

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

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DOUGLAS O'CONNOR et al,
Plaintiff-Appellees/Cross-Appellants,
v.
UBER TECHNOLOGIES, INC.,
Defendant-Appellant/Cross-Appellee

No. 15-17532, 16-15000
No. C-13-3826-EMC
N. Dist. Cal., San Francisco
Hon. Edward M. Chen presiding

HAKAN YUCESOY et al,
Plaintiff-Appellees/Cross-Appellants,
v.
UBER TECHNOLOGIES, INC. et al,
Defendant-Appellants/Cross-Appellees

No. 15-17534, 16-15001
No. C-15-00262-EMC
N. Dist. Cal., San Francisco
Hon. Edward M. Chen presiding

**PLAINTIFF-APPELLEES'/CROSS-APPELLANTS' OPPOSITION TO
MOTION TO CALENDAR ORAL ARGUMENT
AND CROSS-MOTION TO STAY APPEALS**

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Defendant-Appellant/Cross-Appellee Uber has asked this Court to schedule oral argument in the above-referenced appeals, insisting that “these appeals are preliminary injunction appeals, to which expedited briefing and hearing rules apply” and suggesting that there is an urgent need for a decision. Mot. at 3. However, this assertion could not be further from the truth; there is no urgent need for an immediate hearing and ruling on these appeals, and in fact, for the reasons set forth further below, Plaintiff-Appellees submit that these appeals should be stayed because these appeals may well be moot based on subsequent events in the litigation and in a related appeal.

The appeals may be moot because: (1) the District Court terminated the Orders at issue in this appeal; (2) a subsequent decision of this Court in a related case may have mooted the Orders (but further review is now being sought for that decision); and (3) an appeal of the District Court’s order denying Uber’s motion to compel arbitration in this case could also render these appeals moot. Thus, Plaintiff-Appellees respectfully request that the Court enter an indefinite stay of these appeals until their possible mootness can be conclusively determined.

This appeal and cross-appeal stem from orders by the District Court in December 2015 requiring Uber to provide corrective notice under Fed. R. Civ. P. 23(d) to drivers related to a new arbitration clause Uber distributed just two days after the District Court invalidated Uber’s prior arbitration clauses. The District

Court ordered Uber to refrain from issuing any further agreements until the Court approved a corrective notice to accompany the new agreement and unwind the confusion. See O'Connor v. Uber Techs., Inc., 2015 WL 9460292, at *1 (N.D. Cal. Dec. 23, 2015). Uber appealed these orders (see Ninth Cir. Appeal No. 15-17532, 15-17534) and Plaintiffs cross-appealed (see Ninth Cir. Appeal No. 16-15000, 16-15001), arguing that the District Court's Orders did not go far enough to protect putative class members because Uber would still be allowed to continue to send arbitration agreements to potential class members and thereby limit its own liability for claims that were the subject of a pending class action case.

These appeals were subsequently stayed for a period of time by agreement when the parties entered into a proposed settlement. Ultimately, however, the District Court denied approval of the proposed settlement. See O'Connor, Civ. A. No. 13-3826 (N.D. Cal.), Dkt. 748. In its order denying approval of the settlement, the District Court stated that it would "terminate" the Orders from which the parties are appealing here. Id. at *34.¹

By terminating the Orders, it appears that the District Court is no longer requiring Uber to issue the corrective notice to its drivers and is no longer limiting Uber's ability to distribute new arbitration agreements to drivers (with the

¹ As part of the proposed settlement, the parties had requested that the District Court vacate the Orders. The District Court declined to vacate the Orders but then, when rejecting the settlement, terminated the Orders. Dkt. 522, Dkt. 748.

exception of members of the certified class in O'Connor, which Uber has represented to the District Court that it never intended to do anyway, at least with respect to their claims in this case). Plaintiffs are uncertain why the District Court terminated these Orders, and this is an anticipated topic of discussion when the parties appear before the District Court in just two days, Friday, November 18, 2016, for the next Case Management Conference.² Plaintiffs may move to have the Orders reinstated, but as things now stand, these Orders have been “terminated” since August. It thus makes little sense for this Court to now proceed to schedule oral argument expeditiously in these appeals when the Orders being challenged are not currently in effect, and the future of these Orders is in question.³

In addition to the underlying Orders having been terminated, these appeals may also be moot based on this Court’s recent decision in the related case,

² As an explanation for this decision, the District Court stated that “[t]he legal landscape no longer requires the protection afforded by the Orders. ... Thus, Uber is permitted to issue the December 2015 Agreement to new drivers without satisfying the enhanced notice provisions [previously] required by the Court.” Id. Plaintiffs are not clear what the reason was for the District Court’s decision that “the legal landscape no longer requires the protection afforded by the Orders” and expect that issue to be discussed at the conference on Friday.

³ Uber notes in its motion that no party has moved for a stay of these appeals. However, given that the appeals have not yet been scheduled for argument, Plaintiffs were waiting until after the District Court conference on November 18, 2016, to determine whether to move for a stay of these appeals, or request to have them dismissed as moot. Now that Uber has hastily moved for an expeditious scheduling of argument in these appeals, Plaintiffs bring to the Court’s attention the current mootness of these appeals and their uncertain future.

Mohamed v. Uber Technologies, Inc., 2016 WL 4651409 (9th Cir. Sept. 7, 2016).

The Mohamed decision may have direct bearing on whether the Orders that form the basis of this appeal (if they are still in effect, or get reinstated) have any continuing force or effect.

In Mohamed, this Court reversed the District Court's holding that Uber's 2013 and 2014 arbitration agreements are invalid and unenforceable.⁴ If those agreements are not invalid and unenforceable, then it is not clear whether Uber's distribution of a new agreement in 2015 (in which Uber had attempted to "fix" the issue that led to the District Court's invalidation of the prior agreements) would have any actual effect on the drivers' rights or ability to litigate their claims in court. However, in Mohamed, a request for *en banc* review is currently pending. See No. 15-16178, Dkt. 128. It would thus be entirely premature, and complicating, for this Court to wade into the issues presented here until it is clear whether the Mohamed ruling will stand.

In addition, Uber has separately appealed the District Court's order in *this* case that had ruled that Uber's arbitration clauses are invalid. See Ninth Cir. Appeal No. 15-17420. In the appeal in this case, Plaintiffs have argued different grounds for upholding the District Court's decision from what was argued by the plaintiffs in Mohamed. In Mohamed, the plaintiffs addressed whether the

⁴ With respect to the 2014 agreement, this Court also held that issue should have been delegated to an arbitrator.

arbitration clauses were unconscionable and also whether they contained a non-severable and illegal waiver of the right to bring representative PAGA claims. In the appeal in this case, Plaintiffs have argued that the District Court's invalidation of Uber's arbitration clauses should be upheld because the class action waiver contained within them violates the National Labor Relations Act, as set forth by this Court in Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016) (notwithstanding the existence of an opt-out provision in the agreement). See Ninth Cir. Appeal No. 15-17420, Dkt. 45 (Plaintiff-Appellee's Answering Brief), Dkt. 65 (Amicus Brief submitted by the National Labor Relations Board).⁵

But until it is determined whether Uber's 2013 and 2014 arbitration agreements are enforceable or not (either through the Mohamed case or this case), and thus whether Uber's distribution of its 2015 arbitration had any impact on the drivers' rights, it is not clear whether there is any live controversy with respect to the District Court's Rule 23(d) Orders (if they are even in effect--which as described above, they are not currently). It therefore makes little sense for this Court to go forward with these Rule 23(d) appeals at this time.

⁵ In Mohamed, the plaintiffs waived the NLRA argument. Mohamed v. Uber Techs., Inc., 836 F.3d 1102, 1112, n. 8 (9th Cir. 2016). Thus, the Court's reference to the NLRA in Mohamed in note 8 of that decision was dicta. As this Court noted, the plaintiffs in Mohamed raised the NLRA issue for the first time in their sur-reply. They also did not address the reasons why an opt-out provision does not rescue an arbitration clause from illegality, as Plaintiffs have addressed at length in their appellee brief in this case.

Plaintiffs thus respectfully request that the Court stay these appeals for the time being until it can be conclusively determined whether these appeals are moot and deny Uber's request for immediate scheduling of oral argument.

Dated: November 16, 2016

Respectfully submitted,

/s/ Shannon Liss-Riordan
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*Attorney for Plaintiff-
Appellees/Cross-Appellants*

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the limitations of Fed. R.

App. P. 27 and Ninth Circuit Rule 27 because:

- (1) This brief complies with the type-volume limitation of Fed. R. App. P. 27 because this brief contains 6 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
- (2) This brief complies with the typeface requirements of Fed. R. App. P. 32 because the motion has been prepared in 14-point Times New Roman, which is a proportionally spaced font that includes serifs.

Dated: November 16, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 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: November 16, 2016

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