IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

H. THOMAS MORAN, II, RECEIVER, Plaintiff/Appellee.	Appeal No.: 12-3534
-vs.-	D.C. Case No.: 3:05-CV-00072
DAVID W. SVETE, Defendant/Appellant.	

DEFENDANT/APPELLANT DAVID W. SVETE'S

MOTION FOR RECONSIDERATION

OF CLERK'S ORDER, FILED 06/13/13; AND

MOTION FOR PANEL REHEARING

OF SAME ORDER.

COMES NOW, the Defendant/Appellant, DAVID W. SVETE, in propria personam, sui juris, acting as his own Counsel, pursuant to the Federal Rules of Appellate Procedure and the Circuit Rules For The United States Court of Appeals For The Sixth Circuit, and files this his above-captioned Motions. In support of which he states as follows:

Introduction:

The incarcerated, Pro se Appellant David W. Svete, ("Svete"), respectfully files the instant Motion seeking reconsideration of what "appears" to be an Order by the Clerk, entered on 06-13-13, denying his Motion To Proceed In Forma Pauperis On Appeal. Additionally, to the extent that it is unclear exactly who entered the Order, (it "appears" to have been the Clerk), Mr. Svete seeks Panel Rehearing of the 06-13-13 Order.

As discussed below, in entering the Order, a material mistake in fact was made, and the subject Order is contrary to both Sixth Circuit and U.S. Supreme Court law. The Order appealed from is immediately appealable under Title 9 U.S.C. § 16, and the instant appeal has a valid basis in both law and in fact. The subject Order must be Reconsidered and/or the underlying Motion To Proceed In Forma Pauperis Reheard.

Argument:

Respectfully, this is a pretty straightforward situation, and the Clerk's Order, which makes material mistakes in both fact and law, is erroneous. The instant appeal is -without question -from an immediately appealable Order of the District Court. Because Appellant Svete appealed "in part on the District Court's refusal to enforce, through dismissal or stay, an agreement to arbitrate, this Court has independant jurisdiction over that question under the Federal Arbitration Act, ("FAA"), 9 U.S.C.

§ 16, and Rule 4 of the Federal Rules of Appellate Procedure." Simon v. Pfizer, 398 F.3d 765 (6th Cir. 2005). Like Simon, Mr. Svete filed a Motion To Dismiss based upon a mandatory, written Agreement to Arbitrate. Respectfully, the Clerk's order overlooked the fact that Mr. Svete specifically sought to enforce the Arbitration Agreement, wherein the parties had explicitly agreed in writing to arbitrate any issues of arbitrability. The Agreement not only incorporated the Commercial Rules of the American Arbitration Association, but specifically provided that any and all disputes regarding arbitrability of the dispute, including whether the parties' dispute fell within the scope of the Ageement, would be settled through Arbitration, by a AAA Arbitrator, in accordance with the Commerical Rules of the American Arbitration Association. The Agreement unambiguously stipluated that the parties agreed to have the Arbitrator -and not the District Court -determine whether the parties' dispute fell within the scope of the Agreement. The gateway issue of arbitrability being one for the AAA Arbitrator -and not the District Court to decide -the District Court erred by denying Mr. Svete's Motion. (This is a valid, immediately appealable Order, and the Clerk's Motion denying Svete's Motion To Proceed In Forma Pauperis is in error.)

A District Court's denial of a Motion To Dismiss, which was based on the parties' arbitration clause, is independantly and immediately appealable under 9 U.S.C. § 16 of the Federal Arbitration Act ("FAA") and Fed. R. App. P. 4. Such interlocatory appellate

jurisdiction comports with the principle that an appellate court has jurisdiction only over final orders because the FAA's provision for interlocutory appeals from refusals to stay an action or compel arbitration was intended precisely to support a party's contractual right to resolve certain questions through arbitration and avoid court proceedings altogether. See Simon v, Pfizer, 398 F.3d 765 (6th Cir. 2005); Dawson v. Rent-A-Center, Inc., 2012 U.S. App. Lexis 15600 (6th Cir. 07/26/12). See also Moran v. Svete, 366 Fed. Appx. 624 (6th Cir. 2010).

In the instant appeal, the issue Mr. Svete placed squarly before the District Court -was that any question about whether or not the Plaintiff's claims fell within the scope of the Arbitration Agreement -was for the AAA Arbitrator -and not the District Court to decide. Mr. Svete submitted and submits that all of the Plaintiff's claims are arbitrable -but to the extent that there are objections as to whether or not they are indeed arbitrable -and there are -the parties are first required to arbitrate the issue or arbitrability, so that a AAA arbitrator, in accordance with the Commerical Rules of the American Arbitration Association, can make this determination. The District Court denied Mr. Svete's Motion To Dismiss on this basis -intending to subject Mr. Svete to judicial proceedings that the parties had agreed to avoid, and intending to make a determination that the parties had clearly and unmistakably delegated to the Arbitrator. The Agreement is not ambiguous, and by incorporating the

Commercial Rules of the American Arbitration Association, the parties agreed to have the arbitrator decide arbitrability. "[W]hen, as here, parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." Contect Corp. v. Remote Solution, Co., 398 F.3d 205, 208 (2nd Cir. 2005). The AAA Rules state 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." See also First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943-44 (1995); U.S. Rent-A-Center West, Inc. v. Jackson, 177 L.Ed.2d 403 (2010), citing First Options, (where parties have clearly and unmistakably delegated authority to arbitrator -it is for arbitrator and not the court to determine gateway questions of arbitrability).

"Ordinarily, courts of appeals have jurisdiction only over 'final decisions' of district courts. 28 U.S.C. § 1291. The FAA, however, makes an exception to that finality requirement, providing that 'an appeal may be taken from...an order...refusing a stay of any action under section 3 of this title.' 9 U.S.C. § 16(a)(1)(A). By that provision's clear and unambiguous terms, any litigant who asks for a stay under § 3 is entitled to an immediate appeal from denial of that motion-regardless of whether the litigant is in fact eligible for a stay." Arthur Andersen LLP v. Carlisle, 173 L.Ed.2d 832 (2009). This Court has jurisdiction to hear this appeal.

Conclusion:

The Clerk's Order finding that the District Court's Order denying the Appellant's Motion To Dismiss based upon the parties' mandatory, written Agreement to Arbitrate the gateway issues of arbitrability, including the scope of the Agreement, is in error, on both factual and legal grounds. The order denying the Motion to Dismiss clearly falls within the final order exception provided by Title 9 U.S.C. § 16 and Fed. R. App. P. 4, as espoused in Arthur Andersen, Simon, and the prior related appeal in this case, Moran v. Svete.

Wherefore, the incarcerated, Pro se Appellant Svete respectfully requests that this Honorable Court:

1. Grant The Instant Motion;
2. Reconsider The Order Of The Clerk Entered On 06-13-13;
3. Grant A Panel Rehearing With Respect To Appellant's Motion To Proceed In Forma Pauperis On This Appeal; and
4. Grant The Appellant's Motion To Proceed In Forma Pauperis On This Appeal.

Respectfully Submitted:

Mr. David W. Svete
Fed. Reg. No.: 05779-017
FCI Terminal Island
P.O. Box 3007
San Pedro, CA 90731

Appellant, Pro se
06-25-13

-CERTIFICATE OF SERVICE-

I **DO HEREBY CERTIFY**, under the penalty of perjury, under the laws of the United States of America and Title 28 U.S.C. § 1746, that a true and correct ORIGINAL of the foregoing document,

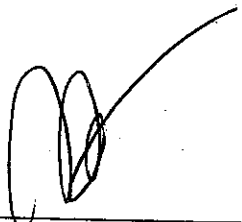
Defendant/Appellant David W. Svete's
Motion For Reconsideration
Of Clerk's Order, Filed 06/13/13; And
Motion For Panel Rehearing Of Same Order,

has been filed today, this 25th day of June, 2013, by placing it in an envelope, with First Class United States Postage Prepaid and Affixed, and delivering it to the prison officials at FCI Terminal Island, where I am presently incarcerated, for further delivery to the United States Post Office, for further delivery to the

United States Court of Appeals
For The Sixth Circuit
100 East Fifth Street, Room 540
Potter Stewart U.S. Courthouse
Cincinnati, Ohio 45202-3988
Attn.: Clerk of the Court

for scanning and entry into the Court's electronic filing (CM/ECF) system. As I am an incarcerated, Pro se litigant, the Pro se Prison Mailbox Rule holds that this document is timely filed today. See Houston v. Lack, 487 U.S. 266 (1988). Consistent with the Court's Rules For Electronic Filing, Notice will be sent automatically by operation of the Court's CM/ECF system, to all parties on the Electronic Filing Receipt. Pursuant to Fed. R. Civ. P. 5(b)(2)(E) and 5(b)(3), Notice sent by electronic mail constitutes service. Specifically, Notice will be served electronically upon the following parties:

Mr. Joseph C. Oehlers
Counsel For Plaintiff/Appellee



David W. Svete
06-25-13

Mr. David W. Svete
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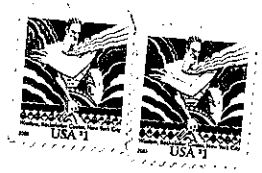

⇔05779-017⇔
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