PHOENIX)
Respondent,

SWIFT TRANSPORTATION CO., INC., INTERSTATE EQUIPMENT LEASING, INC., CHAD KILLIBREW and JERRY MOYES,
Real Parties In Interest.

On Petition from an Order of the United States District Court
For The District of Arizona, Phoenix
District Court Case 2:10-cv-00899-JWS

RESPONSE TO WRIT OF MANDAMUS OF REAL PARTIES IN INTEREST SWIFT TRANSPORTATION CO., INC. INTERSTATE EQUIPMENT LEASING, INC. CHAD KILLIBREW and JERRY MOYES

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership Including Professional Corporations

Ronald J. Holland, Cal. Bar No. 148687
Ellen M. Bronchetti, Cal. Bar No. 226975
Paul S. Cowie, Cal. Bar No. 250131
Four Embarcadero Center, 17th Floor
San Francisco, California 94111-4109
Telephone: (415) 434-9100

Attorneys for Real Parties In Interest
SWIFT TRANSPORTATION CO., INC.
INTERSTATE EQUIPMENT LEASING INC.
CHAD KILLIBREW and JERRY MOYES

CORPORATE DISCLOSURE STATEMENT

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

DATED: February 22, 2011

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By *s/ Ronald J. Holland*

RONALD J. HOLLAND
ELLEN M. BRONCHETTI
PAUL S. COWIE
Attorneys for Real Parties In Interest
Swift Transportation Co., Inc.
Interstate Equipment Leasing, Inc.
Chad Killibrew and Jerry Moyes

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Defendants and Real Parties in Interest submit the following Opposition to Plaintiffs' Petition for Writ of Mandamus.

I. SUMMARY OF ARGUMENT

Pursuant to the extraordinary procedural device of a Writ of Mandamus, Petitioners seek an order that the District Court decide the ultimate issue in the case: whether Petitioners should be classified as employees or independent contractors. Petitioners' request should be denied because the District Court followed Supreme Court precedent and federal legislative and judicial policy and correctly concluded: (1) the parties entered into an agreement to arbitrate; (2) the parties delegated the question of arbitrability to the arbitrator; and, (3) that delving into the propriety of the independent contractor relationship would improperly result in the court resolving merits issues going to the heart of the case.

Indeed, to accept Petitioners' argument would forever prevent the arbitration of the employee/independent contractor dispute. That result is contrary to the federal presumption in favor of arbitration, and Supreme Court precedent.

Moreover, Petitioners are unable to establish the other necessary factors to warrant writ relief. Petitioners have other available means of relief and cannot show: (1) that they will be irreparably damaged; (2) that there has been recurring legal error; or (3) that this issue is novel. Accordingly, the Writ should be denied.

II. FACTS AND PROCEDURAL BACKGROUND

A. Petitioners' Relationship With Swift.

On or about August 7, 2006, Petitioner Sheer contracted with Defendant Swift Transportation Co., Inc. ("Swift") as an Owner/Operator, the common term for independent contractors in the trucking industry. (Respondents' Supplemental Appendix ("Supp. Appendix")[1] 1 at ¶ 4; 3-15). The precise terms of his relationship with Swift were documented in an Independent Contractor Operating Agreement ("ICOA"), which he signed, and which included an arbitration provision. (Supp. Appendix 3-15 generally; 11 at ¶ 24). Petitioner Van Dusen entered into an ICOA with Swift on March 3, 2009, which also included an arbitration provision.[2] (Supp. Appendix 1 at ¶ 8; 18-33 generally; 25 at ¶ 24). By its express terms, the ICOA is expressly not a "contract of employment." Petitioners provided services to Swift under their ICOA until April 7, 2009 (Sheer) and February 12, 2010 (Van Dusen). (Supp. Appendix 1 at ¶¶ 6, 10; 16-17; 34-35).

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[1] Respondent is aware that pursuant to Circuit Rule 30-1, the Ninth Circuit requires an "Excerpts of Record," and not an "Appendix" as prescribed by Federal Rules of Appellate Procedure 30. However, given that Petitioners submitted an "Appendix" in support of their Writ, Respondent has titled its "Supplemental Excerpts of Record" as a "Supplemental Appendix" to prevent confusion.

[2] As noted by the District Court, the language of the two ICOAs varies slightly.

B. In Their ICOAs With Swift, Petitioners Expressly Agreed To Arbitrate Any Disputes Arising Out Of, Or Related To, The Agreement Or The Relationship Created By The Agreement.

Both ICOAs included an arbitration provision which is broad in scope and states, in pertinent part:

> All disputes and claims arising under, arising out of or relating to this Agreement, including an allegation of breach thereof, and any disputes arising out of or relating to the relationship created by the Agreement, including any claims or disputes arising under or relating to any state or federal laws, statutes or regulations, and any disputes as to the rights and obligations of the parties, including the arbitrability of disputes between the parties, shall be fully resolved by arbitration in accordance with Arizona's Arbitration Act and/or the Federal Arbitration Act. Any arbitration between the parties will be governed by the Commercial Rules of the American Arbitration Association.

(Supp. Appendix 11 at ¶ 24; 25 at ¶ 24) (Emphasis added).

C. Procedural History.

On or about December 22, 2009, Sheer, in contravention of the terms of the arbitration provision in his ICOA, filed the underlying complaint commencing this purported hybrid Rule 23/Section 216(b) action in the United States District Court for the Southern District of New York. In his complaint, Sheer claimed he was an employee of Swift and alleged violations of the federal Fair Labor Standards Act, New York Labor Law, and the California Labor Code. Sheer filed his First Amended Complaint on or about February 11, 2010, adding Van Dusen as a plaintiff. Van Dusen also claimed to be an employee of Swift and the two Plaintiffs added causes of action for declaratory judgment, unjust enrichment, and

violations of New York UCC and the CA Civ. Code. On or about March 24, 2010 Petitioners, in a further attempt to avoid their duty to arbitrate these claims, filed their Second Amended Complaint adding an additional claim for "forced labor" in violation of 18 U.S.C. §§ 1589, 1595. (Petitioners' Appendix ("Appendix") 156-188). Each of Petitioners' claims, except for the eighth cause of action, hinge on the single contention they were employees and not independent contractors. Thus, an individual and highly fact-specific determination of employee status is a prerequisite for determining liability on all but one claim.

On April 5, 2010, the Honorable Richard M. Berman, U.S.D.J. S.D.N.Y., transferred this action to the U.S. District Court for the District of Arizona in accordance with the forum selection clauses contained in the ICOAs. This matter was officially received by the Arizona District Court on April 26, 2010. (Appendix 207). On May 21, 2010, Respondents filed their Motion to Compel Arbitration in the District Court of Arizona. (Appendix 154-155).

D. The District Court Correctly Compelled Arbitration.

On September 30, 2010, the Honorable Judge John W. Sedwick, of the District Court of Arizona, issued a 22-page order compelling arbitration. (Appendix 10-31). In a detailed decision, Judge Sedwick carefully considered Petitioners' argument that the Court was first required to resolve whether Petitioners were employees or independent contractors before ordering arbitration.

The Court disagreed, concluding that its authority under well-established case law was to determine whether a valid arbitration agreement existed and whether the agreement covered the dispute. *Id.* at 17-19. The District Court held that "deciding whether an employer-employee relationship exists between the parties falls within the scope of the arbitration agreement, because the arbitration agreement explicitly includes" a delegation clause. *Id.* at 19.

The District Court also correctly reasoned that Petitioners' specific challenge to the relationship between the parties required resolution of the merits of the underlying dispute because it required "an analysis of the [ICOA] as a whole, as well as [a secondary contract] and evidence of the amount of control exerted over plaintiffs by defendants," which is not permitted when deciding the threshold question of arbitrability. *Id.* at 19. After completing its analysis the District Court ruled: "Because a valid arbitration agreement exists and Plaintiffs' claims are within the scope of the arbitration agreement, the court must refer the action to arbitration..." *Id.* at 21. The District Court mindfully stayed the action pending the results of arbitration because "[u]nnecessary delay of the arbitral process through appellate review is disfavored." *Id.* at 30 (citing *Bushley v. Credit Suisse First Boston,* 360 F.3d 1149, 1153 n. 1 (9th Cir. 2004)).

E. The District Court Correctly Denied Petitioners' Motion to Certify For Interlocutory Appeal.

On October 14, 2010, Petitioners filed a "Motion For Reconsideration Of

This Court's Decision To Refer To The Arbitrator The Question Whether the Court Has Authority To Refer This Case To Arbitration, Or Alternatively To Certify An Interlocutory Appeal Under 28 U.S.C. §1292(b)." Petitioners sought to certify for immediate appeal the question of who decides the applicability of the Federal Arbitration Act ("FAA") § 1 exemption. After full briefing on this issue, the District Court denied Petitioners' motion.[3] (Appendix 1). In doing so, the District Court held that there was "no controlling question of law as to which there is a substantial ground for difference of an opinion [as to who decides the applicability of the FAA § 1 exemption] and that an immediate appeal from the court's order would not materially advance the ... litigation." *Id.*

Following the District Court's denial of Plaintiffs' Motion, Petitioners attempted to pursue class arbitration, which is also prohibited by the ICOA and the District Court's Order Compelling Arbitration. (Appendix 21-22). The American Arbitration Association ("AAA") denied Petitioners' multiple attempts to arbitrate this matter as a class action. Subsequently, and after filing this Writ, Petitioners filed 25 individual requests for arbitration with the AAA. Because Petitioners' claims have not properly been filed, they are pending, but have not progressed.

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[3] The District Court's November 16, 2010 Order erroneously states that it denied "Defendants' Motion." The District Court should have stated it was denying Plaintiffs' motion for an interlocutory appeal.

III. STANDARD OF REVIEW

Mandamus is considered a "drastic and extraordinary remedy reserved for really extraordinary causes." *Cheney v. United States Dist. Ct. for Dist. of Colombia*, 542 U.S. 367, 380 (2004) (internal quotes and citations omitted). Petitioners have the burden of showing their right to the issuance of a writ is "clear and indisputable." *Id.* at 381.

In considering the merits of a Writ, the Ninth Circuit applies the following five factors: 1) whether petitioner has any other means to attain the desired relief; 2) whether petitioner is damaged or prejudiced in a way not correctable in later appeal; 3) whether the district court's order is clearly erroneous as a matter of law; 4) whether the district court's order is a recurring error or manifests a persistent disregard of the federal rules; and 5) whether the district court's order raises new and important problems or issues of first impression. *Bauman v. United States Dist. Ct.*, 557 F.2d 650, 654-655 (9th Cir. 1977). While a sliding scale approach applies to weighing these factors, it is undisputed that in order to receive the requested relief, Petitioners *must* demonstrate clear error by the District Court. Petitioners cannot do so.

The relief Petitioners seek is at odds with legislative and judicial policy favoring arbitration and allowing the parties to agree to what matters should be delegated to an arbitrator. The FAA has a "statutory policy of rapid and

unobstructed enforcement of arbitration agreements," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983), and thus, moves "an arbitrable dispute out of court and into arbitration as quickly and as easily as possible. *Bushley,* 360 F.3d at 1153. This strong presumption favoring arbitration was correctly emphasized in Judge Sedwick's Order compelling arbitration and staying this matter. Judge Sedwick noted that orders staying an action pending arbitration are not immediately appealable because "[u]nnecessary delay of the arbitral process through appellate review is disfavored." *Id.* For these and other reasons stated below, the Writ must be denied.

IV. ARGUMENT

A. The District Court's Decision Was Not Clearly Erroneous.

The existence of clear error as a matter of law is a necessary condition for granting a writ of mandamus. *Bauman*, 557 F.2d at 654-655; *Executive Software N. Am., Inc. v. U.S. Dist. Court*, 24 F.3d 1545, 1551 (9th Cir. 1994). "The clear error standard is highly deferential and is only met when the reviewing court is left with a definite and firm conviction that a mistake has been committed." *In Re Anonymous Online Speakers*, 611 F.3d 653, 661 (9th Cir. 2011)(Citations omitted).

Petitioners argue the District Court committed "clear error" when it concluded that an arbitrator should decide the "only question" in this case: whether an employer-employee relationship existed between the parties. (Petitioners' Writ

("Writ") at 4 ("[t]he only question is whether Plaintiffs, despite being labeled "independent contractors," were in fact employees of the Defendants")). As discussed below, Petitioners' argument fails.

Here, the District Court carefully scrutinized the terms of the parties' agreement and concluded an agreement was made. (Appendix 17). The Court then determined because issues of arbitrability were expressly delegated to the arbitrator, the determination of whether the FAA applies was within the proper jurisdiction of the arbitrator. The District Court further concluded the issue of whether an employer-employee relationship existed (and whether the FAA exemption applied) required a ruling on the merits and thus is properly decided by the arbitrator.

Petitioners recognize there is *no* case law supporting their position where the parties have delegated arbitrability issues to the arbitrator. Therefore, Petitioners cannot meet the *Bauman* factor requiring a showing of clear error by the District Court. Attempting to overcome this fatal hurdle, Petitioners argue that an arbitration agreement cannot exist (or be made) until a court decides the FAA exemption issue. However, Petitioners' argument ignores United States Supreme Court precedent and overwhelming legislative and judicial policy in favor of arbitration.

1. The District Court Applied Well-Established Principles In Compelling Arbitration.

As far back as 1986, the Supreme Court in *AT & T Techs., Inc. v. Communications Workers of America,* 475 U.S. 643 (1986), set forth the principles which guided the District Court's proper conclusion to compel arbitration. The first principle is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Id.* at 648. The second is that the question of arbitrability is an issue "for judicial determination … [u]nless the parties clearly and unmistakably provide otherwise. *Id.* at 649. The third principle is that "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *Id.* Finally, the fourth principle is that there is a presumption in favor of arbitration in the sense that "an order to arbitrate … should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Id.* at 650.

2. Principle One – Arbitration Is A Matter Of Contract.

As recognized by the District Court, a primary purpose of the FAA is to require courts to compel arbitration when the parties have, as here, agreed to arbitrate their disputes. (Appendix 15-16); *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 218 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974).

Pursuant to Section 2 of the FAA, arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The FAA thereby places arbitration agreements on an equal footing with other contracts. *Rent-A-Center West v. Jackson*, --- U.S. ---, 130 S.Ct. 2772, 2776 (2010) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

Applying these principles, the District Court properly concluded that it must order arbitration of "any issue referable to arbitration under an agreement in writing for such arbitration . . . upon being satisfied that the making of the agreement for arbitration. . . . is not in issue" (Appendix 16 (citing *Rent-A-Center*, 130 S. Ct. at 2776) (Emphasis added)). Petitioners admit, and the District Court concluded, that "[i]t is uncontroverted that the Contractor Agreement is a 'contract evidencing a transaction involving commerce' and that it contains a 'written provision' to 'settle by arbitration a controversy.'" (See Writ at 3, n. 2; Appendix 17 (citing 9 U.S.C. § 2)).

Petitioners argue that the District Court cannot determine whether an agreement to arbitrate was "made" under Section 4 without determining whether the FAA exemption applies. Contrary to Petitioners' arguments, whether or not an agreement to arbitrate was "made" under Section 4 does not require an analysis of the exemption issue. The FAA's legislative history establishes that the word

"made" was directed to the physical execution of a "paper" which memorialized that assent. Arb. of Interstate Comm. Disputes: Joint Hrgs. on S. 1005 and H.R. 646 before Senate & House Subcomm. of the Comms. on the Jud., 68th Cong., at 17 (1924).

Case law, including that cited by Petitioners, confirms this legislative intent and demonstrates why Petitioners' argument fails. In *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999), there was no dispute as to the formation of a valid arbitration agreement, rather, the stated challenges were to the contract as a whole, which, following *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), "are questions for the arbitrator." *Simula*, 175 F.3d at 726.[4] Petitioners' citation to *Simula* disingenuously omits an essential qualifier: "the FAA provides for discovery and a full trial in connection with a motion to compel arbitration only if 'the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue." *Id.* In *Simula*, no discovery or summary trial was ordered because there was no issue regarding the making of the agreement.

Petitioners also cite to *Deputy v. Lehman Bros.*, 345 F.3d 494 (7th Cir. 2003) to support their argument that the court must decide the exemption issue. *Deputy*, however, supports the legislative intent that summary trial is only permitted as to

[4] The court applied the rule in *Prima Paint* that in deciding whether to compel arbitration, "a federal court may consider only issues relating to the making and performance of the agreement to arbitrate." *Prima Paint*, 388 U.S. at 404.

the making of an agreement, meaning contract formation. In *Deputy* the dispute surrounded whether a signature on an arbitration agreement was valid – *i.e.* whether an agreement to arbitrate was in fact *made* or *in existence.* The court ruled that the district court should have allowed a hearing only as to the genuineness of the signatures, since "the making of the arbitration agreement was in issue." *Id.* at 509-510. *Deputy* is thus distinguishable from the instant case because it addressed whether an arbitration agreement existed, which is not at issue here.

The fact that the making of the agreement is confined to an analysis of whether a contract was formed is confirmed by other Circuit cases. *Chastain v. Robinson-Humphrey Co., Inc.*, 957 F.2d 851 (11th Cir. 1992) (allowing a trial on the issue of whether an arbitration agreement was formed between the parties where plaintiff did not personally sign first agreement, did not sign power of attorney, and second agreement was only signed by plaintiff's father); *T&R Enterprises v. Continental Grain Co.*, 613 F.2d 1272 (5th Cir. 1980) (refusing to grant a section 4 trial where contracts containing arbitration clauses were signed by both parties and were asserted in the original complaint to be the contract between the parties, thus the existence of an arbitration agreement was not "in issue."). District court cases also support this conclusion. *Bettencourt v. Brookdale Senior Living Communities, Inc.*, 2010 WL 274331 (D. Or. Jan. 14, 2010) (allowing a jury

trial where an issue of fact existed as to the formation of an arbitration agreement where the employee but not the employer signed the agreement); *Williams v. MetroPCS Wireless, Inc.*, 2010 WL 62605 (S.D. Fla. Jan. 5, 2010) (jury trial ordered on "limited question" of whether or not the parties entered into an agreement at all where cell phone advertisements repeatedly stated "no contract" but merchandise contained a "Welcome Guide" containing an arbitration provision).

By contrast, there are no reported cases construing the Act as Petitioners do or allowing discovery and trial on whether the Section 1 exemption applies. This is because such a decision would require the court to do an individual analysis of each and every potential plaintiff's work relationship with a putative employer. The determination of employment status requires the application of a variety of complex factors, none of which is, by itself, determinative of employment status. Instead, the factors "are intertwined and their weight depends often upon particular combinations." *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341, 351 (1989); s*ee also Home Ins. v. Industrial Commission*, 123 Ariz. 348, 350 (1979) (applying "right of control" test which requires court to look at totality of the facts and circumstances; listing eight indicia of control, none of which in itself is conclusive). The factors the Court must consider under this analysis include: (1) whether the principal has "the right to control" the manner

and means of accomplishing the result or the details of the work; (2) whether the person performing services is engaged in a distinct occupation or business; (3) whether or not the work is part of the regular business of the principal; (4) whether the principal or the driver supplies the instrumentalities, tools, and the place of work for the person doing the work; (5) the driver's investment in the equipment or materials required by the work; (6) the skill required in the particular occupation; (7) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of an employer or by a specialist without supervision; (8) the driver's opportunity for profit or loss depending on his managerial skills; (9) the length of time for which the services were or are to be performed; (10) the degree of permanence of the working relationship; (11) the method of payment, whether by time or by job; and (12) whether or not the parties believe they are creating an employer-employee relationship. *Borello*, 48 Cal. 3d at 351.[5] Individual analysis of these factors is the only possible way to determine whether each individual's contract is subject to the FAA or not. Such an in-depth factual analysis is not the type of inquiry that lends itself to the summary trial and limited discovery contemplated by the FAA. Indeed, such trials for each and every plaintiff (Petitioners allege there are more than 170 potential plaintiffs) would

[5] Respondents cite to California and Arizona law because Petitioners' claims are largely based on the California Labor Code and the arbitration agreement contains a choice of law provision selecting Arizona law.

result in years of delay, all to determine the question of the jurisdiction of the court or the arbitrator. Such an approach is inconsistent with the federal presumption in favor of arbitration.

To accept Petitioners' argument would shatter the purpose of the FAA and result in no arbitrator ever being able to determine whether a transportation worker is an independent contractor or an employee. While Petitioners cite no case that supports their theory, this exact argument was recently considered, and rejected by the District Court of Minnesota in *Green v. Supershuttle International, Inc.*, 2010 WL 3702592 (D.Minn 2010). As in this case, the plaintiffs in *Green* argued that they were exempt from the FAA under Section 1. Like the District Court in the instant case, *Green* correctly found an agreement to arbitrate existed and left the exemption determination to the arbitrator because the parties' agreement delegated issues of arbitrability to the arbitrator.

3. Principle Two – The Question Of Arbitrability Is For The Court, Unless It Has Been Delegated To The Arbitrator.

The question whether the parties have submitted a particular dispute to arbitration, i.e. the question of arbitrability, is "an issue for judicial determination **[u]nless** the parties clearly and unmistakably provide otherwise." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (Emphasis added). The courts have long held that "parties may agree to arbitrate arbitrability." *AT & T Techs., Inc.*, 475 U.S. at 649. "If . . . the parties did *not* agree to submit the arbitrability

question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). This is a matter of common sense and logic, which flows "exorably from the fact that arbitration is simply a matter of contract between the parties: it is a way to resolve those disputes-but only those disputes-that the parties have agreed to submit to arbitration." *Id.* "When 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." *Id.* at 944. The Supreme Court has recently emphasized that parties can agree to arbitrate questions of "arbitrability." *Rent-A-Center*, 130 S.Ct. at 2777. It is well established that: "[j]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute . . . who has the primary power to decide arbitrability" turns upon what the parties agreed." *First Options of Chicago*, 514 U.S. at 943.

As Petitioners explain, "[t]he only question is whether Plaintiffs, despite being labeled "independent contractors," were in fact employees of the Defendants." (Writ at 4). While also going to the heart of the merits of this dispute, this issue is simply one of arbitrability—a question which the District Court correctly concluded was delegated to the arbitrator here. In concluding the

parties agreed that the arbitrator decides whether the FAA exemption applies, the District Court considered the scope of the parties' agreement and concluded it was sufficiently broad so as to delegate this issue to the arbitrator:

> Deciding whether an employer-employee relationship exists between the parties falls within the scope of the arbitration agreement, because the arbitration agreement explicitly includes "any disputes arising out of or relating to the relationship created by the [Contractor Agreement]," as well as "any disputes as to the rights and obligations of the parties, including the arbitrability of disputes between the parties" under the terms of the arbitration agreement.

(Appendix 28 (citing *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.3d 469, 477 (9th Cir. 1991)).

Moreover, the parties' arbitration agreement expressly provides that any arbitration will be governed by the Commercial Rules of the American Arbitration Association. Section 7 of those rules states: "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." By incorporating Rule 7 into their agreement, the parties further clearly and unmistakably evinced their intention to grant the arbitrator the authority to determine issues of arbitrability. *Fallo v. High-Tech Inst.,* 559 F.3d 874, 878 (8th Cir. 2009) ("the arbitration provision's incorporation of the AAA Rules … constitutes a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator."). This leaves no doubt that the issue before the court may be delegated

to the arbitrator.[6] The District Court's decision is in accord with *AT & T Techs*, 475 U.S. at 649; *First Options of Chicago*, 514 U.S. at 943; *Howsam*, 537 U.S. at 83; and *Rent-A-Center*, 130 S.Ct. at 2777-2778.

Petitioners do not attack the delegation provision contained in the arbitration agreement or allege any other defect in the formation of the arbitration agreement. Rather, Petitioners cite a litany of cases where the court, and not the arbitrator, decided the Section 1 exemption issue. However, a careful review of those cases demonstrates that the agreement at issue did not delegate arbitrability to the arbitrator as does the agreement here. *Circuit City Stores Inc. v. Adams*, 532 U.S. 105 (2001) (did not include a delegation clause); *Lenz v. Yellow Transportation, Inc.*, 431 F.3d 348 (8th Cir. 2005) (did not contain a delegation clause); *Palcko v. Airborne Express*, 372 F.3d 588 (3d Cir. 2004) (relevant portions of arbitration agreement did not contain a delegation clause; *Harden v. Roadway Package Sys.*, 249 F.3d 1137 (9th Cir. 2001) (did not include delegation clause); *McWilliams v. Logicon, Inc.*, 143 F.3d 573 (10th Cir. 1998) (arbitration agreement did not contain delegation clause); *O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997) (acknowledgement of receipt of employee handbook contained arbitration provision which did not contain a delegation clause); *Pryner v. Tractor Supply Co.*,

[6] Since filing their writ, Petitioners have submitted approximately 25 demands for arbitration to the AAA pursuant to the Commercial Rules, thus consenting to abide by its rules, including its rules regarding jurisdiction.

109 F.3d 354 (7th Cir. 1997) (no mention of a delegation clause when discussing the arbitration agreement contained within the plaintiffs' collective bargaining agreements); *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465 (D.C. Cir. 1997) ("pre-dispute resolution agreement" contained waiver of jury trial and arbitration agreement, but no delegation clause); *Rojas v. TK Communications, Inc.*, 87 F.3d 745 (5th Cir. 1996) (employment agreement contained arbitration provision but no reference to a delegation provision); *Asplundh Tree Co. v. Bates*, 71 F.3d 592 (6th Cir. 1995) (both employment agreements at issue contained arbitration agreements but no delegation provisions); *Am. Postal Workers Union v. U.S.*, 823 F.2d 466 (11th Cir. 1987) (no discussion of a delegation clause and decision that postal workers were exempt from the FAA was made after conclusion of arbitration proceedings); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972) (arbitration agreement did not include delegation clause); *Dickstein v. DuPont*, 443 F.2d 783 (1st Cir. 1971) (same). Additionally, none of these cases required the court to engage in an analysis of the underlying merits of the dispute.

Petitioners cite to *Cf. Granite Rock Co. v. Intl. Bro. of Teamsters*, ---U.S.---, 130 S. Ct 2847 (2010), for the proposition that a district court must first determine that the arbitration agreement was validly formed, that it covered the dispute in question and was legally enforceable. Petitioners, however, omit the following key language qualifying the term "legally enforceable:" "absent a provision clearly and

validly committing such issues to an arbitrator." Thus, the *Granite* court recognized that a delegation clause would take this issue out of the jurisdiction of the court and place it in the hands of the arbitrator.

4. Principle Three – In Deciding Arbitrability, A Court Must Not Rule On The Merits.

The District Court correctly concluded that arbitrators, not courts, must decide issues pertaining to the ultimate merits of the dispute. Where an agreement exists and covers the dispute in question, courts "have no business weighing the merits of a dispute." *AT & T Techs.*, 475 U.S. at 650. Therefore, Petitioners' request that the Court determine whether the FAA exemption applies also fails because the dispute is enmeshed with the underlying merits of the case.

In determining whether to compel a party to arbitration, the court must limit its inquiry to "whether a valid agreement to arbitrate exists, and, if it does, whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). The Supreme Court also supports this conclusion: "procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide." *Stolt-Nielsen v. Animalfeeds Int'l. Corp.*, 130 S.Ct. 1758 (2010) (citing *Howsam*, 537 U.S. at 84).

Here, Petitioners acknowledge that "the question of Plaintiffs' employee status is a critical element of Plaintiffs' causes of action and is inseparable from the

merits of Plaintiffs' claims." (Appendix 48) (Emphasis added). Petitioners further admit that resolution of whether an employer-employee relationship existed 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." (Appendix 46) (Emphasis added). Nevertheless, Petitioners argue this is an issue for the court and not the arbitrator.

Under the facts present here, it is undisputed that resolution of the exemption question would entangle the court in the merits of the dispute. Such entanglement is not permitted. This is particularly true here because the court would be required to do an individual analysis of each and every potential plaintiff's agreement in order to grant the relief requested. Whether under Arizona law or California law, the court would need to determine the employment status of each potential plaintiff by applying a lengthy list of complex factors giving them different weights for each individual. Individual analysis of these factors is the only possible way to determine whether each contract is subject to the FAA or not.

Such a detailed factual analysis of the merits is beyond the jurisdiction of the court under the facts presented. Thus, the District Court correctly decided an arbitrator should decide whether Petitioners are employees or independent contractors. Notably, the Court stayed the action pending arbitration. Thus, in the event the arbitrator concludes that the FAA exemption applies to Petitioners'

claims, the Court would then reassume jurisdiction to hear the merits of the dispute.

5. Principle Four – There Is A Presumption In Favor Of Arbitration And Doubts Should Be Resolved In Favor Of Coverage.

The District Court's ruling is also consistent with its obligation to "rigorously enforce agreements to arbitrate," *Dean Witter Reynolds, Inc.*, 470 U.S. at 221, and "liberal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25 n. 32. The Ninth Circuit agrees that the policy in favor of arbitration is so significant that "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Simula*, 175 F.3d at 719 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25). Here, if there were any doubt regarding the arbitrability of the question whether an employer-employee relationship existed between the parties, it was properly resolved by the District Court in favor of arbitration. Petitioners have offered no valid reason as to why the Ninth Circuit should abandon these long-standing principles given the District Court's analysis in the instant case.

6. This Matter Also Does Not Fall Within Arizona's Section 12-1517 Exemption.

Even assuming Petitioners' claims are not covered by the FAA, the Arizona Arbitration Act ("AAA") requires enforcement of their agreement to arbitrate. See Ariz. Rev. Stat. § 12-1501. Claims under the AAA are compelled to arbitration

under Ariz. Rev. Stat. § 12-1502. Like Section 4 of the FAA, the scope of judicial review under Ariz. Rev. Stat. § 12-1502 is limited to instances when the existence of the arbitration agreement is placed in issue. *Stevens/Leinweber/Sullens, Inc. v. Holm Dev. & Mgmt., Inc.*, 165 Ariz. 25, 28 (Ariz. Ct. App. 1990); *United States Insulation, Inc. v. Hilro Constr. Co.*, 146 Ariz. 250, 253 (Ariz. Ct. App. 1985). Although Petitioners' claim that the contract is exempt from the AAA, there is no dispute as to whether the agreement to arbitrate actually exists.

North Valley Emergency Specialists v. Santana, 208 Ariz. 301 (Ariz. 2004), cited by Petitioners, is factually distinguishable from this case. While the question presented in *Santana* was whether certain types of employees were excluded from the exemption, it was undisputed that the plaintiffs were employees of the defendant. Moreover, and most significantly, there was no delegation clause. Accordingly, the issue was properly before the Court. By contrast, Petitioners here do not have employment contracts; they have independent contractor agreements; and their arbitration agreements contain broad delegation clauses. Therefore, the delegation clauses contained in their arbitration agreements should be enforced.[7]

B. Petitioner Is Unable To Meet Its Burden On The Remaining *Bauman* Factors.

Having failed to establish a clear error of law, Petitioners' Writ of

[7] Even if the Court finds that the arbitration clauses are not covered by the FAA or AAA, this matter must still be arbitrated pursuant to state contract law.

Mandamus should be denied. Nevertheless, Respondents now address the remaining *Bauman* factors. A cursory review of each of these factors demonstrates that Petitioners have failed to satisfy the other *Bauman* factors warranting mandamus relief.

1. Petitioners Have Not Set Forth Novel Legal Issues.

While Petitioners attempt to claim their issue is one of first impression, it is not. First, contrary to Petitioners' Writ, legislative history makes clear that the "making" of an arbitration agreement means whether a contract was formed and not whether the FAA applies. *See* Section IV.A.2.; *Simula*, 175 F.3d 716; *Deputy*, 345 F.3d 494; *Chastain*, 957 F.2d 851; *T&R Enterprises*, 613 F.2d 1272; *Bettencourt*, 2010 WL 274331; *Williams*, 2010 WL 62605; *Green*, 2010 WL 3702592. Second, Petitioners' argument that the parties cannot delegate the arbitrability of the FAA exemption has been addressed by the Supreme Court. As discussed above, the Supreme Court has repeatedly ruled that arbitrability issues may be delegated to the arbitrator. In *Rent-A-Center,* the Court held that a "delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement. We have recognized that parties can agree to arbitrate "gateway" questions of "arbitrability,". . . . An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce." *Rent-A-Center*, 130 S.Ct. at 2777-2778. Such

delegation provisions are construed broadly. *Simula*, 175 F.3d at 719-720 ("the standard for demonstrating arbitrability is not high."). Third, Petitioners concede that the District Court must address the merits of their claims and the primary defense of Respondents if their requested relief is granted. This too is in direct contravention of long-standing precedent which holds that where an arbitration agreement exists and covers the dispute in question, courts should not delve into the merits of the dispute. *AT & T Techs*, 475 U.S. at 648-650; *Prima* Paint, 388 U.S. at 404; *Buckeye*, 546 U.S. at 444-446.

In sum, while Petitioners argue that their issue is "novel," it is not. In fact, every single applicable legal concept necessary to resolve this issue has been squarely addressed by the courts (mostly the Supreme Court) and the Legislature. The District Court's Order is consistent with this precedent and the Writ should be denied.

2. There Is No Repeated Error Or Confusion Among The Courts.

Petitioners' fail to offer examples (reported cases) demonstrating repeated error or confusion among the courts. In fact, Petitioners cite only one case in support of that proposition, which is not on point. *Sanford v. Memberworks, Inc.*, 483 F.3d 956 (9th Cir. 2007). *Sanford* involved a challenge to the existence of the agreement, not the arbitrability of that agreement.[8] All of the other cases cited by

[8] In *Sanford,* the plaintiff asserted that she was unaware of the alleged agreement.

Petitioners in this regard, support the District Court's decision because they unambiguously and consistently state the limit of the court's role when deciding a Motion to Compel. (See Writ at 17-21); *Howsam*, 537 U.S. 79; *Rent-A-Center*, 130 S.Ct. 2772; *Prima Paint*, 388 U.S. 395; *Simula*, 175 F.3d 716; *Chiron*, 207 F.3d 1126; *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114 (9th Cir. 2008) (quoting *Chiron*); *Lowden v. T-Mobile USA*, 512 F.3d 1213 (9th Cir. 2008) (quoting *Chiron*); *Republic of Nicaragua*, 397 F.2d 469. Petitioners concede the existence of the Supreme Court's decisions on issues directly relevant here, and argue that these decisions could be taken out of context. Petitioners have not shown that any court, including the District Court, has misapplied or demonstrated any confusion as to the Supreme Court precedent.

3. Petitioners Have Other Available Means Of Relief And Will Not Be Prejudiced In A Way Not Correctable On Appeal.

Petitioners' Writ should also be denied because Petitioners retain adequate means of relief, including: 1) Arbitration; and 2) Appeal from Arbitration, including from partial rulings. This Circuit has held an appeal will not be granted on orders compelling arbitration and the aggrieved party must raise the issue on appeal after the final judgment. *Abernathy v. Southern Calif. Edison*, 885 F.2d 525, 529 (9th Cir. 1989). The one case Petitioners cite, *Douglas v. U.S. District Court*, 495 F.3d 1062 (9th Cir. 2007), does not change this result and has not been followed by any other court for the proposition proffered by Petitioners. While

arguing *Douglas* warrants writ relief, Petitioners rely on *dicta*, wherein the court speculated that it was "doubtful" that an appeal could follow a successful arbitration, but did not foreclose that possibility. *Douglas* is also distinguishable because of the district court's clear errors, including fundamental misapplications of contract law. In *Douglas*, the district court ordered arbitration despite facts that revealed the arbitration clause, including a class action waiver, were unilaterally added to the contract by the defendant by posting the revised contract on its website, but never otherwise notifying plaintiff of these changes. Plaintiff was thus not even aware of the arbitration agreement and certainly had not consented to it. *Douglas* is further distinguishable as it involved consumer contracts of adhesion involving small amounts of damages and primarily seeking declaratory relief.

Petitioners' conclusory speculation that they may suffer injury by participating in arbitration is unsupported. As a preliminary matter, the arbitrator may decide that the arbitration provision is unconscionable or that the Section 1 exemption applies and then the case would proceed before the court, which has retained jurisdiction by staying this matter pending the outcome of arbitration.[9]

Petitioners also assert that if a court does not decide the Section 1 exemption, it would have the effect of writing "the limitations of Sections 1 and 2

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[9] Petitioners' argument that it is "unclear" when the arbitrator will be appointed stems from their delay in filing demands for arbitration and their failure to comply with AAA procedures.

out of the statute." (Writ at 10). That analysis is incorrect because it ignores that the issue will be decided in one forum or the other: the question is simply who decides the issue, court or arbitrator? Here, if the Court were to decide whether an employer-employee relationship exists the court would usurp the arbitrator's authority by deciding a substantive critical issue in the case.[10] Petitioners' argument that a court must always decide the issue was rejected by the Supreme Court in favor of compelling arbitration. *Prima Paint* 388 U.S. at 404. The *Prima Paint* rule is that challenges to the validity of the contract generally are for the arbitrator to decide, even when that may result in a finding that the arbitration agreement itself, because it is subsumed within that contract, is also invalid. Perhaps the *Buckeye* Supreme Court stated it best: "[i]t is true. . . that the *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void." *Buckeye*, 546 U.S. at 448-449. The dissent in *Rent-A-Center* succinctly summarized this well-settled principle:

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

[10] Arbitrators are bound by prior federal court decisions under the doctrines of collateral estoppel and res judicata. See *Aircraft Braking Systems Corp. v. Local 856*, 97 F.3d 155 (9th Cir. 1996) (affirming vacature of arbitration award where district court in previous litigation between the same parties determined an interim contract existed between the parties, but arbitrator found there was no enforceable agreement to arbitrate and stated the district court's order was "not binding upon this arbitrator").

> *Paint*. It reflects a judgment that the 'national policy favoring arbitration' outweighs the interest in preserving a judicial forum for questions of arbitrability – but only when questions of arbitrability are bound up in the underlying dispute. When the two are so bound up, there is actually no gateway matter at all: The question "Who decides" is the entire ball game. Were a court to decide the fraudulent inducement question in *Prima Paint*, in order to decide the antecedent question of the validity of the included arbitration agreement, then it would also, necessarily, decide the merits of the underlying dispute. Same, too, for the question of illegality in *Buckeye;* on its way to deciding the arbitration agreement's validity, the court would have to decide whether the contract was illegal, and in so doing, it would decide the merits of the entire dispute.

Rent-A-Center, 130 S.Ct. at 2787-2788.

Here, the parties agreed—and the District Court ordered—that issues of arbitrability must be submitted to the arbitrator. Thus the Section 1 exemption issue remains alive, but is a matter for the arbitrator to address. In addition, as Petitioners point out, an appeal would be available from any final judgment issued by the arbitrator. Thus, Petitioners have adequate remedies available and cannot demonstrate that they will suffer any irreparable harm

V. CONCLUSION

Petitioners provide this Court with no reason to employ extraordinary writ review to grant its "appeal" because the District Court applied the correct legal standards, as enunciated by the Supreme Court, and reached the correct conclusion favoring arbitration. For all the foregoing reasons, Petitioners' Petition for Writ of Mandamus should be denied.

Dated: February 22, 2011

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By /s/ *Ronald J. Holland*
RONALD J. HOLLAND
ELLEN M. BRONCHETTI
PAUL S. COWIE
Attorneys for Real Parties In Interest
Swift Transportation Co., Inc.
Interstate Equipment Leasing, Inc.
Chad Killibrew & Jerry Moyes

STATEMENT OF RELATED CASES

Respondents are aware of no related cases pending in this Court within the meaning of Ninth Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

This brief complies with the length limits set forth at Ninth Circuit Rule 32(a)(7). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). There are exactly 6,984 words and 602 lines of text.

Dated: February 22, 2011

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By /s/ *Ronald J. Holland*
RONALD J. HOLLAND
ELLEN M. BRONCHETTI
PAUL S. COWIE
Attorneys for Real Parties In Interest
Swift Transportation Co., Inc.
Interstate Equipment Leasing, Inc.
Chad Killibrew & Jerry Moyes

9th Circuit Case Number(s) 10-73780

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