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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

<b>John Doe 1, <i>et al.</i>,</b>	)	
	)	
<b>Plaintiffs,</b>	)	<b>2:10-cv-00899 JWS</b>
	)	
<b>vs.</b>	)	<b>ORDER AND OPINION</b>
	)	
<b>Swift Transportation Co., Inc., <i>et al.</i>,</b>	)	<b>[Re: Motions at 879, 883, and 884]</b>
	)	
<b>Defendants.</b>	)	
	)	

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**I. MOTION PRESENTED**

At docket 879, Defendants Swift Transportation Co., Inc. (“Swift”), Interstate Equipment Leasing, Inc. (“IEL”), Chad Killebrew, and Jerry Moyes (collectively, Defendants) filed a motion for stay pending appellate review of the court’s January 6, 2017 order at docket 862. The five named plaintiffs in this suit (“Plaintiffs”) respond at docket 899. Defendants reply at docket 902. Oral argument was heard on February 15, 2017.

1 Plaintiffs filed a renewed motion to conditionally certify a Fair Labor Standards  
2 Act collective action at docket 883. They filed a motion for class certification as to their  
3 state law claims and leave to amend the complaint at docket 884.  
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5 **II. BACKGROUND**

6 The complete factual and procedural background of this case is set forth in the  
7 court's order at docket 862. Suffice it to say for purposes of the motion to stay, after a  
8 lengthy procedural history, the court ultimately ruled that Plaintiffs had contracts of  
9 employment, which effectively was a denial of Defendants' request to compel arbitration  
10 pursuant to Plaintiffs' contracts with Swift. Given the intractable issue plaguing this  
11 litigation about whether the court should only look at the contract terms or whether it  
12 should consider how the parties' relationships functioned in practice, the court's opinion  
13 made clear that under either approach, Plaintiffs operated under contracts of  
14 employment. Looking solely to the terms of the contracts between the Plaintiffs and  
15 Swift and the terms of the lease agreements between Plaintiffs and IEL, which the court  
16 concluded were necessarily part of Plaintiffs' overall agreements with Swift, the  
17 contracts were ones of employment. Evidence regarding how those terms operated in  
18 practice only strengthened the court's conclusion.  
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22 Defendants appealed the court's ruling and subsequently filed the motion to stay,  
23 requesting that the court stop all further litigation in this matter, including class  
24 certification issues, pending the Ninth Circuit's review of the court's decision.  
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### III. DISCUSSION

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2 In the Ninth Circuit, unlike the Third, Fourth, Seventh, Tenth, and Eleventh  
3 Circuits, an appeal from a district court's denial of a motion to compel arbitration does  
4 not trigger an automatic stay.<sup>1</sup> Rather, the court may, after applying the traditional test  
5 for granting stays pending appeal, use its discretion to stay the litigation or proceed with  
6 matters not involved in the appeal. The basis for the Ninth Circuit's position is that,  
7 generally, appellate review of a collateral order does not deprive the district court of  
8 jurisdiction to proceed with matters not involved in the appeal and arbitrability is an  
9 issue easily severable from the merits of the underlying dispute. Here, however, the  
10 arbitration exemption issue is not easily severable from the underlying merits.

11 Arbitrability is intertwined with Plaintiffs' underlying claim that Defendants violated  
12 employment laws by failing to pay them minimum wage. When the Ninth Circuit  
13 reviews this court's order at docket 862, it will necessarily review whether Plaintiffs had  
14 contracts of employment, which will require it to examine the terms of the contracts and  
15 decide whether the terms established an employment relationship. The appellate court  
16 could also potentially look at other evidence to see if, in practice, those terms were  
17 implemented in such a way as to create an employment relationship. Another basis for  
18 the appellate court's rule against automatic stays is that it prevents a defendant from  
19 "stall[ing] trial simply by bringing a frivolous motion to compel arbitration."<sup>2</sup> No such  
20 frivolous motion is presented here.  
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27 <sup>1</sup>*Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1411-12 (9th Cir. 1990).

28 <sup>2</sup>*Id.* at 1412.

1 The court will apply the traditional test for granting a stay pending appeal. The  
2 test involves a balancing of four factors: “(1) whether the stay applicant has made a  
3 strong showing that he is likely to succeed on the merits; (2) whether the applicant will  
4 be irreparably injured absent a stay; (3) whether issuance of the stay will substantially  
5 injure the other parties interested in the proceedings; and (4) where the public interest  
6 lies.”<sup>3</sup> The first two factors are of critical importance.<sup>4</sup> The Ninth Circuit applies a  
7 continuum approach to balancing these two factors so that a stay is warranted where  
8 an applicant “shows[s] either a probability of success on the merits and the possibility  
9 of irreparable injury, or that serious legal questions are raised and the balance of  
10 hardships tips sharply in [the applicant’s] favor.”<sup>5</sup>

### 13 **Success on the Merits**

14 Defendants assert that success on the merits is likely given the dissenting and  
15 concurring opinions in *In re Swift Transportation Co. Inc.*<sup>6</sup> In that case, while the panel  
16 ultimately denied mandamus relief from the court’s scheduling and planning order, the  
17 dissenting and concurring judges indicated that the court should look only to the terms  
18 of the contract when determining the § 1 exemption issue. This court’s subsequent  
19 opinion acknowledged the dissenting judge’s view in its order and attempted to apply  
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24 <sup>3</sup>*Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

25 <sup>4</sup>*Nken v. Holder*, 556 U.S. 418, 434 (2009).

26 <sup>5</sup>*Leiva-Perez*, 640 F.3d 962, 964, 966 (9th Cir. 2011) (quoting and affirming the  
27 balancing approach in *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)).

28 <sup>6</sup>830 F.3d 913 (9th Cir. 2016).

1 the “categorical” approach she believed was warranted.<sup>7</sup> The court looked to the terms  
2 of the agreements between Plaintiffs and Swift to determine how those terms reflect on  
3 factors that define employment – control, payment, opportunity for profit and loss,  
4 autonomy, duration of relationship, and type of work.<sup>8</sup> It ruled, however, that the terms  
5 of the agreements between Plaintiffs and Swift necessarily include the IEL lease terms  
6 as well. Based on the language in both the contracts and the leases, the court  
7 concluded that Plaintiffs had employment contracts with Swift.<sup>9</sup> The court went on to  
8 discuss evidence reflecting on how the terms actually operated, but its ruling was not  
9 dependent on such outside evidence. Therefore, the court disagrees with Defendants’  
10 argument that their success on appeal is likely because the court failed to apply the  
11 proper procedure in its § 1 determination. It did limit its analysis to the terms of the  
12 contracts and nonetheless found in favor of Plaintiffs’ position. To the extent  
13 Defendants believe that success is likely based on the merits of the court’s conclusion,  
14 rather than the process it used in reaching that conclusion, they failed to present  
15 anything to cause the court to reconsider its ruling and find that it is likely to be  
16 overturned.  
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21 As noted above, however, Defendants could still satisfy the first factor by looking  
22 toward the other end of the continuum—where an applicant need only show that  
23 “serious legal questions” are raised in the appeal if the balance of harm tips “sharply” in  
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26 <sup>7</sup>Doc. 862 at pp. 9-10.

27 <sup>8</sup>Doc. 862 at p. 10.

28 <sup>9</sup>Doc. 862 at p. 22.

1 its favor. Here, while the court believes its conclusion is correct, it recognizes that the  
2 appeal presents serious legal questions as to how a court should properly determine  
3 whether a contract of employment existed. Indeed, the Ninth Circuit stated that the  
4 issue was one of first impression.<sup>10</sup> The dissent in *In re Swift* suggested that the court  
5 undertake a “categorical approach that focuses solely on the words of the contract and  
6 the definition of the relevant category.”<sup>11</sup> In an attempt to properly apply this approach,  
7 the court ended up looking at how the terms reflect on typical indicators of employment  
8 and ended up concluding that the IEL lease terms should also be considered. While  
9 the court believes it applied the categorical approach correctly, given the lack of  
10 precedent on the issue, it nonetheless acknowledges that the appeal does raise serious  
11 legal questions as to the proper method for analyzing the contract terms.  
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#### 14 **Balance of hardships**

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16 Given that Defendants satisfied the first factor related to success based on the  
17 low end of the continuum—serious legal questions, rather than probability of  
18 success—Defendants consequently must show that the irreparable harm factor tilts  
19 sharply in its favor. The harm Defendants allege they will suffer is in the form of  
20 increased cost of litigation associated with defending a proposed class action and the  
21 loss of the benefits of arbitration.<sup>12</sup> Litigation costs generally do not qualify as  
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24 <sup>10</sup>*In re Swift*, 830 F.3d at 917.

25 <sup>11</sup>*Id.* at 920.

26 <sup>12</sup>Defendants quoted *Steiner v. Apple Comput., Inc.*, No. C 07-04486, 2008 WL  
27 1925197, at \*4-5 (N.D. Cal. Apr. 29, 2008) for the proposition that “almost every California  
28 district court to recently consider whether to stay a matter, pending appeal of an order denying  
a motion to compel arbitration, has issued a stay,” but a subsequent case, *Mohamed v. Uber  
Techs.*, 115 F. Supp. 3d 1024, 1028 n.4 (N.D. Cal. 2015), clarified that such a proposition no

1 irreparable harm. However, in potential class actions, courts have found lost time and  
2 money to constitute irreparable harm depending on the circumstances.<sup>13</sup> In *Steiner v.*  
3 *Apple Computer, Inc.*, the district court found that absent a stay the defendant would  
4 not just face “standard costs and burden associated with consumer litigation” but would  
5 also bear costs associated with defending against a class certification, a potential  
6 appeal from any certification ruling, and “expensive and burdensome notification and  
7 certification procedures.”<sup>14</sup> The court agrees with the *Steiner* court’s assessment; if the  
8 court proceeds with the litigation only to have the Ninth Circuit reverse its decision on  
9 arbitrability, Defendants will have incurred substantial class action defense costs  
10 unnecessarily, which constitutes irreparable harm.  
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13 Plaintiffs argue that any costs associated with class certification would be  
14 similarly incurred in arbitration, but the arbitration provisions in the agreements between  
15 Swift and Plaintiffs expressly prohibit class claims, and the court ruled in 2010 that the  
16 waivers were valid.<sup>15</sup> Plaintiff argues that such waivers have subsequently been  
17 deemed invalid by *Morris v. Ernst & Young, LLP*,<sup>16</sup> which held that the National Labor  
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21 longer stands and that the California district courts both grant and deny such stays. Therefore,  
22 Defendants’ assertion that it is basically routine to grant a stay after a denial of arbitration is not  
23 accurate.

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25 <sup>13</sup>See *Steiner*, 2008 WL 1925197, at \*4-5 (finding that the costs of potential class action  
26 constitute irreparable harm). See also *Rajagopalan v. Noteworld, LLC*, No. C11-5574, 2012  
27 WL 2115482, at \*3 (W.D. Wash., June 11, 2012) (noting that in putative class actions, the  
28 probable harm to defendants becomes much greater than in a typical motion to stay pending  
denial of arbitration).

<sup>14</sup>*Steiner*, 2008 WL 1925197, at \*4-5.

<sup>15</sup>Doc. 223 at pp. 12-13.

<sup>16</sup>834 F.3d 975 (9th Cir. 2016).

1 Relations Act (NLRA) precludes employees from waiving the right to arbitrate their  
2 disputes collectively. Application of the NLRA is not an issue in this case. The court in  
3 *Morris* explicitly found it unnecessary to address whether such a waiver violates the  
4 FLSA whose application is an issue in this case. Therefore, the court cannot conclude  
5 that the class arbitration waiver is unenforceable at this juncture.  
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7 The court also concludes that Defendants risk losing the efficiency associated  
8 with arbitration if the court were to continue with the litigation.  
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10 If this case is allowed to proceed on the merits (e.g., to summary judgment  
11 or class certification) without a ruling from the Ninth Circuit on the appeal  
12 herein, and the Ninth Circuit ultimately reverses this Court and compels  
13 [plaintiff's] claim to arbitration, this Court's substantive rulings may be for  
14 naught, and the parties will have expended significant resources to obtain  
15 what, in all likelihood, would constitute non-binding advisory opinions.  
16 Alternatively, were any ruling on the merits by the Court to have some  
17 binding effect on the arbitration, [defendant] would lose the benefit or  
18 arbitration.<sup>17</sup>

19 Such a loss is irreparable harm to Defendants.

20 The primary harm suffered by Plaintiffs is delay. The case was filed more than  
21 seven years ago. After the Ninth Circuit reversed this court's initial order compelling  
22 arbitration based on the fact that the court, not an arbitrator, should decide the § 1  
23 exemption issue, the court finally determined the arbitration issue this past January.  
24 The court concludes that a relatively short additional delay pending appeal is not of  
25 great consequence given the lengthy procedural history and specifically the delay  
26 resulting from the appellate court's questioning of this court's prior rulings on the issue  
27 of arbitrability. A stay while the court awaits the Ninth Circuit's final ruling on arbitrability  
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<sup>17</sup>*Mohamed v. Uber Techs.*, 115 F. Supp. 3d 1024, 1034 (N.D. Cal. 2015).



1 is prudent given the prior history here. Plaintiffs assert that more delay will only make  
2 discovery more difficult as memories dim and relevant witnesses disperse. However,  
3 Plaintiffs have already conducted significant discovery as to employment status in  
4 conjunction with the arbitrability issue under § 1 of the FAA and have already filed their  
5 motions for class certification with supporting materials. Furthermore, the proposed  
6 class is defined as those lease operators with agreements dating back to 2006.<sup>18</sup>  
7 Consequently, discovery necessarily will involve potentially stale or hard to locate  
8 material and witnesses regardless of the stay. Thus, the court concludes that the  
9 balance of hardships here weighs strongly in favor of Defendants.  
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## 12 **Public Interest**

13 A stay is also in the public's interest because it avoids potential waste of judicial  
14 time and resources. Moreover, in the absence of a stay, there is a chance the court will  
15 certify a class and the class would then be notified of the action. "Once certified, most  
16 class actions are resolved through settlement. But it is difficult to envision productive  
17 settlement negotiations in the shadow of the present appeal."<sup>19</sup> Moreover, if the  
18 Defendants prevail on appeal, any class would likely have to be decertified, requiring  
19 additional notices. Multiple, inconsistent notices would likely result in substantial  
20 confusion and wasted efforts.  
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25 <sup>18</sup>See doc. 108 at p. 2 defining the class as: "all truckers who lease a truck from IEL to  
26 drive for Swift during the three years preceding the filing of the initial complaint and up through  
27 the date of final judgment here . . . ." The initial complaint was filed in 2009.

28 <sup>19</sup>*Ontiveros v. Zamora*, No. CIV. S-08-567, 2013 WL1785891, at \*6 (E.D. Cal. Apr. 25,  
2013).

**IV. CONCLUSION**

Based on the preceding discussion, Defendants' motion at docket 879 is GRANTED. This case is stayed pending appeal. Plaintiffs' motions at docket 883 and 884 are denied without prejudice to renewal if appropriate following conclusion of the appeal.

DATED this 24<sup>th</sup> day of February 2017.

/s/ JOHN W. SEDWICK  
SENIOR JUDGE, UNITED STATES DISTRICT COURT

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