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**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF CALIFORNIA**

DOUGLAS O'CONNOR, THOMAS COLOPY, MATTHEW MANAHAN, and ELIE GURFINKEL, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

UBER TECHNOLOGIES, INC,

Defendant.

Case No. CV 13-3826-EMC

**PLAINTIFFS' EMERGENCY MOTION TO ENJOIN UBER'S COMMUNICATIONS WITH CLASS MEMBERS THAT MAY AFFECT OR UNDERMINE THEIR RIGHTS IN THIS CASE, INCLUDING ANY ATTEMPTS TO ENFORCE UBER'S NEW ARBITRATION AGREEMENT**

Judge: Hon. Edward M. Chen

## INTRODUCTION

On December 9, 2015, this Court expanded the scope of this case by including in the class those drivers who have worked for Uber since its 2014 arbitration agreement was implemented. Specifically, the Court held that Uber's 2014 and 2015 arbitration clauses are unenforceable and that drivers bound by those agreements could now be class members in the case. See Dkt. 395 at 9-22. Less than forty-eight hours later, this morning—without any warning to or communication with Plaintiffs' counsel—Uber sent new arbitration agreements to its drivers in an apparent attempt to deceive unwitting class members into giving up their right to participate in the litigation. In doing so, Uber has attempted to usurp this Court's role of overseeing the process of issuing class notice and allowing drivers to have a full and fair opportunity, supervised by the Court, to learn about the case and choose whether or not to participate or to opt out. Indeed, the Court has ordered the parties to meet and confer and to finalize class notice in this case so that it can be approved by the Court at the upcoming hearing on December 17, 2015. See Dkt. 395 at 32. However, far from seeking court approval, Uber has unilaterally sent a new arbitration agreement to its drivers—including members of the certified class--which jeopardizes their right to participate in this action. The language of the agreement clearly purports to apply to all pending litigation, such that all drivers who do not opt out of the arbitration agreement would not be able to participate in a class action.[1]

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[1] The agreement on its face states that the arbitration provision applies to all current cases. See Exh. A to Soda Declaration at 15 ("this provision will preclude …you from participating in or recovering relief under any current or future class, collective, or representative (non-PAGA) action brought against the Company or Uber by someone else").

After Plaintiffs informed Uber of their intent to file this motion, Uber responded that no emergency motion is necessary. However, Uber's counsel has not informed Plaintiffs' counsel that it will not seek to use this agreement to limit the certified class in this case. Nor does the agreement inform class members that it will not affect their rights in this case. Late today—after distributing the agreement this morning, and sowing intense confusion among class members,

(continued on next page)

Moreover, the agreement is an unauthorized communication to class members regarding the subject matter of this case.[2] The agreement makes a passing reference to the O'Connor litigation two-thirds of the way into the lengthy document and does not explain to drivers that a class has been certified or that they may be class members in the case. See Exh. A to Soda Declaration, Exhibit B to McCoy Declaration (filed as Exhibits 1 and 2 to the Liss-Riordan Declaration, filed herewith).

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(Footnote continued from previous page)
Uber communicated to the press (but not even Plaintiffs' counsel) that it would not try to use this new agreement to limit the class in this case. However, there is simply no way for drivers to know upon reviewing the agreement that Uber may "choose" not to try to enforce the agreement, and nothing in the agreement itself appears to prevent Uber from attempting to enforce the agreement. As this Court noted in Mohamed v. Uber Techs., Inc., 2015 WL 3749716, *15 (N.D. Cal. June 9, 2015), a "driver reviewing the 'Paying for the Arbitration' section of the contracts could easily conclude that she would be required to pay arbitral fees simply to begin arbitration," and the same is true here where drivers actually reviewing the agreement would easily conclude that Uber's new contract strips them of the right to participate in this case (unless they opt out of the arbitration clause). Plaintiffs' counsel today have received between 100-200 inquiries from Uber drivers who have expressed confusion and dismay about the new agreement, and do not know if they need to opt out of the agreement to participate in this case. See Liss-Riordan Decl. at ¶ 4. This confusion is even more troubling given that drivers will soon receive class notice in this case and will learn they have the right to "opt out" of the class. Given all the public discussion that has now ensued regarding "opting out" of the arbitration clause, many will likely misunderstand and believe they need to "opt out" in order to be covered by the case.

Because of the widespread confusion Uber has already sowed, Uber must be enjoined from engaging in any further communications with class members that touch on this action in any way. Indeed, Plaintiffs note that if the Court was troubled by Uber's behavior earlier in the litigation, its actions are all the more outrageous now that the drivers at issue are not putative class members, but rather members of a certified class, represented by Plaintiffs' counsel. These unsanctioned communications with class members, which directly jeopardize their right to participate in the case and has already created great confusion, should be enjoined immediately.

[2] Today, Uber has stated to the press (again, not to Plaintiffs' counsel) that this Court "authorized" Uber in an oral ruling yesterday to send the agreements to its drivers. Plaintiffs (who were not represented at a hearing yesterday) are not aware of any such authorization, nor were their counsel consulted regarding this request.

By distributing an agreement that attempts to "fix" the issues the Court has now found made its prior arbitration agreements unenforceable, Uber's new agreement appears to be an attempt to limit the class in this action through its unilateral action. By doing so, Uber is essentially attempting to substitute its own arbitration agreement and opt-out mechanism for the court-approved and supervised notice and opt-out process required by Rule 23. This underhanded behavior is especially egregious given that Uber has already been chastised by this Court for attempting to "unilaterally limit the size and scope of the class ... without being subject to court supervision." O'Connor v. Uber Techs., Inc., 2014 WL 1760314, *4 (N.D. Cal. May 2, 2014). Plaintiffs ask that the Court enjoin enforcement of the arbitration agreements that Uber distributed to class members immediately following the Court's December 9th Order, and require Uber to cease distributing arbitration agreements to class members--or otherwise engaging in any conduct or communications that could interfere with or undermine drivers' rights to participate in this case--for the duration of the litigation.[3]

Plaintiffs respectfully request that the Court take up this issue at the Case Management Conference scheduled for December 17, 2015, at 1:30 pm. Given the confusion that Uber is already sowing among the class, immediate action by the Court is required.

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[3] Furthermore, Plaintiffs note that they reserve the right to appeal the Court's ruling limiting the O'Connor action to drivers in California only, as well the Court's decision to exclude drivers who drove under corporate or fictitious names or through third party transportation companies. Thus, the Court should enjoin enforcement of Uber's new agreement not only with respect to members of the certified class in this case, but also with respect to putative class members who Plaintiffs have previously sought to include in this case as well. Otherwise, Uber may unilaterally cut off Plaintiffs' ability to appeal these issues. See Cty. of Santa Clara v. Astra USA, Inc., 2010 WL 2724512, *3 (N.D. Cal. July 8, 2010) (where class certification had been denied, but could still be raised later in the litigation, the Court still found communications with putative class members to be misleading and improper).

## ARGUMENT

### I. The Court Should Invalidate the Arbitration Agreements Distributed to Class Members In This Case As an Improper Attempt to Interfere With Court Supervised Notice And Opt Out Procedures.

"Misleading communications to class members concerning the litigation pose a serious threat to the fairness of the litigation process, the adequacy of representation and the administration of justice generally" and "Rule 23 specifically empowers district courts to issue orders to prevent abuse of the class action process." In re Sch. Asbestos Litig., 842 F.2d 671, 679 (3d Cir. 1988). Specifically, "Rule 23(d) gives district courts the power to regulate the notice and opt-out processes and to impose limitations when a party engages in behavior that threatens the fairness of the litigation." Wang v. Chinese Daily News, Inc., 623 F.3d 743, 756 (9th Cir. 2010) cert. granted, judgment vacated, 132 S. Ct. 74 (2011). Here, Uber has done precisely that; by distributing a new arbitration agreement within days of this Court's ruling on class certification, Uber has potentially tricked thousands of class members into being required to arbitrate their claims and effectively opting out of the class action, without even realizing that they are doing so. Uber's agreement mentions nothing about class certification and makes only passing reference to the O'Connor case, buried deep in its lengthy contract (that is once again only visible in most cases by clicking on a hyperlink on a phone). See Exhibit A to Soda Declaration, Exhibit B to McCoy Declaration. Drivers receiving the agreement would not realize that they are class members in this case, or that by agreeing and failing to opt out of the arbitration agreement, they may be giving up their right to participate. In effect, Uber is trying to substitute its own notice and opt-out mechanism for court-approved notice and supervision of the opt-out process, and has created substantial confusion among class members in the process. See Liss-Riordan Decl. at ¶ 4 (noting that between 100-200 Uber drivers have contacted Plaintiffs' counsel's firm in the last twelve hours expressing dismay and confusion upon receiving the new agreement).

"The notice required by Rule 23 mandates that class members be exposed to information that will enable them to make an informed, intelligent decision whether to opt out or remain a member of the class." Georgine v. Amchem Products, Inc., 160 F.R.D. 478, 502 (E.D. Pa. 1995) (citing In re Nissan Motor Corp. Antitrust Litig., 552 F.2d 1088, 1105 (5th Cir. 1977)). Here, Uber's distribution of its new arbitration does not even come close. Indeed, the email used to disseminate the agreement makes no mention of the O'Connor case at all. See Exhibit A to McCoy Declaration. Moreover, Uber's decision to disseminate this agreement to class members at the very moment that the Court has ordered the parties to "meet-and-confer regarding the contents and logistics of class notice and other relevant procedural details," see Dkt. 395 at 32, shows bad faith on the part of Uber and its counsel. As such, the Court should exercise its power to strike these agreements and enjoin any such future misleading communications by Uber, as well as consider sanctioning Uber for its conduct. Numerous courts have exercised their Rule 23 powers to strike opt-outs that were obtained improperly and to enjoin further communication with class members. See Wang, 623 F.3d at 755 (explaining that that "[i]n the face of coercive behavior by a party opposing a class, district courts may regulate communications with class members related to the notice and opt-out processes"); Guifu Li v. A Perfect Day Franchise, Inc., 270 F.R.D. 509, 517-19 (N.D. Cal. 2010) (recognizing inherently coercive nature of direct communications between employer and employees regarding participation in class actions and refusing to give effect to "opt outs" obtained by employer); County of Santa Clara, 2010 WL 2724512 *6 (N.D. Cal. July 8, 2010) (misleading or coercive communications by defendants with class members "cannot be allowed under Rule 23, for to rule otherwise would allow defendants to shift control of one preceding from the district judge to the defense counsel."); Keystone Tobacco Co., Inc v. U.S. Tobacco Co., 238 F. Supp. 2d 151, 153, 154 (D.D.C. 2002) (where settlement proposals were presented to class members in potentially coercive manner,

court ordered that a curative notice be sent to persons who signed settlement informing them that they may withdraw from the settlement if they wish to do so and ordered that that plaintiffs' counsel promptly notify the court if improper communications are ongoing so that the court may consider what sanctions to impose, including contempt of court); Georgine, 160 F.R.D. at 502 (noting that "because I have concluded that class members who were exposed to the misleading communications likely did not make a free and unfettered decision to opt out of the class, pursuant to my inherent authority to control the litigation and the attorneys before the court, and my duty to manage the notice to the class under Rule 23, I will restore to the members who originally filed timely exclusion requests the opportunity to make a new independent decision to opt out of the class"); Haffer v. Temple Univ. of Com. Sys. of Higher Educ., 115 F.R.D. 506, 512 (E.D. Pa. 1987) (ordering court-supervised notice and "prohibit[ing] future improper communications" by defendants with class members, and "impos[ing] a substantial sanction against defendants and their counsel"); Tedesco v. Mishkin, 629 F. Supp. 1474, 1484 (S.D.N.Y. 1986) (ruling that Defendant "is restrained from further communicating with class members so as to discourage their participation in this action or to induce class members to 'opt out' of the class. Further, defendant is enjoined from interfering with the due administration and determination of this class action by the court"); Impervious Paint Indus., Inc. v. Ashland Oil, 508 F. Supp. 720, 723-24 (W.D. Ky. 1981) ("Since we cannot say that these class members made a free and unfettered decision … we believe that those opt-outs who have been contacted by [defendant] must be restored to the class and must be sent a special notice setting forth our finding of impropriety on [defendant's] part. They will then be given a period equal to the original opt-out period within which to make a new decision").

These cases all stand for the proposition that class members must be able to "make a free and unfettered decision" as to whether or not to opt out of a certified class under Rule 23.

Impervious Paint Ind., 508 F.Supp. at 721-22. "[T]he court ha[s] authority in Rule 23 class actions to invalidate opt-outs when they were procured through fraud, duress, or other improper conduct." Billingsley v. Citi Trends, Inc., 2013 WL 246115, *3 (N.D. Ala. Jan. 23, 2013) (citing Kleiner v. First Nat. Bank of Atl., 751 F.2d 1193, 1212 (11th Cir.1985)). Here, because Uber's arbitration agreement effectively serves as an opt-out mechanism from the certified class in this case (without explaining that fact or even disclosing the existence of a certified class), the Court should exercise its authority to rescind and refuse to enforce any new arbitration agreements sent to class members.

The Court should also enjoin any future communications by Uber with class members that could undermine or discourage participation in this case in ***any*** manner going forward (including from the hundreds of drivers the company has obviously been in touch with in preparing its declarations in support of its Opposition to Class Certification). "Where defense counsel has ... solicited or advised clients to solicit class members to opt out, courts have imposed a variety of remedies, ranging from requiring a new opt-out phase to assessing attorney's fees or imposing punitive fines." Gortat v. Capala Bros., 2010 WL 1879922, *3 (E.D.N.Y. May 10, 2010), objections overruled, 2010 WL 3417847 (E.D.N.Y. Aug. 27, 2010).

Plaintiffs urge the Court to issue a stern warning to Uber regarding any future attempts to solicit opt-outs from drivers, or to undermine or discourage participation in this case, or create confusion by distributing a new arbitration agreement that purports to affect class members' rights (regardless of whether Uber plans to move to enforce it), and to consider assessing sanctions if it should fail to comply. See Kleiner, 751 F.2d at 1207–10 (affirming district court's disqualification of lead defense counsel and issuance of a $50,000 fine where defense counsel advised clients to solicit class members to opt out of the class action); Tedesco, 629 F.Supp. at 1487 (ordering attorney who circulated misleading communications to class members to bear the

cost of mailing the court's corrective order to all class members, to pay plaintiffs' attorney's fees incurred in uncovering the misleading communications, and to pay a punitive sanction in the amount of $10,000).

## CONCLUSION

For all the reasons set forth herein, Plaintiffs respectfully request that the Court GRANT this motion and issue the proposed order filed herewith.

Respectfully submitted,

DOUGLAS O'CONNOR, THOMAS COLOPY, MATTHEW MANAHAN, and ELIE GURFINKEL, individually and on behalf of all others similarly situated,

By their attorneys,

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Dated: December 11, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing document was served by electronic filing on December 11, 2015, on all counsel of record.

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan, Esq.