Nos. 15-16178, 15-16181, 15-16250

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ABDUL KADIR MOHAMED, Plaintiff-Appellee, v. UBER TECHNOLOGIES, INC., et al., Defendants-Appellants.	No. 15-16178 No. C-14-5200 EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding
RONALD GILLETTE, Plaintiff-Appellee v. UBER TECHNOLOGIES, INC. Defendants-Appellants.	No. 15-16181 No. C-14-5241 EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding
ABDUL KADIR MOHAMED, Plaintiff-Appellee, v. HIREASE, LLC, Defendant-Appellant.	No. 15-16250 No. C-14-5200 EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding

On Appeal from an Order of the United States District Court
for the Northern District of California
The Honorable Edward M. Chen, Judge Presiding
Case No. 14-cv-05200-EMC

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I. INTRODUCTION

In appealing the district court's detailed and well-reasoned order denying its motions to compel arbitration, Uber relegates to a single footnote, on page 50, the district court's holding that is dispositive on appeal. The district court invalidated both the 2013 and 2014 arbitration agreements because they purport to waive the right to bring a representative action under California's Labor Code Private Attorneys General Act of 2004 ("PAGA"). The Agreements declare that the waiver, if found unenforceable, "shall not be severable." The district court correctly held that the PAGA waivers are unenforceable, as confirmed by *Sakkab v. Luxxotica*, 803 F.3d 425 (9th Cir. 2015). Thus, by operation of the non-severability provision in both agreements, neither arbitration agreement is enforceable. That is the end of the analysis here.

Because *Sakkab* had not yet been decided at the time, the district court also engaged in an exhaustive analysis of the separate and independent issue of unconscionability. Although this Court need not address unconscionability to affirm, the district court's unconscionability ruling is correct. The 2013 Agreement – the first Uber driver contract to include an arbitration agreement – was implemented shortly after class action lawsuits began to be filed in order to, as the district court put it, "thwart existing class action litigation." The 2013 Agreement includes a high degree of procedural and substantive unconscionability.

The 2013 Agreement, which Plaintiff Gillette was required to accept in order to continue driving for Uber, is part of a form adhesion contract that provided drivers with no meaningful opportunity to negotiate its terms. Although the Agreement included a nominal opportunity to opt out, the opt-out provision was buried at the end of an extremely long and dense licensing agreement conveyed to drivers by link on a smartphone. Although Uber attempts to conflate the 2013 and 2014 Agreements throughout its brief, the opt-out provision in the 2013 Agreement was so inconspicuous as to be, in the district court's words, "illusory." In addition, the procedures to opt out were onerous, requiring delivery of an opt-out request by hand or by overnight delivery to Uber's legal department in San Francisco.

Substantively, the 2013 Agreement is permeated with unconscionable terms. The Agreement imposes hefty arbitration-related fees and costs that far exceed those required by court litigation, and that preclude the "effective vindication" of Plaintiffs' statutory rights. It includes broad confidentiality requirements that serve the dual purpose of limiting a driver's ability to investigate claims and ensuring that only Uber may benefit from information regarding other arbitration proceedings. The 2013 Agreement also lacks mutuality by compelling to arbitration almost all claims a potential plaintiff may assert while exempting from arbitration the intellectual property claims that are most valuable to Uber. It also provides Uber with the unilateral right to modify the terms of the agreements

without notice. Finally, the 2013 Agreement purports to insulate Uber from PAGA claims, which are unwaivable under California law.

The 2014 Agreement, which Plaintiff Mohamed was required to accept to drive for Uber, is also unconscionable. The 2014 Agreement is procedurally unconscionable as it pressured drivers into accepting disadvantageous terms without providing information allowing them to understand what they were giving up. Although the 2014 Agreement contains the same substantively unconscionable terms as the 2013 Agreement, the district court never issued a final decision on whether the 2014 Agreement was unconscionable, given the court's invalidation of the arbitration provision due to the non-severable and unenforceable PAGA waiver.

Finally, the district court did not err in concluding that it, rather than an arbitrator, had the authority to decide the foregoing issues. Although Uber again attempts to conflate the two Agreements, the 2013 Agreement specifically states that only a court, and not an arbitrator, may assess the validity of the PAGA Waiver. In addition, neither "delegation clause" meets the "clear and unmistakable" standard for delegation established by the Supreme Court, as both Agreements also state that a court, not an arbitrator, will decide issues of arbitrability. The district court also correctly held, in the alternative, that the delegation clauses are unconscionable.

II. STATEMENT OF ISSUES

1. Whether the non-severable PAGA waivers are unenforceable, and therefore the arbitration agreements are unenforceable.

2. Although this Court need not reach it, whether the district court correctly held, in the alternative, that the 2013 Agreement is unconscionable.

3. Although this Court need not reach it, and although the district court did not decide it, whether the 2014 Agreement is unconscionable.

4. Whether the court, not an arbitrator, was the proper decisionmaker to adjudicate the foregoing gateway issues of arbitrability.

III. FACTS AND PROCEDURAL HISTORY

A. Origin of the Arbitration Agreements in *Gillette* (2013 Agreement) and *Mohamed* (2014 Agreement)

In July 2013, Uber added, for the first time, an arbitration provision to the agreement that Uber requires its drivers to accept. ER 8. The new contract was presented to drivers in the smartphone Uber application ("App") through which they receive their driving assignments. ER 4, 5. Drivers who were already working for Uber were required to tap a button accepting the contract before the App would give them their next driving assignment. *Id*. Plaintiff Gillette drove under the July 2013 version of the contract (the "2013 Agreement"). *See* ER 198 *et seq.*

Uber's addition of the arbitration provision in July 2013 was an effort to "thwart existing class action litigation." *See O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2014 WL 1760314, at *8 (N.D. Cal. May 2, 2014); *id.* at *6

(Uber's arbitration agreement was distributed to drivers shortly after the filing of *Lavitman v. Uber Technologies, Inc.*, C.A. No. 12-4490 (Mass. Super. Ct.)).

In August 2013, drivers filed *O'Connor v. Uber Technologies, Inc.* alleging that they had been misclassified as independent contractors. *O'Connor v. Uber Techs., Inc.*, 2013 WL 6407583, at *2 (N.D. Cal. Dec. 6, 2013). The *O'Connor* plaintiffs immediately sought a protective order striking the arbitration provision that Uber had rolled out to its drivers several weeks earlier. Analyzing the 2013 Agreement as a communication with proposed class members under Rule 23, the district court found it to be "potentially misleading, coercive" and a threat "to interfere with the rights of class members." *Id*. at *7. Although the 2013 Agreement included a provision allowing drivers to opt out of the arbitration clause within 30 days, the court found the introduction of the arbitration clause and the running of the opt-out period while cases were pending to be a misleading communication under Rule 23, and ordered Uber to provide corrective notice. *Id.* at *6-7.

Uber drafted corrective notices and a new arbitration agreement (the "2014 Agreement") that it required all drivers to accept starting in June 2014. ER 9; *O'Connor*, 2014 WL 1760314, at *2. It was Uber's own choice to incorporate the corrective notice into a new agreement, rather than simply to send a corrective notice. *See* Uber Req. for Judicial Notice ("Uber RJN") Ex. H. at 3 (upon being

ordered to submit proposed corrective notice, "Uber has submitted two proposed corrective notices and a revised Licensing agreement"). Initially, Uber presented the Court with a draft 2014 Agreement that eliminated the opt-out procedure. *Id.* at *7. Reviewing the proposed new Agreement under Rule 23(d), the court held that "[c]onditioning use of its App on accepting the arbitration provision is clearly an attempt to discourage participation in the class action." *Id*. at *8. Also to alleviate Rule 23(d) concerns, the Court required Uber to permit drivers to opt out through less onerous means, including regular U.S. mail and email. *O'Connor v. Uber Techs., Inc.*, No. 13-cv-3826 EMC, 2014 WL 2215860, at *4 (N.D. Cal. May 29, 2014). For drivers who had already accepted the 2013 Agreement, the Court required Uber to provide an additional 30-day opt-out period. *O'Connor*, 2014 WL 1760314, at *8.

The *O'Connor* court "did *not* 'draft' or 'approve' the *substance* of the 2014 Agreements." *Mohamed v. Uber Techs., Inc.*, No. C-14-5200 EMC, 2015 WL 4483990, at *4-5 (N.D. Cal. July 22, 2015). Rather, it "aided in drafting a corrective *notice* that" – by Uber's own choice – "was incorporated into those Agreements, which notice was designed to call new and existing Uber drivers' attention to the contracts' arbitration provisions and, particularly, their class action waivers." *Id.* (original emphasis).

B. The Contents of the Arbitration Agreements

The 2013 and 2014 Agreements contain similar arbitration provisions. They both require all claims to be brought in arbitration only, on an individual-only basis, explicitly forbidding the right to bring a class, collective, or representative PAGA action. ER 156-58 (2014 Agreement § 14.3.i, 14.3.v), 211 (2013 Agreement § 14.3.v). Each agreement makes the representative PAGA waiver non-severable in the event that a court finds it unenforceable. ER 158 (§ 14.3.v), 211 (§ 14.3.v).

Both Agreements require a driver to bear half the arbitration fees and costs unless "required by law." ER 158 (§ 14.3.vi), 212 (§ 14.3.vi). When questioned by the district court regarding this fee-splitting provision, Uber's counsel explained that "absent a showing of employee status, each party would probably bear their own expenses." ER 31. Uber reiterated in its briefing that drivers would bear half the fees unless otherwise required by law. *See* Plaintiffs-Appellees' Supplemental Excerpts of Record ("SER") 175. In addition, the Agreements contain confidentiality provisions that prevent Plaintiffs from discussing any aspect of the arbitration with other drivers or anyone else. ER 158 (§ 14.3.vii), 212 (§ 14.3.vii). The Agreements require arbitration of claims most likely brought by employees (virtually all statutory and employment claims) while exempting from arbitration the claims most valuable to Uber: intellectual property claims. ER 156-57

(§ 14.3.ii); 209 (§ 14.2). Finally, the Agreements provide Uber the unilateral right to modify the terms of these agreements without notice, at any time for any reason. ER 153 (§ 12.1), 208 (§ 12.1).

Both Agreements purport to delegate issues of arbitrability to an arbitrator, while elsewhere inconsistently stating that such issues will be resolved only by a court. *See infra* § 5.E.

C. Only 0.17% of the *O'Connor* Class Opted Out of the 2013 or 2014 Agreement.

Uber asserts (without record support) that "hundreds" of drivers have opted out of the 2013 and 2014 agreements. Br. at 1, 3, 30. Uber does not specify how many drivers opted out of the 2013 Agreement as opposed to the 2014 Agreement. The *O'Connor* plaintiffs have contended that, due to the intervention of plaintiffs' counsel, 269 drivers in California out of a class of 160,000 opted out of either the 2013 or 2014 Agreement. *See* Uber RJN Ex. K; *O'Connor v. Uber Techs., Inc.* No. 13-cv-3826-EMC, 2015 WL 5138097 (N.D. Cal. Sept. 1, 2015). This represents an opt-out rate of 0.17% for the California-only *O'Connor* class. Although Uber fails to disclose any certain numbers, presumably the opt-out percentage is even smaller for drivers nationwide.

D. The *Gillette* and *Mohamed* Claims

On November 26, 2014, former Uber driver Ronald Gillette, who had been terminated as the result of a background check, filed his action alleging that Uber's

background check practices violated the Federal Fair Credit Reporting Act ("FCRA") and the California Investigative Consumer Report Agencies Act. ER 221-42. *Gillette* also brought claims under PAGA arising from Uber's misclassification of drivers as independent contractors. *Id*. *Mohamed*, filed on November 24, 2014, alleges similar background check claims under the FCRA, the California Consumer Credit Reporting Agencies Act, and Massachusetts law. ER 243-60.

E. The District Court Declines to Compel Arbitration in *Gillette* and *Mohamed* under the 2013 and 2014 Agreements.

Uber filed motions to compel arbitration, asserting that Gillette was bound by the 2013 Agreement and that Mohamed was bound by the 2014 Agreement. SER 001, 027. Gillette and Mohamed filed a consolidated opposition brief. SER 050. Defendants filed a consolidated reply. SER 149. On June 9, 2015, in the decision at issue in this appeal, the district court denied both motions in a single seventy-page decision that carefully addressed both Agreements. ER 1-70.

The district court first considered the "delegation" provisions in the 2013 and 2014 Agreements, which purport to delegate threshold questions of arbitrability to an arbitrator. ER 15-40. The court held these provisions were unenforceable for two reasons. First, they failed the Supreme Court's heightened "clear and unmistakable" standard for delegation clauses because they conflicted with other language in the contracts stating that a court would decide matters. ER

15-23. Second, and independently, the delegation provisions themselves were unconscionable. ER 23-40.

Having concluded that the court, rather than an arbitrator, was the proper decisionmaker with respect to Plaintiffs' assertion that the arbitration agreements were unenforceable, the district court analyzed each agreement in turn.

The district court held both arbitration provisions unenforceable because each contains a PAGA waiver and states that if the PAGA waiver is found to be unenforceable it "shall not be severable." ER 52-53 ("[T]he PAGA waiver is expressly non-severable from the remaining arbitration provisions. Hence, the court strikes the entire arbitration clause from the 2013 Agreement, consistent with the plain language of the contract."); ER 68-69 ("Uber specifically provided that the PAGA waiver 'shall not be severable' if the Court determines it is unenforceable. It is unenforceable. Thus, the arbitration provisions in the 2014 contracts cannot be enforced either.") (internal citations omitted).[1]

[1] After the district court opinion, the Ninth Circuit decided *Sakkab v. Luxxotica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015), holding that PAGA waivers are invalid. Thereafter, in the *O'Connor* case, the district court again analyzed the 2014 Agreement and again held in a detailed opinion that the non-severable PAGA waiver made the Agreement unenforceable. That decision, which was issued on December 9, 2015 while the instant appeal was pending, considered and rejected a number of Uber's arguments about the non-severable PAGA waiver, which Uber declined to make in its appeal brief here. *See O'Connor v. Uber Techs., Inc.*, No. 13-CV-03826-EMC, 2015 WL 8292006, at **6-13 (N.D. Cal. Dec. 9, 2015). In particular, the district court rejected Uber's arguments that the

At the time of the district court's decision, the Ninth Circuit had not yet issued *Sakkab*, so the district court also addressed unconscionability. The district court held (as an alternative and independent ground for its decision) that the 2013 Agreement was unconscionable. First, the court held the Agreement procedurally unconscionable because, among other things, it was inconspicuously buried at the end of a prolix legal document presented to drivers on their phones, making its burdensome opt-out provision illusory. ER 40-42. Second, the district court held that the 2013 Agreement contained at least five substantively unconscionable provisions: (1) it shifted half of the arbitration fees the driver; (2) it contained a confidentiality clause that gave Uber a repeat-player advantage; (3) it was one-sided in that it carved out intellectual property claims that Uber was likely to bring and allowed them to be brought in court; (4) it permitted Uber unilaterally to modify the terms of the agreement; and (5) it included a PAGA waiver which, in addition to being unenforceable and non-severable, was also unconscionable. ER 53-59. And third, the Court held that under the sliding scale approach to

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(continued . . .)

court should "sever" portions of the agreement in order to avoid the effect of the non-severability provision, with the court observing that Uber's proposed "severance" was linguistically impossible without a significant re-writing of the fundamental terms of the contract. *Id.*

unconscionability, without even factoring in the PAGA waiver, the other four provisions "permeated" the agreement, rendering it unenforceable. ER 59-61.

The district court did not reach the question of whether the 2014 agreement should be struck as unconscionable, resting its decision instead on the non-severable PAGA waiver. ER 62-63. The district court did conclude, however, that there was a degree of procedural unconscionability arising from the oppressive manner in which drivers were presented with the disadvantageous terms of the Agreement, and the court noted that the 2014 Agreement contained the same substantively unconscionable terms as the 2013 Agreement. ER 61-62.

F. Plaintiffs Amend to Add Class Representatives Not Subject to Any Arbitration Agreement.

On August 18, 2015, the district court granted Gillette's motion to file a Second Amended Complaint adding three named plaintiffs. *Gillette v. Uber Techs., Inc.*, No. C-14-5241 EMC, 2015 WL 4931793 (N.D. Cal. Aug. 18, 2015). These plaintiffs applied for but were denied employment with Uber based on background checks. SER 190-96. They did not sign arbitration agreements, and thus the class claims will proceed in court even if Uber prevails on this appeal. On October 22, 2015, the district court consolidated *Gillette* and *Mohamed* with a third case into a single action entitled *In re Uber FCRA Litigation*. SER 198.

G. With This Appeal Pending, Uber Required All Drivers to Accept a December 2015 Agreement that Removed the "Non-Severable" Language.

While this Appeal was pending, Uber required all of its Drivers to accept an updated December 11, 2015 Agreement, in which Uber reversed position and made its PAGA waiver "severable," rather than non-severable. SER 127; Plaintiffs-Appellees' Req. for Judicial Notice ("Pls.' RJN") Ex. 2 at 21-22. Plaintiffs challenged this maneuver as coercive and misleading under Rule 23(d), in light of the pending class action in which Uber's motion to compel had already been denied, and asked the district court not to enforce the new arbitration agreement in this pending action. SER 127. On December 23, 2015, the district court issued an order finding the new Agreement to be misleading under Rule 23(d), and required the parties to confer over a corrective notice, but denied Plaintiffs' request to prevent Uber from attempting to invoke new arbitration agreements in this pending class action. The parties have cross-appealed that order.

IV. STANDARD OF REVIEW

The district court's decision to deny a motion to compel arbitration is reviewed *de novo*. *Sakkab*, 803 F.3d at 429. The district court's decision to invalidate the entirety of the 2013 Agreement rather than sever its unconscionable provisions is reviewed for abuse of discretion. *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1006 (9th Cir. 2010); *Armendariz v.*

Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 124 (2000). The district court's findings of fact underlying its decision are reviewed for clear error. *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1267-68 (9th Cir. 2006).

V. ARGUMENT

A. Because the PAGA Waiver Is Unenforceable, the Arbitration Clauses Must Be Struck by Operation of the Contract Language.

Uber's arbitration agreements are invalid because that is what Uber wrote into the agreements, which provide that if the PAGA waivers are held to be unenforceable, those waivers "shall not be severable" from the arbitration clauses. Because the PAGA waivers are unenforceable, the arbitration clauses are unenforceable.

1. The 2013 Agreement's PAGA Waiver Is Non-Severable.

In its Opening Brief, Uber does not challenge (or even address) the district court's non-severability conclusion as to the 2013 Agreement.

The 2013 Agreement arbitration provision states:

> There will be no right or authority for any dispute to be brought, heard or arbitrated as a private attorney general representative action. ("Private Attorney General Waiver"). The Private Attorney General Waiver ***shall not be severable*** from this Arbitration Provision in any case in which a civil court of competent jurisdiction finds the Private Attorney General Waiver is unenforceable.

ER 211 § 14.3(v)(c) (emphasis added).

Although the contract elsewhere contains a general severability clause, that clause explicitly carves out the above-quoted non-severability provision (*i.e.*, § 14.3.v). *See* ER 212 § 14.3.ix.

As the district court correctly held: "[t]he plain language of the contract requires invalidation of the entire arbitration provision because the PAGA waiver expressly forbids severance." ER 52. In an effort to escape this simple conclusion, Uber offered the district court a "structural argument" based on the fact that the 2013 Agreement also included a non-severable class action waiver and a non-severable collective action waiver, arguing to the district court that "[t]he benefit of setting forth three different waivers, and separately providing that they are not severable, is clear, particularly here: the unenforceable waiver does not fall out of the agreement entirely, but instead requires that the impacted claims proceed in court as the parties intended, not the arbitral forum." *See* SER 162. Including three non-severable waivers does not, in any way, suggest that any particular waiver is actually severable. As the district court correctly held, "even if Uber's structural argument offered a plausible construction of the Agreement (and the Court has considerable doubts on that point) it ultimately must be rejected. At best, Uber's argument suggests there is some ambiguity in the otherwise crystal clear language of the contract," and such ambiguity would be construed against the drafter, Uber. *See* ER 52-53.

Even if Uber's "structural" argument were successful as to the 2013 Agreement (which it is not), it would doom Uber's argument on the 2014 Agreement, in which the class, collective, and PAGA waivers are not broken out separately, but are lumped together and, again, made non-severable, as explained in the following section.

Uber also urged the lower court to "***restrict*** enforcement of any unenforceable provision while enforcing the remainder" (SER 164) (emphasis in original) – but that would simply be severance by another name, and the contract makes the waiver non-severable. The cases Uber cited in support are irrelevant because they did not involve a non-severability clause. *See id.* (citing *Ramirez v. Cintas Corp.*, C 04-281-JSW, 2005 WL 2894628, at *9 (N.D. Cal. Nov. 2, 2005) (severing unconscionable clause in absence of non-severability provision) and *Sanchez v. W. Pizza Enters., Inc.*, 172 Cal. App. 4th 154 (2009) (in absence of non-severability provision deciding nonetheless not to sever clause as a matter of discretion but to strike arbitration agreement)).

2. The 2014 Agreement's PAGA Waiver Is Non-Severable.

The arbitration provision in the 2014 Agreement is very similar, but has some differences.

Like the 2013 Agreement, the 2014 Agreement provides:

> You and Uber agree to resolve any dispute in arbitration on an individual basis only, and not on a … private attorney general representative action basis. … The

> Arbitrator shall have no authority to consider or resolve any claim or issue any relief on a class, collective, or ***representative basis***. If at any point this provision is determined to be unenforceable, the parties agree that this provision ***shall not be severable***, unless it is determined that the Arbitration may still proceed on an individual basis only.

ER 158 § 14.3.v (emphasis added).

The district court correctly concluded that "[l]ike the 2013 Agreement, the 2014 contracts expressly provide that if a court determines that the PAGA waiver is unenforceable, the PAGA waiver 'shall not be severable.' Unlike the 2013 Agreement, Uber has never argued that the non-severability language in the 2014 contracts is ambiguous, and the Court concludes it is not. The Court must enforce the express terms of the parties' agreements." ER 68.

The same district court judge recently considered, and rejected, additional arguments made by Uber in an effort to escape the effect of the non-severable PAGA waiver in the 2014 Agreement. *See O'Connor*, 13-cv-3826-EMC, 2015 WL 8292006 (N.D. Cal. Dec. 9, 2015). There, the district court confirmed (and Uber did not dispute) that the unenforceability of the PAGA waiver, and resulting unenforceability of the arbitration clause from which the waiver is "non-severable," was *not* a question of unconscionability; rather that outcome was simply compelled by the operation of contract language and the fact that PAGA waivers are unenforceable as contrary to public policy. *Id.* at **11-12.

In this appeal, Uber's argument challenging the district court's non-severability holding is found in a single footnote. Br. at 50 n.22. There, Uber argues that the final phrase in the provision quoted above – "unless it is determined that the Arbitration may still proceed on an individual basis only" – which was added in the 2014 Agreement, does allow for the severability of the PAGA waiver. That terse argument (which essentially concedes that the 2013 Agreement's PAGA waiver is non-severable), fails for at least three reasons.

First, PAGA claims are, by their nature, representative, and therefore cannot proceed on an "individual"-only basis, as three California Courts of Appeal and numerous federal district courts have held. *See Williams v. Super. Ct.*, 237 Cal. App. 4th 642, 645, 649 (2015) (PAGA claim "must be brought in a representative capacity," and "cannot be split into an arbitrable 'individual claim' and a nonarbitrable representative claim."); *Reyes v. Macy's, Inc.*, 202 Cal. App. 4th 1119, 1123 (2011) ("A plaintiff asserting a PAGA claim may not bring the claim simply on his or her own behalf but must bring it as a representative action …."); *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489, 503 n.8 (2011); *see also Achal v. Gate Gourmet, Inc.*, --- F. Supp. 3d --- , 2015 WL 4274990, at *13 (N.D. Cal. July 14, 2015); *Valdez v. Terminix Int'l Co. Ltd. P'Ship*, 2015 WL 4342867, at *8 (C.D. Cal. July 14, 2015). Therefore, the phrase "unless it is determined that

the Arbitration may still proceed on an individual basis only" has no application to the non-severability of the PAGA waiver.

Second, whatever the "unless" provision was intended to mean, it does not unambiguously override the express "non-severable" language earlier in that sentence here. It also does not support Uber's post-hoc effort to create a mechanism that is wholly absent from and inconsistent with the agreement: the bifurcation and litigation of Plaintiffs' PAGA claims in court, and the arbitration of any remaining claims. Any ambiguity must be construed against Uber, as the drafter of the contract, and the non-severability clause must be given effect. *See Securitas Sec. Servs. USA, Inc. v. Super. Ct.*, 234 Cal. App. 4th 1109, 1126-27 (2015) (even absent a non-severability clause, and even in the presence of a general severability clause, it was ambiguous whether unenforceable PAGA waiver could be severed, and such ambiguity was to be construed against drafter, with the result being denial of the motion to compel arbitration); *see also Slottow v. Am. Cas. Co. of Reading, Pa.*, 10 F.3d 1355, 1361 (9th Cir. 1993) (recognizing California law rule that "ambiguities in a written instrument are resolved against the drafter") (citation omitted).

Third, Uber waived this argument in this appeal – and its non-severability argument as a whole – by failing to brief it in its opening brief. *See Hilao v. Estate of Marcos*, 103 F.3d 767, 778 n.4 (9th Cir. 1996) ("The summary mention of an

issue in a footnote [in an Opening Brief], without reasoning in support of the appellant's argument, is insufficient to raise the issue on appeal."). Leaving an argument for the reply brief deprives the Court of full joinder of issue. Plaintiffs hereby give notice that if Uber raises arguments for the first time in its Reply, Plaintiffs will seek leave to file a Sur-Reply as needed.

3. The Ninth Circuit Has Repeatedly Enforced Non-Severability Provisions According to Their Plain Terms.

The Ninth Circuit has consistently enforced nearly identical non-severability language. *See Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1091, 1098 (9th Cir. 2009) ("In the usual case, we would be required to determine whether the unenforceable class action waiver should be severed from the arbitration agreement as a whole …. However, in the present case the arbitration agreement itself includes a provision prohibiting severance of the class action waiver. Therefore, in accordance with its severability clause, the arbitration agreement as a whole is unenforceable."); *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1219 (9th Cir. 2008) ("Having determined that the (nonseverable) class action waiver is invalid under Washington law, we hold that T-Mobile's arbitration agreement is unenforceable under Washington law."); *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 986-87 (9th Cir. 2007) (because class waiver was unenforceable and was explicitly made non-severable, arbitration clause was struck as unenforceable); *see also Securitas Sec. Servs.*, 234 Cal. App. 4th at 1125-27

(where PAGA waiver was explicitly non-severable, entire arbitration agreement was unenforceable). When the contract makes an enforceable term non-severable, that is the end of the analysis.

In its Reply, Uber will likely cite the Supreme Court's recent decision in *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), but that case merely supports Plaintiffs' position that contractual terms must be enforced. In *DIRECTV*, the Court considered an arbitration agreement informing customers that if "the law of [their] state" made the agreement's class action waiver "unenforceable," then the entire agreement would be unenforceable. *DIRECTV*, 136 S. Ct. at 466. The Supreme Court never questioned the fact that the "non-severable" nature of the agreement would have to be enforced if, in fact, the class action waiver had been unenforceable. Rather, the Supreme Court simply held that class action waiver *was* enforceable, so the non-severability provision was not implicated. *Id*. at 471.

4. The Court Cannot Rewrite the Contract to Avoid the Straightforward Consequences of Uber's Own Drafting.

Uber is likely to argue in its Reply that this Court should rewrite Uber's contract to suit Uber's post hoc preferences. *See* Pls.' RJN Ex. 1 (supplemental briefing on severability issue, dated Nov. 18, 2015). In *O'Connor*, Uber argued that because the non-severability clause is found in a section called "How Arbitration Proceedings Are Conducted," the effect of the clause can be avoided if the court re-writes an earlier clause to make it say that PAGA representative claims

will not go to arbitration after all, but will be split from all other claims and litigated in court. ER 158 (2014), ER 211 (2013). Thus, with respect to the 2014 Agreement, Uber itself has argued that an earlier clause in its contract *also* constitutes an unlawful PAGA waiver, by similarly requiring (like the non-severable clause) that all suits be brought in arbitration only, and only on an individual (non-representative) basis. *See* Pls.' RJN Ex. 1 at 1, discussing ER 156 (§ 14.3.i). Uber has contended that because this earlier unlawful clause is not subject to the non-severability provision, the court should "sever" the earlier provision, and thereby avoid reaching the non-severable provision that expressly dictates what shall happen if a Court finds the PAGA waiver unenforceable.

What Uber calls "severance" is actually a fundamental re-writing of at least five statements sprinkled throughout the contract that compel "all" claims to arbitration. *See* ER 156 § 14.3(i) (so stating in three different instances); ER 154 (§ 14.3); ER 158 (§ 14.3.v). But the contract is explicit about what shall happen if the PAGA waiver is deemed unenforceable: the waiver shall *not* be severed. The Court should apply the contract as Uber wrote it, not fundamentally re-write terms to reach an outcome that has no basis in the contract, and could not possibly have been what the parties expected or understood would happen. *See, e.g.*, *Omstead v. Dell, Inc.*, 594 F.3d 1081, 1087 (9th Cir. 2010) ("[W]e decline to assume the role of contract author rather than interpreter.") (quotation omitted); *Williams*, 237 Cal.

App. 4th at 649 (even absent a non-severability clause, rejecting argument that court can save an unlawful PAGA waiver by "splitting" a PAGA cause of action into an arbitrable individual claim and non-arbitrable representative claim); *see also Armendariz*, 24 Cal. 4th at 124-25 (striking down entire agreement because "the court would have to, in effect, reform the contract, not through severance or restriction, but by augmenting it with additional terms"); *Kolani v. Gluska*, 64 Cal. App. 4th 402, 407-08 (1998) ("Generally, courts reform contracts only where the parties have made a mistake, and not for the purpose of saving an illegal contract." (citing 1 *Witkin Summary of Cal. Law* (9th ed.1987) Contracts §§ 382, 386)).

The district court in *O'Connor* properly rejected Uber's request, concluding: "[I]t is impossible to grammatically or linguistically sever the PAGA claims waiver without completely undermining arbitration itself." *See O'Connor*, 2015 WL 8292006, at *10 (N.D. Cal. Dec. 9, 2015). Uber's proposed revision of the earlier sentence would have eliminated the requirement to arbitrate altogether – as the district court put it, "Uber's proposed edits only highlight the impossibility of linguistically severing the arbitration agreement in order to remove the blanket PAGA waiver, while maintaining the arbitration process." *Id.*

And even if severance were possible, the district court in *O'Connor* correctly held that equity would weigh against it here. *Id*. at *12-13 (citing authority that severance is not mandatory, but a matter of discretion informed by

equitable considerations). The district court observed that "Uber has drafted a contract that deters *ab initio* drivers from bringing representative actions. Any driver who reads the contract will be misled into believing that they have no right to bring a PAGA claim, as the arbitration agreement not only outright prohibits representative actions, but requires that all disputes be arbitrated on an individual basis." *Id.* at *12. Therefore, "[a]pplying principles of equity, severance … is not warranted for this reason as well." *Id.*

5. Pre-Dispute PAGA Waivers Are Unenforceable Under California Law.

"Pre-dispute agreements to waive PAGA claims are unenforceable under California law." *See Sakkab*, 803 F.3d at 430. As *Sakkab* explained, the California Supreme Court in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 382-83 (2014) held that such waivers violate both (a) the rule against enforcing agreements exculpating a party for violations of the law (Cal. Civ. Code § 1668), as well as (b) the rule that a law established for a public reason may not be contravened by private agreement (Cal. Civ. Code § 3513). *Sakkab* also explained that "[i]n *Iskanian*, the court held that even if the PAGA authorized purely

'individual' claims, an agreement to waive representative PAGA claims would be unenforceable." *Sakkab*, 803 F.3d at 431 (footnote omitted).[2]

6. California's Bar on Pre-Dispute PAGA Waivers Is Not Preempted by the FAA.

Sakkab went on to consider and reject the argument that *Iskanian* is preempted by the Federal Arbitration Act ("FAA"). *Sakkab*, 803 F.3d at 431-40.

First, the *Sakkab* Court noted that the *Iskanian* rule applies to any contract, and does not single out arbitration agreements for different treatment. *Id.* at 432-33. Thus, *Iskanian* is consistent with the savings clause of the FAA, which preserves generally applicable contract defenses. *Id.* at 433.

Next, *Sakkab* held that the *Iskanian* rule does not conflict with the FAA's purpose, under ordinary conflict-preemption principles. *Id.* at 433. The Court noted that the *Iskanian* rule gives no preference to arbitration or litigation – it simply precludes the outright waiver of representative PAGA claims. *Id.* at 434. The Court also noted that the *Iskanian* rule does not diminish parties' freedom to select informal arbitration procedures, because PAGA actions do not require the special procedures that are required in, for example, class actions. *Id.* at 435-36.

The U.S. Supreme Court has twice denied *certiorari* to California Supreme Court decisions post-*Iskanian* confirming that the FAA does not preempt the

[2] A petition for re-hearing *en banc* is pending in *Sakkab*. *See Sakkab v. Luxxotica Retail N. Am.*, 13-55184 (9th Cir.).

California prohibition on pre-dispute representative PAGA waivers. *See CarMax Auto Superstores Cal., LLC v. Areso*, --- S. Ct. --- , 2015 WL 5005244 (Dec. 14, 2015); *Bridgestone Retail Ops., LLC v. Brown*, 135 S. Ct. 2377 (2015).

7. The Opt-Out Provision Does Not Change the Fact that the Pre-Dispute PAGA Waiver Is Unenforceable.

The fact that the arbitration agreements contain an opt-out provision does not render the pre-dispute PAGA waivers enforceable, as at least two California courts of appeal have squarely held within the past year. *Securitas Sec. Servs. USA, Inc. v. Super. Ct.*, 234 Cal. App. 4th 1109, 1120-23 (2015) (pre-dispute PAGA waivers void regardless of whether contract allowed employee to opt out); *see also Williams*, 237 Cal. App. 4th at 648 (2015) (same). The district court correctly relied on this authority, which had already rejected "the same argument that Uber makes here." ER 67-68.

Securitas and *Williams* are clear: the fact that an employee had a right to opt out of a pre-dispute PAGA waiver does not change the fact that the waiver is unenforceable. As *Securitas* explains: "*Iskanian*'s underlying public policy rationale – that a PAGA waiver circumvents the Legislature's intent to empower employees to enforce the Labor Code as agency representatives and harms the state's interest in enforcing the Labor Code – does not turn on how the employer and employee entered into the agreement, or the mandatory or voluntary nature of the employee's initial consent to the agreement." 234 Cal. App. 4th at 1122.

Thus, "the law, as *Iskanian* explains, broadly precludes private agreements to waive such public rights," regardless of whether the employer provided an opportunity to opt out of the agreement. *Id.*

Uber relies on a reference in *Iskanian* to the fact the arbitration agreement in that case required the employee to waive his PAGA rights as a "condition of employment," from which Uber argues that the presence of an opt-out clause makes *Iskanian* altogether inapplicable. Unlike *Securitas* and *Williams*, which came after *Iskanian*, *Iskanian* did not involve an opt-out clause, so it did "not squarely address the question" of whether an opt-out clause would convert an unlawful pre-dispute PAGA waiver into an enforceable term. *See Securitas*, 234 Cal. App. 4th at 1121. As *Securitas* points out, *Iskanian* broadly stated the question before it as "whether an employee's right to bring a PAGA action is waivable," and *Iskanian* broadly answered that "an employee's right to bring a PAGA action is unwaivable." *See Iskanian*, 59 Cal. 4th at 382-83. This categorical language provides no exception for the "voluntary acceptance" of a pre-dispute waiver. Moreover, the rationales underlying *Iskanian* apply regardless of whether an opt-out clause is present – *i.e.*, the prohibitions against exculpation for violations of the law and against private contravention of rules serving public purposes.

8. That Mohamed Has Not Asserted a PAGA Claim Does Not Change the Fact that the PAGA Waiver in the 2014 Agreement Is Unenforceable.

Gillette has asserted PAGA claims on behalf of tens of thousands of California drivers subject to the 2014 Agreement and fall within the proposed *Gillette* and *Mohamed* classes. The 2014 Agreement, which includes a California choice-of-law clause, states that "[i]f at any point this [PAGA waiver] provision is determined to be unenforceable, *the parties agree* that this provision shall not be severable." ER 158 (emphasis supplied). The PAGA waiver has been determined by the district court to be unenforceable. "[A]ccording to the principles of contract law, [the] drafter … must be held to an agreement's literal terms." *U.S. v. Leniear*, 574 F.3d 668, 672 (9th Cir. 2009); *see also Yoshida v. Liberty Mut. Ins. Co.*, 240 F.2d 824, 826-27 (9th Cir. 1957) ("Where there is no ambiguity, there is nothing to be construed."). Therefore, as the district court correctly held (ER 63-66), the fact that Mohamed has not asserted a PAGA claim does not change the analysis.

Uber's claim that Mohamed lacks Article III standing (Br. at 49) is baseless. Mohamed alleges that he has suffered "injury in fact" (violation of the background check laws), that the injury is fairly traceable to Defendants, and that the injury

will be redressed by a favorable decision. *See Friends of the Earth, Inc. v. Laidlaw Env. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).[3]

In addition, as the district court recognized, the proper focus is on the legality of the clause at the time it was made, in order to ensure that employees "will not be deterred" by unlawful (and, thus, also unconscionable) terms. *See Armendariz*, 24 Cal. 4th at, 111; *see also* ER 63-66.

B. Although the Court Need Not Reach the Issue, the Agreements Are Procedurally Unconscionable.

Procedural and substantive unconscionability must both be present for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability. *Gentry v. Super. Ct.*, 42 Cal. 4th 443, 468 (2007), *abrogated on other grounds by Iskanian*, 59 Cal. 4th 348. The more substantively oppressive the term, the less evidence of procedural unconscionability is required to render it unenforceable, and vice versa. *Id.*

The district court correctly concluded that both Agreements are procedurally unconscionable. Under California law, procedural unconscionability focuses on the presence of "surprise" or "oppression." *Armendariz*, 24 Cal. 4th at 114 ; *Gentry*, 42 Cal. 4th at 469; *see also Sanchez v. Valencia Holding Co., LLC*, 61 Cal.

[3] The cases Uber cites (Br. at 49 n.20) are inapposite because they do not address the effect of an *expressly non-severable term* that the parties have specifically agreed will, if "determined to be unenforceable," result in the non-enforceability of the agreement.

4th 899, 910 (2015). "'Surprise' involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms." *A&M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 487 (1982) (relied upon by *Armendariz*, 24 Cal. 4th at 114). "'Oppression' arises from an inequality of bargaining power which results in no real negotiation and 'an absence of meaningful choice.'" *Id.* at 486. The California Supreme Court has held that the mere presence of an opt-out clause, although a factor for consideration, *does not* make an arbitration clause per se procedurally conscionable. *See Gentry*, 42 Cal. 4th at 470 (holding that arbitration agreement had degree of procedural unconscionability, notwithstanding 30-day opt-out clause).

Procedural unconscionability is present when employees are not provided with "material information about the disadvantageous terms of the arbitration agreement, combined with the likelihood that the employees felt at least some pressure not to opt out of the arbitration agreement." *Id.* at 472. "[A] conclusion that a contract contains no element of procedural unconscionability is tantamount to saying that, no matter how one-sided the contract terms, a court will not disturb the contract because of its confidence that the contract was negotiated or chosen freely, that the party subject to a seemingly one-sided term is presumed to have obtained some advantage from conceding the term or that, if one party negotiated

poorly, it is not the court's place to rectify these kinds of errors or asymmetries." *Id.* at 470; *see also Sanchez*, 61 Cal. 4th at 911 ("An evaluation of unconscionability is highly dependent on context," and "[t]he doctrine often requires inquiry into the 'commercial setting, purpose, and effect' of the contract or contract provision.") (quoting Cal. Civ. Code § 1670.5).

1. The 2013 Agreement Is Procedurally Unconscionable.

The 2013 Agreement contains both surprise and oppression.

The arbitration agreement was a surprise because Uber provided it to drivers via links on their mobile phones along with an "I agree" button that the drivers had to press in order to continue using the App and receive driving assignments. ER 188-89, 195. The arbitration agreements were not actually displayed along with the "I agree" button; rather, drivers were presented with links through which they presumably could have viewed the lengthy agreements. ER 195. Once a driver clicked the "I agree" button, the agreements were no longer accessible through the App on his phone. SER 101, 145. Defendants admitted that a "glitch" resulted in many agreements "drop[ping] off the driver portals" (SER 178), and Plaintiffs presented evidence indicating that none of the agreements appeared on such "driver portals." SER 184. As a result, the district court made a factual finding that "the relevant contracts were not easily or obviously available to drivers through their driver portals" (ER 6 n.2) – a finding that Uber does not dispute.

If a driver had clicked on the links to the updated agreements presented along with the "I agree" button, the App presumably would have displayed the agreement on the small screen of the driver's mobile phone. ER 188-89 (Colman Decl. ¶ 10). In order to view the arbitration provision and discover the opt-out provision, drivers would have had to scroll down to Paragraph 14.3, which begins approximately eleven *printed* full pages into the July 2013 Licensing Agreement (ER 209), and presumably many more "screens" into the Agreement when displayed on a mobile phone.

In addition, the 2013 Agreement states that the "applicable JAMS rules will apply" if the "Parties cannot agree on an Arbitrator," but does not provide the rules or say which set of JAMS rules is "applicable." ER 210 (2013 Agr. § 14.3.iii.) This failure to provide the rules governing the arbitration is procedurally unconscionable because Plaintiffs and others are "forced to go to another source to find out the full import of what [they are] about to sign – and must go to that effort prior to signing." *Harper v. Ultimo*, 113 Cal. App. 4th 1402, 1406 (2003); *see also Samaniego v. Empire Today LLC*, 205 Cal. App. 4th 1138, 1146 (2012) (same). "Numerous cases have held that the failure to provide a copy of the arbitration rules to which the employee would be bound … supported a finding of procedural unconscionability." *Trivedi v. Curexo Tech. Corp.*, 189 Cal. App. 4th 387, 393 (2010) (collecting cases).

The 2013 Agreement satisfies the "oppression" aspect of the procedural unconscionability analysis because it is an adhesion contract – *i.e.*, a "standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates the subscribing party only the opportunity to adhere to the contract or reject it." *Armendariz*, 24 Cal. 4th at 113. The oppression element is nearly always satisfied in adhesion contracts. *Id.* Uber does not dispute that drivers lacked the right to negotiate or bargain with Uber over the terms in the form contract; rather, Uber rests its position entirely on the fact that the 2013 Agreement had an opt-out provision.

The opt-out provision in the 2013 Agreement was so "highly inconspicuous" as to be "illusory" – it is "part of the arbitration provision, which itself is part of the larger, overall Licensing Agreement," and is "ensconced in the penultimate paragraph of a fourteen-page agreement presented to Uber drivers electronically in a mobile phone application interface," and "was not in any way set off from the small and densely packed text surrounding it." *See* ER 25. Although there is no affirmative obligation to highlight an arbitration clause, *see Sanchez*, 61 Cal. 4th at 914, the fact that an arbitration clause is inconspicuously buried at the end of a long form agreement presented temporarily on a smart phone prevents a reviewing court from having the level of "confidence that the contract was negotiated or chosen freely" such that the "court would have *no basis* under common law

unconscionability analysis to scrutinize … even the most unfair or exculpatory of contractual terms." *Gentry*, 42 Cal. 4th at 470 (emphasis added). *Sanchez* recognized that "the adhesive nature of the contract is sufficient to establish some degree of procedural unconscionability," and that the presence of procedural unconscionability depends upon the facts of the specific case and "the 'commercial setting, purpose, and effect' of the contract or contract provision." *Sanchez v. Valencia Holding, Co.*, 61 Cal. 4th at 911 (2015) (quoting Cal. Civ. Code § 1670.5). *Sanchez* involved a two-page, hard copy consumer agreement for the sale of an automobile, not a fourteen page (when printed) agreement presented to workers via a link on a mobile phone, with the arbitration clause buried at the end. Moreover, *Sanchez* quoted and followed *Gentry*, which held that the presence of an opt-out clause does not determine whether a contract is procedurally unconscionable. *See Sanchez*, 61 Cal. 4th at 915 (quoting *Gentry*, 42 Cal. 4th at 469).

In addition, even in the unlikely event that a driver located the opt-out provision, the steps that the 2013 Agreement required a driver to take to opt out were onerous: deliver a writing by hand to Uber's legal office, or have it delivered there by a "nationally recognized overnight delivery service." *See* ER 212; *cf. Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199 (9th Cir. 2002) (employer

provided employee with "simple one-page" form to return if employee desired to opt out).[4]

Thus, the mere inclusion of an opt-out provision does not eliminate the oppressiveness inherent in adhesion form contracts, as recognized by the very cases Uber cites. *Kilgore v. KeyBank, N.A.*, 718 F.3d 1052, 1059 (9th Cir. 2013), held that an agreement with an opt-out provision was not procedurally unconscionable, but only because arbitration clause was not "buried in fine print." The Court specifically contrasted the agreement in that case with the agreement in *A&M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473 (1982), which found procedural unconscionability arising from the placement of a damages limitation in the "middle of [the] last page of an agreement in inconspicuous font." Likewise, *Ahmed*, 283 F.3d at 1199, observed that the arbitration agreement not only had an opt-out clause, but "also lacked any other indicia of procedural unconscionability," making it clear that the existence of an opt-out clause is not the end of the inquiry. *See also Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108 (9th Cir. 2002)

[4] *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2005 WL 1048073 (S.D.N.Y. May 5, 2005), which approved a class action settlement requiring requests for exclusion to be delivered via "certified or overnight mail," does not establish that Uber's burdensome opt-out process was free of procedural unconscionability as it was not in the context of 14 page adhesion contract that appeared via smartphone.

(considering "identical agreement" as in *Ahmed*, and relying on *Ahmed* without separate unconscionability analysis).[5]

Uber points to the fact that some drivers succeeded in opting out, but so far as the record in a related case reveals, those drivers represented a miniscule fraction of the proposed class, and were able to opt out only due to the intervention of counsel in a pending case in which the arbitration clause purported to waive their right to participate. *See supra* § III.C; *see also* ER 26.[6]

2. The 2014 Agreement Is Procedurally Unconscionable.

The 2014 Agreement was delivered to drivers in the same take-it-or-leave-it manner via links and an "I agree" button as the 2013 Agreement. The 2014 Agreement differed in that it contained a bold notice on the first (printed) page concerning arbitration, contained a more visible opt-out provision in the arbitration portion of the agreement, and allowed drivers to opt-out by email or regular mail. ER 143, 161. Like the 2013 Agreement, the 2014 Agreement was long and dense, found at the end of the Licensing Agreement, which amounted to 12 full printed pages. *See* ER 143-54. As with the 2013 Agreement, the Court found that

[5] If this Court believes that *Gentry* is not conclusive regarding the impact of an opt-out on procedural unconscionability, it should certify this issue to the California Supreme Court.

[6] The lower state court cases Defendants cite (Br. at 28) for the proposition that an opt-out provision forecloses a finding of procedural unconscionability are wholly inapplicable, given that none of those cases even considered the impact of an opt-out provision. In any event, *Gentry* controls.

"Mohamed did not receive a paper copy of the relevant contracts and had to review the contracts on the small screen of his phone," and that "Mohamed likely could not easily or obviously review the relevant agreements in his driver portal while he was still employed by Uber." *See* ER 62 n.48.

In *Gentry*, the Supreme Court held that an agreement, even if it contained a meaningful opt-out provision, would not be *procedurally* conscionable unless the reviewing court was confident that the Agreement was actually "negotiated and freely chosen" such that the Court could not even proceed to review egregiously one-sided contract terms. *Gentry*, 42 Cal. 4th at 470. In *Gentry*, the Court lacked that confidence. Not only was the contract an adhesion contract, but it had two additional indicia of procedural unconscionability. *First*, it presented a "markedly one-sided" portrayal of the relative advantages of arbitration, and neglected to mention "the many disadvantages to the employee that [the employer] had inserted into the agreement." *Id.* at 471. This amounted to a degree of *procedural* unconscionability that justified a reviewing court in proceeding to assess substantive unconscionability. *Second*, *Gentry* found that the arbitration agreement evidenced a clear preference on the part of the employer for arbitration, and "given the inequality between employer and employee and the economic power that the former wields over the latter it is likely that [the] employees felt at least some pressure not to opt out." *Id.* at 472 (citing *Armendariz*, 24 Cal. 4th at 115). This,

too, showed a degree of *procedural* unconscionability that justified a reviewing court to consider substantive unconscionability.

The same two factors are present in the 2014 Agreement. The 2014 Agreement failed to convey to drivers numerous specific drawbacks that the arbitration provision imposed upon the drivers that would have been absent in court litigation, including: the possibility that drivers would have to bear thousands of dollars of arbitration fees and costs to pursue any suit; the prohibition on class actions, which, in practical terms, would be likely to foreclose relief on any number of small claims that the driver would have been able to pursue in court; the prohibition on representative PAGA waivers, which is illegal under California law; the confidentiality provision, which would give Uber an unfair advantage and would not apply in court proceedings; unilateral modification by Uber of the arbitration provision; and Uber's one-sided carve-out, permitting it to bring IP cases in court. ER 208-9, 211-12. Likewise, the contract would have left no doubt that Uber's preference was that drivers participate in the arbitration agreement, and drivers depending on Uber for their livelihood would have felt pressure to agree. The default option in the contract was arbitration; drivers had to accept the agreement as presented, and only by taking affirmative steps that brought them to the attention of Uber's legal department could they opt out. The Court had already made findings that Uber's initial opt-out provision was

unconscionably onerous, and Uber initially attempted to roll out the 2014 agreement with no opt-out provision at all, making its preference entirely clear to any driver who investigated. *O'Connor*, 2014 WL 1760314, at **7-8.

Moreover, as the district court found, and as both the *Gentry* and *Armendariz* decisions make clear, entry-level, low-paid workers face economic pressures that "may be particularly acute," and drivers are unlikely to jeopardize their livelihood in order to opt out of a pre-dispute arbitration agreement. ER 39 (citing *Gentry* and *Armendariz*). Thus, the procedural unconscionability of the 2014 Agreement justifies a reviewing court in proceeding to examine the agreement for substantive unconscionability.

The procedural unconscionability has been heightened by Uber's repeated roll-out of new and different arbitration agreements, each of which purports to bind drivers to arbitration unless they opt out each and every time. This intensifies the pressure that drivers will feel: a driver who is willing to stick his neck out once will likely hesitate before sticking his neck out each time that Uber rolls out a new agreement. *See* Pls.' RJN Ex. 2.

C. Although the Court Need Not Reach the Issue, the Agreements Are Substantively Unconscionable.

1. The Arbitration Fee Splitting Is Unconscionable

Uber's 2013 and 2014 Agreements contain arbitration fee-splitting provisions: "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 equally between the Parties or as otherwise required by applicable law." ER 158, 212. Based on evidence submitted by Plaintiffs, the district court made a factual finding that even straightforward arbitration proceedings would cost thousands of dollars, and that Gillette would be unable to pay these fees and costs given his monthly income of $775. ER 29; SER 148.

The district court concluded that the 2013 Agreement's arbitration fee-splitting provision is generally unconscionable, and that the 2013 and 2014 Agreements' arbitration fee-splitting provision is unconscionable as applied to the arbitration provision's delegation clause. ER 27-32, 40; *see also infra* § V.F.

Uber contends that the district court's reliance on *Armendariz* was erroneous because its application is limited to mandatory employment arbitration agreements.[7] Br. at 39. This contention is incorrect: because the *Armendariz* requirements are necessary to the fair adjudication of unwaivable statutory rights, employees may only waive them after a dispute has arisen. *Armendariz*, 24 Cal. 4th at 103 n.8; *Gentry*, 42 Cal. 4th at 467 ("As we clarified in *Armendariz*, such waiver could only occur 'in situations in which an employer and an employee

[7] This argument incorrectly assumes that Plaintiff Gillette had a meaningful opportunity to exclude himself from Uber's arbitration provision. As discussed previously in Section V.B.1, the opt-out provision contained in the 2013 Agreement was "illusory." ER 25; *O'Connor*, 2013 WL 6407583, at *4.

knowingly and voluntarily enter into an arbitration agreement *after a dispute has arisen.'"*); *Iskanian*, 59 Cal. 4th at 383.

In *Armendariz*, the California Supreme Court set forth four minimum requirements necessary to the fair arbitration of a claim pursuant to the California Fair Employment and Housing Act ("FEHA"). *Armendariz*, 24 Cal. 4th at 99.[8] Because the statutory rights established by the FEHA are for a public purpose, the court concluded that such claims were unwaivable. *Id*. at 101. And by extension, the minimum requirements necessary to vindicate FEHA rights were also unwaivable. *See id*. at 102-03. Indeed, the only time an employee may waive such protections is after a dispute has arisen. *Id*. at 103 n.8 ("These requirements would generally not apply in situations in which an employer and an employee knowingly and voluntarily enter into an arbitration agreement *after a dispute has arisen*.") (emphasis added). Only post-dispute are employees able "to determine what trade-offs between arbitral efficiency and formal procedural protections best safeguard their statutory rights." *Id*. *Armendariz*, 24 Cal. 4th at 100. Because the

[8] The four requirements are: (1) the arbitration agreement may not limit the damages normally available under the statute; (2) there must be discovery "sufficient to adequately arbitrate their statutory claim"; (3) there must be a written arbitration decision and judicial review "sufficient to ensure the arbitrators comply with the requirements of the statute"; and (4) the employer must "pay all types of costs that are unique to arbitration." *Armendariz*, 24 Cal. 4th at 103-13.

Armendariz requirements are essential to the vindication of unwaivable statutory rights, such requirements cannot be waived before a dispute arises.

In addition, the prohibition on pre-dispute PAGA waivers even in the presence of an opt-out provision is equally applicable here, as discussed *supra* § V.A.7. *See Securitas*, 234 Cal. App. 4th at 1121; *Williams*, 237 Cal. App. 4th at 648.

Uber also incorrectly contends that *Armendariz* is preempted by the FAA. As an initial matter, the district court correctly held that Uber waived this argument by making nothing more than a passing reference to it in a footnote. ER 28. *Hilao*, 103 F.3d at 778 n.4; *Estate of Saunders v. C.I.R.*, 745 F.3d 953, 962 n.8 (9th Cir. 2014) ("Arguments raised only in footnotes, or only on reply, are generally deemed waived."). In any event, the California Supreme Court has twice held, post-*AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), that *Armendariz* is not preempted. *See Sanchez*, 61 Cal. 4th at 921; *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1143-45 (2013).

But even if *Armendariz* were preempted, Uber's arbitration provision runs afoul of federal fee-splitting standards. The United States Supreme Court has repeatedly held that arbitration agreements may be invalidated where plaintiffs are required to bear administration fees that preclude the "effective vindication" of their federal statutory rights. *Italian Colors*, 133 S. Ct. at 2310-11; *Rent-A-Ctr.*,

561 U.S. at 74; *Green Tree Fin. Corp.*, 531 U.S. at 90. The effective vindication exception does not require a finding of procedural unconscionability. *See id.*

As the district court found, Gillette would be required to advance his portion of the arbitration fees "just to get the arbitration started." ER 29. Gillette lacks the financial means, moreover, to pay arbitration fees and costs required to resolve even the delegation issue, let alone to fully adjudicate his FCRA claims. *Id*. Thus, the district court's ruling is well supported by controlling federal precedent regardless of whether *Armendariz* applies.

Uber further contends that its drivers are not required to pay for arbitration fees and costs because the Agreements state that "in all cases where required by law, Uber will pay the Arbitrator's and arbitration fees." ER 30.[9] Uber, however, vehemently denies that any of its drivers are employees. SER 017, 044. Indeed, at a hearing in the *O'Connor* matter in November 2013, counsel for Uber represented

[9] Uber similarly contends that under JAMS Employment Arbitration Minimum Standards of Procedural Fairness, Plaintiffs would have only been responsible for the same $400 filing fee as required in Court. Uber, however, waived this argument by failing to make it before the district court. Moreover, as discussed above, Uber contends that its drivers are independent contractors. Accordingly, Uber cannot rely on JAMS *employment* rules to support the enforceability of its arbitration provision. The JAMS Streamlined Rules incorporated by reference in the 2014 Agreement further undercut Uber's contention, requiring a filing fee of $1,200 "to be paid by the party initiating the Arbitration." ER 157; Pls.' RJN Ex. 3. Additionally, unlike federal law, the JAMS Policy makes no exception for indigent plaintiffs. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1177 (9th Cir. 2003) (filing fee unconscionable where arbitration agreement failed to provide exemption based on indigence); 28 U.S.C. § 1915(a)(1).

to the district court that Uber drivers would be required to split arbitration fees and costs with Uber:

> **THE COURT:** Okay. In California who pays?
>
> **MR. HENDRICKS:** Well, it would depend -- in this context, given we're dealing with independent contractors, I believe absent a showing of employee status, each party would probably bear their own expenses.

ER 31.[10] Thus, the district court correctly precluded Uber from gaining an advantage by taking inconsistent positions. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001); ER 31 (finding Uber's arguments was "disingenuous" and "tantamount to doublespeak.").

Uber's contention that the fee provision must be "rendered lawful" through judicial interpretation lacks merit. California courts may interpret an ambiguous arbitration provision in a manner that renders it lawful, *if such interpretation is reasonable*. *Pearson Dental Supplies, Inc. v. Super. Ct.*, 48 Cal. 4th 665, 682 (2010). Here, Uber's representation to the district court that drivers would be required to "bear their own expenses" in arbitration resolves any ambiguity as to the meaning of the fee and cost provision, and renders Uber's proposed interpretation *unreasonable*. Furthermore, such an interpretation would only

[10] Uber's position is consistent with the 2014 Agreement's incorporation of the JAMS Streamlined Rules, which require that "[e]ach Party shall pay its pro rata share of JAMS fees and expenses as set forth in the JAMS fee schedule…." ER 157; Pls.' RJN Ex. 3.

embolden employers to draft agreements that lack "clearly articulated guidelines" on the apportionment of fees, which in turn would "create a sense of risk and uncertainty among employees that could discourage the arbitration of meritorious claims." *Armendariz*, 24 Cal. 4th at 111; *see also Lou v. Ma Labs., Inc.*, No. C 12-05409 WHA, 2013 WL 2156316, at *6 (N.D. Cal. May 17, 2013); *Assaad v. Am. Nat'l Ins. Co.*, No. C 10-03712 WHA, 2010 WL 5416841, at *6 (N.D. Cal. Dec. 23, 2010).[11]

Finally, Uber's contention that it "offered to pay Plaintiffs' arbitration costs before the district court issued its order denying the motion to compel arbitration" is misleading. Br. at 42 n.13. As stated in Uber's motion to compel papers, Uber offered to pay arbitration fees only "as required by law." SER 174-75. It further asserted that "any fee disputes between the parties will be resolved by the

[11] Uber's reliance on *Appelbaum v. AutoNation Inc.*, No. SACV 13-01927 JVS(RNBx), 2014 WL 1396585, at *9 (C.D. Cal. Apr. 8, 2014), *Collins v. Diamond Pet Food Processors of California, LLC*, No. 2:13-CV-00113-MCE, 2013 WL 1791926, at *7 (E.D. Cal. Apr. 26, 2013), *Mill v. Kmart Corp.*, No. 14-CV-02749-KAW, 2014 WL 6706017, at *4 (N.D. Cal. Nov. 26, 2014), *Saincome v. Truly Nolen of America, Inc.*, No. 11-CV-825-JM BGS, 2011 WL 3420604, at *9 (S.D. Cal. Aug. 3, 2011) is misplaced. In all of these cases, there was no dispute that the plaintiffs were "employees," such that *Armendariz* arguably requires employers to bear their arbitration fees and costs. Here, by contrast, Uber contends that drivers are independent contractors who must split arbitration fees and costs, and that *Armendariz* is both inapplicable and preempted by the FAA. *Collins*, *Mill*, and *Saincome*, moreover, addressed attorney fee shifting rather than arbitration fee-splitting provisions. Whereas attorney fee shifting law is clearly established by statute, *Armendariz*, fairly read, "simply renders unenforceable employment contracts that purport to require employees to bear the costs." ER 30.

arbitrator," strategically leaving open the possibility that it may seek reimbursement from the arbitrator for any arbitration fees it advanced. *Id.* Uber's conditional offer to pay arbitration fees is not an unequivocal offer that functions to "moot" a prohibitive costs claim in the cases cited by Uber.[12]

Even if Uber's offer to pay costs was unconditional – which it was not – it does not undermine the district court's finding that the fee-splitting provision is unconscionable. A *post hoc* offer to pay for arbitration fees and costs "can be seen, at most, as an offer to modify the contract; an offer that was never accepted. No existing rule of contract law permits a party to resuscitate a legally defective contract merely by offering to change." *Armendariz*, 24 Cal. 4th at 125 (citing *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1536 (1997) *as modified* (Feb. 10, 1997).

[12] *See, e.g., Muriithi v. Shuttle Exp., Inc.*, 712 F.3d 173, 183 (4th Cir. 2013) (explaining that a party must agree "to pay all arbitration costs" to moot an effective vindication claim); *E.E.O.C. v. Woodmen of the World Life Ins. Soc.*, 479 F.3d 561, 567 (8th Cir. 2007) ("However, Woodmen has agreed to waive the fee-splitting provision and pay the arbitrator's fees *in full*.") (emphasis added); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 300 (5th Cir. 2004); (prohibitive costs argument mooted by offer to pay "all arbitration costs"); *Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 56 (1st Cir. 2002) (same); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 610 (3d Cir. 2002) (same); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003) (same).

2. The Confidentiality Clause Is Unconscionable.

Uber's confidentiality provision states: "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." ER 212. This Court has repeatedly held such clauses substantively unconscionable because they place defendants in a superior legal posture by allowing defendants to access precedent and accumulate knowledge on how to defend claims while denying same to the plaintiff, and stifle a plaintiff's ability to investigate and conduct discovery to support her claims. *See Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 1002 (9th Cir. 2010); *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1079 & n.5 (9th Cir. 2007), *overruled on other grounds as recognized by Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 933-34 (9th Cir. 2013); *Ting v. AT&T*, 319 F.3d 1126, 1152 (9th Cir. 2003).

Here, in addition to giving Uber unilateral access to arbitration precedent, Uber's confidentiality provision severely disadvantages Plaintiffs by precluding them from obtaining critical information regarding Uber's background check practices from third parties, including credit reporting agencies (Hirease and Checkr) and independent transportation companies (Abbey Lane Limousine and Gedi Limousine). Indeed, Uber itself has issued subpoenas to such third parties in order to obtain important information during the course of litigation in this case.

SER 218-42. Plaintiffs' FCRA claims also require a showing of willfulness, which would be hampered by the inability to access information in confidential arbitrations on the same subject.

Uber does not dispute that its confidentiality provision is one-sided. Instead it cites unpersuasive and distinguishable decisions upholding similar provisions. Br. at 45. The analysis set forth in *Velazquez v. Sears, Roebuck & Co.* No. 13CV680-WQH-DHB, 2013 WL 4525581 (S.D. Cal. Aug. 26, 2013) – the primary case relied on by Uber – was rejected by the district court because it was based on dicta from *Kilgore*, which did not overrule *Pokorny*, *Ting*, and *Davis*. *Velazquez*, 2013 WL 4525581, at *5 (citing *Kilgore*, 718 F.3d at 1059 n.9); ER 55.

In *Andrade*, the arbitration agreement, notwithstanding the confidentiality provision, required the arbitrator to allow "discovery authorized by the Federal Rules of Civil Procedure." *Andrade v. P.F. Chang's China Bistro, Inc.*, No. 12 CV 2724 JLS, JMA, 2013 WL 5472589, at *9 (S.D. Cal. Aug. 9, 2013). Here, by contrast, the arbitration agreement provides for "adequate civil discovery" as determined by the arbitrator. ER 211. Thus, like in *Pokorny*, the breadth of Uber's confidentiality clause is not limited by other express contractual terms but rather left to the discretion of the arbitrator. *Pokorny*, 601 F.3d at 1002 ("The unfair advantage enjoyed by Quixtar is especially acute because the Rules of Conduct state that discovery is only available to the extent the arbitrator 'considers

necessary to the full and fair exploration of the issues in dispute.'"). The *Andrade* court also explained that the confidentiality provision was the only aspect of the arbitration agreement alleged to be unconscionable.

Htay Htay Chin v. Advanced Fresh Concepts Franchise Corp., 194 Cal. App. 4th 704 (2011), is similarly unpersuasive as it fails to acknowledge this Court's analysis in *Pokorny*, *Ting*, and *Davis*, provides no analysis of its own, and focuses almost exclusively on the fact that the plaintiff did not explain how the confidentiality provision would disadvantage her in light of the narrow limitations placed on the confidentiality provision – "that it does not apply when disclosure is required by law or when the parties have provided prior written consent." *Htay Htay Chin*, 194 Cal. App. 4th at 714. The "required by law" exception failed to render the confidentiality provisions conscionable in both *Ting* and *Davis*. *Davis*, 485 F.3d at 1079; *Ting*, 319 F.3d at 1151 n.16. And the second exception fails to narrow the confidentially provision at all; rather it provides Uber, which possesses much greater knowledge than Plaintiffs, unfettered power to limit Plaintiffs' ability to investigate their claims. Consistent with this Court's reasoned precedent, Uber's confidentiality clause is unconscionable.

3. The Lack of Mutuality Is Unconscionable.

The district court correctly concluded that the Agreements' intellectual property ("IP") carve out is one-sided and unconscionable. "[T]he paramount

consideration in assessing conscionability is mutuality." *Nagrampa*, 469 F.3d at 1281 (citation omitted). "An agreement may be unfairly one-sided if it compels arbitration of the claims more likely to be brought by the weaker party but exempts from arbitration the types of claims that are more likely to be brought by the stronger party." *Fitz v. NCR Corp.*, 118 Cal. App. 4th 702, 724 (2004) (citing *Armendariz*, 24 Cal. 4th at 119).

Here, the Agreements allow Uber to sue its drivers in court for alleged IP violations while requiring all other disputes to be arbitrated. ER 156-57, 209. California and federal courts have consistently held that exempting IP claims from arbitration while requiring arbitration of all other claims is substantively unconscionable.[13]

That the IP carve out is mutual does not render it conscionable. A lack of mutuality "may be premised on the actual effect of the terms, rather than a superficial reading, where it is clear that the terms would in practice benefit one party." *Macias v. Excel Bldg. Servs. LLC*, 767 F. Supp. 2d 1002, 1009 (N.D. Cal. 2011) (*citing Stirlen*, 51 Cal. App. 4th at 1540-41). "[I]t is far more often the case that employers, not employees, will file [IP] claims." *Fitz*, 118 Cal. App. 4th at

[13] *Carlson v. Home Team Pest Def., Inc.*, 239 Cal. App. 4th 619, 634 (2015) (IP carve-out substantively unconscionable); *Fitz*, 118 Cal. App. 4th at 724 (same); *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 785 (9th Cir. 2002) (same).

725. Uber, as the developer of a mobile device application and associated software, is the sole beneficiary of this exemption.[14]

Uber relies on two inapposite cases. In *Tompkins v. 23andMe, Inc.*, Nos. 5:13-CV-O5682-LHK, 2014 WL 2903752 (N.D. Cal. June 25, 2014), the defendant was in the business of collecting and analyzing DNA samples, and, unlike here, there was a genuine possibility that the plaintiffs would avail themselves of the carve-out in order to protect their intellectual property rights. 2014 WL 2903752, at *17; ER 57. *Farrow v. Fujitsu America, Inc.*, 37 F. Supp. 3d 1115 (N.D. Cal. 2014), is even less applicable because its holding was based on Maryland law. 37 F. Supp. 3d at 1124 ("Maryland law does not require complete mutuality in arbitration agreements.").

Both California and federal courts, including this Court, have repeatedly rejected the argument Uber makes that the contract is not one-sided because it also carves out certain claims that employees are likely to bring, such as workers' compensation, unemployment, and certain ERISA claims. Br. at 43. *See Ferguson*, 298 F.3d at 784 n.6; *Fitz*, 118 Cal. App. 4th at 724; *Mercuro v. Super. Ct.*, 96 Cal. App. 4th 167, 176 (2002). Moreover, the value of this carve-out to

[14] *See* SER 097-099 (*O'Connor* Tr. 15:16 ("Our product is intellectual property."), 25:24-25 ("It means that we have an intellectual property. It is the application."), 43:17-20 ("The providing of the phone was not a function of providing equipment. It was a function of that's how the intellectual property was transmitted. That was the best way, at the time, to protect the property.") Jan. 30, 2015.)

Plaintiffs is uncertain as Uber has consistently taken the position that its drivers are independent contractors ineligible to receive workers' compensation, unemployment insurance, or benefit from the protections of the ERISA.

The California Supreme Court's *Sanchez* decision likewise does not support Uber's position. Although the agreement in *Sanchez* provided for a mutual carve-out of self-help remedies that benefited the defendant, it provided a countervailing benefit to the plaintiff by excluding small claims actions. *Sanchez*, 61 Cal. 4th at 922. Here, the Agreements require the arbitration of small claims actions. Additionally, Uber, as the drafter of the Agreements, never intended for Plaintiffs to obtain any benefit from the exclusion of workers' compensation, unemployment, and ERISA claims because Uber classified them as independent contractors not employees. In *Sanchez*, the exclusion of self-help remedies was further justified because they are "by definition, sought outside of litigation." *Id.* at 922. The same cannot be said of injunctive relief claims.[15]

[15] Uber contends for the first time on appeal that intellectual property carve-outs "serve a host of legitimate business reasons." Br. 46 n.17. Under California law, the "business realities" justification must be "factually established." *Armendariz*, 24 Cal. 4th at 117. Uber failed to make this argument to the district court and failed to present any evidence supporting a legitimate business reason for the IP carve-out. Accordingly, Uber waived this argument and failed to meet its evidentiary burden in any event.

4. The Unilateral Modification Provision Is Unconscionable.

Both Agreements state: "Uber reserves the right to modify the terms and conditions of this Agreement at any time, effective upon publishing an updated version of this Agreement at http://www.uber.com or on the Software." ER 208 (§ 12.1); ER 153 (§ 12.1) Uber's unilateral right to modify is more one-sided than the provision held to be unconscionable in *Ingle*, which allowed modification only on December 31 following 30 days written notice. *Ingle*, 328 F.3d at1179; *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 926 (9th Cir. 2013).

Uber cites an unpublished Ninth Circuit decision and various district court and California Court of Appeal decisions for the proposition that the covenant of good faith and fair dealing precludes any finding of substantive unconscionability from a unilateral modification provision. Br. at 47. *Ashbey v. Archstone Prop. Mgmt., Inc.*, 612 F. App'x 430, 432 (9th Cir. 2015), however, is non-precedential and does not overrule *Ingle* and *Chavarria*. Furthermore, although the covenant of good faith and fair dealing precludes bad faith modifications, it does not preclude one-sided modifications. ER 59. For example, after the district court ordered Uber to provide corrective notice related to the 2013 Agreement, Uber attempted to implement a revised agreement that entirely eliminated drivers' opportunity to opt out of arbitration. *O'Connor*, 2014 WL 1760314, at **7-8 (noting that Uber's counsel considered the modification to be "perfectly lawful"). Although the

district court rejected Uber's deliberate "attempt to limit participation in the suit," Uber's conduct illustrates the type of one-sided changes that are, in Uber's view, consistent with the covenant of good faith and fair dealing. *Id.*

5. The PAGA Waiver Is Unconscionable.

Finally, Uber contends that the PAGA waiver is not unconscionable because Plaintiffs had the opportunity to opt out. This argument fails for the reasons stated above. *See supra* § V.A.7.

D. The Degree of Procedural and Substantive Unconscionability Contained in Both Agreements Renders Them Unenforceable.

The district court did not err in finding "substantial" procedural and substantive unconscionability in the 2013 Agreement. ER 61. The 2013 Agreement contains both oppression and surprise, rendering it procedurally unconscionable. *See infra* § V.B. The five substantively unconscionable provisions, and in particular the complete waiver of PAGA claims, more than "tip the scale" in favor of a conclusion that arbitration agreement is completely unenforceable. *Bridge Fund Capital Corp.*, 622 F.3d at 1004 (finding unconscionable terms, including waiver of statutory right and lack of mutuality, combined with adhesion contract sufficient to affirm unconscionability); *Nagrampa*, 469 F.3d at 1293.

While the district court did not reach the question of whether to invalidate the 2014 Agreement based on unconscionability, ER 62-63, should the Court reach

this issue, the high degree of substantive unconscionability would similarly "tip the scale" even with only a "slight" showing of procedural unconscionability, *Nagrampa*, 469 F.3d at 1293, and here the pressures faced by drivers to accept disadvantageous terms were obvious.

E. The District Court Did Not Abuse Its Discretion in Declining to Sever the Unconscionable Provisions.

1. Even if it Were Severable as a Matter of Contractual Language (Which it Explicitly Is Not), the Illegal PAGA Waiver Is Central to the Agreements' Purpose, Rendering Both Agreements Unenforceable.

As set forth above, the unlawful PAGA waivers are non-severable because the contracts explicitly so state. Uber will likely attempt to argue on Reply (as it recently argued to the district court in *O'Connor*) that the non-severability clauses can be explained away, but even in the absence of these clauses, the PAGA waivers would be non-severable because they are central to the arbitration agreements. Under California law, "[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." Cal. Civ. Code § 1599; *Birbrower, Montalbano, Condon & Frank v. Super. Ct.*, 17 Cal. 4th 119, 137 (1998). On the other hand, "[w]here a contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire

contract is void." Cal. Civ. Code § 1598. "[I]f the court is unable to distinguish between the lawful part of the agreement and the unlawful part, the illegality taints the entire contract, and the entire transaction is illegal and unenforceable." *Keene v. Harling*, 61 Cal. 2d 318, 321 (1964). Courts have "the power, not the duty" to sever illegal provisions. *Marathon Entm't, Inc. v. Blasi*, 42 Cal. 4th 974, 992 (2008).

The primary purpose of both arbitration agreements is to require that all disputes be resolved through arbitration on an individual-only basis. ER 209 § 14.3(i). Thus, the central purpose of the arbitration agreements "is not collateral to or distinguishable from the blanket PAGA waiver, but directly dependent upon it, as the arbitration agreement is designed to prevent PAGA claims from ever being brought." *O'Connor*, 2015 WL 8292006, at *12 (analyzing Uber's 2014 and 2015 arbitration agreements). Therefore, the PAGA waiver cannot be separated from those clauses, rendering the arbitration agreements unenforceable in full pursuant to California Civil Code section 1598.

This Court has held that arbitration agreements infected with illegality must be invalidated. *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1248 (9th Cir. 1994), *as amended* (Mar. 13, 1995) (invalidating entirety of arbitration agreement because "the arbitration clause [did] not merely involve a single, isolated [illegal]

provision" and defendant "attempted to use an arbitration clause to achieve its unlawful ends.").

2. Severing the Unconscionable Terms from the Agreements Would not Further the Interests of Justice.

The district court did not abuse its discretion in determining that the 2013 Agreement's unconscionable provisions could not be severed. ER 59; *Armendariz*, 24 Cal. 4th at 124 (reviewing severance decision for abuse of discretion); *Bridge Fund Capital Corp.*, 622 F.3d at 1006 (same). Where a court has found unconscionable terms in a contract, "the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. Cal. Civ. Code § 1670.5. The California Supreme Court has identified two reasons supporting severance over invalidation: (1) "to prevent parties from gaining undeserved benefit or suffering undeserved detriment as a result of voiding the entire agreement"; and (2) "to conserve a contractual relationship if to do so would not be condoning an illegal scheme." *Armendariz*, 24 Cal. 4th at 123-24; *Bridge Fund Capital Corp.*, 622 F.3d at 1006. "The overarching inquiry is whether the interests of justice … would be furthered by severance." *Armendariz*, 24 Cal. 4th at 124 (quotations omitted).

Here, the interests of justice favor invalidation of both arbitration agreements in full. Plaintiffs will not obtain an undeserved benefit by receiving a

right that Uber unlawfully asked them to waive, nor should Plaintiffs be penalized by the splitting of their action into two different fora – a possibility the Agreements never contemplated. Conversely, Uber fails to identify any undeserved detriment it would suffer by being prohibited from enforcing unlawful and unconscionable terms it attempted to impose on drivers. *See O'Connor*, 2015 WL 8292006, at *12 ("This is not a case where there has been performance, and voiding the contract will result in one party receiving an unfair windfall.").

The second reason justifying severance is equally inapplicable. The five unconscionable provisions discussed above pervade the agreements such that they "cannot be cured by severance or any other action short of rewriting the contract." *Nagrampa*, 469 F.3d at 1293; *see also Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 84-85 (D.C. Cir. 2005) (Roberts, J.) (explaining that severance is inappropriate where "illegality pervades the arbitration agreement" and that "the more the employer overreaches, the less likely a court will be able to sever the provisions and enforce the clause."). Severing the unconscionable provisions would condone an illegal scheme to disadvantage Plaintiffs.

F. The District Court Properly Determined that It, Rather than an Arbitrator, Was the Proper Decisionmaker as to the Issues Now Being Appealed.

The district court correctly held that it, not an arbitrator, was the proper decisionmaker to consider the enforceability of the PAGA waivers and, in the

alternative, the unconscionability of the Agreements. The 2013 Agreement explicitly delegates the enforceability of the PAGA waiver *to the court*. In the alternative, the delegation clauses in both agreements fail the Supreme Court's "clear and unmistakable" standard governing delegation. Finally, again in the alternative, the delegation clauses in both agreements are unconscionable.

1. The 2013 Contract Expressly Makes the Delegation Clause Inapplicable to the Non-Severable PAGA Waiver.

The 2013 Agreement states: "Notwithstanding any other clause contained in this Agreement [such as the delegation clause], any claim that all or part of the … [PAGA] Waiver is … unenforceable … may be determined only by a court of competent jurisdiction and not by an arbitrator." ER 211 § 14.3(v)(c). Thus, there can be no dispute that the district court was correct to adjudicate that issue. *See* ER 41 n.34.

2. Neither Delegation Clause Meets the Supreme Court's "Clear and Unmistakable" Standard.

A court, not an arbitrator, decides whether an arbitration agreement is unconscionable unless the agreement "clearly and unmistakably" delegates arbitrability to the arbitrator. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). This is a "*heightened* standard of proof." *Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 787 (2012); *Rent-A-Ctr.*, 561 U.S. at 69 n.1. The

delegation of arbitrability must be "clear, consistent, and unambiguous" such that no other language in the agreement creates uncertainty as to whether the court or an arbitrator decides issue of arbitrability. *Id.*; *Baker v. Osborne Dev. Corp.*, 159 Cal. App. 4th 884, 891 (2008). "[W]here one contractual provision indicates that the enforceability of an arbitration provision is to be decided by the arbitrator, but another provision indicates that the *court* might also find provisions in the contract unenforceable, there is no clear and unmistakable delegation of authority to the arbitrator." *Ajamian*, 203 Cal. App. 4th at 792; *Hartley v. Super. Ct.*, 196 Cal. App. 4th 1249, 1258 (2011); *Parada v. Super. Ct.*, 176 Cal. App. 4th 1554, 1566 (2009); *Baker*, 159 Cal. App. 4th at 891.

Uber's 2013 and 2014 Agreements both fail the "clear and unmistakable" standard.

First, both agreements provide that state and federal courts in San Francisco will have "exclusive jurisdiction" over "*any* disputes … arising out of or in connection with this Agreement." ER 209 (2013 Agr.) § 14.1; ER 154 (2014 Agr.) § 14.1. Thus, the agreements state that "any" disputes, which would include those regarding arbitrability, shall be heard in court, which contradicts the later arbitration clauses, stating that "without limitation," "disputes arising out of or relating to interpretation or application of this Arbitration Provision" shall be subject to arbitration. ER 209 (2013 Agr. § 14.3.i); ER 156 (2014 Agr. § 14.3.i).

This facial contradiction concerning who will decide arbitrability fails the "clear and unmistakable" standard.

Second, in the same paragraph in which they grant "exclusive jurisdiction" to the courts, the 2013 and 2014 Agreements state: "If any provision of the Agreement is held to be invalid or unenforceable, such provision shall be struck and the remaining provisions shall be enforced …." ER 209 (§ 14.1); ER 154 (§ 14.1). This implies that the San Francisco Court, referenced several sentences earlier, has the authority to consider whether the provisions of the Agreement are unenforceable, and to strike them. This, too, creates a contradiction about which decisionmaker will hear arguments about "unenforceability" of "any provision" of the Agreements.

Third, as noted, the 2013 Agreement allows only a court, and not an arbitrator, to rule on the unenforceability or unconscionability of the PAGA waiver, leaving no doubt that the parties envisioned a court adjudicating gateway issues. ER 211 (§ 14.3.v.c); *see also id.* (§ 14.3.v.a-c) (various waivers not severable if "a civil court of competent jurisdiction" finds them unenforceable).

A long line of California Court of Appeal decisions has held that any of the foregoing examples of ambiguity would cause the Agreements to fail the "clear and unmistakable" standard. In *Baker*, 159 Cal. App. 4th at 859, the contract contained a delegation of arbitrability to an arbitrator, but a different clause in the

arbitration provision allowed for severance if "any provision of this arbitration agreement shall be determined by an arbitrator *or by any court* to be unenforceable." (citation omitted) (emphasis added). Because the contract contemplated that a court might find a provision unenforceable, the delegation was not "clear and unmistakable." *See also Pinela v. Neiman Marcus Grp., Inc.*, 238 Cal. App. 4th 227, 239-41 (2015) (same); *Peleg v. Neiman Marcus Grp., Inc.*, 204 Cal. App. 4th 1425, 1442-45 (2012) (same); *Hartley*, 196 Cal. App. 4th 1258 (same); *Parada v. Super. Ct.*, 176 Cal. App. 4th at 1565-66 (same). Exactly the same is true of both the 2013 and 2014 Agreements.[16]

Uber contends that in applying the "clear and unmistakable standard," courts must take into account only ambiguity within the arbitration clause itself, and must ignore ambiguity created by contradictions with clauses outside the provision. (Br.

[16] Uber relies on a case that did not involve delegation or apply the "clear and unmistakable" standard. *See* Br. at 54 (citing *Boghos v. Certain Underwriters at Lloyd's of London*, 36 Cal. 4th 495, 503 (2005). Uber also relies on *Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir. 2015) and *Oracle America, Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1075 (9th Cir. 2013), in which there was no contradiction in the contract – rather, the question was whether the arbitral rules incorporated into the contract delegated arbitrability to the arbitrator; in both cases, the Court limited its holding to arbitrations between sophisticated parties. Uber cites the depublished case *Universal Pro. Serv., L.P. v. Super. Ct.*, 234 Cal. App. 4th 1128 (2015). The other cases cited by Uber in footnote 23 are inopposite as they do not involve contradictory provisions (*Ariza v. Autonation, Inc.*, 317 F. App'x 662, 663 (9th Cir. 2009), *Chung v. Nemer PC*, 2012 WL 5289414, at *2 (N.D. Cal. Oct. 25, 2012), *Bernal v. S.W. & Pac. Specialty Fin., Inc.*, 2014 WL 1868787, at *4 (N.D. Cal. May 7, 2014).

at 8). This argument has been rejected by all courts that have considered it and is illogical on its face. *See Ajamian*, 203 Cal. App. 4th at 791-92 (expressly rejecting argument); *Hartley*, 196 Cal. App. 4th at 1257 (finding ambiguity outside of arbitration clause); *Parada*, 176 Cal. App. 4th at 1565 (same).

Uber argues that "exclusive" jurisdiction of the courts (ER 209 § 14.1) does not really mean "exclusive" – it just means that *if* a matter is going to be heard in a court, *then* the "exclusive" choice of court will be in San Francisco. But what the agreement *actually says* is that "any dispute" will be heard exclusively in court. A driver, having read either contract, would rightly ask: "So does the Court have exclusive jurisdiction to decide whether this is enforceable, or does the arbitrator?" That absence of "clear and unmistakable" delegation is the end of the inquiry.

3. As an Alternative, Independent Ground, the Delegation Provisions, Themselves, Are Unconscionable.

In the alternative, the delegation clauses, themselves, are unconscionable. *See* ER 23-40 (citing *Rent-a-Ctr.*, 561 U.S. at 71-74 (noting that, when evaluating delegation, courts should consider the unconscionability of the delegation clause itself, rather than the whole agreement)). Because Uber has not separately challenged this holding, any such challenge is waived.

G. The District Court Correctly Rejected Hirease's Attempt to Invoke Uber's Arbitration Agreement

As Hirease recognizes, it has no independent basis to seek to compel arbitration of Mohamed's claims against it. Hirease ignores authority that it cannot rely on Uber's or Rasier's arbitration provisions to compel arbitration of Plaintiff's claim against Hirease for its independent violation of the Massachusetts Consumer Credit Reporting Act ("MCRA") M.G.L. c. 93 §§ 50 *et seq*. *Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1223-24 (9th Cir. 2013). In his individual complaint, Mohamed alleged that, independent of any contract with or obligation owed by Defendants Uber or Rasier, Hirease violated obligations imposed upon it by the MCRA, which "requires . . . Hirease [to] provide a copy of any consumer report procured by Uber or Raiser to Plaintiff and to other similarly situated applicants or employees at the time it provides any such report to Uber or Rasier." (citing M.G.L. c. 93 § 60). ER 246. Just as "Best Buy . . . presented no evidence . . . that DirecTV controlled its behavior in ways relevant to Plaintiffs' allegations" in the *Murphy* case, Hirease presented no evidence that Defendants Uber or Rasier controlled its behavior in its failing to provide Mohamed with the required copy of his background report. *Murphy*, 724 F.3d at 1232.

VI. CONCLUSION

For the foregoing reasons, Uber's appeal should be denied, and the District Court's well-reasoned opinion should be affirmed.

Respectfully submitted,

Dated: January 11, 2016

Goldstein, Borgen, Dardarian & Ho

/s/ Andrew P. Lee
Andrew P. Lee

Attorneys for *Plaintiffs-Appellees Mohamed and Gillette*

CERTIFICATE OF COMPLIANCE
(Fed. R. App. P. 32(a) & 9th Cir. Rule 32-l)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 15,315 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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 proportionally spaced typeface using Microsoft Word 2010 word processing program, a 14-point font size, and the Times New Roman type style.

Respectfully submitted,

Dated: January 11, 2016

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STATEMENT OF RELATED CASES

(9th Cir. R. 28-2.6)

Plaintiffs are aware of the following cases that arise out of the same or consolidated case in the district court:

- *Mohamed v. Uber Techs., Inc.*, No. 15-16178, District Court No. 3:14-cv-05200-EMC;
- *Gillette v. Uber Techs., Inc.*, No. 15-16181, District Court No. 3:14-cv-05241-EMC;
- *Mohamed v. Uber Techs., Inc.*, No. 16-15035.

Plaintiffs are aware of the following cases that raise closely related issues or involve the same transaction or event:

- *O'Connor v. Uber Techs., Inc.*, No. 14-16078, District Court No. 3:13-cv-03826-EMC;
- *Yucesoy v. Uber Techs., Inc.*, No. 15-17422, District Court No. 3:15-cv-00262-EMC;
- *Del Rio v. Uber Techs., Inc.*, No. 15-17475, District Court No. 3:15-cv-03667-EMC;
- *Yucesoy v. Uber Techs., Inc.*, No. 15-17534, District Court No. 3:15-cv-00262-EMC;
- *O'Connor v. Uber Techs., Inc.*, No. 15-17532, District Court No. 3:13-cv-03826-EMC;
- *O'Connor v. Uber Techs., Inc.*, No. 15-80220, District Court No. 3:13-cv-03826-EMC;
- *O'Connor v. Uber Techs., Inc.*, No. 16-1500, District Court No. 3:13-cv-03826-EMC;

- *Yucesoy v. Uber Techs., Inc.*, No. 16-15001, District Court No. 3:15-cv-00262-EMC.

Respectfully submitted,

Dated: January 11, 2016

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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 January 11, 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.

Respectfully submitted,

Dated: January 11, 2016

Goldstein, Borgen, Dardarian & Ho

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