Nos. 14-16078, 15-17420, 15-17422, 15-17475, 15-17532, 15-17533, 15-17534, 16-15000, 16-15001, 16-15035, 16-15595

IN THE

United States Court of Appeals for the Ninth Circuit

DOUGLAS O'CONNOR, et al., Plaintiffs-Appellees, v. UBER TECHNOLOGIES, INC., Defendant-Appellant.	Nos. 14-16078, 15-17420, 15-17532, 16-15000, 16-15595 No. 3:13-cv-03826-EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding
HAKAN YUCESOY, et al., Plaintiffs-Appellees, v. UBER TECHNOLOGIES, INC., Defendant-Appellant.	Nos. 15-17422, 15-17534, 16-15001 No. 3:15-cv-00262-EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding
ABDUL MOHAMED, et al., Plaintiffs-Appellees, v. UBER TECHNOLOGIES, INC., Defendant-Appellant.	Nos. 15-17533, 16-15035 No. 3:14-cv-05200-EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding
RICARDO DEL RIO, et al., Plaintiffs-Appellees, v. UBER TECHNOLOGIES, INC., et al., Defendants-Appellants.	No. 15-17475 No. 3:15-cv-03667-EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding

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INTRODUCTION

After four years of litigation, the majority of which has focused on the validity of the Arbitration Agreements between Uber and drivers, it is remarkable that the *O'Connor* and *Yucesoy* plaintiffs have chosen to lead their Answering Brief with an argument they have never raised before, in which they contend that the validity of the Arbitration Agreements is irrelevant.[1] Even more remarkable is the basis for their newly discovered argument: a decision by the Georgia Supreme Court interpreting Georgia contract law, in which the court held that the mere filing of a putative class action nullifies the putative absent class members' arbitration agreements. Needless to say, this argument has never been adopted by any federal court, as it squarely contradicts Rule 23, the Federal Arbitration Act ("FAA"), the Rules Enabling Act, the Due Process Clause, and the many U.S. Supreme Court and Ninth Circuit decisions interpreting those provisions.

The remainder of Plaintiffs' Answering Brief is equally misguided:

With respect to the Enforceability Appeals, Plaintiffs urge this Court to ignore binding circuit precedent in which this Court has held that the National Labor Relations Act ("NLRA") plainly and unambiguously does *not* prohibit

[1] The *O'Connor* and *Yucesoy* plaintiffs ("Plaintiffs") filed a consolidated Answering Brief. The *Gillette* plaintiffs, however, filed an untimely joinder and the *Del Rio* plaintiffs filed nothing at all. Under Circuit Rule 31-2.3, this Court may strike the *Gillette* plaintiffs' untimely joinder and reverse the district court orders in Appeal Nos. 15-17475, 15-17533, and 16-15035.

workers from entering into *voluntary* arbitration agreements containing class waivers—including Ninth Circuit decisions issued both before and after the contrary National Labor Relations Board ("NLRB," or "Board") interpretation on which Plaintiffs rely. *See Morris v. Ernst & Young, LLP*, 834 F.3d 975, 983 n.4 (9th Cir. 2016); *Johnmohammadi v. Bloomingdales, Inc.*, 755 F.3d 1072, 1075–77 (9th Cir. 2014). This panel is bound by those rulings and should reject Plaintiffs' argument on that basis alone.

With respect to the Rule 23(d) Appeals, Plaintiffs concede that the district court's Rule 23(d) Orders were unnecessary and therefore wrong. *See* Answering Brief at 55–56 (describing both orders as "superfluous"). Yet they urge this Court to leave both Rule 23(d) Orders in place, where they will continue to operate as improper constraints on Uber's business and First Amendment rights. Plaintiffs' concession that the Rule 23(d) Orders were erroneous does not mean the appeals are moot, as Plaintiffs contend; it means this Court should vacate the orders.

With respect to the Rule 23(f) Appeal, Plaintiffs seem to concede that the class certification orders cannot stand if the Arbitration Agreements are enforceable; they present no argument to the contrary. Yet they urge this Court to *change* the class certification orders by creating a new sub-class consisting of the "thousands of Uber drivers who are not bound by any arbitration agreement." Answering Brief at 30. Respectfully, a Rule 23(f) appeal is not the proper vehicle

for Plaintiffs to try to "fix" an erroneous class certification order. This Court should simply decertify. In any event, because Plaintiffs' claims cannot be adjudicated on a classwide basis, even for drivers who are not bound by the Arbitration Agreements, the Court should decertify on that basis as well.

ARGUMENT

I. Enforceability Appeals: This Court Should Enforce The Arbitration Agreements

A. Plaintiffs' "Constructive Opt-Out" Argument Is Waived And Meritless

Plaintiffs' lead argument asks this Court to hold that the Arbitration Agreements are "not relevant" to these appeals, and to affirm the orders denying arbitration, because the named plaintiffs purportedly "opted out of arbitration and, by so doing, rejected arbitration on behalf of the class." Answering Brief at 12. As Uber explained in its Opening Brief, Plaintiffs waived this argument by failing to raise it in the district court and by conceding that most drivers did not, in fact, opt out of arbitration. *See* Opening Brief at 26–27.

In their Answering Brief, Plaintiffs act as if they have been trying to litigate this issue for years, with their argument falling on deaf ears. But in four years of litigation, with countless briefs and hearings about the validity of the Arbitration Agreements (including four rounds of briefing in this Court alone), Plaintiffs cannot point to a single sentence in a single brief where they made this

"constructive opt-out" argument. They point instead to a vague footnote in the "Emergency Motion" they filed at the very beginning of this litigation, before the enforceability of the Arbitration Agreements was even at issue, in which they tried to stop Uber from distributing arbitration agreements in the first place. *See* Answering Brief at 8 n.3. Of course, such a motion would have been entirely unnecessary if, as Plaintiffs now contend, their filing of this lawsuit rendered the Arbitration Agreements irrelevant. In any event, such "a perfunctory [statement], buried amongst the footnotes, does not preserve an argument on appeal." *Coalition for a Healthy Cal. v. FCC*, 87 F.3d 383, 384 n.2 (9th Cir. 1996).

On the merits, Plaintiffs' argument—that the mere filing of a putative class action complaint opts *all* absent class members out of arbitration—violates the FAA, Rule 23, the Rules Enabling Act, and California law. *See* Opening Brief at 27–29. Plaintiffs do not even address these arguments in their Answering Brief; therefore, their response to these arguments is waived. *See Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009).

B. The Class Waiver Does Not Violate The NLRA

1. The Class Waiver Does Not Violate The NLRA Because Drivers Have An Opt-Out Right

With respect to Plaintiffs' contention that the parties' voluntary class waiver violates the NLRA, this Court already rejected that argument in *Johnmohammadi* based on the clear and unambiguous language of the statute. *See* Opening Brief at

18–20. Indeed, *Johnmohammadi* found "no basis" for, and therefore "quickly dismiss[ed]," Plaintiffs' meritless argument. 755 F.3d at 1075. Because *Johnmohammadi* "follow[ed] from the unambiguous terms" of the NLRA, the NLRB was powerless to overrule this Court's decision. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). And if there were any doubt about this Court's holding in *Johnmohammadi*, the Court subsequently reaffirmed its decision in *Morris*, 834 F.3d at 983 n.4—*after* the NLRB issued (and notified this Court about) *On Assignment*. *See* No. 13-16599, Dkt. 52, 64. This Court is bound by both *Johnmohammadi* and *Morris*.

Even if *Johnmohammadi* and *Morris* did not preclude Plaintiffs' argument, this Court should hold, as many others have, that *On Assignment* deserves no deference because it violates the FAA and contravenes the NLRA. *Price v. Uber Techs., Inc.*, 2017 WL 2378280, at *4 (S.D. Ind. June 1, 2017) ("not[ing] that *On Assignment Staffing* was summarily reversed by the Fifth Circuit" and declining to grant deference); *Cavallo v. Uber Techs., Inc.*, 2017 WL 2362851, at *5–8 (D. N.J. May 31, 2017) (same); *Scroggins v. Uber Techs., Inc.*, 2017 WL 373299, at *3 (S.D. Ind. Jan. 26, 2017) (same); *Lamour v. Uber Techs., Inc*., 2017 WL 878712, at *12 (S.D. Fla. Mar. 1, 2017) (same).

a. *On Assignment* Violates The FAA

As Uber discussed in its Opening Brief, *On Assignment*—an NLRB decision that categorically prohibits employees from voluntarily agreeing to individual arbitration—violates the FAA. *See* Opening Brief at 21–23. Indeed, *On Assignment* "single-mindedly" focuses on the supposed goals of the NLRA and improperly "ignore[s] other and equally important Congressional objectives," *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942)—namely, the FAA's goal of "affording parties discretion in designing arbitration processes . . . to allow for efficient, streamlined" dispute resolution, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344–45 (2011).

Plaintiffs' only response is to parrot *On Assignment*'s reference to the Norris-LaGuardia Act. Answering Brief at 24 n.20 (quoting *On Assignment Staffing Servs., Inc.*, 362 NLRB No. 189, 2015 WL 5113231 (Aug. 27, 2015), at *10, *overruled in* 2016 WL 3685206 (5th Cir. June 6, 2016)). But the Norris-LaGuardia Act adds nothing to the analysis. That statute merely announces the federal policy that employees "be free from the interference, restraint, or coercion of employers . . . in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 102—language that is substantively *identical* to Section 7 of the NLRA. And although the Norris-LaGuardia Act goes on to declare unenforceable "[a]ny undertaking or promise . . .

in conflict with the public policy declared" in the Act, 29 U.S.C. § 103—a provision closely tracking Section 8 of the NLRA—this "does not sanction the breach of FAA-protected arbitration contracts," nor does it provide "any 'express congressional command,' as the Supreme Court would require," *On Assignment*, 2015 WL 5113231 (Member Johnson, dissenting). It is therefore unsurprising that Plaintiffs do not cite a single case invalidating an arbitration agreement under the Norris-LaGuardia Act. *See In re Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014) (Member Johnson, dissenting) ("I am not aware of a single case holding that an individual-specific arbitration agreement violates the [Norris-LaGuardia Act], and no such case is cited in the majority opinion or *D.R. Horton* itself.").

b. *On Assignment* Contravenes The NLRA

In addition, *On Assignment* is an unreasonable interpretation of the NLRA that deserves no deference. Most notably, Section 7 of the NLRA guarantees employees "the right to refrain from any or all" collective activities. 29 U.S.C. § 157. Section 9 bolsters this "right to refrain," by guaranteeing "any *individual* employee . . . the right *at any time* to present grievances to [her] employer . . . ." 29 U.S.C. § 159 (emphasis added). And Section 8 prohibits only conduct that "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the[ir]

rights" under Section 7. 29 U.S.C. § 158. *On Assignment's* holding violates all three of these statutory provisions. *See* Opening Brief at 23–25.

In response, Plaintiffs try to justify *On Assignment* by analogizing a voluntary opt-out to an "employer-imposed prerequisite that workers must fulfill before engaging in concerted legal activity." Answering Brief at 25. However, the sole case that Plaintiffs cite—*NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962)—is inapposite. There, an employer violated the NLRA by terminating workers who, without their employer's permission, left a "bitterly cold" machine shop "to protect themselves" from inhumane working conditions. *Id.* at 11, 17. Unlike *Washington Aluminum*, drivers who use the Uber app do *not* need Uber's permission to opt out of arbitration.

Plaintiffs also argue that *On Assignment* is reasonable because an on-opt procedure supposedly creates "a permanent record" reflecting employees' views of collective action, which "pressure[s]" them not to opt out. Answering Brief at 26. But there is not a shred of evidence in the record that any driver was "afraid" to opt out, as Plaintiffs claim (*id.*); to the contrary, it is undisputed that thousands of drivers have done so with no repercussions whatsoever. An individual may opt out of arbitration for any number of reasons; thus, opting out does *not* create a "record" reflecting one's views of collective action. *See* Opening Brief at 24.

Finally, Plaintiffs urge the Court to adopt *On Assignment* based on *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), where an employer entered into individual contracts with employees and then refused to bargain with a union. Answering Brief at 23–24. As this Court has already held, however, *J.I. Case* "does not support the broad proposition" that "an employee may never waive the right to participate in class litigation by negotiating an individual contract with her employer." *Johnmohammadi*, 755 F.3d at 1076. Quite the opposite, *J.I. Case* "stressed that nothing prevents an employee from making an individual contract with her employer, 'provided it is not inconsistent with a collective agreement or does not amount to . . . an unfair labor practice.'" *Id.* at 1077 (citation omitted).[2]

2. The Class Waiver Does Not Violate The NLRA Because Drivers Are Independent Contractors

The NLRA is also inapplicable because Plaintiffs have not proven that drivers are employees. *See* Opening Brief at 18. Plaintiffs urge the Court to "presume that the NLRA applies" because, they allege, it would "violat[e]" drivers' NLRA rights if they had to prove "the applicability of the NLRA."

[2] For similar reasons, Plaintiffs' reliance on *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350 (1940), is misplaced. There, an employer offered workers higher wages and benefits as an inducement to sign individual contracts and "eliminate [a] Union." *Id.* at 359–60. *National Licorice* merely suggests that an employer may violate the NLRA by "offer[ing] [] benefits with the express purpose of curtailing its employees' freedom of choice"—something a voluntary class waiver does not do. *Johnmohammadi*, 755 F.3d at 1076.

Answering Brief at 28. But Plaintiffs cite *no* authority supporting this argument.[3] Nor can they. As this Court has held, a "party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Hoffman v. Citibank, N.A.*, 546 F.3d 1078, 1082 (9th Cir. 2008).

Plaintiffs also urge the Court to presume the NLRA applies because they purportedly made a "colorable showing" that drivers are employees, relying on the district court's denial of Uber's motion for summary judgment. Answering Brief at 28–29. But "[a] denial of summary judgment is not a decision on the merits; it is simply a decision that a material issue of fact" exists. *In re Myers*, 50 F. App'x 892, 893 (9th Cir. 2002). In fact, the *only* California court that has rendered an opinion on the merits of the misclassification issue here affirmed an arbitrator's finding that a driver who used the Uber app was *not* an employee. *Eisenberg v. Uber Techs., Inc.*, 2017 WL 1418695 (Cal. Super. Ct. Feb. 21, 2017); *see also McGillis v. Dep't Econ. Opp.*, 210 So.3d 220, 226–27 (Fla. App. 2017) (concluding that another driver who used the Uber app was an independent contractor under Florida law).

[3] Instead, Plaintiffs note that the NLRB "presum[es] that the NLRA applies" when exercising jurisdiction over misclassification cases. Answering Brief at 28 n.24. That argument, however, is circular, as the presumption comes from the NLRA itself. *See* 29 U.S.C. § 160(b).

* * *

This Court should reach the same conclusion it reached in *Mohamed* and rule that the Arbitration Agreements between Uber and drivers are valid and enforceable and, on that basis, compel arbitration.

II. Rule 23(d) Appeals: This Court Should Vacate The Rule 23(d) Orders

Plaintiffs concede that there was no legitimate basis for the district court's Rule 23(d) Orders. As Plaintiffs explain, "based upon this Court's ruling in [*Mohamed*], the differences between the new arbitration agreements and previous arbitration agreements is [sic] of no legal relevance; thus, it no longer matters what if any notice Uber provided regarding the promulgation of these agreements." Answering Brief at 3. In other words, there was no valid reason to "require[] Uber to provide enhanced notice to class members." *Id.*; *see also id.* at 55–56 (describing both Rule 23(d) Orders as "superfluous" in light of *Mohamed*).

But the absence of any legitimate basis for invoking Rule 23(d) does not mean the appeals are "moot," as Plaintiffs contend; it means the Rule 23(d) Orders must be vacated, so that they no longer impose "superfluous" constraints on Uber's business, its free speech rights, or its ability to enforce the Arbitration Agreements. "'The test for mootness of an appeal is whether the appellate court can give the appellant any effective relief in the event that it decides the matter on the merits in his favor.'" *In re Thorpe Insulation Co.*, 677 F.3d 869, 880 (9th Cir. 2012)

(citation omitted). Here, the Rule 23(d) Orders are preventing Uber—right now—from entering into and enforcing arbitration agreements with drivers, unless Uber includes the district court's preferred warnings and opt-out mechanisms.[4] Because the Rule 23(d) Orders *presently* burden Uber's speech and contract rights, they must be vacated. *See Tory v. Cochran*, 544 U.S. 734, 736–37 (2005).[5]

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[4] Plaintiffs point out that the district court "terminated the 2015 Rule 23(d) order," such that it is "no longer in effect." Answering Brief at 56 n.51. That is a half-truth. The district court relieved Uber of certain elements of the 2015 Rule 23(d) injunction that the court had imposed on a prospective basis, but reiterated its holding that, for drivers who accepted arbitration between December 10, 2015 and August 18, 2016, Uber may *not* enforce Arbitration Agreements unless they comply with the 2015 Rule 23(d) Orders. 2ER318.

[5] Plaintiffs argue, in a two-sentence footnote, that the Rule 23(d) Orders are "not appealable interlocutory orders." Answering Brief at 54–55 n.50. This Court should reject that argument for two reasons. First, the Rule 23(d) Orders are appealable injunctions under 28 U.S.C. § 1292(a)(1) because they require Uber to include certain provisions in its Arbitration Agreements, or else refrain from arbitration altogether. *Thompson v. Enomoto*, 815 F.3d 1323, 1326–27 (9th Cir. 1987); *see also Cobell v. Kempthorne*, 455 F.3d 317, 321–25 (D.C. Cir. 2006) (finding that Rule 23(d) order was appealable injunction); *Great Rivers Coop. v. Farmland Indus., Inc.*, 59 F.3d 764, 766 (8th Cir. 1995) (same). Second, the Rule 23(d) Orders are appealable collateral orders. *In re Copley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008); *see also In re Sch. Asbestos Litig.*, 842 F.2d 671, 677–79 (3d Cir. 1988). In fact, Plaintiffs themselves relied on these jurisdictional bases when they cross-appealed the 2015 Rule 23(d) Order: "The Court's [2015 Rule 23(d)] Order is an injunction, as well as a denial in part [and grant in part] of a requested injunction, appealable under 28 U.S.C. § 1292(a)(1)." 1SER56.

III. Rule 23(f) Appeal: This Court Should Decertify The *O'Connor* Class

A. The Arbitration Agreements Preclude Class Certification

Plaintiffs do not dispute that the class must be decertified if the Arbitration Agreements are enforceable. *See* Answering Brief at 30. Instead, Plaintiffs ask this Court to certify a *new* class consisting only of the "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." *Id.* But that is not an appropriate request for a Rule 23(f) appeal; the purpose of Rule 23(f) is for this Court to review the *district court's* class certification order. Indeed, the Second Circuit rejected such an invitation to narrow an overbroad class, requiring plaintiffs to "return[] to the District Court to seek certification of a more modest class." *In re Initial Pub. Offering Secs. Litig.*, 483 F.3d 70, 73 (2d Cir. 2007) ("The Petitioners, having sought a broad class, are essentially complaining that we failed to narrow their class definition to an extent that might have satisfied Rule 23 requirements. Whatever authority we might have had to undertake that task, we do not think it appropriate to provide legal advice to experienced class action litigators."); *see also Microsoft Corp. v. Baker*, 582 U.S. ___, 2017 WL 2507341, at *4, *14 (June 12, 2017) (rejecting plaintiffs' attempt to "subvert the balanced solution Rule 23(f) put in place"). Thus, assuming this

Court enforces the Arbitration Agreements as it did in *Mohamed*, it should decertify the class here.[6]

B. This Court Should Decertify The Class For Other, Independent Reasons

Plaintiffs acknowledge that they intend to return to the district court and seek certification of a subset of drivers who are not subject to the Arbitration Agreements, based on the same Rule 23 analysis the district court already conducted. *See* Answering Brief at 30. In fact, Plaintiffs have already filed a

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[6] Plaintiffs argue in footnotes that this Court should consider only the December 9 certification order, and not the September 1 order. *See* Answering Brief at 31 n.29, 51 n.46. But the Rule 23(f) petition that Uber filed, and which this Court granted, clearly presented the question "[w]hether Rule 23(f) review of the district court's *two class certification orders* should be granted . . . ." *O'Connor v. Uber Techs., Inc.*, No. 15-80220 (9th Cir.), Dkt. 1-2 at 5 (emphasis added). And Plaintiffs acknowledge that the December 9 order merely "expanded the class" that the district court certified on September 1. *Id.* at 9. In the district court's words, the December 9 order was the result of "supplemental briefing" related to the September 1 order. 1ER72; 1ER169. Thus, the December 9 order did not rehash the reasoning from the September 1 order; rather, it incorporated the Rule 23 analysis that the court previously conducted, addressing only the supplemental issues raised by the class expansion. *See* 1ER94–95. And when Uber initially sought Rule 23(f) review of the September 1 order, Plaintiffs (successfully) urged this Court to deny review as "premature" because "the class parameters [were] unsettled and supplemental briefing [was] ongoing." *O'Connor v. Uber Techs., Inc.*, No. 15-80169 (9th Cir.), Dkt. 2-1 at 2, 20. Now that class certification is settled, this Court should decide all the issues pertaining to both orders. *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004) (the Court may "address any issue fairly included within" an interlocutory order); *Meredith v. Oregon*, 321 F.3d 807, 812 (9th Cir. 2003) (reviewing order that was "'inextricably intertwined' with [and] 'necessary to ensure meaningful review of'" order on appeal).

motion to expand the class definitions, relying on the same flawed arguments the district court previously endorsed. 2ER227–53. Thus, in the interests of efficiency and equity, this Court should reverse the class certification orders on other grounds as well, and make clear that Plaintiffs' claims cannot be adjudicated on a class basis. *See* Opening Brief at 43–62; *see also Baker*, 2017 WL 2507341, at *11 (rejecting plaintiffs' attempt to use appellate review of class certification orders in a manner that would "invite[] protracted litigation and piecemeal appeals").

1. Individualized Inquiries Predominate On The Issue Whether Drivers Are Independent Contractors

This Court should hold that class certification is improper because individualized issues regarding the classification of drivers will "inevitably overwhelm questions common to the class." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013). As discussed in Uber's Opening Brief, there are substantial differences among drivers regarding: (1) each driver's beliefs regarding classification, (2) Uber's right to control each driver, and (3) whether each driver is engaged in a distinct business. *See* Opening Brief at 44–55.

In response, Plaintiffs suggest that class certification is appropriate because certain courts, under different circumstances, with different parties, contracts, and working relationships, have certified classes to decide putative employment status. Answering Brief at 31–33. But, as case law and common sense dictate, Rule 23

"lead[s] to different outcomes when the underlying . . . factual framework is different." *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 591 (9th Cir. 2010) (en banc), *rev'd on other grounds*, 564 U.S. 338 (2011). In *this* case, individual issues predominate regarding the issue of employment status.

a. Drivers' Beliefs About Their Employment Status

Some drivers (including the named plaintiffs) claim to believe they are Uber's employees, whereas most drivers intended to be and believe they are independent contractors, as evidenced by the 400+ drivers who submitted declarations opposing class certification. *See* Opening Brief at 51–53.

Plaintiffs contend that these differences pose no obstacle to class certification because "'the label that the parties attach to the relationship is not dispositive'" in a putative classification analysis. Answering Brief at 39 (citation omitted). But "[e]ven if the factor is not dispositive, it is a factor which [must] be litigated, requiring individual testimony at trial." *Sotelo v. MediaNews Grp., Inc.*, 207 Cal. App. 4th 639, 659 (2012). Indeed, under California law, each driver's belief is a "significant" factor in the classification analysis. *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341, 358 (1989).

Plaintiffs also suggest that no classwide variation exists because, according to Plaintiffs, *all* drivers intended to be independent contractors when they first accepted their agreements with Uber. *See* Answering Brief at 39–41. But

Plaintiffs cite no authority, apart from the flawed rulings under review, to support their claim that an individual's contemporaneous beliefs regarding her putative employment status are irrelevant. On the contrary, courts regularly find no predominance based on differences in putative class members' contemporaneous beliefs regarding their employment status. *See, e.g.*, *Ali v. U.S.A. Cab Ltd.*, 176 Cal. App. 4th 1333, 1350–52 (2009); *Sotelo*, 207 Cal. App. 4th at 657–59.

b. Uber's Putative Right To Control

i. Use of Other Applications: Five of the 17 different agreements that govern the relationships between Uber and the absent class members prohibit drivers from using, or displaying the insignia of, other companies' smartphone applications while using Uber, and twelve do not—a difference that could result in different outcomes regarding Uber's putative right to control. *See* Opening Brief at 46–48.

Plaintiffs try to diminish these as "meaningless [differences] in [the parties'] contracts." Answering Brief at 38. But the parties' contracts are far from "meaningless." *Id.* Instead, "'[written] agreements are a significant factor for consideration'" when assessing the right to control. *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522, 534 (2014) (citation omitted). In any event, these differences matter in practice—according to Plaintiffs, some drivers have been "reprimanded for having Lyft branding visible while driving an Uber" rider.

9ER2028–30; 9ER2043–47. By contrast, where the parties' contracts do *not* control drivers' use or display of other applications, Uber has *not* sought to regulate drivers' use of other lead generation applications. *See* FER60.

ii. Right to Negotiate Fares: Uber's right to control also varies based on whether, and under what circumstances, each driver may negotiate fares with Uber. *See* Opening Brief at 48. Plaintiffs state that, across the board, "there is no way for drivers to alter the amount of the fare." Answering Brief at 37. But they are mistaken: five agreements grant drivers a right to negotiate a fare different from the pre-arranged fare, three agreements grant drivers a right to negotiate fares lower than the pre-arranged fare, and nine agreements grant drivers no right to negotiate. *See* Opening Brief at 37–38.

iii. Acceptance of Gratuities: The parties' agreements also differ as to whether Uber may regulate drivers' acceptance of gratuities from riders—five agreements prohibit drivers from accepting gratuities, while 12 agreements do not. *See* Opening Brief at 48–49. Plaintiffs state that "it is not clear how this issue even impacts the independent contractor" determination. Answering Brief at 38. But, of course, whether Uber may regulate drivers' acceptance of gratuities is relevant to whether Uber "control[s] the manner and means" of drivers' work. *Ayala*, 59 Cal. 4th at 531. Indeed, Plaintiffs themselves have argued that Uber's ability (or inability) to regulate gratuities is an important indicium of control. *See* FER84

(alleging that "Uber's right to control" is evidenced by the fact that "Uber warns drivers against '[a]ccepting cash from a client'") (citation omitted).

iv. Account Deactivation: Finally, the parties' contractual termination rights vary by agreement; seven agreements afford Uber a unilateral right to terminate the relationship, while two are silent and eight provide the parties a mutual right to terminate. *See* Opening Brief at 49–51. Plaintiffs ask the Court to treat all of these termination provisions the same. *See* Answering Brief at 36–37. But this Court has rejected that argument several times: a unilateral "right to discharge at will is [s]trong evidence in support of an employment relationship," whereas a "mutual termination provision is consistent with either an employer-employee or independent contractor relationship."[7] *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 994–95 (9th Cir. 2014); *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1105 (9th Cir. 2014). That precedent is binding here. *See Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 875 (9th Cir. 2014).

c. Drivers' Engagement In A Distinct Business

Individualized inquiries also are needed to determine whether each driver is engaged in a distinct business. Some drivers provide transportation services through the lead generation applications of Uber's competitors, derive a small

[7] The California Court of Appeal and district courts have rejected Plaintiffs' argument, too. Opening Brief at 50–51 & n.12 (collecting cases).

portion of their income from Uber, independently advertise their services, and assemble personal client rosters, whereas other drivers exclusively use the Uber app, are economically dependent on the fares they receive from using Uber, and do not independently advertise or assemble client rosters. *See* Opening Brief at 54.

Plaintiffs argue (without authority) that it is "irrelevant" whether drivers use other lead generation applications. Answering Brief at 42. As this Court has held, however, an individual who provides services through multiple companies is more likely to be engaged in a distinct business—and to be an independent contractor—than one who does not. *See Ruiz*, 754 F.3d at 1104 (drivers did not engage in distinct businesses where their "only business was with [defendant]").

Plaintiffs also suggest that the "distinct business" factor is common because all drivers have the same contractual opportunity to engage in a distinct business, regardless of whether they actually "take advantage of this ability." Answering Brief at 43. The California Court of Appeal has rejected Plaintiffs' argument, holding that the distinct business inquiry "involves consideration of petitioners' actual work," not "the application nor the interpretation of the [parties'] Agreements." *Elijahjuan v. Superior Ct.*, 210 Cal. App. 4th 15, 21–22 (2012).

Finally, Plaintiffs claim that variations in the frequency with which drivers use the Uber app and the proportion of income that drivers derive from Uber fares are irrelevant; instead, they insist, the "relevant question is Uber's right to control

its drivers' schedules." Answering Brief at 43–44. But this conflates two issues—Uber's putative right to control and whether drivers are engaged in distinct businesses. Both factors independently influence drivers' classification status, *Borello*, 48 Cal. 3d at 350–51, and neither is common to the class, *see supra* Part III.B.1.b.

2. Plaintiffs Are Not Adequate Class Representatives

a. Substantial Opposition To Plaintiffs' Lawsuit

Class certification is also improper because Plaintiffs—who seek a remedy that many (if not most) class members oppose—are inadequate class representatives. *See* Opening Brief at 56–57.

In their Answering Brief, Plaintiffs contend that absent class members' interests are "irrelevant" to adequacy. *See* Answering Brief at 50.[8] The Supreme Court, this Court, and circuit courts across the country have repeatedly rejected

[8] In support of this argument, Plaintiffs cite *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985), and *Martin v. Tango's Rest., Inc.*, 969 F.2d 1319, 1324 (1st Cir. 1992), but both of those cases involved administrative enforcement actions brought by the Secretary of Labor, and therefore did not entail *any* analysis of Rule 23 adequacy. Plaintiffs also cite *Matamoros v. Starbucks Corp.*, 699 F.3d 129 (1st Cir. 2012), but that case is equally inapposite. *Matamoros* held that the named plaintiffs were adequate representatives despite the conflicting financial interests of certain absent class members because absent class members could opt out of the class without repercussion. 699 F.3d at 138–39. Here, by contrast, Plaintiffs contend that a judgment in their favor will affect the employment classification of *all* drivers—irrespective of whether they opt out. *See* Opening Brief at 57 n.14.

such arguments, finding that where the named plaintiffs' "interests . . . [are] antithetical to the interests of [absent] class members, [the named plaintiffs] [can] not [] adequately represent[] such class members." *Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997); *E. Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977); *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 315 (5th Cir. 2007).

Plaintiffs also suggest that Uber's evidence does not, in fact, show that class members oppose Plaintiffs' lawsuit. *See* Answering Brief at 49–50. Plaintiffs claim that "many of the [driver] declarations seem merely to reflect a layperson's understanding" about what would happen if they "were reclassified as employees." *Id.* at 50. But the evidence contradicts Plaintiffs' unsubstantiated and paternalistic argument. *See* 8ER1899 ("I've been an employee and . . . an independent contractor. I know the difference between these things."); 6ER1344 ("I am familiar with all of the work regulations applicable to employer-employee relationships in California.").

Plaintiffs contend that Uber's evidence showing variation among class members is "not statistically significant." Answering Brief at 49. But Uber submitted more than *400* declarations from drivers who oppose Plaintiffs' lawsuit—ample evidence to demonstrate that at least *some* "people among the broad class . . . [do] not oppose" being independent contractors and, "in fact,

approve[] of it and wish[] the polic[y] fully enforced." *Mayfield*, 109 F.3d at 1427; *see also United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1284 (7th Cir. 1985) (finding no adequacy because "[a]t least some class members oppose[d] the [retirement] benefit changes for which plaintiffs sue[d]").

b. Intentional Waiver Of Class Members' Claims

Plaintiffs are also inadequate because they cast aside drivers' potentially valuable expense claims—which, according to Plaintiffs' evidence, may be worth hundreds of millions of dollars. *See* Opening Brief at 58–60. Plaintiffs proffer three arguments in defense, none of which is persuasive.

First, Plaintiffs contend they did not, in fact, waive any expenses; rather, they merely "set forth a proposed methodology for drivers" to seek reimbursement for expenses not encompassed within the IRS rate. Answering Brief at 46 n.42. As the district court explained, however, Plaintiffs' proposal was an "untimely," "significant[ly] flaw[ed]," and "not sufficiently detailed" request for thousands of "mini-trials"—an empty gesture that surely would destroy the efficiencies the class procedure is designed to achieve. 1ER132 n.13; 2SER138 n.7.

Second, Plaintiffs contend that Uber has elsewhere "argue[d] that Plaintiffs' proposed reimbursement [method], based on the IRS mileage rate, would overcompensate" drivers—proof, supposedly, that Plaintiffs are adequate. Answering Brief at 45. But Uber has *not* argued that the IRS methodology

overcompensates drivers for all expenses. Rather, Uber argued that the IRS methodology is unreliable *for the expense categories it measures* because it overcompensates some drivers and undercompensates others. 4ER805–06. There are dozens of *other* expense categories to which the IRS methodology does *not* apply, which Plaintiffs waived. *See* Opening Brief at 58.

Finally, Plaintiffs contend they did not waive claims of *value* because the expenses they discarded were not "necessary" and "may well not even be reimbursable" under California law. Answering Brief at 46. This argument, however, asks this Court to assess the *merits* of absent class members' claims, in violation of Rule 23. *See Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194–95 (2013). It rings particularly hollow, too, given that Plaintiffs have repeatedly argued, throughout this litigation, that such expenses *are* necessary and recoverable. *See* FER50, 55–56, 63, 67, 79. Plaintiffs' portrayal of absent class members' expenses as unrecoverable betrays Plaintiffs' remarkable willingness to argue *against* the interests of the putative class they purport to represent, all in the name of preserving class certification. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (acknowledging the "perverse incentives for class representatives to place at risk potentially valid claims" in order to maintain a class action). To the extent these expenses are reimbursable, as Plaintiffs once insisted,

there could be no clearer example of a "conflict[] of interest between [the] named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625.

3. The District Court Adopted An Arbitrary Classwide Damages Methodology

Plaintiffs' gratuities law claim is premised on an unusual theory of liability, never before adopted by any California court.[9] According to Plaintiffs, Uber allegedly made a handful of statements prior to 2012 that fares procured through the Uber app included gratuities. As a result of those few statements alone, and ignoring countless statements by Uber to the contrary, Plaintiffs contend that Uber should be deemed to have actually "included a tip in its fare" throughout the entire class period. Answering Brief at 51. In other words, because Uber allegedly *made statements* about collecting gratuities, *ipso facto*, Uber *actually collected* gratuities. Misguided as this liability theory is, Plaintiffs' damages methodology (which the district court accepted) is even more misguided. According to Plaintiffs' methodology, a lay jury may calculate the gratuities that Uber supposedly collected by deciding what percentage of the fare, in the jury's view, "a reasonable [rider] would *understand* they were paying" as a gratuity on any particular ride, and applying that percentage to every ride throughout the class period. Answering Brief at 51 (emphasis added); 1ER162–63.

[9] Nor is Uber aware of any court outside California that has adopted Plaintiffs' theory, and Plaintiffs have identified none.

Simply put, this damages methodology—which asks a lay jury to guess an amount a reasonable rider might *think* Uber was collecting as a gratuity—does not measure "damages that are attributable to [Plaintiffs'] theory of liability" (that Uber *in fact* collected a gratuity from riders). *Doyle v. Chrysler Grp., LLC*, 663 F. App'x 576, 579 (9th Cir. 2016). Therefore, class certification is premised on an "arbitrary" damages methodology in violation of *Comcast*, 133 S. Ct. at 1433.[10] It is also an improper "Trial by Formula" in violation of *Dukes*, 564 U.S. at 367.

[10] Plaintiffs cite three Massachusetts cases that they contend support their damages methodology. Answering Brief at 51–52. These cases are inapposite. In each, plaintiffs argued that employers misled customers into believing that a clearly identifiable and definite "service charge" retained by the employer was a gratuity. *See Mooney v. Domino's Pizza*, 2016 WL 4576996, at *1 (D. Mass. Sept. 1, 2016) (discrete pizza delivery charge); *Overka v. Am. Airlines, Inc.*, 265 F.R.D. 14, 17 (D. Mass. 2010) ($2 curbside-baggage fee); *DiFiore v. Am. Airlines, Inc.*, 561 F. Supp. 2d 131, 132 (D. Mass. 2008) (same). And in each, the court held that, in determining *liability*, a jury should consider whether a reasonable person would believe the service charge was a gratuity. None of these cases presented the question here—how to calculate classwide *damages*.

CONCLUSION

This Court should: (1) reverse the orders in the Enforceability Appeals (Nos. 15-17420, 15-17422, and 15-17475), (2) vacate the Rule 23(d) Orders (Nos. 14-16078, 15-17532, 15-17533, 15-17534, 16-15000, 16-15001, 16-15035), and (3) decertify the *O'Connor* class (No. 16-15595).

Dated: June 14, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with Circuit Rule 32-1(b) because it contains 6,397 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32-1(c).

Undersigned counsel certifies that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced 14-point Times New Roman typeface using Microsoft Word 2010.

Dated: June 14, 2017

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CERTIFICATE OF SERVICE

Pursuant to Circuit Rule 25-5(f), I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 14, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 14, 2017

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