U.S. COURT OF APPEALS CASE NO. 15-2364

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DOMINIC OLIVEIRA
Plaintiff and Appellee
V.
NEW PRIME, INC.
Defendant and Appellant

APPELLANT'S OPENING BRIEF

On Appeal from United States District Court
for the District of Massachusetts
District Court Case No. 1:15-cv-10603-PBS
Honorable Patti B. Saris, District Judge

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellant New Prime, Inc. states as follows:

New Prime, Inc. has no parent corporation and no publicly held corporation owning ten percent (10%) or more of its stock. New Prime, Inc. is a privately owned company.

Dated: March 9, 2016

Respectfully submitted,

By:/s/ Robert J. Hingula

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Appellant New Prime, Inc. ("Prime"), Defendant in the underlying action, respectfully submits the following Opening Brief.

I. JURISDICTIONAL STATEMENT

The district court had jurisdiction over the underlying case under 29 U.S.C. §216(b) and 28 U.S.C. §1331.

On October 27, 2015, the district court entered a Memorandum and Order denying Prime's Motion to Compel Arbitration. Addendum at 1. Prime timely filed its Notice of Appeal on November 12, 2015. App. at 203.

This Court has jurisdiction over this appeal under 9 U.S.C. §16(a)(1)(B) of the Federal Arbitration Act, which allows an interlocutory appeal to be taken from any order denying a motion to compel arbitration. *Grand Wireless, Inc. v. Verizon Wireless, Inc.*, 748 F.3d 1, 6 (1st Cir. 2014); *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, 673 F.3d 221, 227-28 (3rd Cir. 2012) (order denying motion to compel arbitration appealable "irrespective of the fact that the order was denied without prejudice").

II. STATEMENT OF THE ISSUES PRESENTED

Where the FAA exempts "contracts of employment" of workers engaged in interstate commerce from arbitration, did the district court err in denying Prime's Motion to Compel Arbitration and in requiring the parties conduct merits discovery and to file dispositive motions regarding the entire *relationship* between the parties

rather than ruling on the exemption issue based on the intent of the parties as expressed in the Contractor Agreements?

III. STATEMENT OF THE CASE

Oliveira was formerly a truck driver for Prime, an over-the-road trucking company based on Springfield, Missouri. App. at 2-3, 5. Oliveira briefly worked for Prime as an employee driver starting in March, 2013. *Id*. at 5. On May 31, 2013, Oliveira entered into an Independent Contractor Operating Agreement ("Contractor Agreement") with Prime. *Id*. at 93. On March 12, 2014, Oliveira entered into another, substantively identical Contractor Agreement with Prime. *Id*. at 104. [1]

In both Contractor Agreements, Oliveira and Prime mutually agreed that

> ANY DISPUTES 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, AND ANY DISPUTES AS TO THE RIGHTS AND OBLIGATIONS OF THE PARTIES,

[1] Below, Oliveira argued that he was not bound by the Contractor Agreements, including the arbitration provisions, because the agreements were entered into by an LLC, of which he was the only member, and Prime. App. at 120-21. While the district court did not address this issue in its Order denying Prime's Motion to Compel Arbitration, the district court was correct in rejecting it. As Prime presented below, an individual LLC owner is bound by an arbitration agreement when the owner signed the agreement on behalf of the LLC. *See* App. at 152-54 & 175-77; *see also Tamsco Properties, LLC, et al. v. Langemeier, et al.*, No. 2:09-CV-03086; 2013 WL 246782 (E.D. Cal. Jan. 22, 2013); *Machado v. System4, LLC*, 471 Mass. 204, 28 N.E.3d 401 (2015).

> INCLUDING THE ARBITRABILITY OF DISPUTES BETWEEN THE PARTIES, SHALL BE FULLY RESOLVED BY ARBITRATION IN ACCORDANCE WITH MISSOURI'S ARBITRATION ACT AND/OR THE FEDERAL ARBITRATION ACT.

App. at 102 (¶ 30), 112 (¶ 30). Oliveira and Prime also agreed that "[t]he place of the arbitration herein shall be Springfield, Missouri." App. at 102 (¶ 30), 112 (¶ 30).

Under the Contractor Agreements, Oliveira agreed to lease a truck and to provide driving services to Prime, and Prime agreed to pay him accordingly. App. at 93(¶¶1, 3), 104 (¶¶ 1, 3). Oliveira and Prime specifically agreed "that the intent of the Agreement is to establish an independent contractor relationship at all times." App. at 93 (¶ 2), 101 (¶ 24), 104 (¶ 2), 111 (¶ 24). The parties further agreed that Oliveira was to "determine the means and methods of performance of all transportation services undertaken under the terms of this Agreement, including driving times and delivery routes." App. at 93 (¶ 2), 104 (¶ 2). The Contractor Agreements obligated Oliveira to "pay all operating expenses and maintenance expenses in connection with the operation of the Equipment, including but not limited to fuel, fuel taxes, Federal Highway Use Taxes, tolls, ferries detention, accessorial services, [and] tractor repairs . . . ." App. at 95 (¶ 8), 106 (¶ 8). Oliveira was also required to pay for "all licenses, permits, IRP base plates and authorizations required for operation of the Equipment." App. at 95 (¶ 9), 106

(¶ 9). Oliveira maintained the right to refuse loads offered by Prime and to provide services to other motor carriers during the term of the agreement. App. at 93 (¶ 2), 104 (¶ 2).

Oliveira terminated his relationship with Prime in the fall of 2014. App. at 11. On March 4, 2015, Oliveira filed a Complaint alleging claims for unpaid wages, misclassification as an independent contractor, and breach of contract arising out of his relationship with New Prime. On July 6, 2015, Oliveira filed his Amended Complaint in this Court, raising the same claims, but alleging new facts. App. at 10.

On July 20, 2015, Prime filed a Motion to Compel Arbitration pursuant to the arbitration provisions in Oliveira's Contract Agreements and § 2 of the FAA. App. at 73. On October 27, 2015, the district court entered its Memorandum and Order denying Prime's Motion without prejudice. Addendum at 20. The court further ordered the parties to conduct factual discovery on Oliveira's status as an employee or independent contractor and to file dispositive motions on the issue. *Id*. at 21.

Prime respectfully requests that this Court reverse the district court's ruling denying its Motion to Compel Arbitration, and remand the case to the district court with instructions to compel Oliveira to arbitrate his claims against Prime.

IV. SUMMARY OF ARGUMENT

Section 2 of the FAA provides that written 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." 9 U.S.C. § 2. The district court denied Prime's Motion to Compel Arbitration finding that it must first determine whether the Contractor Agreements between Oliveira and Prime are exempt under § 1 of the FAA, which exempts "contracts of employment" involving transportation workers. Addendum at 20-21; 9 U.S.C. § 1. The district court further ordered discovery regarding whether the relationship between Oliveira and Prime was that of employee/employer or independent contractor, and ordered that dispositive motions be filed on that issue. Addendum at 21.

The issue presented to the district court was whether Oliveira should be compelled to pursue some or all of his claims in arbitration, or whether the agreement between the parties was a contract of employment, and thus, exempt from the FAA. Rather than resolving the threshold issue of whether a particular type of *contract* was created, the district court intends to litigate whether a particular type of *relationship* was formed after the contract was executed.

The district court's order should be reversed because the court seeks to litigate and decide the wrong issue. The sole issue here is whether the Contractor Agreements are exempt under § 1 of the FAA. Yet the lower court plans to litigate

the much broader question of the *relationship* that developed between the parties *after* contract was executed. Litigating this broader question is contrary to § 1 of the FAA, and to the law requiring contracts to be interpreted consistent with the parties' intent at the time of contracting. In determining whether the parties intended to create an independent contractor or an employment agreement, the appropriate inquiry is centered on the terms of the Contractor Agreements. Here, it is undisputed that both parties executed the Contractor Agreements, and the terms of the Contractor Agreements make clear that the parties intended to create an independent contractor relationship. Moreover, the district court properly rejected Plaintiff's only defenses to the formation of the Contractor Agreements. Addendum at 14. Based on these facts alone, the district court erred in not compelling Oliveira to pursue his claims in arbitration.

The district court's order setting full merits discovery and dispositive motion deadlines on the issue of Plaintiff's status as an employee or independent contractor would undermine the intent of the FAA by litigating the critical factual and legal issues as to liability in court rather than in arbitration. If the court finds Oliveira's contracts are not exempt under the FAA, the case would be sent to arbitration. By that point, though, the district court would have already decided the issue of whether the relationship that developed over time between the parties was an independent contractor or employment relationship. While this inquiry may be

pertinent to issues regarding liability, it is unnecessary to the threshold exemption question, i.e. whether the parties intended to create an independent contractor relationship when the Contractor Agreements were executed.

Prime therefore requests that this Court reverse the district court order denying Prime's Motion and to remand the case instructing that Oliveira be compelled to pursue his claims in arbitration.

V. ARGUMENT

A. Standard of Review

The district court's decision to grant or deny a motion to compel arbitration is reviewed *de novo*. *Dialysis Access Center, LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 373 (1st Cir. 2011). The scope of an arbitration clause is reviewed *de novo* while underlying factual findings are reviewed for clear error. *See IOM Corp. v. Brown Forman Corp.*, 627 F.3d 440, 450 (1st Cir. 2010).

The FAA establishes a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Id.*; *IOM Corp.*, 627 F.3d at 450. "[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration …" *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25.

B. The District Court Erred in Failing to Decide the Threshold Arbitrability Question Based on the Written Contractor Agreements, and by Ordering the Parties to Litigate Beyond the Making of the Contract

1. *The FAA makes clear that the arbitrabilty exemption depends on whether there is a contract of employment*

The FAA provides that "nothing herein contained shall apply to *contracts of employment* of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added). This exemption, though, does not extend to independent contractors. *Carney v. JNJ Express, Inc.*, 10 F.Supp.3d 848, 852 (W.D. Tenn. 2014) ("If the [plaintiffs] are independent contractors, their claims are arbitrable under the FAA."). Moreover, exemptions to the FAA are narrowly construed. *See Circuit City v. Adams*, 532 U.S. 105, 119 (2001).

Despite the unambiguous terms of the Contractor Agreements wherein he clearly expressed his intention to enter into an independent contractor relationship with Prime, Oliveira contends that the Contractor Agreements were contracts of employment, and thus, exempt from the FAA. App. at 121. But, because his Contractor Agreements classify him as an independent contractor, Oliveira bears the burden to prove that the Contractor Agreements were actually contracts of employment. *Owner-Operator Indep. Drivers Ass'n, Inc. v. United Van Lines, LLC*, No. 4:06CV219, 2006 WL 5003366, * 3 (E.D. Mo. Nov. 15, 2006); *Owner-*

Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co., 288 F. Supp. 2d 1033, 1035-36 (D. Ariz. 2003); *see also Port Drivers Fed'n 18, Inc. v. All Saints Express, Inc.*, 757 F. Supp. 2d 463, 472 (D.N.J. 2011) ("The test used in *United Van Lines* and *Swift* … not only further the complimentary policies favoring arbitration and narrowly construe the FAA's exemptions, but also provides a sound methodology."). To prove that the Contractor Agreements created an employment relationship rather than an independent contractor relationship, Oliveira is required to present evidence beyond mere allegations and denials. *Carney v. JNJ Express, Inc.*, 10 F.Supp.3d at 852.

Because the FAA exemption only applies to *contracts of employment,* the proper and only issue to be decided at this threshold stage is whether the contract between Oliveira and Prime created an employment relationship or an independent contractor relationship at the time the contract was entered into.

2. *Contracts are to be interpreted according to the intention of the parties at the time they entered into the agreement*

In matters of contract interpretation, the court is required to ascertain what the parties intended at the time they entered into the contract and to interpret the contract consistently therewith. The interpretation of a contract must give effect to the "mutual intention" of the parties at the time the contract was formed. *See Szulik v. State Street Bank and Trust, Co.* 935 F. Supp. 2d 240, 255 (D. Mass. 2013); *Owens v. West*, 182 F. Supp. 2d 180, 195 (D. Mass. 2001); *Polito v. Sch. Comm.*

Of Peabody, 69 Mass.App.Ct. 393, 396, 868 N.E.2d 624, 626-24 (2007). This determination begins with the plain language of the contract itself; if the terms of a contract are not susceptible to more than one construction, the contract will be construed according to the ordinary meaning of the words contained in its provisions. *See J.I. Corp. v. Federal Inc. Co.*, 920 F.2d 118, 119 (1st Cir. 1990); *see also Dingley v. Oler*, 117 U.S. 490 (1886); *Reed v. Ins. Co.*, 95 U.S. 23, 30 (1877) ("A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the court in construing their language, from falling into mistakes and even absurdities").

This approach is consistent with the Supreme Court's instruction that, in the arbitration context, the court's role in determining whether to compel arbitration is a functional one, and the court must interpret the parties' agreement according to its terms. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1742, 1748 (2011); *see also Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

The threshold issue of whether the Contractor Agreements constitute "contracts of employment" – and are thus exempt from the FAA – should be determined by evaluating the Contractor Agreements in their entirety. Prime acknowledges that even if a contract referred to the worker as an "independent contractor," it is appropriate to evaluate other provisions of the agreement to

confirm that they are consistent with the label chosen by the parties. But, that analysis can and should be accomplished only by referring to the provisions of the parties' agreement. This approach is consistent with the mandate that a contract should be interpreted so as to give effect to the parties' intention at the time of formation.

Here, the parties clearly stated their intention to create an independent contractor relationship. App. at 93 (¶ 2), 101 (¶ 24), 104 (¶ 2), 111 (¶ 24). In addition, other provisions of the Contractor Agreements illustrate the parties' intent to create an independent contractor relationship: Oliveira was to "determine the means and methods of performance of all transportation services undertaken under the terms of this Agreement, including driving times and delivery routes," App. at 93 (¶ 2), 104 (¶ 2), Oliveira was obligated to pay all operating expenses and maintenance expenses, including fuel, fuel taxes, tolls, tractor repairs, licenses, and permits, App. at 95 (¶¶ 8, 9), 106 (¶¶ 8, 9), and Oliveira maintained the right to refuse loads offered by Prime and to provide services to other motor carriers during the term of the agreement, App. at 93 (¶ 2), 104 (¶ 2). *Carney v. JNJ Express, Inc.*, 10 F.Supp.3d at 853-54 (finding similar provisions created independent contractor relationship); *see also Davis v. Larson Moving & Storage Co.*, No. 08-1408, 2008 WL 4755835, * 5-6 (D. Minn. Oct. 27, 2008) ("Under these circumstances [as set

forth in the parties' agreement], the Court concludes that Plaintiff has not established that he was functionally an employee of Defendant.").

Because the parties' stated intention was to create an independent contractor relationship, this matter should be arbitrated.

3. *Discovery is only permitted in a Section 1 exemption case if the making of the arbitration agreement is in issue*

The only time discovery and trial are appropriate to decide a motion to compel arbitration is where a dispute exists as to the *making* of the underlying agreement. "[T]he 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.'" *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967)). In *Simula*, the court affirmed the lower court's order denying pre-arbitration discovery because there was no issue regarding the making of the agreement, and stated that even if there was such an issue, it was for the arbitrator to decide. *Simula, Inc.*, 175 F.3d at 726.

The FAA's legislative history establishes that the word "making" refers to the physical execution of a "paper." 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). Thus, courts will order limited discovery regarding only the making of the agreement if, for instance, forgery is alleged. *See, e.g.*,

Deputy v. Lehman Bros. Inc., 345 F.3d 494, 502 (7th Cir. 2003) (in an action alleging securities fraud by one of defendant's brokers, the plaintiff claimed she had not signed the client agreement including the arbitration provision. The Seventh Circuit permitted "the opportunity to conduct limited discovery on the narrow issue concerning the validity of Deputy's signature"); *see also Bensadoun v. Jobe-Rait*, 316 F.3d 171, 175 (2d Cir. 2003) ("if there is an issue of fact as to the making of the agreement for arbitration, then a trial is necessary"); *Ernest v. Lockheed Martin Corp.*, No. 07-CV-02038, 2008 WL 2958964, * 1 (D. Colo. July 29, 2008) ("request for limited discovery on the issue of whether the arbitration agreement was executed by the Plaintiff was appropriate"); *Chastain v. Robinson-Humphrey Co., Inc.*, 957 F.2d 851, 855-56 (11th Cir. 1992) (trial on issue of whether an arbitration agreement was formed).

Here, there is no dispute as to the *making* of the Contractor Agreements, that is, that the Agreements exist and the signatures on them are valid. Moreover, the district court appropriately rejected Plaintiff's defenses as to contract formation, i.e. substantive and procedural unconscionability. Addendum at 14. Because there is no challenge to the existence and formation of the Contractor Agreements, this matter should have been referred to arbitration.

4. *Looking beyond the Contractor Agreements to determine the exemption question would lead to inconsistent outcomes*

(a) **Whether the Contractor Agreements are subject to the FAA should not hinge on the timing of the parties' dispute**

Evaluating the Contractor Agreements is the only rational and workable approach to determining FAA preemption, as to hold otherwise would lead to absurd results depending upon *when* in the relationship a dispute arises. For example, in the FAA section 1 exemption context, if an agreement is *not* a contract of employment at the time it was signed, arbitration would be permissible should a claim arise immediately. If, however, a claim is made one year later, under the exact same contract, the court below would propose that a different outcome is possible based upon an analysis of how the parties' *relationship* may have developed and changed during that one-year period.

This approach acutely contradicts the U.S. Supreme Court's repeated mandate that arbitration agreements must be enforced according to their terms. *See AT&T Mobility LLC*, 131 S. Ct. at 1748. It also runs afoul of § 1 of the FAA. Both provide that the district court must determine whether the Contractor Agreements are contracts of employment exempt under § 1. If the terms of those Agreements have not changed, the contractual right to compel arbitration must remain the same. Whether an employer-employee relationship later develops in practice, *after* the agreement was signed and over time, is not the issue to be decided by the lower

court. Whether an employer-employee relationship later arose is a separate question that can be determined after the salient threshold question is answered, either by the court if the Agreements are held to be exempt, or by the arbitrator if they are not.

(b) The analysis should not be influenced by variables that have no bearing on the parties' intent at the time of contracting

The inconsistencies in results would be further compounded by a host of other variables should the court consider factors beyond the terms of the written Contractor Agreements. Allowing discovery on the merits and considering dispositive motions on the parties' relationship as it developed over time will lead to different outcomes for different drivers even where the same contractual language appears in their respective Agreements. For example, the fact that one driver's relationship with Prime was longer than another driver's might be relied on by the court to find an employment relationship in the former case and a contractor relationship in the latter. Giving weight to the eventual length of the parties' contractual arrangement would be to violate the judicial rules of contract interpretation, which require that the parties' intent *at the time of formation* be given effect. *See, e.g., Sony Computer Entm't Am., Inc.*, 532 F.3d 1007, 1012 (9th Cir. 2008).

To allow merits discovery and a trial on the parties' overall relationship would open the door to inconsistent and even absurd results, as a wealth of factors

and variables irrelevant to the terms of the contract would have influence on the ultimate outcome. The court's role is one of contract interpretation – different results should not be produced where there are identical terms in identical contracts. *See Samson v. NAMA Holdings*, 637 F.3d 915, 929-931 (9th Cir. 2011) (interpreting identical terms consistently in settlement and operating agreements signed by plaintiffs in ruling on motion to compel arbitration).

(c) The present dispute between Oliveira and Prime is plainly encompassed by the Agreements

The dispute between the Parties is within the terms of the Agreements containing the arbitration provision. As the Supreme Court stated in *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002), "absent some ambiguity in the agreement . . . it is the language of the contract that defines the scope of disputes subject to arbitration." *See also See Dialysis Access Center, LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 376 (1st Cir. 2011).

As set forth in Oliveira's Amended Complaint, the present dispute between the Parties falls squarely within the Agreements' arbitration provision. The provision, mandating arbitration of "[a]ny disputes 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, and any disputes as to the rights and obligations of the parties, . . ." is broad, and gives rise to a strong presumption of arbitrability of claims. *Waffle House*, 534 U.S. at

289. (holding that arbitration provision requiring arbitration of "any dispute" is broad and must be interpreted to favor arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute") (citing *United States Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 585 (1960)).

In the present case, Oliveira's claims that Prime failed to properly compensate him pursuant to the FLSA depends on his status as a contractor with Prime created by the Agreements and fall within the plain language of the Agreements.

To the extent that some of Oliveira's claims arose prior to his signing the Agreements containing the arbitration provision, the First Circuit has held that these claims are also covered by the arbitration agreement. In *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006), the First Circuit found that an agreement to arbitrate "any claim or dispute relating to or arising out of this agreement or the services provided" could be applied retroactively because the phrase "or services provided" covers claims or disputes that do not arise out of this agreement and "hence are not limited by the time frame of the agreements."

Other Circuits have held similarly. *See e.g.*, *Zink v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 13 F.3d 330, 332 (10th Cir. 1993) (The court held that "the arbitration agreement is clearly broad enough to cover the dispute at issue despite

the fact that the dealings giving rise to the dispute occurred prior to the execution of the agreement." The court also found that the plaintiff's "contention that an agreement to arbitrate a dispute must pre-date the actions giving rise to the dispute is misplaced" and that plaintiff's suggestion "runs contrary to contract principles which govern arbitration agreements."); *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023, 1028 (11th Cir. 1982) (holding that "[a]n arbitration clause covering disputes arising out of the contract or business between the parties evinces a clear intent to cover more than just those matters set forth in the contract").

Here, Oliveira agreed to arbitrate "[a]ny disputes 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, and *any disputes as to the rights and obligations of the parties*" – an arbitration provision clearly broad enough to encompass all of Plaintiff's claims arising both before and after Plaintiff signed the Agreements. App. at 102 (¶ 30), 112 (¶ 30) (emphasis added). Thus, Oliveira should be compelled to arbitrate all of his claims against Prime.

C. The District Court Erred in Finding That the Applicability of the FAA Exemption Was an Issue for the Court to Determine

If this Court determines that additional discovery is warranted on the issue of whether the FAA exemption applies, the Court should still reverse because the

parties specifically agreed that any issues of arbitrability would be decided in arbitration.

If the parties' agreement to arbitrate so provides, the issue of arbitrability is for an arbitrator to decide. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010) ("We have recognized 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."); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir.1989) ("Parties may, however, agree to allow the arbitrator to decide both whether a particular dispute is arbitrable as well as the merits of the dispute."). An agreement that grants the arbitrator the authority to decide threshold questions of arbitrability is generally referred to as a "delegation provision." *Id. at* 68.

The arbitration provision in the Contractor Agreements provides that "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." App. at 102 (¶ 30), 112-13 (¶ 30). In addition, the arbitration provision incorporates the Commercial Rules of the American Arbitration Association which provide that that "[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 or to the arbitrability of any claim or counterclaim."

American Arbitration Association Commercial Arbitration Rules and Mediation Procedures, R-7(a); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 674 (5th Cir. 2012) ("We agree with most our sister circuits that the express adoption of these rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.").

In *Green v. SuperShuttle International, Inc.*, 653 F.3d 766 (8th Cir. 2011), current and former airport shuttle bus drivers brought suit against SuperShuttle "alleging violations of the Minnesota Fair Labor Standards Act (MFLSA) arising from SuperShuttle's alleged misclassification of its drivers as franchisees rather than employees." *Id*. at 767. The bus drivers had all signed the same franchise agreement that contained both an arbitration clause and a delegation provision. *Id*. at 768. When SuperShuttle moved to compel arbitration, Green argued that "the district court lacked jurisdiction to compel arbitration because the FAA exempts transportation workers." *Id*. at 768-69.

The Eight Circuit recognized that the application of the transportation worker exemption "is a threshold question of arbitrability in the dispute between Green and SuperShuttle." *Id*. at 769. The court emphasized that the franchise agreements "specifically incorporated the Rules of the American Arbitration Association (AAA)," which "provide that an arbitrator has the power to determine his or her own jurisdiction over a controversy between the parties." *Id*. at 769. The

court concluded that by incorporating the AAA Rules, "the parties agreed to allow the arbitrator to determine threshold questions of arbitrability," and "thus the district court did not err in granting the motion to compel arbitration." *Id*.

In rejecting Prime's request to have the issue of arbitrability decided in arbitration, the district court relied on *In re Van Dusen*, 654 F.3d 838 (9th Cir. 2011). *Van Dusen*, which is directly at odds with *Green*, was wrongly decided, and should not be followed here. The court in *Van Dusen* was clearly conflicted on this issue, characterizing its decision on the issue as "relatively close." *Id*. at. 846; *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25 (noting "liberal federal policy favoring arbitration agreements" and that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"). Among other things, the court recognized that its decision could entangle the question of arbitrability with the merits of the underlying claim. *Id*. at 845-46. This is precisely why *Van Dusen* should not be followed here. As discuss further below, the issue as framed by the district court as to the applicability of the FAA exemption is unavoidably enmeshed with the merits of Oliveira's claim that he was mischaracterized as an independent contractor. As such, the district court's ruling is contrary to Supreme Court precedent 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." *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 649- 50 (1986).

The district court here erred in deviating from *Green* and other precedent. In the event that this Court determines that additional discovery is warranted as to the applicability of the FAA exemption, the Court should still reverse the district court's ruling by enforcing the parties' agreement that issues of arbitrability would be decided in arbitration.

D. Allowing Merits Discovery to Decide the Threshold Exemption Question Renders Arbitration Moot

1. *Arbitration is strongly favored*

Congress passed the FAA to overcome a history of judicial hostility to arbitration agreements. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991). Its aim was to "place such agreements upon the same footing as other contracts." *Allied–Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) (internal quotation marks omitted). As enacted, the FAA promotes a liberal federal policy favoring arbitration and guarantees that "[a] written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation

of any contract." 9 U.S.C. § 2; *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546, 551-52 (1st Cir. 2005).

The FAA strongly favors arbitration. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). "The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability." *Moses H. Cone Memorial Hospital, supra,* 460 U.S. at 24-25; *OOIDA v. Swift,* 288 F. Supp. 2d at 1036 ("courts construing arbitration agreements must broadly construe them and must resolve any ambiguities in an arbitration clause and any doubts concerning the scope of arbitrable issues in favor of arbitration.").

Accordingly, the lower court's analysis of the section 1 exemption issue must be conducted in accordance with the strong policy favoring arbitration, and any close call must be resolved in favor of arbitration. *See Simula,* 175 F.3d at 719 ("[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.") (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25).

2. *Courts are prohibited from determining the merits when considering a motion to compel arbitration*

"It is well-established 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.'" *AT & T Techs., Inc. v. Communications Workers*

of America, 475 U.S. 643, 649- 50 (1986). The court's role is strictly limited to determining arbitrability and enforcing agreements to arbitrate, leaving the merits of the claim and any defenses to the arbitrator. *See id*. ("a court is not to rule on the potential merits of the underlying claims"). The district court is thus constrained by this precept when determining the threshold issue of section 1 preemption. It does not have free rein to make merits-based findings as part of its decision on preemption.

3. *A determination of whether Oliveira was an employee or contractor will determine critical issues as to the merits of the case*

Yet the district court's order ignores this binding precedent and evinces the court's intent to become enmeshed in the merits. The court's order requires the parties to conduct and complete discovery and to file dispositive motions to determine whether their relationship was that of employer-employee or contracting parties. But this is the central element of the underlying claims.

To succeed on his claims under the Fair Labor Standards Act, Missouri law, and Maine law, Oliveira is required to prove that he was a Prime employee. Thus, by allowing discovery and making a ruling on the question of *whether an employment relationship was created after the Contractor Agreements were signed*, the lower court will have adjudicated well beyond the threshold question and into the merits, ruling on a key issue at the heart of Oliveira's claims. This result would violate the mandate of the Supreme Court that when deciding initial

questions of arbitrability, the court must not decide the potential merits of the underlying claims. *AT & T Techs.*, 475 U.S. at 649-650. The district court will not run afoul of this precedent if this Court confines the analysis to the proper scope set forth by the FAA: whether the Contractor Agreements – not the parties' entire relationship as evolved over time – are contracts of employment and exempt from the FAA. Because the parties entered into the Contractor Agreements, and that the Contractor Agreements clearly create an independent contractor relationship, the district court erred in not compelling arbitration.

4. *To allow the district court to follow through with its discovery plan would render arbitration moot*

This is *not* a "no harm, no foul" situation. The scope of the discovery and trial as ordered by the district court is significant and has farther reaching effects within the transportation industry. If the court orders the parties to litigate whether an employer-employee relationship developed after the Contractor Agreements were signed, it will simultaneously determine critical portions of the merits of the case. If the court determines that there was no employment relationship and the FAA exemption does not apply, the case will be subject to arbitration under the terms of the Contractor Agreements.

By that point, however, the arbitrator's role and authority to control the proceedings will have been severely gutted by the court's previous rulings. For example, the court will have already determined the proper parties and will have

determined what the final, operative claims in the complaint are to be. The court will have already made rulings on discovery, covering the nature and extent, permissible areas, whether responses were sufficient, etc. – all of which impacts the arbitration. The court will have already set and enforced discovery parameters which potentially conflict with the procedures the arbitrator would have imposed under the FAA and/or AAA. And of course the parties will already have spent a great deal of time and money litigating these expansive issues before even getting to arbitration, frustrating the purpose of using arbitration to streamline the proceedings. *See, e.g.*, *AT&T Mobility* LLC, 131 S. Ct. at 1749 ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. . . And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution") (citing *14 Penn Plaza LLC v. Pyett*, 556 U. S. 247 (2009); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

These judicial rulings and exercises of control, however, would completely usurp the authority of the arbitrator should the district court conclude at the end of this process that an employment relationship did not exist. In that instance, Prime's motion to compel arbitration would be granted, and the arbitrator would take control over the case. However, the parties, pleadings, and discovery issues would

already have been determined by the court in the threshold question stage. As a result, moving the case to arbitration would be essentially a moot exercise, as the arbitrator would have no authority over key issues such as parties, pleadings, discovery, and more.

Indeed, forcing the parties to litigate the merits of the case in court to answer the threshold exemption question, as the district court proposes, would foreclose the possibility of ever arbitrating a misclassification case in the transportation industry. In every instance where a transportation company sought to enforce its arbitration agreement with a current or former driver, the company would never effectively be allowed to enjoy the benefit of its arbitration bargain, since the exemption issue would always be decided in a process by which the lower court ordered and supervised virtually every discovery and pre-trial aspect. By controlling all discovery rulings and by deciding the ultimate issue of employment versus independent contractor status, presumably as part of deciding the threshold exemption issue, the court would usurp the role of the arbitrator every time. This result would ignore the parties' contractual agreement to arbitrate their claims and is contrary to the federal presumption in favor of arbitration, the language of the FAA and Supreme Court precedent. To the contrary, courts have routinely compelled arbitration of misclassification cases. *See Green v. SuperShuttle Intl., Inc.*, 653 F.3d 766, 769 (8th Cir. 2011) (holding arbitrator must decide whether

FAA section 1 exemption applied); *Reid v. SuperShuttle Intl, Inc.*, No. 08-CV-4854, 2010 WL 1049613, *5-6 (E.D.N.Y. Mar. 22, 2010) (compelling arbitration because arbitration agreement governed all aspects of relationship, including claim that drivers were employees rather than independent contractors); *OOIDA v. Swift*, 288 F.Supp.2d 1033 (D. Ariz. 2003) (compelling arbitration and finding that agreement to arbitrate reached all of plaintiffs' claims).

Thus, by allowing substantial discovery and requiring detailed dispositive motion briefs on the issue of whether an employer-employee relationship existed at any time after the Contractor Agreements were signed, the parties' arbitration agreement will not be enforced, even if the court ultimately finds the § 1 exemption does not apply. If instead the district court analyzes the four corners of the Contractor Agreements, it would decide the § 1 exemption issue without also deciding the merits of the case. This would accord with the law's repeated admonishments that district courts refrain from addressing the merits of an underlying dispute and with controlling precedent that contracts are to be interpreted to give effect to the parties' intent at the time they are formed. *See AT&T Techs., Inc.*, 475 U.S. at 649- 50.

VI. CONCLUSION

The district court's order denying Prime's Motion to Compel should be reversed. The district court seeks to litigate and decide whether the Contractor

Agreements are exempt under § 1 of the FAA, when arbitrability should be decided by the arbitrator. The district court order setting full merits discovery and dispositive motion deadlines moots any later arbitration. If the court finds Oliveira's contracts are not exempt under the FAA, the lower court already will have decided the issue of whether the relationship that developed over time between the drivers and Prime was an employment relationship or not. That is the ultimate issue in the case, but an issue unnecessary to the threshold exemption question. The arbitrator will have little to nothing left to decide, and the parties' agreement to arbitrate will be eviscerated. And, because the parties entered into the Contractor Agreements, and the Contractor Agreements clearly create an independent contractor relationship, the district court erred in not compelling arbitration based on the record before it.

Prime therefore requests that this Court reverse the district court order denying Prime's Motion and remand the case instructing that Oliveira be compelled to pursue his claims in arbitration.

Dated: March 9, 2016

Respectfully submitted,

By: /s/ Robert J. Hingula _____

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Appellant's Opening Brief is proportionately spaced, has a typeface of 14 points, and contains 6,730 words, according to the counter of the word processing program with which it was prepared.

Dated: March 9, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on March 9, 2016. I further certify that although all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system, upon acceptance by the Clerk, two (2) copies of Appellant's Opening Brief will be served on all counsel of record, via U.S. Mail.

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U.S. COURT OF APPEALS CASE NO. 15-2364

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DOMINIC OLIVEIRA
Plaintiff and Appellee

V.

NEW PRIME, INC.
Defendant and Appellant

APPELLANT'S ADDENDUM

On Appeal from United States District Court
for the District of Massachusetts
District Court Case No. 1:15-cv-10603-PBS
Honorable Patti B. Saris, District Judge

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TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DOMINIC OLIVEIRA, Plaintiff	
v.	Civil Action No. 15-10603-PBS
NEW PRIME, INC., Defendant.	

MEMORANDUM AND ORDER

October 26, 2015

Saris, C.J.

INTRODUCTION

This case involves a labor dispute between a trucking corporation and a former truck driver. In March 2015, the plaintiff Dominic Oliveira brought this proposed class action alleging that the defendant New Prime, Inc. violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq., and Missouri and Maine labor laws, by failing to pay its truck drivers minimum wage (Docket Nos. 1, 33). New Prime moved to compel arbitration under § 4 of the Federal Arbitration Act (FAA), 9 U.S.C. § 4, and two operating agreements signed by Oliveira on behalf of Hallmark Trucking LLC, both of which contain an arbitration clause (Docket No. 35). Oliveira argues that the Court must determine whether the operating agreements

are exempt from arbitration under § 1 of the FAA before it can consider New Prime's motion to compel arbitration (Docket No. 40). New Prime maintains that the exemption's application is a threshold question of arbitrability that the parties delegated to the arbitrator in the operating agreements (Docket No. 51). After hearing, I agree that it is for the Court, and not the arbitrator, to decide whether the § 1 exemption applies before considering the motion. The motion to compel arbitration is therefore **DENIED** without prejudice.[1]

FACTUAL BACKGROUND

The following facts are taken from the First Amended Complaint (Docket No. 33) and the operating agreements referenced by all parties (Docket No. 36, Ex. A, Ex. B). In March 2013, Plaintiff Dominic Oliveira entered Defendant New Prime's "Paid Apprenticeship" training program, which is advertised as an on-the-job training program for new truck drivers. Docket No. 33, Ex. 2, Ex. 3. Apprentices first obtain a Missouri Commercial Driver's License (CDL) permit. They next

[1] Alternatively, New Prime argues that the Court should dismiss the case for improper venue because the arbitration clause states that arbitration is to take place in Missouri. If the case remains in this Court and moves forward, New Prime moves to dismiss Oliveira's breach of contract/unjust enrichment claim (Count 3), arguing that it is preempted by the FLSA and the Federal Aviation Administration Authorization Act. The Court will not address these issues until the threshold issue of exemption is resolved.

shadow New Prime drivers for three to four weeks and drive 10,000 miles under supervision. During this time, apprentices receive an advance of $200 per week, which is subtracted from their future earnings, but otherwise receive no remuneration. As a result, apprentices are essentially free labor while they train with New Prime. Under Department of Transportation regulations, trucks can be on the road for longer periods of time when a New Prime driver switches off with an apprentice.

After completion of this on-the-road instruction, apprentices take a CDL exam and then work as a "B2" company driver trainee for 30,000 miles. During this period, the trainees earn fourteen cents per mile driven, but are not paid for time spent loading and unloading cargo or protecting company property. The company also regularly deducts money from paychecks, including the $200 weekly advance from the apprenticeship program. As a result of these deductions, Oliveira received approximately $440-$480 per week for driving 5,000-6,000 miles, which equates to about $4/hour while driving.

Finally, after completing the 30,000 miles as a B2 company driver trainee, the truck drivers complete additional orientation classes, which last for about a week. They are then classified as either company drivers or independent contractors. The truck drivers are not paid for the time spent in the

orientation classes, and receive a $100 bonus if they opt to become independent contractors.

In May 2013, when Oliveira returned from his trainee driving, New Prime told Oliveira that he could make more money if he became an independent contractor. New Prime directed him to a company called Abacus Accounting, which was located on the second floor of New Prime's building. Abacus Accounting told Oliveira to provide suggested names for a limited liability company (LLC), and then created Hallmark Trucking LLC on his behalf. New Prime also directed Oliveira to Success Leasing, a closely related corporation to New Prime, to select a truck.

At Success Leasing, Oliveira was given several documents to sign. One of these documents was titled "INDEPENDENT CONTRACTOR OPERATING AGREEMENT," which repeatedly states that the intent of the agreement is to establish an independent contractor relationship between New Prime and Hallmark Trucking LLC. Docket No. 36, Ex. A, at 1, 9. The agreement also contains the following arbitration clause:

> GOVERNING LAW AND ARBITRATION. THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF MISSOURI. ANY DISPUTES 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, 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 MISSOURI'S ARBITRATION ACT AND/OR THE FEDERAL ARBITRATION ACT . . . THE PARTIES SPECIFICALLY AGREE

> THAT NO DISPUTE MAY BE JOINED WITH THE DISPUTE OF ANOTHER AND AGREE THAT CLASS ACTIONS UNDER THIS ARBITRATION PROVISION ARE PROHIBITED . . . THE PLACE OF THE ARBITRATION HEREIN SHALL BE SPRINGFIELD, MISSOURI.

Id. at 10. Oliveira "felt pressure" to sign quickly because New Prime had a load waiting for him outside. Docket No. 33, ¶ 45. Success Leasing then instructed Oliveira to go to the New Prime company store to purchase security locks, fuel, insurance, and other tools of the trade. These items totaled roughly $5,000, which New Prime then deducted from his paycheck at a rate of $75 per week.

Although New Prime labeled Oliveira an independent contractor in the operating agreement, his role as a truck driver for New Prime did not change from his time as an apprentice and trainee driver. New Prime continued to directly and indirectly control Oliveira's scheduling, vacations, and time at home by requiring him to take specific training courses and follow certain procedures. These courses and procedures limited which shipments he could take and made it difficult, if not impossible, for him to work for other trucking or shipping companies. In particular, New Prime dispatched drivers through a "QUALCOMM system" that was not adaptable to other carriers. Docket No. 33, ¶ 51.[2]

[2] The parties have not explained what the "QUALCOMM system" is or how it works.

Meanwhile, New Prime continued to make regular deductions from Oliveira's paycheck, ostensibly because of lease payments on the truck and payments for the other tools that New Prime instructed him to buy. On several occasions, his weekly pay was negative after spending dozens of hours on the road. In March 2014, Oliveira signed a second contract titled "INDEPENDENT CONTRACTOR OPERATING AGREEMENT" on behalf of Hallmark Trucking LLC, which contains an identical arbitration clause to that in the first agreement. Docket No. 36, Ex. B, at 1, 9-10. The second contract also repeatedly states that the agreement establishes an independent contractor relationship between New Prime and Hallmark Trucking LLC.

Oliveira terminated his contract with New Prime in September 2014. The next month, however, New Prime rehired him as a company driver on the condition that New Prime would continue deducting money from his paychecks to repay an alleged debt to Success Leasing. With these deductions, Oliveira again was paid below the minimum wage. He now brings this class action, arguing that he and other New Prime drivers were not paid the minimum wage under federal and state law.

DISCUSSION

I. Statutory Framework

Congress enacted the FAA in 1925 in "response to hostility of American courts to the enforcement of arbitration agreements,

a judicial disposition inherited from then-longstanding English practice." Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111 (2001). To give effect to this purpose, § 2 of the FAA provides that written 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." 9 U.S.C. § 2; see also Circuit City, 532 U.S. at 111. In short, § 2 "is a congressional declaration of a liberal federal policy favoring arbitration agreements." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); see also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991). "At a minimum, this policy requires that ambiguities as to the scope of the arbitration clause itself must be resolved in favor of arbitration." PowerShare, Inc. v. Syntel, Inc., 597 F.3d 10, 15 (1st Cir. 2010) (internal quotation marks and alterations omitted).

The Act provides two mechanisms through which federal courts may enforce § 2's liberal policy favoring arbitration. See Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 68 (2010). Section 3 instructs district courts to stay the trial of an action "upon any issue referable to arbitration under an agreement in writing for such arbitration" once the court is "satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement." 9 U.S.C. § 3.

Section 4 allows any party "aggrieved" by the failure of another party "to arbitrate under a written agreement for arbitration" to petition a district court for "an order directing that such arbitration proceed in the manner provided for in such agreement." Id. § 4. The district court "shall" order arbitration upon being satisfied that "the making of the agreement for arbitration or the failure to comply therewith is not in issue." Id.

Despite the FAA's broad purpose and strong language, the Act does not extend to all arbitration agreements. Section 2 limits its application to contracts "evidencing a transaction involving commerce," or arising from a "maritime transaction." 9 U.S.C. § 2. More importantly for purposes of the present dispute, § 1, titled "exceptions to operation of title," states "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." Id. § 1. Section 1 thus exempts "contracts of employment of transportation workers" from the FAA entirely. Circuit City, 532 U.S. at 119. Employment contracts involving truck drivers fall within the transportation worker exception. See, e.g., Lenz v. Yellow Transp., Inc., 431 F.3d 348, 351 (8th Cir. 2005) (holding that a truck driver, but not a customer service representative, is a transportation worker under § 1); Harden v. Roadway Package Sys., Inc., 249

F.3d 1137, 1140 (9th Cir. 2001) (holding that a truck driver was exempt from the FAA under § 1); Am. Postal Workers Union v. United States Postal Serv., 823 F.2d 466, 473 (11th Cir. 1987) (noting that courts have limited the § 1 exemption to "workers actually engaged in interstate commerce, including bus drivers and truck drivers" (internal quotation marks omitted)).

The FAA does not define the term "contract of employment." See 9 U.S.C. § 1. Although neither the Supreme Court nor the First Circuit has directly addressed the issue, courts generally agree that the § 1 exemption does not extend to independent contractors. See, e.g., Carney v. JNJ Express, Inc., 10 F. Supp. 3d 848, 852-53 (W.D. Tenn. 2014) ("If the [plaintiffs] are independent contractors, their claims are arbitrable under the FAA."); Villalpando v. Transguard Ins. Co. of Am., 17 F. Supp. 3d 969, 982 (N.D. Cal. 2014) (same); Port Drivers Fed'n 18, Inc. v. All Saints, 757 F. Supp. 2d 463, 472 (D.N.J. 2011) (same); Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co., 288 F. Supp. 2d 1033, 1035-36 (D. Ariz. 2003) (same). This construction comports well with "the FAA's purpose of overcoming judicial hostility to arbitration," and the Supreme Court's instruction "that the § 1 exclusion provision be afforded a narrow construction" in light of that purpose. Circuit City, 532 U.S. at 118 (holding that § 1 only exempts employment contracts of

transportation workers from the FAA's reach, not all employment contracts).[3]

II. Analysis

Oliveira's relationship with New Prime can be divided into three periods of time: (1) March 2013 to May 2013, when Oliveira worked for New Prime through the apprenticeship program and as a B2 company driver trainee; (2) May 2013 to September 2014, when Oliveira worked for New Prime under the two operating agreements; and (3) post-October 2014, when New Prime rehired Oliveira as a company driver.[4] Under the statutory framework discussed above, the FAA's application to the present case hinges on whether Oliveira had a contract of employment or an independent contractor relationship with New Prime—and thus falls within or outside the § 1 transportation worker exemption—during each of these three time periods. New Prime appears to concede that Oliveira was an employee in the first and third time periods, and instead argues that the arbitration clause in the operating agreements should extend retroactively and prospectively to cover these intervals.

More specifically, New Prime maintains that Oliveira's claims from his time as an "employee driver" before signing the

[3] The parties do not dispute that Oliveira was a transportation worker under § 1.

[4] The parties do not specify when Oliveira's relationship with New Prime ended permanently.

operating agreements, and after he was rehired as a company driver, fall within the scope of the arbitration clause for two reasons. Docket No. 51, at 7. First, Oliveira's "allegations related to his time as an employee are inextricably related to his decision to become an independent contractor and enter into the Agreements." Id. Next, New Prime contends that the arbitration clause "is very broad and clearly applies to 'any disputes as to the rights and obligations of the parties.'" Id. (quoting Docket No. 36, Ex. A, at 10, Ex. B, at 9-10). New Prime cites to Kristian v. Comcast Corp., 446 F.3d 25, 33-35 (1st Cir. 2006) for the proposition that an arbitration agreement can be applied retroactively if broadly phrased to include claims or disputes that arose prior to signing the agreement.[5]

At this stage in the proceeding, these arguments fail, because they do not address the applicability of the § 1 transportation worker exemption. If Oliveira was an employee in the first and third time periods, then the § 1 exemption applies and the Court cannot order the parties to arbitrate any claims that arose before Oliveira signed the operating agreements or after New Prime rehired Oliveira as a company driver in October 2014. That said, the parties dispute whether Oliveira was an

[5] New Prime does not cite, and the Court is not aware of, any cases in which a court applied an arbitration agreement to claims arising after termination of the contract containing the arbitration clause.

employee or independent contractor during at least the second time period, and whether it is for the Court or the arbitrator to decide the threshold question of the FAA's applicability.

A. Gateway Questions of Arbitrability

The Supreme Court has repeatedly emphasized 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." Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942-43 (1995); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). Parties can agree to allow arbitrators decide "gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." Rent-A-Center, 561 U.S. at 68-69 (internal quotation marks and alterations omitted). "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." Id. at 69. An agreement granting the arbitrator authority to decide threshold questions of arbitrability is generally referred to as a "delegation provision." See id. at 68.

Questions of arbitrability, however, are an exception to the federal policy favoring arbitration agreements. Howsam, 537 U.S. at 83; Kristian, 446 F.3d at 37-38. "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." First Options, 514 U.S. at 944 (internal quotation marks and alterations omitted); see also Howsam, 537 U.S. at 83 ("The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, *the question of arbitrability*, is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." (internal quotation marks and alterations omitted)). In short, courts must enforce valid delegation provisions under the FAA, but courts scrutinize delegation clauses more closely to ensure the parties manifested a clear intent to delegate questions of arbitrability to the arbitrator.

Here, the parties do not contest that the two operating agreements Oliveira signed on behalf of Hallmark Trucking LLC contain valid delegation provisions. The contracts' arbitration clauses state in relevant part: "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 . . ." Docket No. 36, Ex. A, at 10, Ex. B, at 9-10 (emphasis added). Furthermore, as New Prime emphasizes, the

arbitration clauses also incorporate the Commercial Arbitration Rules of the American Arbitration Association (AAA). Id. Ex. A, at 10, Ex. B, at 9-10 ("ANY ARBITRATION BETWEEN THE PARTIES WILL BE GOVERNED BY THE COMMERCIAL ABRITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION."). The Rules provide that "[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 or to the arbitrability of any claim or counterclaim." Am. Arbitration Ass'n Commercial Arbitration R. & Mediation P. R-7(a). Thus, the parties have agreed to arbitrate gateway questions of arbitrability.

Oliveira argues that the arbitration clauses, including the delegation provisions, should not be enforced because the operating agreements are substantively and procedurally unconscionable. This argument fails, however, because Oliveira seeks to invalidate the contracts as a whole rather than the delegation provisions, or even the arbitration clauses, specifically. See Rent-A-Center, 561 U.S. at 72 ("Accordingly, unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator."); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) ("[A]

challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.").

B. Applicability of the Transportation Worker Exemption

The delegation provisions and the AAA Rules do not resolve this matter, because they cannot, and do not, address whether the applicability of the § 1 transportation worker exemption is a question of arbitrability that parties can legally delegate to an arbitral forum in the first place. New Prime argues that the exemption's application is merely a gateway question of arbitrability that the parties delegated to the arbitrator. Oliveira maintains that "questions regarding statutory exemptions to arbitration agreements" under the FAA, including the § 1 exemption, are not questions of arbitrability at all, but a threshold matter that courts must resolve before considering a motion to compel. Docket No. 40, at 3.

Neither the First Circuit nor Supreme Court has answered the central question in this case: does a district court have to determine the applicability of the FAA § 1 exemption itself, or is the exemption issue just another gateway question of arbitrability that contracting parties may validly delegate to an arbitrator? The Ninth Circuit has held that the "district court must make an antecedent determination that a contract is arbitrable under Section 1 of the FAA before ordering

arbitration pursuant to Section 4." In re Van Dusen, 654 F.3d 838, 843 (9th Cir. 2011). Meanwhile, the Eighth Circuit has adopted the opposite viewpoint: it characterizes the applicability of the § 1 exemption as a "threshold question of arbitrability" that parties "can agree to have arbitrators decide." Green v. SuperShuttle Int'l, Inc., 653 F.3d 766, 769 (8th Cir. 2011). This Court finds the Ninth Circuit's analysis more persuasive and adopts its approach for the reasons that follow.

In Green v. SuperShuttle International, Inc., current and former airport shuttle bus drivers brought suit against SuperShuttle "alleging violations of the Minnesota Fair Labor Standards Act (MFLSA) arising from SuperShuttle's alleged misclassification of its drivers as franchisees rather than employees." Id. at 767. The bus drivers had all signed the same franchise agreement that contained both an arbitration clause and a delegation provision. Id. at 768. When SuperShuttle moved to compel arbitration under the agreement and § 4 of the FAA, Green—on behalf of all the drivers—argued that "the district court lacked jurisdiction to compel arbitration because the FAA exempts transportation workers." Id. at 768-69.

The Eight Circuit held that the application of the § 1 transportation worker exemption "is a threshold question of arbitrability in the dispute between Green and SuperShuttle."

Id. at 769. The court emphasized that the franchise agreements "specifically incorporated the Rules of the American Arbitration Association (AAA)," which "provide that an arbitrator has the power to determine his or her own jurisdiction over a controversy between the parties." Id. at 769. The court concluded that by incorporating the AAA Rules, "the parties agreed to allow the arbitrator determine threshold questions of arbitrability," and "thus the district court did not err in granting the motion to compel arbitration." Id.

In contrast, when faced with an analogous scenario, the Ninth Circuit analyzed whether the district court must assess the applicability of the § 1 exemption before ordering arbitration in detail. In In re Van Dusen, two interstate truck drivers entered "independent contractor operating agreements" with Swift Transportation Company. 654 F.3d at 840. The agreements contained both an arbitration clause and a delegation provision. Id. at 840-42. Despite these provisions, the plaintiffs filed suit against Swift and Interstate Equipment Leasing, Company in federal district court alleging violations of the FLSA and of California and New York labor laws. Id.

The In re Van Dusen defendants moved to compel arbitration pursuant to the arbitration clauses in the operating agreements, and the plaintiffs retorted that the contracts were exempt from arbitration under § 1 of the FAA. Id. The district court

"declined to rule on the applicability of the exemption, holding that the question of whether an employer/employee relationship existed between the parties was a question for the arbitrator to decide in the first instance." Id. After the district court denied certification for an interlocutory appeal, the plaintiffs sought mandamus relief from the Ninth Circuit. Id.

The Ninth Circuit held[6] that the applicability of the § 1 transportation worker exemption is not a question of arbitrability that the parties may delegate to an arbitrator. Id. at 843-45. The court explained that because a "district court's authority to compel arbitration arises under Section 4 of the FAA," a district court "has no authority to compel arbitration under Section 4 where Section 1 exempts the underlying contract from the FAA's provisions." Id. at 843. "Section 4 has simply no applicability where Section 1 exempts a contract from the FAA, and private parties cannot, through the insertion of a delegation clause, confer authority upon a district court that Congress chose to withhold." Id. at 844. The court emphasized that "whatever the contracting parties may or may not have agreed upon is a distinct inquiry from whether the

[6] Actually, the Ninth Circuit denied mandamus because the district court's decision was not clearly erroneous under the stringent standard for a writ of mandamus. Id. at 845-46.

FAA confers authority on the district court to compel arbitration." Id.

As the Ninth Circuit highlighted, its holding is consistent with the Supreme Court's decision in Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956). See In re Van Dusen, 654 F.3d at 844 (citing Bernhardt, 350 U.S. at 201-02). In Bernhardt, the Supreme Court held that a district court lacked authority to stay litigation pending arbitration under § 3 of the FAA where the underlying contract containing the arbitration agreement did not evidence a "transaction involving commerce" within §§ 1 and 2 of the Act. Bernhardt, 350 U.S. at 201-02. The In re Van Dusen court concluded that this reasoning regarding the relationship between Sections 1, 2, and 3 of the Act "applies with equal force in interpreting the relationship between Sections 1, 2, and 4 of the FAA." In re Van Dusen, 654 F.3d at 844. Based on this analysis, this Court holds that the question of whether the § 1 exemption applies is for the Court, and not the arbitrator, to decide.

New Prime argues that the arbitrator must decide whether the § 1 exemption applies because otherwise the Court would address the merits of the underlying dispute. More specifically, New Prime maintains that "the issue of whether the Plaintiff was an independent contractor or an employee is plainly entangled in the merits of Plaintiff's underlying claims arising out of his

alleged misclassification." Docket No. 51, at 6. On a second appeal in the Van Dusen case,[7] the Ninth Circuit rejected a similar argument, stressing that its prior opinion "expressly held that a district court must determine whether an agreement for arbitration is exempt from arbitration under § 1 of the [FAA] as a threshold matter." Id. The Ninth Circuit directed the district court to "determine whether the Contractor Agreements between each appellant and Swift are exempt under § 1 of the FAA" before considering Swift's motion to compel on remand. Id. Thus, this Court must keep on trucking in the present case to determine whether the two operating agreements Oliveira signed on behalf of Hallmark Trucking LLC are contracts of employment within the § 1 exemption.

ORDER

The defendant's motion to compel arbitration and stay proceedings, and/or dismiss the case for improper venue, or, in the alternative, to dismiss Count III for failure to state a claim (Docket No. 35) is **DENIED** without prejudice. The parties

[7] After the Ninth Circuit denied the writ of mandamus, the plaintiffs moved "for reconsideration of the grant of Swift Transportation Co. Inc.'s motion to compel arbitration." Van Dusen v. Swift Transp. Co., Inc., 544 Fed. App'x 724, 724. The district court denied the motion for reconsideration, but certified a request for an interlocutory appeal. Van Dusen v. Swift Transp. Co., No. 2:10-CV-00899 JWS, 2011 WL 3924831, at *3 (D. Ariz. Sept. 7, 2011).

may conduct factual discovery on the threshold question of the plaintiff's status as an employee or independent contractor until January 8, 2016. Any motions for summary judgment shall be filed by January 22, 2016.

/s/ PATTI B. SARIS
Patti B. Saris
Chief United States District Judge