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

PLAINTIFF-APPELLEES' AMENDED REQUEST TO REMAND, DISMISS AND/OR STAY PROCEEDINGS PENDING FURTHER DISTRICT COURT LITIGATION OR, IN THE ALTERNATIVE, REQUEST FOR LEAVE TO SUBMIT SUPPLEMENTAL BRIEFING

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Plaintiff-Appellees wish to bring to the Court's attention an issue that arose before the District Court at a Case Management Conference held on March 22, 2017, which could affect the necessity of this set of appeals.[1] As explained below, Plaintiffs have raised an argument that could render this entire set of appeals moot – namely that the enforceability of Uber's arbitration clause is not actually relevant to this case or the scope of a class in this case, since the lead plaintiffs themselves rejected arbitration and thus can be deemed to have opted out of arbitration on behalf of the putative class. The question now is which Court should hear this argument first – the District Court or this Court.

Plaintiffs have requested that the District Court proceed with setting a trial in the O'Connor case, while Uber has urged the District Court to defer setting a trial while these appeals are pending. Uber's principal argument in these appeals is that its arbitration clause is enforceable, which it contends should drastically limit the scope of any potential class (because most Uber drivers are subject to one of its arbitration agreements).

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[1] This motion has been filed in several sets of appeals which concern in some way the question of the legality of Uber's arbitration clause. Plaintiffs originally filed this motion on March 22, 2017, in all of these appeals but, at the direction of the clerk, Plaintiffs are now filing this amended motion to eliminate reference on the caption page to the other appeals involving these parties (including Nos. 16-15595, 15-17532, 16-15000, 15-17534, and 16-15001), as these appeals are not all consolidated.

However, Plaintiffs contend, and have raised the argument to the District Court, that it is immaterial to the scope of the class whether Uber's arbitration agreement is enforceable. The lead plaintiffs in O'Connor opted out of the arbitration clause and thus are not bound by it. Thus, Plaintiffs contend, these lead plaintiffs may serve as class representatives for a class of drivers that includes drivers who did not personally individually opt out of the arbitration clause. By opting out of the arbitration clause, the plaintiffs may be deemed to have rejected arbitration on behalf of the class and therefore have standing to bring this class action on behalf of drivers who did not personally opt out of arbitration.[2]

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[2] Plaintiffs raised this argument to the District Court from the very beginning of the case, and they preserved it again when they moved for class certification. However, the District Court never addressed it.

When Plaintiffs initially filed the case and asked the District Court to enjoin Uber from distributing arbitration clauses that Plaintiffs believed to be unenforceable, Plaintiffs specifically stated that:

> Plaintiffs note though, that the arbitration clause prohibits drivers who are bound by the agreement from bringing a dispute as a class action. See Exhibit 4, at 13. The lead plaintiffs in the case have opted out of the arbitration agreement and are therefore not bound by it. There is nothing therefore prohibiting the lead plaintiffs from bringing a class action on behalf of their fellow drivers. It does not appear that class members who have not opted out of the arbitration clause would be prohibited from participating in a class action brought on their behalf by other drivers who are not bound by this provision. Plaintiffs expect, however, that Defendants will argue that these potential class members are indeed prohibited from even participating in the case. Thus, Plaintiffs are bringing this motion, again in an abundance of caution, in the event that it is determined that class members will not be able to participate in this case unless they opt out of the arbitration clause.

This exact argument was accepted by the Georgia Supreme Court, in a case decided last summer, and for which the Supreme Court denied *certiorari* in December. See Bickerstaff v. Suntrust Bank, 299 Ga. 459, cert. denied, 137 S. Ct.

Plaintiffs' Renewed Emergency Motion for Protective Order, O'Connor Dkt. 15 (Aug. 26, 2013), at n. 4.

When Plaintiffs later moved for class certification, they also pointed out that the Court need not address whether the arbitration clause is enforceable in order to include drivers in the class who themselves did not opt out of the arbitration clause:

> If the Court chooses to address the enforceability of the arbitration clause at this juncture, Plaintiffs respectfully request the opportunity to submit an additional brief, as page limits prevent Plaintiffs from developing here their full argument regarding the unconscionability of Uber's arbitration clause. Plaintiffs also, alternatively, incorporate by reference the arguments they made previously in this case, both in briefing and orally, see Dkt. 15, Dkt. 35, Dkt. 56 at 4-9, and note the Court's earlier comments regarding the potential unconscionability of the arbitration clause. Dkt 56 at 6:17-24; 9:15-10:15, 16:15-25; Dkt. 60, Dkt. 99.

Plaintiffs' Motion for Class Certification, O'Connor Dkt. No. 276, April 23, 2015 at 25, n. 30.

In considering whether to include in the class drivers who did not opt out of the arbitration clause, the District Court has focused on the question of whether or not the arbitration clause is enforceable – despite the fact that Plaintiffs have pointed out (even from the very beginning of this case) that this question does not have to be answered in order to include those drivers in the class. As discussed below, given the prospect of what could be a lengthy appeal process to determine whether Uber's arbitration clause is enforceable, Plaintiffs urge that it would make much sense for the question raised here (whether class members who opt out of an arbitration clause can be deemed to have done so on behalf of a class) to be answered now, either in this Court or at the District Court.

571 (Dec. 5, 2016).[3] Plaintiffs have cited this case to the District Court and have requested the opportunity to submit briefing explaining why, based on the same reasoning adopted in Bickerstaff, the fate of Uber's arbitration clauses is immaterial to the question of the potential scope of the class. See Joint Case Management Statement (Dkt. 798), at 1-2. At the Case Management Conference held on March 22, 2017, Plaintiffs raised the argument with the District Court. The District Court inquired whether this argument, if accepted, could moot the pending appeals and Plaintiffs responded that it could. The District Court then suggested that the issue be raised with this Court in the first instance.[4]

Because this issue was not raised in the parties' briefing before this Court, Plaintiffs are thus filing this request to seek this Court's guidance and determination as to whether this argument should be heard first on appeal, or whether appellate review should await the District Court's consideration of the argument. If the argument is to be heard first before this Court, Plaintiffs request

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[3] Bickerstaff was issued after the District Court certified the O'Connor case as a class action, Dkt. 342 (Sept. 1, 2015), Dkt. 395 (Dec. 9, 2015), and denied Uber's motion to compel arbitration, Dkt. 400 (Dec. 10, 2015). Notably, after the District Court certified an expanded class of drivers (including those who would have been bound by an arbitration clause), Uber moved the next day to compel arbitration for these absent class members, Dkt. 397 (Dec. 10, 2015), and the District Court denied that motion that same day, Dkt. 400 (Dec. 10, 2015), without having given the plaintiffs the opportunity to raise this (or any other) argument.

[4] The relevant portions of the transcript of the Case Management Conference are attached here as Exhibit A.

that the Court provide the parties the opportunity to submit supplemental briefing to address the issue. If it is to be heard first by the District Court, then Plaintiffs suggest the proper course would be for this Court to stay or dismiss these appeals and remand the case to the District Court for consideration of the argument. See White Mountain Apache Tribe v. State of Ariz., Dep't of Game & Fish, 649 F.2d 1274, 1285–86 (9th Cir. 1981) ("This court may remand a case to the district court for further consideration when new cases or laws that are likely to influence the decision have become effective after the initial consideration.").

In Bickerstaff, the Georgia Supreme Court held that a lead plaintiff who filed a class action lawsuit was deemed to have opted out of an arbitration agreement on behalf of the putative class, and his filing of the lawsuit tolled the time for putative class members to opt out of the arbitration agreement. 299 Ga. at 462-63. The Court further held that, after the class was certified, class members could then choose whether to be represented by the lead plaintiff and accede to his decision to reject arbitration by deciding whether or not to opt out of the class action; by not opting out of the certified class, the class members were deemed to have rejected arbitration. Id. at 465-68. The Court specifically rejected the defendant's argument that its arbitration clause only permitted individuals to opt out, rather than allowing a representative to opt out on behalf of a class; the Court recognized that the entire purpose of a class action is for a representative to act on

behalf of absent class members (and that most class members will not take the action that a lead plaintiff takes in order to pursue the legal claims at issue). Id.[5]

This argument, accepted in Bickerstaff, would render moot the arguments raised in these appeals regarding the enforceability of Uber's arbitration clause. Because the lead plaintiffs in O'Connor opted out of arbitration, they should be permitted to represent a class regardless of whether class members themselves personally opted out of the arbitration agreement and regardless of whether that agreement would be enforceable against those class members, if those class members chose to bring their own claims in court.

As far as Plaintiffs are aware, this issue has not been presented or addressed by any courts in the Ninth Circuit.[6] It is thus an issue of first impression, which

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[5] While Bickerstaff was decided under Georgia law, the Court noted that Georgia courts look to Rule 23 of the Federal Rules of Civil Procedure in interpreting and applying Georgia's class action provision, and the Court cited federal decisions under Rule 23 in reaching its analysis and conclusion. 299 Ga. at 462.

[6] This Court held in Hanlon v. Chrysler Corp., 150 F.3d 1011, 1024 (9th Cir. 1998), that individual class members could not, on a representative basis, opt out groups of people from a settlement. That is an entirely different matter from the question of whether lead plaintiffs can, on a representative basis, opt a putative class out of an arbitration clause and thus be permitted to represent the class in ongoing litigation. In Hanlon, the Court reasoned that class members have the due process right to "intelligently and individually choose whether to participate or exclude themselves from a class action." Id. Here, and under the reasoning of Bickerstaff, class members had the right and ability to decide whether to exclude themselves as class members in this case (which would have preserved their right to arbitrate, if that was their preference).

could have enormous consequences for this case (as well as potentially other cases involving arbitration agreements) and should be given proper consideration.

Plaintiffs recognize that the issue was not raised in their appellate brief to this Court and thus understand that this Court may deem it waived for appellate purposes and choose not to address it at this time.[7] It is for this reason that Plaintiffs submit it may be most appropriate for this Court to stay these appeals and remand the case for consideration of this issue by the District Court. If this argument were adopted, then it may largely if not fully moot the pending appeals and thus could be an enormous saving of judicial economy.[8]

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[7] However, this Court could, in its discretion, permit supplemental briefing regarding Bickerstaff notwithstanding the fact that the issue was not raised at the District Court first, because the issue is a purely legal one. See In re Funk, 2011 WL 3300350, at *3–4 (B.A.P. 9th Cir. May 11, 2011) ("a court [may] consider new issues raised on appeal when the issue is purely a matter of law and does not depend on the factual record" so long as "the party against whom the issue is raised will not be prejudiced."). The issue presented here--whether, as in Bickerstaff, a lead plaintiff who opted out of an arbitration agreement can be deemed to have done so on behalf of a class--is a purely legal question.

[8] The arbitration issue is the only issue in Uber's appeal of the District Court's order denying Uber's motion to compel arbitration, No. 15-17420, 15-17422. The enforceability of Uber's arbitration agreement is the primary, if not only, issue before the Court in the Rule 23(f) appeal as well, No. 16-15595. (When the District Court initially certified the O'Connor case as a class action (Dkt. 342), this Court denied Uber's petition for Rule 23(f) review. See No. 15-80169, Dkt. 4. The Court granted Rule 23(f) review only after the District Court expanded the class to include most drivers in California, even those who would have been bound by an arbitration clause. See No. 15-80220, Dkt. 9.) And the arbitration issue is the predicate issue underlying Uber's appeal of the District Court's Rule 23(d)

As noted above in footnote 3, Plaintiffs raised this issue with the District Court at the outset of the case and when moving for class certification, but the District Court did not address it. Now that this Court has reversed the District Court's decision that had found the arbitration clause to be unenforceable based upon its containing a non-severable PAGA waiver, Plaintiffs urge that it would make eminent sense for either this Court or the District Court to decide whether the enforceability question even needs to be addressed – before the parties embark on what now promises to be at least a year-long appeal process to determine whether another ground properly exists for holding Uber's arbitration clause not to be enforceable (whether the class action waiver it contains renders it illegal under the NLRA).

In their recent statements to the District Court and this Court, Plaintiffs mistakenly indicated that they had not raised this issue previously below. Again, as indicated above in footnote 3, Plaintiffs did in fact raise this issue with the District Court from the beginning of the case.[9] However, whether or not it was

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corrective notice order it issued in December 2015, shortly after it ruled Uber's arbitration clause to be unenforceable, No. 15-17532, 16-5000, 15-17534, 16-5001.

[9] Because the parties have for the last two years been so focused on the question of the enforceability of the arbitration clause, because the District Court had held that the clause was not enforceable which led to the ruling certifying a class of drivers regardless of whether they opted out of the arbitration clause, and because the filings in this case have been so voluminous, Plaintiffs' counsel simply

raised previously should not matter. Even if this Court were ultimately to hold that Uber's arbitration clause were enforceable, that holding would not dispose of this argument that the enforceability of the arbitration clause is irrelevant to the question of whether lead plaintiffs who opted out of arbitration can be deemed and understood to have done so on behalf of a class. That issue would still need to be considered by the District Court, even if it were to follow a reversal by this Court of the District Court's decision that the arbitration clause was not enforceable.[10]

But, rather than wait for what could well be a year or more for these appeals to be heard and decided (and then potentially subject to *en banc* petitions and a *certiorari* petition)[11], it would make far more sense for judicial economy purposes

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inadvertently did not remember that she had in fact raised and preserved this argument.

[10] Even if the grounds for the District Court's decision to certify a class including drivers who would be subject to arbitration clauses were reversed, the District Court would be free to consider, and if appropriate, certify that class on other grounds. Under Fed.R.Civ.P. 23(c)(1)(C), federal courts can modify and revisit class certification decisions at any point during a case.

[11] Although the clerk has informed the parties that these appeals are being considered for scheduling in June in Pasadena, it appears likely that the appeals would be subject to delay before final resolution. This is not only because of the prospect of *en banc* or *certiorari* petitions, but also because the primary issue in the appeals regarding the enforceability of Uber's arbitration clause is the question of whether a class waiver violates the National Labor Relations Act (NLRA), an issue that has been taken up by the U.S. Supreme Court and will be heard next term. See Morris v. Ernst & Young, 834 F.3d 975 (9th Cir. 206), *cert granted*, U.S. S. Ct. No. 16-300 (Jan. 13, 2017); Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016), *cert granted*, U.S. S. Ct. No. 16-285 (Jan. 13, 2017); NLRB v.

for this argument to be considered now.

For this reason, Plaintiffs respectfully request that this Court either permit supplemental briefing on this issue now, or dismiss or stay the pending appeals and remand the case to the District Court to address the Plaintiffs' Bickerstaff argument in the first instance.

Dated: March 24, 2017

Respectfully submitted,

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Murphy Oil USA, Inc., 808 F.3d 1013 (5th Cir. 2015), *cert granted*, U.S. S. Ct. No. 16-307 (Jan. 13, 2017).

CERTIFICATE OF SERVICE

I hereby certify that, on March 24, 2017, this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing ("NEF").

/s/ Shannon Liss-Riordan__
Shannon Liss-Riordan

Dated: March 24, 2017