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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

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

PLAINTIFF-APPELLEES' SUPPLEMENTAL BRIEF

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INTRODUCTION

The Court has ordered the parties to submit supplemental briefs addressing the impact of *Epic Sys. Corp. v. Lewis*, No. 16-285, 2018 WL 2292444 (U.S. May 21, 2018).[1] As a result of that decision, one issue relevant to the District Court's orders below has been decided against the Plaintiffs (namely, the argument that Uber's arbitration agreements are not enforceable under the NLRA). These consolidated appeals, however, raise a number of issues that have been impacted by a host of new caselaw that has changed the legal landscape since the District Court issued its class certification orders in *O'Connor* (and orders on Uber's motions to compel arbitration in *O'Connor* and *Yucesoy*) nearly two and a half years ago in late 2015. Plaintiffs submit, therefore, that the proper course should now be for this Court to remand these cases to the District Court for further consideration in light of a number of significant new cases that the District Court has not yet addressed. These cases include, not only *Lewis*, but also the California Supreme Court's recent decision in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018), as well as this Court's decision in *Mohamed v. Uber Technologies, Inc.*, 848 F.3d 1201 (9th Cir. 2016), and the case of *Bickerstaff v.*

[1] A *pro se* litigant who has previously attempted to file briefs in this case has also filed a response to the Court's order. *See* Dkt. 153. This litigant is not a party to this action and is not authorized to file briefs in this case, and so the Court need not consider that submission.

Suntrust Bank, 299 Ga. 459, *cert. denied*, 137 S. Ct. 571 (2016) (which Plaintiffs have previously argued should be considered by the District Court in the first instance, *see* Dkt. 88-1 at 4-5).

Plaintiffs had requested that the District Court certify a class in *O'Connor* and *then* determine whether Uber's arbitration clause was enforceable with respect to those class members who had accepted it. ER2021-23.[2] Significantly, the named plaintiffs, as well as thousands of class members, are not affected by the arbitration clause because they either opted out of arbitration or had ended their work for Uber prior to Uber's implementation of an arbitration clause. *See* Dkt. 108 at 30. The District Court adopted Plaintiffs' approach, in part, by first certifying a class including drivers who were both bound and who were not bound by the arbitration clause. ER72-73. However, the District Court then failed to give Plaintiffs the opportunity to respond to Uber's motion to compel arbitration with

[2] A number of courts have adopted this approach. *See, e.g., Davis v. Four Seasons Hotel Ltd.*, 2011 WL 4590393, *4 (D. Haw. Sept. 30, 2011) ("The possibility that [defendant] may be able to compel unnamed members of the putative class to arbitrate in the future does not preclude class certification"); *D'Antuono v. C & G of Groton, Inc.*, 2011 WL 5878045, *3 (D. Conn. Nov. 23, 2011); *Sealy v. Keiser Sch., Inc.*, 2011 WL 7641238, *3-4 (S.D. Fla. Nov. 8, 2011); *Bond v. Fleet Bank (RI), N.A.*, 2002 WL 31500393, *7 (D.R.I. Oct. 10, 2002) ("[T]hat some members may be subject to a valid arbitration agreement does not preclude this court from certifying a class").

respect to class members who were bound by the arbitration clause.[3] Thus, the District Court never considered Plaintiffs' full arguments as to why the class members who had arbitration clauses should remain in the class.

Most notably, as Plaintiffs have emphasized, they took the position from the beginning of the case that, because the lead plaintiffs had opted out of arbitration, they could be deemed to have done so on behalf of a class. *See* Dkt. 108 at p. 15, n.12. Before this Court disposes of this argument, Plaintiffs submit that the proper course would be to remand the case to allow the District Court to address it in the first instance. Indeed, the usual procedure is for legal issues to be decided first at the trial court level before being addressed on appeal. *See Bibeau v. Pacific Northwest Research Foundation Inc.,* 188 F.3d 1105, 1114 (9th Cir. 1999) (concurring opinion) ("'It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.'") (quoting *Singleton v. Wulff,* 428 U.S. 106, 120 (1976)); *id*. (while recognizing the Court's discretion to resolve legal issues not addressed by the district court, the "'wiser course is to allow the district court to rule on [them] in the first instance.'") (quoting *Barsten v. Department of the Interior,* 896 F.2d 422, 424 (9th Cir.1990)); s*ee also Newman v.*

[3] Uber filed its motion to compel arbitration of class members bound by the arbitration clause *the day after* the District Court included them in the class certification order (*see O'Connor*, Civ. A. No. 13-3826, Dkt. 397), and the District Court proceeded to deny that motion *the same day it was filed*, before Plaintiffs could even respond (*see* ER55-70).

Bank of New York Mellon Corp., 649 Fed. Appx. 630 (9th Cir. 2016). Here, Plaintiffs raised at the outset of the case the argument to the District Court that the named plaintiffs could opt out of arbitration on behalf of the class, *see* SER512 at n.4, but the *Bickerstaff* decision was decided later -- after the District Court had already denied Uber's motion to compel arbitration on other grounds (and without giving Plaintiffs a chance to respond). Thus, the proper course is for this Court to remand the case to the District Court to consider the reasoning of *Bickerstaff*.[4]

In addition, remand is proper now because significant intervening caselaw has affected the propriety of the District Court's class certification decision. In *O'Connor*, the District Court certified a class after consideration of the multi-factor test for determining employee status in *Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341 (1989). However, in *Dynamex*, the California Supreme Court has now announced a revised test for employee status that makes analysis of the *Borello* factors unnecessary. In *Dynamex*, the Court adopted an "ABC" test, which places the burden on the alleged employer to prove three prongs in order to justify independent contractor status. Significantly, the B Prong of this test requires the alleged employer to prove that the services performed by the workers

[4] As Plaintiffs explained in their Brief, *Bickerstaff* was a decision from the Georgia Supreme Court that analyzed the Georgia version of Rule 23, but based its analysis on federal Rule 23 caselaw. *See* Dkt. 108 at 16; *Bickerstaff*, 299 Ga. at 462. Its reasoning was not peculiar to Georgia law and, to Plaintiffs' knowledge, has not yet been addressed by federal courts.

is outside the company's usual course of business. *Dynamex*, 4 Cal. 5th at 959. Plaintiffs submit that, under this test, a revised analysis for class certification is required.[5] Notably, the District Court had excluded putative class members who either drove through limo companies or who used corporate or fictitious names in their dealings with Uber, based upon its conclusion that they would differ from class members and from each other with respect to the "distinct occupation" factor of the *Borello* test. However, under Prong B of the ABC test announced in *Dynamex*, these purported differences do not matter because the issue is solely what Uber's usual course of business is and whether the drivers perform services within that usual course of business. Indeed, in a similar case applying an ABC test, the Seventh Circuit recognized that commonality under the B Prong alone warranted class certification, regardless of purported differences among class members with respect to the other two prongs. *See Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1060 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 2289 (2017).

But rather than deciding this issue afresh at the appellate level, it would be most prudent for this Court to remand to the District Court with instructions to consider class certification in light of this recent significant new authority from the

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[5] Plaintiffs had argued below that the District Court should not limit itself to the *Borello* factors in addressing the misclassification issue, noting that the California Supreme Court had articulated a broader, more employee-protective test in *Martinez v. Combs*, 49 Cal. 4th 35 (2010). Nevertheless, the District Court chose to apply only *Borello*. *See* ER133, n. 14.

California Supreme Court.[6]

After revisiting class certification in light of *Dynamex*, the District Court could then, as in *Bickerstaff*, provide the class with the opportunity to either agree with the lead plaintiffs' rejection of arbitration by remaining in the class (after notice, explaining their options), or reject the lead plaintiffs' rejection of arbitration by opting out of the class. Given the fact that a revised class may need to be certified by the District Court, the District Court could authorize new class notice that would make this choice explicit.

Importantly, Plaintiffs request that the Court remand to the District Court for further consideration of its class certification orders in light of this significant new caselaw, rather than "vacate" the class certification orders because of the risk of widespread confusion if such an order is issued. Because it appears likely that the

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[6] Uber may argue that *Dynamex* will not apply here because the newly announced ABC test should apply prospectively only, rather than retroactively. However, the *Dynamex* Court's adoption of the ABC test is clearly a reinterpretation of existing law, and thus the decision applies retroactively. Moreover, only the Supreme Court can decide that a newly announced test is not retroactive. *See Barr v. ACandS, Inc.*, 57 Cal. App. 4th 1038, 1053 (1997) ("We know of no decisions where the traditional retroactive effect of a judicial decision was altered to apply prospectively other than through pronouncements of the Supreme Court."). Uber may also note that, in *Dynamex*, the California Supreme Court declined to address whether the ABC test would apply to an expense reimbursement claim under Labor Code § 2802. *See Dynamex*, 4 Cal. 5th at 916, n. 5. This is therefore another issue that must now be decided anew and is properly addressed first at the District Court, after affording the parties opportunity for briefing and arguing it.

District Court would certify a revised class upon remand (even if it were a smaller class of drivers who are indisputably not bound by an arbitration clause), there is no reason for this Court to rush to vacate the class certification orders before the District Court has the chance to consider what revised class is appropriate.

Plaintiffs are concerned that there is a real risk that if the class certification orders are vacated (rather than remanded to the District Court for reconsideration in light of recent appellate caselaw), Uber may attempt to alter the class members' rights in the interim. Uber has shown its penchant for taking quick action, in response to developments in this case, to communicate with putative class members in ways affecting their rights under this case.[7] Rather than encouraging such a rush to action, and the potential for emergency briefing and subsequent appeals, Plaintiffs urge the Court to simply remand these cases to the District Court for further consideration in light of *Dynamex*, *Lewis*, *Mohamed*, and *Bickerstaff*, so that the parties may engage in an orderly fashion to address the current state of the

[7] For example, at the outset of the *O'Connor* case, Uber implemented its arbitration clause, which Plaintiffs had noted appeared to be in response to their counsel's litigation of a prior case in Massachusetts, which Uber sought to prevent from spreading. ER194. Later, within 36 hours of the District Court's issuance of its class certification order in December 2015, Uber rolled out a revised arbitration clause in response to that order. ER25. Both actions led to Plaintiffs filing emergency motions, which were granted by the District Court, ER25-32, ER188-99, and which led to Uber's appeals of these orders. Appeal No. 15-17532/15-17534, 14-16078. While Plaintiffs contend that these orders are now moot, *see* Dkt. 108 at pp. 54-59, Uber has continued to press them and burden the courts with procedural wrangling over them.

law. *See, e.g., Ali v. Gonzales*, 421 F.3d 795, 797 (9th Cir. 2005), *as amended on reh'g* (Oct. 20, 2005) ("[W]e are remanding for the district court to reconsider the class certification, rather than vacating that order…"); *In re Target Corp. Customer Data Sec. Breach Litig.*, 847 F.3d 608, 610–11 (8th Cir.), *amended,* 855 F.3d 913 (8th Cir. 2017) (remanding for District Court to reconsider class certification with express instructions that it address particular arguments, rather than vacating the order and decertifying the class pending reconsideration of the class certification order).

Notably, regardless of the Court's decision here, the District Court will soon be considering these same issues in the *Yucesoy* case (brought under Massachusetts law). The District Court has recently allowed the *Yucesoy* case to proceed: the complaint has been amended, and Uber has filed a new motion to dismiss and compel arbitration with respect to the named plaintiffs; the District Court has stated that it intends to consider class certification in that case soon after ruling on Uber's pending motion. The case has several named plaintiffs who are not bound by an arbitration clause, and Plaintiffs will argue that, under the reasoning of *Bickerstaff*, class members should now be permitted to decide whether to follow the lead plaintiffs in rejecting arbitration. Plaintiffs will also argue that class certification is eminently warranted under the Massachusetts ABC test for determining employee status. Notably, in *Dynamex*, the California Supreme Court

specifically adopted the Massachusetts version of the ABC test. *Dynamex*, 4 Cal. 5th at 956, n, 23. Thus, the District Court's analysis which it must now perform in *Yucesoy* will be identical to the analysis that the District Court should also be permitted to perform in *O'Connor*.

Given that the District Court will be called upon in *Yucesoy* to engage in analysis of the propriety of class certification (and appropriate scope of a class) under the Massachusetts ABC test – as well as the question of whether class members bound by arbitration can be deemed to have been opted out of arbitration by lead plaintiffs (as recognized in *Bickerstaff*) -- it would be proper for this Court to allow the District Court to address these issues next in both *Yucesoy* and in *O'Connor*, so that they may be decided first at the trial court level, rather than at the appellate level.

CONCLUSION

Significant caselaw has changed the legal landscape since the District Court issued its decisions certifying a class in the *O'Connor* case and denying Uber's motions to compel arbitration in *O'Connor* and *Yucesoy*. This Court should remand these cases to the District Court for further consideration in light of these intervening cases, rather than deciding issues that have not yet been addressed below. The District Court should be instructed to reconsider its class certification

orders, and orders denying Uber's motions to compel arbitration, in light of *Dynamex*, *Mohamed*, *Lewis*, and *Bickerstaff*.

Dated: June 4, 2018

Respectfully submitted,

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STATEMENT OF RELATED CASES

Plaintiff-Appellees are aware of the following related cases: (1) *O'Connor v. Uber Techs., Inc.*, No. 14-16078, District Court No. 3:13- cv-03826-EMC; (2) *Mohamed v. Uber Techs., Inc.*, No. 15-16178, District Court No. 3:14-cv-05200-EMC; (3) *Gillette v. Uber Techs., Inc.*, No. 15-16181, District Court No. 3:14-cv-05241-EMC; (4) *Gillette v. Uber Techs., Inc.*, No. 15-16250, District Court No. 3:14-cv-05241-EMC; (5) *O'Connor v. Uber Techs., Inc.*, No. 15-17420, District Court No. 3:13-cv-03826-EMC; (6) *Yucesoy v. Uber Techs., Inc.*, No. 15-17422, District Court No. 3:15-cv-00262-EMC; (7) *Del Rio v. Uber Techs., Inc.*, No. 15-17475, District Court No. 3:15-cv-03667-EMC; (8) *O'Connor v. Uber Techs., Inc.*, No. 15-17532, District Court No. 3:13-cv-03826-EMC; (9) *Yucesoy v. Uber Techs., Inc.*, No. 15-17532, District Court No. 3:15-cv-00262-EMC; (10) *Mohamed v. Uber Techs., Inc.*, 15-17533, District Court No. 3:14-cv-05200-EMC; (11) *O'Connor v. Uber Techs., Inc.*, No. 16-15000, District Court No. 3:13-cv-03826-EMC; (12) *Yucesoy v. Uber Techs., Inc.*, No. 16-15001, District Court No. 3:15-cv-00262-EMC; (13) *Mohamed v. Uber Techs., Inc.*, 16-15035, District Court No. 3:14-cv-05200-EMC.

Dated: June 4, 2018

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CERTIFICATE OF COMPLIANCE

I hereby certify that this supplemental brief complies with the Court's Order (Dkt. 152) because it is 2,499 words in length, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: June 4, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2018, I caused the foregoing document to be filed with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of this filing to all counsel of record.

Dated: June 4, 2018

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