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

SUPPLEMENTAL BRIEF REGARDING *EPIC SYSTEMS CORP. v. LEWIS*

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The Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 2018 WL 2292444 (May 21, 2018), further defeats class certification in this case and requires reversal of the district court's order certifying a class of hundreds of thousands of individuals. The district court explained that it certified the class only because it concluded that the individual arbitration agreements entered into by Plaintiffs and Uber "are not enforceable as a matter of public policy." *O'Connor v. Uber Techs., Inc.*, No. 3:13-cv-03826 (N.D. Cal.), Dkt. 395 at 24. And Plaintiffs themselves have acknowledged that an order enforcing the agreements would "destroy the certified class" and "gut the certified class." 2ER449–50, 332. *Epic Systems* ends any possible argument that the arbitration agreements should not be enforced. And because the majority of class members signed these arbitration agreements, Uber respectfully submits that this Court must reverse the district court's class certification order and its order declining to enforce the arbitration agreements.

1. Plaintiffs brought these actions against Uber alleging that Uber misclassified them as independent contractors and, as a result, violated California's gratuities and expense-reimbursement laws. The district court acknowledged that the arbitration agreements precluded class certification because "individualized issues as to whether Uber's more recent arbitration clauses are enforceable against class members will predominate over questions common to all putative class

members." *O'Connor*, Dkt. 341 at 8. But the district court concluded that it could avoid these individualized inquiries by holding that *all* of the arbitration agreements "are unenforceable as a matter of public policy," such that "the Court w[ould] not need to perform an individualized inquiry to determine" if they could be enforced. *O'Connor*, Dkt. 395 at 24. Uber appealed.

During the pendency of the appeal, this Court in a related action rejected the district court's conclusion that the arbitration agreements were categorically unenforceable as a matter of public policy. *See Mohamed v. Uber Technologies, Inc.*, 848 F.3d 1201, 1208 (9th Cir. 2016) at 1208 ("All of Plaintiffs' challenges to the enforceability of the arbitration agreement . . . should have been adjudicated in the first instance by an arbitrator and not in court."). But by that point, this Court had concluded that arbitration agreements that contained mandatory class waivers violated the National Labor Relations Act ("NLRA"). *See Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. granted* 137 S.Ct. 809 (2017). Although the arbitration agreements here were not mandatory, the Court withdrew these appeals from submission two days after oral argument pending the Supreme Court's review of *Morris*. Dkt. 144. On May 21, 2018, the Supreme Court reversed *Morris* in *Epic Systems*, holding that the NLRA does not preclude the enforcement of mandatory agreements to arbitrate on an individual basis.

2. The Court should reverse the district court's order denying Uber's motion to compel arbitration. This Court already held in *Mohamed* that the delegation clause contained in the parties' arbitration agreements is enforceable, and Plaintiffs acknowledged that, after *Mohamed*, "the question of whether Uber's arbitration agreement is enforceable likely turns on the question of whether the class action waiver violated the NLRA." Dkt. 108 at 13. In *Epic Systems*, the Supreme Court answered that question in the negative. As the Court explained, "Congress has instructed that arbitration agreements like those before us must be enforced as written." *Epic Sys.*, 2018 WL 2292444, at *17. Although the Court acknowledged that "Congress is of course always free to amend this judgment," it "s[aw] nothing suggesting it did so in the NLRA." *Id.* Therefore, the Court should compel any remaining named plaintiffs who entered into an arbitration agreement with Uber to honor their contracts and submit their disputes to individual arbitration.[1]

[1] In their Answering Brief, Plaintiffs asserted that regardless of whether the arbitration agreements are enforceable, not a single member of the class is bound by the agreements "because the lead plaintiffs opted out of arbitration and thereby rejected arbitration on behalf of the class." Dkt. 108 at 13–14. But Plaintiffs waived this argument by failing to timely present it to the district court, by failing to present it in any of the four merits briefs initially filed in these appeals, and through repeated judicial admissions that the vast majority of class members did not opt out of the arbitration agreements. *See* Dkt. 96 at 26–27. In any event, the argument is meritless to the extent it relies on a Georgia Supreme Court decision that did not involve the FAA, *see Bickerstaff v. Suntrust Bank*, 299 Ga. 459 (2016), and would violate the FAA, Rule 23, the Rules Enabling Act, and California law. *See* Dkt. 96 at 27–29.

3. Because the arbitration agreements are not categorically unenforceable, the district court's class certification order must also be reversed.[2] *See Avilez v. Pinkerton Gov't Servs., Inc.*, 596 F. App'x 579 (9th Cir. 2015) (holding that "[t]he district court abused its discretion to the extent it certified classes and subclasses that include employees who signed class action waivers").

As noted above, the district court itself initially refused to certify a class that included individuals who signed an arbitration agreement because individualized questions would necessarily predominate with regard to the enforceability of such agreements. *See O'Connor*, Dkt. 341 at 8. This was undoubtedly correct. Because most class members agreed to bring their claims in individual arbitration, a class action could not possibly generate common answers to common questions, and whatever commonality did exist would not predominate over individualized inquiries. *See* Dkt. 96 at 41–43. For similar reasons, a class action would not prove a superior vehicle for resolving Plaintiffs' claims. *Id.* And because named Plaintiffs are *not* bound by an arbitration agreement, they are neither typical nor adequate representatives of the class. *Id.*; *see also Avilez*, 596 F. App'x at 579

[2] The California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court* does not impact the class certification analysis because that decision applies only to California Industrial Welfare Commission ("IWC") wage orders, 4 Cal.5th 903, 916 n.5 (2018), and Plaintiffs assert claims for violation of California's gratuities and expense-reimbursement laws, each of which arise under the California Labor Code rather than IWC wage orders. 10ER2191.

("Avilez's arbitration agreement does not contain a class action waiver and counsel did not dispute that those who signed such waivers have potential defenses that Avilez would be unable to argue on their behalf. To the extent the classes and subclasses include individuals who signed class action waivers, Avilez is not an adequate representative and her claim lacks typicality."). And of course, even if individual class members could raise individualized challenges to the enforceability of their arbitration agreements, those challenges must be brought in arbitration under the agreements' delegation clause. *See Mohamed*, 848 F.3d at 1208.

Indeed, both the district court and Plaintiffs have repeatedly conceded during the pendency of this appeal that a decision reversing the district court's order finding the arbitration agreements unenforceable would necessarily require reversal of the district court's class certification order, as well. *See* 2ER300, 449–50, 332. Accordingly, the Court should reverse the district court's decision certifying the class.[3]

* * *

[3] As explained in Uber's briefing, numerous Rule 23 issues preclude class certification even without the arbitration agreements. *See* Dkt. 96 at 43–62. Uber submits that this Court can—and should—confirm that no class can be certified here in light of these obstacles to commonality, predominance, typicality, superiority, and adequacy. This Court should also reverse the district court's Rule 23(d) orders for the reasons provided in Uber's briefing. *See* Dkt. 96 at 29–41.

In short, *Epic Systems* requires reversal of the district court's order declining to enforce the arbitration agreements. In light of that decision, the district court's class certification order must also be reversed. Because the majority of class members are bound to arbitrate their disputes with Uber on an individual basis and cannot participate in a class proceeding, the class must be decertified.

For these reasons, and those provided in Uber's principal briefs, Uber respectfully requests that the Court reverse class certification, as well as the district court's order denying Uber's motion to compel arbitration.

Dated: June 4, 2018

Respectfully submitted,

/s/ Theodore J. Boutrous, Jr.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32-1 because it contains 1,358 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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 4, 2018

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

CERTIFICATE OF SERVICE

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 4, 2018.

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 4, 2018

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