NO. 15- 17420, 15-17422

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUGLAS O'CONNOR et al, Plaintiff-Appellees, v. UBER TECHNOLOGIES, INC., Defendant-Appellant	No. 15-17420 No. C-13-3826-EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding
HAKAN YUCESOY et al, Plaintiff-Appellees, v. UBER TECHNOLOGIES, INC. et al, Defendant-Appellants	No. 15-17422 No. C-15-00262-EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding

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INTRODUCTION

In this appeal, Uber has challenged the District Court's Orders of December 9 and 10, 2015, which held that Uber's 2013 and 2014 arbitration agreements with its drivers are unenforceable under California law. ER-7, 23, 24. The court ruled the agreements unenforceable because they contain a non-severable waiver of the right to bring representative claims under the Private Attorney General Act ("PAGA"), Cal. Labor Code § 2699, *et seq*. Although this Court recently reversed that conclusion in another case, Mohamed v. Uber Techs., Inc., No. 15-16178, 2016 WL 4651409 (9th Cir. Sept. 7, 2016), a petition for *en banc* review of that decision is now pending, see Appeal No. 15-16178, Dkt. 128, and Plaintiffs submit that the District Court's orders were correctly decided.[1]

But in any event, this Court should affirm the District Court's ruling on a different ground, namely that Uber's arbitration agreements are illegal under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 157, *et seq*. because their

[1] The District Court also previously held in Mohamed that Uber's agreements are unenforceable because they are unconscionable. See Mohamed v. Uber Techs., Inc., 109 F. Supp. 3d 1185, 1225-31 (N.D. Cal. 2015), aff'd in part, rev'd in part and remanded, 2016 WL 4651409 (9th Cir. Sept. 7, 2016). Plaintiffs submit that this is another ground upon which the District Court's Orders should be affirmed. See infra at Part III.

prohibition on class actions violates the Act.[2] See SER-142-145.[3] In Morris v. Ernst & Young, LLP, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), this Court held that class waivers in employment agreements violate the NLRA, thus rendering arbitration agreements containing such provisions unenforceable. The District Court did not reach the NLRA issue below because it held the arbitration agreements unenforceable based upon their inclusion of what the court concluded was a non-severable PAGA waiver. See ER-21. However, this Court can and should affirm the District Court's Orders on this alternative ground. See Rano v. Sipa Press, Inc., 987 F.2d 580, 584 (9th Cir. 1993), as amended (Mar. 24, 1993) (court can "affirm on any ground fairly presented by the record").

Although Uber glossed over the NLRA issue in its Opening Brief, Plaintiffs expect it will now argue that Morris does not apply here for two reasons: (1) that the presence of an "opt-out" clause rescues its arbitration agreement from illegality under the NLRA; and (2) that the drivers are not protected under the NLRA (and thus the Morris decision) because the drivers are independent contractors, not employees. Uber is wrong on both points.

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[2] Plaintiffs in this case raised this argument below. This argument was not raised below in the Mohamed case – and thus the commentary on this issue in Mohamed in footnote 6 was dicta).

[3] The Supplemental Excerpts of the Record Plaintiff-Appellees have filed herewith are cited as "SER" throughout.

First, the existence of an "opt-out" clause does not rescue an arbitration clause containing a class action waiver from illegality under the NLRA. The National Labor Relations Board ("NLRB") has now held that Section 7 rights are non-waivable, even by "voluntary" contract, and that an opt-out provision like Uber's burdens Section 7 rights by requiring workers to take affirmative steps to preserve their ability to engage in concerted activity and by requiring workers to reveal their desire to opt-out to their employer. This Court should give deference to the Board's reasonable interpretation of the NLRA on this issue. See infra Parts I.A & I.B.

Second, Uber cannot escape the dictates of Morris or the NLRA by denying that its drivers are employees. Plaintiffs contend in this case that they are indeed employees and so, if drivers were compelled to individual arbitration in order to pursue the issue of whether they have been misclassified, that result itself would violate the NLRA and this Court's holding in Morris.[4] Thus, the Court must presume that they are employees for purposes of determining the enforceability of the arbitration clause. Or, if the Court believes that a preliminary determination is needed in order to know if the drivers are entitled to protection under the NLRA

[4] By the same token, the drivers cannot be forced to individual arbitration to determine the enforceability of the arbitration clause because such a result would itself violate the NLRA and Morris. Thus, notwithstanding Uber's delegation clause in its 2014 agreement, the drivers cannot be compelled to individual arbitration to address this initial issue of enforceability. Uber's delegation clause itself violates the NLRA and Morris.

and Morris, the Court should remand this case to the District Court to make that preliminary determination.

STATEMENT OF ISSUES

1. Whether the class action waiver in Uber's arbitration agreements violates the drivers' rights under the NLRA, 29 U.S.C. §§ 157, 158(a)(1), and therefore renders the agreements unenforceable;
2. Whether the District Court correctly concluded that Uber's arbitration agreements are unenforceable because they contain non-severable PAGA waivers;
3. Whether Uber's arbitration agreements are unenforceable because they are unconscionable.

STATEMENT OF THE CASE

These appeals arise from the District Court's Orders below holding that Uber's 2013 and 2014 arbitration agreements with its drivers are unenforceable. ER-24, 23. Uber is a transportation company that dispatches drivers to pick up customers and drive them to their destination through its online application. See O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1142 (N.D. Cal. 2015) (discussing Uber's "role as a transportation company rather than a software provider"). Plaintiffs in the O'Connor case filed a class action against Uber in California in August 2013, alleging that Uber misclassified its drivers as

independent contractors rather than employees, thereby depriving them of gratuities and expense reimbursements to which they would otherwise be entitled under the California Labor Code, §§ 2802 and 351. ER-1036.[5] The Yucesoy case was filed in June 2014 in Massachusetts state court (by the same counsel), alleging similar claims under Massachusetts law, Mass. Gen. L. ch. 149 §§ 148B, 148, 152A, on behalf of Massachusetts Uber drivers.[6]

In August 2013, just before the O'Connor case was filed, Uber promulgated a new arbitration agreement for its drivers, which appeared as a pop-up on the drivers' iPhone screens, just as they were about to begin work, prompting them to

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[5] This case was originally filed as a nationwide class action, but the District Court later narrowed it to cover only drivers in California, see O'Connor v. Uber Techs., Inc., 58 F. Supp. 3d 989, 1003-06 (N.D. Cal. 2014), and later certified a class consisting only of Uber drivers in California who contracted with Uber in their own names and not through third parties. See O'Connor v. Uber Techs., Inc., 2015 WL 5138097, *37 (N.D. Cal. Sept. 1, 2015). The case remains styled as "O'Connor v. Uber", although Plaintiffs' counsel no longer represents Mr. O'Connor himself, and Mr. O'Connor was not included in the certified class and is not a lead plaintiff for the class. However, because the case still bears his name, Plaintiffs continue to refer to the case, and the class their counsel represents, as the O'Connor case and class.

[6] The Yucesoy case was later removed to federal court in Massachusetts and subsequently transferred to the Northern District of California, as a related case to the O'Connor case. ER-1121.

Another case, Del Rio v. Uber Techs., Civ. A. No. 3:15-cv-03667-EMC (N. D. Cal.), was filed (by other counsel) on August 11, 2015 (two years after the O'Connor case) and alleges various other wage violations stemming from the alleged misclassification of Uber drivers. ER-1147. The District Court issued the same Orders in Del Rio holding Uber's arbitration clause to be unenforceable, and Uber has appealed the Orders in that case as well. See Ninth Cir. Appeal No. 15-17475.

press a button on their phone's screen in order to agree to the terms of Uber's new driver contract. See SER-201 at ¶5. Drivers could not use the app or continue to drive for Uber until they clicked "Yes, I agree." See SER-201-203. The 2013 arbitration agreement provided a 30-day "opt-out" period during which drivers could choose not to be bound by the arbitration clause if they sent notice in writing "by a nationally recognized overnight delivery service or by hand delivery" to the attention of Uber's General Counsel. ER-179. Opting out by email, or even by ordinary mail, was not an option, and the opt-out option was buried deep within the fine print on page 14 of a 15-page agreement, accessible on drivers' iPhones *if* they clicked a tiny hyperlink. Id.

The O'Connor Plaintiffs objected to the distribution of this arbitration clause to putative class members. See ER-1017, 1060 (Dkt. 4, 15). Following briefing and argument, the District Court ordered that corrective notice be sent to putative class members pursuant to Fed. R. Civ. P. 23(d), see ER-1016, ER-956-58,[7] which resulted in Uber distributing a revised arbitration agreement in 2014, ER-884.[8]

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[7] These corrective notice orders are the subject of another appeal, which is currently stayed. See Ninth Cir. Appeal No. 14-16078, Dkt. 76.

[8] Uber's 2014 arbitration agreement was subsequently modified in November 2014 and again in April 2015, but for clarity's sake the parties refer to this agreement as the "2014 agreement", since the provisions at issue are identical. ER648-67; ER696-715; ER407. The agreement was changed again on December 11, 2015 (in response to the District Court's Order two days earlier holding the 2013 and 2014 agreements to be unenforceable). The promulgation of that further

The 2014 agreement included modest changes, as ordered by the District Court, including the addition of an option allowing drivers to opt-out of the arbitration agreement by email and the placement of notice about the arbitration clause at the beginning of the document. However, the instructions regarding how drivers could opt out of the arbitration clause were still buried deep in the agreement, and most drivers did not appear to appreciate or understand that they had this right.[9]

Following discovery, the O'Connor plaintiffs defeated Uber's motion for summary judgment, resulting in a pronouncement by the District Court that drivers

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revised agreement (which the parties refer to as the "2015 agreement") is the subject of a separate pending appeal and cross-appeal, Ninth Cir. Appeal No. 15-17532/16-15000; Ninth Cir. Appeal No. 15-17634/16-15001.

[9] Out of hundreds of thousands of Uber drivers who received these agreements, only a couple hundred opted out. ER-785. The record shows that most, if not virtually all, of the drivers who opted out appeared to learn of their right to do so from Plaintiffs' counsel and not the increased conspicuousness of the arbitration agreement and opt-out provision. SER-174. Indeed, more than half of the California Uber drivers who opted out of the arbitration clause used a form prepared by Plaintiffs' counsel; of the remaining drivers who opted out without using that form, approximately half were drivers who had been in direct contact with Plaintiffs' counsel's firm. See SER-174 at ¶¶ 2, 4-5. Further, the arbitration clause, including the District Court's Orders regarding the opt-out provision, was the subject of widespread publicity surrounding this case, see, e.g., Said, Carolyn, *Judge to Uber: Let drivers join class-action lawsuit*, SF GATE (June 20, 2014), available at: http://blog.sfgate.com/techchron/2014/06/20/judge-to-uber-let-drivers-join-class-action-lawsuit/ (noting that "Drivers have 30 days to opt out of mandated arbitration, either by e-mailing that request to Uber at optout@uber.com or by contacting Liss-Riordan"). Plaintiffs' counsel also maintained a widely visited website about the case, www.uberlawsuit.com, that described the right to opt out and instructions on how to do so.

"are Uber's presumptive employees" under California law. O'Connor, 82 F. Supp. 3d at 1135.[10]

Following that ruling, the O'Conner plaintiffs moved for class certification. The District Court initially certified a class consisting of drivers whose work for Uber preceded the implementation of the arbitration clause (and thus who were not bound by any arbitration clause), as well as drivers who were bound by the 2013 arbitration clause (since the court found that the 2013 agreement was unconscionable and thus unenforceable). ER-330-32. However, the District Court initially excluded from the class those drivers who were bound by the 2014 arbitration clause, concluding that individualized determinations would need to be made in order to determine whether the 2014 agreement was unconscionable. ER-385-88.

Plaintiffs urged the District Court to reconsider its ruling and expand the class to include drivers bound by the 2014 agreement. ER-1099 (Dkt. 357). On December 9, 2015, the District Court agreed with Plaintiffs, expanded the class to include drivers bound by the 2014 agreement, and held that agreement to be unenforceable. See ER-32-47. The court based its decision on the conclusion that

[10] Plaintiffs in the Yucesoy case moved for summary judgment on the issue that they were misclassified as independent contractors under Massachusetts law, but the District Court deferred consideration of that motion. See Yucesoy, Civ. A. No. 3:15-cv-0262-EMC, Dkt. 46.

the 2014 agreement (as well as the 2013 agreement) contained a non-severable PAGA waiver.[11]

Although Plaintiffs had argued that the arbitration clauses were also not enforceable on the ground that the class action waivers contained within them violate the NLRA, the District Court expressly declined to address this argument. SER-142-145; ER-20-21.

After the court denied Uber's motion to compel arbitration in the California O'Connor case, it did the same in the Massachusetts Yucesoy case, citing to its decisions in O'Connor. ER-1, ER-23.

Uber has appealed here from these Orders denying its motions to compel arbitration. [12]

SUMMARY OF THE ARGUMENT

Uber's arbitration agreements are unenforceable, in light of this Court's ruling in Morris, because they contain class action waivers, which violate the drivers' rights under the NLRA. ER-20-21. See infra, Part I.A.

Morris applies here, despite the fact that Uber's arbitration agreements contain an "opt-out" provision. "Opt-out" provisions do not rescue arbitration

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[11] The court reached this conclusion after two oral arguments and a round of supplemental briefing specifically addressed to this point. See SER-26 to SER-112.

[12] Uber has also appealed, pursuant to Rule 23(f), the District Court's December 9, 2015, class certification decision. That appeal is separately pending. See Ninth Cir. Appeal No. 16-15995.

agreements containing class waivers from illegality under the NLRA, as the NLRB has now squarely held in On Assignment Staffing Servs., Inc., 2015 WL 5113231, (Aug. 27, 2015). Just as this Court reached its conclusion in Morris based in large part upon deference to the NLRB, this Court should now defer to the NLRB's reasonable conclusion in On Assignment Staffing. See infra, Part I.B.

Morris also applies, notwithstanding Uber's claim that its drivers are independent contractors, rather than employees who would be protected under the NLRA. The drivers have alleged, and indeed have made a colorable showing, that they are employees. Forcing them to individually arbitrate their misclassification claims—or even individually arbitrate the enforceability of Uber's arbitration agreement (pursuant to its 2014 agreement's delegation clause)—would itself violate the NLRA and Morris.[13] See infra, Part I.C.

In the alternative, Plaintiffs submit that the Court should affirm the District Court on the ground on which it based its decision to hold Uber's arbitration agreements unenforceable, which is that they contain an un-severable PAGA waiver.[14] See infra, Part II.

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[13] Although Plaintiffs contend that the drivers should be presumed to be employees for purposes of this analysis, alternatively the Court could remand this case for a preliminary determination by the District Court as to whether the drivers are employees under the NLRA.

[14] Although this Court rejected this argument in Mohamed, that decision is subject to a pending petition for re-hearing *en banc*, see Mohamed, Ninth Cir.

Also, although it need not reach this issue in light of Morris, the Court should also affirm the District Court's orders holding Uber's arbitration agreements to be unenforceable because they are unconscionable. See infra, Part III.

ARGUMENT

I. Uber's Arbitration Agreements Are Not Enforceable Because They Contain Class Waivers

A. Under This Court's Holding in Morris v. Ernst & Young, LLP, Class Waivers Violate the NLRA

As Plaintiffs argued below, see SER-142-145, the class action waiver in Uber's arbitration agreements violates the NLRA, thus rendering the agreements unenforceable. Class waivers in employment agreements interfere with workers' Section 7 rights to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." See 29 U.S.C.A. § 157. See In Re D. R. Horton, Inc., 357 NLRB No. 184 (Jan. 3, 2012); Murphy Oil USA, Inc., 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), enforcement denied in relevant part, 808 F.3d 1013 (5th Cir. 2015). Section 8(a)(1) of the National Labor Relations Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7. See 29 U.S.C. §158(a)(1). By interfering with drivers' ability to take concerted

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Appeal No. 15-16178, Dkt. 128, and Plaintiffs submit that the District Court correctly decided the question below.

legal action to improve their working conditions through imposition and enforcement of its class action waiver, Uber has committed an unfair labor practice, and its arbitration agreements containing this waiver are illegal and unenforceable.[15]

This Court has now adopted this conclusion reached by the NLRB in D.R. Horton, finding that "[t]he NLRA is unambiguous" on this point and that "the Board's interpretation of § 7 and § 8 [of the NLRA] is correct" and is entitled to deference under Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984). See Morris, 2016 WL 4433080, *3-*5 (noting that "[t]he intent of Congress in § 7 [and § 8 of the NLRA] is clear and comports with the Board's interpretation of the statute" such that "we need not proceed to the second step of Chevron").

Here, Uber's agreements state that its drivers must resolve "any dispute in arbitration ***on an individual basis only***, and not on a class, collective, or private attorney general representative action basis." ER-430 at § 14.3(v) (emphasis

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[15] Uber may argue that the delegation clause in its 2014 agreement requires that an arbitrator decide the issue of the enforceability of the agreements, rather than a court. However, compelling drivers to individually arbitrate the enforceability of the arbitration clause would itself violate the NLRA and Morris, for the reasons discussed in this section. Thus, the delegation clause is itself unenforceable.

In addition, as discussed infra, Parts II and III, the delegation clause in Uber's 2014 agreement is not clear and unmistakable, and it is unconscionable and thus cannot be enforced.

added). The same provision expressly states that it "shall not be severable, unless it is determined that the Arbitration may still proceed on an individual basis only." Id. This provision effectively "prevents the initiation of *any* concerted work-related legal claim, in *any* forum" and therefore illegally interferes with drivers' Section 7 rights. Morris, 2016 WL 4433080, *4 (emphasis added).[16]

Thus, under this Court's holding in Morris, the class action waiver in Uber's arbitration agreements is unenforceable. As discussed in the next sections, Morris applies notwithstanding the presence of an "opt-out" provision in Uber's arbitration agreements and notwithstanding Uber's denial that the drivers are employees.

B. The Opt-Out Provision in Uber's Arbitration Agreements Does Not Rescue Them from Illegality Under the NLRA

Uber will argue that the outcome of this case is not dictated by Morris because its arbitration agreements contain an opt-out provision. However, this

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[16] Because the provision at issue here, requiring individual proceedings, is expressly non-severable, a ruling that it is illegal requires that the entire arbitration agreement must be stricken. See, e.g., Securitas Sec. Servs. USA, Inc. v. Superior Court of San Diego Cty., 234 Cal. App. 4th 1109, 1112, 1126 (2015), reh'g denied (Mar. 26, 2015), review denied (June 10, 2015) (striking entire arbitration agreement where "under the plain language of the parties' agreement…[the illegal PAGA waiver] was not severable from the remainder of the agreement"); Montano v. The Wet Seal Retail, Inc., 232 Cal. App. 4th 1214, 1224 (2015) (same).

However, if Uber's PAGA waiver is severable, the class waiver provision may also be severable (notwithstanding Uber's statement here that it is non-severable). In that case, a class action may proceed in arbitration. See Morris, 2016 WL 4433080, at *7, n. 8 (suggesting that class waivers may be severed from arbitration agreements so that class proceedings may be pursued in arbitration).

argument fails for two reasons.

First, an opt-out provision does not rescue an agreement from illegality because even where a class action waiver is not "a mandatory condition of employment", it still illegally burdens workers' Section 7 rights by requiring them to take affirmative actions to preserve non-waivable rights and to announce their position to their employer. The NLRB has reached this conclusion, and just as it did in Morris, this Court should give deference to the NLRB's reasonable interpretation of the Act. See infra, Part I.B.1.

Second, the opt-out provision in this case was not meaningful. Even after the modifications ordered by the District Court in 2014, the opt-out provision was obscure, and drivers were unlikely to see and be aware of it. A very small proportion of drivers opted out of the arbitration agreement, and most who did, learned of their right to do so from Plaintiffs' counsel in this case, not because of the conspicuousness of the choice that was presented to them. See infra, Part I.B.2.

1. This Court Should Give Deference to the NLRB's Reasonable Interpretation of the NLRA in On Assignment Staffing That Opt-Out Provisions Do Not Rescue Arbitration Clauses Containing Class Waivers From Illegality

In Morris, this Court deferred to the NLRB's reasonable interpretation of the NLRA, in holding that a ban on class proceedings violates workers' Section 7 rights. See Morris, 2016 WL 4433080, *2 (noting that "'[c]onsiderable deference'

[] attaches to the Board's interpretations of the NLRA.") (quoting N.L.R.B. v. City Disposal Sys. Inc., 465 U.S. 822, 829 (1984)). Although it had previously reserved the question in D.R. Horton, 357 NLRB No. 184 at n.28, the NLRB has now also held that opt-out clauses do not rescue class waivers from illegality. In On Assignment Staffing, 2015 WL 5113231, *7-11, the NLRB decided that a prospective waiver of Section 7 rights (in the form of a class action waiver) is illegal and unenforceable without regard to whether such rights were waived "voluntarily" or as part of an agreement containing an opt-out provision. Thus, under Morris, the NLRB's reasonable interpretation on this question should be given Chevron deference.[17]

In Johnmohammadi v. Bloomingdale's, Inc., 755 F.3d 1072 (9th Cir. 2014), this Court had previously rejected an argument that a class waiver in an arbitration agreement violated the NLRA, pointing to the fact that the agreement contained an opt-out provision. However, the Court in that case did not actually reach the question of whether a class waiver in an arbitration agreement violated the NLRA. Id. at 1075. Thus, it was premature for the Court in Bloomingdale's to address the

[17] Pursuant to Chevron, "if a statute is ambiguous, and if the implementing agency's construction is reasonable," then a court *must* "accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." Cuomo v. Clearing House Ass'n, L.L.C., 557 U.S. 519, 538 (2009); see also City of Arlington v. FCC, 133 S. Ct. 1863, 1868-71 (2013).

ramifications of an opt-out provision before it had even decided whether to adopt the NLRB's conclusion in D.R. Horton.[18] Now that the Court has, in Morris, adopted D.R. Horton in this Circuit, the time is ripe for the Court to address head-on the question of whether an opt-out provision does in fact rescue a class action waiver from illegality.

Significantly, at the time the Court decided Bloomingdale's, the NLRB had not yet decided whether opt-out provisions rescue arbitration agreements containing class action waivers from illegality. See D.R. Horton, 357 NLRB No. 184, at n.28. Thus, in Bloomingdale's, the Court was not asked to defer to the NLRB's interpretation because *there was no Board opinion on this question to defer to*. "Only a judicial precedent holding that the statute [in question] *unambiguously* forecloses the agency's interpretation … displaces a conflicting agency construction" that is issued after the court's decision. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982-83 (2005) (emphasis added). Thus, where an intervening agency interpretation of a statute entitled to Chevron deference is issued, it displaces a prior interpretation of this

[18] Moreover, the Bloomingdale's case is different from this case because there, the employee *conceded* that she "was fully informed about the consequences of making [the decision not to opt out of the arbitration agreement], and she did so free of any express or implied threats of termination or retaliation..." 755 F.3d at 1075. The situation presented here is very different. As discussed further in the next section, Plaintiffs dispute that the opt-out provision in Uber's arbitration agreement was meaningful.

Court. A holding otherwise would "allow[] a judicial precedent to foreclose an agency from interpreting an ambiguous statute" and "would allow a court's interpretation to override an agency's." Id. at 982.

Thus, now that the NLRB has reached this question in On Assignment Staffing,[19] Chevron deference requires that the Court now hold that opt-out provisions do not rescue arbitration agreements containing class action waivers from illegality. Because the Bloomingdale's court did not hold that the NLRA was unambiguously clear regarding whether an opt-out provision would cure a Section 7 violation, this Court must now reexamine the holding of Bloomingdale's in light of the NLRB's intervening decision in On Assignment Staffing.[20]

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[19] Since it reached its conclusion in On Assignment Staffing, the Board has maintained this position that opt-out provisions do not rescue arbitration agreements containing class waivers from illegality. See Nijjar Realty, Inc. v. National Labor Relations Board, Ninth Cir. Appeal No. 15-73921, Dkt. 30; see also NLRB v. Uber Technologies, Inc., Civ. A. No. 4:16-mc-80057-KAW (N.D. Cal.), Dkt. 45-1 (NLRB argued that Uber's opt-out provision does not rescue its arbitration agreement from illegality, in an action to enforce a subpoena the NLRB has issued against Uber).

[20] Uber will point to language in this Court's recent decision in Mohamed which stated that Uber's opt-out provision would have saved its agreement from a finding of illegality under the NLRA. Mohamed, 2016 WL 4651409, at *6, n. 6. However, this language was non-binding dicta. The Mohamed panel specifically noted that the Mohamed plaintiffs "raised the argument … *for the first time in a sur-reply*" and that the "untimely submission *waived the argument*." Id. (emphasis added). By contrast, here, Plaintiffs clearly preserved the issue below. SER-142-145.

Not only was the NLRA argument not raised below in Mohamed, the issue regarding whether an opt-out provision can rescue an arbitration clause from

Not only should this Court defer to the NLRB's decision in On Assignment Staffing out of deference; it should also do so because the decision is correct. In On Assignment Staffing, the NLRB found that "[a]ny binding agreement that precludes individual employees from pursuing protected concerted legal activity in the future amounts to a prospective waiver of Section 7 rights -- rights that 'may not be traded away.'" 2015 WL 5113231, at *8 (quoting Mandel Sec. Bureau, Inc., 202 NLRB 117, 119 (1973)). The NLRB's decision drew on prior Board and Supreme Court precedent, which holds that individual agreements between employers and employees that cause workers to prospectively waive their Section 7 rights are unenforceable,[21] and also drew on the Norris-LaGuardia Act, 29

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illegality was not squarely presented to the panel or included in the briefing before the Court. Id. (internal quotation omitted). Moreover, the Mohamed panel based its dicta regarding opt-out clauses entirely on Bloomingdale's, which is no longer good law for the reasons explained above, reasons that were likewise not addressed by the plaintiffs in Mohamed. The only other case cited by the Mohamed panel is the Morris opinion itself, which also refers to Bloomingdale's. See Morris, 2016 WL 4433080, *n. 4. However, this footnote was clearly dicta in Morris, as that case did not even involve an agreement containing an opt-out provision.

Uber may also cite Bruster v. Uber Techs. Inc., 2016 WL 4086786, *3 (N.D. Ohio Aug. 2, 2016), where a federal court in Ohio found that Uber's arbitration agreement did not violate the NLRA because of its opt-out provision; however, that Court likewise simply followed Bloomdingdale's without accounting for the fact (nor was it presented with the argument) that Bloomingdale's pre-dated On Assignment Staffing and thus is no longer good law on this point.

[21] See also J.I. Case Co. v. N.L.R.B., 321 U.S. 332, 336 (1944) (holding that individual agreements could not be treated as waivers of the statutory right to act collectively even if "the contracts were not unfairly or unlawfully obtained"); National Licorice Co. v. NLRB, 309 U.S. 350, 360-61 (1940) (holding that

U.S.C.A. § 103, which provides that "any . . . undertaking or promise in conflict with the public policy declared in" that statute is unenforceable.[22]

The Board's interpretation of the NLRA in On Assignment Staffing was eminently reasonable. The Board explained that:

> [w]hile the Respondent's employees may *retain* their Section 7 rights by following the prescribed opt-out procedure, Section 8(a)(1)'s reach is not limited to employer conduct that completely prevents the exercise of Section 7 rights. Instead, the long-established test is whether the employer's conduct *reasonably tends* to *interfere* with the free exercise of employee rights under the Act.

2015 WL 5113231, at *5 (emphasis in original). Thus, although Uber drivers may still theoretically have been able to engage in concerted activity (which would have required them to recognize they have the right to, and then follow the procedures to, opt out of the arbitration clause when they first receive it) so that they were not

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individual contracts in which employees prospectively gave up their right to present grievances "in any way except personally," were unenforceable); NLRB v. Local 73, Sheet Metal Workers' Int'l Ass'n, 840 F.2d 501, 506 (7th Cir. 1988); NLRB v. Bratten Pontiac Corp., 406 F.2d 349, 350-51 (4th Cir. 1969); N.L.R.B. v. Stone, 125 F.2d 752, 756 (7th Cir. 1942); First Legal Support Servs., LLC, 342 NLRB 350, 362-63 (2004).

[22] As the NLRB recognized in On Assignment Staffing, "the Norris-LaGuardia Act has particular relevance here" because "even if there were a direct conflict between the NLRA and the FAA, the Norris-LaGuardia Act . . . indicates that the FAA would have to yield insofar as necessary to accommodate Section 7 rights." 2015 WL 5113231, at *10. Moreover, this conclusion does not "depend[] on whether the agreement is properly characterized as a condition of employment" because "the Norris-LaGuardia Act sweepingly condemns '*[a]ny* undertaking or promise ... in conflict with the public policy declared'" Id. (quoting 29 U.S.C.A. §103).

completely prevented from exercising Section 7 rights, their rights were nonetheless burdened by the need to actively opt out of the arbitration clause in order to preserve them.

In On Assignment Staffing, the NLRB determined that an opt out procedure interfered with workers' Section 7 rights in two ways: (1) "[f]irst, the opt-out procedure interferes with Section 7 rights by requiring employees to take affirmative steps…to retain [their] rights"[23]; and (2) [s]econd, the [] opt-out procedure interferes with Section 7 rights because it requires employees who wish to retain their right to pursue class or collective claims to 'make an observable choice that demonstrates their support for or rejection of' concerted activity" and "forces them to reveal their sentiments concerning Section 7 activity" by rejecting the employer's "clearly preferred course of action." Id. at *6-7 (citing Allegheny Ludlum Corp., 333 NLRB 734, 740 (2001), enforced, 301 F.3d 167 (3d Cir.

[23] By compelling drivers to take action in order to preserve their Section 7 rights, Uber's opt-out provision also functions as an employer-imposed prerequisite that workers must fulfill before engaging in concerted legal activity. Such preconditions violate the NLRA. See NLRB v. Washington Aluminum Co., 370 U.S. 9, 14 (1962) (finding that employees did not have to seek permission or provide the company with "an opportunity to avoid the work stoppage" before walking out of work and noting that "such an interpretation of § 7 might place burdens upon employees so great that it would effectively nullify the right to engage in concerted activities which that section protects"); Savage Gateway Supermarket, Inc., 286 NLRB 180, 183 (1987) enforced, 865 F.2d 1269 (6th Cir. 1989) (finding that "a notice requirement" imposed by the employer was "a restrictive condition" that restrains protected activity, such that employee should not have been fired for failing to adhere to it).

2002)). The Board noted that:

> To effectively opt out, employees must explicitly request to be exempted from the requirement to arbitrate, in writing, by providing their name, signature, and the date. This puts the Respondent in the position of having a permanent record of which employees choose to opt out--a fact obvious to employees--and thereby further pressures them to become bound to the unlawful Agreement.

Id. at *7.

The same is true here where Uber required drivers to "notify[] the company in writing of your desire to opt out of this Arbitration Provision…[by email] stating your name and intent to opt out of this Arbitration Provision …[or by mail, in which case the letter] "must clearly indicate your intent to opt out of this Arbitration Provision, and must be dated and signed." ER-477. As in On Assignment Staffing, the drivers here must explicitly request to be exempted from the requirement to arbitrate", creating a "permanent record of which employees choose to opt out." 2015 WL 5113231, at *7. Thus, as the Board recognized in On Assignment Staffing, the choice of whether or not to opt out of a class waiver is not actually a purely "voluntary" one because of the subtle pressure exerted on workers by their employers and the burden of having to take affirmative steps to preserve one's rights.[24] Uber's agreement burdens and interferes with the drivers'

[24] Many courts have recognized the inherent potential for coercion in the context of an employment relationship. See, e.g., Guifu Li v. A Perfect Day Franchise, Inc., 270 F.R.D. 509, 517-19 (N.D. Cal. 2010); McLaughlin v. Liberty Mut. Ins. Co., 224 F.R.D. 304, 309 (D. Mass. 2004) ("Many courts have suggested

that the employer-employee relationship is of such a nature that an employee 'may feel inhibited to sue[.]'"); Gentry v. Superior Court, 42 Cal. 4th 443, 472 (2007) ("The fact that the arbitration agreement was structured so that arbitration was the default dispute resolution procedure from which the employee had to opt out underscored Circuit City's pro-arbitration stance. Given the inequality between employer and employee and the economic power that the former wields over the latter it is likely that Circuit City employees felt at least some pressure not to opt out of the arbitration agreement") (internal citation omitted); Sjoblom v. Charter Communications, LLC, 2007 WL 5314916, *4 (W.D. Wis. Dec. 26, 2007) (noting the "inherently coercive nature" of the employment relationship); Wang v. Chinese Daily News, Inc., 231 F.R.D. 602, 614 (C.D. Cal. 2005); Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 115 (2000) ("[I]n the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment…").

Moreover, the Board has taken the position that prospective waivers of Section 7 rights violate the NLRA because they affect not only those who "voluntarily" sign them, but also because they rob non-signatory employees of the opportunity to recruit the participation and support of other employees who signed a waiver to engage in concerted activity. See NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956) ("The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others."); Harlan Fuel Co., 8 NLRB 25, 32 (1938) (rights guaranteed to employees by Section 7 include "full freedom to receive aid, advice and information from others concerning [their self-organization] rights"). Thus, workers have a protected Section 7 right to solicit, persuade, and appeal to their fellow workers to join them in pursuing collective action – a right that is undermined by a prospective waiver of their fellow employees' Section 7 rights. See Signature Flight Support, 333 NLRB 1250, 1260 (2001), enforced, 31 F. App'x 931 (11th Cir. 2002); Am. Fed'n of Gov't Emps., 278 NLRB 378, 382 (1986).

Section 7 rights by virtue of requiring them to affirmatively and publicly opt out in the very same way that the Board has now held to be an unfair labor practice, and it is therefore illegal notwithstanding the opt-out provision.[25]

Other courts confronting this issue, including the Seventh Circuit and at least two district courts, have adopted the NLRB's conclusion in On Assignment Staffing, holding that arbitration agreements with class action waivers are invalid even if they contain opt-out provisions. In Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1155 (7th Cir. 2016), the Seventh Circuit held that "an arbitration agreement limiting Section 7 rights [i]s a *per se* violation of the NLRA and [can]not be legalized by showing the contract was entered into without coercion" (internal citation omitted). The district courts that have adopted this conclusion are Curtis v. Contract Mgmt. Svcs., Inc., 2016 WL 5477568, *6 (D. Me. Sept. 29, 2016), and Tigges v. AM Pizza, Inc., 2016 WL 4076829, *16 (D. Mass. July 29, 2016).

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[25] Notwithstanding footnote 4 in Morris, this Court seemed to recognize that a prospective waiver of Section 7 rights is illegal regardless of whether it is imposed as a mandatory condition of employment. The Court noted that:

> [T]he Board's determination that a concerted action waiver violates § 8 is no surprise. And an employer violates § 8 ***a second time*** by conditioning employment on signing a concerted action waiver.

Morris, 2016 WL 4433080, at *4 (emphasis added). In other words, enforcing a blanket class action waiver against employees constitutes an unfair labor practice in and of itself because Section 7 rights are non-waivable.

Thus, Uber's arbitration agreements containing a class action waiver, which prospectively waive Section 7 rights, violate the NLRA regardless of whether they were "voluntarily" entered into because they limited the drivers' freedom to decide at the relevant moment whether or not to participate in concerted activity. The Court should therefore hold Uber's arbitration agreements to be unenforceable regardless of the fact that the drivers were given the right to opt out of arbitration.

2. The Opt-Out Provision in Uber's Agreements Did Not Provide Drivers a Meaningful Ability to Opt Out of Individual Arbitration

In addition to the fact that opt-out provisions cannot rescue an arbitration agreement containing a class waiver from illegality (as discussed above), the Court should also find that the opt-out provision does not rescue Uber's arbitration clauses because they did not give the drivers a meaningful opportunity to opt out of the agreement. In both Uber's 2013 and 2014 agreements, the right that drivers had to opt out of arbitration was buried, inconspicuous, and ***not*** meaningful. Indeed, it would simply be a fiction to conclude that the drivers really had any "voluntary" choice about agreeing to be bound to resolve their claims in individual arbitration.

The contract was presented to drivers as a pop-up notification on their iPhone screens as they were trying to access the App to begin working. As the District Court noted, drivers "could only review the contracts on the small screens

of their smartphones (and thus would have to scroll repeatedly to view the entire contract).” Mohamed, 109 F. Supp. 3d at 1198, n. 12. Thus, it is evident that few drivers would have even viewed the agreement at all, or even realized they *could* view the text of the agreement by clicking the hyperlink button on the tiny phone screen, before assenting to its terms. SER-202-03, SER-,193-99.

The District Court held that (even under the more burdensome standard required to show procedural unconscionability), the 2013 arbitration agreements were “inconspicuous” and buried in the fine print, and the opt out mechanism was “‘extremely onerous’ and essentially illusory.” ER-386. The District Court also recognized the coercive presentation of the agreement, which allowed “an Uber driver to swipe a button on their mobile phones” to indicate acceptance but required “a letter via *hand delivery or overnight mail* to Uber's general counsel” in order to opt out. See ER-1014:9-14 (emphasis in original); see also Piekarski v. Amedisys Illinois, LLC, 2013 WL 6055488, *3 (N.D. Ill. Nov. 12, 2013) (noting that “Defendants' proficiency at creating electronic links to documents begs the question why Defendants insisted on its employees printing out and mailing back a paper opt-out form, instead of creating a much more accessible electronic form that could be signed and submitted electronically” and found that the answer was

"obvious—that Defendants intended its employees would not follow all these steps and would instead be bound to arbitrate their grievances").[26]

The 2014 opt-out provision was likewise obscure and buried and did not provide a meaningful opportunity for drivers to opt out of the arbitration agreement, even after the modest changes to the agreement that the District Court required in its corrective notice order. ER-607, 623. That order merely made the opt-out procedure modestly less burdensome, since it could now be done by email.

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[26] It is telling that Uber's opt-out provision did not allow drivers the option of clicking a box on their phones to opt-out of the arbitration agreement, just as they were required to click a box to assent in order to work for Uber. A company that claims to be a "technology" company presumably could have just as easily provided for such an option. See Skirchak v. Dynamics Research Corp., 432 F. Supp. 2d 175, 180 (D. Mass. 2006), aff'd 508 F.3d 49 (1st Cir. 2007) (refusing to enforce provision of arbitration agreement and noting that defendant "did not track whether employees had opened the email about the [Dispute Resolution Program] and followed the link to the Program's website to view its contents" such that there was no evidence their employees had any actual knowledge of its contents); Campbell v. Gen. Dynamics Gov't Sys. Corp., 407 F.3d 546, 548-49 (1st Cir. 2005) (noting that "[a]lthough General Dynamics set up a tracking log to monitor whether each of its employees opened the e-mail—the record indicates that the plaintiff opened the e-mail two minutes after it was sent—it did not take any steps to record whether its employees clicked on the embedded links to peruse either the brochure or the handbook" and therefore the company failed "to contradict the plaintiff's claim that he never read [it]"). The asymmetry between the burdensome opt-out procedure (where drivers had to know to click on a link to review an agreement and understand that they needed to compose a message and deliver it by email or overnight delivery, in order to opt out of the agreement), and the procedure for assenting to arbitration (by which drivers simply had to click an acceptance box that the app is designed to encourage them to click, in order to start working that day -- and indeed most drivers certainly did not even realize they had made a choice) further undermines the notion that the opt-out opportunity was meaningful.

Id. Likewise, the other change ordered by the District Court, requiring that the arbitration clause be announced up front on the first page of the agreement, made little to no difference where the vast majority of drivers would not have even realized they could click on the hyperlink to view it in the first place. And, had they done so, drivers would have been confronted with a tiny-print 17-page agreement shrunk to the size of an iPhone screen, which, as a practical matter, is not visible to the ordinary viewer. ER-102, 104-05 (discussing manner in which the agreement was presented).

The relatively miniscule number of drivers who opted out of the arbitration clause—which consisted of a couple hundred opt-outs as compared to *hundreds of thousands* of Uber drivers--demonstrates that the opt-out provision (even after the modest changes were ordered by the District Court in 2014) was not meaningful.[27] Moreover, the fact that most of those opt-outs can be attributed to the actions of Plaintiffs' counsel in spreading the word to drivers about their right to opt out of the agreement further undermines any notion that the opt-out provision was

[27] Uber states that "hundreds of drivers" opted out, see Uber Br. at 42, and the record indicates this number was approximately 270 in California. ER-784. In contrast, the full size of the class (once the 2014 arbitration clause was invalidated in December 2015) is approximately 240,000. See O'Connor, Dkt. 519-1. As the District Court noted, it had "significant doubts that the California Supreme Court would vindicate an opt-out clause [under a procedural unconscionability analysis] simply because a few signatories out of thousands were able to (and did) successfully opt-out." Mohamed, 109 F. Supp. 3d at 1206.

actually meaningful.[28] Moreover, as the NLRB recognized in On Assignment Staffing, it is evident that many drivers would have been reluctant to opt out of the arbitration clause because they feared retaliation from Uber and feared being singled out by opting out. 2015 WL 5113231, *6-7.

The real-life absence of any significant number of opt-outs from the 2013 or 2014 agreements supports Plaintiffs' contention that Uber's agreement was designed to minimize opt-outs, if not ensure that drivers would ***not*** opt out. Indeed, Uber conceded in its opposition to class certification in O'Connor that "most drivers did not [opt out of arbitration]." See O'Connor, Civ. A. No. 13-3826, Dkt. 298 at 3. Thus, even if the Court were not prepared to rule that opt-out provisions can ***never*** rescue an arbitration agreement containing a class waiver from illegality (as argued in the previous section), the opt-out provision in this case should not rescue Uber's arbitration agreement from illegality, where it simply did not provide a meaningful opportunity for drivers to opt out.[29]

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[28] The record shows that the vast majority of drivers who opted out of the arbitration clause, if not all of them, learned of their right to do so from Plaintiffs' counsel, and the publicity generated from this case, not from actually having recognized their ability to opt out from the agreement itself. See supra, n. 9; SER-174-75.

[29] Plaintiffs recognize that the Mohamed panel rejected the procedural unconscionability argument in that case. Mohamed, 2016 WL 4651409, *5-6. However, the question of whether an opt-out provision is meaningful for purposes of the NLRA analysis, does not necessarily equate with the burden of showing that an agreement is procedurally unconscionable. The facts set forth here demonstrate

Unlike in the Bloomingdale's case, discussed supra, Part I.B1., where the employee *conceded* that she "was fully informed about the consequences of making [the decision not to opt out of the arbitration agreement], and she did so free of any express or implied threats of termination or retaliation if she decided to opt out of arbitration," see 755 F.3d at 1075, here, Plaintiffs hotly contest that drivers were "fully informed" about the consequences of agreeing to arbitration and that they were free of fear of retaliation.

To say that drivers had a "fully informed" choice about whether to agree to arbitration, and were free of any pressure from Uber, is simply a fiction. Thus, regardless of whether the Court finds that the agreements rise to the level of being procedurally unconscionable (discussed infra in Section III.A.), the agreements simply cannot be considered "voluntary" for purposes of the NLRA analysis.

C. Morris and D.R. Horton Apply Here Because Plaintiffs Have Made a Colorable Showing That They Are Employees, or the Court Should Remand the Case to the District Court to Make This Preliminary Determination

The Ninth Circuit's holding in Morris applies to this case because Plaintiffs have alleged, and have made a colorable showing, that the drivers are Uber's employees, and indeed, that is the very subject of the underlying litigation. Uber will undoubtedly argue that Morris does not apply because the drivers are

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that the agreements were not truly voluntary and the opt-out provision not truly meaningful, looking at the question on a more practical level.

independent contractors, rather than employees, and so they are not protected under the NLRA. However, this argument cannot prevail because a holding that the drivers cannot press this argument on a classwide basis would defeat the very purpose of Morris – to preserve employees' right to pursue legal action collectively. If drivers trying to challenge their misclassification through the concerted activity of a class action lawsuit had to litigate their employee status (and the applicability of the NLRA) on an *individual basis* in order to even reach the argument that a class action waiver violated their Section 7 rights, by that point the drivers would have been forced to litigate the employee status question individually, in violation of Morris and D.R. Horton.

Thus, where workers have alleged that they were misclassified as independent contractors (or at least where they have made a colorable showing on this point), a court should assume that they are employees for purposes of determining the threshold applicability of the NLRA and D.R. Horton and the enforceability of a class waiver.[30] Here, the District Court has already denied

[30] The NLRB essentially makes this presumption when it exercises jurisdiction over cases where workers allege they have been misclassified as independent contractors. Although the NLRB only has jurisdiction over employees, see 29 U.S.C. § 152(3), it exercises jurisdiction in cases in which workers allege they have been misclassified as non-employees. For example, charges are now pending against Uber at the NLRB, where the Board is actively investigating whether Uber drivers are employees under the NLRA (and whether their Section 7 rights have been infringed by the class action waiver in Uber's arbitration agreements). See Billington v. Uber Technologies, Inc., 20-CA-160717 (Region 20, Sept. 24, 2015);

Uber's motion for summary judgment on employee status and has determined that the drivers are "Uber's presumptive employees" under California law; the burden is now on Uber to prove otherwise. O'Connor, 82 F. Supp. 3d at 1141 (noting that where drivers "provide a service to Uber, [] a rebuttable presumption arises that they are Uber's employees"); Narayan v. EGL, Inc., 616 F.3d 895, 900 (9th Cir. 2010) ("[U]nder California law, once a plaintiff comes forward with evidence that he provided services for an employer, the employee has established a prima facie case that the relationship was one of employer/employee").[31]

Under these circumstances, where Plaintiffs have made a colorable claim that they are Uber's employees, the holdings of D.R. Horton and Morris should apply.[32] If, however, the Court believes that an actual determination of employee

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London v. Uber Technologies, Inc., 20-CA-160720 (Region 20, Sept. 24, 2015); NLRB v. Uber Technologies, Inc., Civ. A. No. 4:16-mc-80057-KAW (N.D. Cal.) (action to enforce subpoena issued by NLRB in its investigation of these charges).

[31] Likewise, the California Department of Labor Standards Enforcement has issued a ruling that an Uber driver was an employee under California law. See Berwick v. Uber Technologies, Inc., No. 11-46739 EK (Cal. Labor Comm. June 3, 2015) (Uber's appeal pending, CA Ct. App., 1st Dist. A146460).

[32] While the NLRA and California law do not use identical standards for determining whether a worker is an employee or an independent contractor, the factors to be considered under both tests are similar. Under the NLRA, the Board has looked to the law of agency to guide its analysis and has specifically considered the factors enumerated in the Restatement (Second) of Agency § 220. Roadway Package Sys., Inc., 326 NLRB 842, 849-850 (1998). The ten factors listed in the Restatement closely track the factors considered under California's

status needs to be made in order to determine whether the drivers are entitled to protection under the NLRA, then the Court should remand this case to the District Court to make this threshold determination.[33]

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multi-factor test for employee status as set forth in S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 48 Cal. 3d 341, 351 (1989).

[33] Courts at times need to make various preliminary determinations in deciding whether arbitration agreements can be enforced. For example, courts have set hearings to determine whether an employee actually agreed to an arbitration provision. See, e.g., Emmanuel v. Handy Techs. Inc., Civ. A. No. 1:15-cv-12914 (D. Mass. July 27, 2016), Dkt. 40. Courts have also taken it upon themselves to make similar threshold findings regarding employee status to determine whether the Federal Arbitration Agreement's exemption for transportation workers, 9 U.S.C.A. § 1, applies to workers who claim they have been misclassified as independent contractors. See Oliveira v. New Prime, Inc., 141 F. Supp. 3d 125, 135 (D. Mass. 2015) (court decided it must make preliminary determination as to employee status in order to decide whether FAA's Section 1 transportation worker exemption applies), appeal filed, No. 15-2364 (1st Cir. Nov. 19, 2015); Flinn v. CEVA Logistics U.S., Inc., 2014 WL 4215359, *7 (S.D. Cal. Aug. 25, 2014) (analyzing whether workers were employees or independent contractors as a threshold matter before determining whether the FAA applies).

Here, as noted above at note 30, charges are now pending at the NLRB alleging that Uber has misclassified Uber drivers (and has violated the NLRA by attempting to enforce an arbitration agreement against them containing a class waiver). But there is no need for the Court to await a final decision from the NLRB, when that process could take years to complete (including appeals). As the Seventh Circuit made clear in Lewis, it is not necessary for a charge even to be filed at the NLRB for a court to find that a class waiver has violated a worker's rights under the NLRA. Lewis, 823 F.3d at 1151.

II. Uber's Arbitration Clause is Also Unenforceable Because It Contains a Non-Severable PAGA Waiver[34]

In addition to Uber's arbitration agreements being unenforceable because they include a class action waiver that violates the NLRA, they are also unenforceable for the reason found by the District Court below: they contain an illegal waiver of the right to bring representative claims under PAGA, which is not severable from the agreement.[35]

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[34] As noted earlier, Plaintiffs recognize that the District Court's reasoning on this issue was rejected by this Court in the recent Mohamed decision. This decision is now the subject of a pending *en banc* petition. See Appeal No. 15-16178, Dkt. 128. Plaintiffs briefly summarize their argument here in support of the District Court's decision but recognize that its viability may hinge on further review of the Mohamed panel's decision.

[35] The District Court was correct to reach the issue of whether the agreements were enforceable. The delegation clause in Uber's 2013 agreement specifically carved out the PAGA waiver. As for the 2014 agreement, the delegation clause ER-428 at § 14.3(i), was not clear and unmistakable. See ER-10-11; Mohamed, 109 F. Supp. 3d at 1202-04; see also First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (establishing heightened standard for establishing that delegation clause commits questions of arbitrability to the arbitrator). Uber's agreement includes contradictory language requiring claims brought against it to be "subject to the *exclusive jurisdiction* of the state and federal courts located in the City and County of San Francisco, California." ER-426 at § 14.1 (emphasis added). This same provision, seemingly granting the courts exclusive jurisdiction over disputes arising out of the agreement, further notes that "[i]f any provision of this Agreement is held to be invalid or unenforceable, such provision shall be struck," implying that a court should decide severability issues as well. Id. California courts considering similar agreements have found that they did not meet the Supreme Court's heightened standard for delegating arbitrability to the arbitrator. See Peleg v. Neiman Marcus Grp., Inc., 204 Cal. App. 4th 1425, 1444-45 (2012) ("[T]he inconsistency between the Agreement's delegation and severability provisions indicates the parties did not clearly and unmistakably

Uber's contract compels the parties to resolve "all" disputes in arbitration only (ER-428 at §14.3(i)), and it states that in such arbitrations, there can be no representative PAGA claims (ER-430 at §14.3(v)). This provision is illegal under Iskanian v. CLS Transp. Los Angeles, LLC, 59 Cal. 4th 348, 384 (2014), cert. denied, 135 S. Ct. 1155 (2015), which held that "an employment agreement [that] compels the waiver of representative claims under the PAGA, [] is contrary to public policy and unenforceable as a matter of state law." In Sakkab v. Luxottica Retail N. Am., Inc., this Court adopted Iskanian and held that this conclusion is not preempted by the FAA. 803 F.3d 425, 427 (9th Cir. 2015) ("[W]e conclude that the Iskanian rule does not stand as an obstacle to the accomplishment of the FAA's objectives, and is not preempted").

Thus, the question raised here is whether the illegal PAGA waiver in Uber's agreements is severable.[36] The District Court below correctly found that it is not.

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delegate enforceability questions to the arbitrator..."); Ajamian v. CantorCO2e, L.P., 203 Cal. App. 4th 771, 791-92 (2012); Parada v. Superior Court, 176 Cal. App. 4th 1554, 1565-66 (2009); Baker v.Osborne Development Corp., 159 Cal. App. 4th 884, 888-89 (2008); Hartley v. Superior Court, 196 Cal. App. 4th 1249 (2011). Moreover, any "ambiguities in a form contract that cannot otherwise be resolved are resolved against the drafter" (which, in this case, is Uber). Admiral Ins. Co. v. Kay Auto. Distributors, Inc., 2015 WL 400634, *2 (C.D. Cal. Jan. 29, 2015).

In any event, even if the delegation clause was clear and unmistakable, it should not be enforced because it was unconscionable. See infra, Part III.

[36] Uber argues that, even if the arbitration provision contained a non-severable PAGA waiver, the opt-out provision in the agreement rescues it from illegality

In its Opening brief, Uber attempts to bootstrap a general severability provision from an entirely different section of its arbitration agreement (ER-426 at § 14.1), and, through unwieldy linguistic gymnastics, convince the Court that this provision overrides the overall structure of its agreement and *the specific non-severability provision that expressly states that the PAGA waiver "shall not be severable*." ER-430 at §14.3(v).[37] This argument should be rejected.

There is simply no way to "sever" the offending language in § 14.3(i) (waiving PAGA representative claims) short of completely rewriting the contract. The agreement states that "[t]his Arbitration Provision requires all [] disputes to be resolved only by an arbitrator through final and binding arbitration..." ER-428 at

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because the agreement was not mandatory. However, the Mohamed panel correctly rejected this argument, noting that "[b]ecause the PAGA waiver … required employees to make a decision as to whether or not they would preserve their right to bring PAGA claims before they knew any such claims existed, it is unenforceable under Iskanian and Sakkab." See also Mohamed, 2016 WL 4651409, at *8. The California Court of Appeals has held that opt-out provisions do not rescue arbitration agreements containing PAGA waivers from illegality. See Securitas, 234 Cal. App. 4th at 1122; Williams v. Superior Court, 237 Cal. App. 4th 642, 648 (2015).

[37] Although the panel in Mohamed ultimately found Uber's PAGA waiver to be severable, the Court noted that the relevant provisions are "hardly a model of clarity." 2016 WL 4651409, at *8. Plaintiffs submit that this observation is an understatement; the only way to accept Uber's contention that its unlawful PAGA waiver is "expressly severable" is through a tortured reading of the arbitration clause. Uber, which is represented by highly capable counsel, could have drafted its agreements to make clear that the PAGA waiver was severable. It did not do so. Ambiguities are to be construed against drafters, and it was improper for Uber to seek the Court's assistance in reforming its agreements.

§14.3(i) (emphasis added). Uber argues that the PAGA waiver could be avoided by severing this clause and allowing such claims to proceed in court instead, but severing this clause would eliminate the requirement that disputes be arbitrated at all and would eviscerate the entire arbitration clause!

Instead, what Uber really asked the Court to do is to augment the parties' agreement and re-draft the language to write-in an exception for PAGA claims that exempts those claims from arbitration and allows them to proceed in court while all other claims remain compelled to arbitration. This revision would go far beyond "severing" offending language. Courts have no authority to "cure illegality by reform[ing] or augment[ing]" the terms of the parties' contract. Abramson v. Juniper Networks, Inc., 115 Cal. App. 4th 638, 660 (2004).[38]

Moreover, it is a basic principle of contract interpretation that the more

[38] See also Travelers Cas. & Sur. Com. of Am. v. Dunmore, 2014 WL 6886004, at *7 (E.D. Cal. Dec. 4, 2014) (noting that "the Court will not rewrite the parties' contract after the fact to facilitate a different result"); Poublon v. Robinson Co., 2015 WL 588515, *15 (C.D. Cal. Jan. 12, 2015) ("[C]ourts may not rewrite agreements and impose terms to which neither party has agreed."); Reyes v. United Healthcare Servs., Inc., 2014 WL 3926813, at *6 (C.D. Cal. Aug. 11, 2014) (noting that "[s]everance is appropriate only if courts have the *capacity* to cure the unlawful contract through severance or restriction of the offending clause"); 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.").

specific controls over the more general[39], so the specific language in §14.3(v) stating that the PAGA waiver "provision *shall not be severable*…" should trump general severability language elsewhere in the agreement. The District Court properly applied the express language in the agreement, which requires *all* claims be brought in arbitration (including PAGA claims), and then states exactly what should occur if the PAGA waiver in arbitration is deemed unenforceable – it "shall not be severable." ER-430.[40] Thus, the District Court's reading of Uber's contract was correct and should be affirmed.[41]

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[39] See Starlight Ridge South Homeowners Ass'n. v. Hunter-Bloor, 177 Cal. App. 4th 440, 447 (2009) (citing Code Civ. Proc. § 1859) ("Where two provisions appear to cover the same matter, and are inconsistent, the more specific provision controls over the general provision.").

[40] The general severability provision that Uber repeatedly refers to in § 14.1 cannot be used to "sever" the PAGA waiver because the PAGA waiver is inextricably a part of the contract. Indeed, the fact that severing the PAGA waiver actually required an entire rewriting the agreement is confirmed by what happened when Uber issued a revised December 2015 Agreement (in response to the Court's decision two days earlier denying its motion to compel arbitration). In that revised agreement, where Uber purported to "fix" the offending PAGA waiver, Uber had to add twenty lines of new text and make at least *fifteen* separate additions of text throughout the arbitration provision in order to harmonize the new language and prevent conflicts with the previous text. SER-17-25 at § 15.

[41] Uber uses histrionic terms, accusing the District Court of "rigorously invalidat[ing]" Uber's agreements by issuing a string of "anti-arbitration orders" in its "zeal" to hold the agreement unenforceable. Uber Br. at 2-3, 39. However, what Uber asked the Court to do—reform the agreement by severing the PAGA claim—required feats of linguistic acrobatics. Uber's argument requires the Court to ignore specific and express non-severability language in favor of general severability language elsewhere in the agreement, and ignores the very structure of the

Uber argues that in Iskanian, the California Supreme Court severed a similar PAGA waiver and so the same result should happen here. Uber Br. at 34-35. However, this argument is misleading because in Iskanian the plaintiffs did not even make the argument that the PAGA waiver rendered the entire agreement unenforceable. Instead, the plaintiffs there actually urged that the proceedings be bifurcated to allow the PAGA claims to go forward in court while the rest of the claims went to arbitration. See Iskanian, Appellant's Opening Br. 2012 WL 6762727, at *32-33. Thus, the question of whether the PAGA waiver was severable based on the language of the agreement was *not* one of the issues presented for review in Iskanian, and the point was not argued or briefed, whereas here, it has been the focus of extensive briefing by the parties.[42] Moreover, since

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agreement, which relegates all disputes to arbitration unless explicitly excepted (and does *not* except PAGA claims by its plain terms).

[42] Likewise, in Sakkab, the Ninth Circuit expressly noted that "Sakkab has not argued that the PAGA waiver contained in the arbitration agreement rendered the entire arbitration agreement void. Nor has he disputed that he is required to arbitrate the four non-PAGA claims." Sakkab, 803 F.3d at 440. Other cases cited by Uber in support of its severance argument are similarly inapposite. In Hopkins v. BCI Coca-Cola Bottling Co. of Los Angeles, 2016 WL 685018 (9th Cir. Feb. 19, 2016) (unpublished), the plaintiffs expressly *agreed* to severance of the PAGA waiver. See Hopkins Appellants' Reply Br., 2014 WL 7040081, at 29. In Sierra v. Oakley Sales Corp., No. 13- 55891, 2016 WL 683442 (9th Cir. Feb. 18, 2016) (unpublished), the issue was whether the plaintiff's PAGA claims were preempted by the FAA; severability of the PAGA waiver was not addressed, and the case was simply remanded to determine whether the PAGA claim should be permitted in either court or arbitration.

Iskanian, courts have stricken entire arbitration agreements where a PAGA waiver is found to be non-severable. See Securitas Sec. Servs. USA, Inc., 234 Cal. App. 4th at 1126; Montano, 232 Cal.App. 4th at 1224.

The District Court was correct to hold that Uber's illegal PAGA waiver is not severable from the rest of the agreement and thus properly held the inclusion of this waiver rendered the agreements unenforceable in their entirety.

III. Uber's Arbitration Agreements Are Also Unenforceable Because They Are Substantively and Procedurally Unconscionable

Although the Court need not reach this issue (given the NLRA and PAGA waiver arguments addressed above), Uber's arbitration agreements are also unenforceable because they are permeated with both procedural and substantive unconscionability.[43]

A. The Arbitration Provisions Are Procedurally Unconscionable

Procedural unconscionability "focuses on the factors of oppression and surprise." Patterson v. ITT Consumer Fin. Corp., 14 Cal. App. 4th 1659, 1664

[43] For the same reasons discussed in this section, the delegation clause in Uber's 2014 agreement is likewise procedurally and substantively unconscionable and unenforceable, and so the District Court was correct to reach the question of enforceability of the 2014 agreement. As discussed supra at n. 35, it was also correct for the court to reach this question because the delegation clause in the 2014 agreement was not clear and unmistakable. The 2013 agreement did not delegate the question of arbitrability of the class action waiver and PAGA representative waiver to the arbitrator. Mohamed, 2016 WL 4651409, at *3 (noting that "[t]he 2013 Agreement, but not the 2014 Agreement, carved out challenges to these [PAGA and class] waivers from the general delegation provision").

(1993) (citations omitted). The surprise element is satisfied because Uber's arbitration clause was presented via hyperlink on a tiny iPhone screen and for the 2013 agreement was buried deep in Uber's agreement. Moreover, the agreement itself was only reviewable through a hyperlink on a tiny iPhone screen ***if*** a driver actually clicked on the hyperlink (which most drivers never clicked on, and which Uber did not track). The oppression element is likewise satisfied because drivers were required to accept the agreement before starting work, creating a dynamic of economic dependence and coercion, and because drivers knew that Uber would have a lasting record if they chose to opt out and not accede to Uber's clearly preferred course of conduct – arbitration. [44]

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[44] The District Court originally concluded that the 2013 agreement was procedurally and substantively unconscionable and so certified a class including drivers whose work preceded Uber's promulgation of an arbitration clause, as well as those drivers bound by the 2013 agreement. See ER-326. In that order, the court excluded from the class drivers bound by the 2014 agreement because the court concluded that the procedural unconscionability analysis for that agreement would require individualized assessments. Id. at ER-385-88. Previously, the court had decided the 2014 agreement was procedurally unconscionable with respect to the lead plaintiff in Mohamed, 109 F. Supp. 3d 1185, 1231 (N.D. Cal. 2015), but refused to extend that ruling to a class because it believed that the procedural unconscionability analysis would require individualized consideration to determine which drivers "would not have felt free to opt-out" of the agreement under the California Supreme Court's test set forth in Gentry v. Superior Court, 42 Cal. 4th 443, 471-72 (2007). See ER-387. (The court later expanded the class to include drivers who were bound by the 2014 agreement, holding that agreement was not enforceable based, not upon unconscionability, but upon a different conclusion: that the agreement contained a non-severable PAGA waiver, as discussed above.) However, the District Court's refusal to hold that the 2014 agreement was procedurally unconscionable for all Uber drivers, without the need for

In Mohamed, this Court concluded that Uber's agreement is not procedurally unconscionable simply because it contains an opt-out provision. The panel appeared to believe that the mere existence of an opt-out provision automatically immunizes arbitration agreements from charges of procedural unconscionability, no matter how admittedly "burdensome" and "buried in the agreement" the opt-out provision is, or how onerous it is to comply with it. Mohamed, 2016 WL 4651409 at *6.

However, this reasoning is not in line with Ninth Circuit and California Supreme Court precedent. Indeed, under this ruling, Uber could require its drivers to submit an opt-out request via carrier pigeon within an hour of receiving the

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individualized consideration, was incorrect. In Gentry, the California Supreme Court found the agreement there was procedurally unconscionable because "it is not clear that someone *in Gentry's position* would have felt free to opt out." Id. at 471 (emphasis added). In making this statement, the Court did not rely on the specifics of Gentry's income, education, or level of sophistication, but instead on "*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 of the arbitration agreement." Id. at 472 (internal citation omitted) (emphasis added). Thus, the California Supreme Court drew this conclusion for all employees who were in the same "position" as the plaintiff. Likewise, Uber drivers are all in the same position vis a vis Uber in that they clearly have less bargaining power and are presumed to be Uber's employees; indeed, the District Court's ruling that the 2014 agreement was procedurally unconscionable for the lead plaintiff Mohamed was not based upon any individual characteristics about him, but rather based on his position relative to Uber. Mohamed, 109 F. Supp. 3d at 1211-16. The District Court thus should have held that that the 2014 arbitration clause was procedurally (as well as substantively) unconscionable for all Uber drivers and refused to enforce it on that basis.

agreement (or some similarly burdensome or preposterous method), and the opt-out provision would insulate Uber from *any* charge of unconscionability because it was theoretically possible for a driver to comply. Contrary to the Mohamed panel's contentions, "California courts have determined that adhesion is ***not*** a prerequisite for a finding of unconscionability." Laughlin v. VMware, Inc., 2012 WL 298230, at *3, n. 3 (N.D. Cal. Feb. 1, 2012) (emphasis added); see also Lennar Homes of California, Inc. v. Stephens, 232 Cal. App. 4th 673, 689, n. 10 (2014); Harper v. Ultimo, 113 Cal. App. 4th 1402, 1409 (2003) ("[L]et us be quite clear about it: Adhesion is not a prerequisite for unconscionability"); Bruni v. Didion, 160 Cal. App. 4th 1272, 1289 (2008), as modified (Mar. 24, 2008) (noting that "adhesion is not a prerequisite for unconscionability"). Indeed, such a rule would be "in tension with the 'sliding scale' analysis described in Armendariz, which requires a *particularized* analysis of oppression and surprise." Lennar, 232 Cal. App. 4th at 689, n. 10 (citing Armendariz, 24 Cal.4th at 114) (emphasis added).

In support of its conclusion, the Mohamed panel cites this Court's decision in Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1281 (9th Cir. 2006), which in turn cites a single line of dicta from the California Supreme Court in Armendariz. However, as subsequent decisions have recognized, the Court in Armendariz, had "no occasion to confront the problem of unconscionability when there wasn't a contract of adhesion." Harper, 113 Cal. App. 4th at 1409. Just because the Court

in Armendariz stated that the unconscionability analysis should begin with adhesion, does *not* mean it should end there. Id. Indeed, in Nagrampa, this Court recognized that "the critical factor in procedural unconscionability analysis is the *manner in which the contract or the disputed clause was presented and negotiated*." 469 F.3d at 1282 (emphasis added). By suggesting that Nagrampa creates a bright line rule that adhesion is required to show unconscionability, the Mohamed panel misread the precedent of this Court and the California Supreme Court. An opt-out provision is not an on/off switch that can reduce the entire unconscionability analysis to the simple question of whether or not such a provision exists somewhere in the contract. Thus, courts have found agreements to be procedurally unconscionable notwithstanding the presence of an opt-out provision. See, e.g., Jones-Mixon v. Bloomingdale's, Inc., 2014 WL 2736020, at *8 (N.D. Cal. June 11, 2014) ("the Court finds that the agreement to arbitrate was, at the very least, not entirely free from procedural unconscionability" even though the agreement contained an opt-out provision); Gentry v. Superior Court, 42 Cal. 4th 443, 470 (2007) (finding agreement unconscionable notwithstanding an opt-out provision).[45]

[45] Even the decisions of this Court that the Mohamed panel cites, which have found an opt-out provision did ultimately save an agreement from being procedurally unconscionable, have always considered the prominence of the opt-out provision and the overall "oppression and surprise" of the agreement in a nuanced, contextual analysis. See Kilgore v. KeyBank, Nat. Ass'n, 718 F.3d 1052,

Thus, notwithstanding the opt-out provision, the arbitration provision was procedurally unconscionable because overall "the manner in which the contract … was presented and negotiated" contains numerous indicia of oppression and surprise. Nagrampa, 469 F.3d at 1282. The District Court's conclusion on this issue, with respect to the 2013 agreement, was correct, see Mohamed, 109 F. Supp. 3d at 1204-06, and the District Court's conclusion on this issue with respect to Plaintiff Mohamed and the 2014 agreement was also correct, Id. at 1211-16 (and should not have been limited to Mohamed individually, see supra note 44).[46]

B. The Arbitration Provisions Are Substantively Unconscionable

Uber's arbitration agreements contain at least four substantively unconscionable terms: (1) a cost-splitting provision[47]; (2) a broad confidentiality

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1059 (9th Cir. 2013); Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198, 1199–200 (9th Cir. 2002).

[46] See also discussion supra at Part.I.B.2 regarding why Uber's opt-out provision, even in the 2014 agreement, was not meaningful and thus should not rescue the agreement from illegality.

[47] See, e.g., Chavarria v. Ralphs Grocery Co., 733 F.3d 916, 925-26 (9th Cir. 2013). The cost-splitting provision in particular renders the agreement, and the delegation clause, substantively unconscionable because it could saddle drivers with prohibitive costs just to commence an arbitration proceeding and litigate the validity of the delegation clause alone (and thus can be quite deterring). As Plaintiffs showed the District Court below, the agreements refer to the JAMS commercial arbitration rules that require the parties to split the costs of arbitration. See JAMS Streamlined Rules at Rule 26(a)) & JAMS Comprehensive Rules at Rule at 31(a); available at: https://www.jamsadr.com/rules-comprehensive-arbitration/ ("Each Party shall pay its pro rata share of JAMS fees and expenses"). Uber may argue that, under these rules, if a claimant shows that she is an employee, then the company must pay the bulk of the fees. However, because

provision that prevents claimants from sharing information with one another[48]; (3) an intellectual-property carve-out that creates a lack of mutuality by excepting claims from arbitration that Uber is more likely to bring[49]; and (4) a unilateral modification provision that allows Uber to alter the contract in its discretion.[50]

Uber denies that its drivers are employees, a driver may well have to establish before an arbitrator that she is an employee simply to determine whether she will have to pay onerous arbitration fees. This determination could itself cost thousands of dollars and in fact has, in other cases litigated by Plaintiffs' counsel, as shown to the District Court. See SER-176-191; see also Mohamed, 2015 WL 3749716, *15.

[48] These types of confidentiality provisions are particularly inhibiting if coupled with class action waivers because such provisions prevent "the claimant [and] her attorney [from] shar[ing] [] information with other potential claimants." Kinkel v. Cingular Wireless LLC, 223 Ill. 2d 1, 42 (2006); see also Pokorny v. Quixtar, Inc., 601 F.3d 987, 1001 (9th Cir. 2010); Ting v. AT&T, 319 F.3d 1126, 1151-52 (9th Cir. 2003); Lima v. Gateway, Inc., 886 F. Supp. 2d 1170, 1185 (C.D. Cal. 2012). Uber argues that the Ninth Circuit's decision in Kilgore dictates that "enforceability of a confidentiality clause is a matter distinct from the enforceability of an arbitration clause," see Uber Br. at 52; however, this statement constitutes a single line of dicta in a footnote, and seems to directly contradict Ting, which it cites approvingly. See Kilgore, 718 F.3d at 1059 n. 9.

[49] Courts have found one-sided arbitration clauses that exempted claims related to intellectual property rights or trade secrets from arbitration to be substantively unconscionable. See, e.g., Nagrampa, 469 F.3d at 1286-87; Macias v. Excel Building Services LLC, 767 F. Supp. 2d 1002, 1009 (N.D. Cal. 2011); Fitz v. NCR Corp., 118 Cal. App. 4th 702, 724 (2004).

[50] See Chavarria, 733 F.3d at 926; Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1179 (9th Cir. 2003) ("[T]he unilateral power to terminate or modify the contract is substantively unconscionable"). Uber argues that any ability to unilaterally modify the contract would be limited by the covenant of good faith and fair dealing. Uber Br. at 54. However, Uber relies on an unpublished and non-precedential decision by this Court, Ashbey v. Archstone Property Management,

Because Uber's agreements contained these multiple substantively unconscionable terms, the agreements should not be enforced, rather than the offending terms merely severed. This Court has held arbitration agreements with even fewer unconscionable terms to simply not be enforceable, rather than ordering severance of those terms. See Zaborowski v. MHN Gov't Servs., Inc., 601 F. App'x 461, 464 (9th Cir. 2014), cert. granted, 136 S. Ct. 27 (2015), and cert. dismissed, 136 S. Ct. 1539 (2016); Newton v. Am. Debt Servs., Inc., 549 F. App'x 692, 695 (9th Cir. 2013); Chavarria v. Ralphs Grocery Co., 733 F.3d 916, 923-26 (9th Cir. 2013). The reason that unconscionable terms should not merely be severed from an arbitration agreement was well explained by Justice Roberts when he was sitting on the D.C. Circuit Court of Appeals:

> If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts . . . the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties . . . Thus, the more the employer overreaches, the less likely a court will be able to sever the provisions and enforce the clause, a dynamic that creates incentives against the very overreaching [the plaintiff] fears.

Booker v. Robert Half Int'l, Inc., 413 F.3d 77, 84-85 (D.C. Cir. 2005). Thus, courts should not permit "employers and other drafters to draft one-sided

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Inc., 612 Fed. Appx. 430 (9th Cir. 2015), which does not address the binding precedent in Ingle and Chavarria, and disposes of the question in a single sentence without further analysis. Moreover, the District Court noted that "the duty of good faith will only prohibit Uber from imposing *bad faith* modifications, not *all* one-sided modifications." ER-19 (emphasis added).

agreements and then negotiate down to the least-offensive agreement if faced with litigation; rather, employers should draft fair agreements initially." Lou v. Ma Labs., Inc., 2013 WL 2156316, *6 (N.D. Cal. May 17, 2013).[51]

[51] When faced with an arbitration agreement that contains impermissible provisions, such as requiring (or permitting the possibility that) employees split arbitration costs, it is not an adequate response for a court to simply order the employer to pay the costs, or allow the employer to avoid having the arbitration agreement stricken by simply agreeing to pay the costs after the filing of a complaint. Such a result does nothing to remedy the deterrent effect that such provisions have, discouraging employees to file claims in the first place. As the District Court correctly noted, the analysis of whether a provision is unconscionable or not should be made with a view toward what the employee would have seen at the time she or he was deciding whether to pursue a claim. Such an employee would have no way to know that a court has ruled such a provision unenforceable in another case, nor should the employee have to take a chance and guess whether the provision will be enforced – since that risk would itself deter employees from filing claims.

The Mohamed panel did not analyze the cost-splitting provision because it concluded that while "the costs of arbitration in this case may exceed $7,000 per day," the cost-splitting requirement would not prevent drivers from effectively vindicating their rights because "Uber ha[d] committed to paying the full costs of arbitration" for the particular plaintiffs in that case. Id. at *7. However, as the District Court recognized, the presence of such a provision *at the time the contract is made* would "significantly chill drivers in the exercise of their rights under the relevant agreements" because "[a] driver reviewing the 'Paying for the Arbitration' section of the contracts could easily conclude that she would be required to pay arbitral fees simply to begin arbitration—a conclusion which could seriously discourage the driver from attempting to vindicate his or her rights as a putative employee in any forum." Mohamed, 109 F. Supp. 3d at 1209; see also Sonic-Calabasas A, Inc. v. Moreno, 57 Cal. 4th 1109, 1134 (2013); Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 659 (6th Cir. 2003) ("[T]he potential of incurring large arbitration costs and fees will deter potential litigants from seeking to vindicate their rights in the arbitral forum"); Nesbitt v. FCNH, Inc., 811 F.3d 371, 379 (10th Cir. 2016). "To acquiesce in re-writing so offensive a contract would invite employers to impose plainly one-sided contracts and then later negotiate with the courts so as to salvage the most one-sided language judges will tolerate."

The District Court was correct to hold that both the 2013 and 2014 arbitration agreements were substantively unconscionable. Mohamed, 109 F. Supp. 3d at 1218-31. Because the agreements were also procedurally unconscionable, see supra at Part III.A., this Court can affirm the decision below based on the agreements' unconscionability.

CONCLUSION

For all the reasons set forth herein, this Court should affirm the District Court's rulings below, holding Uber's 2013 and 2014 arbitration agreements to be unenforceable. These agreements are illegal and unenforceable because they contain a class action waiver that violates drivers' rights under the NLRA. They are also unenforceable because they contain non-severable PAGA waivers and because they are procedurally and substantively unconscionable.

Dated: October 12, 2016

Respectfully submitted,

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Assaad v. Am. Nat. Ins. Co., 2010 WL 5416841, *10 (N.D. Cal. Dec. 23, 2010); Armendariz, 24 Cal.4th at 124 n. 13; Lou, 2013 WL 2156316, *6.

STATEMENT OF RELATED CASES

Plaintiff-Appellees are aware of the following related cases: (1) *O'Connor v. Uber Techs., Inc.*, No. 14-16078, District Court No. 3:13-cv-03826-EMC; (2) *Mohamed v. Uber Techs., Inc.*, No. 15-16178, District Court No. 3:14-cv-05200-EMC; (3) *Gillette v. Uber Techs., Inc.*, No. 15-16181, District Court No. 3:14-cv-05241-EMC; (4) *O'Connor v. Uber Techs., Inc.*, No. 15-17532/16-15000, District Court No. 3:13-cv-03826-EMC; (5) *Yucesoy v. Uber Techs., Inc.*, No. 15-17534/16-15001, District Court No. 3:15-cv-00262- EMC; (6) *Mohamed v. Uber Techs., Inc.*, No. 15-17533/16-15035, District Court No. 3:14-cv-05200-EMC; (7) *Del Rio v. Uber Techs., Inc.*, No. 15-17475, District Court No. 3:15-cv- 03667-EMC; (8) *O'Connor v. Uber Techs., Inc.*, No. 16-15595, District Court No. 3:13-cv-03826-EMC.

Dated: October 12, 2016 */s/ Shannon Liss-Riordan*

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the limitations of Fed. R. App. P. 32(a) and Ninth Circuit Rule 32 because:

(1) Pursuant to Fed. R. App. P. 32, this Answering Brief contains 13,930 words, excluding the parts of the brief exempted by the Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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

Dated: October 12, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2016, I caused the foregoing document to be filed with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of this filing to all counsel of record.

Dated: October 12, 2016

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