Nos. 15-16178, 15-16181, 15-16250

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

On Appeal from an Order of the United States District Court
for the Northern District of California
The Honorable Edward M. Chen, Judge Presiding
Case No. 14-cv-05200-EMC

PLAINTIFFS-APPELLEES' PETITION FOR REHEARING EN BANC

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I. INTRODUCTION

En banc review is merited because the Panel's decision compelling Uber drivers to arbitration in this putative nationwide class action conflicts with Supreme Court precedent, upends existing Ninth Circuit law, and sets forth a new rule, contrary to existing precedents, under which an opt-out provision categorically insulates an otherwise unconscionable arbitration agreement from challenge. The decision also conflicts with other circuits in areas where national uniformity is necessary, *i.e.*, whether an opt-out provision negates the illegal waiver of rights protected by the NLRA, and whether an equivocating, post-hoc offer to pay arbitration costs despite language in an arbitration clause imposing large fees on the claimant allows the effective vindication of federal statutory rights.

First, the Panel's decision creates a new level of insulation from court review for arbitration agreements that is incompatible with this Court's precedents. Here, the district court held that Uber's arbitration agreement, including the "delegation" clause purporting to delegate all questions of arbitrability to an arbitrator, was procedurally unconscionable, and then identified five substantively unconscionable terms in the agreement. Reversing, the Panel held that the existence of an opt-out provision, by itself, precluded any finding of procedural unconscionability with respect to the delegation clause, thus ending the

unconscionability inquiry. The Panel stated that "[t]he fact that the opt-out provision was 'buried in the agreement' does not change this analysis." Slip Op. 17-18 (attached hereto as Ex. A). This holding conflicts with this Court's decision in, among others, *Kilgore v. KeyBank, N.A.*, 718 F.3d 1052, 1059 (9th Cir. 2013) (en banc), which recognized that an opt-out provision may *not* cure procedural unconscionability if the provision constitutes a "surprise" term that is "buried in the fine print." It is also directly contrary to the California Supreme Court's holding – one that is authoritative on this question of California contract law – in *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), which found procedural unconscionability notwithstanding a meaningful opt-out provision. The Panel's rule wrongly legitimizes procedurally unconscionable terms, thus insulating substantively unconscionable terms from review.

Second, the Panel's decision is contrary to the Supreme Court's mandate that delegating questions of arbitrability to an arbitrator must be done in a "clear and unmistakable" way. The Panel itself described Uber's contract language bearing on delegation as "hardly a model of clarity." To nonetheless delegate arbitrability thus directly conflicts with the Supreme Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (courts decide question of arbitrability unless there is "clear and unmistakable" evidence that the question has been delegated to the arbitrator).

Third, although this Court recently held that class action waivers violate the right to engage in "concerted action" under the National Labor Relations Act, *see Morris v. Ernst & Young*, __ F.3d __, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), the Panel held that drivers' option of taking affirmative steps to opt out of the waiver in the 30 days after entering the contract, no matter how hidden the opt-out term is, rendered Uber's subsequent restraint on drivers' concerted action lawful. This holding conflicts with the rule in the Seventh Circuit, according to which an employee cannot prospectively waive the right to engage in protected concerted action under the NLRA. *See Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1155 (7th Cir. 2016).

Fourth, the Panel's reliance on Uber's attorneys' after-the-fact representation in an appellate brief that Uber would pay for all arbitration costs (contrary to the contract language and to representations Uber made to the court below), conflicts with the rule in the Sixth Circuit that the effective vindication doctrine considers the costs imposed by the contract as drafted, not as purportedly unilaterally modified after-the-fact by mid-litigation offers.

II. LEGAL STANDARD AND STATEMENT OF COUNSEL

Re-hearing en banc may be granted if (a) "the panel decision conflicts with a decision of the United States Supreme Court or [the Ninth Circuit], (b) the "proceeding involves one or more questions of exceptional importance," or (c) the

opinion "directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity." *See* Fed. R. App. P. 35(b) and 9th Cir. Rule 35-1.

Undersigned counsel represents that, in his judgment, this standard is met as to each of the four points in this petition, as explained below.

III. REASONS FOR GRANTING THE PETITION

A. The Panel's Holding that an Opt-Out Provision Precludes a Finding of Unconscionability Conflicts with Ninth Circuit and California Supreme Court Precedent.

The Panel decision accepts Uber's argument that "the delegation clause could not have been procedurally unconscionable because both agreements gave drivers an opportunity to opt out of arbitration altogether," explaining that such an argument was correct under "circuit court precedent" that the Panel "does not have the authority to ignore." Slip Op. 16-17. The Panel suggested that unless the opt-out provision rose to the level of an "illusory promise," the "fact that the opt-out provision was 'buried in the agreement' does not change th[e] analysis." Slip Op. at 17-18. This is directly contradicted by *Kilgore*, 718 F.3d at 1059 – one of the cases the Panel viewed itself as being bound to follow – which concluded that an arbitration clause was not procedurally unconscionable because it was not "buried in the fine print," and which drew a distinction to cases in which difficult-to-find provisions gave rise to procedural unconscionability. *Id.* (citing *A&M Produce v.*

FMC Corp., 135 Cal. App. 3d 473, 489 (1982)). The Panel also viewed itself as being bound by *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199 (9th Cir. 2002), but that case similarly indicates that the mere existence of an opt-out provision is not the end of the unconscionability inquiry: there, the agreement in question was held conscionable not simply because there was an opt-out provision, but because it "also lacked any other indicia of procedural unconscionability."

Under Panel's holding, an opt-out provision eliminates any unconscionability analysis even when the opt-out provision is, as the record showed here: (a) a "surprise" term itself, buried in the very last provision of a lengthy, complex agreement; (b) found in an agreement that was not available to the drivers after they clicked to accept it; (c) accessible only by clicking on a link presented alongside an "I agree" button on a smartphone screen – a button that the driver had to click to receive the next driving assignment; and (d) in an agreement presented on the small screen of the driver's mobile phone, requiring the driver to scroll down through dozens and dozens of "screens" of small print even to learn of the opt-out provision. *See* Pls.' Resp. Br. (ECF No. 44) at 31-39.

The Panel's rule holding that the inclusion of an opt-out provision in a contract immunizes it from challenge on procedural (and therefore also substantive) unconscionability grounds is also contrary to this Court's instruction that courts must "examine 'the manner in which the contract was negotiated and

the circumstances of the parties at that time'" when determining procedural unconscionability. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1171 (9th Cir. 2003) (quoting *Kinney v. United Healthcare Servs., Inc.*, 70 Cal. App. 4th 1322, 1329 (1999)).

The Panel's holding also directly conflicts with the California Supreme Court's decision in *Gentry*, which is authoritative on matters of California contract law. 42 Cal. 4th 443. *Gentry* held that even though the contract at issue in that case contained a meaningful opt-out provision, it was nonetheless procedurally unconscionable – a holding that is incompatible with the Panel's opinion. *Id.* at 470. *Gentry* specifically declined to agree with the Ninth Circuit's *Ahmed* case, upon which the Panel relied, because "in its brief discussion of the unconscionability issue," the *Ahmed* decision merely observed that there was an opt-out provision, but "did not consider the concealment of disadvantageous terms, nor the reality that [the employer] clearly favored arbitration and was in a position to pressure employees to choose its favored option." *Id.* at 471-72 & n.10 (disagreeing with *Ahmed*, 283 F.3d 1198). As the District Court explained, this holding of *Gentry* remains the law in California. *Mohamed v. Uber Techs., Inc.*, 109 F. Supp. 3d 1185, 1215 n.32 (N.D. Cal. 2015) (clarifying that this portion of *Gentry* was not abrogated, *citing Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 366 (2014)).

In addition, the illogicality of the Panel's rule is obvious: Here, for example, the district court found that the agreement's delegation clause possessed a degree of procedural unconscionability, notwithstanding the opt-out, because it "failed to notify drivers" that they "may be required to pay considerable forum fees" even to challenge arbitrability if they do not opt out. *Mohamed*, 109 F. Supp. 3d at 1215. But under the Panel's rule, a driver's failure to opt out – even if uninformed due to Uber's non-disclosure of what the district court held to be a substantively unconscionable term – prevents any court inquiry into unconscionability.

Under the Panel's decision, the contract that the California Supreme Court held to be unconscionable in *Gentry* could not even be *reviewed* by a federal court, other than to note that the contract contained an opt-out provision. Because the Panel incorrectly viewed itself as bound by prior Ninth Circuit precedent to part ways with the California Supreme Court, en banc review is necessary.

B. The Panel's Delegation Holding Conflicts with the Supreme Court's "Clear and Unmistakable" Delegation Rule, as Well as Prior Ninth Circuit Decisions Enforcing Non-Severability Clauses.

The default rule is that courts decide gateway questions of arbitrability, such as challenges to unconscionable and unlawful contract terms. This presumption is overcome only by "clear and unmistakable" agreement that the arbitrator will decide such questions in the first instance. *First Options of Chic., Inc.*, 514 U.S. at 944. Here, the agreement contained a delegation clause, but it also contained

explicit exceptions to the delegation clause that, depending on how they are construed, could result in the entire action being heard by a court, not an arbitrator.

The 2013 Agreement includes waivers of class actions, collective actions, and representative PAGA actions, and after each waiver, it states: "The … Waiver **shall not be severable from this Arbitration Provision** in any case in which **a civil court of competent jurisdiction finds the … Waiver is unenforceable.** In such instances [the class, collective, or representative claim] must be litigated in a civil court of competent jurisdiction." Slip Op. at 22, *see also* ER-211 (emphasis added). The Agreement goes on to state that "any claim that all or part of [any of the three waivers] is invalid, unenforceable, unconscionable, void or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator." *Id*.

Thus, the contract contains explicit language that could easily be read to mean that a court, not an arbitrator, will address the gateway issue of whether any of the waivers in question is unenforceable, and if the court concludes that such a waiver is unenforceable, the waiver "shall not be severable from this Arbitration Provision," meaning that the arbitration provision also shall be unenforceable.

The Panel concluded that this provision was not "a model of clarity," and described itself as needing to "read[] these ambiguous provisions" together to make a determination about what the agreement means when it states that the

PAGA waiver is "not … severable from this arbitration provision." Slip Op. at 22-23. The Panel ultimately interpreted these provisions to mean that although the PAGA waiver is unenforceable, the PAGA claim nonetheless *is* severable from the arbitration provision and should proceed in court, while the arbitration clause otherwise remains in effect. *Id.*

Setting aside Plaintiffs' view that the Panel's resolution of this ambiguity was incorrect, the Panel expressly found that the language was "ambiguous." If Plaintiffs' reading of the ambiguous language is correct, no aspect of this dispute would be delegated to an arbitrator at all. To conclude under these circumstances that the contract "clearly and unmistakably" delegates gateway issues to the arbitrator conflicts with the Supreme Court's precedents.

The holding also conflicts with a long line of Ninth Circuit decisions stating that when Parties make a provision explicitly non-severable, and when that provision is struck down, the non-severability provision should be applied according to its terms. *See Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1091, 1098 (9th Cir. 2009) ("In the usual case, we would be required to determine whether the unenforceable class action waiver should be severed from the arbitration agreement as a whole …. However, in the present case the arbitration agreement itself includes a provision prohibiting severance of the class action waiver. Therefore, in accordance with its severability clause, the arbitration

agreement as a whole is unenforceable."); *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1219 (9th Cir. 2008); *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 986-87 (9th Cir. 2007). The Panel's error is even more clear in light of the general rule that any ambiguity must be construed against Uber as the drafter. Cal. Civ. Code § 1654.

The Court should review the Panel's delegation holding en banc.

C. The Panel's Holding that a Class Action Waiver that Otherwise Would Violate the NLRA Becomes a Lawful Restraint on Concerted Action if the Employees Had an Initial Opportunity to Opt Out, However Hidden, Conflicts with the Rule in the Seventh Circuit.

A mandatory class action waiver violates employees' right to engage in "concerted action" guaranteed by Section 7 of the NLRA. *See Morris v. Ernst & Young*, __ F.3d __, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016). The Panel in this case held that the class action waiver at issue did not violate the NLRA because although it was mandatory to accept the agreement, there was a thirty-day opt-out period during which drivers could allegedly take additional affirmative steps to opt out of the arbitration portion of the agreement. Slip Op. 18 n.6. Even though failure to opt out would thereafter restrain the employees from engaging in concerted action in any future dispute that might arise with Uber, the Panel concluded that there was no restraint on "concerted action." In so holding, the Panel followed a prior panel decision that had reached this holding as a matter of first impression in *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072,

1075 (9th Cir. 2014). *Johnmohammadi* cited no authority for its decision. *Id.*

The Panel's decision, and *Johnmohammadi*, conflict with the rule in the Seventh Circuit. As stated in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147, 1155 (7th Cir. 2016): "The Ninth Circuit's decision in *Johnmohammadi* conflicts with a much earlier decision from this court," according to which "contracts between employers and individual employees that stipulate away Section 7 rights necessarily interfere with employees' exercise of those rights" (*citing NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942)). The Seventh Circuit noted: "In *Johnmohammadi*, the Ninth Circuit, without explanation, did not defer to the Board." *Id.*[1]

At present, class waivers with opt-outs are lawful in this Circuit but unlawful in the Seventh Circuit, making en banc review appropriate. At the very least, this Court should grant en banc review to await the outcome of petitions for writ of certiorari that have been filed with the Supreme Court in *Morris* (9th Cir.), *Lewis* (7th Cir.), as well as by the NLRB in a Fifth Circuit case. *See Ernst & Young, LLP v. Morris*, No. 16-300 (U.S. Sup. Ct. Cert. Pet. filed Sept. 8, 2016); *Epic Sys. Corp.*

[1] The National Labor Relations Board ("NLRB") agrees with the Seventh Circuit, and disagrees with the Panel and *Johnmohammadi*. In *On Assignment Staffing Services, Inc.*, the NLRB held that an arbitration agreement with an opt-out provision was unlawful because it purported to permit "employees to prospectively waive their Section 7 right to engage in concerted activity." 362 NLRB No. 189 (2015), *rev'd*, 15-60642, 2016 WL 3685206 (5th Cir. June 6, 2016).

v. Lewis, No. 16-285 (U.S. Sup. Ct. Cert. Pet. filed Sept. 2, 2016); *Nat'l Labor Rels. Bd. v. Murphy Oil USA, Inc.*, No. 16-307 (U.S. Sup. Ct. Cert. Pet. filed Sept. 9, 2016).[2]

D. The Panel's Decision that an Employer Can Deter Employee Suits by Including a Prohibitively Expensive Arbitration Fees Provision, and Then Save the Agreement by Offering After-the-Fact to Bear the Arbitration Costs Conflicts with the Rule in the Sixth Circuit.

As the Panel recognized, the Supreme Court has stated that arbitration agreements are invalid under the "effective vindication of rights" doctrine if the

[2] The Panel determined that Plaintiffs had waived the NLRA argument by not raising it in their Response brief but that, in any event, the argument failed under *Johnmohammadi* because of Uber's opt-out clause. *See* Slip Op. at 18 n.6. If the contract is unlawful under the NLRA, it should not be enforced, regardless of the timing of Plaintiffs' challenge. *See In re Tamen*, 22 F.3d 199, 204 (9th Cir. 1994) (considering argument raised for first time on appeal because "California law allows a party to raise the issue of a contract's illegality at any time."); *Pac. Tel. & Tel. Co. v. MCI Telecommc'ns Corp.*, 649 F.2d 1315, 1319 (9th Cir. 1981) (same). Here, Uber as well as the Panel had a full opportunity to consider the argument prior to the decision. At the time Plaintiffs filed their Response brief, no court of appeals had held that the NLRA prohibits class action waivers. In a Sur-Reply brief, to which Uber responded, Plaintiffs noted that the Seventh and Ninth Circuits were poised to decide this issue for the first time, and Plaintiffs argued that, depending on the outcome of those decisions, the contract at issue here could be unlawful. After briefing was complete in this case, but before the Panel ruled, the *Morris* and *Lewis* opinions were issued, holding that class action waivers violate the NLRA. Plaintiffs filed notices of supplemental authority (ECF Nos. 94, 121) to which Uber responded (ECF Nos. 100, 122). In its responses, Uber contended, among other things, that the Plaintiffs here are classified as independent contractors and thus outside the scope of the NLRA, but Plaintiffs have challenged that classification in this case, and "[u]nder California law, once a plaintiff comes forward with evidence that he provided services for an employer, the employee has established a prima facie case that the relationship was one of employer/employee." *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010).

"'filing and administrative fees attached to arbitration … are so high as to make access to the forum impracticable.'" Slip Op. at 19 (quoting *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013)). The Panel further noted that "[e]vidence submitted by the Plaintiffs suggests that the costs of arbitration in this case may exceed $7,000 per day." *Id.* Yet the Court refused to reach the question of whether such costs prevent "effective vindication" of Plaintiffs' rights, solely on the basis that after being sued, Uber had "committed to paying the full costs of arbitration." *Id.*

This holding is directly contrary to an en banc decision of the Sixth Circuit, which convincingly explains:

> In considering the ability of plaintiffs to pay arbitration costs under an arbitration agreement, reviewing courts should not consider after-the-fact offers by employers to pay the plaintiff's share of the arbitration costs where the agreement itself provides that the plaintiff is liable, at least potentially, for arbitration fees and costs. The reason for this rule should be obvious. Our concern is that cost-splitting provisions will deter potential litigants from bringing their statutory claims in the arbitral forum. When the cost-splitting provision is in the arbitration agreement, potential litigants who read the arbitration agreement will discover that they will be liable, potentially, for fees if they bring their claim in the arbitral forum and thus may be deterred from doing so. Because the employer drafted the arbitration agreement, the employer is saddled with the consequences of the provision *as drafted.* If the provision, as drafted, would deter potential litigants, then it is unenforceable, regardless of whether, in a particular case, the employer agrees to pay a particular litigant's share of the fees and costs to avoid such a holding.

Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 676–77 (6th Cir. 2003) (*en banc*). The Third Circuit has twice quoted this "cogent" reasoning with approval.

See Spinetti v. Serv. Corp. Int'l, 324 F.3d 212, 218 n.2 (3d Cir. 2003); *Parilla v. IAP Worldwide Servs., VI, Inc.*, 368 F.3d 269, 285 n.17 (3d Cir. 2004). For the reasons explained by the Sixth Circuit, the Panel's decision should not become the law of this Circuit.

In addition, although the Panel concluded that Uber had "committed to paying the full costs of arbitration," and issued its decision based upon that determination, Uber repeatedly equivocated on its offer to bear costs in various representations to the district court. *See* Pls.' Resp. Br. 43-46, ECF No. 44 (*e.g.*, initially informing the court that plaintiffs would have to pay; asserting that Uber would pay "where required by law"; changing positions about which set of arbitration rules was incorporated into the agreement). Other circuits that have considered post-litigation offers to pay arbitration costs when applying the "effective vindication" doctrine have done so only when the offer is full and unequivocal. *See, e.g.*, *Muriithi v. Shuttle Express., Inc.*, 712 F.3d 173, 183 (4th Cir. 2013) (party must agree "to pay all arbitration costs" to moot an effective vindication claim); *E.E.O.C. v. Woodmen of the World Life Ins. Soc.*, 479 F.3d 561, 567 (8th Cir. 2007) ("However, Woodmen has agreed to waive the fee-splitting provision and pay the arbitrator's fees in full."). To avoid giving its stamp of approval to defendants who deter employees from challenging unlawful practices by purporting to impose high arbitration fees on them and then, in litigation, make

shifting and ambiguous offers voluntarily to pay for fees that the contract does not require them to pay is another reason that the "effective vindication" analysis should be applied to the contract language presented to employees, not attempts to unilaterally modify the contract mid-litigation.

IV. CONCLUSION

Plaintiffs-Appellees request that en banc review be granted.

Respectfully submitted,

Dated: September 21, 2016

Goldstein, Borgen, Dardarian & Ho

/s/ William C. Jhaveri-Weeks
William C. Jhaveri-Weeks

Attorneys for *Plaintiffs-Appellees Mohamed and Gillette*

CERTIFICATE OF COMPLIANCE
(Fed. R. App. P. 32(a) & 9th Cir. Rule 32-l)

I certify that pursuant to Circuit Rule 35-4, the attached petition for rehearing en banc is proportionately spaced, has a typeface of 14 points or more and contains 3,698 words (petitions not to exceed 4,200 words).

Respectfully submitted,

Dated: September 21, 2016

Goldstein, Borgen, Dardarian & Ho

/s/ William C. Jhaveri-Weeks
William C. Jhaveri-Weeks

Attorneys for *Plaintiffs-Appellees Mohamed and Gillette*

STATEMENT OF RELATED CASES

(9th Cir. R. 28-2.6)

Plaintiffs are aware of the following cases that arise out of the same or consolidated case in the district court:

- *Mohamed v. Uber Techs., Inc.*, No. 15-16178, District Court No. 3:14-cv-05200-EMC;
- *Gillette v. Uber Techs., Inc.*, No. 15-16181, District Court No. 3:14-cv-05241-EMC;
- *Mohamed v. Uber Techs., Inc.*, No. 16-15035.

Plaintiffs are aware of the following cases that raise closely related issues or involve the same transaction or event:

- *O'Connor v. Uber Techs., Inc.*, No. 14-16078, District Court No. 3:13-cv-03826-EMC;
- *Yucesoy v. Uber Techs., Inc.*, No. 15-17422, District Court No. 3:15-cv-00262-EMC;
- *Del Rio v. Uber Techs., Inc.*, No. 15-17475, District Court No. 3:15-cv-03667-EMC;
- *Yucesoy v. Uber Techs., Inc.*, No. 15-17534, District Court No. 3:15-cv-00262-EMC;
- *O'Connor v. Uber Techs., Inc.*, No. 15-17532, District Court No. 3:13-cv-03826-EMC;
- *O'Connor v. Uber Techs., Inc.*, No. 15-80220, District Court No. 3:13-cv-03826-EMC;
- *O'Connor v. Uber Techs., Inc.*, No. 16-1500, District Court No. 3:13-cv-03826-EMC;

- *Yucesoy v. Uber Techs., Inc.*, No. 16-15001, District Court No. 3:15-cv-00262-EMC.

Respectfully submitted,

Dated: September 21, 2016

Goldstein, Borgen, Dardarian & Ho

/s/ William C. Jhaveri-Weeks
William C. Jhaveri-Weeks

Attorneys for *Plaintiffs-Appellees Mohamed and Gillette*

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 September 21, 2016.

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.

Respectfully submitted,

Dated: September 21, 2016

Goldstein, Borgen, Dardarian & Ho

/s/ William C. Jhaveri-Weeks
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