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June 7, 2016

VIA ECF

Molly C. Dwyer
Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *Mohamed v. Uber Technologies, Inc.*, Nos. 15-16178+

Dear Ms. Dwyer:

Appellants Uber Technologies, Inc. and Rasier-CA, LLC (together, "Uber") are in receipt of the Court's order dated June 6, 2016, in which the Court references a joint stipulation filed in the district court (*see* Exhibit A), and requests that the parties be prepared to discuss at oral argument (1) "whether there remains a case or controversy for which this court may grant effective relief" and (2) "the impact, if any, of the proposed settlement in *O'Connor v. Uber Technologies, Inc.*, Case No. 13-cv-03826-EMC," (*see* Dkt. 99). Uber will be prepared to discuss these topics at oral argument; in the interim, however, Uber files this correspondence in order to clarify that the proposed settlement agreement in this case does *not* moot this appeal (and no party has contended that it does) and the proposed settlement in *O'Connor* has no effect on this appeal.

As an initial matter, the parties in this case—although they are currently engaged in good faith negotiations to resolve this litigation—have not yet finalized a memorandum of understanding regarding a prospective settlement, let alone filed any motion for preliminary settlement approval or obtained preliminary or final settlement approval from the district court. *See In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) ("Rule 23(e) of the Federal Rules of Civil Procedure requires court approval of all class action settlements, which may be granted only after a fairness hearing and a determination that the settlement taken as a whole is fair, reasonable, and adequate."). That alone forecloses any finding of mootness. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 465 n.3 (1978) ("After we granted certiorari … the parties entered into a tentative settlement agreement …. In view of the tentative nature of the settlement, this case is not moot.").

Additionally, the parties' draft memorandum of understanding expressly provides for the continuation of this appeal by ensuring that a case or controversy will continue to exist. Indeed,

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as the parties stated in the stipulation they recently filed with the district court, certain material "terms of the settlement agreement [will be] contingent upon the outcome of Uber's pending appeals …." *See* Exh. A at 3; *see also Nixon v. Fitzgerald*, 457 U.S. 731, 744 (1982) (rejecting argument that settlement agreement mooted appeal because respondent "agreed to accept liquidated damages of $28,000" on top of a $142,000 settlement payment "in the event of a ruling by [the Supreme] Court that petitioner was not entitled to absolute immunity"); *John Doe 1 v. Abbott Labs.*, 571 F.3d 930, 933 (9th Cir. 2009) (finding an appeal was not mooted by a conditional settlement in which defendant agreed to make an additional monetary payment if this Court affirmed several of the district court's rulings). If and when the parties reach a final memorandum of understanding, Uber will file a copy of the parties' memorandum of understanding with this Court so the Court may see for itself that the parties have a continuing and concrete interest in the outcome of this appeal.

With respect to the Court's question regarding the effect of the parties' settlement in *O'Connor*, Uber states that the *O'Connor* settlement does not resolve all of the claims at issue in this case or affect the Court's jurisdiction to hear this appeal. Specifically, the *O'Connor* settlement does not release any of the background check or consumer reporting claims asserted in this litigation. *See O'Connor*, 13-cv-03826-EMC, ECF No. 575 ¶¶ 105, 166–75.

Very truly yours,

s/ Theodore J. Boutrous, Jr.

Theodore J. Boutrous, Jr.
GIBSON, DUNN & CRUTCHER LLP
Counsel for Appellants Uber Technologies, Inc.
and Rasier LLC

cc: All counsel of record (via ECF)

CERTIFICATE OF SERVICE

I, Theodore J. Boutrous, Jr., 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 using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Theodore J. Boutrous, Jr.

Theodore J. Boutrous, Jr.

Dated: June 7, 2016

Exhibit A

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE UBER FCRA LITIGATION

Case No.: 14-cv-05200-EMC

JOINT STIPULATION AND [PROPOSED] ORDER VACATING RULE 23(d) ORDERS PURSUANT TO RULE 54(b)

Before: Hon. Edward M. Chen

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JOINT STIPULATION VACATING RULE 23(d) ORDERS

Pursuant to Federal Rule of Civil Procedure 54(b) and Civil Local Rule 7-12, *In re Uber FCRA Litigation* Plaintiffs Ronald Gillette, Abdul Mohamed, Shannon Wise, Brandon Farmer and Meghan Christenson (collectively, "Plaintiffs"), and Defendants Uber Technologies, Inc. ("Uber")[1] and Rasier, LLC (together, "Defendants") (together with Plaintiffs, the "Parties"), by and through their respective counsel of record, hereby stipulate as follows:

WHEREAS, Uber previously filed motions to compel arbitration of certain named plaintiffs' claims. *See Gillette*, ECF No. 16; *Mohamed*, ECF No. 28.

WHEREAS, the Court denied Uber's motions to compel arbitration in an order that invalidated Uber's arbitration agreements with drivers who use the Uber software application. *See Gillette*, ECF No. 48; *Mohamed*, ECF No. 70 (together, the "Motion to Compel Orders").

WHEREAS, Uber promulgated revised versions of its Licensing Agreement and the Rasier Agreement on December 10, 2015 (the "December 2015 Arbitration Provision"). *See O'Connor v. Uber Techs., Inc.*, No. 13-cv-03826-EMC, ECF No. 410, Exs. A–C.

WHEREAS, Plaintiffs filed a motion pursuant to Federal Rule of Civil Procedure 23(d) on December 15, 2015, requesting that the Court enjoin Uber's communications with putative class members and enforcement of the December 2015 Arbitration Provision. *See In re Uber FCRA Litig.*, ECF No. 127.

WHEREAS, on December 23, 2015, the Court granted, in part, Plaintiffs' Rule 23(d) motion. *See In re Uber FCRA Litig.*, ECF No. 137. In its order, the Court declined to rule on the enforceability of the December 2015 Arbitration Provision, but nevertheless held as follows: (i) the December 2015 Arbitration Provision "shall have no effect on the rights of certified class members" to pursue their certified claims in *O'Connor*; (ii) the December 2015 Arbitration Provision "may not be enforced until a revised cover letter and arbitration agreement which conform to [the Court's December 23, 2015 order] is issued;" and (iii) "[d]uring the pendency of Uber driver cases before [the]

[1] Throughout this Joint Stipulation and Proposed Order, "Uber" shall also refer to Uber Technologies, Inc.'s past, present, and future parents, subsidiaries, affiliates, divisions, and any other legal entities, whether foreign or domestic, that are owned or controlled by Uber Technologies, Inc.

Court, all cover letters, notices and arbitration provisions given to new or prospective drivers must conform with the requirements [in the Court's December 23, 2015 order], and be approved." *Id.* at 8. The Court further requested that the parties meet and confer and stipulate to "the appropriate form, content, and procedures of the revised arbitration provision and corrective cover letter . . . ." *Id.*

WHEREAS, on January 13, 2016, the Parties submitted a joint statement in response to the Court's December 23, 2015 order, to which the Parties attached a draft proposed revised arbitration provision and corrective cover letter (with disagreements noted in redline). *In re Uber FCRA Litig.*, ECF No. 154.

WHEREAS, on January 19, 2016, the Court issued an order regarding the Parties' joint statement and further clarifying the scope of the Court's December 23, 2015 order. *In re Uber FCRA Litig.*, ECF No. 156.

WHEREAS, Uber respectfully disagrees with the Court's Rule 23(d) orders (ECF Nos. 137, 156) (together, the "Rule 23(d) Orders") and has appealed those orders to the U.S. Court of Appeals for the Ninth Circuit (Case Nos. 15-17532, 15-17533, 15-17534), and Plaintiffs have cross-appealed (Case No. 16-15035) (together, the "Rule 23(d) Appeals").

WHEREAS, the Parties have reached a settlement agreement that will resolve the *In re Uber FCRA Litigation* lawsuit, with some terms of the settlement agreement being contingent upon the outcome of Uber's pending appeals regarding the Motion to Compel Orders, *see* Ninth Circuit Case Nos. 15-16178 and 15-16181, and pending final settlement approval by this Court and any appeals therefrom.

WHEREAS, as part of that settlement agreement, Plaintiffs have agreed to stipulate to a vacatur of the Court's Rule 23(d) Orders subject to the terms of this Joint Stipulation. The Parties intend to promptly file a Motion for Preliminary Approval, attaching a copy of the settlement agreement, together with this Joint Stipulation and Proposed Order.

WHEREAS, no final judgment, order, or proceeding has been entered in this *In re Uber FCRA Litigation*;

WHEREAS, the Parties' settlement agreement will permit Uber to void the settlement agreement in its entirety unless and until this Court grants this Joint Stipulation. This Joint Stipulation is a significant and material term of the Parties' settlement agreement.

WHEREAS, if this Court grants this Joint Stipulation, but the settlement agreement does not result in a non-appealable final judgment, Defendants stipulate that, in this litigation, they will not enforce or seek to enforce the December 2015 Arbitration Provision or any other subsequent arbitration provision promulgated prior to the decision on final approval of the parties' settlement agreement and any appeals therefrom, against Plaintiffs or the absent class members Plaintiffs seek to represent, with respect to the claims Plaintiffs have asserted in this litigation in the Complaint they filed on April 13, 2016, *see* ECF No. 171.

WHEREAS, the parties will ask the Ninth Circuit to stay the Rule 23(d) Appeals pending the settlement approval process but both parties reserve their rights to continue litigating the Rule 23(d) Appeals, such that the immediately preceding WHEREAS clause shall be null and void and have no effect whatsoever if an appellate court reverses or vacates this Court's Rule 23(d) Orders or this Court later decides to vacate or modify the Rule 23(d) Orders for any reason other than in direct response to this stipulation.

WHEREAS, nothing in this stipulation or the Parties' settlement agreement prevents, nor shall it be construed as preventing, Uber from enforcing or seeking to enforce any prior arbitration provision to which Plaintiffs or the absent class members they seek to represent might be bound, and nothing in this stipulation or the Parties' settlement agreement prevents, nor shall it be construed as preventing, Plaintiffs or absent class members from opposing such efforts.

WHEREAS, Federal Rule of Civil Procedure 54(b) grants district courts authority to vacate or revise "any order or other decision, however designated, that adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties . . . at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities," if it would be "consonant with equity" to do so. Fed. R. Civ. P. 54(b); *Simmons v. Brier Bros. Co.*, 258 U.S. 82, 90–91 (1992).

WHEREAS, courts routinely grant parties' stipulations to vacate or revise non-final orders as part of the settlement approval process, including in class actions. *See, e.g.*, *U.S. Gypsum Co. v. Pac. Award Metals, Inc.*, 2006 WL 1825705, at *1 (N.D. Cal. July 3, 2006) (granting request to vacate claims construction and summary judgment orders under Rule 54(b) and noting that the parties' agreement to vacate "was a significant factor in successfully resolving [the] litigation"); *De la O v. Arnold Williams*, 2008 WL 4192033, at *1 (E.D. Wash. Aug. 27, 2008) (granting Rule 54(b) motion for vacatur and vacating orders finding statutes and regulations to be unconstitutional as part of class action settlement); *Gemini Ins. Co. v. N. Am. Capacity Ins. Co.*, 2015 WL 3891423, at *2–3 (D. Nev. June 18, 2015) (granting joint request to vacate summary judgment and motion for reconsideration orders under Rule 54(b) where settlement was contingent on vacatur of the orders); *Jaynes Corp. v. Amer. Safety Ins.*, 2014 WL 11115424, at *3 (D. Nev. Dec. 2, 2012) (granting joint motion to vacate summary judgment order under Rule 54(b) in accordance with the parties' conditional settlement agreement); *see also In re L. Bruce Nybo, Inc.*, 263 B.R. 905 (D. Nev. 2001) (granting motion to vacate opinion per stipulation for settlement under Rule 60(b)(6)).

WHEREAS, the Parties believe it would be "consonant with justice" for this Court to vacate its Rule 23(d) Orders, now that the Parties have reached a settlement agreement. *Simmons*, 258 U.S. at 90–91; *Gemini*, 2015 WL 3891423, at *3 (granting Rule 54(b) request for vacatur as part of conditional settlement agreement where the parties joined in the stipulated motion seeking vacatur).

WHEREAS, Rule 23(d) vests courts with the authority to "exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Gulf Oil v. Bernard*, 452 U.S. 89, 100 (1981). Plaintiffs recognize that Defendants have appealed the Court's Rule 23(d) Orders and, in their appeal, have made the following arguments: The Court's authority "is not unlimited, and indeed is bounded by the relevant provisions of the Federal Rules" and the First Amendment. *Id*. Thus, a "mere possibility of abuses does not justify" a Rule 23(d) order. *Id*. at 104. Rather, any "order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Id*. at 101. Moreover, because Rule 23(d) orders

can "involve[] serious restraints on expression," a court's "weighing" process must "result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances." *Id*. at 102, 104; *see also In re Sch. Asbestos Litig*., 842 F.2d 671, 680–81, 684 (3d Cir. 1988) ("Orders regulating communications between litigants . . . pose a grave threat to first amendment freedom of speech.").

WHEREAS, the Parties disagree as to whether this Court properly exercised its Rule 23(d) authority in the first place when it entered the Rule 23(d) Orders. However, *all* Parties jointly agree that, in light of the Parties' settlement agreement and the terms of this Joint Stipulation, the Rule 23(d) Orders are no longer necessary.

WHEREAS, this Court originally granted Plaintiffs' Rule 23(d) motion, in part, to provide "clarity" to drivers regarding the existing "legal landscape" and "to ensure the rights of the putative class members are reasonably protected." *In re Uber FCRA Litig.*, ECF No. 137 at 4, 6. However, those concerns and the legal complexity that this Court identified no longer exist, insofar as they ever existed, now that the Parties have reached a settlement agreement.

WHEREAS, the Parties anticipate that they will expend substantial costs and significant efforts, and that it will take several years of litigation in this Court and the appellate courts, in order to resolve the *In re Uber FCRA Litigation* lawsuit if the Court does not approve the Parties' settlement agreement, an agreement that will be contingent on the vacatur of this Court's Rule 23(d) Orders. Thus, vacatur of the Court's Rule 23(d) Orders will substantially minimize the time and cost that would otherwise be expended by the Parties and also the Court in litigation. *See Gemini*, 2015 WL 3891423, at *1 (granting Rule 54(b) request for vacatur as part of conditional settlement agreement because "[t]he alternative [was] continued litigation and trial in [the] Court, followed by appellate proceedings and potential further litigation on remand"); *Jaynes*, 2014 WL 11115424, at *2 (granting stipulated motion to strike pursuant to conditional settlement because "[t]he proposed resolution . . . conserve[d] judicial resources in several respects"); *De la O*, 2008 WL 4192033, at *2 (granting Rule 54(b) motion for vacatur because "[t]he certain cost of continuing the case [would] be significant and

the results of both . . . [an] appeal and the action itself [were] uncertain with considerable risk of an adverse outcome for Plaintiffs").

NOW THEREFORE, the Parties hereby stipulate, subject to the approval of this Court, that:

1. The Court's December 23, 2015 and January 19, 2016 orders, *see In re Uber FCRA Litig.* ECF Nos. 137, 156 (together, the "Rule 23(d) Orders"), are hereby vacated pursuant to Federal Rule of Civil Procedure 54(b).

2. Uber shall be permitted to continue distributing to drivers nationwide the December 2015 Arbitration Agreement, and may seek to enforce the December 2015 Arbitration Provision against any and all drivers who have assented to, and did not opt out of, that agreement.

3. If the settlement agreement does not result in a non-appealable final judgment, Defendants shall not enforce or seek to enforce, in this litigation, the December 2015 Arbitration Provision or any other subsequent arbitration provision promulgated prior to the decision on final approval of the parties' settlement agreement and any appeals therefrom, against Plaintiffs or the absent class members Plaintiffs seek to represent, with respect to the claims Plaintiffs have asserted in this litigation in the Complaint they filed on April 13, 2016, *see* ECF No. 171.

4. While the parties will ask the Ninth Circuit to stay the Rule 23(d) Appeals, both parties reserve their right to continue pursuing their appeals of the Court's Rule 23(d) Orders, and the preceding sentence (#3 above) shall be null and void and have no effect whatsoever if an appellate court reverses or vacates this Court's Rule 23(d) Orders or this Court later decides to vacate or modify the Rule 23(d) Orders for any reason other than in direct response to this stipulation.

5. Nothing stated herein shall in any way directly or indirectly restrict or limit Uber's ability to seek to enforce any prior version of its arbitration agreement against any prospective driver, driver or any other person, including Plaintiffs and the absent class members they seek to represent, and nothing stated herein shall in any way directly or indirectly restrict or limit any person from opposing Uber's attempts to enforce any prior version of its arbitration agreement.

Dated: June 1, 2016

Respectfully submitted,

GOLDSTEIN, BORGEN, DARDARIAN & HO

/s/ Laura L. Ho
Laura L. Ho
Andrew P. Lee
William Jhaveri-Weeks

Attorneys for Plaintiffs and the Putative Class

Dated: June 1, 2016

Respectfully submitted,

AHDOOT & WOLFSON, P.C.

/s/ Tina Wolfson
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Attorneys for Plaintiffs and the Putative Class

Dated: June 1, 2016

Respectfully submitted,

LITTLER MENDELSON, P.C.

/s/Rod M. Fliegel
Rod M. Fliegel

Attorneys for Defendants Uber Technologies, Inc. and Rasier, LLC

Dated: June 1, 2016

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP
/s Joshua Lipshutz
Joshua Lipshutz
Attorneys for Defendants Uber Technologies, Inc. and Rasier, LLC

FOR GOOD CAUSE SHOWN, IT IS SO ORDERED:

HONORABLE EDWARD M. CHEN

ECF ATTESTATION

I, Kevin J. Ring-Dowell, attest that concurrence in the filing of this document has been obtained from the signatories listed above, which shall serve in lieu of their signatures on the document. Signed this 1st day of June, 2016.

By: */s/ Kevin J. Ring-Dowell*
Kevin J. Ring-Dowell