IN THE UNITED STATE COURT OF APPEALS
FOR NINTH CIRCUIT

IN RE: VIRGINIA VAN DUSEN et al.,

Petitioners

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Respondent,

SWIFT TRANSPORTATION CO., INC.,
INTERSTATE EQUIPMENT LEASING, INC.
CHAD KILLIBREW and JERRY MOYES,

Real Parties in Interest

_____/

District Court No. CV-10-899-PHZ-JWS

# PETITION FOR WRIT OF MANDAMUS

**SUSAN MARTIN (AZ#014226)**
**DANIEL BONNETT (AZ#014127)**
**EDWARD TUDDENHAM**
**DAN GETMAN**

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## RELIEF SOUGHT

Petitioners seek a Writ of Mandamus vacating the district court's order referring the question of whether Plaintiffs are exempt from the Federal Arbitration Act ("FAA") and the Arizona Arbitration Act ("AAA") to an arbitrator to decide in the first instance. Doc. 223, Order dated September 30, 2010 attached hereto and at Appendix in Support of Petition for Writ of Mandamus ("Appendix") at pp. 10-31. Plaintiffs seek to compel the district court to comply with its statutory duty to decide the FAA and AAA exemption question prior to referring this matter to arbitration.

## ISSUE PRESENTED

Whether, when confronted with a factually disputed claim of exemption from arbitration under Section 1 of the FAA ("nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce") and §12-1517 of the AAA ("This article shall have no application to arbitration agreements between employers and employees or their respective representatives"), a district court has a duty to resolve that question before compelling arbitration under Section 4 of the FAA or §12-1502 of the AAA?

## FACTS NECESSARY TO UNDERSTAND THE ISSUES

Virginia Van Dusen, John Doe I, and Joseph Sheer are interstate truck drivers who allege that they were employees of Defendants Swift Transportation Co, Inc., Interstate Equipment Leasing, Co., interrelated privately held companies owned and operated by the same principals, Defendants Chad Killibrew and Jerry Moyes. Appendix 156-188. These plaintiffs assert claims against their alleged employers under the minimum wage provisions of the Fair Labor Standards Act (29 U.S.C. §206), the forced labor provisions of 18 U.S.C. §1589, the minimum wage and deduction statutes in New York and California Labor Law, and under the common law of contract and unjust enrichment.[1] *Id.* Plaintiffs bring their FLSA

[1] Count One of the Second Amended Complaint, Doc. 62, alleges that Plaintiffs and other similarly situated drivers were, by law and fact, treated as employees of Defendants and that Defendants violated the Fair Labor Standards Act (FLSA) by failing to pay Plaintiffs and other drivers the statutorily mandated minimum wages, largely because of a host of deductions, such as gas, tolls, insurance, truck lease payments, maintenance, and bonds, all taken from Plaintiffs' wages to cover Defendants' business expenses. Appendix 179. Counts Two and Three allege that Defendants' contracts with drivers' are unconscionable for a variety of reasons, including that they allow Defendants to fire the Plaintiffs for any reason or no reason, repossess their leased truck, and also to demand payment of all remaining lease payments, even if Defendants re-lease the trucks. *Id.* Thus, Defendants can, at any time, impose the draconian financial penalties of a default on drivers for any or no reason at all. Counts Four through Seven claim that drivers in New York and California were employees of Defendants and that Defendants violated various state labor laws, including state minimum wage guarantees. *Id.* at 180-184. Count Eight seeks damages for violation of the federal forced labor statute, insofar as Defendants threatened Plaintiffs that they would use the legal system to enforce the crushing debt that defendants' contract operation imposed on plaintiffs.

claims as an FLSA collective action and their other claims as putative Rule 23(b)(3) class actions. The claims arise from a common trend in the trucking industry to control drivers as employees but denominate them as independent contractors. Approximately 170 individuals have filed consents to join the FLSA action. Plaintiffs' FLSA and state labor law claims are predicated on the allegation in the complaint that Plaintiffs were employees of Defendants.

Defendants moved to compel arbitration pursuant to Section 4 of the FAA relying on the arbitration clause contained in the Operating Agreement under which each of the Plaintiffs worked.[2] Appendix 154-155. Plaintiffs opposed the motion asserting, *inter alia*, that the Operating Agreement was exempt from arbitration under Section 1 of the FAA, which exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from the provisions of the FAA. Appendix 53-60. There is no question that interstate truck drivers fall within this exemption. *Harden v.*

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*Id.* at 184-185.

[2] Defendants required Plaintiffs and similarly situated drivers to sign two documents prior to commencing work: an agreement to lease a truck from Defendant Interstate Equipment Leasing (which provides that all disputes must be brought exclusively in state or federal court), Appendix 108-123, 125-40, and an independent contractor operating agreement by which the drivers agreed to lease the truck back to Swift and drive for Swift (which contained an arbitration provision). Appendix 93-106, 141-53. Plaintiffs allege that these two documents formed a single contract that, despite labeling Plaintiffs as independent contractors, in reality, created a common law employment relationship. *See* Appendix 47-53.

*Roadway Package Systems, Inc.*, 249 F.3d 1137 (9th Cir. 2001). The only question is whether Plaintiffs, despite being labeled "independent contractors," were in fact employees of the Defendants.

Plaintiffs met their burden with respect to the exemption issue by submitting affidavits and other evidence which showed that a triable issue of fact existed as to whether they were employees of the Defendants.[3] *Cf Tinder v. Pinkerton Security*, 305 F.3d 728 (7th Cir. 2002) (party opposing motion to compel arbitration has burden of producing specific facts showing that a triable issue of material fact exists). [4]

The district court declined to rule on whether Plaintiffs met their burden with respect to the exemption. Instead, the district court held that the question of whether an employer/employee relationship existed for purposes of the FAA and

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[3] *See voluminous declaration and documentary evidence of employment status* submitted with Plaintiffs' Motion for Preliminary Injunction, Docs 188-1 through 188-4 and Docs 162-1 through 162-57 (the latter were incorporated by reference in Appendix 44-45, fn4). This evidence makes clear that drivers are treated in all material respects exactly the same as Defendants' employee drivers.

[4] If the writ is granted and the district court finds that Plaintiffs are not employees, it will have to decide whether the FAA §1 exemption applies to independent contractor work agreements. There is a split in the district courts as to whether the FAA §1 exemption applies to such agreements or is limited to agreements with workers who fit the common law definition of employee. *See OOIDA v. Swift Transporation Co. Inc.*, 288 F.Supp.2d 1033, 1035 fn 3 (D. Ariz. 2003). The district court will not need to resolve that question if, as Plaintiffs

AAA exemptions was a question for the arbitrator to decide in the first instance. The court's opinion stated,

> The Court having decided that a valid arbitration agreement exists must next consider whether the dispute at issue 'falls within the scope of the parties agreement to arbitrate.' [quoting *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)]. . . .
>
> . . . 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 dispute 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.
>
> In addition, resolving whether an employer-employee relationship exists would require an analysis of the Contractor Agreement as a whole, as well as the Lease and evidence of the amount of control exerted over plaintiffs by defendants, to determine whether an employer/employee relationship existed between the parties. When the threshold question of arbitrability is before the district court, the district court considers only the validity and scope of the arbitration clause itself and not the contract as a whole.

Doc 223 at 19.

Plaintiffs filed a timely motion for reconsideration of this issue, or, in the alternative, for certification of the question of who decides the FAA and AAA

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contend, it finds that Plaintiffs' are employees.

exemption questions for immediate appeal pursuant to 28 U.S.C. §1292(b). Appendix 2-9. On November 17, 2010, the district denied that motion. Appendix 1. This petition for mandamus followed.

## REASONS FOR GRANTING THE WRIT

A writ of mandamus is "an extraordinary or drastic remedy," *Calderon v. United States Dist. Court,* 163 F.3d 530, 534 (9th Cir. 1998) (en banc), used only to "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Will v. United States,* 389 U.S. 90, 95 (1967). This is such a case as Plaintiffs seek to compel the district court to comply with its duty to determine if Plaintiffs' suit is exempt from the FAA and AAA before compelling arbitration under those Acts.

The Ninth Circuit considers five factors when deciding whether to grant mandamus relief:

> (1) whether the petitioner has no other adequate means, such as direct appeal, to secure relief;
>
> (2) whether he will suffer damage not correctable on appeal from final judgment;
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> (3) whether the district court's order is clearly erroneous as a matter of law;
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> (4) whether the order represents an oft-repeated error by the district court; and,
>
> (5) whether the order raises new and important problems or legal issues of first impression.

*Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654-55 (9th Cir.1977). The third factor is a necessary condition for granting a writ of mandamus, *Executive Software N.Am. Inc. v. U.S. Dist. Court,* 24 F.3d 1545, 1551 (9th Cir. 1994), and Plaintiffs will begin by addressing that issue. If that factor is satisfied, the Court looks to whether the other four factors "point in favor of granting the writ." *Id.* at 1551. Rarely, if ever, are all five factors met; factors (4) and (5) "are in direct conflict with each other, and it would appear to be impossible to meet both criteria." *In re: Gonzalez,* ___ F.3d ___, 2010 W.L. 4104722 at *3 (9th Cir. October 20, 2010). "Accordingly a showing of less than all of the Bauman factors, indeed of only one, does not mandate denial of the writ." *Id.* In this case all of the criteria except the fourth support the granting of the writ.

**Factor 3: The District Court's Order Is Clearly Erroneous As A Matter of Law**

The FAA was enacted "'to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate' (citation omitted), and to place such agreements 'upon the same footing as other contracts (citation omitted).' " *Volt Information Sciences, Inc. v. Board of Trustees,* 489 U.S. 468, 478 (1989). However, the FAA does not apply to all arbitration agreements. As is made clear in Section 2, the Act applies only to a written arbitration provision that appear "in any maritime transaction or a contract evidencing a transaction involving commerce." 9 U.S.C.

§2. The definition of "commerce" set forth in Section 1 of the Act further narrows the applicability of the FAA by stating that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. §1.

Thus, before a Court can exercise its power to compel arbitration under §4 of the Act, it must first determine that there is (1) a written arbitration agreement (2) in a maritime transaction or contract involving commerce, and it must further determine that (3) the contract is not one exempted under Section 1. A court simply has no authority to compel arbitration under the FAA unless and until the court is satisfied that these three criteria have been met. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 401-402 (1967) ("first" question for a court is whether the arbitration provision is "within the coverage of the Arbitration Act" – i.e. whether it is contained in a contract covered by Section 1 and 2); *Republic of Nicaragua v. Standard Fruit Co.,* 937 F.2d 469, 476 (9th Cir. 1991) (a district court must make the threshold determination of whether a contract is a transaction involving commerce); *Three Valleys Municipal Water District,* 925 F.2d 1136, 1140-1141 (9th Cir. 1991) (only a court can decide whether an agreement to arbitrate *exists*); *Harden,* 249 F.3d at 1140 (court has no authority to compel arbitration where contract falls within Section 1 exemption). *Cf. Granite Rock Co. v. Int'l. Bro. of Teamsters,* __U.S.___,130 S. Ct. 2847, 2856-2860 (2010)

(presumption of arbitrability does not excuse district court from first determining that "arbitration agreement was validly formed and that it covered the dispute in question and *was legally enforceable."*) (emphasis added).

That the district court must make these determinations before it compels arbitration is evident from the language of Section 4 of the Act which clearly states that, upon the filing of a petition to compel arbitration,

> The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.

9 U.S.C. §4. Plainly in requiring a district court to satisfy itself that "the making of the agreement for arbitration" is not in issue, Section 4 is referring not to any arbitration agreement, but to one subject to the Act, i.e. a written agreement in a "maritime transaction or a contract evidencing a transaction involving commerce," as provided by Section 2, that it is not in a "contract[] of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" excluded pursuant to Section 1. *See Bernhardt v. Polygraphic Co.,* 350 U.S. 198 (1956) (right to stay litigation pursuant to Section 3 of the Act applies only to contracts falling within Section 1 and 2 of the Act). To read the reference to

"the making of an agreement for arbitration" in Section 4 in any other way would write the limitations of Sections 1 and 2 out of the statute – any agreement for arbitration, whether written or oral, no matter where it appeared or whether it was an excluded employment contract would be subject to arbitration if the limits of Section 1 and 2 are not read into Section 4.

Thus it is clear that Section 4 of the FAA requires the district court to "satisfy itself" that the Section 1 exemption does not apply, and if the Section 1 exemption is "in issue" "the court must proceed summarily to the trial thereof." 9 U.S.C. §4. To allow an arbitrator to decide the exemption question in the first instance, as happened here, represents a refusal by the district court to carry out a clear legal duty imposed by the FAA which has the effect of denying litigants their statutory right to a *judicial* determination of whether an exemption applies.

So evident is this legal proposition that Plaintiffs have been unable to find any cases that specifically discuss the issue although the Supreme Court and every circuit court treats Section 1 exemption questions as issues for the court to decide. *See, e.g., Circuit City Stores Inc. v. Adams,* 532 U.S. 105 (2001) (reversing Court of Appeals' determination that sales representative fell within Section 1 exception); *Lenz v. Yellow Transportation, Inc.,* 431 F.3d 348 (8th Cir. 2005) (reversing district court's finding that customer service representative of transportation company was Section 1 exempt); *Palcko v. Airborne Express,* 372

F.3d 588, 593-594 (3d Cir. 2004) (affirming district court finding based on affidavits that plaintiff was Section 1 exempt); *Harden v. Roadway Package Sys.*, 249 F.3d 1137 (9th Cir. 2001) (reversing district court determination that delivery driver was not Section 1 exempt); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 575-576 (10th Cir. 1998) (affirming district court ruling that exemption did not apply); *O'Neil v. Hilton Head Hospital*, 115 F.3d 272, 274 (4th Cir. 1997) (deciding that Section 1 exemption did not apply and that agreement was subject to the FAA before compelling arbitration); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir. 1997) (deciding as an initial matter whether employment contract is exempt under FAA); *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1470-1472 (D.C. Cir. 1997) (affirming district court determination prior to compelling arbnitration that Section 1 did not apply); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 747- 748 (5th Cir. 1996) (same); *Asplundh Tree Co. v. Bates*, 71 F.3d 592, 596-601 (6th Cir. 1995) (on appeal from order compelling arbitration, resolution of Section 1 exemption question is "essential" to resolving appeal); *Am. Postal Workers Union v. U.S.*, 823 F.2d 466 (11th Cir. 1987) (holding FAA limitations period for appealing arbitration award inapplicable because workers are exempt under Section 1); *Erving v. Virginia Squires Basketball Club*, 468 F.2d

1064, 1069 (2d Cir. 1972) (affirming district court ruling that Section 1 exemption does not apply); *Dickstein v. DuPont,* 443 F.2d 783, 785 (1st Cir. 1971) (same).[5]

The fact that a Section 1 exemption question involves disputed facts does not change the result; the court still must make the exemption determination. Section 4 of the FAA anticipates the possibility of factual disputes with respect to the making of an arbitration agreement covered by the FAA and clearly states that when such disputes arise, "the court shall proceed summarily to the trial thereof." 9 U.S.C. §4. Nothing in the FAA authorizes a court to abdicate the judicial function

[5] As far as Plaintiffs have been able to determine, every occasion in which a truck driver has asserted that his *alleged* employee status entitles him to the FAA Section 1 exemption, the question has been determined by the district court not by the arbitrator. *See Bell v. Atlantic Trucking Co.,* 2009 WL 4730564 (M.D. Fla. 2009) (finding based on allegations of complaint and terms of independent contractor agreement that trucker was common law employee exempt under Section 1); *Gagnon v. Service Trucking, Inc.,* 266 F.Supp.2d 1361, 1365-1366 (M.D. Fla. 2003) (finding truckers' independent operating agreement was contract of employment exempt under §1); *See also, Owner-Operator Indep. Drivers Assn. Inc. v. Swift Transportation Co., Inc.,* 288 F.Supp.2d 1033, 1035 (D. Ariz. 2003) (finding §1 exemption did not apply where plaintiffs did not "present[] the Court with any analysis showing that the owner-operators who signed the M.S. Carriers' contract at issue should in fact be considered employees based on the terms of the contract and the circumstances of their working relationship with M.S. Carriers."); *Owner Operator Independent Drivers Assn. Inc. v. United Van Lines,* 2006 WL 5003366 (E.D. Mo. 2006) (court denies Section 1 exemption because drivers failed to carry burden of showing exemption applied). The instant case is the only case Plaintiffs have found where the exemption question has been referred to the arbitrator.

and enlist an arbitrator to resolve factual issues that are clearly the responsibility of the district court.[6]

The Arizona Supreme Court also treats exemption questions under the Arizona Arbitration Act as questions for the courts to determine. *North Valley Emergency Specialists, LLC v. Santana,* 93 P.3d 501, 506 (Ariz. 2006) (granting Arizona equivalent of mandamus petition to compel district court to apply exemption and vacate order to arbitrate).

Thus the most critical *Bauman* factor – that the district court committed a clear error of law -- supports granting the petition for mandamus.

**Factors 1 & 2: Plaintiffs Have No Other Adequate Means of Securing Relief and Will Suffer Damages Not Correctable on Appeal After A Final Judgment.**

The district court's order leaving it to the arbitrator to decide the exemption question is not immediately appealable because the district court stayed Plaintiffs' complaint pending the outcome of arbitration, rather than dismissing the action. Appendix 31. *Sanford v. Memberworks, Inc.,* 483 F.3d 956, 961 (9th Cir. 2007) (no

[6] Factual disputes over whether a transaction "involve[es] commerce" for purposes of FAA § 2, also are determined by the court. *See, e.g., Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 401 n. 6 (1967) (relying of affidavits to determine that controversy involved a transaction in commerce and thus was subject to the FAA); *Ideal Unlimited Services Corp. v. Swift-Eckrich, Inc.*, 727 F.Supp. 75 (D.P.R. 1989) (In deciding whether there is transaction involving commerce governed by Act, court may look to contract, affidavits, and parties' business operations).

appeal lies from stay pending arbitration). Moreover the district court denied Plaintiffs' motion for certification of an interlocutory appeal under 28 U.S.C. §1292(b). Plaintiffs thus meet the first *Bauman* factor as, absent mandamus relief, Plaintiffs will have no choice but to proceed with arbitration. *Douglas v. U.S. District Court,* 495 F.3d 1062 (9th Cir. 2007) (finding order staying case pending arbitration satisfied the first *Bauman* factor and granting mandamus); *Credit Swiss v. U.S. Dist. Ct.*, 130 F.3d 1342, 1345-1346 (9th Cir. 1997) (same).

After the arbitration is complete, an appeal may be available from a final judgment enforcing any arbitration award made, but by that point Plaintiffs may well have suffered injury that cannot be corrected on appeal. That is so because the Plaintiffs filed their complaint as a class action and the arbitration agreement enforced by the district court contains a class action waiver provision. That provision would be of no effect if mandamus is granted and the district court decides that the Section 1 exemption applies. However, if mandamus is denied Plaintiffs will have to proceed with individual arbitration.[7] If the individual

[7] The American Arbitration Association has refused Plaintiffs' request to file a class arbitration. Appendix 230. Once an arbitrator has been appointed, Plaintiff intend to argue to the arbitrator that the class action waiver is unconscionable. That issue is for the arbitrator to decide pursuant to the delegation clause in the arbitration agreement. *See Rent-a-Center West v. Jackson,* ___U.S. ___, 2010 WL 2471058 (June 21, 2010). Because it is unclear when the arbitrator will be appointed or when or how the issue will be decided, Plaintiffs have no choice but to proceed with this petition for mandamus.

Plaintiffs are successful in arbitration and are awarded all of the damages they have requested, their individual claims will be moot and they will likely be unable to appeal either the exemption question or the class issue. This is precisely the irreparable injury that this Court found sufficient to meet the first and second *Bauman* factors in *Douglas*, 495 F.3d at 1068-1069. That case, like this one, involved a petition for mandamus to review an order compelling arbitration on the basis of an agreement containing a class action waiver. In granting the writ, this Court held that the district court clearly erred in finding the plaintiff had agreed to the arbitration contract as well as in upholding the class action waiver. The Court found that proceeding to individual arbitration could potentially moot both the contract agreement question and the class action waiver question if the plaintiffs were successful in their individual arbitrations. Accordingly, the Court held that the *Douglas* plaintiffs satisfied the first and second *Bauman* factors.[8] *Id.* Plaintiffs face precisely the same problem as the *Douglas* plaintiffs and, as a result, the second *Bauman* factor counsels in favor of granting mandamus.

Moreover, because this is a supervisory mandamus case, "[m]andamus relief may be appropriate . . . even if *Bauman*'s second factor – that the error cannot be

[8] It is true that if Plaintiffs lose or receive less than what they seek in arbitration, they could raise the exemption issue on appeal from an order enforcing the arbitration award, but that was true in *Douglas* as well, *see* 495 F.3d at 1068 fn 4, and did not preclude the Court from granting the mandamus petition.

corrected on appeal from the final judgment – is absent." *In re Gonzalez,* 2010 WL 4104722 at * 3. Supervisory mandamus cases are ones that involve the "proper judicial administration of the federal system." *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 259-260 (1957), as opposed to cases that focus on issues unique to a given case. *See, e.g., Plastic Science, Inc. v. U.S. District Court,* 863 F.2d 886 (9th Cir. 1988) (petition for mandamus to review district court order interpreting stipulation as waiving a right to jury trial). The reason for granting mandamus in supervisory cases "is to provide necessary guidance to the district courts and to assist them in their efforts to ensure that the judicial system operates in an orderly and efficient manner." *In re Gonzalez,* 2010 WL 4204722 at *3, *quoting Cement Antitrust Litig.*, 688 F.2d 1297, 1307 (9th Cir. 1982).

Supervisory mandamus is appropriate here because the issue presented has nothing to do with the specific facts of this case and instead addresses the proper allocation of functions between the district court and arbitrators in cases filed under the FAA. As set forth below, the district courts have evidenced considerable confusion on that issue and a clear statement of the duty of the district court to decide FAA exemption questions prior to ordering arbitration is critical to the orderly and efficient operation of the judicial system. Indeed, this case is quite similar to *LaBuy*, the Supreme Court case that originated the concept of

supervisory mandamus. That case affirmed writs of mandamus issued by the Seventh Circuit to vacate orders referring two antitrust cases to special masters pursuant to FRCP 53(b). The Court concluded that the referrals were in violation of the requirements of Rule 53(b) and represented "little less than an abdication of the judicial function." *LaBuy,* 352 U.S. at 256. Here too, the Court's refusal to decide the exemption issue violates the clear mandate of the FAA and involves a similar abdication of the judicial function. *See also, Town of N. Bonneville v. U.S. Dist. Ct.,* 732 F.2d 747 (9th Cir. 1984) (granting mandamus without considering injury to plaintiff where district court failed to consider mandatory 28 U.S.C. §1631 requirements for transfer prior to transferring cases to Court of Claims).

Thus the first and second *Bauman* factors weigh heavily in favor of granting the writ.

**Factor 5. The Order Raises New And Important Legal Issues Of First Impression**

As far as Plaintiffs can determine, this Circuit has never directly addressed the question of who decides a Section 1 exemption question, let alone who decides the issue where the facts necessary to determine the application of the exemption are disputed. While Plaintiffs believe that the correct answer to those questions is implicit in cases like *Circuit City,* 532 U.S. 105, and *Harden,* 249 F.3d 1137, the question of who decides what issues on a motion to compel arbitration has caused

no end of confusion in the district courts. Some of this confusion has resulted from the less than precise language that has been used to describe the district courts' admittedly limited role in a motion to compel arbitration. For instance, in this case, the district court referred the exemption issue to the arbitrator based on language in *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 720 (9th Cir. 1999) ( a district court "can determine only whether a written arbitration agreement exists, and if it does, enforce it in accordance with its terms"), and *Chiron v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) ("The court's role is limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue."). *See* Appendix 26-28. Many other courts have embraced these descriptions of the district court's role. *See, e.g.*; *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008) (*quoting Chiron*); *Lowden v. T-Mobile USA*, 512 F.3d 1213, 1217 (9th Cir. 2008) (same). These statements regarding the district court's authority, while certainly correct in context, are misleading and lead to error when they are applied to the question of who should resolve an asserted exemption under Section 1. Taken literally, if a court can only decide "whether a written agreement exists, and if it does, enforce it in accordance with its terms" then if follows logically that the exemption question must be referred to the arbitrator once a written agreement is found to exist.

The Supreme Court has contributed to the confusion on this issue. In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), the Court noted that,

> 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." . . . . Linguistically speaking, one might call any potentially dispositive gateway question a "question of arbitrability," for its answer will determine whether the underlying controversy will proceed to arbitration on the merits. The Court's case law, however, makes clear that, for purposes of applying the interpretive rule, the phrase "question of arbitrability" has a far more limited scope. See 514 U.S. at 942. Court has found the phrase applicable in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.

*Id.* at 83-84. This definition of "arbitrability" is correct in the context of the *Howsam* case where neither Section 2 coverage nor Section 1 exemptions were at issue. But taken out of that context and applied generally, it could well lead a court to make the mistake of simply looking at the arbitration agreement to see if it the claim fell within the scope of the arbitration agreement and leaving the exemption question for the arbitrator – precisely what the district court here did. The likelihood of confusion over this point has now been compounded by the Court's decision in *Rent-a-Center West v. Jackson,* ___U.S. ___, 130 S.Ct. 2772 (June 21,

2010), which holds that "parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Id.* at 2777. It is clear that *Rent-a-Center's* holding, like *Prima Paint's,* only applies *after* a court has first found that the FAA applies and that a valid and legally enforceable delegation clause exists. *See Prima Paint,* 388 U.S. at 401-2 ("Having determined that the contract in question is within the coverage of the Arbitration Act, we turn to the central issue in this case: whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators."); *Rent-a-Center*, 130 S.Ct. at 2777-8 ("An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other."). Taken out of context, however, *Rent-a-Center's* language suggests that where, as here, an arbitration provision contains a 'delegation' clause, fundamental judicial questions such as whether the FAA even applies to the controversy could be sent to an arbitrator to decide.

Courts have similarly been confused by the language, originating in *Prima Paint* and carrying through *Rent-a-Center* that the district court has no authority to consider a contract as a whole in determining the question of arbitrability and must

focus exclusively on the arbitration provision itself. *Prima Paint,* 388 U.S. at 403-404; *Rent-a-Center West,* 130 S.Ct. at 2278-2279; *Republic of Nicaragua v. Standard Fruit Company,* 937 F.2d 469, 477 (9th Cir. 1991). Here again, this statement of the law is correct in context, but leads to error where a trial court relies on it to determine the exemption aspect of the question of arbitrability. That is precisely what happened here: The trial court reasoned that it had to refer the employer/employee issue to the arbitrator because that issue related to the contract as a whole while the court's consideration of arbitrability is limited to the "validity and scope of the arbitration agreement itself and not the contract as a whole." Appendix 28. The district court below is not the only one that has been led astray by the application of these less than complete statements regarding the district court's role in determining arbitrability. For example, in *Sanford v. Memberworks, Inc.,* 483 F.3d 956, 963-964 (9th Cir. 2007), this Court reversed a district court's order compelling arbitration based on the fact that the plaintiff had never agreed to the arbitration contract. Like the district court in this case, the district court in *Sanford* acknowledged the plaintiff's contention that she had not entered into the contract but held that that argument involved a challenge to "the validity of the whole contract and not specifically the arbitration agreement" necessitating the conclusion that "her claim is an issue for the arbitrator not the Court." *Id.* at 959. This sort of repeated misapplication of precedent would seem to satisfy *Bauman*

factor 4, in addition to presenting an issue of first impression which satisfies the requirements of factor 5. The importance of clarifying that the district courts have a duty to make a judicial determination of Section 1 exemption issues prior to ordering arbitration is particularly critical in light of the increasing trend in the trucking industry of mislabeling employee drivers as 'independent contractors', *see, e.g., Narayan v. EGL,* ___F.3d ___, 2010 WL 3035487 (9th Cir. 2010); *Estrada v. Fed Ex Ground Package System, Inc.,* 154 Cal.App.4th 1 (2007).

This Court should end the confusion created by the above cited cases and clearly spell out for the district courts that they have a non-delegable judicial duty to decide whether an arbitration agreement falls within the scope of Section 2 of the FAA and, if it does, whether it is nevertheless exempt under the provisions of Section 1 *before* compelling arbitration. In addition, the Court should clarify what where there is a factual dispute with regard to the applicability of an exemption, the district court has a duty to proceed "summarily to a trial thereof" after affording the parties an opportunity for discovery. 9 U.S.C. §4. *See Simula, Inc.,* 175 F.3d at 726 ("FAA provides for discovery and full trial in connection with a motion to compel arbitration . . . if 'the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue'"); *Deputy v. Lehman Bros.,Inc.,* 345 F.3d 494, 511 (7th Cir. 2003) (holding that parties are entitled to discovery prior to Section 4 trial).

Thus, *Bauman* Factor 5, whether the order raises new and important problems or legal issues of first impression, as well as "other compelling factors relating to the efficient and orderly administration of the district courts," *In re Cement Antitrust Litigation v. U.S. District Court*, 688 F.2d 1297, 1301 (1982), support the granting of mandamus relief.

## CONCLUSION

All of the relevant *Bauman* factors support the granting of the requested writ of mandamus. Accordingly, this Court should vacate the district court's order staying this case pending arbitration and direct the district court to hold a trial, after an appropriate period for discovery, on the question of whether the Plaintiffs are employees of Defendants exempt from arbitration under Section 1 of the FAA.

Respectfully submitted this 9th day of December, 2010.

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