NO. 15-16178, 15-16181, 15-16250

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ABDUL KADIR MOHAMED, et al., Plaintiff-Appellees, v. UBER TECHNOLOGIES, INC. et al., Defendant-Appellant	No. 15-16178, 15-16181, 15-16250 No. C-14-5200, C-14-5241-EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding

REPLY IN SUPPORT OF MOTION OF PLAINTIFF-APPELLEES' MOTION TO INTERVENE IN RELATED CASE, APPEAL NO. 15-16178, 15-16181, 15-16250

Shannon Liss-Riordan
Adelaide Pagano
LICHTEN & LISS-RIORDAN, P.C.
729 Boylston Street, Suite 2000
Boston, MA 02114
(617) 994-5800

Counsel for Prospective Intervenors Douglas O'Connor, et al. and Hakan Yucesoy, et al.

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Proposed Intervenors O'Connor et al (a certified class of Uber drivers in California) and Yucesoy et al (a putative class of Uber drivers in Massachusetts) (collectively, "O'Connor Plaintiffs") submit this brief reply in support of their Motion to Intervene, which this Court has indicated it will entertain at oral argument on June 16, 2016. See Abdul Mohamed v. Uber Technologies, Inc., et al., Ninth Cir. Appeal No. 15-16178, Dkt. 105.[1]

First, the O'Connor Plaintiffs' Motion to Intervene is timely in light of the totality of circumstances and should be granted. The O'Connor Plaintiffs have a significant protectable interest in making sure that all potentially meritorious arguments that could support the District Court's decision that Uber's arbitration clause is not enforceable (including the argument that Uber's agreements violate §7 of the NLRA) are preserved and squarely presented in this appeal, which addresses overlapping issues that touch upon their own (currently stayed) appeals. Likewise, the O'Connor Plaintiffs have a further significant interest in seeing the ongoing settlement process in their case continue without a disruptive decision in this appeal which could have a significant impact on the consummation of the settlement. Moreover, Uber will suffer minimal prejudice by allowing the O'Connor Plaintiffs to intervene here because this appeal has already been pending

[1] This case has been consolidated with Mohamed v. Uber Technologies, Inc., et al., Ninth Cir. Appeal No. 15-16250, and Gillette v. Uber Technologies Inc. et al., Ninth Cir. Appeal No. 15-16181. For simplicity's sake Plaintiffs refer to these consolidated appeals as "the Mohamed appeal."

for more than a year, and Uber has already addressed the argument that its agreements violate the NLRA and are unenforceable under the NLRB's decision in D.R. Horton. See Dkt. 82 at 14-17.

Thus, for all these reasons, the O'Connor Plaintiffs respectfully request that they be allowed to intervene and be afforded an opportunity to submit a brief in this appeal and that the Court not issue a decision until they have been permitted to submit their brief and participate in argument. Alternatively, the O'Connor Plaintiffs request that the Court at least briefly defer any decision in this case until they can conclude the settlement process below.

A. The O'Connor Plaintiffs' Motion to Intervene Is Timely.

In its Opposition, Uber argues that the O'Connor Plaintiffs' Motion to Intervene is untimely because they have been aware of this appeal for some time and accuses Plaintiffs of "judge-shopping," by filing this motion after the panel members were announced. See Dkt. 104 at 6-7. Uber's allegations of untimeliness are unfounded; Plaintiffs acted promptly and were already researching their motion prior the panel announcement. Plaintiffs filed this motion mere days after the hearing on their Motion for Preliminary approval took place on their own proposed settlement (and just days after Uber and the Mohamed plaintiffs announced their

own settlement, potentially mooting this appeal).[2]

This Court has held that with respect to motions to intervene, "[t]imeliness is a flexible concept" and that "the mere lapse of time, without more, is not necessarily a bar to intervention." United States v. Alisal Water Corp., 370 F.3d 915, 921 (9th Cir. 2004). "Timeliness [of a motion for intervention] is determined by the *totality of the circumstances* facing would-be intervenors, with a focus on three primary factors: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." Smith v. Los Angeles Unified Sch. Dist., 2016 WL 2956915, *6 (9th Cir. May 20, 2016) (emphasis added). Here, despite the stage of the proceedings, intervention is appropriate because of the minimal prejudice to the other parties, and the valid reasons for the delay.

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[2] In their Motion to Intervene, the O'Connor Plaintiffs suggested that the proposed settlement in Mohamed may have mooted this appeal and may constitute an improper attempt to obtain an advisory opinion. See Dkt. 102 at 3, n. 5. In its Opposition, Uber insists that this is not the case. See Dkt. at 5-6, 9. However, in many cases involving similar settlements, the Court has carefully examined the contours of the proposed agreement to determine whether in fact the appeal is moot. See, e.g., Allflex USA, Inc. v. Avid Identification Sys., Inc., 704 F.3d 1362, 1369 (Fed. Cir. 2013) ("We hold that where, as here, the appellant has identified no relationship between the valuation placed on the appeal and the issues the appellant wishes to challenge, the parties have simply placed a "side bet" on the outcome of the appeal, which is not enough to avoid a ruling of mootness"); DHX, Inc. v. Allianz AGF MAT, Ltd., 425 F.3d 1169, 1172 (9th Cir. 2005) ("The parties' detailed and highly unusual settlement agreement reveals an embarrassingly ill-conceived attempt to preserve a live controversy despite taking all economic issues off the table"); Gator.com Corp. v. L.L. Bean, Inc., 398 F.3d 1125, 1132 (9th Cir. 2005). The O'Connor Plaintiffs submit that it would be appropriate for the Court to do the same here, as it is not clear whether there is even a live controversy in this case, and this is another reason that Proposed Intervenors moved to intervene when they did (very soon after they learned of the proposed settlement in Mohamed).

Although the O'Connor Plaintiffs were aware of the existence of the Mohamed appeal since last year, it was only very recently that they had reason to believe that intervention here would be necessary to protect their own interests. The O'Connor Plaintiffs had a pending appeal of the District Court's decisions regarding the enforceability of the 2013 and 2014 arbitration agreements in their own case, in which they preserved critical arguments that may have been waived in this appeal, or not presented as squarely here as in the O'Connor case.[3] See Ninth Cir. Appeal No. 15-17420. However, the O'Connor Plaintiffs reached a proposed settlement with Uber in April 2016, in the midst of briefing these issues before this Court. After reaching the proposed settlement, the O'Connor Plaintiffs believed their case would be finally resolved through settlement and therefore they moved to stayed their appeals pending approval of their proposed settlement. However, at

[3] In this appeal, Uber has argued that the Mohamed plaintiffs waived the argument that Uber's agreement is unenforceable under the NLRB's decision in In Re D. R. Horton, Inc., 357 NLRB No. 184 (Jan. 3, 2012). See Dkt. 82 at 12-13. This argument, regarding the applicability of D.R. Horton, was clearly preserved in the O'Connor case, Case No. 15-17420. See O'Connor, Civ. A. No. 13-3826 (N.D. Cal.), Dkt. 353 at 22-25, Dkt. 400 at 14-15 (District Court noted that "Plaintiffs argue that the arbitration agreement is unenforceable because it violates the drivers' rights under the National Labor Relations Act to file a class action" but refusing to reach the D.R. Horton argument because it decided the issue on other grounds). Thus, if the O'Connor plaintiffs are permitted to intervene in this case, the D.R. Horton argument will be unambiguously preserved.

Likewise, the question of the illegality -- and non-severability -- of the PAGA waiver in Uber's 2013 and 2014 agreements (and thus this basis for holding Uber's arbitration clause unenforceable, separate and apart from unconscionability analysis) was addressed directly, and in much greater detail, in the Order that is the subject of the O'Connor Plaintiffs' (currently stayed) appeal, No. 15-17420. Uber has argued that this basis for holding its arbitration clause unenforceable was not actually an underpinning of the Mohamed decision below, see Dkt. 61 at 8. However, this argument was squarely presented – and formed the basis for the District Court's December 9, 2015, ruling regarding Uber's arbitration clause – in the O'Connor case.

the hearing before the District Court on June 2, 2016, the District Court expressed questions and reservations about certain aspects of the proposed settlement, intimating that renegotiation of some aspects of the settlement might be necessary in order for it to be approved. Just before that hearing, the parties in Mohamed announced a settlement of their own case (which Uber denies renders this appeal moot, but which at the very least should reduce the urgency for a decision, and see supra note 2). Given the suddenly delicate state of the proposed settlement in O'Connor, as well as the announcement of a settlement in Mohamed, Plaintiffs moved to intervene promptly to assure that this appeal would not affect the settlement process in this case.

As explained in their motion to intervene, a ruling by this Court (or even a leaning at argument) as to the enforceability of Uber's 2013 and 2014 arbitration agreements could severely impact the ability of the parties to finalize their settlement, should the District Court require (as now seems likely) that certain provisions in the agreement be revised. See Dkt. 102 at 4. Given the judicial preference for voluntary settlements of complex litigation, see Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992), this Court should encourage the parties to reach and finalize an agreement that will obtain court approval. Should the Court proceed with this appeal in the face of this delicate posture of the O'Connor case, such a result may well not be reached.

But, should the Court proceed with this appeal, even given this delicate posture, the O'Connor plaintiffs would now be particularly at risk if this Court were to hear this appeal but without the benefit of briefing and argument from the related O'Connor case, whose plaintiffs had indisputably preserved an important argument (the applicability of D.R. Horton)[4], and which case squarely addressed below the question of the non-severability of Uber's illegal PAGA waver in its 2013 and 2014 arbitration agreements (see supra note 3).

This is not a situation where the proposed intervention "threaten[s] to broaden the scope of the case going forward" or where intervenors are attempting to "inject[] new issues into the litigation." Day v. Apoliona, 505 F.3d 963, 965 (9th Cir. 2007) (internal quotation omitted). Instead, intervention "will ensure that [the Court's] determination of an already existing issue is not insulated from review simply due to the posture of the parties." Id. Allowing the O'Connor plaintiffs to intervene (in a case that this Court has already recognized as related to the

[4] The NLRB has repeatedly concluded, like it did in D.R. Horton, that class waivers in arbitration agreements violate the NLRA, and an increasing number of courts have followed the NLRB's conclusion, most recently the Seventh Circuit in Lewis v. Epic Sys. Corp., No. 15-2997, 2016 WL 3029464 (7th Cir. May 26, 2016). See also Totten v. Kellog Brown & Root, LLC, 2016 WL 316019, *12-14 (C.D. Cal. Jan. 22, 2016); Grant v. Convergys Corp., 2013 WL 781898, *5 (E.D. Mo. Mar. 1, 2013), reconsideration denied, motion to certify appeal granted, 2013 WL 1342985 (E.D. Mo. Apr. 3, 2013), appeal dismissed (Jan. 17, 2014); Herrington v. Waterstone Mortg. Corp., 2012 WL 1242318, *6 (W.D. Wis. Mar. 16, 2012). Although this Court has yet to squarely address this question of whether class action waivers like the one at issue here violate the NLRA, briefing and argument addressing this question is complete in Morris v. Ernst & Young LLP, No. 13-16599 (9th Cir., argued Nov. 24, 2015), and is ongoing in Hoot Winc, LLC, et al. v. National Labor Relations Board, No. 15-72839 (9th Cir.) (Reply brief due July 1, 2016), and so a panel of this Court could rule on this issue soon.

O'Connor case) will guarantee that the D.R. Horton argument is unequivocally preserved and will assure that the District Court's reasoning regarding the non-severability of the PAGA waiver is squarely presented (since this issue was fleshed out much more fully and directly in O'Connor).

In sum, this Court has stated that that "all the circumstances of a case must be considered in ascertaining whether or not a motion to intervene is timely under Fed. R. Civ. P. 24." Legal Aid Society of Alameda Co. v. Dunlop, 618 F.2d 48, 50 (9th Cir.1980). Here, a complex web of constantly evolving circumstances, involving overlapping appeals, an eleventh-hour settlement announcement in the Mohamed case, and the now uncertain outcome of the parties' proposed settlement in O'Connor (where the parties now seem likely to be sent back to the negotiating table on at least some aspect of the settlement), led the O'Connor Plaintiffs to move to intervene at this point, just before oral argument. In light of the "totality of the circumstances," the intervention motion should be deemed timely because Proposed Intervenors acted promptly in reaction to changed circumstances, and critically, because the interests of justice favor intervention by preserving all possible arguments on behalf of the overlapping class members (Uber drivers) in these cases. Smith, 2016 WL 2956915, *6.

B. The O'Connor Plaintiffs Have A Significant Protectable Interest In The Subject Of The Mohamed Appeal Which Is Not Adequately Represented At Present.

Uber argues that "an appellee's bare desire to preserve the district court's

flawed decision is not a valid reason for a stay," Dkt. 104 at 7; however, this argument mischaracterizes the O'Connor Plaintiffs' reasons for filing this motion to intervene. There are overlapping issues raised by the Mohamed plaintiffs' appeals and the appeals in O'Connor, and in light of recent developments, Plaintiffs' appeals in O'Connor may well go forward after all, such that their rights must be preserved. As set forth supra, n. 3, the O'Connor Plaintiffs have a significant interest in making sure that all potentially meritorious arguments are preserved and adequately presented to this Court, so that to the extent overlapping issues regarding the enforceability of Uber's arbitration agreements are decided here, the O'Connor Plaintiffs are not prejudiced if their settlement is not consummated.

Moreover, an interest in protecting the viability of a pending settlement *is* itself a valid protectable interest. Class Plaintiffs, 955 F.2d at 1276 (noting "the strong judicial policy that favors settlements, particularly where complex class action litigation is concerned").[5] Uber notes that the District Court has not indicated how or when it will rule on the plaintiffs' motion for preliminary settlement approval, Dkt. 104 at 3. However, if the past is any indicator, the

[5] Uber disingenuously suggests that the parties would "benefit…at the bargaining table" from a ruling on this appeal, see Dkt. 104 at 1, but, in reality, any ruling, regardless of which way the appeal is decided, will likely change the parties' respective positions drastically enough so as to warrant completely reevaluating the underlying settlement and may render further negotiations impossible.

District Court is expected to rule promptly, likely in the next several weeks. In light of the questioning at the hearing on preliminary approval, there appears to be a high probability that the parties in O'Connor will need to renegotiate some aspects of the deal in order to obtain approval. Uber argues that the O'Connor Plaintiffs are engaged in "gamesmanship" by trying to cement the current status quo in place while their settlement is ruled upon, see Dkt. 104 at 7-8. On the contrary, the O'Connor Plaintiffs' motion to intervene merely reflects their desire to protect the interests of the certified class by either allowing the settlement process to play out below without a dramatic disruption in the form of a decision in this appeal, or to make sure the class's interests are adequately protected if this appeal does go forward right away, by assuring that all possible meritorious arguments are squarely presented.[6] In light of these significant protectable interests, intervention should be permitted.

C. Uber Would Not Suffer Any Appreciable Harm By Allowing Intervention.

Intervention is particularly appropriate given the minimal harm to Uber if this appeal is briefly delayed. This appeal has already been pending before this Court for a year; a brief delay of another few months would not prejudice Uber,

[6] Uber's claim that there is no "ongoing settlement process" below, Dkt. 104 at 7-8, is patently false. There *is* a process for approval of class settlements under Fed. R. Civ. P. 23(e), which involves preliminary and then final approval (and commonly involves – and most likely will involve here -- further settlement negotiations needed if preliminary approval of the deal as now written is denied). The parties are in the midst of that process, as they are actively seeking preliminary approval of their proposed settlement and awaiting the District Court's ruling.

which has already altered its newer versions of its arbitration agreements from the versions at issue in this appeal.[7] Likewise, allowing the O'Connor plaintiffs to intervene so as to provide clear standing to make the argument that Uber's agreements violate drivers' Section 7 rights under the NLRA (as well as the argument that agreement's PAGA waiver is non-severable) does not prejudice Uber, as Uber has already responded to these arguments on the merits in its briefing. See Dkt. 82 at 14-17. In short, there is almost no prejudice to Uber by allowing O'Connor plaintiffs to intervene here and letting them submit supplemental briefing in support of the Mohamed Plaintiffs' position (or at least delaying decision to allow settlement proceedings to play out in their case below).

CONCLUSION

The O'Connor and Yucesoy Plaintiffs respectfully request that their Motion to Intervene in the related case, Mohamed, Appeal Nos. No. 15-16178, 15-16181, 15-16250, be granted, and reiterate their request that decision in this case be deferred until Proposed Intervenors can conclude their attempts at settlement below, or, alternatively, can be afforded an opportunity to submit supplemental briefing, and participate in argument, in support of the Mohamed Plaintiffs.

[7] Indeed, longer waits for an appeal to be heard in the Ninth Circuit are not uncommon. See, e.g., Juarez v. Jani-King of California, Inc., No. 12-17759 (9th Cir.) (still pending). Indeed, the Court's own website states that the typical time for oral argument in a civil appeal is approximately 9-12 months from completion of briefing, whereas here briefing was only just completed. See Frequently Asked Questions, No. 16, available at: https://www.ca9.uscourts.gov/content/faq.php

Dated: June 13, 2016

Respectfully submitted,

DOUGLAS O'CONNOR, et al.,
HAKAN YUCESOY, et al.,

By their attorneys,

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan
Adelaide Pagano
LICHTEN & LISS-RIORDAN, P.C.
729 Boylston Street, Suite 2000
Boston, MA 02116
(617) 994-5800
sliss@llrlaw.com

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) *Mohamed v. Uber Techs., Inc.*, No. 15-16250, District Court No. 3:14-cv-05200-EMC; (5) *Del Rio v. Uber Techs., Inc.*, No. 15-17475, District Court No. 3:15-cv- 03667-EMC; (6) *Yucesoy v. Uber Techs., Inc.*, No. 15-17534, District Court No. 3:15-cv-00262-EMC; (7) *O'Connor v. Uber Techs., Inc.*, No. 15-17532, District Court No. 3:13-cv-03826-EMC; (8) *Mohamed v. Uber Techs., Inc.*, No. 15-17533, District Court No. 3:14-cv-05200-EMC; (9) *O'Connor v. Uber Techs., Inc.*, No. 16-1500, District Court No. 3:13-cv-03826-EMC; (10) *Yucesoy v. Uber Techs., Inc.*, No. 16-15001, District Court No. 3:15-cv-00262-EMC; (11) *Mohamed v. Uber Techs., Inc.*, No. 16-15035; and (12) *O'Connor v. Uber Techs., Inc.*, No. 16-15995, District Court No. 3:13-cv-03826-EMC.

CERTIFICATE OF SERVICE

I hereby certify that, on June 13, 2016, this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing ("NEF").

/s/ Shannon Liss-Riordan__
Shannon Liss-Riordan

Dated: June 13, 2016