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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

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| John Doe 1, et al., |) | |
| |) | |
| Plaintiffs, |) | 2:10-cv-00899 JWS |
| |) | |
| vs. |) | ORDER AND OPINION |
| |) | |
| Swift Transportation Co., Inc., et al., |) | [Re: Motions at Dockets 771, 744, |
| |) | 751, 757, 763, 768, 820] |
| Defendants. |) | |
| |) | |

I. MOTIONS PRESENTED

At docket 771 the five named plaintiffs in this suit (“Plaintiffs”) filed a motion for partial summary judgment, asking the court to find that the contractor agreements they entered into with Defendant Swift Transportation Co., Inc. (“Swift”) constituted contracts of employment, which are exempt from the Federal Arbitration Act (“FAA”) and the Arizona Arbitration Act (“AAA”). Their statement of facts and supporting documents are filed at dockets 772 through 776. Defendants respond at docket 792, with their statement of facts at docket 797, and their supporting documents at dockets 793 through 795. Plaintiffs reply at docket 851. Defendants filed separate motions for partial summary judgment as to each of the named Plaintiffs at dockets 744, 751, 757, 763, and 768. Plaintiffs responded jointly to all motions at docket 608. Defendants filed separate replies. Oral argument was not requested and would not be of

1 assistance to the court. As shown in the following discussion, this order has the effect
2 of rendering moot Defendant’s motion for reconsideration at docket 820.

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4 **II. BACKGROUND**

5 Swift is a motor carrier that is engaged in the interstate transportation of freight.
6 Plaintiffs are truck drivers who each entered into a contractor operating agreement with
7 Swift (the “Contractor Agreement(s)").¹ Under each Contractor Agreement, the
8 respective Plaintiff agreed to furnish “Equipment” and labor necessary for the
9 transportation of freight, which would be furnished by Swift. The “Equipment” is a truck
10 specifically identified in “Schedule A” of each Contractor Agreement with a unit number,
11 year, make, and serial number. The Plaintiff is listed as the owner of the truck,
12 Defendant Interstate Equipment Leasing (“IEL”) is listed as the financing entity, and
13 Swift is identified as the operator of the truck.² Each Contractor Agreement refers to
14 the signing Plaintiff as a “Contractor” and specifically states that he or she is an
15 independent contractor, not an employee of Swift, and is responsible for determining
16 “the method, means and manner of performing work and services” under the Contractor
17 Agreement.³ Each Contractor Agreement also contains a provision requiring that “all
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22 ¹The five named Plaintiffs all entered into Contractor Agreements with Swift. The
23 material language in the agreements for purposes of these motions is the same or similar.
24 When citing to the relevant provisions, the court has made note of language differences.

25 ²Doc. 772-7 at p. 46 (Van Dusen Contractor Agreement, Schedule A); Doc. 772-8 at
26 p. 11 (Sheer Contractor Agreement, Schedule A); Doc. 772-9 at p. 26 (Motolinia Contractor
27 Agreement, Schedule A); Doc. 772-10 at p. 28 (Schwalm Contractor Agreement, Schedule A);
28 Doc. 775 at p. 48 (Peter Wood Contractor Agreement (2009), Schedule A); Doc. 775-1 at p. 22
(Peter Wood Contractor Agreement (2014), Schedule A).

³Doc. 772-7 at p. 44 (Van Dusen Contractor Agreement at ¶ 18); Doc. 772-8 at p. 9
(Sheer Contractor Agreement at ¶ 18); Doc. 772-9 at p. 24 (Motolinia Contractor Agreement at
¶ 18); Doc. 772-10 at p. 25 (Schwalm Contractor Agreement at ¶ 17); Doc. 775 at p. 8 (Peter

1 disputes and claims arising under, arising out of or relating to [the Contractor
2 Agreement], including . . . any disputes arising out of or relating to the relationship
3 created by the [Contractor Agreement]" be "fully resolved by arbitration."⁴
4

5 None of the Plaintiffs owned the "Equipment" before entering into the Contractor
6 Agreement. Rather, on the same day, each Plaintiff also executed an "Equipment
7 Leasing Agreement" with IEL ("IEL Lease"), wherein he or she agreed to lease the truck
8 that is referred to in Schedule A of the Contractor Agreement.⁵ Each IEL Lease
9 provides in pertinent part that the lessee will fill out a form that authorizes Swift to
10 deduct weekly lease payments owed to IEL under the lease from his or her earned
11 compensation under the Contractor Agreement.⁶ Each one also states that the lessee
12 shall be in default under the lease in the event his or her Contractor Agreement with
13 Swift is terminated and that in the event of default IEL may "declare the entire amount
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18 Wood Contractor Agreement (2009) at ¶ 17); Doc. 775-1 at p. 28 (Peter Wood Contractor
19 Agreement (2014) at ¶ 17).

20 ⁴Doc. 772-7 at p. 44 (Van Dusen Contractor Agreement at ¶ 24); Doc. 772-8 at p. 9
21 (Sheer Contractor Agreement at ¶ 24); Doc. 772-9 at p. 24 (Motolinia Contractor Agreement at
22 ¶ 24); Doc. 772-10 at p. 26 (Schwalm Contractor Agreement at ¶ 25); Doc. 775 at p. 46 (Peter
Wood Contractor Agreement (2009) at ¶ 24); Doc. 775-1 at p. 29 (Peter Wood Contractor
Agreement (2014) at ¶ 25).

23 ⁵The terms of Peter Wood's lease have not been provided to the court. Defendants
24 provided documents showing that Peter Wood obtained his truck in 2009 and in 2014 by
25 assuming another driver's lease. The documents contain the assignments, IEL's consent to the
26 assignments, and the authorization for deduction forms granting Swift permission to pay the
lease rents from his settlement account. The parties do not assert that the specific terms of
Peter Wood's lease are materially different from the other Plaintiffs' leases.

27 ⁶Doc. 722-7 at p. 22 (Van Dusen Lease at ¶ 2(e)); Doc. 772-9 at p. 2 (Motolinia Lease at
28 ¶ 2(e)); Doc. 772-10 at p. 2 (Schwalm Lease at ¶ 2(e)). Sheer's lease is worded differently but
nonetheless gives the same effect. Doc. 765-4 at p. 2 (Sheer Lease at ¶ 2).

1 of unpaid rent then accrued and thereafter payable for all Equipment then leased . . . to
2 be immediately due and payable.”⁷

3
4 In 2009, Plaintiffs filed a complaint against Swift and IEL alleging various labor
5 law claims and putting the status of the employment relationship between Plaintiffs and
6 Swift at the heart of the lawsuit. Defendants moved to compel arbitration based on the
7 terms of the Contractor Agreements, but Plaintiffs opposed arbitration based in part on
8 § 1 of the FAA, which exempts “contracts of employment of . . . workers engaged in
9 foreign or interstate commerce.”⁸ By order dated September 30, 2010, the court
10 granted Defendants’ motion to compel arbitration and stay this action pending
11 completion of arbitration. The court concluded that applicability of the exemption was a
12 question for the arbitrator to decide in the first instance.⁹

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14 Plaintiffs subsequently filed a petition for writ of mandamus with the Ninth Circuit
15 Court of Appeals. In their Petition, Plaintiffs argued that the district court committed
16 clear error by “refusing to resolve their claim of exemption from arbitration under
17 Section 1 of the [FAA] and Section 12-1517 of the Arizona Arbitration Act . . . before
18 compelling arbitration pursuant to those acts.”¹⁰ The Ninth Circuit concluded that a
19 district court must first determine whether the agreement at issue is exempt as a
20 contract of employment pursuant to § 1 before ruling on a motion to compel arbitration.
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24 ⁷Doc. 772-7 at p. 25 (Van Dusen Lease at ¶ 13(b)); Doc. 772-9 at p. 5 (Motolinia Lease
25 at ¶ 13); Doc. 772-10 at p. 5 (Schwalm Lease at ¶ 13). Doc. 765-4 at p. 6 (Sheer Lease at
¶ 13).

26 ⁸9 U.S.C. § 1.

27 ⁹Doc. 223.

28 ¹⁰*In re Van Dusen*, 654 F.3d 838, 840 (9th Cir. 2011) (“*Van Dusen I*”).

1 It nonetheless denied Plaintiffs' petition for mandamus relief on the grounds that it was
2 not satisfied that the district court committed clear error.

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4 After the Ninth Circuit's denial of mandamus, Plaintiffs requested that the court
5 again reconsider its order compelling arbitration or, alternatively, to certify an
6 interlocutory appeal under 28 U.S.C. § 1292(b). The court granted the request to certify
7 an interlocutory appeal. On appeal, the Ninth Circuit stated that its opinion in *Van*
8 *Dusen I* was the law of the circuit and remanded the case.¹¹

9
10 The court issued an order asking the parties to file a notice outlining what
11 needed to be done to conclude the case. Defendants contended that the only thing to
12 be done was for the court to review the four corners of the Contractor Agreements to
13 determine if they were contracts of employment. Plaintiffs requested a comprehensive
14 schedule for discovery needed to determine what facts bear on Plaintiffs' status as
15 employees or independent contractors. The court concluded that Plaintiffs' approach
16 was correct given its prior orders which indicated it thought that information outside the
17 four corners of the Contractor Agreements was necessary to decide the issue and the
18 Ninth Circuit's decisions did not instruct otherwise, and it set forth a scheduling and
19 planning order in conformity with Plaintiffs' suggested schedule.¹² Defendants objected
20 to the court's ruling, but the court maintained its decision to proceed with discovery after
21 considering how other district courts have handled the issue and citing multiple cases
22 where the courts have looked to the relationship of the parties in determining whether
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27 ¹¹*Van Dusen v. Swift*, 544 Fed. Appx. 724 (9th Cir. 2013) ("*Van Dusen II*").

28 ¹²Doc. 548.

1 the contract is one of employment.¹³ Defendants petitioned the Ninth Circuit for a writ
2 of mandamus, challenging the district court’s decision. The Ninth Circuit denied the
3 request, with one judge on the panel issuing a dissenting opinion.¹⁴
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5 III. DISCUSSION

6 **A. Identifying “Contracts of Employment”**

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8 The issue before the court is whether Plaintiffs’ Contractor Agreements are
9 exempt from arbitration under § 1 of the FAA and § 12-1517 of the AAA. Section 1 of
10 the FAA provides that the FAA does not apply to “contracts of employment” of
11 transportation workers.¹⁵ Section 12–1517 of the AAA “exempts all employer and
12 employee employment agreements from the provisions of [the Act].”¹⁶ When
13 Defendants originally moved to compel arbitration, Plaintiffs opposed the motion
14 arguing that because they were employees of Swift they were therefore exempt from
15 arbitration under the FAA and the AAA. The court declined to consider the exemption
16 issue when it originally compelled arbitration back in 2010. It concluded that the
17 arbitrator needed to decide the exemption issue because such a decision would require
18 an analysis of the Contractor Agreements and the IEL Leases, as well as consideration
19 of Plaintiffs’ working relationship with Swift and that, under the arbitration provision in
20 the Contractor Agreements, issues of arbitrability and issues regarding the relationship
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25 ¹³Doc. 605.

26 ¹⁴*In re Swift Transp. Co. Inc.*, 830 F.3d 913 (9th Cir. 2016).

27 ¹⁵*Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

28 ¹⁶*N. Valley Emergency Specialists, LLC v. Santana*, 93 P.3d 501, 506 (Ariz. 2004).

1 of the parties were to be decided by an arbitrator. It declined to address the exemption
2 issue in part because determining whether Plaintiffs' were exempt from arbitration
3 based on an employee-employer relationship with Swift—as Plaintiffs requested—
4 would overlap with the merits of plaintiffs' claims, which would exceed the proper role of
5 a court in addressing threshold questions of arbitrability.¹⁷

7 When reviewing this court's decision, the Ninth Circuit agreed with Plaintiffs'
8 position that § 1 exemption is not a "question of arbitrability" that can be delegated to an
9 arbitrator. Rather, the issue of exemption is a threshold question that the court is
10 required to answer. The Ninth Circuit, however, recognized that it was a close call
11 given "the law's repeated admonishments that district courts refrain from addressing the
12 merits of an underlying dispute."¹⁸ This suggested to the court that the Ninth Circuit did
13 not take issue with Plaintiff's position that exemption would turn on their employment
14 status. Ultimately, the Ninth Circuit mandated that the court "determine whether the
15 Contract Agreements between each appellant and Swift are exempt under § 1 of the
16 FAA before it may consider Swift's motion to compel."¹⁹

19 On remand, over the objection of Defendants, the court maintained its position
20 that its exemption analysis requires the court to consider the Contractor Agreement as
21 a whole, as well as the lease and evidence of the amount of control exerted over
22 Plaintiffs by Defendants. It indicated that determining exemption status will require the
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26 ¹⁷*Van Dusen I*, 654 F.3d at 843.

27 ¹⁸*Id.* at 846.

28 ¹⁹*Van Dusen II*, 544 Fed. Appx. 724, at **1.

1 court to consider numerous fact-oriented details about how the contracts operated,
2 such as the employer's right to control the work, the individual's opportunity to earn
3 profits from the work, the individual's investment in equipment and material needed for
4 the work, whether the work requires a specialized skill, and whether the work done by
5 the individual is an integral part of the employer's business.²⁰ The court's decision to
6 look to the parties' relationship, as well as the Contractor Agreements and IEL leases,
7 was supported by numerous district court cases that framed the § 1 exemption issue in
8 terms of a plaintiff's employment status.²¹ The court set a case management schedule
9 and provided the parties an opportunity to discover evidence that would affect the
10 court's analysis.
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13 Defendants again petitioned the Ninth Circuit for a writ of mandamus ordering
14 this court to vacate its case management order and decide the petition to compel
15 arbitration without discovery or trial. The Ninth Circuit denied the request.²² It did so
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19 ²⁰Doc. 605.

20 ²¹See, e.g., *Operator Indep. Drivers Assoc., Inc. v. Swift*, 288 F. Supp. 2d 1033 (D. Ariz.
21 2003); *Carney v. JNJ Express, Inc.*, 10 F. Supp. 3d 858, 853-54 (W. D. Tenn. 2014) (examining
22 whether the plaintiffs were actually employees and how much control the defendant had over
23 plaintiffs' performance); *Port Drivers Fed'n 18, Inc. v. All Saints*, 757 F. Supp. 2d 463, 472 (D.
24 N.J. 2011) (concluding that plaintiffs failed to establish that they were employees rather than
25 independent contractors); *Davis v. Larson Moving & Storage Co.*, 2008 WL 4755835, at *5-6
26 (D. Minn. Oct. 27, 2008) (examining whether plaintiff was functionally an employee of the
27 defendant); *Flinn v. CEVA Logistics U.S., Inc.*, 2014 WL 4215359, at * 5 (S.D. Cal. Aug. 25,
2014) (examining whether plaintiff had an employment relationship with defendant); *Cilluffo v.
Central Refrigerated Services, Inc.*, 2012 WL 8523507, at * 3 (C.D. Cal. Sept. 24, 2012) (noting
that the Section 1 exemption issue turns on whether the plaintiffs are independent contractors
or employees); *Bell v. Atl. Trucking Co.*, 2009 WL 4730564, at *4 (M.D. Fla. 2009) (examining
whether plaintiff was an independent contractor or an employee).

28 ²²*In re Swift*, 830 F.3d at 915.

1 after considering the requisite mandamus factors set forth in *Bauman*.²³ While it
2 recognized that the issue of how to proceed when deciding a § 1 exemption issue was
3 one of first impression, it found the other factors did not support mandamus relief—the
4 Defendants could obtain relief on appeal after this court makes the decision about
5 arbitration, there was no significant risk of prejudice, the district court did not commit
6 clear error or an often-repeated error. Indeed, the Ninth Circuit concluded that “the
7 issuance of a case management order is not only consistent with, but required by, the
8 federal rules.”²⁴ It indicated that it could decide the issue of what to consider when
9 deciding the exemption issue—an issue of first impression—on direct appeal after the
10 court’s “final order denying or compelling arbitration.”²⁵

13 In dissent, Judge Ikuta applied the factors differently and concluded that
14 Defendants’ petition for mandamus should be granted. In doing so, she concluded that
15 this court had committed clear error and an error that has been often made by district
16 courts considering the issue. She indicated her belief that the law requires that the
17 court consider only the Contractor Agreements and decide whether they set forth terms
18 and conditions of employment.²⁶ Judge Horowitz, while not joining in Judge Ikuta’s
19 dissent because he concluded mandamus was not necessary, did specifically indicate
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25 ²³557 F.2d 650, 654-55 (9th Cir. 1977).

26 ²⁴*In re Swift*, 830 F.3d at 917.

27 ²⁵*Id.* at 916.

28 ²⁶*Id.* at 920.

1 that he thought the issue should be decided on the terms and conditions of the
2 agreements alone.²⁷

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4 This court need not make a definitive ruling as to whether it must look at only the
5 applicable contracts themselves to see if they set forth terms and conditions of
6 employment or whether it can look outside the contracts at how the provisions of the
7 contract operate in practice because, in either scenario, the Plaintiffs were operating
8 under employment contracts.

9 10 **B. Four Corners of the Contractor Agreements**

11 As noted above, § 1 of the FAA excludes “contracts of employment” from the
12 FAA. The dissenting opinion in *Swift* indicated that the court should take “a categorical
13 approach that focuses solely on the words of the contract and the definition of the
14 relevant category,” which in this case is employment.²⁸ That is, the court should look to
15 see if the contract at issue sets forth “terms and conditions of employment.”²⁹

16
17 Employment is generally determined by looking at the extent of the alleged employer’s
18 control, matters related to payment and opportunity for profit and loss, the workers’
19 ability to operate as an autonomous business, the type of work and its relation to the
20 alleged employer’s work, and the length of the relationship.³⁰

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23 ²⁷*Id.* at 918.

24 ²⁸*In re Swift*, 830 F.3d at 920 (Ikuta, J., dissenting).

25 ²⁹*Id.*

26 ³⁰ The common law factors for identifying employment are as follows: (1) the extent of
27 control which, by the agreement, the master may exercise over the details of the work;
28 (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of
occupation at issue and whether that occupation is generally done under employer supervision
or by a specialist without supervision; (4) the skill required; (5) whether the employer supplies

1 Under the dissent’s categorical approach, the court must look to see to what extent
2 and how the terms and conditions in the Contractor Agreements bear upon the above-
3 listed factors. Other terms and conditions related to employment are ones that prevent the
4 worker from maintaining other employment without consent, require a worker to devote all
5 time and ability working for the employer, or create a covenant not to compete after
6 termination.³¹

8 Looking solely at the Contractor Agreements, there are several terms and
9 conditions that suggest an employment relationship:

- 11 • **Type of work:** The terms of the contract make clear that Swift is in the
12 business of transportation and Plaintiffs were doing the work of
13 transporting on behalf of Swift. Swift’s “central mission is the delivery of
14 [freight] to customers; the drivers’ job is to effectuate that purpose” and

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17 the instrumentalities and place of work; (6) the length of time for which the person will be doing
18 the work; (7) whether the payment is by time or by the job; (8) whether the work is a part of the
19 regular business of the employer; (9) whether the employer is or is not in business;
20 (10) whether the parties believe they are creating an employment relationship. Restatement
21 (Second) of Agency §220(2) (1958); see also *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S.
22 318, 322-23 (1992) (noting that when a statute refers to “employment” without further
23 discussion, the common law definition of employment applies and referencing the Restatement
24 (Second) of Agency; see also *Santiago v. Phoenix Newspapers, Inc.*, 794 P.2d 138, 145 n.6
25 (Ariz. 1990) (en banc) (noting that Arizona courts look to the common law factors set forth in the
26 Restatement of Agency to determine the existence of employment). The economic realities test
27 employed by the Ninth Circuit for purposes of defining employment status is determined by the
28 following factors: (1) the degree of the alleged employer's right to control the manner in which
the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending
upon his managerial skill; (3) the alleged employee's investment in equipment or materials
required for his task, or his employment of helpers; (4) whether the service rendered requires a
special skill; (5) the degree of permanence of the working relationship; and (6) whether the
service rendered is an integral part of the alleged employer's business. *Real v. Driscoll
Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979). These two sets of factors are
functionally the same.

³¹*In re Swift*, 830 F.3d at 920 (Ikuta, J., dissenting).

1 therefore the Plaintiff's work is "the very core of its business."³² This
2 suggests an employment relationship.

- 3
- 4 • **Permanence:** The Contractor Agreements, except for Plaintiff Sheer's,
5 specify that the term of the agreement runs from the date of signing until
6 December 31 of the same year, after which it automatically extends year
7 to year unless terminated by either party.³³ The agreements do not
8 contemplate an end to the service relationship—the terms show that
9 Plaintiffs were not hired to perform a specific project or work for a defined
10 period of time. A term of infinite duration is indicative of employee
11 status.³⁴
 - 12 • **Control:** The Contractor Agreements give Swift the right to terminate the
13 agreements without cause on ten days notice.³⁵ A provision allowing
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19 ³²*FedEx Home Delivery*, 361 NLRB No. 55, at p. 20 (Sept. 30, 2014).

20 ³³Doc. 772-7 at p. 43 (Van Dusen Contractor Agreement at ¶ 17.A); Doc. 772-9 at p. 23
21 (Motolinia Contractor Agreement at ¶ 17.A); Doc. 772-10 at p. 24 (Schwalm Contractor
22 Agreement at ¶ 16.A); Doc. 775 at p. 45 (Peter Wood Contractor Agreement (2009) at ¶ 17.A);
23 Doc. 775-1 at p. 27 (Peter Wood Contractor Agreement (2014) at ¶ 16.A). Sheer's Contractor
24 Agreement was more limited in its duration. It provided for a one-year contract with an option to
25 renew for an additional year. Doc. 772-8 at p. 8 (Sheer Contractor Agreement at ¶ 17.A).

26 ³⁴*Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1105 (9th Cir. 2014); *Narayan v. EGL,*
27 *Inc.*, 616 F.3d 895, 903 (9th Cir. 2010).

28 ³⁵Doc. 772-7 at p. 43 (Van Dusen Contractor Agreement at ¶ 17.A); Doc. 772-8 at p. 8
(Sheer Contractor Agreement at ¶ 17.A); Doc. 772-9 at p. 23 (Motolinia Contractor Agreement
at ¶ 17.A); Doc. 772-10 at p. 24 (Schwalm Contractor Agreement at ¶ 16.A); Doc. 775 at p. 45
(Peter Wood Contractor Agreement (2009) at ¶ 17.A); Doc. 775-1 at p. 27 (Peter Wood
Contractor Agreement (2014) at ¶ 16.A).

1 termination at-will is indicative of the right to control the agent's activities
2 and suggests an employment relationship.³⁶

- 3
- 4 • **Control:** Despite a provision that states Plaintiffs control the method and
5 manner of their work, the terms of the Contractor Agreements
6 nonetheless provide Swift with some control over Plaintiff's delivery
7 schedule. The Contractor Agreements state that if a lease operator fails
8 to properly and timely deliver a shipment and Swift determines in its sole
9 discretion that the lease operator has failed to deliver a shipment, Swift
10 has the right to temporarily take possession of lease operator's truck and
11 complete the delivery and to require the driver to indemnify Swift for any
12 costs and expenses incurred by Swift as a result.³⁷
 - 13 • **Control and opportunity for profit:** Plaintiffs agreed to be paid on a per
14 mile basis at a rate set forth in a schedule attached to each agreement,
15 but Swift retained the right to decrease the rate per mile with 30 days
16 notice.³⁸ Provisions providing the company unilateral control to change
17 the terms of the agreement is a factor that weighs in favor of employment
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21 ³⁶*Narayan*, 616 F.3d at 900, 903.

22 ³⁷Doc. 772-7 at p. 39 (Van Dusen Contractor Agreement at ¶ 5.C); Doc. 772-8 at p. 4
23 (Sheer Contractor Agreement at ¶ 5.B); Doc. 772-9 at p.19 (Motolinia Contractor Agreement at
24 ¶ 5.C); Doc. 772-10 at p. 20 (Schwalm Contractor Agreement at ¶ 5.C); Doc. 775 at p. 41
25 (Peter Wood Contractor Agreement (2009) at ¶ 5.C); Doc. 775-1 at p. 23 (Peter Wood
Contractor Agreement (2014) at ¶ 5.C).

26 ³⁸Doc. 772-7 at p. 38 (Van Dusen Contractor Agreement at ¶ 2.C); Doc. 772-8 at p. 3
27 (Sheer Contractor Agreement at ¶ 2.D); Doc. 772-9 at p. 18 (Motolinia Contractor Agreement at
28 ¶ 2.C); Doc. 772-10 at p. 19 (Schwalm Contractor Agreement at ¶ 2.C); Doc. 775 at p. 40
(Peter Wood Contractor Agreement (2009) at ¶ 2.C); Doc. 775-1 at p. 22 (Peter Wood
Contractor Agreement (2014) at ¶ 2.C).

1 status.³⁹ Moreover, Swift controlled when and if it offered loads to
2 Plaintiffs. That is, there was no agreement to provide a certain number of
3 loads or to perform a specific delivery job. Therefore, under the terms of
4 the agreements, Swift controlled load assignments and mileage rates,
5 which in turn dictated how much Plaintiffs could earn.
6

- 7 • **Control:** The Contractor Agreements require Plaintiffs to comply with “any
8 [company] policy.”⁴⁰ Such a provision evinces a certain level of control
9 over Plaintiffs’ day-to-day work.⁴¹
10
- 11 • **Equipment:** Plaintiffs were required to have a Qualcomm
12 Communications system that is compatible with the company’s
13 equipment.⁴² While Plaintiffs did not have to obtain that required system
14 from Swift, all Plaintiffs nonetheless did so through a rental agreement
15 that was attached and incorporated into their Contractor Agreements.⁴³
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17 ³⁹*NLRB v. United Ins. Co.*, 390 U.S. 254, 259 (1968).
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19 ⁴⁰Doc. 772-7 at p. 43 (Van Dusen Contractor Agreement at ¶ 17.A); Doc. 772-8 at p. 8
20 (Sheer Contractor Agreement at ¶ 17.A); Doc. 772-9 at p. 23 (Motolinia Contractor Agreement
21 at ¶ 17.A); Doc. 772-10 at p. 24 (Schwalm Contractor Agreement at ¶ 16.A); Doc. 775 at p. 45
(Peter Wood Contractor Agreement (2009) at ¶ 17.A); Doc. 775-1 at p. 27 (Peter Wood
Contractor Agreement (2014) at ¶ 16.A).

22 ⁴¹*Affinity Logistic*, 754 F.3d at 1102; *In re Slay Transp. Co., Inc.*, 331 NLRB 1292, 1294
23 (2000).

24 ⁴²Doc. 772-7 at p. 39 (Van Dusen Contractor Agreement at ¶ 5.D); Doc. 772-8 at p. 4
25 (Sheer Contractor Agreement at ¶ 5.C); Doc. 772-9 at p. 20 (Motolinia Contractor Agreement at
26 ¶ 5.D); Doc. 772-10 at p. 21 (Schwalm Contractor Agreement at ¶ 5.D); Doc. 775 at p. 42
(Peter Wood Contractor Agreement (2009) at ¶ 5.D); Doc. 775-1 at p. 42 (Peter Wood
Contractor Agreement (2014) at ¶ 5.D).

27 ⁴³Doc. 772-7 at p. 53 (Van Dusen Contractor Agreement, Qualcomm Rental
28 Addendum); Doc. 765-5 at p. 2 (Sheer Qualcomm Purchase Agreement); Doc. 772-9 at p. 33

- 1 • **Equipment and Operational Costs:** The Contractor Agreement also
2 offer leasing and cost-advancing options to Plaintiffs. In the agreements,
3 Swift also retains the discretion to pay for certain items on behalf of
4 Plaintiff and then deduct those payments from Plaintiffs' settlements.⁴⁴
5 Cost-advancing and leasing arrangements that allow drivers to operate
6 are evidence of an employment relationship.⁴⁵
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8 On the other hand, each Contractor Agreement contains provisions declaring
9 that the signing Plaintiff operates as an independent contractor and not an employee of
10 Swift. The applicable provision in the agreements require the signing Plaintiff "to
11 determine the method, means and manner of performing work and service under [the
12 agreement]."⁴⁶ Such a provision suggests that the parties intended to create an
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15 (Motolinia Contractor Agreement, Qualcomm Rental Addendum); Doc. 747-9 at p. 2 (Schwalm
16 Contractor Agreement, Qualcomm Rental Addendum); Doc. 775 at p. 55 (Peter Wood
17 Contractor Agreement, Qualcomm Purchase Addendum); Doc. 775-1 at p. 83 (Peter Wood
18 Contractor Agreement (2014), Qualcomm Rental Agreement). Plaintiff Sheer's Contractor
19 Agreement did not specify that the Qualcomm Rental Agreement would be incorporated into the
20 agreement but other provisions operate to do so. See Doc. 772-8 at p. 9 (Sheer Contractor
21 Agreement at ¶ 21) (incorporating any document specifically referred to or contemplated by the
22 agreement).

23 ⁴⁴Doc. 772-7 at p. 43 (Van Dusen Contract Agreement at ¶ 14); Doc. 772-8 at p. 8
24 (Sheer Contractor Agreement at ¶ 14); Doc. 772-9 at p. 23 (Motolinia Contractor Agreement at
25 ¶ 14); Doc. 772-10 at p. 24 (Schwalm Contractor Agreement at ¶ 14); Doc. 775 at p. 45 (Peter
26 Wood Contractor Agreement (2009) at ¶ 14); Doc. 775-1 at p. 27 (Peter Wood Contractor
27 Agreement (2014) at ¶ 14).

28 ⁴⁵See *Affinity Logistics Corp.*, 754 F.3d at 1104 (finding that drivers do not provide their
own tools, which would be indicative of an independent contractor, when a company provides
those tools through a leasing and cost-advancing arrangement).

⁴⁶Doc. 772-7 at p. 44 (Van Dusen Contractor Agreement at ¶ 18); Doc. 772-8 at p. 9
(Sheer Contractor Agreement at ¶ 18); Doc. 772-9 at p. 24 (Motolinia Contractor Agreement at
¶ 18); Doc. 772-10 at p. 25 (Schwalm Contractor Agreement at ¶ 17); Doc. 775 at p. 46 (Peter
Wood Contractor Agreement (2009) at ¶ 18); Doc. 775-1 at p. 28 (Peter Wood Contractor
Agreement (2014) at ¶ 17).

1 independent contractor relationship and that the Plaintiff would be able to have
2 autonomy. The Contractor Agreements also state that Plaintiffs would not be entitled to
3 workers' compensation benefits.
4

5 There are also provisions in the Contractor Agreements enforcing the idea that
6 Plaintiffs would have the right to daily autonomy and the opportunity to operate their
7 own profitable trucking business. For example, each agreement states that the
8 respective Plaintiff can turn down any loads tendered by Swift.⁴⁷ Each one also states
9 that the Plaintiff cannot haul for another carrier while he or she is using the truck under
10 Swift's operating authority, but if the Plaintiff removes and returns all indicia and
11 documents relating to Swift's operating authority— "all identification devices, licenses
12 and base plates pertaining to [Swift]"—then he or she can provide services to another
13 carrier.⁴⁸ Each also provides that the Plaintiff can hire employees as long as the
14 Plaintiff obtains the required amount of accident/hazard insurance.⁴⁹ The agreements
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17 ⁴⁷Doc. 772-7 at p. 38 (Van Dusen Contract Agreement at ¶ 1); Doc. 772-8 at p.2
18 (Sheer Contractor Agreement at ¶ 1); Doc. 772-9 at p. 18 (Motolinia Contractor Agreement at
19 ¶ 1); Doc. 772-10 at p. 19 (Schwalm Contractor Agreement at ¶ 1); Doc. 775 at p. 40 (Peter
20 Wood Contractor Agreement (2009) at ¶ 1); Doc. 775-1 at p.22 (Peter Wood Contractor
21 Agreement (2014) at ¶ 1).

22 ⁴⁸Doc. 772-7 at p. 39 (Van Dusen Contract Agreement at ¶ 5.A., 5.B); Doc. 772-9 at
23 p. 19 (Motolinia Contractor Agreement at ¶ 5.A, 5.B); Doc. 772-10 at p. 20 (Schwalm
24 Contractor Agreement at ¶5.A, 5.B); Doc. 775 at p. 41 (Peter Wood Contractor Agreement
25 (2009) at ¶ 5.A, 5.B); Doc. 775-1 at p. 23 (Peter Wood Contractor Agreement (2014) at ¶ 5.A,
26 5.B). Sheer's Contract Agreement has different language. The applicable provision states that
27 Sheer cannot haul goods for any third party while operating under Swift's operating authority
28 and that he cannot haul for any other carrier while using Swift's resources, name, or authorities.
There is no provision describing what would need to be returned before Sheer could drive for
another carrier. Doc. 772-8 at p. 4 (Sheer Contractor Agreement ¶ 5.A).

⁴⁹Doc. 772-7 at p. 40 (Van Dusen Contractor Agreement at ¶ 7.A); Doc. 772-8 at p. 5
(Sheer Contractor Agreement at ¶ 7.A); Doc. 772-9 at p. 20 (Motolinia Contractor Agreement at
¶ 7.A); Doc. 772-10 at p. 21 (Schwalm Contractor Agreement at ¶ 7.A); Doc. 775 at p. 42 (Peter
Wood Contractor Agreement (2009) at ¶ 7.A); Doc. 775-1 at p. 24 (Peter Wood Contractor

1 make Plaintiffs responsible for all repairs and fuel costs, but the agreements state that
2 Plaintiffs can use Swift's repair services and purchase fuel from Swift facilities or with
3 Swift's credit.⁵⁰ Plaintiffs were not required to purchase or rent any equipment from
4 Swift, but they could do so.⁵¹ Indeed, as noted above, all Plaintiffs rented their required
5 communications equipment from Swift through an addendum agreement to the
6 Contractor Agreement. Plaintiffs were responsible for certain types of insurance, but
7 they could purchase such insurance through Swift.⁵²
8
9

10 On the surface, these terms suggest that Plaintiffs had autonomy and support
11 the idea that Plaintiffs had the opportunity to work for others and establish a distinct,
12 profitable business. However, the Contractor Agreements and the terms that Plaintiffs
13 agreed to therein cannot be read in isolation and do not provide the complete terms and
14 conditions of their working arrangement. Each of the named Plaintiffs also executed an
15 accompanying IEL lease on the same day as the Contractor Agreement. That is, the
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19 Agreement (2014) at ¶ 7.A).

20 ⁵⁰Doc. 772-7 at pp. 42-43 (Van Dusen Contractor Agreement at ¶¶ 10,15); Doc. 772-8 at
21 pp. 7-8 (Sheer Contractor Agreement at ¶¶ 10,15); Doc. 772-9 at pp. 22-23 (Motolinia
22 Contractor Agreement at ¶¶ 10,15); Doc. 772-10 at pp. 23-24 (Schwalm Contractor Agreement
23 at ¶¶ 10,15); Doc. 775 at pp. 44-45 (Peter Wood Contractor Agreement (2009) at ¶¶ 10,15);
24 Doc. 775-1 at pp. 26-27 (Peter Wood Contractor Agreement (2014) at ¶¶ 10,15).

25 ⁵¹Doc. 772-7 at p. 39 (Van Dusen Contractor Agreement at ¶ 4); Doc. 772-8 at p. 4
26 (Sheer Contractor Agreement at ¶ 4); Doc. 772-9 at p. 19 (Motolinia Contractor Agreement at ¶
27 4); Doc. 772-10 at p. 20 (Schwalm Contractor Agreement at ¶ 4); Doc. 775 at p. 41 (Peter
28 Wood Contractor Agreement (2009) at ¶ 4); Doc. 775-1 at p. 23 (Peter Wood Contractor
Agreement (2014) at ¶ 4).

⁵²Doc. 772-7 at p. 41 (Van Dusen Contractor Agreement at ¶ 8); Doc. 772-8 at pp. 6-7
(Sheer Contractor Agreement at ¶ 8); Doc. 772-9 at pp. 21-22 (Motolinia Contractor Agreement
at ¶ 8); Doc. 772-10 at pp. 22-23 (Schwalm Contractor Agreement at ¶ 8); Doc. 775 at pp. 43-
44 (Peter Wood Contractor Agreement (2009) at ¶ 8); Doc. 775-1 at pp. 25-26 (Peter Wood
Contractor Agreement (2014) at ¶ 8).

1 truck they were going to use to provide their driving services to Swift was a leased
2 truck. For those contract drivers who had accompanying IEL leases, such as Plaintiffs,
3 the lease provisions effectively curtail the provisions in the Contractor Agreements that
4 provide for their autonomy and ability to operate as a distinct business.
5

6 While the Contractor Agreements state that the respective Plaintiff can use his or
7 her truck for other carriers, the accompanying leases refer to drivers working for one
8 “Carrier” and that term is defined under the lease as Swift.⁵³ Pursuant to the IEL
9 leases, each Plaintiff must have a Contractor Agreement with Swift, and the only
10 provision related to payments indicates that rents must be paid by Swift on a weekly
11 basis after it had deducted the requisite amount from the Plaintiff’s earnings.⁵⁴ The
12 lease also specifies a maximum number of miles that the Plaintiff can drive the leased
13 truck per month and specifically contemplates that Swift will keep track of mileage:
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[Plaintiff] agrees that the Rent is based upon normal wear and tear, and that
[Plaintiff] shall drive the vehicle 11,000 miles dispatched by Carrier, whether
loaded or empty, or less per MONTH. . . . [Plaintiff] agrees to a charge of
nine cents (\$.09) for each mile driven in excess This Excess Mileage
Charge shall be calculated monthly by subtracting the Standard Mileage from
the same month’s actual miles dispatched by Carrier, whether loaded or
empty—based on Carrier’s then most current version of its mileage guide—
and multiplying by \$0.09 cents per mile.⁵⁵

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23 ⁵³Doc. 772-7 at p. 22 (Van Dusen Lease at ¶ 2(e)); Doc. 772-9 at p. 2 (Motolinia Lease
24 at ¶ 2(e)); Doc. 772-10 at p. 2 (Schwalm Lease at ¶ 2(e)). Plaintiff Sheer’s lease does not
25 contain the term “Carrier” but, rather, just uses “Swift.” Doc. 765-4 at p. 2 (Sheer Lease at ¶ 2).

26 ⁵⁴Doc. 772-7 at pp. 22, 24-25 (Van Dusen Lease at ¶¶ 2(e), 12(g)); Doc. 772-9 at pp. 2,
27 4-5 (Motolinia Lease at ¶¶ 2(e), 12(g)); Doc. 772-10 at pp. 2, 5 (Schwalm Lease at ¶¶ 2(e),
28 12(g)); Doc. 765-4 at pp. 2, 8 (Sheer Lease at ¶¶ 2, 12(g)).

⁵⁵Doc. 772-7 at p. 22 (Van Dusen Lease at ¶ 2(c)); Doc. 772-9 at p. 2 (Motolinia Lease
at ¶ 2(c)); Doc. 772-10 at p. 2 (Schwalm Lease at ¶ 2(c)); Doc. 765-4 at p. 9 (Sheer Lease at
¶ 21).

1 Therefore, when read in conjunction, contract drivers with accompanying IEL Leases,
2 as a practical matter, had to drive for Swift.

3 Under the terms of the IEL Leases, the ability of Plaintiffs to keep leasing their
4 trucks was explicitly dependent on them maintaining their Contractor Agreements with
5 Swift.⁵⁶ When read in conjunction with the at-will termination provision in the Contractor
6 Agreements, Swift effectively had full control of the terms of the relationship. Swift
7 could use the threat of the at-will termination provision to pressure Plaintiffs to agree to
8 changes because termination would automatically put him or her in default, which,
9 under the terms of the lease, had significant financial consequences for contract
10 drivers—default by a Plaintiff meant that IEL could accelerate all remaining lease
11 payments for the remainder of the lease and satisfy the debt out of the Plaintiff's bond,
12 maintenance account, and settlements with Swift.⁵⁷

13 The lease provisions also limited the ability of the Plaintiffs to have a different
14 driver operate the leased truck. A substitute driver could only be used if the Plaintiffs
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25 ⁵⁶Doc. 772-7 at pp. 24-25 (Van Dusen Lease at ¶ 12(g)); Doc. 772-9 at pp. 4-5
26 (Motolinia Lease at ¶ 12(g)); Doc. 772-10 at p. 5 (Schwalm Lease at ¶12(g)); Doc. 765-4 at p. 6
(Sheer Lease at ¶ 12(g)).

27 ⁵⁷Doc. 772-7 at p. 25 (Van Dusen Lease at ¶ 13); Doc. 772-9 at p. 5 (Motolinia Lease at
28 ¶ 13); Doc. 772-10 at p. 5 (Schwalm Lease at ¶ 13); Doc. 765-4 at pp. 6-7 (Sheer Lease at
¶ 13).

1 were “ill, disabled, or otherwise unable to drive the [truck].”⁵⁸ Moreover, in order to hire
2 a substitute driver, Plaintiffs had to submit written notice for IEL’s approval.⁵⁹
3 Plaintiffs therefore were not free to use their discretion to choose their own employees;
4 generally an independent contractor would have the unrestricted right to hire its own
5 employees.⁶⁰
6

7 Defendants argue that IEL is a separate company and that the terms of the IEL
8 Leases should not be considered as part of Plaintiffs’ Contractor Agreements with Swift.
9 The court disagrees. The terms of the two agreements are explicitly entwined and
10 clearly designed to operate in conjunction for those drivers who leased equipment from
11 IEL for purposes of becoming contract drivers with Swift. As noted above, the IEL
12 Leases provide that Plaintiffs are in default if their Contractor Agreements with Swift are
13 terminated by Swift or Plaintiffs. In such an event, IEL is entitled to terminate the lease
14 and accelerate all remaining lease payments for the remainder of the lease and satisfy
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18 ⁵⁸Doc. 772-7 at p. 23 (Van Dusen Lease at ¶ 6(a)); Doc. 772-9 at p. 3 (Motolinia Lease
19 at ¶ 6(a)); Doc. 772-10 at p. 3 (Schwalm Lease at ¶ 6(a)). Sheer’s lease does not have a
20 provision regarding third-party drivers; rather, it has a provision preventing sublease without
21 consent.

22 ⁵⁹The court notes that Defendants misrepresent the record to this effect. In their
23 response to Plaintiffs’ statement of facts, Defendants state that the lease specifically allows
24 contract drivers to “substitute a competent, licensed driver who will be under his/her control and
25 direction.” This is an incomplete representation of the provision. The whole provision is as
26 follows: “Lessee agrees that, except as otherwise provided below, he/she shall be the driver
27 assigned to the Equipment. If Lessee is ill, disabled, or otherwise unable to drive the [truck],
28 he/she must submit a written request to substitute a competent, licensed driver who will be
under his/her control and direction and will not abuse the [truck] and will operate it with
reasonable care, diligence, and caution, and subject to all provision of the Lease, which request
Lessor shall review within ten (10) business days.” See, e.g., Doc. 772-7 at p. 23 (Van Dusen
Lease at ¶ 6(a)).

⁶⁰Doc. 771 at p. 22. *Affinity Logistics Corp.*, 754 F.3d at 1102-03 (finding the right to hire
helpers of little significance where employer had to approve hires).

1 the debt out of the Plaintiff's bond, maintenance account, and settlements with Swift.

2 The leases require the respective Plaintiff to authorize and direct *Swift* to pay the rent
3 due on the truck directly to IEL from the Plaintiff's earned compensation on a weekly
4 basis:
5

6 [Plaintiff] shall execute an "Authorization and Assignment" (in the form
7 attached hereto) in favor of [IEL] authorizing and directing the motor carrier
8 ("Carrier") with which [Plaintiff] has entered into [an] independent contractor
9 operating agreement ("ICOA")—which shall be Swift Transportation Co., Inc.
10 —to deduct weekly the Overall Lease Payments from [Plaintiffs] earned and
11 available settlement compensation under the ICOA and to electronically
12 deliver all Overall Lease Payments to [IEL] within two business days of each
13 Overall Lease Payment Date. [Plaintiff] shall supply [IEL] with a copy of
14 [Plaintiff's ICOA . . . immediately upon its signing by all parties.⁶¹

15 In turn, the authorization for deduction of weekly lease payments to IEL is specifically
16 incorporated by reference into the Contractor Agreement.⁶² The Contractor

17 Agreements also reference Plaintiffs' indebtedness to IEL:

18 [Swift] and [Plaintiff] acknowledge that [Plaintiff] may have indebtedness or
19 obligations to third parties whereby [Plaintiff], with the consent of [Swift], has
20 agreed to have sums deducted from [Plaintiff's] settlements to satisfy such
21 indebtedness or obligations. [Plaintiff] hereby authorizes [Swift] to deduct any
22 such indebtedness or obligations from [Plaintiff's] settlements.⁶³

23 ⁶¹Doc. 772-7 at p. 22 (Van Dusen Lease at ¶ 2(e)); Doc. 772-9 at p. 2 (Motolinia Lease
24 at ¶ 2(e)); Doc. 772-10 at p. 2 (Schwalm Lease at ¶ 2(e)). Plaintiff Sheer's lease is worded
25 differently but to the same effect. Doc. 765-4 at p. 2 (Sheer Lease at ¶ 2).

26 ⁶²Doc. 772-7 at p. 31 (Van Dusen Lease, Authorization and Assignment Form);
27 Doc. 772-9 at p. 11 (Motolinia Lease, Authorization and Assignment Form); Doc. 772-10 at p.11
28 (Schwalm lease, Authorization and Assignment Form). Plaintiff Sheer's authorization form for
deduction is worded differently and does not contain incorporation language. Doc. 765-4 at
p. 13 (Sheer Lease, Authorization for Deduction Form).

⁶³Doc. 772-7 at p. 43 (Van Dusen Contract Agreement at ¶ 16); Doc. 772-8 at p. 8
(Sheer Contractor Agreement at ¶ 16); Doc. 772-9 at p. 19 (Motolinia Contractor Agreement at
¶ 4); Doc. 772-10 at p. 23 (Schwalm Contractor Agreement at ¶ 16); Doc. 775 at p. 45 (Peter
Wood Contractor Agreement (2009) at ¶ 16); Doc. 775-1 at p. 27 (Peter Wood Contractor
Agreement (2014) at ¶ 14).

1 Schedule A to each Contractor Agreement acknowledges that the Plaintiff was leasing
2 his truck and that he did, in fact, have indebtedness to a third party—IEL.⁶⁴ It is
3 undisputed that both agreements were presented to Plaintiffs together and were
4 unilaterally drafted by Swift’s attorneys. It is also undisputed that IEL is a wholly-owned
5 subsidiary of Swift that is publically traded as part of the Swift umbrella of companies, is
6 located at the same location as Swift, and shares Swift’s computer systems. Therefore,
7 the contractual terms and conditions of Plaintiffs’ agreements with Swift were set forth
8 in both the Contractor Agreements and the IEL Leases and should be considered
9 together when determining whether Plaintiffs operated under a contract for
10 employment.
11
12

13 In sum, looking at the terms and conditions of the Contractor Agreement and the
14 terms and conditions of the IEL Leases, which essentially restricted the purported
15 autonomy allowed in the Contractor Agreements, contract drivers who obtained their
16 trucks through a lease with IEL, such as Plaintiffs, had contracts for employment that
17 are therefore exempt from arbitration under the FAA and the AAA.
18

19 **C. Other Evidence**

20 The evidence presented from outside the four corners of the agreements also
21 support the court’s conclusion that Plaintiffs had employment contracts with Swift. The
22 load assignment and payment structure limited Plaintiffs’ autonomy and ability to
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26 ⁶⁴Doc. 772-7 at p. 46 (Van Dusen Contract Agreement, Schedule A); Doc. 772-8 at p. 11
27 (Sheer Contractor Agreement, Schedule A); Doc. 772-9 at p. 26 (Motolinia Contractor
28 Agreement, Schedule A); Doc. 772-10 at p. 28 (Schwalm Contractor Agreement, Schedule A);
Doc. 775 at p. 48 (Peter Wood Contractor Agreement (2009), Schedule A); Doc. 775-1 at p. 22
(Peter Wood Contractor Agreement (2014), Schedule A).

1 maximize their profits. Defendants assert that Plaintiffs were paid by the job, on a per
2 mile basis, and not by time spent at work. The fact that Plaintiffs were paid on a per
3 mile basis and not based on time spent working does not make their compensation
4 project-based. As noted above, the mileage rate was set by Swift, and Swift could
5 unilaterally change it. Plaintiffs were not paid after completion of a specific job; rather,
6 they received settlement payments on a weekly basis. Indeed, payment of Swift's
7 employee drivers was set up similarly: Plaintiffs, as well as many other contract drivers,
8 were paid per mile driven on a weekly basis just as they had been paid previously when
9 they worked as employees for Swift.⁶⁵

12 Defendants argue that Plaintiffs were free to do as little or as much for Swift as
13 needed to make a profit as an independent driver. Plaintiffs had much less control of
14 their schedule than Defendants contend. Even though Plaintiffs were not explicitly
15 required to work a set number of hours, the combination of the Contractor Agreements
16 and the IEL Leases dictated a minimum amount of time Plaintiffs needed to drive for
17 Swift in order to pay the weekly rent for the leased truck. The evidence shows that to
18 make enough to pay rent and other costs out of their Swift earnings, Plaintiffs needed to
19 drive 2,100 to 2,400 a week for Swift.⁶⁶ That is around the same mileage expected of
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25 ⁶⁵Doc. 797 (Defendants' Response to Fact 113); Doc. 776-1 at p. 3 (Motolinia
26 Declaration at ¶¶ 9, 10); 776-2 at pp. 3, 4 (Van Dusen Declaration at ¶¶ 8, 9); Doc. 776-3 at p.
27 3 (Sheer Declaration at ¶¶ 7, 8); Doc. 776-4 at pp. 3, 4 (Schwalm Declaration at ¶¶ 9,10); Doc.
28 776-5 at p. 3 (Wood Declaration at ¶¶ 8, 9).

⁶⁶Doc. 776-8 at pp. 40-41 (Swift 30(b)(6) Depo. at pp. 154-57); Doc. 775-3 at p. 111 (Ex.
12, Swift's Contracted Driver Manual at Section 5, p. 2).

1 Swift's employee drivers.⁶⁷ Plaintiffs' declarations show that they had to drive at least
2 as many hours for Swift when driving as contract drivers as they had to drive when they
3 were employees.⁶⁸ Swift provided a declaration from its CEO, David Barry, which states
4 that "there are many instances where Owner Operators will not accept loads for weeks
5 or even months at a time with no repercussion."⁶⁹ However, he does not state that the
6 owner operators he refers to are ones with IEL Leases like Plaintiffs. Clearly, for drivers
7 with IEL Leases, failure to drive for Swift would be failure to pay rent and could result in
8 lease termination, loss of use of the truck, and possible rent acceleration. There is no
9 evidence to show that drivers with IEL Leases had any way to pay rent apart from
10 Swift's deductions.
11

12
13 Defendants argue that Plaintiffs could maximize their earnings based on what
14 assignments they agreed to take. They assert that contract drivers had the opportunity
15 to receive multiple loads at a time if desired, relying on an affidavit from David Barry.⁷⁰
16 However, during his deposition, Barry acknowledged that loads were *normally* only
17 offered one load at a time except for times when a stacked delivery package was
18 assigned to a driver.⁷¹ While Barry said Swift tried to accommodate contract drivers'
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22 ⁶⁷Compare Doc. 775-3 at p. 111 (Ex. 12 Swift's Contracted Driver Manual at Section 5,
p. 2) with Doc. 775-6 at p. 23 (Ex. 14b, Employee Driver Manual at Section 5, p. 1).

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24 ⁶⁸Doc. 776-1 at p. 3 (Motolinia Declaration at ¶ 7); 776-2 at p. 3 (Van Dusen Declaration
at ¶ 6); Doc. 776-3 at p. 3 (Sheer Declaration at ¶ 5); Doc. 776-4 at p. 3 (Schwalm Declaration
at ¶ 7); Doc. 776-5 at p. 3 (Wood Declaration at ¶ 6).

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26 ⁶⁹Doc. 793 (Barry Declaration at ¶ 13).

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28 ⁷⁰Doc. 793 (Barry Declaration at ¶ 16).

⁷¹Doc. 776-8 at p. 20 (Swift 30(b)(6) Depo. at pp. 73-76). Defendants rely on the fact
that at one point Barry said "the system will send out three or four choices they can choose

1 preferred loads when possible, there is nothing to show that those requests were
2 routinely granted or that Plaintiffs had any meaningful information about available loads
3 that would allow them to maximize income. Indeed, Barry acknowledged that drivers do
4 not have access to programs that allow them to see which loads are available; Swift's
5 planners were the only ones with access to the available loads and were the ones who
6 controlled assignments offered.⁷²

8 Defendants argue that Plaintiffs had the freedom to refuse a load and wait for a
9 better load to be offered. However, turning down a load would have been very risky
10 because there was no way to know if doing so would result in a better or worse load to
11 follow or when the next load would be offered.⁷³ It is undisputed that turning down
12 loads would likely lead to fewer miles driven and therefore was done infrequently.⁷⁴
13 Plaintiffs acknowledged that they had the right to turn down loads, but they testified that
14 in practice it was discouraged or at least not advisable to do so.⁷⁵ Without access to

17 from, if that's what they want to do. It just depends upon what the freight basket looks like."
18 Doc. 776-8 at p. 20 (Swift 30(b)(6) Depo. at pp. 73-74). However, it is unclear if he means the
19 planners can choose or the driver himself can choose. In any event, Barry agreed that in the
20 *normal course* "the planner puts together its puzzle matching loads to drivers and pushes a
21 button and the load matched to particular driver is communicated to the driver" and "only one
load is communicated to the driver at a time and he has some period of time to either accept it
or not." Doc. 776-8 at p. 20 (Swift 30(b)(6) Depo. at pp. 74-75).

22 ⁷²Doc. 776-8 at p. 20 (Swift 30(b)(6) Depo. at p. 76).

23 ⁷³Doc. 797 at p. 89 (Defendants' Response to Fact 141, acknowledging that turning
24 down a load meant a driver could sit for up to 48 hours).

25 ⁷⁴Doc. 797 at p. 89 (Defendants' Response to Fact 142, acknowledging that "turning
26 down loads could mean fewer miles" and is done "infrequently").

27 ⁷⁵Doc. 776-2 at p. 4 (Van Dusen Declaration at ¶ 11) (acknowledging that he rarely
28 turned down loads because it could result in sitting for "days"); (Doc. 776-3 at p. 4 (Sheer
Declaration at ¶ 10) (same); Doc. 776-4 at p. 4 (Schwalm Declaration at ¶ 12) (same);
Doc. 776-5 at p. 4 (Wood Declaration at ¶ 11) (same); Doc. 772-2 at p. 26 (Van Dusen Depo. at

1 the available load options and without any real choice over load assignments, Plaintiffs
2 were unable to exercise judgment in a way that allowed them to generate additional
3 income.
4

5 The evidence also shows that it was impracticable for Plaintiffs to establish their
6 independence from Swift in order to maximize profits. Defendants argue that there
7 were ways Plaintiffs and other contract drivers could use their “business acumen, hard
8 work, and enterprise” to make a profit and establish an autonomous business.⁷⁶
9

10 Specifically, they stress that Plaintiffs had the ability to work for other carriers as they
11 saw fit. That ignores the terms of the IEL Leases, which, as discussed above, operated
12 to restrict drivers to carrying loads primarily for Swift. IEL confirmed that the leases are
13 structured to require the lessee to drive for Swift because rent payments were to be
14 made through Swift and so that Swift could keep track of mileage fees that were to be
15 applied under the lease.⁷⁷ Defendants say that IEL leased to individuals with no
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17 _____
18 p. 98) (stating that “Swift didn’t like it when you turned down loads” and that it could result in
19 sitting for awhile before you got offered another one.); Doc. 772-4 at pp. 6, 11, 19, 35 (Motolinia
20 Depo. at pp. 19-20, 40, 69, 135) (acknowledging that if you didn’t take loads, you did not work);
21 Doc. 772-5 at p. 9 (Schwalm Depo. at p. 29) (stating that she believed she would be placed at
22 the bottom of the assignment list if she declined a load); Doc. 772-6 at p. 13 (Wood Depo. at
23 pp. 45-46) (stating that he risked being terminated or at least sitting for days if he declined an
24 assignment); Doc. 772-3 at pp. 11-12 (Sheer Depo. at pp. 39-41) (stating that if he did not take
25 a load then “they may just let you sit because you refused a load” and that he did not “refuse
26 loads”). Defendants point to the fact that Sheer said he never suffered any adverse
27 consequence from turning down a load, but he explained that was because he did not actually
28 turn them down (Sheer Depo. at p. 124), and earlier he had also acknowledged that it was
understood that turning down a load was not advisable (Sheer Depo. at p. 41).

⁷⁶Doc. 797 at p. 176 (Defendants’ Statement of Fact 61).

⁷⁷Doc. 776-7 at pp. 15-16 (IEL 30(b)(6) Depo. at pp. 56-59) (acknowledging that lessees
were to be drivers for Swift but stating that there would be no way to know whether a driver
moonlighted with others and got paid on the side and acknowledging that requiring lessees to
drive for Swift ensured payment of excess milage fees).

1 affiliation with Swift and therefore IEL would have allowed Plaintiffs to drive for
2 someone not affiliated with Swift, but the only evidence of such an arrangement was
3 testimony that IEL leased trucks to drivers who had an independent contractor
4 agreement with Central Freight and authorized Central Freight to pay rent on their
5 leases.⁷⁸ That evidence is not proof of a contract driver's ability to operate for multiple
6 carriers at one time but, rather, shows exclusiveness with a different carrier. IEL
7 acknowledged that drivers did not have multiple authorizations and assignments in
8 effect at the same time.⁷⁹ IEL did not receive payments from different carriers on behalf
9 of a driver bouncing back and forth between carriers.⁸⁰ Plaintiffs themselves did not
10 drive for multiple carriers and believed they could not drive for other carriers or that
11 doing so would be impracticable.⁸¹

12 Defendants assert that nothing prevented Plaintiffs from moonlighting with other
13 carriers. However, even if Plaintiffs could have moonlighted with other carriers on top
14 of any work for Swift, as a practical matter, it would have been hard to do so. The

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19 ⁷⁸Doc. 797 at p. 108 (Defendants' Response to Fact 170); Doc. 776-7 at pp. 16 (IEL
20 30(b)(6) Depo. at pp. 59-60).

21 ⁷⁹Doc. 776-7 at p. 17 (IEL 30(b) Depo. at p. 62).

22 ⁸⁰Doc. 776-7 at pp. 16-17 (IEL 30(b) Depo. at pp. 60-61).

23 ⁸¹Doc. 772-2 at p. 13 (Van Dusen Depo. at pp. 45-48) (acknowledging that it would have
24 been difficult to get the required permits and licences to moonlight under her own authority);
25 Doc. 772-3 at pp. 24-25 (Sheer Depo. at p. 92-93) (stating that he was told by IEL that he could
26 not drive for another carrier); Doc. 772-4 at p. 26 (Motolinia Depo. at pp. 97-98 (stating that he
27 was told he could not drive for other carriers); Doc. 772-5 at p. 23 (Schwalm Depo. at pp. 87-
28 88) (stating that she was not allowed to haul for another carrier and did not have the option of
just removing all indicia of Swift's authority); Doc. 772-6 at pp. 23-24 (Wood Depo. at pp. 85-92)
(acknowledging that in theory they were supposed to be able to drive for other carriers but that
in practice it was not actually allowed or could only be allowed with permission and if he
followed the terms of the contract).

1 Contractor Agreements required drivers to remove and return all evidence of Swift's
2 operating authority and its licenses to operate before they could use the truck to drive
3 for another company and also prohibited drivers from using any company equipment
4 while driving for another entity, which would include the Qualcomm communication
5 systems. Defendants point to Barry's affidavit where he asserts that contract drivers
6 only had to cover up Swift indicia, implying no return was necessary.⁸² That contradicts
7 his testimony given during Swift's Rule 30(b) deposition where he acknowledged that
8 doing only that would be a contract violation.⁸³ Moreover, even if covering up indicia
9 was sufficient, that does not change the fact that drivers had to remove or cover up the
10 base plates on the truck, which means they would then need new registration for the
11 truck to get new base plates from the applicable department of motor vehicles.⁸⁴ Barry
12 testified that he did not know whether there had been a contract driver who drove for a
13 third-party carrier in compliance with the Contractor Agreements.⁸⁵

17 Defendants also rely on the fact that Plaintiffs were free to establish a fleet of
18 trucks by leasing more trucks and hiring more drivers. As noted above, the IEL Leases
19 restricted the ability of Plaintiffs to use third-party drivers to situations where he or she
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21 ⁸²Doc. 793 (Barry Declaration at ¶ 8).

22 ⁸³Doc. 776-8 at pp. 55-56 (Swift 30(b)(6) Depo. at pp. 215-19).

23 ⁸⁴Doc. 776-8 at pp. 57-58 (Swift 30(b)(6) Depo. at pp. 223-26).

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25 ⁸⁵His declaration states that he personally knows several contract drivers who have
26 driven for other carriers. Barry Declaration at ¶ 8. That contradicts his testimony where he said
27 he knows drivers asked him about how to drive for other carriers, but he did not know whether
28 any had properly done so. He assumed that some drivers might do so in ways that contravene
the contractor agreement terms. Doc. 776-8 at pp. 56-58 (Swift 30(b) Depo. at pp. 215 - 26).
Van Asdale v. Int'l Game Tech., 577 F.3d 989, 998 (9th Cir. 2009) (“[A] party cannot create an
issue of fact by an affidavit contradicting his prior deposition testimony.”).

1 were ill, disabled, or otherwise unable to drive. Even if hiring was allowed in practice,
2 Swift retained the authority to bar any of Plaintiffs' hires that it deemed unqualified and
3 required those hires to follow all "rules, policies, and protocols" of Swift.⁸⁶ IEL also
4 required the driver to get its approval before hiring a third-party driver.⁸⁷ "In such
5 circumstances, the significance of the right to hire employee drivers is greatly
6 diminished."⁸⁸ Moreover, IEL considered the leasing of a second truck for a third-party
7 driver to be a "risky endeavor" and did not "encourage" the practice in any "way, shape,
8 or form."⁸⁹

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10
11 Even if Plaintiffs could have hired other drivers, they would have had to rely on
12 Swift for assignments adequate to cover their costs. Also, given that contract drivers
13 simply carried the loads assigned to them for the price per mile set unilaterally by Swift,
14 the most Plaintiffs could gain from an additional driver was a cut of the milage earned
15 by that driver.
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20 ⁸⁶Doc. 772-7 at pp. 40-41 (Van Dusen Contract Agreement at ¶¶ 7.A, 7.D); Doc. 772-8
21 at p. 6 (Sheer Contractor Agreement at ¶ 17.D); Doc. 772-9 at pp. 20-21 (Motolinia Contractor
22 Agreement at ¶¶ 7.A, 7.D); Doc. 772-10 at pp. 22-23 (Schwalm Contractor Agreement at ¶¶
23 7.A, 7.D); Doc. 775 at pp. 42-43 (Peter Wood Contractor Agreement (2009) at ¶¶ 7.A, 7.D);
24 Doc. 775-1 at pp. 24-25 (Peter Wood Contractor Agreement (2014) at ¶¶ 7.A, 7.D).

25 ⁸⁷Doc. 772-7 at p. 23 (Van Dusen Lease at ¶ 6(a)); Doc. 772-9 at p. 3 (Motolinia Lease
26 at ¶ 6(a)); Doc. 772-10 at p. 3 (Schwalm lease at ¶6 (a)). Sheer's lease does not have a
27 provision regarding third-party drivers; rather, it has a provision preventing sublease without
28 consent.

⁸⁸Doc. 771 at p. 22. *Affinity Logistics Corp.*, 754 F.3d at 1102-03 (finding the right to hire
helpers of little significance where employer had to approve hires and required them to comply
with company policies).

⁸⁹Doc. 776-7 at p. 32 (IEL 30(b)(6) Depo. at pp. 122-23)

1 The Plaintiffs, in fact, were not independent businesses when they started
2 contract driving and never operated as independent business. They all leased their
3 trucks from IEL at the time they entered in their Contractor Agreements and did not
4 present themselves as independent business entities.⁹⁰ Indeed, Swift chose candidates
5 for contract driving from its employee driver pool based on experience, safety record,
6 and ability to haul a certain number of miles, not their business reputation.⁹¹ Plaintiffs
7 were offered trucks through IEL with no credit check and little to no money down.⁹²
8 Pursuant to the Contractor Agreements, Plaintiffs had the opportunity to lease
9 equipment and pay for expenses through Swift. Plaintiffs all obtained their insurance,
10 transponder, and Qualcomm communications system through Swift.⁹³ Plaintiffs also
11 accepted Swift's offer to set up a maintenance account to cover cost of repairs that
12 Plaintiffs would pay into through settlement deductions.⁹⁴ Swift offered Plaintiffs access
13 to Swift's "Comdata" card so that Plaintiffs could rely on Swift's credit to purchase fuel
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19 ⁹⁰Defendants point to the fact that Plaintiff Wood entered into a Contractor Agreement
20 with Swift in 2014 where he indicated that he would be doing business as "Starlight Trucking."
21 Wood testified that he did that because he wanted to start his own company and to feel more
22 independent, but he clarified that he did not actually start the business. Doc. 776-2 at p. 26
23 (Wood Depo. at pp. 99-100). He thought that if he presented himself as an established
24 company that he would have a different relationship with Swift (2014 was the second time that
25 Wood worked as a contract driver with Swift). Doc. 776-2 at p. 27 (Wood Depo. at pp. 101-02).

24 ⁹¹Doc. 797 at pp. 6-9 (Defendants' Response to Facts 9-14).

25 ⁹²Doc. 797 at pp. 9-10 (Defendants' Response to Fact 15).

26 ⁹³Doc. 776-1 at p. 3 (Motolinia Declaration at ¶¶ 4-5); Doc. 776-2 at p. 3 (Van Dusen
27 Declaration at ¶¶ 3, 5); Doc. 776-3 at p. 3 (Sheer Declaration at ¶¶ 3-4); 776-4 at p. 3 (Schwalm
28 Declaration at ¶¶ 4-5); Doc. 776-5 at p. 3 (Wood Declaration at ¶¶ 3-4).

28 ⁹⁴Doc. 797 at pp. 135 (Defendants' Response to Fact 210).

1 and other expenses with charges on the card being deducted from later settlements.⁹⁵
2 Swift advanced fuel taxes for Plaintiffs and later recouped the money.⁹⁶ Swift's
3 assistance in providing the necessary equipment and credit through cost-advancing and
4 leasing arrangements is evidence that Plaintiffs did not actually operate
5 autonomously.⁹⁷ Plaintiffs did not build businesses while driving for Swift; it is
6 undisputed that Plaintiffs did not gain equity in their trucks or rented equipment through
7 their payments.⁹⁸
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10 While there are some disputes about how much control Swift actually exercised
11 over Plaintiffs, the evidence shows that Swift indeed monitored their operations. While
12 Barry's declaration states that Plaintiffs did not have to do any regular check-ins and
13 were not met at delivery sites or supervised by anyone at Swift, his deposition testimony
14 provides a more accurate picture of how Plaintiffs were supervised. In his deposition,
15 he states that contract drivers report arrivals and departures and give an estimated time
16 of arrival through the Qualcomm communications system that they are required to
17 have.⁹⁹ He affirmed that these updates were expected to be sent by all types of
18 drivers.¹⁰⁰ His affidavit states that Swift does not monitor their progress while en route,
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21 ⁹⁵Doc. 797 at pp. 140-41 (Defendants' Response to Fact 218).

22 ⁹⁶Doc. 797 at pp. 132 (Defendants' Response to Fact 207).

23 ⁹⁷See *Affinity Logistics Corp.*, 754 F.3d at 1104 (finding that drivers do not provide their
24 own tools as would be indicative of an independent contractor when a company provides the
25 tools through a leasing and cost-advancing arrangement).

26 ⁹⁸Doc. 797 at pp. 26 (Defendants' Response to Fact 49).

27 ⁹⁹Doc. (Swift 30(b)(6) Depo. at pp. 99, 110).

28 ¹⁰⁰Doc. (Swift 30(b)(6) Depo. at p. 110).

1 but he testified that the progress of loads for certain customers were monitored by a
2 specific group within Swift, and he stated that the assignment planners have access to
3 data to show if loads are running on time and that driver managers have the ability to
4 know where all drivers are and what their availability is at frequent intervals.¹⁰¹ Based
5 on that testimony, it is clear that, while Swift did not have a person visually monitoring
6 pick-ups and drop-offs, it nonetheless expected contract drivers to report regularly as to
7 their status and had the capability to track their progress.
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10 Altogether, the terms of the Contractor Agreements, bolstered by the evidence
11 presented as to how those terms worked in practice, persuade the court to find that
12 Plaintiffs had contracts of employment which are exempt from arbitration under § 1 of
13 the FAA and under the AAA.
14

15 **V. CONCLUSION**

16 Based on the preceding discussion, Plaintiffs' motion at docket 771 is
17 GRANTED. Defendants' motions for summary judgment as to each individual Plaintiff
18 at dockets 744, 751, 757, 763, and 768 are DENIED. The preceding discussion shows
19 that even without considering the evidence obtained in discovery, Plaintiffs had
20 contracts of employment. Accordingly, Defendants' motion at docket 820 for
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28 ¹⁰¹Doc. (Swift 30(b)(6) Depo. at pp. 44, 101-02, 105).

1 reconsideration of the case management order or certification of an interlocutory appeal
2 is DENIED as moot.

3 DATED this 5th day of January 2017.
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6 /s/ JOHN W. SEDWICK
7 SENIOR JUDGE, UNITED STATES DISTRICT COURT
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