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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

John Doe 1, et al.,

Plaintiffs,

vs.

Swift Transportation Co., Inc., et al.,

Defendants.

No. CV 10-899-PHX-JWS

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF MOTION TO LIFT STAY AND VACATE ORDER COMPELLING ARBITRATION BASED ON NEW FACTS

(Oral Argument Requested)

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Plaintiffs file this reply brief in support of their motion to lift the stay and vacate the Court's order compelling arbitration. Defendants' opposition to the motion does not rebut the essential fact that, because Defendants will not pay the initial filing fees and the AAA will not waive those fees, Plaintiffs are effectively precluded from pursuing their claims in the arbitral forum. Accordingly, the motion to lift the stay of Plaintiffs' federal court action should be granted.

I. DEFENDANTS' CHALLENGES TO THE FACTS UNDERLYING THE MOTION ARE WITHOUT MERIT

A. The AAA Has Denied Plaintiffs a Waiver of the Fees Necessary to Obtain a Hardship Determination

Plaintiffs requested the AAA to determine whether the 56 truck drivers who have filed arbitration demands would qualify for a waiver or deferral of the filing fees necessary to obtain a ruling from an arbitrator on their hardship applications. The AAA indicated that filing fees would not be waived but could be deferred if each plaintiff executed a guarantee for the amount of the deferred fees. *See* Doc 277 at 23. Plaintiffs did not anticipate any dispute on this issue given the extensive communications Plaintiffs had with the AAA concerning this issue in their efforts to try to have the fees waived or to have Defendants pay the fees. Plaintiffs' efforts included a specific request to the AAA for the AAA to determine whether the AAA would waive or defer the fees for 56 claimants whose hardship declarations were submitted to the AAA and a response by the AAA that the hardship declarations submitted by Plaintiffs would be candidates for a hardship deferral only, rather than candidates for a hardship waiver. (Doc. 278-6; *see also* Doc. 278, Doc. 278-4, 278-5, Doc. 278-10; April 14, 2011 letter attached to Declaration of Dan Getman in support of Plaintiffs' Reply ("Getman Decl."), at Exh. 3.) However, Defendants attached to their opposition an email from the AAA in which the AAA appeared to take a different position in *ex parte* communications with Defendants after this motion was filed. In order to avoid any confusion on this critical issue, Plaintiffs again asked the AAA to confirm whether Plaintiffs were eligible for waivers or deferrals. The AAA has now confirmed unequivocally what Plaintiffs stated in their motion and

Defendants challenged: the AAA will not waive the filing fees for any of the 56 individuals who have presented demands for arbitration. (*See id.*) The AAA has offered to defer the filing fee but only if each claimant executes a guarantee to pay the filing fee.[1] (See Getman Decl. at Exh. 1 & 2; *see also* Doc. 278-4, Doc. 278-5 (explaining difference between waiver and deferral under AAA procedures.)

B. Plaintiffs Must Pay or Guarantee a Minimum of $2,300 to 7,100 Plus an Arbitrator's Deposit to Obtain a Hardship Determination

It is undisputed that each Plaintiff driver must pay a minimum of $2,300 to $7,100 plus the arbitrators' deposit to have his claims heard. Defendants quibble with the $7,100 filing fee (1/2 of the $10,400 filing fee currently demanded by the AAA plus half of the "final fee" required by the AAA before any hearing can be conducted) on the grounds that Plaintiffs could reduce that fee by lying about the value of their damages claims until they have gotten a hardship determination and then, once the hardship determination has been made, raising the amount of their damages. Doc. 287 at 17. Leaving aside the fact that such subterfuge would be fraud, and that Defendants would be likely to object to any subsequent efforts to raise the damages amounts, the entire argument is moot because the AAA has confirmed that Plaintiffs' injunctive and declaratory claims mandate a minimum filing fee of $4,600 (of which each Plaintiff would have to pay $2,300) plus the arbitrator's deposit. Thus, even if the damages amount could be reduced by fraud or in some other way, each driver would still have to pay a minimum filing fee of $2,300 because each Plaintiff has presented a live claim for declaratory and injunctive relief. (Doc. 278-10.)

Defendants respond to this point in a single sentence claiming that because Plaintiffs are no longer working for Defendants they have no standing to obtain

[1] Under the AAA's deferral procedures, each driver must sign a guarantee that he will pay the deferred fees regardless of the outcome of the case. (Doc. 278-4.) As Plaintiffs pointed out in their initial brief, Plaintiffs have no ability to pay the money now and no present prospects of being able to do so. Thus, it would be fraudulent for Plaintiffs to enter into such a guarantee knowing that they cannot pay. Defendants do not dispute that point in their opposition papers.

declaratory or injunctive relief on behalf of current employees. But Defendants' argument misconstrues Plaintiffs' claim. What each driver seeks is a declaration that his Lease/Independent Contractor Operating Agreement is unconscionable and unenforceable and an injunction prohibiting Defendants from taking action to enforce the penalties imposed by those agreements. *See* Doc 62, Second Amended Complaint, prayer for relief ¶2(e). Because a driver's liability under the Lease/ICOA survives the termination of his employment by Swift, those claims are very much alive. For example, Plaintiff Sheer currently owes $32,000 on his lease according to Defendants. (Doc. 69-15 ¶21-32.)

C. The Hardship Affidavits of All of the Putative Class Members Must Be Considered

Defendants make the further argument that the Court should ignore all of the hardship affidavits other than Plaintiff Sheer's on the grounds that the other 55 drivers have no standing to challenge the order compelling arbitration. Defendants' argument ignores the fact that this Court referred the claims of "Virginia Van Dusen and Joseph Sheer, *et. al.*" to arbitration, (Doc. 223, pp. 1, 22), and has permitted the other 55 drivers to opt-in to this lawsuit under the FLSA. Under the terms of Defendants' arbitration agreement, these claims must be filed individually and cannot be heard together. Surely, Defendants are not suggesting that these opt-in Plaintiffs should be required to file independent lawsuits, raising the same issues raised in this case. Plaintiffs imagine Defendants would be the first to complain that the lawsuits violated this Court's order staying the case pending arbitration.

Further, Sheer as representative of the putative class alleged in this action has standing, and, indeed, the duty to protect the interests of the putative class members by bringing their situations to the Court's attention. Because of the class action waiver provision in the arbitration agreement, the Court's order compelling arbitration effectively forces each of the putative class members represented by Sheer to file an individual arbitration. The excessive fees being demanded of those putative class

members are just as devastating to their claims as they are to the claims of Plaintiff Sheer and Sheer as class representative has standing to protect their interests as well as his own. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980) (putative class representative has standing to appeal denial of class certification even after his claim is moot); *Deposit Guar. Nat'l Bank, Jackson Miss. v. Roper*, 445 U.S. 326, 334 (1980) (named plaintiff has standing to appeal denial of class certification even after judgment has been entered in his favor).

II. THE REQUIREMENTS FOR RECONSIDERATION DO NOT APPLY BUT HAVE BEEN SATISFIED IF THEY DO

As indicated in Plaintiffs' motion, Doc 277 at 9 fn 5, Plaintiffs do not believe that this motion to lift the stay is properly characterized as a motion for reconsideration of the order compelling arbitration. It is, rather, a new, independent motion asserting that Defendants have failed to comply with their arbitration agreement or, alternatively, that the actual costs imposed by the agreement preclude Plaintiffs from proceeding in arbitration. Several courts of appeal have held that such motions are not even ripe until a party has exhausted the AAA waiver/deferral process. *See James v. McDonalds Corp.*, 417 F.3d 672, 679 (7th Cir. 2005); *Dobbins v. Hawk's Enterp.*, 198 F.3d 715, 717 (8th Cir. 1999). Plaintiffs have now exhausted that avenue and this motion is now ripe for consideration. Plaintiffs argued that the motion met the reconsideration standard out of an abundance of caution and they maintain that the AAA's denial of waiver is a new fact that would support reconsideration if reconsideration applied. Nor has there been delay in seeking reconsideration if reconsideration standards apply.[2]

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[2] Between October 2010 and June 2011, the Plaintiffs were engaged in a continuous effort to have these arbitrations heard by the AAA, notwithstanding the Plaintiffs' inability to pay the AAA's commercial arbitration fees. First in correspondence on December 20, 2010, Plaintiffs asked the AAA to determine that the cases could be heard without Plaintiffs having to pay fees under the terms of the arbitration agreement itself. (Getman Decl. Ex. 4.) On January 13, 2011, the AAA determined that it would honor the arbitration clause insofar as it required an arbitrator rather than the AAA to determine hardship (as would normally occur under the

III. THE ARBITRATION AGREEMENT REQUIRES DEFENDANTS TO PAY THE FEES NECESSARY FOR AN ARBITRATOR TO DETERMINE HARDSHIP

As explained in Plaintiffs' opening brief, the only sensible interpretation of the arbitration agreement is to read it to require the Defendants to pay the filing fees necessary to obtain a hardship determination. Defendants drafted the agreement, which means it must be given the meaning which a reasonable *driver* would have given to the language, *see Restatement 2d of Contracts* §201(2), and it is inconceivable that a driver, confronted with language that promised to relieve him of all financial liability for arbitration costs upon a showing of substantial hardship, would read that language to mean that he would, nevertheless, have to pay several thousand dollars to obtain that hardship determination. Defendants' interpretation, that a driver must pay substantial fees in order to obtain a ruling that he can't afford to pay substantial fees, is so patently circular that it cannot be considered reasonable. Plaintiffs' reading of the agreement also brings the agreement in line with the requirements of the Federal Arbitration Act, making it the preferable reading. *Id* § 203(a) (interpretation which gives a reasonable, lawful meaning is preferable to one that does not).

Commercial Rules), but the AAA also stated that it would not appoint an arbitrator and administer the agreement until it received payment of all fees. (Doc. 277-5.) At that point Plaintiffs pressed Defendants to pay these fees so that an arbitrator could be appointed. (Doc. 277-2.) Defendants responded equivocally stating only that "[a]t this time, Defendant intends to comply with the terms of the Agreement." (Doc. 278-1.) When pressed for an explanation, Defendants stated that "No arbitrator has yet decided whether or not Plaintiff has not yet shown financial hardship matter [sic] which is why no payment has been made." (Doc. 277-2.) In February, Plaintiffs' counsel attempted to convince Defendants to tender the fees necessary to have the hardship questions heard by an arbitrator as required by the arbitration clause despite the Plaintiffs' inability to pay these fees. (Getman Decl. Ex. 5.) When it became clear that the Defendants would not pay the fees necessary to have an arbitrator appointed to determine Plaintiffs' hardship claims, Plaintiffs then asked the AAA to waive fees for the Plaintiffs on April 14th. (Getman Decl. Ex. 3.) The AAA only decided this question with finality on or about June 6th (and confirmed it on July 11, 2011). (Doc. 278-6; Getman Decl. Ex. 3.) A week later, on June 14th, Plaintiffs moved the Court to lift the stay and permit Plaintiffs to bring their claims in the only remaining venue in which they could be heard – this Court.

IV. THE COSTS OF ARBITRATION EFFECTIVELY PRECLUDE PLAINTIFFS FROM VINDICATING THEIR FEDERAL RIGHTS

A. Defendants Apply the Wrong Legal Standard in Arguing the Merits of Plaintiffs' Motion

Defendants argue that "Arizona law" requires the Court to uphold its order compelling arbitration relying almost exclusively on *Harrington v. Pulte Home Corp.*, 119 P.3d 1044 (Ariz. App. 2006), and *Jones v. General Motor Corp.*, 640 F.Supp.2d 1124 (D.Ariz. 2009), and cases which apply Arizona unconscionability law and are otherwise distinguishable. Defendants' argument reflects a fundamental misunderstanding. Plaintiffs' motion is not based on Arizona unconscionability law, but on the Federal Arbitration Act (FAA) which cannot be used to compel arbitration when the costs of arbitration prevent plaintiffs from 'effectively vindicating" their rights in the arbitral forum. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 637 (1985) (FAA compels arbitration "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function"); *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90 (2000) ("[t]he existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum."). Arizona unconscionability analysis set forth in *Harrington* and *Jones* is simply inapplicable to the current motion.[3]

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[3] This is why cases like *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003), cited and discussed by Plaintiffs in their motion at pp. 14-16, (Doc. 277), are more persuasive precedents because they apply an FAA analysis rather than an unconscionability analysis. To the extent that *Harrington* and *Jones* conflict with the FAA's requirement that parties to an arbitration must be able to vindicate their rights, such decisions would be preempted. *See AT&T Mobility v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740, 1753 (2011). While Defendants cite that case, the stark contrast between the arbitration provision there (in which the defendant was required to pay all costs for nonfrivolous claims, the arbitration took place in the county in which the customer was billed, that parties could bring their claims in small claims court in lieu of arbitration, and which awarded a minimum of $7,500 and twice the attorneys' fees if claimants received

Harrington and *Jones* are also distinguishable because in both of those cases the plaintiffs offered no specific facts to demonstrate actual hardship. The allegations of excessive costs were "speculative at best." *Harrington*, 119 P.3d at 1056; *Jones*, 640 F.Supp.2d at 1132. The affidavits submitted by the *Harrington* and *Jones* plaintiffs contained only "conclusory statements" and offered no "specific facts" or "showing of assets." *Harrington*, 119 P.3d at 1056; *Jones*, 640 F.Supp.2d at 1132. More importantly, in neither of those cases had the plaintiffs attempted to pursue the FAA's fee waiver procedure. In light of this latter fact, the plaintiffs in *Harrington* and *Jones* could not possibly satisfy their burden of showing that arbitration was prohibitively expensive.

Here, by contrast, Plaintiffs have done all that they can to obtain a waiver of the AAA fees that are preventing them from effectively vindicating their federal statutory rights and have submitted detailed statements of their assets and liabilities and specific statements regarding the costs they face. This Court ordered arbitration in reliance on the fact that AAA Rules and the agreement permitted waiver of the costs of arbitration. Plaintiffs did not know that the result of Defendants' arbitration provision, which places the determination of hardship on the arbitrator would preclude them from getting such a determination altogether. In light of these differences, neither *Harrington* nor *Jones* has any relevance to the issues presented by Plaintiffs' motion, even if Plaintiffs' motion hinged on a showing of unconscionability, which it does not.

B. Defendants' Argument That the Costs Are Not Prohibitive Lacks Merit

In light of the financial difficulties the Plaintiffs find themselves in, the undisputed fact that each Plaintiff driver must pay a minimum deposit of $2300 to $7,100 plus an arbitrator's fee in order to have his claims of hardship determined, effectively precludes the Plaintiff drivers from pursing their claims in arbitration. Defendants take

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an award greater than the last settlement offer) and this one, where Defendants are insisting Plaintiffs must agree to become liable to pay thousands of dollars to have their claims heard, shows that the refusal to pay the fees in this case is contrary to the statute and must also pay an arbitrator's deposit.

issue with this conclusion on several grounds, none of which has merit.

1. Plaintiffs' potential recovery is irrelevant to their ability to proceed now

Defendants first argue that the filing fees being demanded of the Plaintiffs are *de minimus* when compared to the amounts that they claim to be owed in damages. Whether or not that is true, the amounts that a plaintiff may recover some time in the future are wholly irrelevant to the question of whether the costs that must be paid now effectively preclude Plaintiffs from proceeding with arbitration. Anticipated future recovery is speculative at best even in the strongest of cases. It is essentially meaningless as a measure of one's current ability to pay costs, a fact that is confirmed by the local rules of this Court which do not consider the size of a claim in determining eligibility to proceed *in forma pauperis*. *See* Dist. Of Arizona Local Rule 3.3(a) (list of evidence to be considered in *in forma pauperis* application does not include evidence regarding the potential damages arising from the claim to be filed). Plaintiffs recognize that this was a factor considered in *Harrington* and *Jones*, but as explained in *Jones*, that factor was considered to determine whether the fees were "disproportionate" to the amounts claimed. *See Jones*, 640 F.Supp.2d at 1132. Disproportionality may be relevant to unconscionability analysis but has no relevance at all to the FAA issue presented which focuses exclusively on whether the fees to be paid effectively preclude a litigant from proceeding in arbitration.

2. Defendants' speculation regarding contingency agreements is not a proper consideration

Defendants argue that the costs at issue are not prohibitive because Plaintiffs' counsel could agree to advance the filing fees and arbitrator fees for each of the individual drivers. Defendants speculate that because Plaintiffs filed this action as a class action on behalf of thousands of individuals, Plaintiffs' counsel must have agreed to advance costs. It is true that Plaintiffs' counsel was prepared to advance costs for a single class and collective action where the efficiencies of proceeding on a class basis would have made such an undertaking reasonable. The legal issues for the collective action and

class would have been determined together. Because of the class action waiver that Defendants inserted in their arbitration agreement, there is no way to arbitrate these claims in a cost efficient way. Plaintiffs' counsel would have to advance the costs of litigation for each individual driver and engage in scores of potentially repetitive proceedings and they cannot afford to and have not agreed to do any such thing. Again, Defendants cite *Harrington* as support for their argument, but *Harrington* proves Plaintiffs' point. That case was filed in state court as a class action, and nothing in the arbitration agreement precluded class arbitration so that referral to arbitration did not make litigating the claim more costly. *Harrington*, 119 P.3d at 1047. In such circumstances, the court reasonably concluded that plaintiffs "do not even show arbitration will put them in any worse position than litigation in allowing them to pursue their claims." *Id.* at 1056. But here, Defendants insist that arbitration must proceed on an individual by individual basis with the consequence that arbitration will be exponentially more costly for the putative class members than proceeding in federal court where class treatment is a possibility. No doubt Defendants' decision to insert a class waiver was made precisely for this reason.

3. Defendants' objections to the documents offered by Plaintiffs have no merit

In violation of Local Rule 7.2(m)(2), Defendants make several evidentiary objections in a separate filing objecting to the evidence. This is clearly inappropriate and Defendants' objections should themselves be stricken. *See* L.R. Civ. P. 7.2(m)(2), which states in relevant part:

> Objections to Admission of Evidence on Written Motions. An objection to the admission of evidence offered in support of or opposition to a motion must be presented in the objecting party's responsive or reply memorandum … and not in a separate motion to strike or other separate filing.

Defendants make no challenge to the drivers' claims of hardship other than with respect to Plaintiff Sheer. The AAA found all of the claimants qualify for hardship deferral. Defendants dispute Mr. Sheer's declaration based on information that they located in an error-prone internet database that specifically admits the information is unreliable. Doc.

288-3. Mr. Sheer's actual 2010 property valuation is attached hereto as Exhibit O, which is identical with the valuation listed in his sworn statement of hardship.[4] In any event, the emails are self-authenticating and Defendants cite no requirement that the evidence offered on this motion must meet the standards for admissibility at trial. *See JLG Enterprises, Inc. v. Excalibur Sires, Inc.*, No. 10-cv-2138, 2011 WL 1103325, at 12 (E.D.Cal. Mar. 22, 2011). If the Court nevertheless believes authentication is required, Counsel will immediately do so.

IV. SEVERANCE IS NOT APPROPRIATE

Defendants propose that if the Court finds that the costs in this case exceed Plaintiffs' ability to pay, then the Court may sever some unspecified portion of the arbitration clause and still allow the case to proceed in arbitration. The Court cannot cure the unenforceable nature of the arbitration agreement through severance as Defendants propose. "Generally courts do not rewrite contracts for parties." *Olliver/Pilcher Ins. v. Daniels*, 715 P.2d 1218, 1221 (Ariz. 1986). Only if it is clear from the terms of the contract that a provision is severable, can courts can sever agreements. *Valley Medical Specialists v. Farber*, 982 P.2d 1277, 1286 (Ariz. 1999). Courts cannot add new language or qualifications as that would amount to re-writing the parties' agreement. *Id.*; *Zep, Inc. v. Brody Chemical Co., Inc.*, No. CV-09-0505, 2010 WL 1381896 at *5 (D. Ariz. Apr. 6, 2010).

Wernett v. Service Phoenix, LLC, No. CIV-09-168, 2009 WL 1955612, 9 (D.Ariz. July 6, 2009), cited by the Defendants, is inapplicable. In contrast to *Wernett*, Plaintiffs move for relief directly under the FAA's requirement that an arbitral forum be reasonably available to a claimant, not under state law unconscionability doctrine. Further, in

[4] The Court can take judicial notice of this property valuation pursuant to Fed. R. Evid. 201(b). Defendants' further complaint that Mr. Sheer's declaration is supported by 2009 tax information is equally meritless in that at the time Mr. Sheer's declaration was completed, Mr. Sheer had not yet filed his 2010 tax return. If the Court desires, Plaintiff Sheer will submit the 2010 information, which will show no significant change in his financial circumstances.

Wernett, the District Court struck specific clauses relating to discovery, remedies and limitations that it found unconscionable. Here, unlike *Wernett*, Defendants failed to identify any specific clause that could be severed to permit the case to proceed in arbitration except for the cost-shifting provision that does not remedy the issues here. (Doc 287 at 22.) Striking the "cost-splitting provision" of the agreement would only make matters worse. The agreement unequivocally states that arbitration "will be governed by the Commercial Rules of the American Arbitration Association (the 'Rules')." Those Rules provide that "the filing fee shall be advanced by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award." AAA Commercial Rule R-49. The cost-splitting provision that Defendants apparently contend should be severed appears in the arbitration agreement as an "exception" to the AAA Commercial Rules. Striking the cost-splitting provision would force Plaintiffs to pay the entire filing fee rather than just half. The only way to cure the cost problem created by the arbitration agreement would be to leave the cost splitting "exception" in place and add a further "exception" to the effect that Defendants will pay all fees necessary to obtain an initial ruling on claims of substantial hardship. However reasonable such a fix may seem, it cannot be achieved without violating the law prohibiting a court from re-writing an agreement. Because arbitration is a matter of contract, "the Court cannot create a new agreement for the parties to uphold the contract." *Wernett*, 2009 WL 1955612, at *9. There simply is nothing that the Court can sever which would permit the arbitration clause to remain in effect.

CONCLUSION

For all of the foregoing reasons, Plaintiffs' motion for reconsideration and to lift the stay of proceedings and vacate the order compelling arbitration should be granted.

Respectfully submitted this 15th day of July, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2011, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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