Nos. 15-17420, 15-17422

IN THE

United States Court of Appeals for the Ninth Circuit

DOUGLAS O'CONNOR, THOMAS COLOPY, MATTHEW MANAHAN, and ELIE GURFINKEL, Plaintiffs-Appellees, v. UBER TECHNOLOGIES, INC., Defendant-Appellant.	No. 15-17420 No. 3:13-cv-03826-EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding
HAKAN YUCESOY, ABDI MAHAMMED, MOKHATAR TALHA, BRIAN MORRIS, and PEDRO SANCHEZ, Plaintiffs-Appellees, v. UBER TECHNOLOGIES, INC., Defendant-Appellant.	No. 15-17422 No. 3:15-cv-00262-EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding

UBER'S OPPOSITION TO PLAINTIFF-APPELLEES' AMENDED MOTION TO REMAND, DISMISS, AND/OR STAY PROCEEDINGS OR, IN THE ALTERNATIVE, FOR LEAVE TO FILE SUPPLEMENTAL BRIEFING

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INTRODUCTION

After four years of litigation and three years of appellate proceedings, and on the eve of oral argument, Plaintiff-Appellees ("Plaintiffs") filed a motion to dismiss these appeals or, alternatively, to request yet another round of briefing so that they may argue, for the very first time, that the parties' "arbitration clause is not actually relevant to this case." Mot. at 1. This is quite an astonishing contention, given that the parties have been fighting for years over the enforceability of the arbitration agreements between Uber and the drivers that Plaintiffs purport to represent. Even more astonishing is the *reason* Plaintiffs give for the newfound purported irrelevance of the arbitration agreements: According to Plaintiffs, the very filing of a putative class action lawsuit has the effect of opting out *all* absent class members from the arbitration clause, rendering its class action waiver null and void. Needless to say, no federal court has ever adopted such an outlandish theory; tellingly, Plaintiffs rely exclusively on an inapposite Georgia state court case interpreting Georgia contract law, *Bickerstaff v. Suntrust Bank*, 299 Ga. 459 (2016). This Court should deny Plaintiffs' untimely and meritless Motion for several reasons.

Plaintiffs waived their "constructive opt-out" argument in four different ways. First, Plaintiffs did not present this argument to the district court (despite what Plaintiffs now contend), even though they had every opportunity to do so; accordingly, Plaintiffs have not preserved the argument for appeal. *See Singleton v.*

Wulff, 428 U.S. 106, 120 (1976). Second, Plaintiffs—although they have filed *four* merits briefs and dozens of supplemental briefs in these appeals—failed to raise this argument in *any* one of those briefs, and should not be permitted to do so now. *See United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015). Third, Plaintiffs' counsel recently filed arbitration demands on behalf of several drivers within the certified class—an implicit admission that the named plaintiffs did *not*, in fact, opt the entire absent class out of arbitration, as Plaintiffs now claim. Finally, Plaintiffs have conceded in numerous judicial filings that (1) the parties' arbitration agreements set forth specific contractual requirements a driver must follow to opt out of arbitration, (2) a large majority of the class has *not* opted out of arbitration, and (3) an order from this Court enforcing the parties' arbitration agreements "would gut the certified class in this case." *O'Connor v. Uber Techs., Inc.*, No. 3:13-cv-03826-EMC (N.D. Cal.) ("D. Ct."), Dkt. 611 at 3. These unambiguous admissions foreclose Plaintiffs' efforts to argue a contrary position now. *See United States v. Crawford*, 372 F.3d 1048, 1055 (9th Cir. 2004) (en banc).

This Court should also decline to grant Plaintiffs' Motion because Plaintiffs' argument—that the mere filing of a putative class action lawsuit opts *all* absent putative class members out of their arbitration agreements—flies in the face of the Federal Arbitration Act ("FAA"), *see* 9 U.S.C. § 1 *et seq*., the Rules Enabling Act, *see* 28 U.S.C. § 2072, the contracting parties' due process rights, Supreme Court

precedent, and California contract law. As the Supreme Court has explained numerous times, the FAA "reflects the overarching principle that arbitration is a matter of contract," and it requires courts to "'rigorously enforce' arbitration agreements *according to their terms*, … including terms that 'specify *with whom* the parties choose to arbitrate their disputes ….'" *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (citation omitted) (emphasis added). Plaintiffs' argument contravenes this fundamental principle by suggesting that a named plaintiff may eviscerate hundreds of thousands of arbitration agreements, simply by filing a single putative class action complaint. And, by suggesting that a plaintiff may bind absent putative class members by purportedly opting out on their behalves *before* moving for class certification, Plaintiffs ignore the bedrock rule that "a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified." *Standard Fire Ins. Co. v. Knowles,* 133 S. Ct. 1345, 1349 (2013).

This Court should not entertain Plaintiffs' last-minute ploy to derail oral argument in these appeals, which have been pending for upwards of three years and are tentatively scheduled for oral argument in June 2017. Instead, Uber respectfully requests that the Court (1) deny the Motion in its entirety; (2) coordinate all pending appeals before the same panel that resolved *Mohamed v. Uber Techs., Inc.*, Nos. 15-

16178+ pursuant to this Court's General Order 3.6(d); and (3) schedule oral argument for the week of June 5, 2017, or as soon thereafter as practicable.

ARGUMENT

I. Plaintiffs Waived The "Constructive Opt-Out" Argument They Now Seek To Assert.

In a tacit acknowledgement that they have waived the argument they now seek to assert, Plaintiffs devote much of the Motion trying to argue that it simply "should not matter" whether they have ever made their "constructive opt-out" argument to this or any other court before. Mot. at 8–9. On the contrary, under this Court's precedents, Plaintiffs' failure to raise their argument at any point over the past four years of litigation, as well as their express and implied admissions that most drivers have *not* opted out of arbitration, doom Plaintiffs' Motion.

First, Plaintiffs did not present their "constructive opt-out" argument to the district court for consideration in the first instance, reason enough for this Court to deny the Motion. *See Singleton*, 428 U.S. at 120 ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *see also In re Mortg. Elec. Registration Sys., Inc.*, 754 F.3d 772, 780 (9th Cir. 2014) ("Generally, arguments not raised in the district court will not be considered."). Notably, the validity of the parties' arbitration agreements, as well as the effect of the agreements' opt-out clauses, have been front and center in the district court since the very inception of this case. On August 21, 2013, less than one week after

Plaintiffs first initiated this action, Plaintiffs filed a motion asking that the district court, *inter alia*, compel Uber to provide drivers with notice that "[i]n order to 'opt out' [of arbitration] the drivers are required to send a notice of their intent to 'opt out' in writing to Uber," and that drivers "need to 'opt out' of the arbitration clause in order to be able to potentially participate in this case." *See* D. Ct., Dkt. 4 at 2. Plaintiffs did *not* preserve their "constructive opt-out argument" at that time, nor in any of the dozens of briefs they filed regarding class certification, Uber's motions to compel arbitration, or Uber's motions to stay the district court proceedings—*all* of which squarely addressed the issue of how the parties' arbitration agreements affect the scope of this case. *See, e.g.*, D. Ct., Dkt. 276, 353, 370, 416, 432, 443.[1]

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[1] Plaintiffs have conceded in multiple filings and in open court that they failed to raise their "constructive opt-out" argument with the district court. *See, e.g.*, No. 15-17420, Dkt. 89 at 6 ("Plaintiffs have not previously raised this argument below to the District Court."); No. 14-16078, Dkt. 87, Oral Argument at 21:31, http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000011252 (conceding that Plaintiffs did not present this argument before because "in 2013, [Plaintiffs' counsel] didn't have a crystal ball to see what would happen in the future"); D. Ct., Dkt. 805, Mar. 22, 2017 Tr. at 7:22–8:1 ("THE COURT: And have you raised this issue? Is this issue now before the Ninth Circuit? Has it been raised in the Ninth Circuit? MS. LISS-RIORDAN: No. I mean, it hasn't been—it hasn't been presented anywhere.").

In their amended Motion, Plaintiffs tried to retract these many concessions, claiming that Plaintiffs purportedly *had* asserted their new argument in the district court and "simply inadvertently did not remember that [they] had in fact raised and preserved this argument." Mot. at 8–9 n.9. But Plaintiffs' repeated judicial admissions to the contrary are binding. *See Crawford*, 372 F.3d at 1055.

Second, Plaintiffs waived their "constructive opt-out" argument because—as Plaintiffs themselves concede—they failed to raise the argument in any of the merits briefs filed with this Court. *See* Mot. at 7 ("Plaintiffs recognize that the issue was not raised in their appellate brief."); *Dreyer*, 804 F.3d at 1277 ("Generally, an appellee waives any argument it fails to raise in its answering brief."). Recently, in a related appeal, this Court held that drivers waived an argument regarding the validity of a class waiver contained in the parties' arbitration agreement by not raising that argument in their answering brief. *See Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1212 n.6 (9th Cir. 2016) (declining to consider "untimely" argument raised "for the first time in a sur-reply"). It should apply that same logic again here. In fact, the argument for waiver in this particular set of appeals is even stronger than in *Mohamed*, given that Plaintiffs filed *four* separate merits briefs in these appeals and did not raise their new argument in *any* of them. *See* Nos. 14-16078, Dkt. 23; 15-17420, Dkt. 45; 15-17532 and 15-17534, Dkt. 22; 16-15595, Dkt. 28.

And, in any event, Plaintiffs' backpedaling is based entirely on a single opaque sentence buried in a single footnote in a single district court brief, without any analysis or case law. *See* Mot. at 2–3 n.2 (arguing that Plaintiffs preserved their argument simply because they stated the following: "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"). Such "a perfunctory [statement], buried amongst the footnotes, does not preserve an argument on appeal." *Coalition for a Healthy Cal. v. FCC*, 87 F.3d 383, 384 n.2 (9th Cir. 1996).

Third, Plaintiffs' counsel has initiated multiple arbitration proceedings over the past several months against Uber on behalf of certified class members regarding the claims at issue in the litigation below. *See* D. Ct., Dkt. 798 at 2 n.2 (conceding that "Plaintiffs' counsel has begun bringing individual arbitrations against Uber"). By seeking to enforce and benefit from the arbitration agreements that are the subject of these appeals on behalf of certified class members, Plaintiffs cannot now take the exact *opposite* position here and suggest that these drivers are not subject to the arbitration agreements that they themselves have invoked. *See In re Subpoenas Duces Tecum Dated March 16, 1992*, 978 F.2d 1159, 1162 (9th Cir. 1992) (finding waiver where party's conduct was inconsistent with argument).

Finally, Plaintiffs have repeatedly conceded, in judicial filings and open court, that the arguments they are now trying to make have no merit. They have conceded, for instance, that the parties' arbitration agreements set forth the sole and exclusive means by which drivers may opt out of arbitration. *See, e.g.*, D. Ct., Dkt. 4 at 3 ("[T]he procedure to opt-out of arbitration requires the driver to send, by hand or overnight delivery, a signed, written statement … indicating his or her desire to opt out."). They have conceded that a few *hundred* drivers opted out of arbitration, not the *entire* absent class, as they now claim. *See, e.g.*, No. 15-17420, Dkt. 45 at 17 n.9 ("Out of hundreds of thousands of Uber drivers who received these agreements, only a couple hundred opted out."). And they have conceded that the parties' arbitration

agreements preclude class certification—a far cry from their new argument that the "arbitration clause is not actually relevant to this case." Mot. at 2; *see, e.g.*, D. Ct., Dkt. 4 at 6–7 ("[T]he arbitration provision will, without a doubt, … prevent[] the ability of class members to participate in litigation."); D. Ct., Dkt. 575 at 5 (an order enforcing the "arbitration clauses could destroy the certified class"); D. Ct., Dkt. 611 at 3 (an order enforcing the parties' agreements "would gut the certified class"). The concessions are binding, and preclude Plaintiffs' "constructive opt-out" argument in its entirety. *See Crawford*, 372 F.3d at 1055 ("A judicial admission is binding."); *Am. Civil Liberties Union of Nevada v. Masto*, 670 F.3d 1046, 1064 (9th Cir. 2012) (statement made during oral argument "constitutes a binding judicial admission").

For all of these reasons, Plaintiffs—through their words as well as their actions—have waived the sole argument driving their Motion. On any one of these bases, or all of them, this Court should deny the Motion.

II. Plaintiffs' Argument Violates The FAA, The Rules Enabling Act, Due Process, Supreme Court Precedent, And California Contract Law.

This Court should also deny Plaintiffs' Motion because the "constructive opt-out argument" Plaintiffs are requesting leave to make in the district court or, in the alternative, in supplemental briefing here, plainly contravenes the FAA, the Rules Enabling Act, due process, Supreme Court precedent, and California contract law.

A. "Congress enacted the FAA in response to widespread judicial hostility to arbitration." *Italian Colors*, 133 S. Ct. at 2308–09. To counteract such hostility,

the FAA establishes a "liberal federal policy favoring arbitration agreements," requires "courts [to] place arbitration agreements on an equal footing with other contracts," and preempts state laws and "procedure[s] that [are] inconsistent with the FAA, even if [they are] desirable for unrelated reasons." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346, 351 (2011) (citations omitted). Here, Plaintiffs' argument that a named plaintiff's mere filing of a class action lawsuit opts out *any and all* putative absent class members from arbitration, irrespective of the express terms of the parties' arbitration agreements, violates the FAA for at least two independent reasons.

First, Plaintiffs' argument disregards the FAA's cardinal command that courts must "'rigorously enforce' arbitration agreements according to their terms, … including terms that 'specify *with whom* the parties choose to arbitrate ….'" *Italian Colors*, 133 S. Ct. at 2309 (citation omitted). The Supreme Court, time and again, has held that "the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010); *see also CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (the FAA "requires courts to enforce agreements to arbitrate according to their terms"); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) (the FAA "ensure[s] the enforceability, according to their terms, of private agreements to arbitrate.").

Plaintiffs' argument would circumvent that statutory mandate, impermissibly enabling a single named plaintiff to shred not only the terms of her own arbitration agreement, but also those of hundreds (or, as in this case, hundreds of thousands) of other arbitration agreements.[2] Plaintiffs' argument contradicts numerous Supreme Court decisions—most notably *Concepcion*, which gave the Supreme Court's imprimatur to bilateral arbitration agreements that "forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Concepcion*, 563 U.S. at 348. If the mere filing of a class action nullifies a class action waiver, then *Concepcion* and the many cases that followed it were meaningless.

In this case, Uber and hundreds of thousands of drivers within the certified class agreed to an arbitration provision setting forth the sole and exclusive method for opting out of arbitration. That provision states as follows:

> **If You do not want to be subject to this Arbitration Provision, You may opt out of this Arbitration Provision by notifying Uber in writing of Your desire to opt out of this Arbitration Provision, either by (1) sending, within 30 days of the date this Agreement is executed by You, electronic mail to optout@uber.com, stating Your name and intent to opt out of this Arbitration Provision or (2) by sending a letter by U.S. Mail, or by any nationally recognized**

[2] Plaintiffs' argument would likewise eviscerate the very purpose of opt out clauses in arbitration agreements—provisions that, by design, are intended to *encourage* parties to exercise their own discretion and avoid adhesion.

> **delivery service (*e.g*, UPS, Federal Express, etc.), or by hand delivery to … [Uber's General Counsel] …**
>
> **In order to be effective, the letter under option (2) must clearly indicate Your intent to opt out of this Arbitration Provision, and must be dated and signed. The envelope containing the letter must be received (if delivered by hand) or post-marked within 30 days of the date this Agreement is executed by You. Your writing opting out of this Arbitration Provision, whether sent by (1) or (2), will be filed with a copy of this Agreement and maintained by Uber.**
>
> **Should You not opt out of this Arbitration Provision within the 30-day period, You and Uber shall be bound by the terms of this Arbitration Provision.**

See No. 15-17420, Dkt. 18-4 (ER622–23); *id.*, Dkt. 18-2 (ER264) (setting forth substantially similar provisions for the 2013 agreement). Notably, none of these arbitration provisions authorizes a party to opt herself or anyone else out, simply by filing a putative class action lawsuit. Under Supreme Court precedent, it is the duty of this Court to "rigorously enforce" the parties' arbitration agreements "according to their terms," not to inject additional opt-out clauses that the parties never even contemplated, let alone accepted. *Italian Colors*, 133 S. Ct. at 2309.

Second, Plaintiffs' argument would "interfere[] with fundamental attributes of arbitration and thus create[] a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344. Plaintiffs' argument presumes that a named plaintiff may opt out of arbitration on behalf of the putative class immediately upon filing a class lawsuit and, only "after the class [is] certified," "class members [] then choose whether to … accede to his decision to reject arbitration." Mot. at 5. But that argument is in

considerable tension with the requirement that parties to an arbitration agreement may—and to avoid a possible finding of waiver, often must—move to compel arbitration as soon practicable. *See Martin v. Yasuda*, 829 F.3d 1118, 1127–28 (9th Cir. 2016) (defendant waived its right to compel arbitration by waiting until the parties had "expended considerable money and effort" preparing for "class certification"). Furthermore, Plaintiffs' argument—which would postpone arbitration in *every putative class action* until after class certification—would "destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure." *Italian Colors*, 133 S. Ct. at 2312.

Notably, *Bickerstaff*—the only case on which Plaintiffs rely in support of their Motion—is a Georgia state court decision interpreting Georgia contract law, and does not address the preemptive effect that the FAA would have on the discrete issue of Georgia state law that the court decided. In fact, as the *Bickerstaff* plaintiffs explained in a supplemental brief filed after the court rendered its opinion:

> The Federal Arbitration Act ('FAA') is not discussed in the Georgia Supreme Court [*Bickerstaff*] opinion for a simple reason—[the defendant] did not timely raise the issue …. Before the Georgia Supreme Court, [the defendant] briefed *only* state-law issues. [The defendant] did not even mention the FAA, nor did it in any way discuss preemption or hostility to arbitration.

Response to Supplemental Brief of Petitioner, 2016 WL 6994886, at *2 (Nov. 23, 2016). Because *Bickerstaff* reached only a question of Georgia contract law, without any analysis of the FAA, *Bickerstaff* is not controlling or persuasive; it is irrelevant.

See Reinkemeyer v. SAFECO Ins. Co. of Am., 166 F.3d 982, 984 (9th Cir. 1999) (courts may "disregard[] state court interpretations of state law … [that] violate federal law."); *see also Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1242 (9th Cir. 1984) ("[A] state court's interpretation of federal law does not bind our decision.").

B. Plaintiffs' "constructive opt-out" argument also violates the fundamental tenets of class action law, in at least two ways.

First, Plaintiffs' argument rests on the fictional proposition that a named plaintiff may opt out of arbitration on behalf of absent putative class members at the very moment the named plaintiff files her lawsuit, well before she has obtained or even requested class certification. *See* Mot. at 3–4. However, as the Supreme Court explained in *Standard Fire*, "a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified." *Standard Fire,* 133 S. Ct. at 1349. The reason for this, of course, "is simple …. '[A] nonnamed class member is [not] a party to the class-action litigation *before the class is certified*.'" *Id.* (quoting *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011)) (emphasis in original). Under *Standard Fire*, then, the named plaintiffs in this action have no legal right to opt out on behalf of absent putative class members at the moment the named plaintiff files her lawsuit.

Second, "the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b)." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011). This statutory protection safeguards the constitutional due process rights of the parties to a class action proceeding. *See Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1176 (11th Cir. 2010) ("The Rules Enabling Act, 28 U.S.C. § 2072—and due process—prevents the use of class actions from abridging the substantive rights of any party."). Here, Plaintiffs' proposed argument runs afoul of these important protections, as it permits one individual (the named plaintiff) to unilaterally vitiate the substantive contract rights of countless other individuals (in this case, Uber and the hundreds of thousands of drivers with whom Uber has contracted).

C. As a matter of California contract law, "[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Cal. Civ. Code § 1638. As California courts have explained, this commonsense requirement ensures that "[i]f contractual language is clear and explicit and does not involve an absurdity, the plain meaning governs." *Am. Alternative Ins. Corp. v. Superior Court*, 135 Cal. App. 4th 1239, 1245 (2006); *see also In re Marriage of Facter*, 212 Cal. App. 4th 967, 978 (2013) (citations omitted) ("A contract must be so interpreted as to give effect to the mutual intentions of the parties as it existed at the time of contracting.").

For substantially the same reasons as those set forth above with respect to the FAA, *supra* at II(A), Plaintiffs' argument also violates California law because it enables a party to evade her contractual obligations—in this case, to arbitrate in accordance with the arbitration agreements she chose to accept—by doing nothing more than filing a lawsuit, or (even more passively) by being a putative absent class member in a lawsuit filed by someone else. As a matter of California law, Plaintiffs' argument cannot stand. *See Eastwood Homes, Inc. v. Hudson*, 161 Cal. App. 2d 532, 541 (1958) ("[C]ourts are not empowered under the guise of construction to depart from the plain meaning of the contract."). And, to the extent Plaintiffs' argument imposes a special rule of contractual interpretation applicable to arbitration agreements—and *only* arbitration agreements—Plaintiffs' argument violates the FAA. *See Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) ("Courts may not … invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.").

* * *

Plaintiffs' Motion seeks to derail four separate appeals that are fully-briefed and tentatively scheduled for oral argument in only a few months, based on nothing more than an untimely and frivolous argument that plainly violates the FAA, the Rules Enabling Act, due process, Supreme Court precedent, and California contract law. This Court should deny Plaintiffs' Motion.

III. The Court Should Deny Plaintiffs' Motion To Dismiss And Remand Because The District Court Stayed The Proceedings Below And Stated That It Will Not Allow Briefing On Plaintiffs' Argument At This Time.

This Court should also deny Plaintiffs' Motion insofar as it requests dismissal and remand because the district court has indicated it is not inclined to entertain Plaintiffs' argument. On March 22 (the same day Plaintiffs filed the Motion here), Plaintiffs presented their "constructive opt-out" argument to the district court for the first time at a case management conference. In response, the district court questioned both the merits and tardiness of Plaintiffs' request, stating: "Why didn't you raise this issue? It seems very odd …." Ex. A at 10:11-14. The district court stated that it would "take a closer look at *Bickerstaff*," and that "if [it] feel[s] that there's enough there to require further briefing, [it will] order that, but right now [it] do[es] [not] see it." *Id.* at 14:25–15:2. The court then reiterated its skepticism once again at the close of the hearing: "I have to say right now I have my doubts …." *Id.* at 43:1.

Moreover, the district court has *stayed* the district court proceedings pending the outcome of these appeals. *See* D. Ct., Dkt. 806. Thus, remand—less than three months prior to oral argument—would result in another unnecessary and diversionary trip back to the district court and more delay in resolving these appeals.

IV. The Court Should Coordinate Oral Argument For All The Pending Appeals And Set An Argument Date As Soon As Practicable.

It has been nearly four years since Plaintiffs filed their lawsuit in the district court. In that time, this litigation has yielded numerous related appeals concerning

the enforceability of the parties' arbitration agreements—all but one of which remain pending today. Last year in *Mohamed*, this Court undercut the foundation of the district court orders at issue in these appeals when it upheld the parties' 2013 and 2014 arbitration agreements, holding that they contained an enforceable delegation clause that required an arbitrator to resolve all gateway issues in the first instance. *See Mohamed*, 848 F.3d 1201. This ruling is in accord with every other federal court to consider the validity of Uber's arbitration agreements with drivers—*nineteen* in all. Now, faced with the consequences of *Mohamed*, Plaintiffs attempt to delay the inevitable implications of that ruling with meritless stall tactics.

Rather than indulge Plaintiffs' transparent attempts to evade this Court's jurisdiction, the Court should resolve these issues, by scheduling all of these appeals to be argued together before the *Mohamed* panel. Each appeal is fully briefed, and the Clerk has tentatively scheduled all but one appeal (No. 14-16078) for argument during the Court's June 2017 Pasadena oral argument calendar.

To recap, four groups of appeals are currently pending before this Court:

- ***O'Connor v. Uber Techs., Inc.*, No. 14-16078**: This is Uber's appeal arising from a series of orders issued under Rule 23(d), in which the district court required Uber to add disclosures and warnings to the 2013 arbitration agreement, permit drivers to opt out via email and U.S. mail, and give all drivers a second opt out opportunity. Like the district court order that this Court reversed in *Mohamed*,

these Rule 23(d) orders were based on a mistaken belief that the agreement's opt out clauses were "onerous" and illusory, and were infused with an impermissible inference that arbitration would bar "drivers from . . . *benefitting* from [a] class action," thereby "*adversely* affecting [the] rights" of drivers. D. Ct., Dkt. 60 at 9–10 (emphasis added). This appeal was originally scheduled for oral argument together with *Mohamed*, but was later stayed at the parties' request. No. 14-16078, Dkt. 72. This is the only appeal that is not tentatively scheduled for argument in June, but Uber requests that it be scheduled in June as well.

- ***O'Connor v. Uber Techs., Inc.*, Nos. 15-17420+**: This is Uber's appeal challenging the district court's orders denying Uber's motions to compel arbitration under both the 2013 and 2014 arbitration agreements. These appeals present *exactly* the same issues as the ones that this Court recently resolved in *Mohamed*. However, Plaintiffs argue that they have preserved and presented one additional issue—the validity of the agreements' class waiver provision under the NLRA—that was not adequately presented in *Mohamed* (and Uber disputes this assertion). This set of consolidated appeals is tentatively scheduled for argument in June 2017.

- ***O'Connor v. Uber Techs., Inc.*, Nos. 15-17532+**: This is a set of consolidated cross-appeals in which parties to multiple related lawsuits challenge two orders in which the district court enjoined Uber from enforcing the revised arbitration agreement that Uber issued in December 2015 to comply with the district

court's previous orders, unless and until Uber added even *more* disclosures to the 2014 arbitration agreement and provided drivers *another* opportunity to opt out (specifically ordering that it be done by way of a pop-up screen that drivers would view *before* reviewing the arbitration agreement). These orders expressly cite and rely on the district court's prior Rule 23(d) orders (the subject of Appeal No. 14-16078), *see* D. Ct., Dkt. 435 at 3–4, which—as discussed above—rest on the same flawed logic as the district court orders that this Court reversed in *Mohamed*. This set of consolidated cross-appeals is tentatively scheduled for argument in June 2017.

- ***O'Connor v. Uber Techs., Inc.*, No. 16-15595**: This is Uber's Rule 23(f) appeal challenging the district court's class certification rulings. This appeal challenges several class certification findings, including the district court's findings that drivers' putative employment status may be determined on a classwide basis, that Plaintiffs are adequate, and that Plaintiffs have proposed a viable damages methodology for their Gratuities Claim.[3] It also argues that the district court's class certification rulings improperly permit class litigation on behalf of hundreds of thousands of drivers who agreed to arbitrate their claims on an individual basis—an

[3] The fact that this appeal raises challenges to the class certification orders that are *unrelated* to the parties' arbitration agreements is another reason for this Court to deny Plaintiffs' Motion with respect to Uber's Rule 23(f) appeal, No. 16-15595. Indeed, Plaintiffs' counsel herself recently conceded that "all [Rule 23 issues] are subsumed under the current 23(f) appeal." *See* Ex. B at 6:14–8:5.

argument that necessarily depends on this Court's rulings in *Mohamed* and Appeal Nos. 15-17420+. This appeal is tentatively scheduled for argument in June 2017.

Under this Court's General Order 3.6(d), a "prior panel is encouraged to accept a case that predominately involves the interpretation and application of [a] prior panel decision." As discussed above, each and every one of these appeals implicates identical or substantially similar legal and factual issues as those that were decided in this Court's *Mohamed* decision. Moreover, assigning this case to the *Mohamed* panel would promote judicial efficiency, given the complex procedural and factual history of this case. It would take considerable judicial resources for a new panel to familiarize itself with these cases and these arguments, many of which have already been presented to the panel in *Mohamed*.

CONCLUSION

This Court should deny the Motion and coordinate the following appeals for oral argument before the Ninth Circuit panel pursuant to General Order 3.6(d): (1) *O'Connor v. Uber Techs., Inc.*, No. 14-16078; (2) *O'Connor v. Uber Techs., Inc.*, No. 15-17420 (including consolidated appeal No. 15-17422); (3) *O'Connor v. Uber Techs., Inc.*, No. 15-17532 (including consolidated appeal Nos. 15-17533, 15-17534, 16-15000, 16-15001, 16-15035); and (4) *O'Connor v. Uber Techs., Inc.*, No. 16-15595.

Dated: March 30, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1) and Ninth Circuit Rule 32-1, the undersigned certifies that this brief complies with the applicable typeface, type style, and type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f) and Ninth Circuit Rule 32-1, this brief contains 5,199 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

Dated: March 30, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Theodore J. Boutrous, Jr., hereby certify that I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: March 30, 2017

Respectfully submitted,

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