NO. 15- 17532/16-15000, 15-17534/16-15001

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUGLAS O'CONNOR et al, Plaintiff-Appellee/Cross-Appellant, v. UBER TECHNOLOGIES, INC., Defendant-Appellant/Cross-Appellee	No. 15-17532, 16-15000 No. C-13-3826-EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding
HAKAN YUCESOY et al, Plaintiff-Appellee/Cross-Appellant, v. UBER TECHNOLOGIES, INC., et al., Defendant-Appellants/Cross-Appellees	No. 15-17534, 16-15001 No. C-15-00262-EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding

PLAINTIFF-APPELLEES/CROSS-APPELLANTS' DOUGLAS O'CONNOR AND HAKAN YUCESOY's CONSOLIDATED PRINCIPAL AND RESPONSE BRIEF

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INTRODUCTION

These appeals concern a pattern of abusive behavior and gamesmanship by Defendant Uber Technologies, Inc., in which Uber has repeatedly sought to use arbitration agreements to cut off its drivers' right to participate in pending class actions brought on their behalf, and to thereby unilaterally limit its own liability. In particular, this appeal concerns Uber's issuance of a revised arbitration agreement to its drivers across the country, which purported on its face to waive class members' right to participate in a pending (already certified) class action, O'Connor v. Uber Technologies, C.A. No. 13-3826 (N.D. Cal.), as well as putative class members' right to participate in a pending (not yet certified) class action, Yucesoy v. Uber Technologies, C.A. No. 3:15-cv-00262 (N.D. Cal.) (as well as other class cases that had been filed but not yet certified). Uber's revised December 2015 agreement was distributed to drivers in the midst of pending litigation and admittedly in *direct response* to the District Court's Order issued two days earlier in the O'Connor case, which had just invalidated its previous arbitration agreement. Uber's issuance of the December 2015 agreement was not an ordinary business communication, but rather a blatant attempt to nullify the District Court's Order, which had invalidated Uber's previous arbitration agreement, and to usurp the District Court's role in managing and overseeing the orderly progression of these class action cases. The revised December 2015

agreement resulted in massive confusion among class members and putative class members and effectively allowed Uber to unilaterally convert putative opt-out class actions into opt-in proceedings, thereby turning Fed. R. Civ. P. 23 on its head.

In the face of Uber's brazen actions, the District Court issued its Order of December 23, 2015, which is the subject of this appeal. With respect to the certified class in O'Connor, the District Court invalidated the December 2015 agreement and enjoined Uber from sending further agreements to certified class members, or from engaging in further communication with class members that could affect their rights, absent prior approval of class counsel or the court. ER-5. In doing so, the court acted pursuant to the dictates of Gulf Oil Co. v. Bernard, 452 U.S. 89, 101 (1981) and Fed. R. Civ. P. 23(d), relying on "a clear record and specific findings" that Uber's new arbitration agreement was "a direct response to the Court's rulings in the ongoing class action litigation," and that it had "led to considerable confusion" among drivers. ER-4.

However, with respect to putative and potential class members, including the proposed class in the Yucesoy action (as well as drivers who had been excluded from the class certified in the O'Connor action, but who Plaintiffs may appeal their exclusion), the District Court's Order allowed Uber to continue sending arbitration agreements to these drivers going forward, albeit with a corrective cover letter.

ER-7-8. This decision was in error. Uber should not be permitted to continue using arbitration clauses abusively as a way to cut off putative class members' right to participate in pending class litigation, and to thereby unilaterally convert opt-out Rule 23 class actions into "opt-in" proceedings. Instead of putting a stop to Uber's efforts to engage in such tactics to limit its own potential liability, the District Court erroneously ruled that Uber could continue to distribute new arbitration agreements to prospective class members indefinitely, so long as they included a marginally "better" cover letter with the agreement containing more information about what was contained therein. See ER-6-7.

Plaintiffs have filed this cross-appeal on the ground that Uber should not be permitted to continue to abuse arbitration as a means to extract waivers from putative class members that would remove them from the protections of already-filed class cases, and thereby to supplant the court-supervised notice and opt-out procedures mandated by Rule 23. Though it was well within the District Court's Rule 23(d) powers to require Uber to issue corrective notice, the District Court's overly cautious approach is insufficient to protect class members' rights and sets a dangerous precedent that will allow defendants to misuse arbitration agreements during ongoing class action litigation as a way to subvert Rule 23 and avoid class-wide liability for pending claims.

Uber's attempt to paint the District Court as hostile to arbitration is simply

unfounded. Instead, it is *Uber's* attempt to usurp the District Court's role under Rule 23, and to limit its own liability through coercive and misleading means, that is truly at issue in these appeals. The District Court has ***not*** shown an "improper preference for class action litigation over arbitration," nor has it suggested that "drivers should opt out of arbitration." Br. at 2-3 (emphasis omitted). Instead, the District Court has simply exercised its "duty … to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." Gulf Oil Co., 452 U.S. at 100; see also Wang v. Chinese Daily News, Inc., 623 F.3d 743, 755 (9th Cir. 2010), cert. granted, judgment vacated, 132 S. Ct. 74 (2011) ("[B]ecause of opportunities for abuse and management challenges in class actions, district courts have both the duty and the broad authority to exercise control over a class action"); Balasanyan v. Nordstrom, Inc., 2012 WL 760566, *3 (S.D. Cal. Mar. 8, 2012) ("[A] court must protect the interest of putative class members by preventing misleading communications, perhaps even disallowing communications if they attempt to undermine Rule 23 by encouraging class members not to join the suit."). The District Court has an obligation under Rule 23 to protect class members and potential class members from coercion and abuse. A court cannot and should not abdicate this duty simply because Uber has invoked the Federal Arbitration Act and thereby distributed arbitration agreements to putative class members, rather than distributing other forms of documents that

would affect the rights of class members or putative class members in the midst of litigation, such as releases or class opt-out forms. As such, this Court should uphold those aspects of the District Court's Order below which invalidated Uber's December 2015 agreement and restricted Uber's further communications with class members and potential class members. However, the Court should reverse the Order insofar as it allowed Uber to continue its abusive pattern of using arbitration agreements to attempt to drastically limit its liability in already pending cases by seeing to it that putative class members would no longer be able to participate in the case.

STATEMENT OF JURISDICTION

The District Court has jurisdiction over the appeals in both O'Connor and Yucesoy pursuant to 28 U.S.C. § 1332(d), because both class action cases involve more than 100 people; the amount in controversy exceeds $5,000,000, exclusive of interest and costs; and members of the proposed classes are citizens of a state different from the defendant. 28 U.S.C. §1332(d)(2).[1]

Uber filed timely notices of appeal of the District Court's Order of December 23, 2015, which is the subject of this appeal, on December 28, 2015. ER-17, ER-23. Plaintiffs filed a timely notice of cross-appeal of the same Order

[1] These appeals have been consolidated with the appeal and cross-appeal in Mohamed v. Uber Technologies, Inc., Nos. 15-17533 and 16-15035. See January 27, 2016 Order.

on January 4, 2016, in both the Yucesoy and O'Connor cases. ER-26, ER-29. On January 19, 2016, the District Court issued a second Order, clarifying certain aspects of its earlier Order, see ER-9, and Uber filed an amended notice of appeal on the same day. ER-34, ER-40.

The Court has jurisdiction over these appeals and cross-appeals pursuant to 28 U.S.C. § 1292, because the District Court's Orders have the effect of "granting, continuing, modifying, refusing or dissolving [an] injunction[]." See 28 U.S.C. §1292(a)(1). The Court's December 23, 2015, Order is an injunction, as well as a denial in part of a requested injunction, appealable under 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

1. Where Uber distributed a new arbitration agreement to represented class members and putative class members in *direct* response to the District Court's Order two days earlier that had held Uber's previous arbitration agreements unenforceable, and the new agreement purported to waive their rights to participate in the pending litigation (by "fixing" the issue that had led the previous arbitration agreement to be held unenforceable), was the District Court's decision to invalidate this new arbitration agreement, and enjoin further *ex parte* communications with certified class members in the O'Connor action, a proper exercise of its powers pursuant to Fed. R. Civ. P. 23(d)?
2. Did the District Court, however, err in deciding that modest corrective notice

would be sufficient to protect putative class members' rights, thus allowing Uber to continue to distribute the new arbitration agreements to putative class members for cases that had not yet been certified, which were plainly promulgated in response to developments in the litigation, would effectively eliminate most putative class members' ability to participate in already-pending cases, and would effectively convert pending opt-out class actions into "opt-in" proceedings, thereby contravening Rule 23?

STATEMENT OF THE CASE

These consolidated appeals and cross-appeals arise from Uber's actions in December 2015, in which it distributed new arbitration agreements to class members and putative class members in pending class action cases just two days after the District Court had declared Uber's prior arbitration agreement unenforceable.

The first of these cases, O'Connor v. Uber Technologies Inc., was filed in August 2013 in federal court in California as a class action on behalf of individuals who have worked as drivers for Uber anywhere in the country, alleging that they have been misclassified as independent contractors and thus did not receive reimbursement for necessary work-related expenses they have incurred, and also alleging that they have not received all gratuities which passengers paid for their

benefit. ER-900.[2] The Yucesoy case was filed in June 2014 in Massachusetts state court, alleging similar claims under Massachusetts law on behalf of Massachusetts Uber drivers.[3] Both cases are class actions brought on behalf of Uber drivers, alleging that Uber has misclassified them as independent contractors and violated

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[2] The case was originally filed on behalf of drivers nationwide (other than in Massachusetts) under California law. ER-[Dkt 1]. Although the District Court originally ruled that the case could proceed as a putative national class action, O'Connor v. Uber Technologies, Inc., 2013 WL 6354534, *4 (N.D. Cal. Dec. 5, 2013), it later reversed course and limited the case to California drivers. O'Connor v. Uber Technologies, Inc., 58 F. Supp. 3d 989, 1005-06 (N.D. Cal. 2014). Plaintiffs sought leave to file an interlocutory appeal of this order, but that motion was denied. See ER-914 (at Dkt. 138), ER-917 (at Dkt. 160). Thus, Plaintiffs in O'Connor may still appeal, following final judgment, the District Court's reversal of its earlier ruling that held that California law could apply to drivers nationwide, based on Uber's California choice of law provision that it chose to include in its contracts with drivers.

In reversing its earlier decision that a nationwide class could be pursued in this case, the District Court relied on Sullivan v. Oracle Corp., 51 Cal. 4th 1191 (2011), where the California Supreme Court held that California Labor Code claims did not apply to workers outside of California. However, in Oracle there was no choice-of-law provision at issue to overcome the ordinary presumption against extraterritorial application of the California wage laws, and this Court in Gravquick A/S v. Trimble Navigation Int'l Ltd., 323 F.3d 1219, 1223 (9th Cir. 2003), made clear that, in the absence of an "express geographical limitation[] as to its application," a California state statute can "be applied to an out-of-of state [party] through a choice of law provision in the contract." Thus, Plaintiffs believe they have a likelihood of obtaining reversal of the District Court's decision and thereby expanding the O'Connor case back to a national class action.

[3] The case was later removed to federal court in Massachusetts and subsequently transferred to Judge Edward M. Chen in the Northern District of California, the same judge already presiding over O'Connor. ER-1000-01.

wage laws as a result.[4]

Since the O'Connor case was filed more than two and a half years ago, the parties have engaged in extensive discovery and engaged in a great deal of motion practice. The District Court ruled on Uber's Motion to Dismiss and its subsequent Motion for Judgment on the Pleadings. See ER-906 (at Dkt. 60), ER-910 (at Dkt. 99). The court also had occasion to consider Uber's Motion for Summary Judgment (which it denied) and Plaintiffs' Motion for Class Certification (which it mostly granted). See O'Connor v. Uber Technologies, Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015); ER-432. Likewise, the Yucesoy case has been hotly contested, and Uber has filed four separate Motions to Dismiss as well as two separate Motions to Compel arbitration of several of the named plaintiffs. See ER-995 – 1016 (at Dkt. 6, 36, 109, 149, 62, 94).[5]

On September 1, 2015, the District Court certified the O'Connor case as a class action. ER-432. However, at that time, the class was limited to drivers whose work for Uber had ended before June 2014 because the court did not include in the

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[4] The Mohamed and Gillette cases were filed several months later in federal court in California, alleging violations of state and federal credit and consumer reporting laws on behalf of a nationwide class of drivers, and were subsequently consolidated with one another. ER-962, 983, 972 (at Dkt. 111).

[5] Due to procedural delays, including Uber's removal of Yucesoy to federal court, transfer of the case to California, and serial filing of ***four*** motions to dismiss, the case has not yet progressed beyond the pleading stage, with discovery only just now beginning.

class those drivers who were bound by Uber's 2014 or 2015 arbitration clause[6] which contained a class action waiver.[7] After further briefing and argument concerning the enforceability of Uber's 2014 and 2015 arbitration agreements, see OCONNOR SER-67-119, the District Court ruled on December 9, 2015, that these arbitration agreements were also unenforceable, and as a result it expanded the class to include drivers who had accepted those agreements, thus expanding the certified class to consist of most Uber drivers who have ever worked in California. ER-340-42, 348-63.

Uber had opposed certification of this expanded class primarily because of Uber's 2014 arbitration clause (containing a class action waiver) that it contended bound all drivers in California that have worked since June 2014. Based on the court's invalidation of that arbitration clause on December 9, 2015, the supplemental class certification order brought more than 240,000 drivers within the class. (The earlier class certification Order, see ER-432, which included in the class only those drivers whose work for Uber ended before June 2014 or those

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[6] Because Uber's 2014 and 2015 arbitration agreements contain substantially similar terms, the parties have referred to them both for convenience sake as the 2014 agreement. Throughout this brief, when referring to Uber's 2014 arbitration agreement, Plaintiffs intend to include the 2015 agreement as well.

[7] The court had previously held Uber's 2013 arbitration agreement unenforceable on unconscionability grounds, see ER-50-02, and thus that agreement did not limit the class certified in the September 1, 2015, class certification order. ER-432, ER-491-94.

drivers who had opted out of the 2014 arbitration clause, included only approximately 8,000 drivers).[8]

On December 11, 2015, two days after the District Court issued its supplemental class certification order in O'Connor, which had vastly expanded the scope of the class, Uber distributed to its drivers nationwide a newly revised arbitration clause, which Uber contended "fixed" the problem that had led the District Court to declare its 2014 arbitration agreement unenforceable (namely its inclusion of a non-severable PAGA waiver). This new arbitration clause was clearly intended to limit Uber's potential liability going forward in already-filed class cases. It is Uber's distribution of this newly revised agreement in December 2015 that is the subject of this appeal.

1. Uber's History of Abusive Use of Arbitration Agreements in This Litigation.

Just a couple of weeks before the O'Connor case was filed, Uber distributed to its drivers nationwide a revised contract which included a buried arbitration provision containing a class action waiver.[9] At the outset of the case, Plaintiffs

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[8] Uber appealed the District Court's Order which held the arbitration clause unenforceable, and that appeal is now pending before this Court. See Ninth Cir. Appeal No. 15-17420.

[9] The agreement appeared as a pop-up on drivers' iPhone screens, just as they were about to go on duty, prompting them to press a button on their phone's screen in order to agree to the terms of Uber's new driver contract. See OCONNOR-SER-

filed an Emergency Motion for Protective Order in an effort to prevent Uber from continuing to disseminate the agreement to putative class members (and thereby prevent them from participating in this class action case), now that the case was pending. ER-901 (at Dkt. 4).[10] After full briefing and argument by the parties, including a motion for reconsideration by Uber, the District Court ultimately granted in part Plaintiffs' Motion for Protective Order. See ER-860, 798. The District Court expressly declined to rule on the enforceability of the agreement at that time, finding that the issue was not yet ripe, see ER-863, n. 1, and instead ordered corrective notice be sent to all drivers who received the new agreement after the case had been filed, to inform them about the effect of the agreement on

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152 at ¶5, OCONNOR-SER-121 at ¶5. Drivers could not use the App or work for Uber until they clicked "Yes, I agree." See OCONNOR-SER-121-23. The arbitration agreement provided a 30-day "opt-out" period during which drivers could choose not to be bound by the arbitration clause if they sent notice in writing "by a nationally recognized overnight delivery service or by hand delivery" to the attention of Uber's General Counsel. See OCONNOR-SER-166. Opting out by email or even by ordinary mail was not an option, and the opt-out option was buried deep within the fine print on page 14 of a 15 page agreement, accessible only on drivers' iPhones if they clicked a tiny hyperlink. Id.

[10] Plaintiffs argued that, because the case was filed during the 30-day period in which drivers could opt out of the arbitration clause, the District Court has the power under Rule 23(d) to control communications with putative class members and thus to enjoin further communications between Uber and its drivers that could affect their rights in the case.

their rights in the pending litigation. ER-870-71.[11] This corrective notice informed drivers about the pendency of the case and provided drivers a modestly less burdensome means of "opting out" of the arbitration agreement by providing an email address to which opt-outs could be sent and providing more prominent notice in the agreement regarding the arbitration clause and opt-out option.[12]

The District Court eventually confronted the enforceability of the arbitration agreements in the related Mohamed action, where the court ultimately ruled in an exhaustive seventy-page opinion that both Uber's earlier 2013 agreement and its

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[11] The court made a distinction between drivers who were already working at the time the case was filed as opposed to drivers who began working later and would thus receive the arbitration clause after the filing of the case. Though the initial 2013 arbitration was apparently rolled out in response to another previously filed class action in Massachusetts, see O'Connor, 2014 WL 1760314, *6 (N.D. Cal. May 2, 2014) ("[T]he timing of the promulgation of the Licensing Agreement by Uber …strongly suggests the Agreement was motivated as a response to the class action suit filed in Massachusetts"), the District Court found it significant that the distribution of the agreement preceded the filing of the O'Connor case. At issue in this appeal, however, the December 2015 agreement was ***admittedly*** distributed by Uber in direct response to the District Court's Order of two days' prior, and admittedly for the purpose of affecting the rights of putative class members to participate in claims that had already been filed. ER-72.

[12] Contrary to Uber's characterization, the District Court "did *not* 'draft' or 'approve' the *substance* of the 2014 Agreements," but rather simply "aided in drafting a corrective *notice*," which was designed to ameliorate the misleading and abusive nature of Uber's roll-out of the agreements during the pendency of litigation. Mohamed v. Uber Techs., Inc., 2015 WL 4483990, *4-5 (N.D. Cal. July 22, 2015) (emphasis in original).

Uber appealed the District Court's Order regarding corrective notice for the 2013 agreement, and that appeal is pending in this Court as Ninth Cir. Appeal No. 14-16078.

later 2014 agreement (which had been re-issued with corrective notice as ordered by the court), were unconscionable and unenforceable. See ER-500. In considering a motion to certify the O'Connor class as a class action, and, in response to additional supplemental briefing and multiple hearings, the District Court again addressed the 2014 arbitration agreement, and ultimately concluded on December 9, 2015, that the 2014 arbitration agreement was not enforceable and thus could not be used to limit the scope of the class in O'Connor. The District Court based that decision on this Court's ruling in Sakkab v. Luxottica Retail N. Am., Inc., 803 F.3d 425, 431 (9th Cir. 2015), that PAGA waivers are unenforceable under California law and that conclusion is not preempted by the Federal Arbitration Act. In a detailed decision, the court concluded that the PAGA waiver contained in Uber's arbitration agreement is non-severable and thus rendered the entire agreement unenforceable. ER-348-49. The District Court engaged in a detailed analysis of the agreement's severability language and ultimately concluded that the PAGA waiver could not be cured absent reformation. In light of its conclusion that the 2014 arbitration agreement was unenforceable with respect all drivers, the District Court's December 9, 2015 Order expanded the previously certified class in O'Connor, see ER-432, to now include all drivers who

have worked in California (other than two excluded categories), without reference to whether they had accepted arbitration clauses. ER-348-363.[13]

2. The Facts Giving Rise To This Appeal.

Less than forty-eight hours after the District Court held that Uber's 2014 arbitration clause was unenforceable, and thus that drivers who had previously been excluded from the class in this case based on the 2014 agreement, see ER-432, 491-95, could now be members of the certified class in O'Connor (which expanded the class size from approximately 8,000 to 240,000 drivers), Uber sent out a new arbitration agreement to its drivers nationwide, which purported to "fix" the issue that had led the District Court to find the earlier arbitration clause unenforceable.[14] Uber did so without any warning to or communication with class counsel and in admitted direct response to the District Court's Order. Uber sent out this new arbitration agreement to its drivers across the country, including to members of the certified class in O'Connor as well as putative class members in Yucesoy (in Massachusetts) and putative class members in O'Connor (in states

[13] Uber appealed that Order holding Uber's 2014 arbitration clause unenforceable, which is pending with this Court as Ninth Cir. Appeal No. 15-17420.

[14] Specifically, Uber addressed the District Court's finding that its arbitration clause contained a non-severable PAGA waiver (which rendered the arbitration agreement unenforceable after Sakkab), by purporting to revise the agreement and make the PAGA waiver severable.

other than California and Massachusetts, who would be putative class members in O'Connor should Plaintiffs obtain a reversal of the District Court's ruling limiting the case to California drivers). The agreement on its face stated that the arbitration provision applied to all current cases. ER-288; ER-305 ("this provision will preclude …you from participating in or recovering relief under any current or future class, collective, or representative (non-PAGA) action brought against the Company or Uber by someone else"). Nowhere did this new December 2015 arbitration agreement inform drivers of the District Court's ruling invalidating the previous arbitration agreement, which had allowed drivers who would have been bound by the previous arbitration clauses to participate in these pending cases.[15]

Plaintiffs' counsel learned of Uber's actions when they were contacted by hundreds of drivers beginning early in the morning on December 11, 2015, concerned and confused by the new agreement and what effect it had on their right to participate in the pending cases. ER-285-86. Uber communicated to the press (but not to class counsel) that it would refrain from using this new agreement to

[15] Unlike Uber's previous effort in 2013 to distribute an arbitration agreement just before the O'Connor case was filed, here, Uber distributed an arbitration agreement in the midst of already-filed class actions and in direct response to developments in the litigation that had just dramatically expanded the size of the certified class in O'Connor. Although in 2013, Plaintiffs asserted that the court had the right to invoke its powers under Rule 23(d) because the 30-day opt-out peiord was still running when the case was filed, here, there is no question that these pending cases were *already* on file when Uber rolled out its arbitration clause.

limit the now-certified class in the O'Connor case (though it made no such representations with respect to the other pending cases, and the agreement on its face purports to limit all drivers' right to participate in any class action, including O'Connor class members). ER-275.[16]

Moreover, Uber's misbehavior took place *after* Uber had already been chastised by the District Court previously in this litigation for attempting to "unilaterally limit the size and scope of the class … without being subject to court supervision," by sending out earlier arbitration clauses to its drivers. O'Connor v. Uber Techs., Inc., 2014 WL 1760314, *4 (N.D. Cal. May 2, 2014). Despite the court's earlier chastisement, after months of hotly contested briefing and argument

[16] When Plaintiffs' counsel confronted Uber about its decision to send *ex parte* legal documents to represented class members (as well as potential class members), which purported to waive drivers' right to participate in these cases, Uber stated that it had the District Court's permission to do so. Uber was apparently referring to a brief exchange with Judge Chen in the midst of a 40-minute hearing in a *different* case, involving entirely different counsel, at which class counsel was not present. ER-198:20-199:11; 200. The District Court later clarified that his understanding from this brief exchange in an entirely different case "was that when you say *going forward* and we're talking about the Del Rio case, that the plan was to promulgate a new perhaps 2017 version or 2016 version [agreement]… that would apply to new drivers," and not that Uber would send a new agreement to class members and potential class members in this litigation. OCONNOR-SER-11:17 – 12:8. The court further noted that it "did not anticipate that [the new agreement] would apply to current drivers, certainly not to those in the class who were on the verge of getting notices out … So whatever your intent was, I'm going to tell you my intent, and my intent was not to approve and I had no intent of saying yeah, go ahead and just issue notices to current employees, including class certified class members." Id.

regarding the enforceability of Uber's arbitration clause, and notwithstanding the fact that the litigation was now much farther advanced, Uber took it upon itself to send *another* arbitration agreement to its drivers that clearly sought to limit its liability in pending cases by ensuring that most drivers would not be able to participate in them based upon a class action waiver in the agreement.

SUMMARY OF THE ARGUMENT

In this case, Uber issued a revised arbitration agreement to its drivers, which purported to strip drivers of their right to participate in pending class action cases brought on their behalf – a right which had only just been recognized by the District Court two days earlier when it held Uber's prior arbitration agreement to be unenforceable. Uber sent this revised agreement to represented class members in the O'Connor action, as well as to potential class members, such as the putative class in Yucesoy (and the broader potential class in O'Connor, should Plaintiffs there prevail on their appeal of the District Court's Order limiting the case to California). It did so in clear response to the District Court's Order, issued just two days before, holding Uber's prior arbitration clause unenforceable, and without any clear explanation of the effect of the new agreement on drivers' newly affirmed right to participate in these pending cases.

Uber's actions constitute an improper attempt to "diminish the size of the class and thus the range of potential liability," by attempting to avoid the court's

recent ruling that Uber's previous arbitration agreements were unenforceable. Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193, 1202 (11th Cir. 1985). Rule 23 entrusts courts with broad authority to exercise control over class actions, including communications between defendants and potential class members. See Gulf Oil, 452 U.S. at 99-101 ("Because of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties"); see also Wang, 623 F.3d at 755; Balasanyan, 2012 WL 760566, *3. "Courts applying the Gulf Oil standard have found that *ex parte* communications soliciting opt-outs, or even simply discouraging participation in a case, undermine the purposes of Rule 23 and require curative action by the court." Guifu Li v. A Perfect Day Franchise, Inc., 270 F.R.D. 509, 517 (N.D. Cal. 2010). Thus, the District Court was carrying out its duty to protect the integrity of the class action process and acted well within the scope of its Rule 23(d) powers when it invalidated the misleading agreement and required Uber to obtain court approval before sending any further agreements or communications that would affect drivers' right to participate in these pending cases. See infra, Part II.

However, while the District Court properly held that no further arbitration agreements could be sent to class members in the O'Connor case (and that the new arbitration clause would not apply to member of the certified O'Connor class), it

erred in allowing Uber to continue sending out revised arbitration agreements to putative class members, such as the Massachusetts drivers who are potential class members in the Yucesoy case (and drivers outside California and Massachusetts who are potential class members in O'Connor, should Plaintiffs win their appeal of the District Court's Order limiting the case to California),[17] thereby cutting off their right to participate in pending litigation. While ordering Uber to send corrective notice if it wanted to distribute new arbitration agreements that would affect these drivers' rights was plainly within the District Court's authority under Rule 23(d), the District Court erred by concluding that merely providing a corrective cover letter to putative class members was sufficient to protect these drivers' rights. Allowing Uber to continue to send out these agreements to putative class members going forward permits Uber to essentially convert the Rule 23 opt-out mechanism into an opt-in mechanism by limiting putative classes in already pending (though not yet certified) cases to only those drivers who take affirmative measures to opt out of Uber's revised arbitration clause. Moreover, the promulgation of these revised agreements cannot merely be said to be an ordinary business communication, but instead are an obvious and admitted response to the Court's recent rulings in this ongoing litigation. Uber's actions in distributing

[17] Likewise, Uber's distribution of arbitration agreements to drivers outside California also affected the rights of putative class members in the Mohamed and Gillette cases, which are members of putative national class actions on credit reporting claims.

these agreements simply constitutes a transparent attempt to "unilaterally limit the size and scope of the class … without being subject to court supervision." O'Connor v. Uber Techs., Inc., 2014 WL 1760314, *4 (N.D. Cal. May 2, 2014). Uber should not be permitted to evade the Court's jurisdiction and continue its campaign to unwittingly ensure that drivers cannot participate in ongoing class litigation by repeatedly sending out revised arbitration agreements to putative class members. For all of these reasons, the District Court should have granted Plaintiffs' Emergency Motion for Protective Order in its entirety, and should have barred Uber from promulgating any future arbitration agreements that could limit the ability of drivers to participate in pending class litigation – including not only certified class members in O'Connor, but also to putative and potential class members in Yucesoy, and O'Connor (and other already-filed class cases such as Mohamed).

ARGUMENT

I. The Standard of Review.

"This Court reviews a district court's grant of a preliminary injunction" as well as the scope of such an order, "for abuse of discretion." United States v. Schiff, 379 F.3d 621, 625 (9th Cir. 2004) (citing United States v. Estate Preservation Servs., 202 F.3d 1093, 1097 (9th Cir. 2000); Idaho Watersheds Project v. Hahn, 307 F.3d 815, 823 (9th Cir. 2002). "A trial court abuses its discretion if it

bases its decision on 'an erroneous legal standard or on clearly erroneous factual findings.'" Schiff, 379 F.3d at 625.

II. The District Court Acted Well Within Its Rule 23 Powers In Invalidating Uber's Arbitration Agreement With Respect To Members of The O'Connor Certified Class And In Requiring Approval of Future Communications with Class Members and Putative Class Members.

The District Court's decision to bar Uber from sending further arbitration agreements to certified class members in the O'Connor action was well within its Rule 23(d) powers, and indeed, should have been extended to include *all potential class members* in the pending class cases as well.[18] Thus, in the face of Uber's coercive and misleading campaign to use arbitration agreements to drastically limit its potential liability in pending class cases, the District Court's Order did not even approach the outer limits of its authority. Contrary to Uber's contentions, the District Court's decision to invalidate the agreement and bar further communications absent court supervision properly complied with Gulf Oil's dictates, relying upon "a clear record and specific findings" regarding the abusive and misleading nature of Uber's dissemination of its December 2015 arbitration agreement to class members and putative class members. Gulf Oil Co., 452 U.S. at 90. In Gulf Oil, the Supreme Court recognized that "[b]ecause of the potential for

[18] Uber agreed at the hearing below on Plaintiffs' Emergency Motion for Protective Order that it would not seek to enforce its December 2015 arbitraton agreement against certified O'Connor class members. However, as the District Court noted in its Order, the December 2015 agreement on its face did not indicate this limitation. ER-4.

abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." 452 U.S. at 100. Specifically, Gulf Oil requires that:

> [A]n order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties…In addition, such a weighing—identifying the potential abuses being addressed—should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances.

Id. at 100.[19]

Here, the District Court's Order reflects such a weighing and is based on a clear record and specific findings regarding the detrimental effects of Uber's

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[19] Once a class is certified (as is the case with respect to the certified class members in O'Connor), the District Court's mandate to oversee abusive communications by defendants is even stronger. See Kleiner, 751 F.2d at 1207, n. 28 (noting that "[a]t a minimum, class counsel represents all class members as soon as a class is certified" such that "[t]he court below correctly concluded that the solicitation of exclusions constitutes a 'per se' abuse."). But courts clearly have this power and duty as well with respect to pending class cases that have not yet been certified. See Mevorah v. Wells Fargo Home Mortg., 2005 WL 4813532, *3 (N.D. Cal. 2005) (applying Gulf Oil analysis to precertification communications by defendant to potential class members without regard to the fact that no motion for class certification was filed); Keystone Tobacco Co., Inc. v. U.S. Tobacco Co., 238 F. Supp. 2d 151, 154 (D.D.C. 2002) (Rule 23 provides authority for court to regulate communications between a party and class members, even before a class has been certified); Basco v. Wal-Mart Stores, Inc., 2002 WL 272384 (E.D. La. Feb. 25, 2002) ("[W]here an alleged class action has been filed but certification has not yet been decided, a court may issue a limitation on ex parte contact under Rule 23, if it is clear the defendant is attempting to engage in conduct which would undermine the purposes of the rule.").

promulgation of the December 2015 agreement. The District Court reviewed the plain text of the agreement (which on its face purports to prevent drivers from participating in pending class cases), the manner in which it was presented (in "direct response to the Court's rulings in the ongoing class action litigation" and *not* as part of a "purely [] isolated business decision," see ER-4), as well as a declaration from counsel attesting that within twelve hours of Uber sending out the new agreement, she had received "between 100-200 inquiries from Uber drivers who are concerned, dismayed, and confused about the new arbitration agreement distributed to drivers this morning." ER-275, n. 1.

Relying upon these facts, the District Court found that: (1) recent developments in the litigation "increase[d] the complexity of the legal landscape surrounding the Uber litigation, and may have an impact on drivers' evaluation of the benefits of arbitration versus litigation," (2) the December 2015 agreement impermissibly purported to waive the claims of members of the certified class in O'Connor, and (3) there was "evidence that it has in fact led to considerable confusion among the drivers." ER-3. Based on these findings, the District Court relied on its Rule 23(d) powers to craft an Order that invalidated the agreements, and required approval by the Court or class counsel for future communications with class members and putative class members that affect their rights in the litigation. However, if anything, the District Court's Order was overly cautious

and *too* narrowly tailored, in that it limited the ban on sending further revised arbitration agreements to the certified class members in O'Connor, thereby allowing Uber to continue sending new arbitration agreements to potential class members in other pending, but not yet certified, class cases.[20] Indeed, the District Court's Order was particularly warranted in light of Uber's continued pattern of misusing arbitration, as the District Court had already deemed Uber's prior promulgation of its arbitration agreement to be misleading and abusive under Rule 23, see ER-860-71, and unenforceable under unconscionability and public policy doctrines. ER-500, ER-340. Thus, insofar as the District Court's Order barred Uber from sending further arbitration agreements or other such communications to O'Connor class members, it plainly complied with the dictates of Gulf Oil, and in fact, should have been extended to lend the same protection to putative class members in other pending cases.

Uber argues that the District Court relied "entirely on a single paragraph of inadmissible hearsay from the declaration of plaintiffs' lead counsel" as the basis

[20] Instead, the District Court merely required that Uber include a modest corrective notice when it re-issued the agreement to putative class members in the Yucesoy case as well as potential (but not currently certified) class members in O'Connor (including drivers outside California for whom the court declined to even provide corrective notice that their rights could be affected by O'Connor). ER-6-7, 9-10 (rejecting Plaintiffs' proposal to explain to drivers that O'Connor had been filed as a nationwide class action, which would have informed drivers nationwide that their rights could be at stake in this litigation). Plaintiffs note that ordering Uber to issue corrective notice was well within the District Court's Rule 23(d) powers. See, supra, n. 19.

for its Order, such that there was no clear record on which to base the Order. Br. at 27. Uber is incorrect for several reasons. First, Plaintiffs *did* include declarations from two drivers as attachments to counsel's declaration, which show the drivers' misunderstanding that they had no choice but to agree to arbitrate in order to keep driving for Uber. ER-288-89, ER-313-14. Second, in exigent circumstances such as these, it is entirely appropriate for the Court to rely on a declaration from counsel, and indeed, courts have routinely relied on declarations from counsel as the basis for Rule 23(d) orders that limit communication with class members. See Camp v. Alexander, 300 F.R.D. 617, 623 (N.D. Cal. 2014); Wright v. Adventures Rolling Cross Country, Inc., 2012 WL 2239797, at *4 (N.D. Cal. June 15, 2012). Moreover, the District Court based its assessment not only on the declaration, but on the circumstances of Uber's behavior, noting that "[t]here can be little doubt that the purpose of the new Agreement is not purely an isolated business decision but one which is informed by Uber's litigation strategy," given that it was promulgated less than two days after the Court invalidated the previous arbitration agreement, and purported to nullify the effects of that Court Order (at least for not-yet-certified cases). ER- 4. Indeed, the agreement was plainly aimed at undercutting the District Court's recent decision finding Uber's prior agreement invalid, and was an attempt to "diminish the size of the class and thus the range of [Uber's] potential liability." Kleiner, 751 F.2d at 1202. Uber distributed the

agreement without informing drivers that the District Court had just ruled that Uber's prior agreement was invalid and that they could now participate in these pending cases. The District Court recognized that material changes in the posture of the cases rendered Uber's actions misleading, deceptive, and confusing to drivers and properly found that "[b]ecause the legal landscape has become materially more complicated for the drivers, it is imperative that drivers be given clarity, and that the ability of drivers to opt out at this juncture be clear and non-cumbersome." ER-4.

Uber further argues that counsel's declaration "does not explain … why the [December 2015] Arbitration Provision was suddenly *more* confusing that the (virtually identical) Arbitration Provision" Uber had sent out previously. Br. at 27 (emphasis in original). Uber contends that the District Court had no justification for invoking Rule 23(d) because Uber's revised December 2015 agreement was substantially similar to the earlier agreements it had sent to drivers previously. Br. at 26. This argument willfully ignores the obvious consequences of Uber's actions and the District Court's own explanation; Uber sent out the December 2015 agreement two days after the District Court had ruled that its prior agreement was unenforceable and thereby expanded the certified class in O'Connor, but Uber made *no mention* of this new ruling or how accepting this revised arbitration agreement would affect drivers' standing in the pending cases now that the prior

agreement had been ruled unenforceable. In other words, less than two days after a federal court ordered that drivers could participate in several pending class action cases, Uber sent a revised arbitration agreement that purported to strip away that right, without even informing drivers that a Court had conferred it in the first place. To suggest that this communication was not misleading and deceptive is simply untenable. The District Court explained as much in its Order, noting that "drivers who failed to opt out of [Uber's prior arbitration] agreements may still believe they are required to arbitrate and thus pay little heed to the opt out provisions of the new arbitration agreement," not realizing that the prior agreements have now been found unenforceable. ER- 3. See also OCONNOR-SER-16:12-17 ("It may be the case that some people who failed to opt out, not fully understanding that they are not bound at least as we sit here right now applying those early arbitration agreements, may say -- may pay little heed to the new arbitration agreement because they may think well, I didn't -- I didn't opt out. I'm stuck. Well, maybe they are not stuck. We will find out.").[21]

[21] Moreover, while Uber suggests that the "December 2015 Agreement was *the same* as the Arbitration Provision Uber was issuing to drivers … *with the district court's blessing*" earlier in the case, this is a gross mischaracterization of the record. Br. at 26 (emphasis in original). Contrary to Uber's characterization, the District Court did not "bless" the prior agreements. Indeed, the Court "did *not* 'draft' or 'approve' the *substance* of the 2014 Agreements," but rather simply "aided in drafting a corrective *notice*," which was designed to ameliorate the misleading and abusive nature of Uber's roll-out of the agreements at the particular

Moreover, as Plaintiffs clearly explained below, because class members in O'Connor would "soon receive class notice … and will learn they have the right to 'opt out' of the class," Uber's communication and the "public discussion that has now ensued regarding 'opting out' of the arbitration clause" would lead many drivers to "misunderstand and believe they need to 'opt out' in order to be covered by the [class action] case." ER- 275, n. 1. This issue further exacerbated the confusing and misleading nature of Uber's communication to class members.[22]

Next, Uber argues that "there could be no likelihood of serious abuses justifying a Rule 23(d) order" for O'Connor class members because Uber disclaimed any intent to enforce the December 2015 agreement to limit the rights

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time and in the particular context in which they were originally sent. Mohamed, 2015 WL 4483990, *4-5 (emphasis in original). To suggest that the District Court's previous Order for corrective notice somehow gave Uber an unlimited license to distribute new arbitration agreements to class members going forward is plainly incorrect.

[22] Uber claims that its December 2015 agreement must not have been misleading because a number of drivers did in fact opt out of the arbitration clause. Br. at 27-28. However, it seems obvious that many of these drivers were those who contacted Plaintiffs' counsel, expressing confusion and dismay (and who then learned they should opt out in order to preserve their rights to participate in the pending class actions). ER-285-89; OCONNOR-SER-51. However, for the countless drivers who did not know to contact Plaintiffs' counsel, there is no telling what effect Uber's communication might have had. Indeed, that is the point; the Court is supposed to oversee communications with class members that affect class members' rights in the litigation, and it was patently improper for Uber to unilaterally send such a communication without consulting Plaintiffs' counsel or the Court.

of class members with respect to the claims that were certified in this case. Br. at 28. However, Uber did not include this limitation *in the new agreement*, and a class member receiving Uber's new agreement would have absolutely no reason to know that Uber has apparently agreed not to invoke the new arbitration agreement with respect to the O'Connor action. The District Court recognized as much in its Order, when it invalidated the agreement and prohibited Uber from sending any further arbitration agreements to class members in O'Connor. ER-4 – ER-5 ("Uber contends that it does not intend to invoke the new agreement against the members of the certified class as to certified claims up to the date of class certification; however, the new arbitration agreement does not reflect this limitation").

Indeed, less than a month later, Uber had already walked back its prior position and argued that any future arbitration agreements it issues "should be enforceable vis-à-vis all class members…including members of the certified O'Connor class." See OCONNOR-SER-2. Uber's behavior makes clear that, absent Court supervision, it cannot be trusted to communicate forthrightly with its drivers regarding the pending litigation and their rights. Indeed, Uber did not even inform or consult class counsel about the December 2015 arbitration agreement until many hours *after* the agreements had already been sent to the class. In fact, it is not clear when Uber's counsel would have deigned to inform Plaintiffs' counsel of its intentions at all, had she not been flooded with calls and emails from

concerned and confused drivers, prompting her to reach out to Uber's counsel.[23] This behavior alone demonstrates Uber's contempt for the protections that Rule 23 imposes on the class action process.[24] Following the District Court's orders on class certification, Plaintiffs' counsel are now the legal representatives of the O'Connor class and they should *at the very least* have been consulted before their clients were sent legal documents that purport to waive their right to participate in the case. The District Court was entitled to take note of this fact and to issue an order preventing Uber from showing the same disregard in the future, by requiring prior approval of the Court or class counsel before Uber sends communications to

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[23] Indeed, Plaintiffs' counsel was forced to learn about Uber's intentions from statements in the press, before she ever received an explanation from Uber. ER-274 – ER-275.

[24] "[C]ourts have held that, 'once a class has been certified, the rules governing communications [with class members] apply as though each class member is a client of the class counsel.'" Harris v. Vector Mktg. Corp., 716 F. Supp. 2d 835, 847 (N.D. Cal. 2010) (quoting Manual of Complex Litig. § 21.33, at 300 (4th ed. 2004)); see also Parks v. Eastwood Ins. Servs., 235 F.Supp.2d 1082, 1083 (C.D.Cal.2002) (stating that, "[i]n a class action certified under Rule 23, ... absent class members are considered represented by class counsel unless they choose to 'opt out'"); Jacobs v. CSAA Inter-Ins., 2009 WL 1201996, *3 (N.D. Cal. May 1, 2009).

However, even before a class is certified, courts have power to exert control over communciations with putative class members during the pre-certification stage. See, e.g., Mevorah v. WellsFargo Home Mortg., 2005 WL 4813532, *3 (N.D. Cal. 2005); Keystone Tobacco Co., Inc., 238 F. Supp. 2d at 154; Basco, 2002 WL 272384 at *3; Hampton Hardware, Inc. v. Cotter & Co., 156 F.R.D. 630, 634 (N.D.Tex.1994) (limiting the defendant's communications with class members prior to certification); Haffer v. Temple Univ. of Commonwealth Sys. of Higher Educ., 115 F.R.D. 506, 512 (E.D.Pa.1987).

the class in the future, and by barring any further arbitration agreements from being sent to O'Connor class members during the pendency of the case.

Uber insists that the District Court's decision to require Uber to obtain prior approval from the Court or class counsel before sending out future agreements to drivers was a violation of its First Amendment rights and constitutes "an unprecedented restraint that finds no basis in Rule 23(d) or existing case law." Br. at 23. This is simply not the case. Indeed, Gulf Oil expressly provides for limitations on speech under the First Amendment, when a Court determines that the balance between "the need for a limitation and the potential interference with the rights of the parties," requires it. 452 U.S. at 101. Thus, Courts have routinely exercised their powers under Rule 23(d) to limit communications with class members (or putative class members)[25] going forward, and to require Court

[25] Indeed, Gulf Oil itself is explicit that this power extends to communications with *potential* class members such as the putative class members in the Yucesoy case. Gulf Oil Co., 452 U.S. at 104 ("We recognize the possibility of abuses in class-action litigation, and agree with petitioners that such abuses may implicate communications with *potential* class members") (emphasis added). See also supra, n. 19. Likewise, courts have the power under Rule 23(d) to exercise control over communications with potential class members for whom the Court has denied class certification without prejudice. See Cty. Of Santa Clara v. Astra USA, Inc., 2010 WL 2724512, *3 (N.D. Cal. July 8, 2010) (where class certification had been initially denied, but could still be raised later in the litigation, the Court still found communications with putative class members to be misleading and improper). Thus, the District Court also had the power to regulate communications with respect to putative class members who Plaintiffs have previously sought to include

approval before sending future communications. See, e.g., In re Initial Pub. Offering Securities Litig., 499 F. Supp. 2d 415, 421 (S.D.N.Y. 2007) (holding that "before Bechtold may issue any class-wide communication or press release, he must submit to the Court a copy of the communication for *in camera* review); Belt v. Emcare, Inc., 299 F. Supp. 2d 664, 669 (E.D. Tex. 2003) (citing to Gulf Oil in FLSA case and enjoining "all Defendants from making any ex-parte communications with absent class members regarding this action until the end of trial"); Buck v. Republic Services, Inc., 2013 WL 2321784, *2 (E.D. Mo. May 28, 2013) ("[T]he Court orders Defendants to provide notice to Plaintiffs' counsel of any written communication they intend to send potential class members three days prior to sending the communication. Plaintiffs will then will have three days to file a motion with the Court addressing any concerns"); Recinos-Recinos v. Express Forestry, Inc., 2006 WL 197030, *14 (E.D. La. Jan. 24, 2006) (ordering that "defendants and their agents shall refrain from any unilateral communications with plaintiffs, opt-in plaintiffs, potential plaintiffs and/or their families *regarding the captioned litigation*" pending the Court's ruling on class certification) (emphasis in original); Jack Faucett Associates, Inc.. v. Am. Tel. and Tel. Co., 1985 WL 6267,

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in the O'Connor case (such as drivers from other states if they are successful on their appeal, or California drivers that the District Court excluded from the certified class because they drove through third-party transportation companies or under corporate names).

at *1 (D.D.C. Sept. 30, 1985) (ordering that defendant "shall not directly or indirectly seek to contact, through the United States mail or any other mode of communication, any class member … concerning this litigation without prior approval of the Court"). Like all of these courts, the District Court weighed Uber's First Amendment rights against the other interests at stake, as required by Gulf Oil, and found that restrictions on Uber's further communications were warranted.[26]

[26] Uber also argues that the District Court's requirement that corrective notice accompanying future arbitration agreements sent to potential class members must include a "push button" hyperlink to the opt-out email address, is "bizarre" and "bear[s] no relationship to the alleged confusion" caused by Uber's actions. Br. at 31. While Plaintiffs' maintain that the corrective notice is inadequate to protect potential class members and that Uber should be barred entirely from sending further agreements to potential class members, with or without corrective notice, see infra, Part III, Uber's attack on the corrective notice is entirely unwarranted. The District Court's Order simply requires a clear and concise cover letter, explaining "the current legal landscape," and providing a "renewed opportunity to opt out." ER-6. Contrary to Uber's arguments, the District Court's goal of minimizing confusion was well served by its Order requiring a "succinct" corrective cover letter and "easily accessible opt-out function" that is embedded right in the cover letter, see ER-7; the District Court obviously recognized that confused drivers needed to be provided with a clear and concise explanation of Uber's agreement and its effect on their rights in light of the current posture of the litigation. Requiring Uber to place an opt-out hyperlink in the body of a one-page email was intended to enhance the chances that drivers would actually read and understand the corrective notice and how to participate in the litigation if they choose to do so. Nothing about this process "encourage[s] drivers to make an uninformed decision to opt out of arbitration," Br. at 36, and indeed, it would be entirely unnecessary to send this corrective cover letter at all if the District Court did not now have to unwind the confusion caused by Uber's improper communications. The cover letter simply provides drivers with information and a clear, easy way to participate in the litigation, and unless Uber's real goal is dupe

The First Amendment cases that Uber cites in support of its position, see Br. at 31, do not even mention Gulf Oil or Rule 23 and instead involve political speech. As such, these cases are simply inapposite. When viewed in the context of Gulf Oil's weighing test, Uber's hyperbolic assertions about its First Amendment rights ring hollow. Thus, in light of this authority and Uber's pattern of disseminating abusive and misleading arbitration agreements during this litigation, it is clear that the District Court acted well within the purview of its Rule 23 powers in requiring that Uber refrain from sending any further arbitration agreements to O'Connor class members and seek prior Court approval before sending further communications that affect these drivers' rights.

III. The District Court Erred In Holding That Uber Could Limit the Scope of Other Putative Classes, For Cases Already Filed, By Sending Out New Arbitration Agreements That Purported to "Fix" The Invalidity That Led The Court to Hold The Previous Arbitration Clause Invalid.

While the District Court clearly had the power to oversee communications with class members and putative class members and to require the issuance of corrective notice, the Court erred in denying in part Plaintiffs' Emergency Motion for Protective Order, and thereby allowing Uber to continue distributing arbitration agreements to potential class members in these already-filed cases going forward. As noted earlier, there are several categories of "potential" class members at issue

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drivers into agreeing to arbitration, it is unclear how providing a "push-button" opt out mechanism would cause any harm to Uber at all.

here. First, there are those drivers who are putative class members in the Yucesoy case (Uber drivers who have driven for Uber in Massachusetts). Second, Plaintiffs in O'Connor originally filed the case as a national class action, and they have reserved the right to appeal the District Court's decision to limit the case to California (as well as the Court's decision to exclude from the class those drivers who drove under corporate or fictitious names or through third party transportation companies in California, see ER-498, 344-48]). These individuals continue to be potential class members in the O'Connor litigation, and by sending out its arbitration agreement to these drivers, Uber effectively unilaterally cut off Plaintiffs' ability to appeal these issues for the vast majority of these putative class members (who as a practical matter, will not opt out of an arbitration agreement, no matter how informative the corrective notice may be). Thus, the District Court should have enjoined enforcement of Uber's new agreement, not only with respect to members of the certified class in O'Connor, but also with respect to putative class members who Plaintiffs have previously sought to include in the O'Connor case as well. See County Of Santa Clara, 2010 WL 2724512, *3 (where class certification had been denied, but could still be raised later in the litigation, the Court still found communications with putative class members to be misleading and improper).

Thus, it was error for the District Court to distinguish between members of the certified class in O'Connor and potential class members in Yucesoy and O'Connor (as well as other pending class cases, such as Mohamed) and to allow Uber to continue sending arbitration agreements to potential class members going forward. Because the arbitration agreements would require drivers to take action to opt out of the agreements, so as to be covered by already pending class cases, the District Court's Order effectively allows Uber to convert these opt-out Rule 23 class actions into opt-in proceedings and thereby permits Uber to limit its own liability from pending class claims by drastically reducing the scope of those potential classes.

Numerous courts have held that where an employer, during the pendency of class litigation, distributes to putative class members documents that could impact the legal rights of employees in that litigation, the court should exercise its powers pursuant to Rule 23(d) to ensure that those documents do not undermine the rights of the putative class members. See, e.g., Kleiner, 751 F.2d. at 1202-03 (upholding district court's invalidation of opt-out forms obtained through ex parte phone calls to defendant bank's customers); Slavkov v. Fast Water Heater Partners I, LP, 2015 WL 6674575, *2, *7 (N.D. Cal. Nov. 2, 2015) (noting that "Courts in this district have limited communications, as well as invalidated agreements that resulted from those communications, when they omitted critical information or were otherwise

misleading or coercive" and holding "settlement releases signed by a putative class members … are invalid"); Guifu Li, 270 F.R.D. 509 (refusing to enforce opt-outs signed by employees during the pendency of a class action suit); Wang v. Chinese Daily News, 236 F.R.D. 485, 489 (C.D. Cal. 2006) (invalidating signed opt-out forms obtained by defendant employer during workplace meetings); County of Santa Clara v. Asta USA, Inc., 2010 WL 2724512, *4 -*6 (N.D. Cal. 2010) (refusing to enforce releases of putative class members in a consumer class action through an "accord and satisfaction" which did not contain an explanation of plaintiffs' theory of the case or contact information for plaintiffs' counsel); Freidman v. Intervet Inc., 730 F. Supp. 2d 758, 764 (N.D. Ohio 2010) (invalidating settlement releases obtained from putative class members that failed to clearly advise them that they were giving up the right to participate in putative class action).[27]

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[27] These courts have also recognized that the risk of coercive solicitation of opt-outs and releases is particularly acute in the context of employment relationships, which Plaintiffs here contend is the relationship between Uber and its drivers (and which the District Court has already held presumptively is the relationship, see O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1145 (N.D. Cal. 2015) ("[T]he Court has determined that the Plaintiffs are Uber's presumptive employees…"). See, e.g., Brown v. Mustang Sally's Spirits & Grill, Inc., 2012 WL 4764585 (W.D.N.Y. Oct. 5, 2012) ("Where defendants are also the employers of potential class action plaintiffs, the workplace relationship with the employees and their knowledge of sensitive information about current and former employees, put them in a position to exercise strong coercion in connection with potential class members' decisions . . . ."); Austen v. Catterton Partners V, LP, 831 F.Supp.2d. 559, 568 (D. Conn. 2011) ("[W]hen the defendant is in an ongoing, current

Courts have recognized that, when class litigation is pending, Rule 23(d) permits them to supervise any communications with putative class members that could affect their rights. These communications include documents that purport to have the class members opt out of the litigation, or release their claims, or agree to arbitration clauses that would also prevent them from participating in the litigation. Indeed, where arbitration agreements strip a putative class member of the right to participate in pending class action litigation, the arbitration agreement functions effectively the same as *ex parte* releases or class opt-out forms solicited by defendants, and these have all been routinely invalidated by courts. The distribution of arbitration agreements (containing class waivers) distributed in the midst of a pending class class deprives potential class members of their right to participate and recover in the case without their having to take any action – which is the point of a class action. See infra, Part III.A. Thus, such agreements effectively eliminate the ability of most class members to obtain relief sought in the case because, as the defendant well knows, as a practical matter, few class members will pursue individual arbitrations.

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business relationship with members of a putative class, for example an employment relationship, it may be prudent to preempt the defendant's ability to use that relationship and pressure class members to make factual concessions or settle claims"); A Perfect Day Franchise, Inc., 270 F.R.D. at 517-19; Ralph Oldsmobile Inc. v. General Motors Corp., 2001 WL 1035132, at *2 (S.D.N.Y. Sep. 7, 2001); Burrell v. Crown Cent. Petroleum, Inc., 176 F.R.D. 243, 244 (E.D. Tex. 1997).

Thus, courts have refused to enforce arbitration clauses in agreements which are distributed to employees during the pendency of litigation and which negatively impact these putative class members' right to participate in an already-pending case. See, e.g., Billingsley v. Citi Trends, Inc., 560 F. App'x 914, 919 (11th Cir. 2014) (refusing to enforce agreements distributed after filing of a collective action); Russell v. Citigroup, Inc., 748 F.3d 677, 680 (6th Cir. 2014) (refusing to enforce an arbitration agreement signed by a plaintiff in an ongoing lawsuit where the plaintiff understandably "expected the contract to apply only to future lawsuits" and the agreement was presented directly to the represented litigant and not through his counsel); Jimenez v. Menzies Aviation Inc., 2015 WL 4914727, *6 (N.D. Cal. Aug. 17, 2015) (refusing to compel arbitration of putative class members where new arbitration policy was disseminated during the pendency of the class action and noting that "[a]t best, ….[the] new arbitration policy raises the specter of interference with the rights of … putative class members; at worst, it was a deliberate effort to undermine pending class litigation"); Balasanyan v. Nordstrom, 2012 WL 760566 (S.D. Cal. Mar. 8, 2012) (invalidating new arbitration agreement with a class waiver, distributed during pendency of a class action); Espinoza v. Galardi S. Enterprises, Inc., 2015 WL 9592535, *3 (S.D. Fla. Dec. 31, 2015) (refusing to enforce arbitration agreements distributed during the pendency of an FLSA collective action); Piekarski v. Amedisys Illinois, LLC, 4 F.

Supp. 3d 952, 956 (N.D. Ill. 2013) (refusing to enforce arbitration agreements distributed during the pendency of case); Williams v. Securitas Sec. Serv. USA, Inc., 2011 WL 2713741, *2 (E.D. Pa. July 13, 2011) (same); In re Currency Conversion Fee Antitrust Litigation, 361 F.Supp.2d 237 (S.D.N.Y. 2005) (refusing to enforce arbitration agreements distributed during the pendency of case); Carnegie v. H&R Block, Inc., 180 Misc.2d 67, 70 (N.Y.S.C. Jan. 7, 1999) (refusing to enforce arbitration agreements signed by potential class members after the lawsuit was filed). These cases recognize that arbitration agreements can act similarly to releases or class opt-outs by taking away potential class members' right to participate in a pending case. Their inability to participate in pending class litigation effectively deprives them of the ability to obtain relief because, as defendants well know, few employees will be able to, or as a practical matter will actually pursue individual arbitrations.

That an arbitration agreement promulgated during the pendency of litigation includes an opt-out provision (as Uber's does here), really makes no difference. Particularly where the agreement does not adequately disclose the consequences of failing to opt out of arbitration (i.e. that plaintiffs may waive their rights in pending litigation), or where the opt out mechanism is too unreasonable and burdensome, the opt-out right does not protect the putative class members' rights. See Piekarski,

4 F. Supp. 3d at 956; Securitas, 2011 WL 2713741, *2 (refusing to enforce arbitration agreement imposed during pendency of putative class action).

However, even when a defendant includes a clear and non-burdensome opt-out mechanism, the distribution of arbitration clauses with opt-out provisions effectively converts a pending class case from an opt-out class action under Rule 23 into an opt-in proceeding, because it requires the class member to affirmatively take action in order to have their rights vindicated in the case, as opposed to the Rule 23 opt-out process, whereby class members need not take any action to have their rights vindicated. Thus, by distributing such agreements, employers can effectively convert a Rule 23 opt-out process to an "opt-in" process, albeit without any supervision or approval by the court. See infra, Part III. A. Thus, in doing so, the defendant is usurping the court's role as the overseer of the class action process as provided for in Rule 23. Id. at *4 ("Securitas's proposal to allow its [] employees a second 30–day opt out period if the court conditionally certifies a class is also insufficient because it is *for the court*, not Securitas, to determine the amount of time employees shall have to consider their right to join this action") (emphasis added). Likewise, where the defendant has disseminated arbitration agreements as part of a clear litigation strategy to thwart participation in the case and limit its own liability, it is clear that the arbitration agreement is functioning just like a release or

class opt-out distributed by defendants in order to limit their liability in a pending class action, and it should be treated accordingly. See infra, Part III. C.

Here, Uber's agreement was an attempt to effectively convert the pending Rule 23 class actions already pending (such as Yucesoy) into opt-in actions. Further, it was disseminated in a clear attempt to nullify the District Court's December 9, 2015, Order, which would have cleared the way for these drivers to participate as potential class members in the Yucesoy case (as well as other class cases already pending). As such, these agreements undermine the integrity of the class action process, and the District Court erred in allowing Uber to reissue them with the addition of a minor corrective cover letter.[28]

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[28] The minor changes of the corrective cover letter that the District Corder would, as a practical matter, make no difference to whether drivers would understand what rights were at stake and what they would need to do to protect their rights. Even the corrective notice ordered by the court would have been presented to drivers as a tiny-print 17-page legally dense agreement shrunk to the size of an iPhone screen. OCONNOR-SER-151-67.

Uber has pointed to the fact that so many drivers did opt out of the December 2015 agreement as evidence that the agreement did provide them adequate notice of their rights. Br. at 18-19. However, as a practical matter, it appears evident that the vast majority (if not all) of the drivers who opted out of this agreement were those who were in contact with Plaintiffs' counsel, or viewed counsel's website, www.uberlawsuit.com, which explained to drivers what was at stake with respect to the arbitration clause, or learned about it from other drivers, or from the media (who have been closely following this case and this issue in particular). See Yucesoy, Civ. A. No. 3:15-cv-00262 (N.D. Cal.), Dkt. 103. It does not appear likely that any significant number of drivers actually opted out of the December 2015 arbitration clause because they had actually seen it, read it, and understood it. Plaintiffs' counsel submitted evidence regarding the large number of drivers who contacted her firm in the wake of receiving the December 2015

With or without a corrective notice (which as a practical matter would at most only marginally increase the understanding of putative class members regarding what rights they have at staike), the result is the same: if a company such as Uber is permitted to distribute new aribitration agreements while a class case is pending, so as to dramatically decrease the number of potential class members who might be able to participate in the case, it is thus able to undermine the protections provided by Rule 23 to ensure that a court will oversee and supervise the fair administration and prosecution of a class action. Rule 23 provides courts with the power – and responsibility – to ensure the integrity of the class process. Allowing a defendant to undermine that integrity by unilaterally limiting the scope of the potential class and dictating the terms under which someone can participate as a class member (including effectively turning an "opt-out" process to an "opt-in" process) undermines that integrity.

Thus, the District Court's Order should be reversed insofar as it failed to grant Plaintiffs' Emergency Motion for Protective Order in its entirety, and allowed Uber permission to continue issuing arbitration agreements to putative class members in these cases and thereby limit its potential liability and the ability of those potential class members to participate in pending litigation.

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agreement and who expressed confusion regarding whether they needed to opt out or not opt out in order to participate in the class action, as well as how to opt out. ER-285-89, OCONNOR-SER-51-52.

A. By Allowing Uber to Distribute New Arbitration Agreements to Putative Class Members in Cases Already Filed, the Court Essentially Converted These Class Action Cases From Opt-Out To Opt-In Proceedings, Thus Undermining the Dictates of Rule 23.

Uber's distribution of its December 2015 arbitration agreement has required drivers to take an affirmative step to remain potentially a part of these proceedings; drivers must opt out of arbitration in order to, in effect, *opt in* to these cases. Uber's *de facto* imposition of an opt-in regime, which requires an affirmative response from would-be class action members, runs counter to the nature and purpose of Rule 23. Courts have consistently rejected attempts to convert a Rule 23 class action into a de facto opt-in proceeding, such as, for example, by requiring "mandatory class-member questionnaires" on pain of dismissal. Kern v. Siemens Corp., 393 F.3d 120, 125 (2d Cir. 2004); see also Enter. Wall Paper Mfg. Co. v. Bodman, 85 F.R.D. 325, 327 (S.D.N.Y. 1980) (rejecting the notion that "each person receiving notice be required to file a statement of claim in order to qualify as a class member"); Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1557 (11th Cir.1986) ("Used in a Rule 23(b)(2) setting, a discovery order threatening dismissal for non-compliance amounts to no more than an affirmative 'opt-in' device—that is, it requires passive class members to take positive action to stay in the suit."); McCarthy v. Paine Webber Group, Inc., 164 F.R.D. 309, 313 (D.Conn.1995) ("Dismissal of an absent class member's claims as sanctions for

failure to answer a questionnaire is contrary to the opt-out policy of Rule 23"). Specifically, courts have recognized that:

> requiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step.

Kern, 393 F.3d at 124. Thus, by requiring would-be class members to take an extra step to participate in the litigation, Uber has subverted the opt-out mechanism that is fundamental to the Rule 23 class action.[29]

Rule 23's opt-out mechanism serves a critically important purpose by assuring effective enforcement of wage laws, and mitigating against a number of factors that would otherwise discourage workers from vindicating their rights under those laws. It is widely recognized that opt-out class actions will result in greater participation, and thus, better enforcement of the wage laws, than an opt-in process. Commentators have generally recognized that, where cases are governed by an "opt-in" mechanism (such as under the FLSA), opt-in rates are typically in the range of 15 to 30 percent of a potential class. In contrast, where cases are

[29] Uber's actions are particularly egregious with respect to the certified class in O'Connor where an opt-out class under Rule 23 has already been certified. Plaintiffs have already satisfied the stringent requirements of class certification, only to have the entire process of court-supervised notice undermined unilaterally by the defendant, who did not even consult or inform class counsel of its intentions.

governed by the "opt-out" mechanism of Rule 23, typically very few class members opt out (less than 3% in employment law class actions on average). See infra, n. 36. Thus, "there is widespread agreement that an opt-in regime results in fewer workers advancing wage claims than under an opt-out regime." Brunsden, 29 Berkeley J. Emp. & Lab. L. at 297. Moreover, Rule 23's opt-out regime mitigates against a number of factors that discourage participation in an opt-in process, including lack of knowledge or understanding regarding the laws,[30] small claim amounts,[31] perceived and actual risks of taking affirmative action against

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[30] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 813 (1985) (a potential class may be "so unfamiliar with the law" that he will not sue individually or affirmatively request to be included in a legal action); Moscarelli v. Stamm, 288 F.Supp. 453, 461 (E.D.N.Y. 1968) ("One of the purposes of a class action is to provide a remedy for those who have been injured by a fraudulent course of conduct but who, because of their economic situation or ignorance, are unable to protect themselves by separate lawsuits.").

[31] See, e.g., McLaughlin v. Liberty Mut. Ins. Co., 224 F.R.D. 304, 312 (D. Mass. 2004) (lack of incentive to bring individual claims); Phillips Petroleum Co., 472 U.S. at 812-13 (one of the advantages of opt-out class actions is that each individual's "plaintiff's claim may be so small[] . . that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required"); Mace v. Van Ru Credit Corp., 109 F.3d 338, 345 (7th Cir. 1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."); Chase v. AIMCO Properties, L.P., 374 F. Supp. 2d 196, 198 (D.D.C. 2005) ("individual wage-and-hour claims might be too small in dollar terms to support a litigation effort").

one's employer,[32] educational and language barriers and transitory worker populations,[33] and general inaction, non-receipt or non-opening of legal notices, and reluctance to sign unrequested legal papers. All of these advantages of the Rule 23 class action mechanism are lost when a defendant is permitted to unilaterally limit participation in the class by distributing an arbitration agreement to potential class members after a case is filed but prior to class certification.

Indeed, it has been widely recognized that Rule 23's opt-out regime is fundamentally different from the opt-in method utilized in FLSA collective actions. The two methods have been described as "polar opposites." See John C. Coffee, Jr., Litigation Governance: Taking Accountability Seriously, 110 Colum.

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[32] See, e.g., Guzman v. VLM, Inc., 2008 WL 597186, *8 (E.D.N.Y. Mar. 2, 2008) (citing workers' "fears of retaliation"); Ramirez v. RDO-BOS Farms, LLC, 2007 WL 273604, *2 & n.1 (D. Or. Jan. 23, 2007) (noting evidence that workers may not have opted in to FLSA collective action because they were "fearful to join"); Jankowski v. Castaldi, 2006 WL 118973, *2 (E.D.N.Y. Jan. 13, 2006) (reasoning that potential class members might not have opted in to the FLSA action due to fear of reprisal, particularly given their citizenship status); Ingram v. Coca-Cola Co., 200 F.R.D. 685, 701 (N.D. Ga. 2001) ("[a]bsent class treatment, each employee . . . would have to undertake the personal risk of litigating directly against his or her current or former employer).

[33] Leyva v. Buley, 125 F.R.D. 512, 518 (E.D. Wash. 1989) ("Given the circumstances of the potential class members, a class action appears superior to joining each migrant worker individually, or requiring them to bring independent actions. With their lack of English, their presumably limited understanding of the legal system, the fact that few live permanently within the Eastern District of Washington, and their generally indigent status, it is highly unlikely that the individual plaintiffs would pursue this litigation if class certification were not allowed").

L. Rev. 288, 301 (2010); see also Haro v. City of Rosemead, 94 Cal. Rptr. 3d 874, 877-78 (Cal. App. 2d Dist. 2009) ("The procedural dynamics of a collective action when plaintiffs opt in are different from the class action when parties may opt out of the class"). In fact, "substantial legal authority supports the view that by adding the 'opt out' requirement to Rule 23 in the 1966 amendments, Congress *prohibited* 'opt in' provisions by implication." Kern v. Siemens Corp., 393 F.3d 120, 124 (2d Cir. 2004). "In sum, [opt-in] actions are not class actions." Haro, 94 Cal. Rptr.3d at 877-78; see also Clark v. Universal Builders, Inc., 501 F.2d 324, 340 (7th Cir.1974) ("[T]he requirement of an affirmative request for inclusion in the class is contrary to the express language of Rule 23(c)(2)(B)"); Enter. Wall Paper Mfg. Co. v. Bodman, 85 F.R.D. 325, 327 (S.D.N.Y. 1980) ("Rule 23(c)(2)(B) calls for a notice that enables prospective members to opt-out, in language strongly suggesting the impropriety of opt-in requirements").

Here, by requiring drivers to "opt-out" of Uber's revised arbitration agreement in order to remain part of pending class action cases, Uber effectively turned Rule 23 on its head and converted these cases into opt-in proceedings rather than the opt-out class action proceedings envisioned by Rule 23.[34] In other words,

[34] As Plaintiffs vigorously argued in their Emergency Motion for Protective Order, Uber's actions have caused confusion (and will continue to do so if Uber is permitted to continue sending revised agreements to putative class members unchecked). See ER-275 to ER-286; Makaeff v. Trump U., LLC, 2015 WL 5638192, at *5 (S.D. Cal. Sept. 21, 2015) ("[A]n opt-out card included with the

Uber's actions have required drivers to take an affirmative step to remain potentially a part of these proceedings; drivers must opt out of arbitration in order to, in effect, *opt in* to these cases – a step that discourages many (and would effectively eliminate) would-be class members.[35] See, e.g., Samuel Issacharoff & Geoffrey P. Miller, Will Aggregate Litigation Come to Europe?, 62 Vand. L. Rev. 179, 203-04 (2009) ("American experience suggests that the opt-in procedure will face difficulty in attracting widespread participation."); Judith Resnik, Fairness in Numbers: A Comment on at&t v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers, 125 Harv. L. Rev. 78, 140, n. 367 (2011) ("The FLSA's collective action mechanism has been criticized as less effective than Rule 23."); De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 310 (3d Cir. 2003) ("Under most circumstances, the opt-out class will be greater in number, perhaps even exponentially greater"

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notice could very well be construed by many class members as an opt-*in* card, resulting in class members unwittingly excluding themselves from the litigation."); Leuthold v. Destination Am., Inc., 224 F.R.D. 462, 470 (N.D. Cal. 2004) ("Confusion would likely result in asking potential plaintiffs both to opt in and to opt out of the claims in this suit.").

[35] Uber's motives are clear: "[i]t is no secret that banks, insurance companies, and other potential corporate defendants do not like class actions. Today, such potential defendants, in a broad array of industries, hope that they have found a surreptitious way to defeat the feared class action: mandatory binding arbitration." Jean R. Sternlight, As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?, 42 Wm. & Mary L. Rev. 1, 5 (2000).

than an opt-in class).[36] Uber should not be permitted to limit the size of the class and to do away with the advantages of the Rule 23 class action mechanism by unilaterally limiting participation in the class through promulgation of an arbitration agreement during the pre-certification stage.

B. The FAA Does Not Preempt Fed. R. Civ. P. 23 And Does Not Grant Uber An Unfettered Right to Distribute Arbitration Agreements To Putative Class Members So as to Unilaterally Undermine Rule 23 And Engage in Gamesmanship With Respect to Pending Class Litigation.

Uber decries the District Court's interference with its contracts and suggests that it has an absolute and inviolable right to promulgate arbitration agreements whenever and however it pleases, relying on the Supreme Court's decisions in AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011), and American Exp. Co.

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[36] "Historically, the FLSA's opt-in mechanism has limited the size of the FLSA action, with estimates indicating that typically only between fifteen and thirty percent of potential plaintiff-employees opt-in." See Rachel K. Alexander, Federal Tails and State Puppy Dogs: Preempting Parallel State Wage Claims to Preserve the Integrity of Federal Group Wage Actions, 58 Am. U.L. Rev. 515, 518 (2009); see also Andrew C. Brunsden, Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts, 29 Berkeley J. Empl. & Lab. L. 269, 291-94 & n.125 (2008) (average opt-in rate of 15.7% from 21 cases reviewed); Gary L. Sasso, et al., Defense Against Class Certification, 744 P.L.I./Litig. 389, 511 (2006); Matthew W. Lampe & E. Michael Rossman, Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action, 20 The Lab. Law. 311, 313 (2005). By contrast, opt-out rates average less than 3% in employment law class actions under Rule 23. See Theodore Eisenberg & Geoffrey Miller, The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues, 57 Vand. L. Rev. 1529, 1532, 1549 (2004).

v. Italian Colors Rest., 133 S. Ct. 2304 (2013).[37] However, although these rulings have been recognized generally as the Supreme Court's condonation of companies employing class action waivers generally, in the context of implementing arbitration as an alternative to court litigation, in the ordinary course of business, nothing in these rulings need be ready to suggest that courts must turn a blind eye to employers' gamesmanship implementation of arbitration agreements to thwart class litigation so as to reduce their potential liability in already-pending cases. While these cases may suggest that courts be respectful of companies' use of arbitraton agreements for legitimate business purposes, those rights are not inviolable and subject to such abuse as Uber has attempted to utilize them here. Courts still clearly have the right to control class communications under the powers vested in them by Rule 23(d). And, once a class case is filed, a court has the power under Rule 23(d) to control communications with the class or putative class, and that power extends to ensuring defendants cannot unilaterally limit the scope of the class by distributing revised arbitration agreements to putative class members after a case has been filed.

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[37] Notably, in Concepcion and American Express, the Supreme Court held that the FAA preempts *state* law principles that the Court found failed to place arbitration agreements on an equal footing with other contracts. However, Rule 23 is the result of a federal enactment. See Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 559 U.S. 393, 400 (2010). Thus, there is no reason to think that these cases require that the FAA allows Uber to trample on the federal Rule 23's established procedures governing class actions.

The power to oversee the class dynamics rests with the court. Thus, while companies may well be permitted to distribute arbitration agreements containing class waivers in certain instances, this recently proclaimed legal right should not give them free license to engage in such gamesmanshiplike behavior that Uber has once a class case has been filed. There is simply no reason why the FAA should give a company such as Uber license to deploy arbitration in the midst of an ongoing class action in such a way as to subvert Rule 23's court-approved notice and opt-out process. The FAA "requires courts to enforce agreements to arbitrate according to their terms . . . unless the FAA's mandate has been 'overridden by a contrary congressional command.'" CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669 (2012) (quoting Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 226 (1987)). Rule 23 was enacted pursuant to federal Congressional action under the Rules Enabling Act. See Shady Grove, 559 U.S. at 400 ("Congress . . . has ultimate authority over the Federal Rules of Civil Procedure; it can create exceptions to an individual rule as it sees fit—either by directly amending the rule or by enacting a separate statute overriding it in certain instances."); Charles A. Wright, Class Actions, 47 F.R.D. 169, 170 (1970) (noting that in 1966 Congress enacted a revised Rule 23: "a bold and well-intentioned attempt to encourage more frequent use of class actions"). Throughout its briefing, Uber urges and suggests that it has an absolute and sacrosanct right to distribute new arbitration agreements

to its drivers no matter the implication for the Rule 23 process. However, there is no reason not to see Rule 23 as at least on an equal footing with the FAA, as it is likewise a "congressional mandate." See Balasanyan v. Nordstrom, Inc., 2012 WL 1944609, *3 (S.D. Cal. May 30, 2012) (citing In re Currency Conversion Fee Antitrust Litigation, 361 F.Supp.2d 237 (S.D.N.Y.2005); Williams v. Securitas Security Services USA, Inc., 2011 U.S. Dist. LEXIS 75502 (E.D. Pa. 2011) ("various courts have relied on Rule 23 to invalidate arbitration provisions since Moses H. Cone was decided."). There is simply no reason to think that the FAA should be deemed to preempt or overrule Rule 23's notice and opt-out process, and that Uber should be permitted to distribute new arbitration agreements to on putative class members that would likely affect ther rights in already-filed class cases without court supervision.

Although the Supreme Court has signaled a general endorsement of arbitration placing limits on the ability to participate in class actions, through its decision in Concepcion, 563 U.S. 333 (2011), it has not ruled that arbitration agreements are permissible in all circumstances – a fact that courts have acknowledged when they have prohibited the type of gamesmanship Uber is engaging in here. See Balasanyan, 2012 WL 1944609, *2, n. 4 ("Even assuming Nordstrom could prove its argument that arbitration agreements have a preferred status, it has not attempted any discussion of its implicit contention that the Rules

Enabling Act and Fed. R. Civ. P. 23 do not qualify as a type of the 'congressional mandate' supposedly required by CompuCredit" as a "contrary congressional command").[38] "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Morton v. Mancari, 417 U.S. 535, 551 (1974); California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States, 215 F.3d 1005, 1012 (9th Cir. 2000) ("[I]t is a well established axiom of statutory construction that, whenever possible, a court should interpret two seemingly inconsistent statutes to avoid a potential conflict."). Because Uber's urged reading of the FAA would conflict with Rule 23, the FAA need not be read to allow the conduct at issue here, and the District Court had grounds under federal law – Rule

[38] Indeed, "Congress acknowledged the impropriety of consumer and employee arbitration prior to the passage of the Act of 1925 and assured concerned members of Congress that the Act merely guaranteed enforcement of freely entered arbitration agreements between parties of equal bargaining power." Marc J. Mandich, AT&T v. Concepcion: The End of the Modern Consumer Class Action, 14 Loy. J. Pub. Int. L 205, 212-13 (2012); see Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011). "Thus, the proposed 'Arbitration Fairness Act of 2011' … represents the widely felt sentiment that the totality of Supreme Court case law regarding consumer and employee arbitration runs contrary to the FAA's language and purpose." Id.

23 – to prohibit Uber's conduct as interfering with the rights of putative class members in a pending class case.[39]

C. Uber's December 2015 Arbitration Agreement, Distributed Nationwide Two Days After the District Court Held Its Previous Agreement Unenforceable, Was Not An "Ordinary Business Communication", But Was Instead a Clear Attempt To Escape The District Court's Recent Ruling And Limit Its Liability in Cases Already Filed for Which Classes Had Not Yet Been Certified.

Uber's distribution of a revised arbitration agreement to putative class members during the pendency of the litigation and in admitted response to a court ruling issued two days earlier is improper and should not have been permitted as it

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[39] The District Court's solution that Uber should simply provide putative class members with marginally better notice is simply not sufficient to protect their rights. Indeed, when faced with situations in which defendants have attempted to distribute documents to putative class members that would affect their rights in a pending class case (including releases, class opt outs, and arbitration clauses), courts have frequently simply stricken them outright – not, as the District Court ordered here, given the defendant another chance to distribute the documents, albeit with marginally enhanced notice. See, e.g., Guifu Li, 270 F.R.D. 509; Wang, 236 F.R.D. at 489; County of Santa Clara, 2010 WL 2724512 at *4; Slavkov, 2015 WL 6674575 at *2, *7; Freidman, 730 F. Supp. 2d at 764; Billingsley, 560 F. App'x at 919. Here, in a case where Uber has repeatedly used arbitration agreement to try to limit its potential classwide liability, it should not be permitted to continue being given more chances to do so. Given Uber's repeated distribution of revised arbitration agreements in order to protect itself from ongoing class litigation, it is unrealistic to expect drivers to understand that they must opt out in order to protect their rights to participate in ongoing class litigation brought to advance their interests. It is especially unrealistic to expect drivers to realize they must continue opting out, over and over again, to protect their rights in already-filed, ongoing cases. The clear intent of Uber's actions has been to reduce as much as possible the number of drivers who might ever be permitted to participate in a class action.

was blatant gamesmanship and an attempt to "unfairly thwart potential [] plaintiffs' ability to [participate]" in pending litigation. Espinoza, 2015 WL 9592535, *3 (S.D. Fla. Dec. 31, 2015). Indeed, a number of courts have recognized that where a defendant distributes an arbitration agreement in the midst of ongoing litigation, which is clearly intended to reduce participation in a class case (as opposed to, for example, merely distributing an arbitration agreement in the ordinary course of business), the defendant's improper motive provides additional grounds for a court to invalidate the agreement. See id. (noting that "presentation of agreements to arbitrate disputes …was motivated, at least in part, by the filing of this civil action" and "was intended, at least in part, to dissuade entertainers from participating in this civil action" and invalidating the agreements on these grounds); Williams, 2011 WL 2713741, *3 ("Whatever right Securitas may have to ask its employees to agree to arbitrate, its current effort … is confusing and misleading and clearly designed to thwart unfairly the right of its employees to make an informed choice as to whether to participate"); Billingsley, 560 F. App'x at 922 ("Whatever right Citi Trends may have had to ask its employees to agree to arbitrate, the district court found that its effort in the summer of 2012 was confusing, misleading, coercive, and clearly designed to thwart unfairly the right of its store managers to make an informed choice"); O'Connor, 2013 WL 6407583, *4 (N.D. Cal. Dec. 6, 2013) ("[T]here is a distinct possibility that the arbitration provision and class

waiver imposed by Uber was motivated at least in part by the pendency of class action lawsuits" and noting that this weighed in favor of regulating Uber's communication with class members).

For example, in an earlier Order in O'Connor, the District Court distinguished between a defendant sending out an arbitration agreement "for normal business purposes, and not [as] an attempt to thwart the pending class action lawsuit," as opposed to sending out an agreement in direct response to developments in the litigation as an attempt to limit its liability. Id. at *6. The District Court reiterated that distinction in its Order below, noting that "[t]here can be little doubt that the purpose of the new Agreement is not purely an isolated business decision but one which is informed by Uber's litigation strategy" and that it was sent as "a direct response to the Court's ruling in the ongoing class action litigation" – a fact which "Uber does not dispute." ER- 4. This is in stark contrast to cases where the Court found that the arbitration agreements had been in place long before the litigation and were disseminated in the ordinary course of business.[40] This distinction makes sense, as arbitration was never intended to be

[40] See, e.g., Pablo v. ServiceMaster Glob. Holdings Inc., 2011 WL 3476473, *2 (N.D. Cal. Aug. 9, 2011) ("[T]he Court is faced with evidence that numerous arbitration agreements were signed by defendants and their employees, as well as affidavits stating that defendants have utilized these agreements for at least the past eight years"); Balasanyan v. Nordstrom, Inc., 294 F.R.D. 550, 573-74 (S.D. Cal. 2013) ("[T]the court concedes that Nordstrom was engaging in a standard practice

misused as a device to subvert the court-supervised Rule 23 process of class action litigation. Moreover, as discussed supra, pp. 39-42, arbitration agreements are not specially exempt and there is no reason they should be treated any differently from other forms of improper releases and class opt-outs that a defendant employer may distribute in the course of a class action case, which simply seek to pick off putative class members and diminish a defendant's potential liability.

When arbitration is used admittedly and in such a gamesmanlike manner in the midst of litigation as a strategic attempt to thwart a class action and eliminate the practical ability of most class members to obtain relief sought on their behalf, the defendant's actions should be policed by the District Court under Gulf Oil. As such, the District Court here should have exercised its powers under Rule 23 and granted Plaintiffs' Motion for Protective Order in its entirety. The District Court should not have allowed Uber to continue disseminating agreements to putative class members in the pending cases (including Yucesoy, O'Connor, and other cases) so as to thwart the potential for those cases to obtain relief for most of the class. As noted above, courts have stricken such attempts by defendants to obtain ex parte opt-outs, releases, as well as arbitration agreements, after class cases have

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that many companies engage in when hiring new employees" and holding that where new employees signed the arbitration agreement in the ordinary course of the established hiring process, the agreements were enforceable).

been filed and without giving defendants another chance to do it "better" – and thus thwart the court's power to control such class dynamics. There was no reason for the District Court here to give Uber another chance – and thereby drastically limit its potential liability by turning the Rule 23 mechanism on its head to unilaterally make these effectively "opt-in" rather than "opt-out" proceedings.

CONCLUSION

For all the reasons set forth herein, this Court should:

- Uphold those aspects of the District Court's Order that invalidate Uber's December 11, 2015, arbitration agreement as to members of the certified class in O'Connor and which enjoin Uber from engaging in any further communications that are "reasonably likely to affect the prosecution and adjudication of the O'Connor class action or engender confusion in respect thereto, except with approval of class counsel or the Court," including the "promulgation of any future arbitration agreements to certified class members purporting to affect claims asserted in O'Connor." ER-5.
- Reject Uber's request for an order that the District Court exceeded its powers by ordering corrective notice in connection with Uber's issuance of new arbitration clauses to putative class members in pending cases.
- Reverse those aspects of the District Court's Order that allow Uber to continue promulgating new arbitration agreements to the putative class members in

already-pending class cases, including Yucesoy, O'Connor (with respect to putative class members who have, at least to date, been excluded from the class, but whose exclusion is still subject to appeal), and other pending class cases.

Dated: March 3, 2016

Respectfully submitted,

/s/ Shannon Liss-Riordan
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Attorney for Plaintiff-Appellees/Cross-Appellants Douglas O'Connor, et al. and Hakan Yucesoy, et al.

STATEMENT OF RELATED CASES

Plaintiff-Appellees/Cross-Appellants Douglas O'Connor, et al. and Hakan Yucesoy, et al., are aware of the following related cases: (1) *O'Connor v. Uber Techs., Inc.*, No. 14-16078, District Court No. 3:13-cv-03826-EMC; (2) *Mohamed v. Uber Techs., Inc.*, No. 15-16178, District Court No. 3:14-cv-05200-EMC; (3) *Gillette v. Uber Techs., Inc.*, No. 15-16181, District Court No. 3:14-cv-05241-EMC; (4) *Yucesoy v. Uber Techs., Inc.*, No. 15-17422, District Court No. 3:15-cv-00262- EMC; (5) *Del Rio v. Uber Techs., Inc.*, No. 15-17475, District Court No. 3:15-cv- 03667-EMC; (6) *O'Connor v. Uber Techs., Inc.*, No. 15-80220, District Court No. 3:13-cv-03826-EMC.

Dated: March 3, 2016 */s/ Shannon Liss-Riordan*

CERTIFICATE OF COMPLIANCE

I hereby certify that this Principal and Response Brief on Cross-Appeal complies with the limitations of Fed. R. App. P. 32(a), Fed. R. App. P. 28.1, and Ninth Circuit Rule 32 because:

(1) Pursuant to Fed. R. App. P. 28.1(e)(2)(B), this Principal and Response Brief on Cross-Appeal contains 16,491 excluding the parts of the brief exempted by the Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

(2) This brief complies with the typeface requirements of Fed. R. App. P. 32 because the motion has been prepared in 14-point Times New Roman, which is a proportionally spaced font that includes serifs.

Dated: March 3, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2016, I caused the foregoing document to be filed with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of this filing to all counsel of record.

Dated: March 3, 2016

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