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., Defendant-Appellant.	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

APPELLANTS UBER TECHNOLOGIES, INC. AND RASIER, LLC'S OPPOSITION TO PROPOSED INTERVENORS' MOTION TO INTERVENE AND STAY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

The *O'Connor* and *Yucesoy* plaintiffs have filed a truly remarkable and inappropriate motion. Even though they settled their case against Uber, they wish to prevent the *Mohamed* appeal—a completely *separate* case—from proceeding to oral argument because they are worried that this Court's decision might weaken their litigation position *if* the district court rejects their settlement agreement and they are forced to return to the bargaining table or proceed to trial. *See* Mot. at 4. In other words, the *O'Connor* and *Yucesoy* plaintiffs wish to preserve the deeply flawed district court orders that are providing them with unwarranted bargaining leverage over Uber, out of fear that this Court will correctly overturn those orders. *See* Mot. at 5–6 (describing "the potential benefit of freezing the current status of Uber's 2013 and 2014 arbitration agreements"). It is difficult to conceive of a more improper basis for seeking a stay. This Court should deny the motion and decide the *Mohamed* appeal as expeditiously as possible, so the parties in *all* pending cases against Uber can benefit from this Court's ruling—whether in court or at the bargaining table.

BACKGROUND

I. THE *O'CONNOR* & *YUCESOY* CASES

The *O'Connor* plaintiffs filed a putative class action against Uber Technologies, Inc. ("Uber") in August 2013. No. C-13-3826 EMC (N.D. Cal.) ("*O'Connor* D. Ct."). They allege that Uber has misclassified California drivers as

independent contractors, thus depriving them of gratuities and expense reimbursements to which they would be entitled under California Labor Code Sections 351 and 2802, if they were employees of Uber. *O'Connor* D. Ct., Dkt. 1. The *O'Connor* plaintiffs do *not* assert any background check or consumer reporting claims, based on federal law or otherwise. *Cf. infra* at 4–5.

In a pair of orders issued September 1, 2015 and December 9, 2015, the district court certified two classes consisting of approximately 240,000 drivers in California—nearly all of whom are bound by Uber's arbitration agreements.[1] *O'Connor* D. Ct., Dkt. 341, 395. Uber filed a Rule 23(f) petition requesting permission to appeal these orders, which this Court granted on April 5, 2016. *See* No. 16-15595.

Uber also filed two motions to compel arbitration, which the district court denied in a single order on December 10, 2015. *See O'Connor* D. Ct., Dkt. 400. Pursuant to 9 U.S.C. § 16(a)(1)(C), Uber appealed the district court's order denying arbitration. *See* No. 15-17420.

The *Yucesoy* plaintiffs—a putative class of Massachusetts drivers who are represented by the same counsel representing the *O'Connor* plaintiffs—filed a putative class action against Uber in June 2014. Like the *O'Connor* plaintiffs, they

[1] These arbitration agreements are contained within the standard licensing agreement that Uber sends to all drivers who use the Uber app. These agreements also have opt-out provisions, allowing drivers to opt out of arbitration—which hundreds of drivers have done. *See, e.g.*, *O'Connor* D. Ct., Dkt. 276 at 25 n.30.

allege that Uber has misclassified drivers as independent contractors and failed to remit gratuities and reimburse business expenses. No. 3:15-cv-00262-EMC (N.D. Cal.) ("*Yucesoy* D. Ct."), Dkt. 157-1, 164. As in *O'Connor*, Uber filed motions to compel arbitration of the *Yucesoy* plaintiffs' claims, the district court denied Uber's motions and invalidated Uber's arbitration agreements, and Uber appealed those orders. *See* No. 15-17422.

In March and April 2016, Uber participated in a series of mediation sessions with counsel representing the *O'Connor* and *Yucesoy* plaintiffs, culminating in a settlement agreement to resolve the *O'Connor* and *Yucesoy* actions. The plaintiffs filed a single motion for preliminary settlement approval in both *O'Connor* and *Yucesoy* on April 21, 2016, *O'Connor* D. Ct., Dkt. 518 & 574, *Yucesoy* D. Ct., Dkt. 206 & 221, and the district court held a preliminary settlement approval hearing on June 2, 2016. As a result of the parties' settlement agreement, the district court vacated the trial date in *O'Connor* and took the *O'Connor* and *Yucesoy* plaintiffs' motion for preliminary settlement approval under submission. *O'Connor* D. Ct., Dkt. 680; *Yucesoy* D. Ct., Dkt. 230. The district court has not indicated how or when it will rule on the plaintiffs' motion for preliminary settlement approval.

Simultaneously with the filing of plaintiffs' motion for preliminary settlement approval, the parties filed a joint request asking that this Court stay any appeals arising out of *O'Connor* and *Yucesoy*—but they did *not* request a stay of

appeals arising out of any other cases. To the contrary, in the parties' joint letter, Uber's counsel expressly stated that the *Mohamed* appeals (discussed below) "are not part of the Parties' settlement agreement, remain unaffected by the agreement, and should continue unabated," and the *O'Connor* and the *Yucesoy* plaintiffs neither objected to this statement nor independently asked the Court to stay the *Mohamed* appeals. No. 15-17420, Dkt. 31 at 2. In reliance on the parties' joint letter, this Court stayed most of the appeals arising out of *O'Connor* and *Yucesoy*, and declined to stay the *Mohamed* appeals. No. 15-17420, Dkt. 32.[2]

II. THE *MOHAMED* LITIGATION

The *Mohamed* plaintiffs filed a putative class action against Uber and Rasier, LLC (together with Uber Technologies, Inc., "Uber") in November 2014. On October 22, 2015, the *Mohamed* case was consolidated with two other putative class actions, *Gillette v. Uber Techs., Inc.*, No. 14-cv-05241-EMC (N.D. Cal.) ("*Gillette* D. Ct.") and *Nokchan v. Uber Techs., Inc.*, No. 15-cv-03009-EMC (N.D. Cal.).[3] In the consolidated complaint, the *Mohamed* plaintiffs allege that Uber violated the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* and related state

[2] The Court initially declined to stay Uber's Rule 23(f) appeal. No. 16-15595, Dkt. 9. However, upon a renewed request by the *O'Connor* and *Yucesoy* plaintiffs, this Court stayed that appeal as well. No. 16-15595, Dkt. 10.

[3] Although the consolidated district court case is captioned *In re Uber FCRA Litigation*, 3:14-cv-05200-EMC, Uber refers to that case as the *Mohamed* case and the named plaintiffs in that action as the *Mohamed* plaintiffs for simplicity.

background check and consumer reporting laws. No. C-14-5200 EMC (N.D. Cal.) ("*Mohamed* D. Ct."), Dkt. 109.

In early 2015, Uber moved to compel arbitration of the *Mohamed* plaintiffs' claims, on the ground that those plaintiffs are subject to Uber's arbitration agreements. *Mohamed* D. Ct., Dkt. 28; *Gillette* D. Ct., Dkt. 16. On June 9, 2015, in a single order, the court denied Uber's motions to compel arbitration and invalidated Uber's arbitration agreements. *Mohamed* D. Ct., Dkt. 70; *Gillette* D. Ct., Dkt. 48. Uber appealed this order under 9 U.S.C. § 16(a)(1)(C),[4] the parties have completed briefing in this appeal, and oral argument is scheduled to take place in less than one week.

Over the past several months, Uber and the *Mohamed* plaintiffs have engaged in mediation sessions and good-faith settlement discussions in an effort to resolve the *Mohamed* case but, at all times, the proposed settlement terms have been contingent upon the outcome of this appeal. As of the filing of this opposition brief, the parties have *not* yet reached an agreement on all material terms or finalized a memorandum of understanding. Additionally, the parties' draft memorandum of understanding expressly provides that this appeal will continue and ensures that a case or controversy will continue to exist. Indeed, as the parties stated in a stipulation they recently filed with the district court, certain

[4] There were three notices of appeal arising out of the district court's order. On Uber's motion, this Court consolidated these appeals.

material "terms of the settlement agreement [will be] contingent upon the outcome of Uber's pending appeals …." *Mohamed* D. Ct., Dkt. 175 at 3.

ARGUMENT

I. THE COURT SHOULD DENY THE *O'CONNOR* & *YUCESOY* PLAINTIFFS' UNTIMELY STAY REQUEST

This Court should deny the improper stay request filed by the *O'Connor* and *Yucesoy* plaintiffs because the motion is procedurally improper, substantively meritless, and reflects pure gamesmanship.

A. The Motion To Stay Is Untimely

As an initial matter, This Court should deny the motion to stay because the *O'Connor* and *Yucesoy* plaintiffs have unreasonably delayed in bringing their motion. The movants have been aware of the *Mohamed* litigation since no later than *December 24, 2014*, when the district court related the *O'Connor* and *Mohamed* cases at the district court level. *See Mohamed* D. Ct., Dkt. 16. They have been aware of the *Mohamed* appeal since no later than *June 18, 2015*, when Uber moved to consolidate the *Mohamed* appeal with one of the appeals arising out of *O'Connor* (a motion the *O'Connor* plaintiffs opposed, *see* No. 14-16078, Dkt. 53). *See* No. 15-16181, Dkt. 8. And when the *O'Connor* and *Yucesoy* parties filed a joint letter with this Court nearly two months ago, Uber's counsel expressly stated that the *Mohamed* appeals "are not part of the Parties' settlement agreement, remain unaffected by the agreement, and should continue unabated …." No. 15-

17420, Dkt. 31 at 2. Yet the *O'Connor* and *Yucesoy* plaintiffs waited until just *one week* before the *Mohamed* oral argument, and *one day after* this Court announced the panel members who will be hearing the *Mohamed* appeal, to file their stay motion. *See Standing Committee on Discipline of U.S. Dist. Court for Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1443 (9th Cir. 1995) ("Judge-shopping doubtless disrupts the proper functioning of the judicial system and may be disciplined."). The movants have offered no justification for their abject failure to timely seek the relief they now request.

B. An Appellee's Bare Desire To Preserve The District Court's Flawed Decision Is Not A Valid Reason For A Stay

On the merits, this Court should deny the motion to stay because the *O'Connor* and *Yucesoy* plaintiffs' *sole* purpose is to preserve a deeply flawed status quo—temporarily cementing in place the district court's erroneous orders denying Uber's motions to compel arbitration—so they might exert bargaining leverage over Uber in the speculative event of further settlement negotiations. Indeed, the *O'Connor* and *Yucesoy* plaintiffs *admit* that is their sole purpose, conceding that they have requested a stay because "this Court's ruling or leaning in *Mohamed* could have a substantial impact on the parties' positions in the *O'Connor* and *Yucesoy* cases." Mot. at 4 n.6; *see also id.* at 4 ("[A] decision … in the *Mohamed* appeal will undoubtedly complicate any further negotiations"). This gamesmanship does not warrant a stay of the *Mohamed* appeal. *See Wiltz v. Bayer*

CropScience, Ltd. P'ship, 645 F.3d 690, 694 n.6 (5th Cir. 2011) (denying motion to stay appeal because "plaintiffs' motion to stay [was] simply an attempt to preserve a victory in what they [then] perceive[d] to be the more favorable forum."); *see also U.S. v. Bramble*, 680 F.2d 590, 592 (9th Cir. 1982) ("We deal here with gamesmanship, and we decline to support it.").

The *O'Connor* and *Yucesoy* plaintiffs also contend that the continuation of the *Mohamed* appeal could impose "potential irreparable harm to the *ongoing settlement process*" in the *O'Connor* and *Yucesoy* matters. No. 15-17420, Dkt. 35 at iii (emphasis added). But, of course, there *is* no ongoing settlement process in those cases; the parties have executed and submitted for court approval a binding settlement agreement that, if approved, would result in final judgment. And even if the *O'Connor* and *Yucesoy* settlement does not go forward (a speculative concern at this point), the "settlement process" (whatever that means) would only *benefit* from a definitive ruling from this Court regarding the validity of Uber's arbitration agreements.

In a footnote, the *O'Connor* and *Yucesoy* plaintiffs further suggest that a stay is warranted because the *Mohamed* parties are in the process of negotiating a settlement agreement. Mot. at 3 n.5. And they speculate that the *Mohamed* parties' anticipated settlement would be "not proper" because it supposedly would require this Court to "issue advisory decisions." *Id.* In addition to being

unfounded (the *O'Connor* and *Yucesoy* plaintiffs have not been involved in any of the *Mohamed* settlement discussions and have never seen the parties' confidential draft memorandum of understanding), both of these statements are false. As Uber explained in a recent submission to this Court, *see* No. 15-16178, Dkt. 101, the *Mohamed* parties—although they are currently engaged in good-faith negotiations—have not finalized a memorandum of understanding regarding a prospective settlement, let alone filed any motion for preliminary settlement approval or obtained preliminary or final settlement approval from the district court. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 466 n.3 (1978) ("In view of the tentative nature of the settlement, this case is not moot."). Moreover, the *Mohamed* parties' draft memorandum of understanding, which the *Mohamed* parties will submit to this Court if and when it is finalized and executed, expressly provides for the continuation of this appeal by ensuring that a case or controversy will continue to exist—indeed, certain material terms of the settlement will be contingent upon the outcome of Uber's pending appeals. There is nothing improper about such a contingent settlement agreement. *See Nixon v. Fitzgerald*, 457 U.S. 731, 744 (1982); *John Doe 1 v. Abbott Labs.*, 571 F.3d 930, 933 (9th Cir. 2009).

C. A Stay Of The *Mohamed* Appeal Would Harm Uber

Additionally, the relief that the *O'Connor* and *Yucesoy* plaintiffs seek would impose severe harm on Uber. This appeal has already been pending for a full year, during which time Uber has been forced to operate its business under a cloud of uncertainty regarding the validity of its arbitration agreements with drivers. Indeed, the district court's order invalidated more than 240,000 arbitration agreements between Uber and drivers. Many other federal courts across the country, however, have rejected the district court's analysis and upheld the validity of those same arbitration agreements. *See, e.g.*, *Suarez v. Uber Techs., Inc.*, 2016 WL 2348706 (M.D. Fla. May 4, 2016); *Varon v. Uber Techs., Inc.*, 2016 WL 1752835 (D. Md. May 3, 2016); *Sena v. Uber Techs., Inc.*, 2016 WL 1376445 (D. Ariz. Apr. 7, 2016); *Bruster v. Uber Techs., Inc.*, 2016 WL 2962403 (N.D. Ohio May 23, 2016). As long as the district court's erroneous arbitration order is permitted to stand—which this appeal can remedy—Uber will suffer prejudice.

II. THE COURT SHOULD DENY THE *O'CONNOR* & *YUCESOY* PLAINTIFFS' UNTIMELY MOTION TO INTERVENE

This Court should also deny the *O'Connor* and *Yucesoy* plaintiffs' motion to intervene in this action, both because their motion is untimely and because they do not even attempt to satisfy—nor do they satisfy—the requirements of Rule 24.

"Intervention on appeal is governed by Rule 24 of the Federal Rules of Civil Procedure." *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997) (citation omitted).

"Intervention at the appellate stage is, of course, unusual and should ordinarily be allowed only for 'imperative reasons.'" *Id.* (citation omitted). "A timely motion is required for the granting of intervention, whether as a matter of right or permissively." *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015). Timeliness is determined with reference to three factors: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *U.S. v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004). Here, the *O'Connor* and *Yucesoy* plaintiffs fail at every step of the analysis.

First, the *O'Connor* and *Yucesoy* plaintiffs seek intervention on appeal, not at the district court—reason enough for this Court to declare their motion untimely. *See Perry v. Brown*, No. 10-16696, Dkt. 406 (9th Cir. Feb. 22, 2012) (denying as untimely a motion to intervene filed on appeal). Second, as discussed above, Uber will be severely prejudiced by any intervention—this appeal is fully briefed and oral argument is scheduled for next week, meaning that Uber should soon have a ruling from this Court on the validity of its arbitration agreements. Further delay will impose additional harm on Uber's business by leaving Uber in prolonged limbo with respect to its ability to resolve disputes in arbitration. Finally, the reasons for and length of the delay also compel a finding that the motion to intervene is untimely. Even though the *O'Connor* and *Yucesoy* plaintiffs were

aware of this case no later than December 24, 2014, and even though they were aware of this appeal no later than June 18, 2015, *see supra* at 6–7, they waited until just one week before oral argument before seeking to intervene for the sole purpose of trying to stop the lower court's decision from possibly being reversed. For all of these reasons, this Court should deny the intervention motion as untimely.

Even if this Court were inclined to consider the merits of the intervention request (it should not), the Court should deny the motion for failure to satisfy Rule 24. The movants ignore these standards altogether, claiming instead that the Court should grant their motion to intervene simply because "their prospective settlement efforts [allegedly] could be hampered by allowing this appeal to go forward." Mot. at 2 n.4. Because that is not a valid basis for intervention under Rule 24, this Court should deny the motion to intervene. *See Bates*, 127 F.3d at 873.[5] And because intervention must be denied, this Court should also deny as moot the motion to stay the appeal. *See Synqor, Inc. v. Artesyn Techs., Inc.*, 410 Fed. App'x. 336, at *336–37 (11th Cir. Mar. 3, 2011) ("Because Cisco is not a party to this appeal, its motion to stay the injunction is moot.").

[5] The *O'Connor* and *Yucesoy* plaintiffs concede that "the proposed *O'Connor* and *Yucesoy* settlement would not moot the *Mohamed* appeal." Mot. at 7 n.7. Thus, it is plain that although Uber's arbitration agreements play a role in both sets of cases, there is not substantial overlap between the cases to satisfy Rule 24.

CONCLUSION

For the reasons set forth above, Uber respectfully requests that the Court deny the *O'Connor* and *Yucesoy* plaintiffs' improper and untimely motions.[6]

Dated: June 9, 2016

Respectfully submitted,

/s/ Theodore J. Boutrous, Jr.

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[6] Uber does not oppose the *O'Connor* and *Yucesoy* plaintiffs' request to remove Appeal No. 14-16078 from the list of cases to be argued on June 16, 2016. *See* Mot. at 1 n.3. As plaintiffs accurately state, this Court previously granted a stay of that appeal. *See* No. 14-16078, Dkt. 72 ("In accordance with the parties' request, this matter is removed from the June 16, 2016 oral argument calendar ….").

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 June 9, 2016.

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

Dated: June 9, 2016

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