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March 11, 2010

Hon. Richard Berman
U.S. District Court for the Southern District of NY
500 Pearl St.
New York, NY 10007

Re: *Van Dusen v. Swift Transportation Co., Inc.,* 09-cv-10376-RMB

Dear Judge Berman:

This Court accepted defendants' pre-motion letter as its motion to transfer venue under Fed. R. Civ. P. Rule 12(b)(3) and 28 U.S.C. 1404(a) and allowed Plaintiffs three pages of letter briefing to respond to the motion.

The Plaintiff truck drivers bring FLSA and other employment law claims based on Defendants' decision to mis-classify them as independent contractors rather than employees. Plaintiffs also bring unconscionability and unjust enrichment claims arising out of an integrated series of contracts signed by Plaintiffs -- an "Independent Contractor Operating Agreement" or ICOA with Swift, and a truck Lease with the related company, IEL. Plaintiff must sign both forms together, or neither is valid, thus they are classic contracts of adhesion. *See e.g.* Exh. A, pp.3-31.

Defendants first contend that neither resides in New York. However, this is patently false. Swift has a terminal in Syracuse. *See* http://swift.drivers-central.com/swift-transportation/locations.cfm (Exh.B, p.1) and so Swift clearly "resides" in New York. IEL as a single integrated enterprise with Swift also must be held to reside in NY through leasing trucks to truckers in New York who drive for Swift in New York. IEL conducts its truck leasing operations at Swift terminals for Swift's business purposes Sheer Decl.¶5-10; Van Dusen Decl.¶ 3, 4,8,10. Defendant Swift is the largest truckload common carrier in the U.S., operating throughout the 50 states. Exh. B, p.2.

Defendants next ask Your Honor to enforce a forum selection clause they wrote, but they do not cite any particular clause in any particular contract. In fact there are many contradictory clauses. One lease requires that claims be brought in state court in Phoenix. *See* Exh. C, p.8 ¶ 20. Another claims federal or state court in Phoenix. Exh. A, p.8 ¶ 21. The ICOAs require that claims be brought only in arbitration. Exh. A, p.25 ¶ 24; Exh. C, contract ¶ 24; Exh. D, p.8 ¶ 25. However, Defendants claim they do not yet seek to enforce the arbitration clause of the ICOA.

To the extent there is any coherence in the myriad forms, they enshrine Defendants' desire to forum shop. It should be noted that Swift has litigated at least two other federal court wage claims brought by truckers where it did not enforce its forum shopping clause. *Nolte v. Swift Transportation Co,* 2:00-cv-04503-AHM (C. D. California); *Tidwell v. Swift Transportation Co.,* 2:05-cv-00232-LRS (E.D. Washington). Knowing the Judge on the case here, Defendants now seek transfer. Forum shopping in this case should not be permitted.

The clauses which Defendants claim, were tucked inside nearly one hundred pages of fine print in the adhesion contracts which its lawyers drafted and which it coerced plaintiffs into signing by

various high pressure techniques. Since the plaintiffs' acceptance of the defendants' forum selection was tainted by coercive high pressure tactics, this selection is invalid *ab initio.*

"Procedural unconscionability" voids a forum selection clause when the unconscionability pertains to the formation of the entire contract.[1] *Studebaker-Worthington Leasing Corp. v. New Concepts Realty,* 887 NYS2nd 752 (N.Y.Sup. App. Term 2009), holds that if a contract is void *ab initio* because it is unconscionable, the forum selection clause contained within it is not enforceable. The enforceability of forum-selection clauses should be decided according to federal law even in diversity cases, since "[q]uestions of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature." *Jones v. Weibrecht,* 901 F.2d 17, 19 (2d Cir.1990).[2]

In determining whether an agreement is unenforceable for procedural unconscionability, federal courts look to the general fairness of the signing process.[3] A recent case in this District noted:

> [Plaintiff] does not allege that HIP used **high pressure tactics or any other form of coercion** in attaining her consent to the Arbitration Provision. She does not allege, for example, that HIP did not provide her with sufficient time to read the Agreement, that she was not permitted to review the Agreement with an attorney, or that HIP undertook any other action that resulted in Nayal being "coerced or pressured into signing the Agreement without reading it or that the Agreement was induced by fraud or entered into under duress."

Nayal v. HIP Network Services IPA, Inc. 620 F.Supp.2d 566, 572 (SDNY 2009)(emph. added) *aff'd* . **Here, however, Defendants unconscionably coerced signatures on the agreements they drafted.** All named Plaintiffs give detailed declarations showing that Defendants did use high pressure tactics and coercion. *See generally,* Sheer, Van Dusen, Doe 1 Decls.[4] There is a significant disparity in bargaining power between Swift Transportation, with its legal team, and the high school educated truckers. The truckers were not permitted time to review the agreement,

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[1]See the complaint for explication of the substantive unconscionability in the contracts.

[2]However, even Arizona would apply the same unconscionability test. *Effio v. FedEx Ground Package* 2009 WL 775408, *3 (D.Ariz.,2009) ("Procedural unconscionability is generally found where the agreement is a contract of adhesion.").

[3]Most of the unconscionability analysis performed by the federal courts has been in the context of arbitrability, where the very strong presumption in favor of arbitrability outweighs claims of unfairness in making the agreement. Here, the only question is whether Swift's motion to transfer this case from one court to another can be granted. There is no "strong federal policy" favoring transfer of venue, the way there is favoring arbitration. Thus the equities in this case favor keeping the case before Your Honor.

[4]In considering a transfer of venue motion, courts may review materials outside of the pleadings. *See Jockey Int'l, Inc. v. M/V "Leverkusen Express"*, 217 F.Supp.2d 447, 450-51 (S.D.N.Y.2002). When analyzing plaintiff's preliminary prima facie showing, the facts must be viewed in the light most favorable to the plaintiff. *New Moon Shipping Co., Ltd. v. MAN B & W Diesel AG,* 121 F.3d 24, 29 (2d Cir.1997). "A disputed fact may be resolved in a manner adverse to the plaintiff only after an evidentiary hearing." *Id.* (citing *CutCo Indus. v. Naughton,* 806 F.2d 361, 365 (2d Cir.1986)).

and none were permitted to review the Agreement with an attorney, though they all sought to do so. None were allowed to take the contract out of the office, and all were required to sign the agreements then and there, or not at all. And in each case, there were substantial financial costs imposed if plaintiffs refused to sign. These are the precise factors that this Court has held voids arbitration agreements. For example, in *Brennan v. Bally Total Fitness,* 198 F.Supp.2d 377, 383 -84 (S.D.N.Y. 2002), this Court vacated an arbitration agreement for procedural unconscionability in forming the agreement, "(1) the considerable disparity in bargaining power ...(2) ... failure to give the employees adequate time to review the contract; (3) ... failure to inform the employees that they could review the document with an attorney; (4) ...conceded threat that those who refused to sign would not be promoted; and (5) ... failure to address the impact that the [clause] would have on any pending complaints... . *Id.,* 198 F.Supp.2d at 383-4. These same factors apply here. Clearly the unrepresented trucker plaintiffs lack equal bargaining power with the nation's largest truckload carrier and its teams of lawyers, the plaintiffs were not given time to review the contracts, were not permitted to review the document with their own attorneys or advisors, and they were pressured to sign or lose their livelihood. Under well settled law in this jurisdiction, defendant cannot enforce a procedurally unconscionable forum shopping clause against these plaintiffs who validly filed this case in this District.

As Your Honor wrote in *Freeman v. Hoffmann-La Roche Inc.* 2007 WL 895282, 1 (S.D.N.Y. 2007):

> "The burden is on the party seeking transfer to make a clear-cut showing that it is warranted...." *UFH Endowment, Ltd. V. Nevada Manhattan Mining, Inc*., No. 98 Civ. 5032, 2000 WL 1457320, at *3 (S.D.N.Y. Sept. 28, 2000) (citation and internal quotation omitted). **A plaintiff's choice of forum will not be disturbed unless the movant shows that "the balance of convenience and justice weighs heavily in favor of transfer."** *Royall Lyme Bermuda Ltd. v. Coastal Fragrance, Inc.*, No. 97 Civ. 2711, 1997 WL 620840, at *1 (S.D.N.Y. Oct. 7, 1997) (granting motion to transfer venue) (citations and internal quotation omitted). **"The interests of justice require that this Court not reward [forum shopping]."** *In re Eclair Bakery Ltd.*, 255 B.R. 121, 142 (Bankr.S.D.N.Y. 2000)

Defendants have not denied that most of the myriad factors under 18 U.S.C. 1404(a) favor this District. Apart from its procedurally unconscionable forum shopping clause, Defendants only 1404(a) claim is that the decision makers who took the unlawful actions alleged in the complaint are located in Arizona. While it may be more convenient to Defendant's wealthy corporate witnesses to litigate in Phoenix, most of the lower income named Plaintiffs reside in New York, as does their contingent fee counsel. Most of the 1404(a) factors favor the plaintiffs (Plaintiff's Choice of Forum, Convenience of Witnesses, Location of Relevant Documents, Convenience of the Parties, Locus of Operative Facts, Availability of Process, Relative Means of the Parties, Forum's Familiarity with the Governing Law, Trial Efficiency and the Interest of Justice). It is no hardship for the nation's largest truckload carrier to litigate in the Southern District of New York. Defendants have counsel here. Defendants fail to make a clear and convincing showing that their forum shopping should be permitted. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 218 (2d Cir.1978).

Sincerely,

Dan Getman

I hereby certify that a copy of the foregoing with all attachments was served on defendants' counsel, Gary Shapiro and James Boudreau simultaneously by overnight delivery service on this February 23, 2010.

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Dan Getman