Nos. 14-16078, 15-17420, 15-17422, 15-17532, 16-15000,
15-17534, 16-15001, 16-15595

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUGLAS O'CONNOR et al,	:	No. 14-16078, 15-17420,
Plaintiff-Appellees,	:	15-17532, 16-15000, 16-15595
	:	No. C-13-3826-EMC
v.	:	N. Dist. Cal., San Francisco
UBER TECHNOLOGIES, INC.,	:	Hon. Edward M. Chen
Defendant-Appellant	:	

HAKAN YUCESOY et al,	:	No. 15-17422, 15-17534,
Plaintiff-Appellees,	:	16-15001
	:	No. C-15-00262-EMC
v.	:	N. Dist. Cal., San Francisco
UBER TECHNOLOGIES, INC. et al.,	:	Hon. Edward M. Chen
Defendant-Appellants	:	

On Appeal from the
United States District Court for the Northern District of California
The Honorable Edward M. Chen
No. C-13-3826-EMC

PLAINTIFF-APPELLEES' CONSOLIDATED ANSWERING BRIEF

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INTRODUCTION

In these appeals, Uber seeks to overturn the District Court's certification of a class of drivers challenging their misclassification as independent contractors, an order holding Uber's arbitration agreement unenforceable, and two orders (which are now moot) supervising Uber's communications with class members. As explained below, the District Court's class certification order follows a long line of precedent in which workers who have been misclassified as independent contractors have routinely been able to challenge their classification on a classwide basis. Indeed, it would make little sense for workers performing the same job to have to make such a challenge one-by-one, when the company itself has set forth a blanket decision to classify them all as independent contractors, and the District Court's ruling broke no new ground in allowing such a classwide challenge.

With respect to the arbitration agreement, it was not even necessary for the District Court to determine whether the agreement is enforceable, since the lead plaintiffs who originated this suit opted out of arbitration and thus can be deemed to have done that on behalf of the class they sought to represent (as Plaintiffs have maintained since the beginning of this case).

However, if the Court were to address the arbitration agreement, it should affirm the District Court's decision to find it unenforceable, but on different grounds from that reached by the District Court. The reason it is unenforceable is

because it violates the drivers' rights under the National Labor Relations Act ("NLRA"), 29 U.S.C. §157, *et seq.*, as made clear by binding authority in this Circuit, see Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016), cert. granted, 137 S. Ct. 809 (2017). Morris applies here, even though Uber included an "opt-out" provision in its arbitration clause (an issue not yet directly addressed by this Court) and even though Uber purported to classify its drivers as independent contractors.

The Court should also affirm the District Court's decision to certify the class because the propriety of the certification of independent contractor misclassification claims is well established, and there is nothing unusual about this case that would make it necessary for the court to conduct a driver-by-driver analysis of the correct classification. The mere fact that Uber submitted several hundred declarations from drivers (supposedly) affirming that they "want" to be classified as independent contractors is of no moment legally. And the fact that Plaintiffs sought to recover reimbursement of expenses using the IRS reimbursement rate (which was enacted precisely in order to make it unnecessary for workers to prove actual individual vehicle expenses) does not in any way undermine the lead plaintiffs' adequacy. The District Court's certification of the gratuities claim was likewise correct and well within the court's discretion.

Finally, for reasons that Plaintiffs do not understand, Uber also continues to pursue its appeal of two orders that the District Court issued pursuant to Rule 23(d) in order to supervise class communications. Both of these orders are now moot, and the Court need not concern itself with them. These orders both required Uber to provide enhanced notice to class members related to its promulgation of new arbitration agreements. However, based upon this Court's ruling in Mohamed v. Uber Technologies, Inc., 848 F.3d 1201 (9th Cir. 2016), the differences between the new arbitration agreements and previous arbitration agreements is of no legal relevance; thus, it no longer matters what if any notice Uber provided regarding the promulgation of these agreements. If the Court finds the agreements unenforceable, it will be based on the argument Plaintiffs raise here – that the class action waiver violates the NLRA, and this class waiver is contained in all versions of Uber's agreement; thus, the question of whether drivers needed any enhanced notice when presented with these agreements is now moot. However, if, for some reason, the Court found it were necessary to rule on the validity of these orders, there is no reason to reverse them, as they were properly within the District Court's discretion to supervise class communications at the time they were entered.

STATEMENT OF JURISDICTION

Plaintiffs agree with Uber's Statement of Jurisdiction, except with respect to Uber's appeal of the District Court's Rule 23(d) orders. These orders are

procedural orders regulating communications with putative class members and are not appealable, as discussed at further length in Plaintiffs' Motion to Dismiss Appeal No. 14-16078 (Dkt. 8), which is hereby incorporated by reference.

STATEMENT OF ISSUES

1. Whether the Court even needs to reach the question of whether Uber's arbitration agreement is enforceable, since the named plaintiffs opted out of arbitration and thus can be deemed to have rejected arbitration on behalf of a class (or at least tolled the time for class members to opt out of arbitration);

2. If the Court believes that it nevertheless does need to reach the question of whether Uber's arbitration agreement is enforceable, whether the agreement is not enforceable because the class action waiver within it violates the drivers' rights under the NLRA (notwithstanding the fact that the arbitration agreement had an opt-out provision and notwithstanding the fact that Uber has classified the drivers as independent contractors);

3. Whether the District Court acted properly within its broad discretion in certifying a class of Uber drivers in California challenging their classification as independent contractors, both with respect to (1) their claim for reimbursement of common expenses that all Uber drivers must incur in order to perform their jobs (namely expenses incurred in maintaining and using a vehicle and phone service), and (2) their claim for unremitted gratuities, based upon their contention that Uber

charged customers gratuities but failed to remit the total proceeds of these gratuities to the drivers;

4. Whether the Rule 23(d) orders issued by the District Court to supervise class communications are now moot, but if they are for some reason not moot, whether the District Court acted properly within its discretion to manage such communications at the time they were issued so as to enhance class members' understanding of what rights they may be giving up if they accepted Uber's new agreements without opting out of arbitration.[1]

STATEMENT OF THE CASE

I. BACKGROUND

Defendant Uber Technologies, Inc. ("Uber") is a car service established in 2009 in California, which engages hundreds of thousands of drivers to transport its customers. O'Connor v. Uber Technologies, Inc., 82 F. Supp. 3d 1133, 1141 (N.D. Cal. 2015). Customers can summon a driver by placing a request on Uber's smartphone app.

Uber relies entirely on drivers whom it classifies as independent contractors to perform the transportation services at the heart of its business. Before they are able to drive for Uber, all drivers are required to agree to the terms of a form

[1] An amicus brief was recently filed by a *pro se* litigant (Dkt. 102), which raises issues not relevant to these appeals and not addressed below, and so this Court need not consider the matters raised therein.

contract drafted by Uber. SER384 at 250:19-22. Although some aspects of these contracts have changed over time, the contracts uniformly label drivers as independent contractors and uniformly give Uber the right to terminate the driver in its sole and unreviewable discretion (either explicitly or by default). ER141-43; SER300-306. Likewise, Uber has conceded that, when determining whether to terminate a driver, it does not consult which version of the contract the particular driver signed, instead relying on its unquestioned right to terminate drivers at will. SER340 at 185:15-186:8.

Drivers do not need any particular experience or skills to work for Uber, other than having a vehicle and driver's license. SER446. Uber has required its drivers to pass background checks, to accept a certain percentage of ride requests (in Uber management's discretion), and to maintain high levels of customer satisfaction.[2] Uber sets and calculates all fares, charges them to customers, determines how much the drivers will receive, and then remits the drivers' payments to them weekly via direct deposit; drivers have no ability to negotiate the rates or prices charged to customers or the percentage of the fare retained by Uber. SER376 at 165:2-21, 167:20-168:7; SER392. Uber asks customers to rate drivers at the end of each ride, and Uber management determines what is an acceptable minimum customer rating for drivers to remain with Uber or be terminated.

[2] See ER1446, § 2; SER348 at 101:17-104:3, SER349-50 at 116:12-119:18; SER355 at 242:5-18; SER333 at 67:13-68:9; SER391 at 130:1-22.

SER348 at 101:17-103:5.

II. THIS LITIGATION

In August 2013, Plaintiffs filed the O'Connor case as a class action, alleging that Uber has misclassified its drivers as independent contractors rather than employees and has failed to reimburse them for expenses needed to do their jobs (in violation of California Labor Code § 2802) and has also failed to remit to them the total proceeds of gratuities that it has included in the fares charged to customers (in violation of California Labor Code § 351, which is enforceable through the UCL, Cal. Bus. & Prof. Code § 17200). ER2191-2204. Plaintiffs filed the Yucesoy case in June 2014, alleging similar claims under Massachusetts law on behalf of Uber drivers who have worked in Massachusetts. ER2298-2300.

Just before the O'Connor case was filed, Uber promulgated a new agreement for its drivers, which appeared as a pop-up on the drivers' smartphone screens and which they needed to accept in order to work, or continue working, for Uber. The agreement contained an arbitration clause that included a class action waiver, but it also included an option for drivers to opt out of the arbitration clause. ER1442, 1462. The lead plaintiffs in O'Connor opted out of the arbitration clause, but since they were concerned with whether the court would allow them to have opted out on behalf of the drivers they sought to represent as a class in court, in an abundance of caution, they asked the court to enjoin Uber from distributing this

new arbitration agreement, now that their case was on file, because they were concerned that most drivers would not be aware of the arbitration clause or the potential consequences of not opting out of arbitration.[3] The court declined to enjoin Uber from distributing the new agreement but required Uber to provide enhanced notice to the drivers, including information about the case that had been filed, and to make it less burdensome for drivers to opt out of arbitration. ER172, ER188.[4] Uber appealed those orders (referred to here collectively as "the initial Rule 23(d) order"). ER2138.[5]

Following lengthy discovery, the District Court denied Uber's motion for summary judgment, O'Connor, 82 F. Supp. 3d 1133, and ultimately (following a

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[3] See SER512 (Plaintiffs' Emergency Motion, filed on August 26, 2013), at n. 4 ("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... 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, [] 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").

[4] The court's order led to Uber distributing a revised agreement (the "2014 arbitration agreement") that included modest changes, including the addition of an option to opt-out of arbitration by email and the placement of notice about the arbitration clause at the beginning of the document. ER2093-2116.

[5] Plaintiffs moved to dismiss this appeal as a non-appealable case management order, see Appeal No. 14-16078 (Dkt. 8), and later moved to dismiss this appeal as moot (Dkt. 89). This Court denied both motions, indicating it would consider these arguments together with the appeal (Dkt. 12, 92).

three-hour hearing on August 8, 2015, see SER160-298) certified the case as a class action on behalf of Uber drivers who have worked in California.[6] In that initial class certification order, the court certified the gratuities claim only (inviting further briefing on the reimbursement claim) and limited the class to drivers who were either not bound by any arbitration agreement, who were bound only by Uber's 2013 arbitration agreement, or who had opted out of arbitration. ER104-71.[7] Following further briefing and argument, the court then expanded the class to include the expense reimbursement claim and also to include drivers who were bound by Uber's 2014 arbitration agreement (based on the court's conclusion that the 2014 agreement was also not enforceable). ER79-95, 102.[8]

Although Plaintiffs had continued to maintain that the enforceability of

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[6] The court excluded from the class those drivers who have driven for Uber through third party transportation companies (such as limo companies), as well as drivers who have contracted with Uber, or been paid by Uber, through corporate names, rather than their own individual names. ER144-47; ER169-70. This exclusion eliminated lead Plaintiffs O'Connor and Colopy from the class, and the court certified Plaintiffs Manahan and Gurfinkel as class representatives. ER125, n. 8; ER108, n. 1.

[7] Uber petitioned this Court for permission to appeal the District Court's initial class certification order, pursuant to Rule 23(f), but this Court denied that petition. See Appeal No. 15-80169 (Dkt. 4).

[8] Due to Uber's explosive growth, the supplemental class certification order, which now included drivers bound by the 2014 agreement, expanded the class from several thousand drivers to approximately 240,000 drivers. ER-449. Following this expansion of the class, Uber filed a new Rule 23(f) petition, which was granted. See Appeal No. 15-80220 (Dkt. 9). The Court did ***not*** state that it was granting review of the District Court's earlier class certification ruling.

Uber's arbitration agreement was not relevant to the question of whether a class should be certified (since the lead plaintiffs had opted out of arbitration), see ER2024 at n. 30 (incorporating by reference arguments made previously in the case), in its class certification orders, the District Court focused on whether the arbitration agreement was enforceable. The District Court ultimately held that the 2013 and 2014 agreements were not enforceable because the contained non-severable PAGA waivers. ER68-69. Plaintiffs had also argued that the agreements was not enforceable because they contained a class action waiver which violated the NLRA, ER929-32, but the District Court declined to address this argument.

Following the District Court's order expanding the class to include drivers who were bound by the 2014 arbitration agreement (on December 9, 2015, see ER71), Uber filed the next day an ex parte motion to compel arbitration for the drivers in the newly certified class. ER2261 (Dkt. 397). Before Plaintiffs had an opportunity to respond to that motion (and to reiterate that the enforceability of the agreement was irrelevant to the class certification order, since the lead plaintiffs had opted out of arbitration), the Court immediately denied Uber's motion that same day (on December 10, 2015). ER55-56.[9]

Two days after the court expanded the class to include drivers who were bound by the 2014 agreement, Uber issued a revised arbitration agreement (the

[9] The Court also denied Uber's motion to compel arbitration in the Yucesoy case, citing the reasoning of its decision in O'Connor. ER103, 49.

"2015 arbitration agreement") that purported to "fix" the issue that had led the court to hold the 2014 agreement was unenforceable. Plaintiffs, again concerned about Uber's attempt to limit its potential class liability in a pending class action that had just been certified, moved again to enjoin Uber from distributing the new arbitration clauses in an attempt to limit its ongoing class liability. ER765-75. The court denied Plaintiffs' request to enjoin Uber's actions and instead issued another Rule 23(d) order, requiring Uber to provide enhanced notice to drivers, making it clearer to them what rights they may be giving up by accepting the new agreement without opting out of arbitration. ER25.[10]

In August 2016, this Court ruled in another related class action, Mohamed v. Uber Technologies Inc., C.A. No. 3:14-cv-5200 (N.D. Cal.), that the District Court erred in the reasons it held Uber's arbitration agreements to be unenforceable. However, in that case, the plaintiffs had not opted out of arbitration (nor had they occasion to argue that plaintiffs who opted out of arbitration could do so on behalf of a class). Also, in Mohamed, the plaintiffs waived below the argument that the arbitration agreement violated the NLRA (and raised the issue for the first time in a surreply, see Appeal No. 15-16178, Dkt. 76 at 24), so this Court did not have the

[10] Following the District Court's supplemental class certification order, and just before the case was scheduled for trial in June 2016, the parties engaged in a series of mediation sessions and reached a proposed class settlement of up to $100 million plus various non-monetary terms. See O'Connor, Dkt. 518, 519-6. However, the District Court declined to grant preliminary approval of the settlement, finding the monetary recovery not to be sufficient. See Dkt. 748.

opportunity to consider this argument with full briefing and oral argument. The Court nevertheless, without the benefit of briefing, opined in dicta that the agreement did not violate the NLRA because it contained an opt-out provision. Mohamed, 836 F.3d at 1112 n. 6. Plaintiffs in O'Connor noted that the NLRA issue had been waived in Mohamed but had been preserved in O'Connor and was subject to full briefing in O'Connor (including being supported by an amicus brief submitted by the NLRB, see Appeal No. 15-17420, Dkt. 65). In denying *en banc* review of Mohamed, the Court deleted the dicta from the Mohamed footnote that had opined on this issue. See 848 F.3d at 1212 n. 6. In doing so, the *en banc* Court appeared to recognize that the issue had not been properly preserved or argued in Mohamed and should await decision based upon full argument in this case.

ARGUMENT

I. THE COURT NEED NOT DECIDE WHETHER UBER'S ARBITRATION AGREEMENT IS ENFORCEABLE BECAUSE THE LEAD PLAINTIFFS OPTED OUT OF ARBITRATION

Much of this case has been devoted to the question of whether Uber's arbitration agreement is enforceable. However, from the beginning of the O'Connor case, Plaintiffs have noted that the enforceability of the arbitration agreement for class members is not relevant because the lead plaintiffs opted out of arbitration and, by so doing, rejected arbitration on behalf of the class.

Because the District Court had spent a great deal of time addressing the

question of whether the arbitration agreement was enforceable (based on the Mohamed case), when it came time for the District Court to decide whether to include in the class here those drivers who were bound by arbitration agreements, the District Court focused on enforceability of the agreement as the critical factor. Plaintiffs, however, only addressed its enforceability as a precautionary measure. But because the lead plaintiffs had not agreed to arbitration, there was no need for the District Court below to address this question, nor is it necessary for this Court to address it now.

Now that this Court has reversed the District Court's reasoning for holding Uber's arbitration agreements unenforceable (see Mohamed, 848 F.3d at 1210-14), the question of whether Uber's arbitration agreement is enforceable likely turns on the question of whether the class action waiver violates the NLRA. In Morris, this Court held that class waivers in employment agreements violate the NLRA. That decision, however, is now on appeal to the U.S. Supreme Court and is expected to be argued next term.

This Court, however, need not await a decision from the Supreme Court because the enforceability of Uber's arbitration agreement is not relevant to the question of whether the District Court properly included in the class those drivers who were bound by the agreement. This is because the lead plaintiffs opted out of arbitration and thereby rejected arbitration on behalf of the class (or at least tolled

the time for class members to opt out of arbitration).

This exact argument was adopted last year by the Georgia Supreme Court in the case of Bickerstaff v. Suntrust Bank, 299 Ga. 459, cert. denied, 137 S. Ct. 571 (2016). There, the Court recognized that, when a lead plaintiff rejects arbitration and then attempts to represent a class, that plaintiff has effectively rejected arbitration on behalf of the class. Id. at 462-63. Indeed, the entire purpose of a class action is for lead plaintiffs to take action on behalf of absent class members in order to protect their rights. It is well recognized that most people who have legal claims against a company that has violated the law for many people will not take action to challenge the alleged unlawful practice. That is why lead plaintiffs are permitted to bring claims on behalf of a class – to vindicate the rights of others, most of whom are unlikely to do so themselves.

In Bickerstaff, the Court recognized that the lead plaintiff could reject arbitration and then pursue a class action and that, if the lead plaintiff ultimately succeeded in satisfying the class certification requirements, then class members would have the option of participating in the class action or opting out of it. Id. at 468. Should they opt out, they can then maintain their right to arbitrate their claims. But by not opting out, they have effectively joined in, and acceded to, the

lead plaintiffs' rejection of arbitration on their behalf. Id. at 468-69.[11]

This scenario is exactly what happened in this case, and this Court should recognize, like the Georgia Supreme Court did in Bickerstaff (and the U.S. Supreme Court declined to disturb) that the lead plaintiffs opted out of arbitration on behalf of the class. Thus, the Court need not delve into the question of whether Uber's arbitration agreement is enforceable, nor need the Court await the Supreme Court's decision in Morris, which is likely not to be issued until next year.[12]

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[11] The Bickerstaff Court held that the lead plaintiff's having opted out of arbitration effectively tolled the time for the rest of the class to opt out of arbitration – which they could then do upon deciding whether to stay in the case after it was certified. Id. at 463, 468. The Bickerstaff Court held that the lead plaintiff effectively took this action on behalf of the class members, even though the arbitration agreement in that case prohibited participation in a class action and stated that it required "individual notification of the decision to reject arbitration." Id. at 461, n.3, 465.

[12] Uber argues that Plaintiffs never raised this argument before, but Uber is mistaken. Plaintiffs noted at the very start of the case when they filed their Emergency Motion for Protective Order that they were raising the concern that Uber was promulgating an illegal arbitration agreement only in an abundance of caution, in the event the court believed it needed to address this issue. SER512 at n.4. When Plaintiffs later moved for class certification, they again pointed out that the District Court need not address whether the arbitration agreement is enforceable in order to include drivers in the class who themselves did not opt out. ER2024, n. 30.

Uber notes that more recently Plaintiffs stated that this argument had not previously been raised. However, that statement was simply mistaken, and Plaintiffs quickly corrected it. See Appeal No. 14-16078 (Dkt. 88 at 2, n. 2). This Court recognized that this argument can be raised here by expressly allowing Plaintiffs to include it in their revised consolidated briefing. See id. (Dkt. 92).

In any case, regardless of whether the argument was waived, the Court can consider the argument because a settled exception to the general rule of waiver is

Uber argues that this Court should not follow Bickerstaff, since it is a decision by a Georgia court. The issue here, however, is whether the result reached in Bickerstaff makes sense and should be adopted by this Court. In reaching this decision, the Georgia Supreme Court, while applying state law, looked to the federal Rule 23. 299 Ga. at 462, 464. It does not appear that this issue has ever been addressed by this Court.[13] Thus, it is an important issue of first impression for this Court to decide – or alternatively, for this Court to remand for consideration by the District Court in the first instance.

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that "[w]hen the issue… is purely one of law and either does not affect or rely upon the factual record developed by the parties …the court of appeals may consent to consider it." United States v. Yijun Zhou, 838 F.3d. 1007, 1016 (9th Cir. 2016).

[13] This Court previously 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, but 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 agreement 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). Uber argues that Plaintiffs "cannot legally bind" absent class members prior to class certification, see Br. at 28, but again, Plaintiffs did not "bind" absent class members, but rather tolled and preserved their ability to have these claims brought on their behalf in court until class certification was ruled upon (at which point class members could opt out of the class and elect to be bound by the arbitration agreement).

The rule makes eminent sense and should be adopted by this Court. "Certification is the process by which a named party may begin representing a class of individuals who are not named and do not otherwise participate in the litigation." Davis v. Prof'l Musicians Local 47, 2014 WL 12479397, *2 (C.D. Cal. Mar. 24, 2014). One of the benefits of the class action device—recognized by federal courts throughout the country--is that it allows individuals who would not otherwise act to have their rights vindicated by a representative plaintiff who takes action for them. See, e.g., Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997); Greer v. Dick's Sporting Goods, Inc., 2017 WL 1354568, *9 (E.D. Cal. Apr. 13, 2017); In re Reformulated Gasoline Antitrust & Patent Litig., 2007 WL 8056980, *1 (C.D. Cal. Mar. 27, 2007).

Thus, this Court should reach this important question now, or should remand to the District Court to consider whether it was even necessary to decide if Uber's arbitration agreements are enforceable against class members.

II. UBER'S ARBITRATION AGREEMENT IS NOT ENFORCEABLE BECAUSE IT IMPERMISSIBLY WAIVES DRIVERS' RIGHTS TO ENGAGE IN CONCERTED LEGAL ACTIVITY, IN VIOLATION OF THE NLRA

If this Court nevertheless it must decide here whether Uber's arbitration agreement is enforceable, the answer to that question is no, since this Court has now in Morris adopted the NLRB's holding in D.R. Horton, 357 NLRB No. 184 (2012), holding that class waivers in employment agreements interfere with

workers' rights to engage in concerted activities and thus violate the NLRA.[14] Here, all versions of Uber's arbitration agreements state that its drivers must resolve "any dispute in arbitration on an individual basis only," ER974 at §14.3(v), and thus they violate the NLRA.[15]

Despite the binding authority in this Circuit, Uber argues that Morris does not apply here because the "opt-out" provision rescues the agreement from illegality and because the drivers are classified as independent contractors, not employees, and thus are not protected by the NLRA. Both of these arguments should be rejected.[16]

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[14] In Mohamed, this Court rejected the reasoning on which the District Court held Uber's arbitration clause to be unenforceable. However, the decision is not a holding that Uber's arbitration clause *is* enforceable. The argument that the agreement violates the NLRA is a separate ground on which it can be held unenforceable, an argument that was waived in Mohamed and thus not reached in that decision. See supra at 11-12.

[15] Uber strangely argues that Plaintiffs are "judicially estopped" from arguing that the arbitration agreement is unenforceable, because their counsel has filed individual arbitration demands on behalf of some drivers (who are not class members or for claims not covered by the certified class). The fact that some drivers have chosen to bring their claims straight to arbitration has no bearing on whether the arbitration agreement is enforceable.

[16] The District Court did not address either of these issues because it declined to address the NLRA argument at all. The Court could alternatively remand to the District Court to decide these issues in the first instance.

Although Plaintiffs did argue below that Uber's arbitration agreements are invalid under the NLRA, see ER929-32, Uber argues that that Plaintiffs waived the NLRA argument because they did not specifically argue to the District Court that the opt-out provision does not rescue the agreement from illegality under the

As a preliminary note, Uber argues that this Court cannot address the illegality of its arbitration agreements under the NLRA because the 2014 version (though not the 2013 version) contains a delegation clause. However, drivers cannot be compelled to individual arbitration in order to determine whether the arbitration clause is unenforceable under the NLRA. Forcing drivers to *individually* arbitrate even this preliminary issue would itself violate the NLRA and Morris.[17]

A. THE OPT-OUT PROVISION IN UBER'S ARBITRATION AGREEMENT DOES NOT RESCUE IT FROM ILLEGALITY UNDER THE NLRA

The NLRB has now expressly rejected Uber's argument that a class action waiver does not violate the NLRA if workers have the ability to opt out of arbitration. See NLRB Amicus Brief, Appeal No. 15-17420 (Dkt. 65) (citing On Assignment Staffing, 362 NLRB No. 189, 2015 WL 5113231, *7-11 (Aug. 27,

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NLRA. This argument makes little sense, as the opt-out provision is Uber's *defense* to Plaintiffs' NLRA argument, which Uber never raised below. Plaintiffs were not required to anticipate and respond in advance to Uber's response to Plaintiffs' argument that Uber never raised below. See also United States v. Yijun Zhou, 838 F.3d at 1016 (court of appeals may consider argument not raised below when the issue is purely one of law).

[17] Uber argues that many courts have now enforced its arbitration clause, but, as Plaintiffs have explained in their responses to Uber's notices of supplemental authority (see Appeal No. 15-17420, Dkts. 80, 83, 87, 94), those courts are not all in Circuits that have adopted D.R. Horton, nor have those courts been presented with the arguments raised here.

2015). Even if the existence of an opt-out provision means that an arbitration clause containing a class action waiver is not "a mandatory condition of employment"[18], it still illegally burdens and interferes with workers' rights under the NLRA by requiring them to take affirmative actions to preserve these non-waivable rights and thus to announce their position to their employer.

Although it had previously reserved the question in D.R. Horton, 357 NLRB No. 184 at n.28, the NLRB has now squarely held that opt-out provisions do *not* rescue class action waivers from illegality. See On Assignment Staffing, 2015 WL 5113231, *7-11. Just as it did in Morris, this Court should give deference to the Board's reasonable interpretation of the NLRA. See Morris, 834 F.3d at 980.

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[18] Even though Uber drivers technically had the ability to opt out of arbitration, Plaintiffs do not concede that the arbitration agreement was truly "voluntary". The manner in which the arbitration agreement was presented to the drivers -- as a pop-up notification on their smartphone screens that they had to accept in order to begin working, SER526 -- did not give drivers a true choice as to whether to accept the arbitration agreement. Although the 15-page agreement had a provision allowing drivers to opt-out of arbitration, it was extremely difficult for drivers to review the tiny print of this agreement on their smartphones, and few drivers would even realize they *could* view the text of the agreement by clicking the hyperlink. The information on how to opt out remained buried in a difficult-to-read agreement on their smartphones, even after the District Court ordered modest changes to enhance the visibility of the agreement. ER1430, ER1445; SER504-506.

The relatively miniscule number of drivers who opted out of the arbitration agreement—hundreds out of *hundreds of thousands* of Uber drivers (and most of whom opted out because they learned of their right to do so from the publicity generated by Plaintiffs' counsel, not from being able to learn of their right to do so by reviewing Uber's agreement, SER501-02) —demonstrates that the opt-out provision that Uber provided was not meaningful. ER1987.

Indeed, other courts confronting this exact issue have adopted the NLRB's conclusion, finding that it is reasonable and is entitled to deference. See Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1155 (7th Cir. 2016) ("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."); In re Fresh & Easy, LLC, 2016 WL 5922292, *12 (Bankr. D. Del. Oct. 11, 2016) (holding that arbitration agreements with class action waivers are invalid even if they contain opt-out provisions); Curtis v. Contract Mgmt. Svcs., Inc., 2016 WL 5477568, *6 (D. Me. Sept. 29, 2016) (same); Tigges v. AM Pizza, Inc., 2016 WL 4076829, *16 (D. Mass. July 29, 2016) (same).

Uber argues that this Court already held in Johnmohammadi v. Bloomingdale's, Inc., 755 F.3d 1072 (9th Cir. 2014), that opt-out provisions render arbitration agreements containing class action waivers legal even under the NLRA. However, Johnmohammadi predated the Ninth Circuit's decision in Morris, and so, when it was issued, this Court had not yet even decided whether a class action waiver in an arbitration agreement violated the NLRA. It was thus premature – and not possible -- for the Court in Johnmohammadi to decide whether such a provision could rescue an arbitration clause from illegality under the NLRA before the Court had even tackled the question of whether class waivers violate the NLRA. Now that this Court has adopted the NLRB's decision in D.R. Horton, this

Court is in a position to consider whether an opt-out provision provides workers with the protection afforded by the NLRA.

Moreover, Johnmohammadi pre-dated the NLRB's decision in On Assignment Staffing. Thus, in Johnmohammadi, 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 Court. To hold 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. Because this Court in Johnmohammadi did not hold that the NLRA was unambiguously clear regarding whether an opt-out provision would cure a Section 7 violation, the Court must now reexamine the holding of Johnmohammadi in light of the NLRB's intervening decision in On Assignment Staffing.

Uber contends that the Ninth Circuit subsequently confirmed in Morris the holding of Johnmohammadi that a voluntary arbitration agreement containing a

class waiver does not violate the NLRA. However, Morris simply noted Johnmohammadi's holding in a brief footnote. 834 F.3d at 982 n. 4. In Morris, the arbitration agreement did not contain an opt-out provision, and therefore that statement was merely dicta. Indeed, the court seemed to recognize in Morris that a prospective waiver of NLRA rights is illegal regardless of whether it is imposed as a mandatory condition of employment, noting that "[p]reventing the exercise of a §7 right" violates the Act, and "an employer violates [the NLRA] ***a second time*** by conditioning employment on signing a concerted action waiver." Morris, 834 F.3d at 982 (emphasis added). In other words, an employer violates the NLRA a first time by imposing a class action waiver to prevent concerted activity, and it does so a *second time* by making that waiver a mandatory condition of employment.

The Court should not only 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 Board held 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 have long held that individual agreements between employers and employees that cause workers to prospectively waive their

Section 7 rights are unenforceable,[19] and also drew on the Norris-LaGuardia Act, 29 U.S.C.A. § 103, which provides that "any . . . undertaking or promise in conflict with the public policy declared in" that statute is unenforceable.[20] The Board explained that:

> 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, their rights were nonetheless burdened by the need to actively opt-out of the arbitration clause in order to preserve them – both because they needed "to take affirmative steps…to retain [their] rights", id. at *5, and because "the [] opt-out procedure … requires

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[19] See also J.I. Case Co. v. N.L.R.B., 321 U.S. 332, 336 (1944) (individual agreements could not be treated as waivers of the 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) (individual contracts in which employees prospectively gave up their right to present grievances "in any way except personally," were unenforceable).

[20] 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, *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).

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. 2002)).

With respect to the first point, by compelling drivers to take action in advance in order to preserve their Section 7 rights, Uber's opt-out provision functions as an employer-imposed prerequisite that workers must fulfill before engaging in concerted legal activity. It has long been established that 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 before walking out of work). See further discussion in NLRB Amicus Brief, at 18. Uber equates this impermissible precondition as equivalent to complying with a deadline to file a grievance, see Br. at 24, but this analogy is inapposite. Uber's argument would require employees to make a decision months or even years before the employer's conduct giving rise to the concerted activity even takes place. See NLRB Amicus Brief, at 14-15 (noting that "protected concerted activity…often arises spontaneously. When the opportunity to exercise Section 7 rights is presented, employees must be able to decide…"); NLRB v. Granite State Joint Bd.,

Textile Workers Local 1029, 409 U.S. 213, 217-18 (1972) ("[T]he vitality of [Section 7] requires that the [employee] be free to refrain in November from the actions he endorsed in May.").

With respect to the second point, by compelling drivers to inform Uber that they may want to engage in a class action by opting out of the arbitration clause – something that many drivers have been afraid to do – Uber has put the drivers in the same situation that the Board has found violated employees' rights:

> To effectively opt out, employees must explicitly request to be exempted … 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.

On Assignment, 2015 WL 5113231at *7. [21] See also ER-520; and see further discussion in NLRB Amicus Brief, at 19.[22]

Finally, prospective waivers of Section 7 rights violate the NLRA because

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[21] Uber insists that drivers "might opt out for reasons that have nothing to do with [their] view of collective action," Br. at 24, but this argument misses the point; individual arbitration is the default, and it is obviously Uber's preference that drivers' not opt out of arbitration.

[22] Courts have routinely recognized the inherent potential for coercion in the context of an employment relationship, leading employees to not want their employers to know they would or may participate in an action against the employer. See, e.g., Guifu Li v. A Perfect Day Franchise, Inc., 270 F.R.D. 509, 517-19 (N.D. Cal. 2010); Gentry v. Superior Court, 42 Cal. 4th 443, 472 (2007); 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).

they affect not only those who "voluntarily" sign them, but also because they deprive non-signatory employees of the opportunity to recruit the participation and support of their fellow employees who signed a waiver. See NLRB Amicus Brief, at 16-17; see also NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956); Harlan Fuel Co., 8 NLRB 25, 32 (1938). Thus, workers have a protected right to solicit, persuade, and appeal to their fellow workers – 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).[23]

B. THE NLRA APPLIES NOTWITHSTANDING THE FACT THAT UBER'S CONTRACT PURPORTS TO CLASSIFY DRIVERS AS INDEPENDENT CONTRACTORS

Uber also argues that the NLRA does not apply to the drivers in this case

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[23] Uber argues that the named plaintiffs cannot represent class members who did not opt out of arbitration. Br. at 42-43. This argument ignores the fact that *the named plaintiffs'* rights under the NLRA would be violated by a ruling preventing them from engaging in concerted activity with other drivers who did not opt out of the agreement. See NLRB v. Alt. Entm't, Inc., 2017 U.S. App. LEXIS 9272 (6th Cir. May 26, 2017) (NLRA protects employee efforts "to persuade other employees to engage in concerted activities"). In any event, Plaintiffs offered to name an additional lead plaintiff who did not opt out of arbitration, if the court found it necessary for them to do so, but the District Court did not find it necessary. ER2024. If this Court believes that such a class representative is necessary, Plaintiffs should be permitted to add one on remand. See Kennerly v. United States, 721 F.2d 1252, 1260 (9th Cir. 1983). Likewise, Plaintiffs offered to name an additional lead plaintiff in the Yucesoy case who did opt out of arbitration, if that was necessary. See Yucesoy, C.A. No. 3:15-cv-00262, Dkt. 262 at n. 1.

because they have been classified as independent contractors and not employees. This argument should likewise be rejected. Other courts confronting this argument have presumed that the NLRA applies even where workers have been classified as independent contractors. See, e.g., Curtis v. Contract Mgmt. Servs., 2016 WL 5477568, *7 (D. Me. Sept. 29, 2016); Bekele v. Lyft, Inc., 2016 WL 4203412, *13 (D. Mass. Aug. 9, 2016); Souran v. GrubHub Holdings Inc., et al., Civ. A. No. 1:16-cv-06720 (N.D. Ill.), Dkt. 66-68. It makes sense for the Court to presume that the NLRA applies because, if workers attempting to challenge their misclassification through the concerted activity of a class action lawsuit had to litigate their employee status (and thus the applicability of the NLRA) on an *individual basis* in arbitration in order to even reach the argument that a class action waiver violated their rights, by that point the workers would have already been forced to litigate the employee status question individually, in violation of the NLRA.[24]

Alternatively, the Court should presume employee status, since Plaintiffs have made a colorable showing that Uber drivers are employees. The District Court has denied Uber's motion for summary judgment on employee status and

[24] The NLRB similarly makes the presumption that the NLRA applies when it exercises jurisdiction over cases where workers allege they have been misclassified as independent contractors, even though the NLRB only has jurisdiction over employees (see 29 U.S.C. § 152(3)).

determined that the drivers are "Uber's presumptive employees." O'Connor, 82 F. Supp. 3d at 1141.[25] Likewise, the California Labor Commissioner has already determined 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).[26]

If, however, the Court believes that an actual court determination of employee status needs to be made in order to determine whether the drivers are entitled to protection under the NLRA, then the Court could remand this case to the District Court to make this threshold determination.[27]

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[25] 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 extremely similar. Compare Roadway Package Sys., Inc., 326 NLRB 842, 849-850 (1998) (applying Restatement factors), with S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 48 Cal. 3d 341, 351 (1989).

[26] Uber cites to Uber Technologies, Inc. v. Eisenberg, 2017 WL 1418695, at *1 (Cal. Super. Ct. Feb. 21, 2017), in support of its argument that drivers are properly classified, but that case was simply confirmation of a single arbitration decision regarding a driver who is not a class member in this case, not a court ruling independently analyzing this question.

[27] It is not unusual for courts to make various preliminary determinations as part of their determination of whether an arbitration agreement is enforceable. For example, courts have set preliminary hearings to determine whether an employee actually agreed to an arbitration provision, see, e.g., Emmanuel v. Handy Technologies, Inc., C.A. No. 1:15-cv-12914 (D. Mass. July 27, 2016) (Dkt. 40), or whether a worker is exempt under the FAA's transportation worker exemption. See In re Van Dusen, 654 F.3d 838, 843 (9th Cir. 2011) (remanding to District Court to

III. THE COURT SHOULD AFFIRM THE DISTRICT COURT'S CLASS CERTIFICAITON ORDER

Uber has primarily argued that the class certification order should be reversed because most Uber drivers are bound by an enforceable arbitration agreement and therefore cannot participate in a class action in court. As discussed above, this argument should be rejected because the lead plaintiffs opted out of arbitration, which they can be deemed to have done on behalf of the class and, even if the Court felt it was necessary to evaluate whether the arbitration agreement is enforceable for class members, the agreement is not enforceable because its class action waiver violates the drivers' rights under the NLRA.

However, regardless of the Court's decision regarding the arbitration clause, there are thousands of Uber drivers who are not bound by any arbitration agreement, either because their work for Uber predated its implementation of an arbitration clause or because they opted out of arbitration. ER300. Thus, a class was appropriately certified, regardless of the scope or enforceability of Uber's arbitration agreement.

Uber has raised several arguments challenging the District Court's decision to certify a class, separate from its arguments regarding arbitration. These

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make preliminary determination regarding employee status and applicability of the FAA); Doe v. Swift Transportation Co., 2017 WL 67521 (D. Ariz. Jan. 6, 2017) (making preliminary determination regarding workers' employee status under the terms of their contract).

arguments are patently wrong and should be rejected. The District Court acted well within its "broad discretion to determine [that] a class should be certified."[28] Thus, the Court should affirm the District Court's certification of the plaintiffs' claims challenging their classification as independent contractors, seeking reimbursement for their expenses and payment of gratuities that Uber charged customers but did not remit to the drivers.[29]

A. THE DISTRICT COURT CORRECTLY HELD THAT WHETHER THE DRIVERS ARE UBER'S EMPLOYEES IS A QUESTION APPROPRIATE FOR CLASSWIDE RESOLUTION

Uber attempts to argue that the question of whether its drivers were appropriately classified as independent contractors is an individualized question not capable of classwide resolution. However, Uber's argument ignores the fact that courts have routinely certified classes of workers challenging their

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[28] Where, as here, the Court is "reviewing a grant of class certification, [this Court] accord[s] the district court noticeably more deference than when [it] review[s] a denial of class certification." Parsons v. Ryan, 754 F.3d 657, 673 (9th Cir. 2014).

[29] As noted earlier, this Court granted Uber's "petition for permission to appeal the district court's *December 9, 2015 order* granting class action certification", Appeal No. 15-80220, Dkt. 9 (emphasis added), but declined to grant Rule 23(f) review of the original class certification order, in which the District Court certified the drivers' claim that they had been misclassified and their gratuities claims. Appeal No. 15-80169, Dkt. 4. Thus, the only issues properly before the Court are those presented by the supplemental order of December 9, 2015. In any event, Plaintiffs will address Uber's arguments below about all the claims that were certified.

misclassification as independent contractors[30] under the California test established in S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 48 Cal. 3d 341 (1989).[31]

Courts have long recognized the appropriateness of deciding on a classwide basis whether workers performing the same job are appropriately classified as employees or independent contractors. See Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 327 (1992) (determination of employment status "generally turns on factual variables within an employer's knowledge, thus permitting categorical

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[30] See, e.g., Ayala v. Antelope Valley Newspapers, Inc., 59 Cal. 4th 522, 539-40 (2014); Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 997 (9th Cir. 2014); Bradley v. Networkers Int'l, LLC, 211 Cal. App. 4th 1129, 1147 (2012), as modified on denial of reh'g (Jan. 8, 2013) (reversing denial of class certification on misclassification claim); Gounev v. Delta Mech., Inc., 2015 WL 11658711, *4 (S.D. Cal. July 24, 2015); Villalpando v. Excel Direct Inc., 303 F.R.D. 588 (N.D. Cal. 2014); Soto v. Diakon Logistics (Delaware), Inc., 2013 WL 4500693, *7 (S.D. Cal. Aug. 21, 2013), clarified on denial of reconsideration, 2013 WL 5939787 (S.D. Cal. Nov. 5, 2013); Guifu Li v. A Perfect Franchise, Inc., 2011 WL 4635198, *2 (N.D. Cal. Oct. 5, 2011); Dalton v. Lee Publications, Inc., 270 F.R.D. 555 (S.D. Cal. 2010); Norris-Wilson v. Delta-T Grp., Inc., 270 F.R.D. 596 (S.D. Cal. 2010). Ruiz v. Affinity Logistics Corp., 2009 WL 648973 (S.D. Cal. Jan. 29, 2009); Smith v. Cardinal Logistics Mgmt. Corp., 2008 WL 4156364 (N.D. Cal. Sept. 5, 2008); Chun-Hoon v. McKee Foods Corp., 2006 WL 3093764 (N.D. Cal. Oct. 31, 2006).

[31] The Borello test is one of three tests that may be used under California law to determine if a worker is properly classified as an employee or independent contractor. As Plaintiffs argued below, see ER-1222, n. 2, California law has recognized even broader and more lenient standards under Martinez v. Combs, 49 Cal. 4th 35 (2010), which allows workers to establish employee status under any one of three alternative tests, including the right "(a) to exercise control over the wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship." Id. at 64. Under these even more lenient Martinez tests, certification of employee status should be even simpler.

judgments about the 'employee' status of claimants with similar job descriptions" and noting the unworkability of a test that would "lead to different results for claimants holding identical jobs"); Vizcaino v. U.S. Dist. Court for W. Dist. of Washington, 173 F.3d 713, 724 (9th Cir. 1999); Tierno v. Rite Aid Corp., 2006 WL 2535056, *9 (N.D. Cal. Aug. 31, 2006); Martins v. 3PD, Inc., 2013 WL 1320454, *8-9 (D. Mass. Mar. 28, 2013) (noting that "[c]lass actions are [] the preferred vehicle for adjudicating employment classification claims" because "[o]f necessity, a company's employee-classification scheme applies to all individuals classified under it"). These courts recognize that makes little sense to make differing individualized determinations of employee status for a large group of workers performing the same job. Moreover, as the District Court noted, "there is inherent tension between . . . Uber['s] argu[ment] that it has properly classified *every single driver* as an independent contractor . . . [and] Uber['s] argu[ment] that individual issues with respect to each driver's 'unique' relationship with Uber so predominate that this Court (unlike, apparently, Uber itself) cannot make a classwide determination." ER-38.

But not simply relying on this wealth of caselaw, as well as the logic of deciding on a classwide basis whether the drivers are appropriately classified, the District Court engaged exhaustively with every primary and secondary Borello factor before certifying a class. ER133-159; ER1041-42. The District Court noted

that "every (or nearly every) consideration under the California common-law test of employment can be adjudicated with common proof on a classwide basis. Some may favor Plaintiffs' position on the merits, while others support Uber's. But all favor certification." ER159.[32]

Uber attempts to defeat class certification by arguing that each and every Borello factor must be common to the class. See Br. at 45. As noted above, the District Court found that all Borello factors are common (except potentially part of one factor). However, the California Supreme Court has made clear that "the considerations in the multi-factor [Borello] test are not of uniform significance", see Ayala, 59 Cal. 4th at 539, and that the Court must carefully balance the "extent to which the various secondary factors would be of substantial relevance" and "the likely materiality of" of any factors that are subject to individual proof. McCleery v. Allstate Ins. Co., 2016 WL 463275, *11 (Cal. Ct. App. Feb. 5, 2016). Indeed, numerous courts have certified independent contractor cases even where not every single one of the Borello factors has been found to be common. See, e.g., McCleery, 2016 WL 463275, *11; Dalton, 270 F.R.D. at 562-63; Norris-Wilson, 270 F.R.D. at 608.

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[32] Indeed, out of all of the Borello factors, the only one to raise concern with the District Court was the "independent business" factor -- which the court addressed by excluding from the class drivers who it believed may present varying facts relevant to this factor – namely drivers who have driven for Uber through third party transportation companies (such as limo companies) or who have contracted with Uber using a corporate name. See infra, Part III.A.3.

In any case, Uber's argument that there are differences with respect to three of the fourteen Borello factors, is incorrect, and any alleged differences among drivers are not material or sufficient to defeat class certification.

1. UBER'S RIGHT TO CONTROL DRIVERS IS COMMON ACROSS THE CLASS, AND MINOR DIFFERENCES IN UBER'S CONTRACTS DURING THE CLASS PERIOD ARE NOT A REASON TO DENY CLASS CERTIFICATION

Of the Borello factors, "[t]he 'most significant consideration' is the putative employer's 'right to control work details.'" ER113 (quoting S.G. Borello, 48 Cal. 3d at 350). The California Supreme Court has made clear that "the strongest evidence of the right to control is whether the hirer can discharge the worker without cause" because possessing the right to terminate at will means workers will always be under the employer's control, aware that they must do precisely what the employer wishes or risk termination. Ayala, 59 Cal. 4th at 531.

The District Court was correct in finding that Uber's right to control drivers was common notwithstanding immaterial differences in Uber's contracts with its drivers, which bear no relationship to the reality of its practices. The record shows that Uber has *one* integrated system, under which it uniformly retains control of pricing, payments to drivers, access to the Application, and what standards drivers will be held to. ER133-159. Here, despite Uber's *post hoc* attempt to claim there are contractual variations in its ability to terminate drivers at will, both Uber's

contracts with drivers ***and*** the factual record reflecting its actual practice[33], demonstrate that Uber uniformly has the discretion to terminate drivers at will.[34]

Uber attempted to claim that Plaintiffs could not show a uniform right to control because some of its contracts with drivers include a "mutual termination" clause, while others allow for "at will termination." Br. at 49-50. However, there is no material significance in this difference, as either version allows Uber to terminate for any or no reason. Indeed, Uber's own witness, Vice President of Operations Ryan Graves, testified that, in deciding whether to discipline or terminate drivers, Uber does not consult drivers' contracts to determine what version they signed and thus whether Uber has the right to do so. See SER340 at 185:15-186:8; ER-143, n.21 (District Court noted in class certification order that

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[33] See SER406-419; SER456-99 (examples of Uber using its discretion to terminate and suspend drivers).

[34] Employee status can be shown by demonstrating either a uniform right to control workers *or* a uniform practice of controlling workers. In emphasizing the importance of the *right* to control, the California Supreme Court in Ayala recognized that an employer still retains a critical level of control by virtue of possessing the right to discipline or terminate employees, *even if it chooses not to exercise that right*. However, this conclusion does not mean that an employer which uniformly terminates workers in its discretion for any or no reason cannot be subject to class certification on a misclassification claim simply because it has inserted nominal differences into its contracts that bear no relationship to reality, particularly since "the rights spelled out in a contract may not be conclusive if other evidence demonstrates a practical allocation of rights at odds with the written terms." Ayala, 59 Cal. 4th at 535. Under these circumstances, the District Court was correct to consider *both* the reality of the working relationship – that "Uber does not in practice differentiate between contracts in terminating drivers," ER143 – and Uber's theoretical "right" to control its drivers.

"Uber's former CEO testified that he is unaware of any system that would permit Uber to determine what its contractual duties are vis-á-vis termination with respect to any individual driver"); Gonzalez v. Workers' Comp. Appeals Bd., 46 Cal. App. 4th 1584, 1593 (1996); Brose v. Union-Tribune Publ'g Co., 183 Cal. App. 3d 1079, 1085–86 (Ct. App. 1986) (where "the agreement could be terminated by either party in 30 days or by the Company immediately if Doucette violated the [agreement]" court found that company maintained the right to terminate at will).[35]

Similarly, Uber tried to argue that some contracts allow drivers to "negotiate fares", while others do not, see Br. at 48. But the District Court correctly recognized that there is no way for drivers to alter the amount of the fare, which is determined in Uber's sole discretion by its own formula. ER-136; see also SER376 at 165:2-21, 167:20-168:7.[36]

Likewise, that some contracts technically permit drivers to work for other ride-sharing companies, and others do not, see Br. at 46, does not defeat class

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[35] Moreover, a true independent contractor "would have to finish out his contract or pay damages to Uber for early termination," ER-141, n.19, which ***none*** of Uber's contracts require. See also Solis v. Cascom, Inc., 2011 WL 10501391, *6 (S.D. Ohio Sept. 21, 2011) (workers who "worked until they quit or were terminated" had relationship "similar to an at-will employment arrangement").

[36] As the District Court noted, Uber's suggestion that "drivers have the power to negotiate their own fares with riders because they can turn off the Uber application before a ride is complete" is simply disingenuous because it means that drivers can only "negotiate" their compensation *downward*, and it says nothing regarding whether they can negotiate the pre-determined fare formula *with Uber*. ER-137. Indeed, it is unrefuted that drivers uniformly cannot do so. Id.

certification; instead, "what is relevant is that Uber acknowledges that it retains the exact same right of control over all of its drivers with respect to their ability to work for other companies like Lyft and Sidecar—none." ER-138. Indeed, Uber has represented on numerous occasions that "it *never* restricts drivers from simultaneous use of other apps like Lyft and Sidecar." Id. at n.18 (emphasis added). Uber cannot rely on meaningless language in its contracts where "other evidence demonstrates a practical allocation of rights at odds with the written terms." Ayala, 59 Cal. 4th at 535.

Similarly, that some contracts allow drivers to accept gratuities while others do not, does not establish that there was meaningful variation in Uber's right to control drivers. It is not clear how this issue even impacts the independent contractor analysis since both independent contractors and employees traditionally receive tips.

In sum, the fact that Uber has apparently inserted meaningless language in some contracts does not create material differences between drivers when these alleged differences are not borne out by reality. The District Court correctly found that the record demonstrates one integrated system under which Uber uniformly maintains immense control over many aspects of its drivers work and no control over others. The Court's in-depth analysis of the record is sound, and its conclusion that Uber's right to control is common across the class is entitled to

deference by this Court. Parsons, 754 F.3d at 673.

2. VARIATION IN DRIVERS' SUBJECTIVE BELIEFS REGARDING WHETHER THEY ARE EMPLOYEES IS NOT A BASIS FOR DENYING CLASS CERTIFICATION

Uber next argues that differences in drivers' subjective beliefs regarding "whether or not the parties believe they are creating the relationship of employer-employee" varies across the class and precludes certification. Br. at 51-52 (quoting Borello, 48 Cal.3d at 351). This argument was also soundly rejected below because "the label that the parties attach to the relationship is not dispositive and will be ignored if their actual conduct establishes a different relationship." Bradley, 211 Cal.App.4th at 1146; see also Grant v. Woods, 71 Cal. App. 3d 647, 654 (Ct. App. 1977) ("the belief of the parties as to the legal effect of their relationship is not controlling if as a matter of law a different relationship exists"). Indeed, the question of whether or not workers are aware of their legal rights, or even understand the legal difference between an employee and an independent contractor, should be no basis for denying them protections of the wage laws through a class action.[37]

Moreover, as the District Court noted, "the evidence overwhelmingly

[37] As discussed infra at pp. 48-50, the question of whether workers "want to be" classified as employees or independent contractors likewise has no relevance to the question of their correct classification, since employees cannot disclaim their rights under the wage laws.

indicates that all Uber drivers likely understood themselves to be agreeing to be independent contractors *when they first signed up to drive for Uber*." ER-82 (emphasis added). "[T]he question is not whether the drivers thought they *should* be employees, or even whether after some contemplation ***they now think that they are employees***, but whether they believed they were signing on to be Uber's employee when the relationship between the parties was first 'created.'" ER-82, n. 31 (emphasis added). See Alexander, 765 F.3d at 997 (noting that "plaintiffs admit that on the day they signed their original Operating Agreement, *in reliance on Defendants' statements that they would be an independent contractor,* they intended to enter into an independent contractor relationship" but ultimately concluding that drivers were employees) (emphasis in original). Thus, the fact that the named plaintiffs now "believe they are Uber's employees" (and indeed have brought suit on this very point) does not suggest that they believed they were entering into a relationship as employees at the time they signed up to work for Uber (and in fact, the named plaintiffs have admitted that they filed taxes as independent contractors, see ER-83).[38] To adopt Uber's argument here would

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[38] The cases Uber cites in support of this questionable proposition are clearly distinguishable. For example, in Ali v. U.S.A. Cab Ltd., 176 Cal. App. 4th 1333, 1351 (2009), the Appeals Court reviewed a decision denying class certification under a deferential abuse of discretion standard and affirmed where the drivers' subjective beliefs was *just one of many* Borello factors that cut against certification. The court even acknowledged that "[p]erhaps another trial judge

mean that employees can never change their perspective and come to eventually believe that they are misclassified without defeating commonality (because some may learn about the law and reach this conclusion and others may not).

3. THE DISTRICT COURT'S EXCLUSION OF DRIVERS WHO DROVE THROUGH THIRD-PARTY COMPANIES OR USED CORPORATE NAMES WAS A REASONABLE MEANS TO REDUCE POTENTIAL VARIATION ON THE "INDEPENDENT BUSINESS" PORTION OF ONE BORELLO FACTOR

The District Court recognized that most, if not all, of the Borello factors are susceptible to common proof. Indeed, out of all of the Borello factors, the only factor that raised concern with the District Court was the "independent business" factor (i.e. "whether the one performing services is engaged in a distinct occupation *or business*," see Borello, 48 Cal. 3d at 351 (emphasis added)). The District Court addressed this point by excluding from the class any drivers who drove through third-party companies or who contracted or were paid under corporate names rather than in their own names. ER144-48, ER170.

Uber attacks the District Court's method for addressing potential variation in

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considering the matter in the first instance would have allowed class treatment." Id. Similarly, in Sotelo v. MediaNews Grp., Inc., 207 Cal. App. 4th 639, 659 (2012), the Appeals Court again reviewed a decision denying certification, according it deference, and affirming where the parties' subjective beliefs were just one of *many* factors found not to be common among the class. Moreover, even the trial court in that case acknowledged that "a class members' belief about his or her status will not defeat employment status [], as a subjective standard may be entitled to less weight." Id.

the "independent business" Borello factor. First, the "independent business" factor is just one of the Borello factors, and numerous courts have certified independent contractor cases even where not every single Borello factor is found to be common. See supra, p. 34. In any case, here, the District Court chose a reasonable method for eliminating potential differences in this particular factor by conservatively excluding those drivers who may have considered themselves to be independent businesses by having taken the step of incorporating their businesses or driving through an independent third-party company.[39] Although Plaintiffs opposed the court's exclusion of these drivers from the class, SER146-152, this method of tailoring the class was a reasonable solution to address its concerns and is not a ground to reverse class certification.

Uber claims that the District Court's tailoring of the class to remove drivers who drove through corporations did not adequately address variations among class members, but the facts that Uber focuses on are not material or do not actually differ among class members. First, Uber argues that because some drivers drive for Uber's competitors like Lyft, they are engaged in a "distinct business" while others are not. However, whether certain drivers work for Uber's competitors is irrelevant; many low-wage workers work multiple jobs, sometimes for businesses

[39] Plaintiffs had proposed limiting the class by excluding "drivers who had others working under them." SER151, n. 22. The District Court elected an even broader exclusion.

in the same industry. See ER146, n. 24 (noting that "Drivers like Manahan and Gurfinkel, [] more closely resemble fast-food workers who may work shifts at both Burger King and McDonald's"). Uber has admitted that it never prevented its drivers from working for competitors like Lyft, see ER138, and whether or not drivers take advantage of this ability has no bearing on whether they are Uber's employees *while driving Uber passengers*. When class members drive Uber passengers, they are indisputably (and commonly) wearing Uber's "hat" and not that of a private business. For example, Uber customers cannot request a particular driver, see O'Connor, SER442 at 209:8-210:1, and thus, there is no mechanism for drivers to "independently advertis[e]," see Br. at 54, or recruit repeat clients among Uber customers (even if they were to print up business cards, or distinguish themselves in some way to customers).[40] When drivers are logged into Uber's system, their only choice is to take whatever rides are offered them, and if they do not accept enough rides, they face discipline (such as being terminated or being offered fewer rides). SER391 at 130:1-22.

Likewise, Uber's argument that some drivers "use Uber only to add a little extra cash to their incomes" while others drive full-time, see Br. at 54, has no

[40] Addressing a similar issue, the Massachusetts Supreme Judicial Court looked to "whether the worker is wearing the hat of an employee of the employing company, or is wearing the hat of his own independent enterprise". Coverall North America, Inc. v. Division of Unemployment Assistance, 447 Mass. 852, 858 (2006) (holding that a cleaning worker was an employee, entitled to unemployment compensation).

bearing on the "distinct business" factor. Whether a waiter picks up a single shift per week, or instead works full-time, does not affect his status as an employee of the restaurant where he serves, just as driving more or fewer hours does not make an Uber driver any more or less an employee. Instead, "[t]he relevant question is Uber's right to control its drivers' schedules." ER135, n. 15. "Because [Uber] uniformly has no such control, it is not surprising that there are significant differences between class members with respect to the actual number of hours they spend driving for Uber," but what matters is that drivers *uniformly* choose how much or how little to drive. Id.

B. THE DISTRICT COURT CORRECTLY FOUND THAT PLAINTIFFS GURFINKEL AND MANAHAN ARE ADEQUATE CLASS REPRESENTATIVES

1. PLAINTIFFS REASONABLY SOUGHT REIMBURSEMENT FOR VEHICLE AND PHONE EXPENSES

At the same time that Uber has vociferously argued that its drivers were not entitled to reimbursement of any expenses, and that their method of calculating expenses is excessive, Uber also argues that the lead plaintiffs are not adequate to represent the class on the expense reimbursement claim because they "only" sought reimbursement of vehicle expenses, based upon the IRS reimbursement rate, and phone expenses. Thus, Uber contends, the lead plaintiffs were willing to "sacrifice" claims for other categories of expenses that some drivers incurred. Br. at 55-58. The District Court soundly rejected this argument, which is a transparent

attempt by Uber to escape class liability for its own legal violation in the name of "protecting" the class. See Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, U. A., 657 F.2d 890, 895 (7th Cir. 1981) ("When it comes . . . to determining whether 'the representative parties will fairly and adequately protect the interests of the class,' . . . it is a bit like permitting a fox, although with a pious countenance, to take charge of the chicken house").

Plaintiffs followed the weight of caselaw in which courts have routinely approved of the use of the IRS mileage reimbursement rate as the measure of reimbursement damages for vehicle expenses. See, e.g., Dalton v. Lee Publications, Inc., 270 F.R.D. 555, 564 (S.D. Cal. 2010); Zellagui v. MCD Pizza, Inc., 59 F.Supp.3d 712, 721 (E.D. Pa. 2014); Koral v. Inflated Dough, Inc., 2014 WL 4904400, *3 (D. Co. Sept. 9, 2014); see also Lewis v. Starbucks Corp., 2008 WL 4196690, *6 (E.D. Cal. Sept. 11, 2008) (utilizing IRS reimbursement rate to gauge reasonableness of settlement award of class claims under § 2802); Schulz v. QualxServ, LLC, 2012 WL 1439066, *6 (S.D. Cal. Apr. 26, 2012). Uber attacks Plaintiffs for not seeking enough in their expense reimbursement claim, but also argues that Plaintiffs' proposed reimbursement, based on the IRS mileage rate, would ***overcompensate*** class members. SER37, n.33. Uber cannot have it both ways, and the District Court properly rejected this argument.

The District Court correctly recognized that vehicle maintenance and phone

expenses are the expenses that *all Uber drivers* incur and that these expenses necessarily constitute the majority of drivers' expenses. ER-97-98.[41] Indeed, it is far from clear that the other expenses that Uber disingenuously attacks Plaintiffs for not seeking are even "necessary" to performing the duties of an Uber driver at all and thus may well not even be reimbursable under § 2802.[42] It is the class

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[41] It is disingenuous for Uber to argue that Plaintiffs seek "only" a "narrow subset of expenses" subsumed in the IRS rate, see Br. at 9, when that rate includes vehicle depreciation or lease payments, maintenance and repairs, oil, gas, tires, insurance, and license and registration fees; it is "self-evident" that these expenses comprise the vast majority of necessary business expenses for a driver, along with the smartphone and data plan needed to drive for Uber. ER- 97. Indeed, the entire purpose of the IRS rate is to make it unnecessary for individuals to keep track of their actual vehicle expenses.

[42] The other expenses that Uber describes, such as refreshments for riders, radio subscriptions, and car washes, see Br. at 58, Uber would certainly argue are *not* "necessary" business expenses, and thus, they may not be recoverable at all, meaning that Plaintiffs did not "waive" anything. USS–POSCO Indus. v. Case, 244 Cal. App. 4th 197, 206 (2016), reh'g denied (Feb. 19, 2016), review denied (Apr. 20, 2016) (where employee had option not to incur the expense, it is not recoverable under § 2802). Simply because some drivers paid for these expenses and would like to have them reimbursed does not make the lead plaintiffs inadequate for not seeking them, when it was far from clear they could be recovered. Indeed, courts have recognized that "[a]bsent evidence Defendant knew or had reason to know that Plaintiff had incurred business-related expenses, Defendant is not liable for failure to reimburse [them]… as a matter of law." Hammitt v. Lumber Liquidators, Inc., 19 F. Supp. 3d 989, 1000–01 (S.D. Cal. 2014). Here, Uber would certainly argue that it had no reason to know whether drivers incurred these other categories of expenses.

In any event, Plaintiffs did not "waive" these expenses but instead set forth a proposed methodology for drivers who wanted to seek reimbursement for these other expenses to do so, in addition to the class' pursuit of the classwide expenses that were indisputably incurred by anyone who has driven for Uber. See SER138, n. 7. The District Court, however, held that it would not allow class members to

representatives' role to make reasonable decisions regarding which claims and damages to pursue, and here, Plaintiffs made a reasonable decision in the interests of maximizing recovery for the class as a whole. ER-97-98. As the District Court rightly recognized, "[t]his is not a case where the class representatives are pursuing relatively insignificant claims while jeopardizing the ability of class members to pursue far more substantial, meaningful claims." ER-97[43] (quoting In re Universal Serv. Fund Telephone Billing Practice Litigation, 219 F.R.D. 661, 669 (D. Kan. 2004) ("the named plaintiffs' decision to abandon the fraud claim appears to have been a choice that advances the named plaintiffs' interests as well as the interests of the absent class members…"); see also Thomas v. FTS USA, LLC, 312 F.R.D. 407 (E.D. Va. 2016); Gillespie v. Equifax Info. Servs., LLC, 2008 WL 4614327, *5 (N.D. Ill. Oct. 15, 2008) ("[Plaintiffs'] strategic decisions about what claims to bring against Equifax do not render them inadequate class representatives").

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pursue claims for additional expenses in this proceeding, but instead ensured that the class notice clearly notified class members that if they wished to pursue claims for other expenses, they would need to take separate action to do so. See SER59-60, SER64-65.

[43] For example, in Tasion Commc'ns v. Ubiquiti Networks, Inc., 308 F.R.D. 630, 641 (N.D. Cal. 2015), the court denied certification of a class where the plaintiffs waived "damages [that] are likely to exceed by many times" the value of what the claims they were seeking to certify. That is plainly not the case here.

2. SOME DRIVERS' PREFERENCE TO REMAIN MISCLASSIFIED IS NOT A VALID GROUND TO DENY CLASS CERTIFICATION

In a further attack on the plaintiffs' adequacy, Uber argues that "plaintiffs seek a remedy (employment status) that countless absent class members oppose." Br. at 56. Courts have long recognized that companies may not rely on workers disclaiming their rights under the wage laws in order to evade compliance with those laws. It is well established that the question is not whether workers "want" to have their wage rights vindicated; the relevant question is whether their rights ***have*** been violated. "[A]n interest by certain putative class members in maintaining the allegedly unlawful policy is not a reason to deny class certification." See Matamoros v. Starbucks Corp., 699 F.3d 129, 138 (1st Cir. 2012) (affirming class certification, notwithstanding defendant's submission of dozens of affidavits from putative class members attesting they did not agree with the litigation and felt they would be harmed if it was successful).[44] The District Court's role here was to determine whether adjudication of those rights could be

[44] The Supreme Court has declared that "[i]f an exception … were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections." Tony & Susan Alamo Foundation v. Sec'y of Labor, 471 U.S. 290, 302 (1985) (employer liable for paying even employees who ***do not want*** to be reimbursed for their wages). See also Martin v. Tango's Restaurant, Inc., 969 F.2d 1319, 1324 (1st Cir. 1992) (awarding damages to an "involuntary plaintiff", recognizing that enforcement of wage laws serves an important public purpose, including protecting complying competitors).

done on a classwide basis, and the mere fact that some workers would prefer not to have their rights enforced is not a ground to deny class certification.

Courts have regularly considered and rejected similar arguments when considering whether to certify independent contractor misclassification claims. See, e.g., Dalton v. Lee Publications, Inc., 270 F.R.D. 555, 560 (S.D. Cal. 2010) ("Defendant argues that … class members prefer the freedom of being an independent contractor… But merely because some class members do not want to pursue these claims does not mean the class should not be certified…"); Smith v. Cardinal Logistics Mgmt. Corp., 2008 WL 4156364, *7 (N.D. Cal. Sept. 5, 2008) ("[W]here certain employees, …seek to invoke the protections afforded under California labor laws, courts must be mindful of…[the] public purpose beyond the private interests of the workers themselves.").

Moreover, the basis for Uber's assertion is doubtful: Uber points to 400 "happy camper" declarations it submitted in opposing class certification. However, these declarations are not statistically significant in a class of hundreds of thousands of drivers. As the District Court observed, "there is nothing to suggest (and Uber does not contend) that these 400 drivers were randomly selected and constitute a representative sample of the driver population[] [n]or is there evidence that the responses of these drivers were free from the taint of biased questions." ER-127. Further, only 150 of these drivers actually stated in their

declarations that they preferred to remain independent contractors, see ER-127; many of these drivers were not ultimately included in the certified class (because of the court's exclusion of drivers who used a corporate name), see ER-127, n. 10; and many of the declarations seem merely to reflect a layperson's understanding that the drivers would necessarily lose all flexibility in their work if they were reclassified as employees – a point that is hardly assured (and that was likely suggested to them by Uber in soliciting the declarations). Indeed, Plaintiffs submitted evidence showing that, when asked whether they wanted to be reimbursed for their expenses, the very same drivers who submitted these declarations said that they ***did*** want to be reimbursed and did not understand that is one of the remedies that Plaintiffs are seeking in this case. ER-128; SER308, 312.

In sum, the stated desires of a minute fraction of the class that they like the way Uber operates is irrelevant to the question of whether Uber has violated the law by classifying them as independent contractors. The District Court correctly disregarded these declarations.

C. THE DISTRICT COURT PROPERLY CERTIFIED THE GRATUITIES CLAIM

In addition to their claim for expense reimbursement, Plaintiffs also brought a claim under the California Gratuities Law, Cal. Labor Code § 351, based on the allegation that Uber advertised that a gratuity has been included in the fare, but

Uber has not remitted the proceeds of this gratuity to the drivers.[45] The District Court correctly found this claim suitable for class certification, both in its initial class certification order and in a later order denying Uber's effort to decertify this claim.[46]

Plaintiffs submitted evidence showing that Uber included a tip in its fare. ER159 (describing "extensive evidence"). Because it has not specified exactly what the amount of the tip is, the District Court agreed with Plaintiffs that a factual issue would be raised for trial of what amount of gratuity a reasonable customer would understand they were paying.[47] Uber argues that the District Court erred in certifying this claim because it would be an individualized question of what each customer believed they were paying as gratuity. This argument misses the point of

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45 Rather than remitting the full gratuity to the drivers, Uber has taken its commission from the entire fare and thus not remitted to the drivers the total proceeds of the gratuity that Plaintiffs allege Uber has charged customers. Section 351 requires that all gratuities be remitted to service employees, and the employer may not retain a portion of it. See Cal. Labor Code § 351; ER160.

46 Neither order is now properly before the Court, since the gratuities claim was certified in the initial class certification order, see supra at n. 29 and the District Court's denial of Uber's motion to decertify this claim (Dkt. 499) is also not before this Court.

47 See ER162-163 ("Assuming for a moment that the jury finds Uber liable for violating section 351, it will then be tasked with determining what portion of the fares charged actually was the tip…For example, the jury could determine that the average customer (or driver, or both) would expect that any advertised 'included gratuity' would be 15% of the total fare charged").

Plaintiffs' claim; because Uber did not specify the amount of the gratuity, the factual issue for trial is what a reasonable customer would understand they were paying. This reasonableness inquiry can be decided on a classwide basis, and courts have routinely presented such questions to juries.[48]

For instance, in Mooney v. Domino's Pizza, 2016 WL 4576996, *4 (D. Mass. 2016), the court certified a class under the Massachusetts' tips law of pizza delivery drivers who claimed that customers reasonably believed that a fee that was included in their bills was a tip. The court agreed that this claim was certifiable, as it would be for the jury to determine whether customers reasonably believed they were paying a tip, based on the employer's designation of the fee in question, not what each individual customer actually believed. The court rejected the defendant's argument that each customer's individual understanding would need to be established, explaining that a "transaction-by-transaction approach . . . would make the Tips Act effectively unenforceable even in single-plaintiff litigation, as no employee would be able to litigate the specific circumstances of the individual customer interactions, undoubtedly resulting in situations in which employees were improperly deprived of tips." Id. See also DiFiore v. American Airlines, Inc., 561 F. Supp. 2d 131, 136 (D. Mass. 2008) (utilizing a "reasonable []

[48] See, e.g., Simpson v. Kroger Corp., 219 Cal. App. 4th 1352, 1371 (2013); Peak-Las Positas Partners v. Bollag, 172 Cal. App. 4th 101, 106, (2009), as modified (Mar. 26, 2009) ("[O]bjective reasonableness [is a] question[] of fact").

passenger" standard under Massachusetts tips law to determine whether customers would have understood that a fee charged to them was a tip for the skycaps); Overka v. American Airlines, Inc., 2010 WL 517407 (D. Mass. Feb. 4, 2010) (certifying similar tortious interference claim in nationwide class action in which skycaps challenged the employer's charging a fee that reasonably appeared to customers to be a tip).

The District Court's certification of the § 351 claim followed this line of authority by allowing the jury to determine the amount that a reasonable customer would understand to be the tip, based on Uber's representations, coupled with their own real-life experiences regarding the customary amount of a tip. Far from pulling a figure "out of thin air" as Uber suggests, see Br. at 61, Plaintiffs presented evidence from which the jury could conclude that a reasonable customer would understand that Uber was including a gratuity based on 20% of the fare, which is a standard amount of gratuity in the car service industry. See O'Connor, Dkt. 485-3 at 9 ("20% tip is included in the fare."); SER361 at 21:18-22:7.[49]

[49] For instance, Plaintiffs presented evidence that Uber itself has acknowledged a 20% tip to be a "customary" amount of a tip. Although Uber did not always specify the amount of the gratuity included in its fare for UberBlack and UberX drivers, it has at various times explicitly ascribed 20% to be the amount of tip that was included in the fare. See id. at 20 ("Customer:…what is the percentage/total for tips to the driver? How is that calculated. Uber: It's 20%, included in the fare. ☺"); id. at 29 ("Tip is included in your fare (about 20%) so no need to ever worry about this!"); id. at 52. Also, Plaintiffs noted that Uber's Rule 30(b)(6) witness testified that the UberTaxi service (which is not a part of this case) sets 20% as the

Unlike in Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1434 (2013), which Uber cites for the general proposition that a classwide damages methodology cannot be arbitrary and speculative, Plaintiffs' theory of damages is based on an objective reasonableness standard, under which a fact-finder would be called upon to assess Uber's own representations, coupled with their lay understanding of the typical amount of a tip in the car service industry. The District Court's certification of the gratuity claim is sound and should be affirmed.

IV. THE DISTRICT COURT'S RULE 23(D) ORDERS ARE MOOT, BUT IN ANY CASE, THE COURT ACTED WELL WITHIN ITS DISCRETION TO SUPERVISE CLASS COMMUNICATIONS WHEN IT ISSUED THEM

Finally, the District Court issued two separate Rule 23(d) Orders in this case, each of which is the subject of a separate appeal. However, there is no reason for this Court to address either of these Rule 23(d) appeals, as they are both moot.

The first Rule 23(d) Order was issued at the outset of the case in response to Plaintiffs' protest that Uber had just distributed a new arbitration agreement to its drivers, which failed to inform them of the now pending litigation and the rights they were potentially giving up if they accepted the new agreement without opting out of the arbitration clause. ER172, ER188.[50] Uber's appeal of this order, No. 14-

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default tip, recognizing that 20% is a standard amount for a tip in the transportation industry. See SER361 at 21:18-22:7.

[50] Plaintiffs moved to dismiss this appeal on the ground that the Order at issue was an un-appealable case management order (see Appeal No. 14-16078, Dkt. 8);

16078, has been mooted by this Court's later decision in Mohamed.

In Mohamed, the Court found that Uber's 2013 arbitration agreement was not procedurally unconscionable, since it contained an opt-out provision, which the Court held was not "illusory." Mohamed, 848 F.3d at 1211. The purpose of the District Court's original Rule 23(d) Order was to make the opt-out provision less "illusory" by requiring it be more visible to drivers and that drivers be allowed to opt out by email, rather than simply overnight delivery. ER2144; ER2148.

However, because this Court rejected the District Court's finding that the 2013 agreement's opt-out provision was illusory, there is effectively no relevant difference between the opt-out provisions in the 2013 agreement and the later 2014 arbitration agreement (which Uber distributed in response to the District Court's order). Thus, after Mohamed, the original 2013 Rule 23(d) Order was superfluous and is moot. There is therefore no reason for the Court to even address this appeal.

The second Rule 23(d) Order was issued two years later, following Uber's distribution of a new arbitration agreement just two days after the District Court issued its Supplemental Class Certification Order, which expanded the class by

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the Court denied this motion without prejudice to revisiting the issue in the appeal itself (Dkt. 12). As explained in their motion, courts have routinely held that such orders in which a trial court is merely exercising its right to control class communications pursuant to Fed.R.Civ.P. 23(d) are not appealable interlocutory orders. See Radcliffe v. Transunion, LLC, 419 F. App'x 768, 769 (9th Cir. 2011) (noting that an order limiting class communications under Rule 23(d) is typically not appealable); Catena v. Capitol Indus., Inc., 543 F.2d 77, 79 (9th Cir. 1976).

including drivers who were bound by Uber's 2014 arbitration agreement. ER-25. That arbitration agreement (the "2015 agreement") was an attempt by Uber to "fix" the issue that had led the District Court to conclude that the arbitration agreement was not enforceable (namely it remedied the non-severable PAGA waiver). Upon Plaintiffs' protest, the District Court required that Uber provide enhanced notice to the drivers regarding the implications of accepting this new arbitration agreement without opting out. ER765-89; ER31-32.

However, that Order was also mooted by this Court's decision in Mohamed, which rejected the District Court's rationale for concluding that Uber's earlier arbitration agreements were unenforceable.[51] After this Court's ruling in Mohamed, if the 2013 and 2014 agreements are unenforceable, it is for the reason that Plaintiffs argue here (that the class action waiver contained within them violates the drivers' rights under the NLRA), which applies equally to the 2015 agreement. Thus, the enforceability of the 2013 and 2014 agreements is no different from that of the 2015 agreement. Therefore, any steps the District Court took to help ensure that drivers had adequate notice of what rights they may be giving up by accepting the 2015 agreement (as opposed to the 2013 or 2014 agreement) without opting out of arbitration have now been rendered superfluous,

[51] This appeal was also mooted because the District Court terminated the 2015 Rule 23(d) Order. ER2272 (Dkt. 522). The Order is therefore no longer in effect, and it is not clear to Plaintiffs what relief Uber is even seeking through this appeal.

and Uber's appeal of the District Court's order is also moot.

If, however, the Court believes for some reason that it does need to reach the merits of these appeals, the Court should hold that the District Court acted well within its discretion under Rule 23(d) to supervise communications with putative class members (or in the case of the second order – communications with certified class members).

With respect to the original Rule 23(d) order, the District Court was well within its discretion to determine that class members should be apprised of what rights they may be giving up by accepting Uber's new agreement but not opting out of the arbitration clause, given that a class action had just been filed on their behalf. Courts have broad discretion to manage communications with putative class members when they are concerned that companies are engaging in misleading communications that may deprive them of their rights in a pending class action.[52] Thus, if this Court feels the need to reach this issue, it should affirm that the

[52] See, e.g., Kleiner v. First Nat. Bank of Atlanta, 751 F.2d 1193, 1206, n. 28 (11th Cir. 1985); Buck v. Republic Services, Inc., 2013 WL 2321784, *2 (E.D. Mo. May 28, 2013) ("[T]he Court orders Defendants to provide notice to Plaintiffs' counsel of any written communication they intend to send potential class members three days prior .... Plaintiffs will then will have three days to file a motion with the Court addressing any concerns"); Mevorah v. Wells Fargo Home Mortg., 2005 WL 4813532, *3 (N.D. Cal. 2005); Keystone Tobacco Co., Inc. v. U.S. Tobacco Co., 238 F. Supp. 2d 151, 154 (D.D.C. 2002); Basco v. Wal-Mart Stores, Inc., 2002 WL 272384 (E.D. La. Feb. 25, 2002); Hampton Hardware, Inc. v. Cotter & Co., 156 F.R.D. 630, 634 (N.D.Tex.1994) (limiting the defendant's communications with class members prior to certification).

District Court had the discretion to fashion a remedy that it saw fit to make more clear what was being presented to the drivers.[53]

With respect to the new arbitration agreement that Uber distributed in December 2015, two days after the District Court certified a class including all drivers who were bound by the arbitration clause, Uber was attempting to undermine the certification going forward, in the hope of protecting itself from any further future liability on a classwide basis. The District Court's order simply sought to ensure that class members were aware that, by not opting out of the new agreement, they might be giving up their right to participate in class litigation going forward.[54] Thus, if the Court feels the need to address this Order (even

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[53] Uber contends that, through its Rule 23(d) orders, the District Court was "encouraging" drivers to opt out of arbitration, in violation of the FAA. This argument is akin to arguing that courts that have imposed protective orders, such as in Guifu Li v. A Perfect Day Franchise, Inc., 270 F.R.D. 509, 518 (N.D. Cal. 2010), Cty. Of Santa Clara v. Astra USA, Inc., 2010 WL 2724512, *3 (N.D. Cal. July 8, 2010), and Slavkov v. Fast Water Heater Partners I, LP, 2015 WL 6674575, *2, *7 (N.D. Cal. Nov. 2, 2015), were improperly "encouraging" class members to reject settlement offers, or "encouraging" class members not to opt out of class actions, simply by taking measures to help ensure that any such decisions by class members were knowing and voluntary decisions and not the result of coercive tactics by the defendants.

[54] In addition to reviewing the challenged communications (which on their face purported to prevent drivers from participating in pending class cases, see ER28), the District Court also considered the manner in which the new agreement was presented (in "direct response to the Court's rulings in the ongoing class action litigation" id.), as well as a declaration from Plaintiffs' counsel attesting that within twelve hours of its dissemination, she had received "between 100-200 inquiries from Uber drivers who are concerned, dismayed, and confused." ER549, ER767 at

though it is now moot, as described above), it should decline to reverse the Order because the District Court did nothing more than help ensure that drivers would understand what rights they were potentially giving up going forward by accepting the new agreement.[55]

CONCLUSION

The District Court's extremely thorough class certification analysis, which followed voluminous briefing and multiple hearings, broke no new ground, was well reasoned, and should be affirmed. The District Court clearly did not abuse its discretion in granting class certification, as common issues plainly predominate in this case.

Uber's attempt to limit the class through the use of its arbitration clause

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[55] Indeed, if anything, Plaintiffs contended that the District Court's Order did not go far enough to protect class members. Plaintiffs cross-appealed the Order, arguing that a defendant should not be permitted to limit its potential class liability by distributing a new arbitration agreement that limits the workers' rights to participate in a currently pending class action. SER55-57. See, e.g., Jimenez v. Menzies Aviation Inc, 2015 WL 4914727, *6 (N.D. Cal. Aug. 17, 2015); Balasanyan v. Nordstrom, 2012 WL 760566 (S.D. Cal. Mar. 8, 2012) (invalidating new arbitration agreement with a class waiver, distributed during pendency of a class action); Espinoza v. Galardi S. Enterprises, Inc., 2015 WL 9592535, *3 (S.D. Fla. Dec. 31, 2015) (refusing to enforce arbitration agreements distributed during the pendency of an FLSA collective action); Piekarski v. Amedisys Illinois, LLC, 4 F. Supp. 3d 952, 956 (N.D. Ill. 2013) (refusing to enforce arbitration agreements distributed during the pendency of case); Williams v. Securitas Sec. Serv. USA, Inc., 2011 WL 2713741, *2 (E.D. Pa. July 13, 2011) (same).

should be rejected because the lead plaintiffs opted out of arbitration on behalf of the class (or at least tolled the time for class members to opt out of arbitration, which they did by choosing to stay in the class, once it was certified), and thus it is not relevant whether the arbitration clause would be enforceable against absent class members, were they to bring their own claims.

However, even if the Court does choose to address the question of whether the arbitration clause is enforceable, it should hold that it is not (and that the District Court properly did not limit the class based upon which drivers were bound by arbitration) because the class action waiver in the arbitration clause renders it illegal under the NLRA.

The District Court's case management protective orders in which it supervised Uber's communication with the class and potential class are non-appealable and in any event moot. Should the Court believe it needs to address these orders on the merits, it should affirm them, as they were properly within the District Court's discretion.

Dated: May 31, 2017

Respectfully submitted,

/s/ Shannon Liss-Riordan_____
LICHTEN & LISS-RIORDAN, P.C.

Attorney for Plaintiff-Appellees

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) *Gillette v. Uber Techs., Inc.*, No. 15-16250, District Court No. 3:14-cv-05241-EMC; (5) *O'Connor v. Uber Techs., Inc.*, No. 15-17420, District Court No. 3:13-cv-03826-EMC; (6) *Yucesoy v. Uber Techs., Inc.*, No. 15-17422, District Court No. 3:15-cv-00262-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. 15-17532, District Court No. 3:13-cv-03826-EMC; (9) *Yucesoy v. Uber Techs., Inc.*, No. 15-17532, District Court No. 3:15-cv-00262-EMC; (10) *Mohamed v. Uber Techs., Inc.*, 15-17533, District Court No. 3:14-cv-05200-EMC; (11) *O'Connor v. Uber Techs., Inc.*, No. 16-15000, District Court No. 3:13-cv-03826-EMC; (12) *Yucesoy v. Uber Techs., Inc.*, No. 16-15001, District Court No. 3:15-cv-00262-EMC; (13) *Mohamed v. Uber Techs., Inc.*, 16-15035, District Court No. 3:14-cv-05200-EMC.

Dated: May 31, 2017

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 14-16078, 15-174

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 28-1.1.
The brief is 16,485 words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☒ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is 16,485 words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

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Signature of Attorney or Unrepresented Litigant: s/ Shannon Liss-Riordan

Date: May 31, 2017

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2017, 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: May 31, 2017

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