Nos. 15-17420, 15-17422, 15-17475

IN THE

United States Court of Appeals for the Ninth Circuit

DOUGLAS O'CONNOR, THOMAS COLOPY, MATTHEW MANAHAN, and ELIE GURFINKEL, Plaintiffs-Appellees, v. UBER TECHNOLOGIES, INC., Defendant-Appellant.	No. 15-17420 No. 3:13-cv-03826-EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding
HAKAN YUCESOY, ABDI MAHAMMED, MOKHATAR TALHA, BRIAN MORRIS, and PEDRO SANCHEZ, Plaintiffs-Appellees, v. UBER TECHNOLOGIES, INC., Defendant-Appellant.	No. 15-17422 No. 3:15-cv-00262-EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding
RICARDO DEL RIO and TONY MEHRDAD SAGHEBIAN, Plaintiffs-Appellees, v. UBER TECHNOLOGIES, INC. and RASIER-CA, LLC Defendants-Appellants.	No. 15-17475 No. 3:15-cv-03667-EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding

APPELLANTS' CONSOLIDATED OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendants-Appellants Uber Technologies, Inc. and Rasier-CA, LLC hereby file their corporate disclosure statement as follows. Uber Technologies, Inc. is a privately held corporation. No parent corporation or publicly held corporation owns 10% or more of its stock. Rasier-CA, LLC is a wholly-owned subsidiary of Uber Technologies, Inc.

Dated: March 18, 2016

Respectfully submitted,

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INTRODUCTION

In a series of unprecedented and deeply flawed orders, the district court invalidated nearly 250,000 arbitration agreements between Uber and independent transportation providers who use the Uber app ("drivers")—all for the purpose of certifying a mega-class of those drivers, notwithstanding their agreement to arbitrate their claims on an individual basis.

According to the district court, the arbitration agreements are unenforceable *in their entirety* because they contain a waiver of representative claims under California's Private Attorneys General Act ("PAGA"), Cal. Lab. Code § 2699 et seq. Despite acknowledging that the PAGA waiver is *expressly severable* under the agreements' severability and savings clauses, the district court refused to sever the provision. The court reached this remarkable conclusion even though it could not point to *any* decision in which a court has refused severance of such a PAGA waiver. In fact, Plaintiffs have never cited, and Uber is not aware, of a single instance in which an appellate court has *ever* declined to sever a PAGA waiver governed by an express severability provision.

To the contrary, the California Supreme Court, when confronted with a materially identical agreement in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 391-92 (2014), excised the PAGA waiver at issue in that case and enforced the remainder of the parties' arbitration agreement. This Court,

too, has repeatedly severed unenforceable PAGA waivers in *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425, 440 (9th Cir. 2015), and, more recently, *Hopkins v. BCI Coca-Cola Bottling Co., of Los Angeles*, — F. App'x —, 2016 WL 685018 (9th Cir. Feb. 19, 2016), and *Sierra v. Oakley Sales Corp.*, — F. App'x —, 2016 WL 683442 (9th Cir. Feb. 18, 2016). There is no justification for the district court's failure to do the same here.

In fact, the district court's PAGA ruling is only the latest in a series of anti-arbitration orders invalidating Uber's arbitration agreements in these and related cases. For example, the district court had earlier found that Uber's arbitration agreements are procedurally unconscionable, even though it is undisputed that *hundreds* of drivers opted out of those agreements. Under binding Ninth Circuit case law, including an en banc decision from 2013, a meaningful opportunity to opt out *precludes* a finding of procedural unconscionability and therefore *requires* enforcement of an arbitration agreement. *See Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1059 (9th Cir. 2013) (en banc); *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199 (9th Cir. 2002); *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108 (9th Cir. 2002). The district court acknowledged the holdings of those cases, yet it refused to follow them based on its disagreement with this Court's analysis. The district court later acknowledged that its ruling is likely erroneous under

binding California Supreme Court precedent as well, *see Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899 (2015), but left its ruling in place nonetheless.

The district court's orders contravene the "liberal federal policy favoring arbitration," *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (quotation marks and citation omitted), and reflect the very "judicial hostility to arbitration" that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., was meant to counteract. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308-09 (2013). Indeed, the Supreme Court has repeatedly instructed that "courts must 'rigorously enforce' arbitration agreements according to their terms." *Id.* at 2309 (citation omitted). Rather than "rigorously enforc[ing]" Uber's arbitration agreements, the district court has rigorously *invalidated* them over and over again, based on a series of baseless rationales. This Court should reverse the orders denying Uber's motions to compel arbitration, hold that Uber's arbitration agreements are enforceable, and compel the parties to arbitrate their claims.

STATEMENT OF JURISDICTION

The district court has jurisdiction over *O'Connor* and *Yucesoy* under 28 U.S.C. § 1332(d)(2) because the plaintiffs in each case seek to certify a class action with more than 100 members, including one or more members with citizenship diverse from Uber, and the matter in controversy exceeds $5 million exclusive of interest.

The district court has jurisdiction over *Del Rio* under 28 U.S.C. § 1331 because that action asserts a claim under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq. The district court has supplemental jurisdiction under 28 U.S.C. § 1367 over the *Del Rio* state-law claims.

This Court has jurisdiction to hear these appeals under the FAA, 9 U.S.C. § 16(a)(1)(C), because the district court denied Uber's motions to compel arbitration.

The district court issued its orders denying Uber's motions to compel arbitration in *O'Connor* on December 9 and 10, 2015 (Excerpts of Record ("ER") 24-55; ER7-22), and Uber filed a timely notice of appeal on December 9, 2015 (ER88-89), which it amended on December 10, 2015 (ER85-87).

The district court issued its orders denying Uber's motion to compel arbitration in *Yucesoy* on December 9 and 22, 2015 (ER23; ER1), and Uber filed a timely notice of appeal on December 9, 2015 (ER90-91), which it amended on December 23, 2015 (ER71-73).

The district court issued its order denying Uber's motion to compel arbitration in *Del Rio* on December 16, 2015 (ER2-6), and Uber filed a timely notice of appeal on December 17, 2015 (ER83-84).

STATEMENT OF ISSUES

1. Whether the district court erred by using an expressly severable PAGA waiver provision as the basis for invalidating Uber's arbitration agreements with drivers.

2. Whether the existence of a meaningful opt-out provision, which hundreds of drivers utilized to opt out of arbitration, precludes a finding of procedural unconscionability, as this Court already held in a 2013 en banc decision and in multiple other panel decisions.

3. Whether the district court should have enforced an arbitration agreement containing several provisions—a cost-sharing provision, a confidentiality clause, an intellectual property carve-out, and a modification clause—that this Court and other courts have repeatedly found to be conscionable and enforceable and which, in any event, could be severed from the arbitration agreement in accordance with California law and the express language of the agreements themselves.

4. Whether the district court should have enforced a clear and unmistakable delegation provision that delegates most gateway issues of arbitrability to an arbitrator and retains court jurisdiction over certain other gateway issues, in clear and unambiguous terms.

STATEMENT OF THE CASE

These consolidated appeals arise from three related actions alleging that drivers who use the Uber smartphone application are employees of Uber rather than independent contractors. In the *O'Connor* action, Plaintiffs seek reimbursement of expenses under California Labor Code section 2802 and recovery of allegedly converted tips under California Labor Code section 351, on behalf of a certified class that includes nearly 250,000 individuals who use or have used the Uber app as drivers. ER394-403; ER24-55. Plaintiffs in the *Yucesoy* action assert similar claims under Massachusetts law on behalf of a putative class of Massachusetts drivers. ER60-70. Plaintiffs in *Del Rio* assert various claims for alleged violations of the California Labor Code, including a PAGA claim, on behalf of a putative class of California drivers. ER192-224. Plaintiffs in *Del Rio* also seek to pursue a collective action under the FLSA. ER220-223.

Although many of the named Plaintiffs and the vast majority of class and putative class members in these cases assented to arbitration provisions requiring them to arbitrate all "disputes arising out of or related to ... [their] relationship[s] with Uber, including termination of [those] relationship[s]" and requiring them to bring claims against Uber "on an individual basis only, and not on a class, collective or private attorney general representative action basis," the district court

refused to enforce *any* of these agreements and denied Uber's motions to compel arbitration.

The district court's orders refusing to compel arbitration are premised largely on reasoning contained in a June 9, 2015 order issued in *Mohamed v. Uber Techs., Inc.*, N.D. Cal., No. 3:14-cv-05200-EMC, and *Gillette v. Uber Techs.*, N.D. Cal., No. 3:14-cv-05241-EMC (Appellants' Motion for Judicial Notice ("MJN"), Ex. A), and a supplemental class certification order in the *O'Connor* action issued on December 9, 2015 (ER24-55).[1]

A. The Uber Software Application

Uber is a technology company that connects individuals in need of rides ("riders") with independent transportation providers searching for passengers ("drivers"). ER226. Uber provides the technology through a smartphone application, which Uber licenses to drivers pursuant to a software licensing agreement ("Licensing Agreement") and a Driver Addendum Related to Uber Services ("Driver Addendum"). ER227. Drivers who use the app's uberX

[1] The *Mohamed* and *Gillette* order is the subject of a fully briefed appeal that is scheduled for oral argument before this Court in June 2016. *See Mohamed v. Uber Techs., Inc.*, 9th Cir., No. 15-16178; *Gillette v. Uber Techs., Inc.*, 9th Cir., No. 15-16181; *Mohamed v. Hirease, LLC*, 9th Cir., No. 15-16250. The parties in that appeal have also briefed the arbitration-related reasoning in the *O'Connor* supplemental class certification order. Uber's arguments in this brief largely mirror the arguments Uber made in the *Mohamed-Gillette* appeal.

platform[2] are also required to accept an agreement called the Transportation Provider Service Agreement (the "Service Agreement") with one of Uber's wholly-owned subsidiaries (Rasier, LLC, Rasier-CA, LLC, or Rasier-PA, LLC), in lieu of or in addition to a Licensing Agreement and Driver Addendum. ER227, ER230-32; ER135-137. On occasion, Uber implements updated versions of these agreements, which drivers must accept in order to access or continue to access the app. ER227.

B. The 2013 Agreements

1. February 2013 and August 2013 Service Agreements

From approximately February 2013 to August 27, 2013, drivers who accessed the uberX platform were required to assent to a Service Agreement with Rasier. ER227; ER234-49. From approximately August 27, 2013, to October 22, 2013, drivers who accessed the uberX platform were required to assent to an amended, but substantially similar, version of the Service Agreement. ER228; ER271-286.

Drivers who signed up for the uberX platform *online* during this timeframe received an email from Uber instructing them to review and sign the applicable

[2] The uberX platform connects riders to vehicles operated by private individuals (i.e., "ridesharing" services) as well as vehicles operated by transportation companies. ER226. Other relevant platforms include UberBLACK, which connects riders to limousines and town cars operated by transportation companies, and UberSUV, which connects riders to luxury sport utility vehicles operated by transportation companies. ER226.

Service Agreement. ER230; ER313. A hyperlink within the email directed drivers to a PDF copy of the Service Agreement in EchoSign, a web-based review and electronic signature system, which drivers could review prior to signing. ER230; ER313. Drivers who signed up for the uberX platform *in person* at an Uber office during this timeframe were provided with an iPad that navigated them to a PDF copy of the applicable Service Agreement in the same EchoSign system for review and electronic signature. ER230; ER315-17. After electronically signing the Service Agreement, drivers received a confirmation email with a PDF copy of the executed Service Agreement. ER230; ER319.

Regardless of the method by which drivers signed up to access uberX, Uber made copies of the Service Agreements executed through EchoSign available to drivers on Uber's "Driver Portal"—a website that enables drivers to obtain information about their Uber account. ER232; ER325.

2. July 2013 Licensing Agreement

On July 22, 2013, Uber sent an email to drivers using the UberBLACK and UberSUV platforms, stating that Uber intended to roll out an updated Licensing Agreement and Driver Addendum, and including a hyperlink to the updated agreements. ER229. Shortly thereafter, Uber rolled out the updated Licensing Agreement and Driver Addendum. ER229-30; ER251-65; ER267-69. When drivers logged onto the app, they were presented with a notification window

(1) advising them that Uber had updated its agreements; and (2) providing links to the updated agreements. ER229-30. Drivers were required to click a "Yes, I agree" button indicating that they accepted the updated agreements in order to continue using the app. ER229; ER309. A second notification window then appeared asking drivers to confirm that they had reviewed the agreements, and drivers were again required to click a "Yes, I agree" button to access the app. ER229-30; ER311.

3. October 2013 Service Agreement

In October 2013, Rasier notified drivers on the uberX platform that it was planning to roll out a new Service Agreement. ER231. In accordance with Uber's standard practices, local directors of operations chose the method of notification, typically via email or text message (SMS) to drivers' mobile phones, informing drivers that a new Service Agreement was forthcoming. ER231. Beginning on or about October 22, 2013, Rasier "rolled out" the October 2013 Service Agreement through the uberX platform. ER231; ER288-303. As with the rollout process for the July 2013 Licensing Agreement, drivers were presented with a notification window containing links to the updated agreements and were required to click two separate buttons indicating that they accepted those updated agreements. ER231-32; ER321; ER323. New drivers that attempted to access the uberX platform for the first time subsequent to the October 2013 "rollout," but prior to December 6,

2013, were required to accept the October 2013 Service Agreement through the Uber app before being permitted to access the uberX platform. ER231-32.

4. The 2013 Agreements Generally

The July 2013 Licensing Agreement and the February 2013, August 2013, and October 2013 Service Agreements (collectively, the "2013 Agreements") contain a virtually identical arbitration provision (the "2013 Arbitration Provision").[3] The 2013 Arbitration Provision appears under a bolded, underlined heading ("**Arbitration**"), and contains a standalone delegation provision, which states as follows:

> **Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial.**
>
> Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision.

ER261. The 2013 Arbitration Provision also requires the parties to assert claims "on an individual basis only," and not in a class, collective, or private attorney general representative action basis. ER263.

[3] The 2013 Driver Addendum incorporates by reference the arbitration provision in the 2013 Licensing Agreement. ER269.

Under a standalone, underlined subheading entitled "Paying For The Arbitration," the 2013 Arbitration Provision provides that "in all cases where required by law, Uber will pay the Arbitrator's and arbitration fees." ER264. It further specifies that "[i]f under applicable law Uber is not required to pay all of the Arbitrator's and/or arbitration fees, such fee(s) will be apportioned between the Parties in accordance with said applicable law, and any disputes in that regard will be resolved by the Arbitrator." ER264.

Additionally, the 2013 Arbitration Provision states, under a separate subheading entitled "Your Right To Opt Out Of Arbitration," that arbitration "is not a mandatory condition of [drivers'] contractual relationship with Uber," and that drivers "may opt out of [the] Arbitration Provision by notifying Uber in writing of [their] desire to opt out." ER264. In bolded font, the opt-out provision provides that any opt-out "**must be post-marked within 30 days**" of the date of acceptance and may be delivered to Uber either by hand delivery or overnight mail delivery service. ER264. It further states that drivers "have the right to consult with counsel of [their] choice concerning [the] Arbitration Provision" and reiterates that drivers "will not be subject to retaliation if [they] exercise [their] right to ... opt-out of coverage under [the] Arbitration Provision." ER264. It is undisputed that many drivers—including the named Plaintiffs in *O'Connor*

(ER488)—opted out of the 2013 Arbitration Provision using the opt-out procedure set forth above. ER189-91; ER228.

C. The District Court's Redrafting of Uber's Arbitration Provision

On August 21, 2013, five days after filing their complaint (ER1036-49), the *O'Connor* Plaintiffs filed an emergency motion asking the district court to find that the 2013 Arbitration Provision was unconscionable or, alternatively, to require Uber to (1) send a notice to putative class members about the *O'Connor* action; and (2) provide putative class members a renewed opportunity to opt out of arbitration. ER1017-35. They argued that the court could grant this relief by exercising its authority to regulate communications with putative class members under Federal Rule of Civil Procedure Rule 23(d). ER1026-27.

In its ruling, the district court deferred consideration of whether the 2013 Arbitration Provision is enforceable, but granted, in part, the alternative requests for relief. ER1005-16. Even though Uber issued the 2013 Licensing Agreement before *O'Connor* was filed, and even though many of the individuals to whom Uber sent the 2013 Licensing Agreement were not even putative class members, the Court found that the 2013 Arbitration Provision threatened to "adversely affect[] [drivers'] rights" and ordered Uber to give drivers "clear notice of the arbitration provision, the effect of assenting to arbitration on their participation in [the] [*O'Connor*] lawsuit, and reasonable means of opting out of the arbitration

provision within 30 days of the notice." ER1013-15. The court further ordered Uber not to distribute any Licensing Agreement containing an Arbitration Provision without prior court approval, and directed the parties to submit proposed corrective notices and a revised Licensing Agreement consistent with the court's order. ER1016.

Following the district court's ruling, the *O'Connor* parties submitted proposed corrective notices and Uber submitted a revised Licensing Agreement for the district court's review. ER1000-04; ER959-99. The district court found that Uber's corrective notice gave adequate "notice ... that a New Licensing Agreement [would] ensue, that actions against Uber [were] pending ... , and that assenting to the New Licensing Agreement preclude[d] participation in ... lawsuits against Uber." ER954. It also found that Uber's proposed Licensing Agreement gave "clear notice of the arbitration provision." ER954. Yet the court nonetheless ordered Uber to submit another revised corrective notice and Licensing Agreement with a more "fair" opt-out procedure. ER954; ER957. Once more, the district court emphasized that, in its view, the mere distribution of Uber's Arbitration Provision—which was "rolled out" *before* the *O'Connor* action was even filed—

"jeopardize[d] the fairness of the litigation" and required the district court to intervene in order "to protect [putative] class members." ER946; ER949.[4]

Uber then submitted two revised corrective notices and a revised Licensing Agreement, *see* ER913-942, which, according to the district court, gave drivers "a reasonable means of opting out—sending a letter by U.S. mail," and afforded drivers "a renewed opportunity to opt out." ER887. Nonetheless, the court imposed a number of additional edits, ordering Uber to: (1) bold the paragraph in its Arbitration Provision describing the opt-out procedure; (2) allow drivers to opt out via email; (3) provide drivers with the contact information for Plaintiffs' counsel; and (4) submit another round of proposed documents for the Court's review. ER888-89.

Uber filed a third round of corrective notices, a revised Licensing Agreement, and a revised Service Agreement.[5] ER831-83. The district court made yet another series of edits before finally approving the documents and directing Uber to "issue the documents as corrected." ER786-830. Finally, on or about June 21, 2014, Uber rolled out the court-approved Licensing Agreement (the "2014

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[4] Uber's appeal of these orders is fully briefed and scheduled for oral argument before this Court in June 2016. *See O'Connor v. Uber Techs., Inc.*, 9th Cir., No. 14-16078.

[5] Although Rasier was not (and is not) a defendant in *O'Connor*, Uber submitted a revised Service Agreement to ensure that this agreement was also "in conformity with the Court's orders." ER834.

Licensing Agreement") and Service Agreement (the "2014 Service Agreement") (together, the "2014 Agreements"). ER485; ER607-23; ER630-46.

D. The 2014 Agreements

The Arbitration Provision in the 2014 Agreements (the "2014 Arbitration Provision") has (1) a delegation clause; (2) class and representative action waiver provisions; (3) a cost-allocation provision; and (4) an opt-out provision, that are substantially similar (though not identical) to those contained in the 2013 Agreements. ER620-23. The only material differences between the 2013 Agreements and 2014 Agreements are the following:

- Before being presented with the 2014 Agreements and a renewed opportunity to opt out, drivers received a two-page, court-approved corrective notice advising them of the Arbitration Provision. ER786-88.
- The first page of the 2014 Agreements, in a bolded, capitalized, over-sized, stand-alone message, directs drivers to the Arbitration Provision and advises drivers that they may opt out of arbitration by following the opt-out procedure described therein. ER617.
- The 2014 Arbitration Provision provides drivers with virtually the same information contained in the court-approved corrective notice. ER618-20.
- The opt-out provision in the 2014 Agreements is bolded. ER622-23.

- The 2014 Arbitration Provision permits drivers to opt out of arbitration in four ways—by sending (1) an email to optout@uber.com; or by delivering Uber a letter via (2) hand delivery; (3) U.S. mail; or (4) "any nationally recognized delivery service (e.g., UPS, Federal Express, etc.)." ER622-23.

It is undisputed that *hundreds* of drivers opted out of the 2014 Arbitration Provision. ER785 ("[I]t appears that ... 269 drivers timely opted out of the arbitration clause in the state of California.").[6]

E. The District Court's Order Denying Uber's Motions to Compel Arbitration in *Mohamed* and *Gillette*

On June 9, 2015, the district court issued a single order denying Uber's motions to compel arbitration under both the 2013 Arbitration Provision (in the *Gillette* action) and the 2014 Arbitration Provision (in the *Mohamed* action). *See* MJN, Ex. A. The district court denied Uber's motions based on its belief that the court (rather than an arbitrator) has the authority to determine the enforceability of the Arbitration Provisions and because, in the district court's view, the Arbitration

[6] The 2014 Agreements were subsequently revised in November 2014 and again in April 2015. ER648-67; ER696-715; ER407. These revised agreements are materially identical with respect to the provisions at issue, though some of the section numbering differs slightly. Accordingly, references herein to the "2014 Agreements" and "2014 Arbitration Provision" use the numbering in the 2014 Agreements and 2014 Arbitration Provision but refer also to the corresponding sections in the November 2014 and April 2015 Agreements.

Provisions—both the 2013 version that Uber drafted and the 2014 version the district court edited and approved—were unconscionable.

Specifically, the district court found as follows:

- Delegation Clause: The district court acknowledged that the delegation clause clearly and unmistakably delegates gateway arbitrability issues to an arbitrator. *See* MJN, Ex. A at 16 ("Plaintiffs do not appear to contend that the language of the delegation clauses itself is ambiguous, and such an argument would be a tough sell."). And it found that the "Supreme Court [has] recognized that very similar language to that utilized in the delegation clauses here satisfies the 'clear and unmistakable' standard." *Id.* at 16 (citing *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010)). Yet the district court claimed to be unable to reconcile the delegation clause with (1) the general jurisdiction clause and (2) a provision granting courts the authority to determine the validity of the class action and PAGA waiver. *Id.* at 17-20.

- Procedural Unconscionability: The district court concluded that the Arbitration Provisions are procedurally unconscionable, even though drivers had an opportunity (and in the case of the 2014 Agreements, a renewed opportunity) to opt out of arbitration, and even though hundreds of drivers did opt out. MJN, Ex. A at 24-27, 32-40, 41-42, 61-62. The court recognized that three Ninth Circuit decisions, including a 2013 en banc decision—*Kilgore v. KeyBank, Nat'l Ass'n*,

718 F.3d 1052, 1059 (9th Cir. 2013) (en banc); *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199 (9th Cir. 2002); *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108 (9th Cir. 2002)—held that a meaningful opportunity to opt out precludes a finding of procedural unconscionability, yet refused to follow these precedents because of its belief that they represent "an inaccurate picture of California law." MJN, Ex. A at 36.[7]

With respect to the 2014 Agreements in particular, the district court found procedural unconscionability to be an "extremely close question." *Id.* at 40. But—despite the fact that the district court itself edited and approved the rollout of the 2014 Agreements, including the opt-out provision—the court concluded that the 2014 Arbitration Provision is procedurally unconscionable based on the court's belief that drivers who use the Uber app are "lower-level laborer[s]," are "likely subject to ... economic pressures," and "may feel pressure to appease their putative employer" by agreeing to arbitrate their claims. *Id.* at 39.

- Substantive Unconscionability: The district court concluded that the PAGA waiver rendered the Arbitration Provision substantively unconscionable under the California Supreme Court's decision in *Iskanian v. CLS Transportation*

[7] In a subsequent ruling, the district court acknowledged that "[i]f the Ninth Circuit ... adheres to *Ahmed*, *Najd*, and *Kilgore*, then [the district court's] procedural unconscionability finding is unlikely to survive appellate review, and the 2014 arbitration provisions would likely be enforced under California law." MJN, Ex. B at 7-8.

Los Angeles, 59 Cal. 4th 348 (2014). *See* MJN, Ex. A at 43-49, 59-60, 62-63. The court then refused to sever the purported PAGA waiver because of a non-severability clause contained in Section 14.3(v) of the agreement.[8] *Id.* at 49-53, 68-69.

In the alternative, the district court concluded that the 2013 Arbitration Provision (but not the 2014 Arbitration Provision) is "permeated" with substantive unconscionability and thus unenforceable because it (i) provides that arbitration costs may be apportioned between the parties if compatible with applicable law; (ii) carves out intellectual property ("IP") claims from arbitration; (iii) permits Uber to modify the arbitration agreement; and (iv) contains a confidentiality provision. *Id.* at 53-61.

F. The *O'Connor* Class Certification and Arbitration Orders

On September 1, 2015, the district court issued a class certification order in *O'Connor* granting, in part, and denying, in part, the named Plaintiffs' motion for class certification. ER326-93. The court *included* within the class drivers who are bound by the 2013 Arbitration Provision under the theory that the 2013 Arbitration Provision is unconscionable as to all drivers across the board, without regard to their individual circumstances, and is so clearly unenforceable that there is no risk

[8] The Service Agreements are numbered by subsection only, such that Section 14.3(v) appears as Subsection (v). *See, e.g.*, ER643.

this Court will overturn the district court's decision. ER388-89. But the court *excluded* from the class drivers who are bound by the 2014 Arbitration Provision because, in the court's words, "there is a chance that the Ninth Circuit might reverse" its ruling in *Mohamed* and *Gillette*. ER388. As the court explained, "certifying, noticing, and litigating a class on behalf of a large number of individuals who may later need to be excluded from the class [because their claims must be arbitrated] does not make sense" and defeats superiority under Federal Rule of Civil Procedure 23(b)(3). ER388. The court further acknowledged that, contrary to its earlier statements, a "reasonably sizeable portion of ... drivers may *not* face ... general economic pressure to assent to Uber's arbitration agreements" because they are *not* "economically dependent on Uber for their livelihoods." ER387 (emphasis added).

The *O'Connor* Plaintiffs subsequently requested that the court reconsider its decision to exclude drivers bound by the 2014 Arbitration Provision and rule that the 2014 Arbitration Provision is unconscionable across the board. N.D. Cal., No. 3:13-cv-03826-EMC, Dkt. 357. During oral argument, however, the court stated it was "taking a second look" at its earlier unconscionability ruling because, in the court's revised view, its finding that the 2014 Arbitration Provision is procedurally unconscionable was "problematic" and "questionable" in light of the California Supreme Court's intervening decision in *Sanchez v. Valencia Holding Co.*, 61 Cal.

4th 899 (2015). ER98-101; *see also* ER32-33 ("*Sanchez* ... cast[s] doubt on the viability of" the court's procedural unconscionability analysis).

In response, the *O'Connor* Plaintiffs argued, for the first time, that the court should strike down the 2014 Arbitration Provision *even if it is not unconscionable* because the PAGA waiver contained in the 2014 Agreements violates California public policy. ER113-32. The court ultimately agreed with this new argument, and held—in its December 9, 2015 supplemental class certification order, which dramatically expanded the certified class to *include* drivers who are bound by the 2014 Arbitration Provision—that pre-dispute PAGA waivers violate public policy and are unenforceable irrespective of unconscionability. ER33-34; ER47.

Contrary to its earlier view, the district court held that Section 14.3(v) of the 2014 Arbitration Provision is *not* a "blanket" PAGA waiver and thus does not fall within the *Iskanian* rule. ER36. As the court explained, Section 14.3(v) "bar[s] PAGA claims in arbitration only" and "does not prohibit PAGA claims in all forums." ER37. Because Section 14.3(v) is *not* a "blanket" PAGA waiver, the court held that the non-severability clause in Section 14.3(v)—which applies *only* to Section 14.3(v)—does *not* require the wholesale invalidation of Uber's 2014 Arbitration Provision. ER37.

Nevertheless, the district court *still* invalidated the 2014 Arbitration Provision because a *different* section—Section 14.3(i)—contains a "blanket"

PAGA waiver. ER36-37. Even though the court found that Section 14.3(i) "*is* severable" pursuant to *two* severability and savings clauses, the court refused to sever the PAGA waiver. ER37. In the court's view, "the blanket PAGA waiver is inextricably linked with the remainder of the arbitration agreement," cannot be "linguistically excise[d] ... from the rest of the agreement," and thus cannot be severed. ER38-39; ER42. Accordingly, the court invalidated the 2014 Arbitration Provision in its entirety and added to the class all drivers who assented to the 2014 Agreements. ER47. In a subsequent order, the district court described the severability issue as a "close analysis" that presented a "serious legal question," but stood by its decision to include all drivers who accepted the 2014 Agreements in the certified class. ER78.

Uber moved to compel arbitration of the claims of the absent class members within the certified class after each of the two class certification orders. N.D. Cal., No. 3:13-cv-03826-EMC, Dkts. 346, 397. The district court denied these motions on December 10, 2015. ER7-22. With respect to the 2014 Agreements, the court denied the motion based exclusively on its reasoning in the *O'Connor* supplemental class certification order. ER21-22. As for the 2013 Agreements, the district court based its ruling largely on the unconscionability reasoning of its order denying arbitration in *Mohamed*. ER8; ER11-19.

The district court declined to address Plaintiffs' argument that the class action waiver rendered the Arbitration Provisions unenforceable under the National Labor Relations Board's ("NLRB") ruling in *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (2012), *rev'd in part*, *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), because they contain a class and collective action waiver. ER20-21. The district court noted that the "vast majority of courts" have not followed the NLRB's decision. ER21.

G. The *Yucesoy* and *Del Rio* Arbitration Orders

Uber moved to compel arbitration of the claims of four of the named Plaintiffs in the *Yucesoy* action. No. 3:15-cv-00262-EMC, Dkts. 62, 94. Plaintiffs Hakan Yucesoy and Abdi Mahammed assented to the 2013 Licensing Agreement (ER754-55), Plaintiff Brian Morris assented to the 2014 and 2015 Licensing Agreements (ER407), and Plaintiff Pedro Sanchez assented to the 2014 Licensing Agreement and the 2014 Service Agreement (ER408-09). The district court denied Uber's motion to compel arbitration as to Yucesoy and Mahammed for the reasons set for in the *Mohamed* order and the December 10, 2015 *O'Connor* order addressing the 2013 Agreements. ER1. The court denied Uber's motion to compel arbitration as to Morris and Sanchez for the reasons set forth in its *O'Connor* supplemental class certification order. ER23.

In *Del Rio*, Uber moved to compel arbitration of the non-PAGA claims of the two named Plaintiffs. N.D. Cal., No. 3:15-cv-03667-EMC, Dkt. 16. Plaintiff Richardo Del Rio assented to the 2014 Service Agreement, while Plaintiff Tony Mehrdad Sagehebian assented to the 2013 Licensing Agreement. ER137. The district court denied the motion based on the reasoning of the *Mohamed* and *O'Connor* orders. ER2-3.[9]

STANDARD OF REVIEW

An order denying a party's motion to compel arbitration is reviewed *de novo*. *See Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1057 (9th Cir. 2013) (en banc). This *de novo* review must be undertaken "with a healthy regard for the federal policy favoring arbitration." *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 936 (9th Cir. 2001) (quotation marks and citation omitted).

SUMMARY OF THE ARGUMENT

Uber's Arbitration Provisions are valid, binding, and enforceable. This Court should compel the absent class members in *O'Connor* and the named Plaintiffs in *Yucesoy* and *Del Rio* to arbitrate their claims, as they agreed to do.

I. The district court erroneously invalidated the Arbitration Provisions based on the supposed invalidity of a waiver of representative PAGA claims. The PAGA

[9] On February 24, 2016, the parties entered into a stipulation under which Sagehebian agreed to individual arbitration and dismissal without prejudice of his claims. ER56-59.

waiver is enforceable here because, unlike in *Iskanian*, it was not a condition of employment. Further, in the *Yucesoy* case, the PAGA waiver is not contrary to California public policy because none of the named Plaintiffs or putative class members in that action are California residents. Even if it were invalid, the PAGA waiver is expressly severable and thus the district court simply should have refused to enforce it, rather than using it as a basis to invalidate the Arbitration Provisions in their entirety.

II. Under binding Ninth Circuit precedent, including an en banc decision from 2013, the Arbitration Provisions *cannot* be procedurally unconscionable because they provided drivers a meaningful opportunity to opt out of arbitration—a contractual right that hundreds of drivers exercised. *See Kilgore*, 718 F.3d at 1059 (holding that an arbitration provision is not procedurally unconscionable if it "allows [signatories] to reject arbitration" through an opt-out procedure).

III. If this Court finds the Arbitration Provisions to be procedurally unconscionable (which it should not), the agreements are still enforceable because they are not substantively unconscionable—that is, nothing in the agreements is "so one-sided as to 'shock the conscience.'" *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 246 (2012). Each of the provisions that the district court identified as substantively unconscionable—the cost-sharing provision, the confidentiality clause, the IP carve-out, and the

modification clause—has been upheld by this Court or other courts on numerous occasions. Moreover, any or all of those provisions, like the PAGA waiver, could have been severed from the remainder of the Arbitration Provisions if necessary, in accordance with the "strong legislative and judicial preference" in California for "sever[ing] [an] [unconscionable] term and enforc[ing] the balance of the agreement." *Roman v. Superior Court*, 172 Cal. App. 4th 1462, 1477 (2009).

IV. As an alternative to the above arguments, this Court can resolve these appeals by enforcing the delegation provision contained in the Arbitration Provisions and allowing the arbitrator to determine whether the agreements are unconscionable. The district court correctly found that the language of the delegation provision evidences a "clear and unmistakable" intent to arbitrate gateway issues such as arbitrability, yet inexplicably refused to adhere to that provision. MJN, Ex. A at 16-23. The district court should have enforced the delegation provision and compelled Plaintiffs to arbitrate questions of arbitrability.

ARGUMENT

The FAA is designed "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). It thus "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford*

Junior Univ., 489 U.S. 468, 478 (1989). The district court's orders fly in the face of these requirements, undermining and invalidating Uber's arbitration agreements at every opportunity. The district court's flawed approach has led to the certification of a massive class action comprised almost exclusively of drivers who agreed to arbitrate their claims on an individual basis. The FAA was designed to prevent precisely what has happened here. This Court should reverse and compel arbitration.

I. Uber's Arbitration Provisions Are Enforceable Notwithstanding the Representative PAGA Waiver

The district court ruled that the blanket PAGA waiver contained in Uber's Arbitration Provisions—Section 14.3(i)—requires wholesale invalidation of those Provisions. That was error for two reasons: (1) the PAGA waiver at issue here is not contrary to California public policy under *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014); and (2) in any event, the PAGA waiver is expressly severable—the district court should have severed or otherwise restricted it and enforced the remainder of the Arbitration Provisions.

A. The PAGA Waiver in This Case Is Enforceable

As an initial matter, the blanket PAGA waiver in this case is enforceable, notwithstanding *Iskanian*, because drivers had an opportunity to opt out of arbitration altogether. *Iskanian*, on its face, applies only when a PAGA waiver contained within an arbitration agreement is a "condition of employment," which

is not the case here. 59 Cal. 4th at 360.[10] Here, arbitration was (1) "not a mandatory condition of [drivers'] contractual relationship with Uber"; and (2) drivers would "not be subject to retaliation if [they] ... opt[ed]-out" of the Arbitration Provision. ER622-23; ER264.[11]

In addition, the PAGA waiver cannot be a basis for striking down the Arbitration Provisions in *Yucesoy* because the named Plaintiffs are Massachusetts residents seeking to represent a putative class of Massachusetts drivers, and they have not brought any PAGA claim. California obviously has no "public policy" interest, *see Iskanian*, 59 Cal. 4th at 383-84, in prohibiting non-California residents from waiving PAGA claims they have not asserted (and do not even have standing to assert). The district court thus erred in refusing to compel arbitration in *Yucesoy* based on the supposed unlawfulness under California law of a contractual provision that is entirely irrelevant to that case. *See Lee v. Am. Express Travel Related Servs., Inc.*, 348 F. App'x 205, 207 (9th Cir. 2009) (holding that plaintiffs

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[10] Although *Securitas Security Services USA, Inc. v. Superior Court*, 234 Cal. App. 4th 1109 (2015), concluded that the *Iskanian* rule applies to voluntary PAGA waivers, it recognized that "*Iskanian* [did] not involve an agreement with an opt out provision, and thus [did] not squarely address the question." *Id.* at 1121. This Court thus need not and should not follow *Securitas*.

[11] Moreover, *Iskanian* and *Sakkab* were wrongly decided because the *Iskanian* rule undermines the fundamental attributes of arbitration and is therefore preempted by the FAA. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747, 1753 (2011). Uber hereby preserves this argument, even though it recognizes that the panel hearing these appeals is bound by *Sakkab*.

lacked standing under Article III to challenge allegedly unconscionable contractual provisions "because they ha[d] not yet been injured by the mere inclusion of the[] provisions in their agreements"); *West v. Henderson*, 227 Cal. App. 3d 1578, 1588 (1991) (rejecting unconscionability challenge based on "hypothetical" invocation of provision that was "not being asserted" against the plaintiff); *Dauod v. Ameriprise Fin. Servs., Inc.*, 2011 WL 6961586, at *5 (C.D. Cal. Oct. 12, 2011) (where plaintiff asserts no PAGA claims, the question "whether a PAGA waiver taints the Agreement with illegality is not even a genuine issue in [the] case").

B. The District Court Should Have Severed the PAGA Waiver and Enforced the Remainder of the Arbitration Agreements

If this Court determines that the PAGA waiver contained in Uber's Arbitration Provisions is unenforceable as a matter of California public policy, it should sever or restrict enforcement of that PAGA waiver because it is *expressly severable* under the Agreements, as set forth in *two* severability and savings clauses. Indeed, the district court did not rely on, Plaintiffs have not cited, and Uber is not aware of a single instance in which a court has *ever* refused to sever a PAGA waiver where, as here, that provision is subject to one or more express severability clauses. Severance or restriction is also the only proper outcome under the FAA, Supreme Court precedent, and California severability law.

In *Iskanian*, the California Supreme Court evaluated the enforceability of a provision in a mandatory arbitration agreement that prohibited the parties from

asserting a representative PAGA claim in *any* forum. That agreement provided as follows: "EMPLOYEE and COMPANY agree that each will not assert class action or representative action claims against the other *in arbitration or otherwise*." *Iskanian*, 59 Cal. 4th at 360-61 (emphasis added). Based on this blanket waiver, *Iskanian* "conclude[d] that an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions *in any forum* is contrary to public policy." *Id.* at 360 (emphasis added). As the Court further explained, "it is contrary to public policy for an employment agreement to eliminate [PAGA claims] *altogether* by requiring employees to waive the right to bring a PAGA action before any dispute arises." *Id.* at 383 (emphasis added).

The same scenario arose in *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015). There, the arbitration provision stated, "You and the Company each agree that, *no matter in what capacity*, neither you nor the Company will ... file (or join, participate or intervene in) a class-based lawsuit, court case or arbitration"—a prohibition that included "collective or representative arbitration claim[s]" and was understood by the parties as "prohibiting [plaintiff] from bringing *any* PAGA claims on behalf of other employees." *Id.* at 428 (emphasis added). As this Court explained, the *Iskanian* rule "provides only that representative PAGA claims may not be waived outright." *Id.* at 434. Because the

PAGA waiver in *Sakkab* was a blanket prohibition that applied both in court and in arbitration, the Court "held that the waiver of [plaintiff's] representative PAGA claims may not be enforced" and remanded so that the district court could determine whether the PAGA claims should be arbitrated or litigated. *Id.* at 440.

In this case, Uber's Arbitration Provisions contain just one clause that could conceivably fall within the ambit of *Iskanian* and *Sakkab*—a blanket PAGA waiver contained in Section 14.3(i) of the Arbitration Provisions. That provision reads, in relevant part, as follows:

> **Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. *This Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not be way of court or jury trial, or by way of class, collective, or representative action*.**

ER620 (emphasis added); *see also* ER261.[12]

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[12] A separate section of Uber's 2014 Arbitration Provision—Section 14.3(v)—provides that an "*Arbitrator* shall have no authority to consider or resolve any claim or issue any relief on a class, collective, or representative basis." ER622 (emphasis added). The district court correctly concluded that Section 14.3(v) in the 2014 Arbitration Provision merely "bar[s] PAGA claims in *arbitration*" and "does not prohibit PAGA claims in *all* forums." ER37 (emphasis added).

This interpretation of Section 14.3(v) is not only consistent with the contract's express language; it also makes logical sense. By including one *severable* PAGA waiver that applies in *all* fora (Section 14.3(i)) and one *non-severable* PAGA waiver that applies only in *arbitration* (Section 14.3(v)), the parties clearly expressed their hierarchy of intentions: there should be no representative PAGA claims in any forum, but to the extent a court rules that

If this Court determines that the blanket PAGA waiver in Section 14.3(i) is unenforceable, it should sever the blanket PAGA waiver and enforce the remainder of Uber's Arbitration Provisions. Indeed, the district court correctly found that Section 14.3(i) "is severable" pursuant to *two* severability and savings clauses:

> Section 14.1: If any provision of this Agreement is held to be invalid or unenforceable, such provision shall be struck and the remaining provisions shall be enforced to the fullest extent under law.
>
> Section 14.3(ix): Except as stated in subsection [14.3(v)], above, in the event any portion of this Arbitration Provision is deemed unenforceable, the remainder of this Arbitration Provision will be enforceable.

ER618; ER623; ER261; ER264-65; *see* ER38-39.

Yet, even though Section 14.3(i) is expressly severable, the district court concluded that the representative PAGA waiver could *not* be severed because it "is

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PAGA claims must be allowed to proceed *somewhere*, there absolutely must be no representative PAGA claims in arbitration. As *Sakkab* recognized, even companies that prefer arbitration as a general matter "may prefer to litigate representative PAGA claims" because, *inter alia*, "[d]efendants may face hefty civil penalties in PAGA actions, and may be unwilling to forgo judicial review by arbitrating them." 803 F.3d at 437-38.

Notwithstanding its ruling that Section 14.3(v) of the 2014 Arbitration Provision applies in arbitration only, and is thus *not* a blanket PAGA waiver, the district court inexplicably viewed Section 14.3(v) in the 2013 Arbitration Provision as a "blanket, non-severable waiver." ER20. But that provision, like the 2014 Arbitration Provision, expressly applies only to proceedings "in *arbitration*," and states that if the waiver of representative PAGA claims is found to be unenforceable, such claims must be brought "in a civil court of competent jurisdiction," rather than in arbitration. ER263 (emphasis added).

inextricably linked with the remainder of the arbitration agreement," such that severance would "remove the heart of the arbitration agreement." ER38-39; ER42. This reasoning erroneously treated the PAGA waiver as the *primary* objective of the Arbitration Provisions. But that is plainly not the case.

In fact, the district court's finding that the PAGA waiver, though expressly severable, could not be "linguistically" severed contradicts *Iskanian* itself—the very decision that established, as a matter of California law, the unenforceability of PAGA waivers. In *Iskanian*, the plaintiff accepted an agreement that required him to arbitrate "any and all claims" arising out of his employment with the defendant, and provided that neither party would "assert class action or representative action claims against the other in arbitration or otherwise." 59 Cal. 4th at 360-61. Thus, as with Uber's Arbitration Provisions, the agreement in *Iskanian* (1) required arbitration of *all* claims, and (2) included a blanket waiver of representative PAGA claims in *any* forum. Yet rather than invalidate the entire agreement, the California Supreme Court held that the agreement was *enforceable* as to non-PAGA claims:

> Having concluded that CLS cannot compel the waiver of Iskanian's representative PAGA claim but that the agreement is otherwise enforceable according to its terms, we next consider how the parties will proceed .... *Iskanian must proceed with bilateral arbitration* on his individual damages claims, and CLS must answer the representative PAGA claims in some forum.

59 Cal. 4th at 391 (emphasis added).[13]

The district court's opinion is also inconsistent with *Securitas Security Services USA, Inc. v. Superior Court*, 234 Cal. App. 4th 1109 (2015). There, unlike here, the non-severability clause applied to the *blanket* PAGA waiver in the parties' arbitration agreement—i.e., it applied *whenever* a dispute was "brought as a class, collective or representative action," whether in arbitration or in litigation. *Id.* at 1114. Because of that, the court was forced to strike down the entire agreement. *Id.* at 1125-26. Here, as the district court found as to the 2014 Arbitration Provision, the non-severability clause is limited to Section 14.3(v), which applies only *in arbitration*; the blanket PAGA waiver, in contrast, is expressly severable. *See supra* at 32 n.12.

The district court's opinion also conflicts with this Court's recent decision in *Hopkins v. BCI Coca-Cola Bottling Co., of Los Angeles*, — F. App'x —, 2016 WL 685018 (9th Cir. Feb. 19, 2016). In *Hopkins*, the parties signed an arbitration agreement requiring arbitration of "*any* claims arising out of or related to [plaintiff's] employment with [defendant]," and which included a representative PAGA waiver. MJN, Ex. C at 9 (emphasis added). The *Hopkins* plaintiff—like

[13] The parties briefed severability. *See* Appellants Opening Br., 2012 WL 6762727, at *32 (Dec. 20, 2012) ("When the invalid provision is excised, the prohibition on *arbitrating* PAGA representative actions remains, but there is no bar to litigating such claims in court.").

Plaintiffs here—argued that the PAGA waiver could not be linguistically severed from the parties' agreement. *Id.* at 41-42. But this Court disagreed, holding that "the offending clause waiving representative claims may be severed from the rest of the agreement." 2016 WL 685018, at *1. In fact, the Court held that severance was *particularly* appropriate because the parties' agreement—just like Uber's Arbitration Provisions—contained an express severability provision. *Id.*; *see also Sierra v. Oakley Sales Corp.*, — F. App'x —, 2016 WL 683442, at *1 (9th Cir. Feb. 18, 2016) (holding that an arbitration agreement was "not per se unconscionable" where "the offending clause waiving representative [PAGA] claims appears to be severable from the rest of the agreement").

This Court reached the same conclusion in *Sakkab* as well. In *Sakkab*, the plaintiff accepted an arbitration agreement prohibiting him from filing a lawsuit or court case "that relate[d] in *any* way to [his] employment" with defendant, or from filing or joining any class, collective, or representative claim. 803 F.3d at 428 (emphasis added). Although this Court invalidated the representative PAGA waiver, the Court nonetheless held that it was "clear that the non-PAGA claims in the [complaint] must be arbitrated" in accordance with the parties' arbitration agreement, and remanded solely for the purpose of determining "where [plaintiff's] representative PAGA claims should be resolved." *Id.* at 440.

Numerous other courts faced with similar arbitration agreements have followed precisely the same approach as *Iskanian*, *Hopkins*, *Sierra*, and *Sakkab*—severing blanket PAGA waivers and enforcing the remainder of the parties' arbitration agreements. *See, e.g.*, *Franco v. Arakelian Enters., Inc.*, 234 Cal. App. 4th 947, 952-53, 965-66 (2015); *Hilton v. Allcare Med. Mgmt., Inc.*, 2015 WL 5634742, at *7-8 (Cal. Ct. App. Sept. 25, 2015) (unpublished); *Gomez v. Marukai Corp.*, 2013 WL 492544, at *3 (Cal. Ct. App. Feb. 11, 2013) (unpublished); *Tagliabue v. J.C. Penney Corp.*, 2015 WL 8780577, at *6-9 (E.D. Cal. Dec. 15, 2015); *Jacobson v. Snap-On Tools Co.*, 2015 WL 8293164, at *1, 5-6 (N.D. Cal. Dec. 9, 2015); *Levin v. Caviar, Inc.*, — F. Supp. 3d —, 2015 WL 7529649, at *9 (N.D. Cal. Nov. 16, 2015); *Valdez v. Terminix Int'l Co.*, 2015 WL 4342867, at *8-9 & n.6 (C.D. Cal. July 14, 2015). Severance of the PAGA waiver is also consistent with California's "very liberal view of severability," pursuant to which a court must "enforc[e] valid parts of an apparently indivisible contract where the interests of justice or the policy of the law would be furthered.'" *In re Marriage of Facter*, 212 Cal. App. 4th 967, 987 (2013) (quotation marks and citation omitted).

The California Civil Code expressly codifies this important principle. California Civil Code section 1599, for example, provides that "[w]here a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the

rest." Similarly, California Civil Code section 1643 states that "[a] contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." *See also* Cal. Civ. Code § 1652 ("Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses ...."); *id.* § 3541 ("An interpretation which gives effect is preferred to one which makes void.").[14]

Thus, rather than limiting severance to the narrow set of agreements in which unenforceable clauses can be neatly crossed out using a red pen, the California Supreme Court has repeatedly held that courts should "sever" or "restrict" enforcement of seemingly indivisible provisions so as to enforce the lawful aspects of those provisions. For example, in *Marathon Entertainment, Inc. v. Blasi*, 42 Cal. 4th 974 (2008), the California Supreme Court analyzed the enforceability of an agreement between an actress and a management company. Although some of the services that the management company performed pursuant to the agreement were illegal, *Marathon* held that the management company was entitled to payment for services lawfully rendered under the contract. *Id.* at 996-

[14] The district court claimed that severing the PAGA waiver would constitute an impermissible "reformation" of the contract. ER37. But "severance" is distinct from "reformation" because the latter entails "augmenting [the contract] with additional terms." *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 125 (2000).

98. Citing California Civil Code section 1599, the Court rejected a line-by-line parsing of the parties' agreement, as well as the actress's suggestion that the "undifferentiated" nature of the contract required invalidation of the agreement *in toto*, and instead held that the actress's obligation to pay the management company for illegal services could be "extirpated from the contract by means of severance or restriction." *Id*. (quotation marks and citation omitted).

In *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 17 Cal. 4th 119 (1998), the California Supreme Court applied these same severability and restriction principles to a contract for legal services. Pursuant to that contract, an out-of-state law firm provided legal services to its client both legally (in New York) and illegally (in California, without a California bar license). *Id.* at 137-40. Although the contract was an indivisible agreement for legal services, *Birbrower* invoked Civil Code section 1599 and concluded that the law firm was permitted to prove, on remand, that the court should "sever the illegal portion of the contract from the rest of the agreement." *Id*. at 137-38.

Finally, severance of the PAGA waiver is the *only* outcome consistent with the FAA's command that "any doubts concerning the scope of arbitrable issues" should be decided "in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25. In its zeal to demolish Uber's Arbitration Provisions, the district court did not even *address* this requirement. But Supreme Court precedent is clear: courts *must*

"give 'due regard ... to the federal policy favoring arbitration.'" *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 473 (2015) (quoting *Volt*, 489 U.S. at 476).

For all of these reasons—the express severability clauses, the case law from this Court and other courts severing PAGA waivers, California's preference to sever or restrict terms, and the federal and state policies favoring arbitration—this Court should sever or restrict enforcement of the PAGA waiver in Uber's Arbitration Provisions, and enforce the remainder of the parties' agreement.

II. The Arbitration Provisions Cannot Be Procedurally Unconscionable Because Drivers Could, and Did, Opt Out of Arbitration

Under California law, a court may find that an agreement is procedurally unconscionable only when "oppression or surprise [exist] due to unequal bargaining power." *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 246 (2012). "The oppression component arises from ... an absence of ... a meaningful choice on the part of the weaker party." *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1319 (2005) (quotation marks and citation omitted). Thus, the *existence* of a meaningful choice to modify or reject an arbitration agreement is fundamentally incompatible with, and thus precludes, a finding of procedural unconscionability. *See id.* at 1320; *see also Aron v. U-Haul Co. of Cal.*, 143 Cal. App. 4th 796, 809 (2006) ("[T]here can be no 'oppression' when [a] customer has meaningful choices."); *Smith v. Ford Motor*

Co., 462 F. App'x 660, 663-64 (9th Cir. 2011) (finding no procedural unconscionability because the plaintiff "was presented with a meaningful choice").

This Court—on three occasions, including in a 2013 en banc decision—has held that a meaningful opportunity to opt out of an arbitration agreement *precludes* a finding of oppression and *requires* enforcement of the arbitration agreements. *See Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1059 (9th Cir. 2013) (en banc); *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199 (9th Cir. 2002); *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108 (9th Cir. 2002).[15] In *Ahmed*, for example, a case in which an employer sought to compel arbitration of a former employee's claims, this Court held that the arbitration agreement in question was "not ... a contract of adhesion"—and that the "case lack[ed] the necessary element of procedural unconscionability"—because the employee had an "opportunity to opt-out of the [defendant's] arbitration program" by mailing in an opt-out form. 283 F.3d at 1199. Similarly, in *Kilgore*, an en banc panel of this Court held that a putative class of student-borrowers could not show that their lender's arbitration agreement was procedurally unconscionable because the "arbitration clause

[15] *Accord Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1073 (9th Cir. 2007) ("[I]f an employee has a meaningful opportunity to opt out of the arbitration provision ... and still preserve his or her job, then it is not procedurally unconscionable."); *Hoffman v. Citibank (S.D.) N.A.*, 546 F.3d 1078, 1085 (9th Cir. 2008) (per curiam).

allow[ed] [the] students to reject arbitration within sixty days of signing" the agreement. 718 F.3d at 1059.[16]

The present appeals fall squarely within this binding Ninth Circuit case law. It is undisputed that drivers who accepted the agreements could opt out of arbitration within 30 days of accepting the agreement, and that drivers were informed they would face no adverse consequences should they elect to opt out. ER622-23; ER264. It is further undisputed that hundreds of drivers *did*, in fact, opt out. ER228; ER189-91; ER785.

The district court acknowledged that *Kilgore*, *Najd*, and *Ahmed* all support Uber's argument and stand for the proposition that a meaningful right to opt out precludes a finding of procedural unconscionability:

> Uber argues that the existence of a meaningful right to opt-out ... necessarily renders those [arbitration] clauses ... procedurally conscionable as a matter of law, citing [*Ahmed*, *Najd*, and *Kilgore*] .... **It cannot be denied that each of the cited decisions stand for the precise proposition of law that Uber advocates.**

[16] Other circuit courts agree. For example, in *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634 (7th Cir. 1999), the Seventh Circuit enforced an employer's arbitration agreement and compelled a former employee into arbitration because the parties' arbitration agreement contained an opt-out provision and the employee was thus "free not to arbitrate; she was given a choice and she chose—by not signing the opt-out provision—to be bound by the [arbitration agreement]." *Id.* at 636.

MJN, Ex. A at 34 (emphasis added). Yet the district court nevertheless refused to follow these binding Ninth Circuit decisions, expressing instead its disagreement with this Court's holdings. *Id.* at 36 (claiming "*Kilgore* presents an inaccurate picture of California law").

In the district court's view, the en banc Ninth Circuit failed to account for *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007)—an off-point and since-overturned state-court decision issued six years *before* this Court's en banc *Kilgore* ruling. *See* MJN, Ex. A at 36. The district court, however, was required to follow binding circuit precedent even if it disagreed with it. *See, e.g.*, *Owen ex rel. Owen v. United States*, 713 F.2d 1461, 1464 (9th Cir. 1983) (Ninth Circuit's interpretation of state law is binding "in the absence of any subsequent indication from the California courts that [its] interpretation was incorrect"). For that reason alone, this Court should reverse the district court and compel arbitration.[17]

[17] Notably, since *Gentry* was issued nearly a decade ago, federal courts in California routinely have followed *Kilgore*, *Najd*, and *Ahmed*. *See Mill v. Kmart Corp.*, 2014 WL 6706017, at *5-6 (N.D. Cal. Nov. 26, 2014); *Mendoza v. Ad Astra Recovery Servs. Inc.*, 2014 WL 47777, at *5 (C.D. Cal. Jan. 6, 2014); *Velazquez v. Sears, Roebuck & Co.*, 2013 WL 4525581, at *6 (S.D. Cal. Aug. 26, 2013); *King v. Hausfeld*, 2013 WL 1435288, at *8 (N.D. Cal. Apr. 9, 2013); *Hodsdon v. Bright House Networks, LLC*, 2013 WL 1091396, at *5 (E.D. Cal. Mar. 15, 2013); *Alvarez v. T-Mobile USA, Inc.*, 2011 WL 6702424, at *6 (E.D. Cal. Dec. 21, 2011); *Meyer v. T-Mobile USA Inc.*, 836 F. Supp. 2d 994, 1002-03 (N.D. Cal. 2011); *Arellano v. T-Mobile USA, Inc.*, 2011 WL 1362165, at *4-6 (N.D. Cal. Apr. 11, 2011); *Guadagno v. E*Trade Bank*, 592 F. Supp. 2d 1263, 1270 (C.D. Cal. 2008); *Swarbrick v. Umpqua Bank*, 2008 WL 3166016, at *4-5 (E.D. Cal. Aug. 5, 2008).

In any event, *Gentry* is inapplicable here for several reasons. In *Gentry*, the California Supreme Court held that the employment arbitration agreement at issue was "not entirely free from procedural unconscionability" because the employer provided its employee with a dispute resolution handbook that "was markedly one-sided" in the way it portrayed arbitration—the handbook "touted the virtues of arbitration" under headings like "WHY ARBITRATION IS RIGHT FOR YOU AND CIRCUIT CITY," yet failed to mention the "significant disadvantages" of the arbitration agreement at issue. 42 Cal. 4th at 470-72. And because the employer made it "unmistakably clear that [it] preferred that the employee participate in the arbitration program," the employer was in a unique "position to pressure employees to choose its favored option." *Id.* at 471-72 & n.10; *see also id.* at 472 (there was "no doubt about [the employer's] preference" for arbitration). Indeed, the *Gentry* court expressed doubt that *any* employees in the plaintiff's position "would have felt free to opt out," finding it likely that they "felt at least some pressure not to opt out of the arbitration agreement." *Id.* at 471-72.

By contrast, there has been no finding in this case that Uber "touted the virtues of arbitration" or made it "unmistakably clear that [it] preferred" arbitration, nor any finding that Uber "pressur[ed] [drivers] to choose [arbitration]." *Gentry*, 42 Cal. 4th at 471-72 & n.10. To the contrary, Uber advised drivers that "[a]rbitration [was] not a mandatory condition of [their]

contractual relationship with Uber" and "[i]f [drivers] [did] not want to be subject to [the] Arbitration Provision, [they] may opt out." ER264 (advising drivers they have a "right to consult with counsel ... concerning [the] Arbitration Provision" and stating that they "will not be subject to retaliation" if they "opt-out of coverage under [the] Arbitration Provision").

The district court's other reasons for failing to follow *Kilgore* with respect to the 2013 Agreements were also erroneous. First, according to the district court, the opt-out provision was "buried in the contract ... [and] not in any way set off from the small and densely packed text surrounding it." MJN, Ex. A at 25. But it was not "buried"; rather, it was set forth in a separate and clearly labeled section of the Licensing Agreement with an underlined heading entitled "Your Right to Opt Out Of Arbitration," and the opt-out deadline was emphasized in boldface, explaining that "the signed writing **must be post-marked within 30 days of the date this Agreement is executed by you**." ER264. That is no different from the opt-out provision in the arbitration agreement this Court upheld in *Kilgore*. *See Kilgore*, 718 F.3d at 1059 (finding no procedural unconscionability where the opt-out provision was not "buried in fine print in the Note, but was instead in its own section, clearly labeled, in boldface"). Moreover, the California Supreme Court held in *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899 (2015), that the FAA preempts state-law rules that would require a party to draw special attention to an

arbitration provision. *Id.* at 914 (holding that a party has "no obligation to highlight [an] arbitration clause [in] its contract" and that "[a]ny state law imposing such an obligation would be preempted by the FAA"). For exactly these same reasons, the Arbitration Provisions were not a "surprise" to drivers. MJN, Ex. A at 33.

Second, the district court found the 2013 opt-out provision to be "meaningless" because it required drivers to submit their opt-out forms by overnight mail or hand delivery, rather than using email. *Id.* at 25-26.[18] But there is no requirement—and no Ninth Circuit or California authority holding—that a party must be able to invoke a contractual right via email in order for that right to be meaningful and not illusory. To the contrary, courts routinely order class members to serve opt-out notices by overnight delivery or certified mail, in part because those delivery methods preserve "documentary corroboration of a class member's efforts to opt out" while imposing only "minimal cost and effort." *In re WorldCom, Inc. Sec. Litig.*, 2005 WL 1048073, at *1, *5 (S.D.N.Y. May 5, 2005); *accord, e.g.*, *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 123 (S.D.N.Y. 2009) (rejecting argument that service of objections to a class settlement by "certified mail, overnight mail, or by hand" was too "burdensome" for class

[18] The district court expressly held that the opportunity to opt out of the 2014 Arbitration Provision was "meaningful," and yet it *still* held that the agreement was procedurally unconscionable. MJN, Ex. A at 33.

members). Further, as *Sanchez* makes clear, the district court's imposition of special opt-out requirements in the arbitration context is contrary to California law and preempted by the FAA. 61 Cal. 4th at 914.

In any event, it is undisputed that many drivers *did* utilize the opt-out procedures in *both* the 2013 and 2014 Arbitration Provisions to opt out of arbitration, so it simply cannot be the case that the opt-out provision in the 2013 Agreements was "illusory" and "meaningless," as the district court held. Thus, *Kilgore* applies equally to the 2013 and 2014 Arbitration Provisions, precluding a finding of procedural unconscionability.

III. Neither the Cost-Splitting Provision, Nor Any Other Provision, Renders the Arbitration Agreements Substantively Unconscionable

Because Uber's arbitration agreements are not procedurally unconscionable, this Court should not reach the question of substantive unconscionability. *See Kilgore*, 718 F.3d at 1058. If this Court does turn to substantive unconscionability, however, it should find that nothing in the Arbitration Provisions is substantively unconscionable. *See Pinnacle*, 55 Cal. 4th at 246 ("A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be so one-sided as to shock the conscience." (quotation marks and citation omitted)). Alternatively, it should sever any substantively unconscionable provisions and enforce the remainder of the Arbitration Provisions. *Roman v. Superior Court*, 172 Cal. App. 4th 1462, 1477 (2009) ("[T]he strong

legislative and judicial preference is to sever the offending term and enforce the balance of the agreement[.]").

A. The Cost-Splitting Provision Is Not Unconscionable

The district court found the 2013 and 2014 Arbitration Provisions substantively unconscionable based on a cost-sharing provision that provides:

> [I]n all cases where required by law, Uber will pay the Arbitrator's and arbitration fees. If under applicable law Uber is not required to pay all of the Arbitrator's and/or arbitration fees, such fee(s) will be apportioned between the Parties in accordance with said applicable law, and any disputes in that regard will be resolved by the Arbitrator.

ER622; ER264. According to the district court, this provision means that Plaintiffs would "be subject to hefty fees of a type they would not face in court if they [were] forced to arbitrate," and that they "would be unable to access the arbitral forum ... if the fee-splitting clause [were] enforced." MJN, Ex. A at 29, 40.

In reaching this holding, the district court relied primarily on *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000), which precludes mandatory employment arbitration agreements that would "require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court." *Id.* at 110-11. But *Armendariz* applies only in the context of "mandatory employment arbitration agreements"—not, as here, where Plaintiffs could opt out of the Arbitration

Provisions (as many drivers did). *Id.* at 103 n.8; *see also Pearson Dental Supplies, Inc. v. Superior Court*, 48 Cal. 4th 665, 677 (2010) (a "mandatory employment arbitration agreement" is one that "an employer imposes on the employee as a condition of employment"); *Swarbrick*, 2008 WL 3166016, at *4 (finding that *Armendariz* was inapplicable where the plaintiffs had an "opportunity to negotiate or reject the arbitration clauses"). For that reason alone, the district court erred.

In any event, the FAA preempts the *Armendariz* rule, which imposes a special burden on arbitration agreements—and *only* arbitration agreements. *See Concepcion*, 131 S. Ct. at 1746 (the FAA does not permit agreements to arbitrate to be invalidated "by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue"); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("Courts may not ... invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.").

Also incorrect is the district court's conclusion that Plaintiffs would be subject to "hefty fees of a type they would not face in court" if forced to arbitrate. MJN, Ex. A at 29. *Armendariz* applies only if arbitration agreements are deemed to be *mandatory employment* agreements, rather than non-mandatory provisions contained within software licensing agreements that are signed by independent contractors, as is the case here. *Armendariz*, 24 Cal. 4th at 110-11. But if the agreements at issue are deemed to be mandatory employment agreements, the

JAMS Minimum Standards of Procedural Fairness would apply. ER621; ER262. According to those standards,

> An employee's access to arbitration must not be precluded by the employee's inability to pay any costs .... ***The only fee that an employee may be required to pay is JAMS' initial Case Management Fee***. All other costs must be borne by the company, including any additional JAMS Case Management Fee and all professional fees for the arbitrator's services.

MJN, Ex. D at 3 (emphasis added). Accordingly, at most, only a minimal initial fee would apply. Furthermore, because California law and the FAA require courts to interpret the fee provision in a manner so as to "render[] it lawful," *Pearson*, 48 Cal. 4th at 682,[19] if the district court believed the cost-sharing provision to be

[19] *Pearson*, 48 Cal. 4th at 682 ("When an arbitration provision is ambiguous, we will interpret that provision, if reasonable, in a manner that renders it lawful, both because of our public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution, and because of the general principle that we interpret a contractual provision in a manner that renders it enforceable rather than void."); *Appelbaum v. AutoNation Inc.*, 2014 WL 1396585, at *9 (C.D. Cal. Apr. 8, 2014) (arbitration agreement was not unconscionable because "if California law would require Defendants to assume the costs of the arbitration to avoid unconscionability, that law would apply"); *Mill*, 2014 WL 6706017, at *4-6 (arbitration agreement satisfied *Armendariz* because it required employer to pay fees necessary "under state law"); *Collins v. Diamond Pet Food Processors of Cal., LLC*, 2013 WL 1791926, at *6-7 (E.D. Cal. Apr. 26, 2013) (enforcing arbitration agreement allowing attorney's fees to be apportioned to prevailing party because it "[was] explicitly limited by [an] 'in accordance with law' provision"); *Saincome v. Truly Nolen of Am., Inc.*, 2011 WL 3420604, at *9 (S.D. Cal. Aug. 3, 2011) (no substantive unconscionability arose from arbitration provision that provided that arbitrator would assess costs or attorney's fees in accordance with applicable law because arbitrator would construe provision to avoid violating FLSA).

unconscionable, it should have interpreted the Arbitration Provisions to require Uber to bear all arbitration costs. In fact, the fee provision itself expressly contemplates this result. ER622 ("[I]n all cases where required by law, Uber will pay the Arbitrator's and arbitration fees."); ER264 (same).

In the alternative, the court should have severed the cost-sharing provision instead of declaring the entire Arbitration Provisions unenforceable. *See Bigler v. Harker Sch.*, 213 Cal. App. 4th 727, 738 (2013) (rejecting argument that a fee provision in an arbitration agreement was substantively unconscionable because "that term could easily have been severed from the contract"); *Roman*, 172 Cal. App. 4th at 1477 (a fee-sharing provision, to the extent it may be deemed unconscionable, should be severed from the arbitration agreement). Indeed, "the strong legislative and judicial preference is to sever the offending term and enforce the balance of the agreement." *Roman*, 172 Cal. App. 4th at 1477.

B. No Other Provision Is Substantively Unconscionable

None of the other provisions identified by the district court is substantively unconscionable either.

First, the Arbitration Provision is not substantively unconscionable merely because it contains a confidentiality provision, which states as follows: "Except as may be permitted or required by law, as determined by the Arbitrator, neither a party nor an Arbitrator may disclose the existence, content, or results of any

arbitration hereunder without the prior written consent of all Parties." *O'Connor* ER622; ER264. As the en banc Court in *Kilgore* held, enforceability of a confidentiality clause is a "matter distinct from the enforceability of [an] arbitration clause." 718 F.3d at 1059 n.9.

Moreover, numerous courts have upheld the validity of arbitration agreements with confidentiality provisions *identical* or *virtually identical* to the language found in the Arbitration Provision. *See, e.g.*, *Htay Htay Chin v. Advanced Fresh Concepts Franchise Corp.*, 194 Cal. App. 4th 704, 714 (2011); *Velazquez*, 2013 WL 4525581, at *5-6; *Andrade v. P.F. Chang's China Bistro, Inc.*, 2013 WL 5472589, at *9 (S.D. Cal. Aug. 9, 2013).

Second, the Arbitration Provision is not substantively unconscionable based on any supposed lack of "mutuality." MJN, Ex. A at 56-57. The Arbitration Provision permits *all* parties to litigate IP claims in court, a mutual carve-out that courts *routinely* uphold as a matter of law.[20] In addition, IP carve-outs such as this one are not unconscionable because they serve a host of legitimate business interests—including the protection of the parties' IP rights and the protection of third-party interests. *See Armendariz*, 24 Cal. 4th at 117 (it is not "unfairly one-

[20] *Smith v. VMware, Inc.*, 2016 WL 54120, at *4-5 (N.D. Cal. Jan. 5, 2016); *Tompkins v. 23andMe, Inc.*, 2014 WL 2903752, at *17 (N.D. Cal. June 25, 2014); *Hodsdon*, 2013 WL 1091396, at *6; *Ruhe v. Masimo Corp.*, 2011 WL 4442790, at *4 (C.D. Cal. Sept. 16, 2011); *Pirro v. Wash. Mut. Bank*, 2010 WL 3749597, at *3-4 (C.D. Cal. Sept. 23, 2010).

sided" for an employer "to impose arbitration on the employee" given "some reasonable justification" based on "business realities").[21]

Moreover, the Arbitration Provisions also carve out claims that are far more likely to be asserted *against* Uber, such as employee benefit claims under the Employee Retirement Income Security Act, workers compensation claims, state disability insurance claims, and unemployment insurance benefit claims. ER620-21; ER261-62. The Arbitration Provisions also *cover* claims more likely to be brought by Uber, such as claims for trade secrets, unfair competition, and "claims arising under the Uniform Trade Secrets Act." ER620; ER261-62. Courts—including the California Supreme Court in *Sanchez*—have recognized that such *mutual* carve-outs are not unfairly one-sided and do not create substantive unconscionability. *See, e.g.*, *Sanchez*, 61 Cal. 4th at 921-22 (finding no substantive unconscionability in an agreement that included a carve-out favoring defendant because another carve-out in the agreement favored the plaintiff). And even if the IP carve-out were objectionable, the district court should have severed it.

Third, the Arbitration Provision is not substantively unconscionable merely because it permits Uber to modify the terms and conditions of the agreement. ER617; ER260. In fact, this Court has expressly *rejected* the argument that a

[21] *Smith*, 2016 WL 54120, at *5; *Steele v. Am. Mortg. Mgmt. Servs.*, 2012 WL 5349511, at *8 (E.D. Cal. Oct. 26, 2012); *Laughlin v. VMware, Inc.*, 2012 WL 298230, at *6 (N.D. Cal. Feb. 1, 2012).

party's ability to unilaterally modify an arbitration agreement renders it unconscionable, because such provisions are always subject to the limits "imposed by the covenant of good faith and fair dealing implied in every contract." *Ashbey v. Archstone Prop. Mgmt., Inc.*, 612 F. App'x 430, 432 (9th Cir. 2015) (quotation marks and citation omitted). And even before *Ashbey*, "Ninth Circuit courts [had] a history of enforcing contracts containing change-in-terms provisions." *Ekin v. Amazon Servs., LLC*, 84 F. Supp. 3d 1172, 1176 (W.D. Wash. 2014); *see also Slaughter v. Stewart Enters., Inc.*, 2007 WL 2255221, at *10 (N.D. Cal. Aug. 3, 2007). California courts agree. *See, e.g.*, *Serpa v. Cal. Sur. Investigations, Inc*., 215 Cal. App. 4th 695, 708 (2013) ("[T]he implied covenant of good faith and fair dealing limits the employer's authority to unilaterally modify [an] arbitration agreement and saves that agreement from being illusory and thus unconscionable."); *Cobb v. Ironwood Country Club*, 233 Cal. App. 4th 960, 965-66 (2015); *Serafin v. Balco Props. Ltd.*, 235 Cal. App. 4th 165, 176 (2015); *Peng v. First Republic Bank*, 219 Cal. App. 4th 1462, 1474 (2013); *24 Hour Fitness, Inc. v. Superior Court*, 66 Cal. App. 4th 1199, 1214 (1998).

Fourth, for the reasons discussed above, the representative PAGA waiver is not substantively unconscionable because *Iskanian* does not apply, and even if it were, it is severable. *See supra* Part I.

IV. An Arbitrator Should Decide the Enforceability of the Arbitration Provisions

In the alternative to the procedural and substantive unconscionability discussions above, this Court could dispose of this case by ordering enforcement of the parties' delegation clause, which clearly and unmistakably delegates most threshold questions of arbitrability to an arbitrator. *See Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015). The Arbitration Provisions here do just that. *See* ER620 (arbitrator is to resolve "disputes arising out of or relating to interpretation or application of this Arbitration Provision, Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision"); ER261-62 (similar). Under *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), this language is unambiguous in its mandate that the arbitrator, not the Court, should address any arguments that Plaintiffs may have regarding contract validity, irrevocability, or enforceability. *Id.* at 70-72.

The district court nonetheless refused to enforce the delegation provision because of the agreements' general jurisdictional reservation—a provision that is *not* a part of the Arbitration Provisions. But just because the parties intended to delegate arbitrability disputes to an arbitrator as a *general* matter does not eliminate the need to identify the court that would have jurisdiction in the event a judicial proceeding becomes necessary. For example, a court proceeding may be required to compel the parties to arbitration (as here) or to enforce an arbitral

award. That is why the Arbitration Provisions begin with "Except as it otherwise provides, ..." ER620; ER261.[22]

The California Supreme Court has held that an arbitration provision with very similar features evinced a clear and unmistakable intent to refer threshold arbitrability issues to an arbitrator. In *Boghos v. Certain Underwriters at Lloyd's of London*, 36 Cal. 4th 495 (2005), the Court rejected the claim that a separate service of suit clause requiring the defendants to "submit to the jurisdiction of a court of competent jurisdiction within the United States" created ambiguity. 36 Cal. 4th at 502-03. The Court found instead that the parties "clearly ... intended ... for all disputes to be settled in binding arbitration, even if other provisions, read in isolation, might seem to require a different result," and held that the provisions were harmonious because the service of suit clause applied whenever defendants needed "to compel arbitration or to enforce arbitral awards." *Id.* at 503; *accord Dream Theater, Inc. v. Dream Theater*, 124 Cal. App. 4th 547, 556 (2004) ("No matter how broad the arbitration clause, it may be necessary to file an action in

[22] The Arbitration Provisions also include an exception to the general delegation clause by permitting a party to "apply to a court of competent jurisdiction for temporary or preliminary injunctive relief" when "the award to which that party may be entitled may be rendered ineffectual without such provisional relief." ER621; ER263. As another example, the 2013 Arbitration Provision (but not the 2014 Arbitration Provision) expressly states that "a court of competent jurisdiction and not ... an arbitrator" must determine the enforceability of the Arbitration Provision's class action, collective action, and representative action waivers. ER263.

court to enforce an arbitration agreement, or to obtain a judgment enforcing an arbitration award.").

Likewise, federal courts routinely hold that discrete references to "courts," like those in the 2013 and 2014 Agreements, do not render clear and unmistakable delegation clauses ambiguous. *See, e.g.*, *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1075 (9th Cir. 2013) (finding a clear and unmistakable intent to delegate and holding that it was "immaterial" that applicable arbitration rules stated that there could be "challenge[s] to [the arbitral tribunal's] jurisdiction [in] a court"); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 879 (8th Cir. 2009) (a reference to "court costs" in a governing law provision did not conflict with a clear and unmistakable intent to delegate because "a party may seek to have the arbitrator's order confirmed, modified or vacated in a court ....").[23]

V. This Court Should Not Follow the NLRB's Decision in *D.R. Horton*

Plaintiffs in *O'Connor*, relying on the NLRB's decision in *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (2012), *rev'd in part*, *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), also asked the district court to deny Uber's motion to compel arbitration on the ground that because Section 7 of the National

[23] The Plaintiffs in *Yusecoy* raised a handful of additional case-specific challenges to Uber's motion to compel, including claims of waiver and the lack of assent to any arbitration agreement. *See* No. 3:15-cv-00262-EMC, Dkt. 72 at 3-11. Uber rebutted each of these arguments below. *See* No. 3:15-cv-00262-EMC, Dkt. 80 at 1-7. The district court did not address these arguments.

Labor Relations Act ("NLRA"), 29 U.S.C. § 157, gives employees the right to engage in "concerted activities," they should be permitted to "band[] together" and pursue their claims on a class basis. No. 3:13-cv-03826-EMC, Dkt. 353 at 22-25. As the district court correctly recognized, the "vast majority of courts" have declined to follow NLRB's decision in *D.R. Horton* because its interpretation of the FAA is contrary to *Concepcion*. ER21; *see also Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013) (per curiam) (noting rejection of *D.R. Horton* by "two courts of appeals, and the overwhelming majority of the district courts"). Indeed, the California Supreme Court and the Second, Fifth, and Eighth Circuits have all rejected the reasoning of *D.R. Horton*. *See Iskanian*, 59 Cal. 4th at 373-74; *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013) (per curiam); *D.R. Horton*, 737 F.3d at 356-61; *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013).

These courts have correctly concluded that the NLRB ignored *Concepcion*'s teaching that "[t]he principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms" and that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S. Ct. at 1748 (quotation marks and citation omitted). Moreover, neither the NLRA's language nor legislative history shows any indication of prohibiting a class action

waiver in an arbitration agreement; there is no "inherent conflict" between the FAA and NLRA, particularly because the NLRA itself favors arbitration and permits unions to waive the rights of employees to litigate statutory employment claims in favor or arbitration; and the NLRA was enacted and reenacted *before* the advent in 1966 of modern class action practice, and consequently could not have protected a "right of access" to a procedure that did not exist when it was last reenacted. *See D.R. Horton*, 737 F.3d at 360-62; *Iskanian*, 59 Cal. 4th at 371-72.

CONCLUSION

For the reasons set forth above, the Court should reverse the orders denying Uber's motions to compel arbitration, hold that Uber's arbitration agreements are enforceable, and compel the parties to arbitration.

Dated: March 18, 2016

Respectfully submitted,

s/ Theodore J. Boutrous, Jr.

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STATEMENT OF RELATED CASES

Appellants are aware of the following related cases: (1) *O'Connor v. Uber Techs., Inc.*, 9th Cir., No. 14-16078, N.D. Cal., No. 3:13-cv-03826-EMC; (2) *O'Connor v. Uber Techs., Inc.*, 9th Cir., No. 15-80220, N.D. Cal., No. 3:13-cv-03826-EMC; (3) *O'Connor v. Uber Techs., Inc.*, 9th Cir., No. 15-17532, N.D. Cal., No. 3:13-cv-03826-EMC; (4) *O'Connor v. Uber Techs. Inc.*, 9th Cir., No. 16-15000, N.D. Cal., No. 3:13-cv-03826-EMC; (5) *Mohamed v. Uber Techs., Inc.*, 9th Cir., No. 15-16178, N.D. Cal., No. 3:14-cv-05200-EMC; (6) *Mohamed v. Hirease, LLC*, 9th Cir., No. 15-16250, N.D. Cal., No. 3:14-cv-05200-EMC; (7) *Mohamed v. Uber Techs., Inc.*, 9th Cir., No. 15-17533, N.D. Cal., No. 3:14-cv-05200-EMC; (8) *Mohamed v. Uber Techs., Inc.*, 9th Cir., No. 16-15035, N.D. Cal., No. 3:14-cv-05200-EMC; (9) *Yucesoy v. Uber Techs., Inc.*, 9th Cir., No. 15-17534, N.D. Cal., No. 3:15-cv-00262-EMC; (10) *Yucesoy v. Uber Techs., Inc.*, 9th Cir., No. 16-15001, N.D. Cal., No. 3:15-cv-00262-EMC; and (11) *Gillette v. Uber Techs., Inc.*, 9th Cir., No. 15-16181, N.D. Cal., No. 3:14-cv-05241-EMC.

Dated: March 18, 2016

s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Court Rule 32-1 because it contains 13,991 words, excluding the parts of the brief exempted by the Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Undersigned counsel certifies that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced 14-point Times New Roman typeface using Microsoft Word 2010.

Dated: March 18, 2016

s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 18, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 18, 2016

s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.