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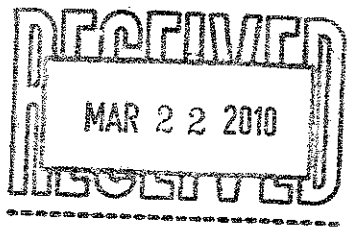

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March 19, 2010

VIA HAND DELIVERY

Honorable Richard M. Berman, USDJ
United States District Courthouse
500 Pearl Street
New York, NY 10007

Re: Van Dusen, et al. v Swift Transportation Co., Inc., et al
09-cv-10376 (RMB/JCF)

Dear Judge Berman:

This Firm represents Defendants Swift Transportation Co., Inc. ("Swift") and Interstate Equipment Leasing, Inc. ("IEL") in the above-captioned matter. We previously moved this Court to dismiss this matter for improper venue or, in the alternative, to have it transferred to the District of Arizona. As of today, that motion is still pending. Consequently, Defendants have yet to file an answer or otherwise respond to the complaint. In the meantime, Plaintiffs have sought to engage Defendants in substantive discovery not available to them in arbitration. As a result, and in accordance with Your Honor's Individual Practices, we write to request a pre-motion conference for permission to file a motion to stay these proceedings and compel arbitration.[1]

Sheer and Van Dusen performed services for Swift as independent contractors, and they both signed independent contractor agreements ("ICOA")[2] with Arizona choice of law and arbitration provisions. The arbitration provision 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*

[1] For the reasons stated in their Motion to Dismiss, Defendants submit that this Court is not the proper one to resolve a motion to compel arbitration; the United States District Court for the District of Arizona is. Defendants nevertheless request this Court's permission to file a motion to stay this action and compel arbitration in this Court in order to preserve its argument that Plaintiffs may only pursue this case on an individual basis in arbitration. Should this Court grant Defendants' Motion to Dismiss and/or transfer this case to the District of Arizona, as requested, it is Defendants' position that the Arizona court should resolve Defendants' motion to compel arbitration, regardless of where it is first filed.

[2] A copy of this ICOA was previously submitted to the Court as Exhibit D to Plaintiffs' opposition to Defendants' motion to dismiss or, in the alternative, to transfer.

> *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.*

(emphasis provided).

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, not only placed arbitration agreements on equal footing with other contracts, but established a federal policy in favor of it. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). 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." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Plaintiffs *are not* employees of Swift, and their ICOAs *are not* "contracts of employment." Therefore, the exemption set forth in § 1 of the FAA does not apply. In addition, Plaintiffs' disputes with Swift[3] fall squarely within the scope of the arbitration provision in their ICOAs, and are generally arbitrable under the FAA. For those reasons, the Court should compel Plaintiffs to submit their claims to arbitration and dismiss this action or, at a minimum, stay it. *See* 9 U.S.C. §§ 3, 4.

Plaintiffs filed Fair Labor Standards Act claims against both IEL *and* Swift on a joint employer theory.[4] Whatever the merit of Plaintiffs' FLSA and state wage claims against IEL, Plaintiffs must arbitrate those claims. Although Plaintiffs do not have separate agreements to arbitrate with IEL (as they do with Swift), the law is clear that a non-signatory may compel arbitration if it demonstrates that the dispute raises allegations of substantially interdependent and concerted misconduct by both a non-signatory and one or more of the signatories to the contract. *Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524, 526 (5th Cir. 2004); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (noting that failure to apply an arbitration provision to a non-signatory in a situation of substantial interdependence would render the arbitration process "meaningless and the federal policy in favor of arbitration effectively thwarted.") *See also Arthur Andersen LLP v. Carlisle*, 556 U.S. ___, at p. 7 (2009) (holding Section 3 of the FAA's mandate to stay litigation is not confined to disputes between parties to a written arbitration agreement; it also requires the stay of any claim "referable to arbitration under an agreement in writing" and if a written arbitration provision is made enforceable for the benefit of a third party under state contract law, the statute's terms are fulfilled). Here, Plaintiffs' entire Amended Complaint against IEL is premised on interdependent and concerted misconduct with Swift, which is indisputably subject to an enforceable arbitration clause. Plaintiffs' claims against Swift and IEL are intentionally, and inherently, intertwined. In such an instance, they cannot avoid the impact of the contractual arbitration provisions merely

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[3] The parties also agreed in their ICOAs "that no dispute may be joined with the dispute of another and agree that class actions under this arbitration provision are prohibited." Therefore, Plaintiffs must arbitrate their instant disputes on an individual, non-class or collective basis.

[4] IEL is a truck leasing operation; it *does not* "employ" individuals who choose to lease trucks from it. Indeed, IEL does not contract with, employ, or pay wages or other compensation to individuals who drive trucks and/or haul goods, nor does it exercise any control over the work of the putative Plaintiffs. It merely leases trucks to individuals who want to lease/own one.

by naming an alleged non-signatory. Indeed, a contrary ruling would allow plaintiffs to routinely avoid arbitration through manipulative pleading. It would also run afoul of the well accepted premise that any disputes regarding the proper scope of an arbitration clause should be resolved in favor of arbitration. Again, Plaintiffs' Amended Complaint contains myriad allegations that IEL and Swift are one in the same and jointly responsible for the illegalities alleged. Assuming those allegations are true, IEL is a beneficiary of Swift's contracts and entitled to enforce the contractual arbitration provision on the same footing as Swift. Any other result would send Plaintiffs' FLSA claims against Swift to arbitration, but its FLSA claims against IEL to Court, thereby threatening inconsistent rulings and waste of judicial, as well as party, resources.

Defendants expect that Plaintiffs will contend that the contracts which contain the relevant arbitration provisions are unconscionable and/or entered into under such circumstances as to be void. The clear and unambiguous terms of the arbitration provisions at issue, however, reserve such gateways issue for the arbitrator. *See* Agreement, at ¶ 24 (". . . 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 . . .."). Accordingly, Plaintiffs are free to raise any defenses they may have to the arbitration provision, but they must do so in the arbitral forum. *See AT&T Technologies Inc. v. Communications Workers,* 475 U.S. 643, 649 (1986); *accord First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943 (1995) ("The question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter.") *See also Contec Corp. v. Remote Solution Co.,* 398 F.3d 205, 211 (2d Cir. 2005) (holding that where parties incorporated AAA rules giving arbitrator power to determine jurisdiction, including objections to the existence, scope or validity of the arbitration agreement, "it is the province of the arbitrator to decide whether a valid arbitration agreement exists."); *Stewart v. Paul, Hastings, Janofsky & Walker,* 201 F. Supp. 2d 291, 292 (S.D.N.Y. 2002) (ruling gateway dispute for the arbitrator to decide, not the court, because provision expressly gave arbitrator authority to determine if agreement was void or voidable).

Respectfully submitted,

LITTLER MENDELSON, P.C.

Gary D. Shapiro

cc: Dan Getman (via Federal Express)