

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DOUGLAS O’CONNOR, *et al.*,
Plaintiffs,
v.
UBER TECHNOLOGIES, INC., *et al.*,
Defendants.

No. C-13-3826 EMC

**ORDER GRANTING IN PART
PLAINTIFFS’ ‘RENEWED
EMERGENCY MOTION FOR
PROTECTIVE ORDER TO STRIKE
ARBITRATION CLAUSES’**

(Docket No. 15)

Plaintiffs Douglas O’Connor and Thomas Colopy (“Plaintiffs”) filed the current class action complaint against defendants Uber Technologies, Inc. (“Uber”) and two of its executives, Travis Kalanick and Ryan Graves (collectively “Defendants”), seeking restitution, damages, and other relief for unremitted gratuity. Now pending before this Court is Plaintiffs’ “Renewed Motion for Protective Order to Strike Arbitration Clauses” (Docket No. 15).

Having considered the parties’ moving and response papers, as well as the oral argument of counsel, the Court hereby **GRANTS**, in part, Plaintiffs’ motion.

I. FACTUAL & PROCEDURAL BACKGROUND

Uber offers a mobile phone application used by riders and drivers to facilitate an “on demand” car service. *See* Docket No. 1 (Compl., ¶¶ 1, 11). The application is used by riders and drivers alike. Riders and drivers begin by downloading the application to their mobile phones. Riders can request rides via the application and the fare is assigned to the first driver within the geographic area to respond to the rider’s request via the application. *See* Docket No. 56 (Hearing Transcript, at pgs. 35:19-37:6). Plaintiffs, who are former drivers and users of the application,

1 allege Uber advertises to riders that gratuity is included in the total cost of the service. *Id.* at ¶ 14.
2 Plaintiffs contend that despite this advertisement, Uber does not remit the full amount of gratuity it
3 receives from customers to the drivers. Plaintiffs have brought a putative class action against Uber
4 to recover the full amount of gratuity they believe they are owed.

5 Prior to the instant case, Uber was sued in Massachusetts state court over its gratuity policy
6 in 2012. *See* Docket No. 15 (Mot., at pg. 6, n. 11) (citing *Lavitman et al. v. Uber Technologies, Inc.*
7 *et al.*, Mass. Super. Ct. (Suffolk), C.A. No. 12-4490). A similar action was filed against Uber in
8 Illinois. *See id.* (citing *Ehret v. Uber Technologies, Inc.*, C.A. No. 12CH36714 (Circuit Court of
9 Cook County, IL)). Both actions are class action lawsuits.

10 The following year, during the pendency of the Massachusetts and Illinois lawsuits against
11 Uber, on July 22, 2013, Uber informed users (drivers) they would receive within two weeks an
12 electronic notification asking them to approve new agreements. Docket No. 36-2 (Coleman Decl.,
13 ¶ 10). Continued use of the Uber application was conditioned on approval of these agreements. *See*
14 *id.* One such agreement, titled Software Licensing and Online Services Agreement (the “Licensing
15 Agreement”), contained an arbitration provision. *See id.* (Ex. A to Coleman Decl., § 14.3). Users
16 could accept the Licensing Agreement, including its arbitration provision, by swiping a button on
17 their mobile phones. Users were given thirty (30) days to opt out of the arbitration provision, *see id.*
18 at § 14.3(viii) (“Your Right to Opt Out of Arbitration”). However, opting out required users to send
19 a letter via hand delivery or overnight mail to Uber’s general counsel, clearly indicating an intent to
20 opt out. *See id.* Otherwise, the drivers would be bound by the arbitration agreement, potentially
21 barring them from this or any other lawsuit.

22 Plaintiffs filed the current action on August 16, 2013. Less than a week later, Plaintiffs
23 consented to proceed before Magistrate Judge Westmore and filed an “Emergency Motion for
24 Protective Order to Strike Arbitration Clauses,” requesting the Court strike the arbitration provision,
25 or alternatively, to provide more time to opt out and notice of the pendency of the current class
26 action. *See* Docket Nos. 3, 4. On August 23, 2013, Magistrate Judge Westmore denied Plaintiffs’
27 motion without prejudice on grounds Plaintiffs had failed to first serve Defendants with summons
28 and complaint. *See* Docket No. 14 (Order, at pg. 3-4). Three days later, Plaintiffs filed their

1 The Court declines to rule on the unconscionability of the arbitration provision as the issue is
2 not properly before the Court at this juncture. Because there is no allegation that a motion to compel
3 arbitration is pending or threatened, the issue of whether the arbitration provision is enforceable is
4 not yet ripe for resolution. *See e.g., Lee v. American Exp. Travel Related Services, Inc.*, 348 Fed.
5 Appx. 205, 207 (9th Cir. 2009) (class representatives of a putative class action could not challenge
6 inclusion of arbitration provision on unconscionability grounds because no arbitration was
7 threatened or impending); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019-20 (1984) (challenge
8 to constitutionality of arbitration scheme not ripe for resolution because Monsanto “did not allege or
9 establish that it had been injured by actual arbitration under the statute”). *See also Posern v.*
10 *Prudential Securities, Inc.*, No. C-03-0507 SC, 2004 WL 771399, at *8 (N.D. Cal. Feb. 18, 2004)
11 (finding plaintiff’s request to declare arbitration clause invalid speculative because defendant had
12 not yet moved to compel arbitration). Even if an unnamed class member were faced with a motion
13 to compel arbitration, Plaintiffs cite no authority establishing a putative class representative has
14 standing to challenge the motion prior to certification of the class.

15 This is not to say that the issue may not properly be addressed later in the proceedings. For
16 example, unconscionability and hence enforceability of the arbitration provision may arise at the
17 class certification stage. Its validity and enforceability may be material to factors under Rule
18 23(a)(3) – *e.g.*, numerosity, typicality, and adequacy of representation. Furthermore, Plaintiffs are
19 not foreclosed from adding a new putative class representative to join the current class action, a
20 representative who has not yet opted out of the arbitration provision. At this juncture, the Court
21 declines to address whether the arbitration agreement is unenforceable as unconscionable without
22 prejudice to further consideration at a later time.¹

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26 ¹ Since this Court declines to address unconscionability on ripeness grounds, the Court also
27 declines to rule on Uber’s contention, *see* Docket Nos. 36 (Opp’n, at pg. 10) and 59 (12/5/2013
28 Letter Brief at pg. 3) (citing *Momot v. Mastro*, 652 F.3d 982, 988 (9th Cir. 2011)), that this Court
lacks jurisdiction to entertain the enforceability issue because the parties have clearly and
unmistakably evinced an intent to delegate that issue to the arbitrator, as discussed in *Rent-A-Center,*
West, Inc. v. Jackson, 130 S.Ct. 2772 (2010) and its progeny.

1 B. Rule 23(d): Controlling Class Communications

2 Plaintiffs alternatively request this Court to assert control over communications by Uber with
3 members of the putative class, pursuant to Fed. R. Civ. P. 23(d). Specifically, Plaintiffs request this
4 Court require (1) electronic notice of the current class action be given to the proposed class (*e.g.*,
5 email or other electronic means); (2) to extend the opt-out period to sixty (60) days; and (3) to allow
6 Uber drivers to opt out of the arbitration provision electronically – *i.e.*, swiping a button on their
7 mobile phones or via email.

8 Uber responds threefold. First, exercising control over communications here would “chill
9 Uber’s ability to exercise rights afforded to it under the FAA” and Supreme Court precedent, as
10 articulated in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1744 (2011). Second, circulation
11 of the Licensing Agreement, and the arbitration provision included within it, is not a class
12 communication. Third, the Court cannot assert control over class communications absent a
13 “showing of misconduct.”

14 Uber’s argument that Plaintiffs’ requested relief somehow pits the Federal Arbitration Act
15 (“FAA”) against Rule 23(d), wherein the latter should yield, is meritless. Neither *Concepcion* nor
16 the FAA abrogates Rule 23(d). *Concepcion* imposed limitations on state law – California common
17 law relating to the contractual defense to unconscionability – which would have effectively barred
18 enforcement of an arbitration agreement. The Court did not address the ability of the district court
19 under Rule 23(d) to control communication which would lead to an arbitration agreement in the
20 midst of a class action lawsuit. *See e.g., Balasanyan v. Nordstrom, Inc.*, No. 11-CV-2609-JM-
21 WMC, 2012 WL 760566, *2, n. 1 (S.D. Cal., Mar. 8, 2012) (noting that the Supreme Court’s
22 holding in *Concepcion* does not affect that court’s decision to control class communications or
23 invalidate the arbitration agreement before it, where allowing parties to do so would “create an
24 incentive to engage in misleading behavior”). Indeed, Uber recognizes the generally broad power
25 to manage class actions and communications with the class. *See* Docket No. 36 (Opp’n, at pg. 22, n.
26 10) (“. . . Defendants do not contest, for the purposes of this Opposition, that a court may limit future
27 communications with putative class members where such communications would be misleading or
28 coerce a putative class member to repudiate a substantive right.”).

1 Uber’s citation to *American Exp. Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2306-
2 2307 (2013) for the proposition that Rule 23 must yield to the FAA is unavailing. While *Italian*
3 *Colors* affirms that an otherwise valid arbitration agreement cannot be refused enforcement simply
4 because it would undermine the efficacy of a class action, the Court did not discuss Rule 23(d) and
5 the district court’s ability to control communications with the class thereunder. *Italian Colors* is
6 inapposite to the issue at bar. The issue now before this Court is not the substantive validity of an
7 arbitration provision, but whether, as a procedural matter, a court may regulate an employer’s
8 attempt to impose an arbitration requirement and waiver of legal rights during the course of a class
9 action lawsuit. Neither *Concepcion* nor *Italian Colors* addressed this question.

10 Next, Uber contends that circulating the Licensing Agreement, and its arbitration provision,
11 is a business communication, not a class communication subject to Rule 23(d). However, the
12 touchstone under Rule 23(d) is not whether the communication is of an ordinary business nature;
13 rather, the inquiry is whether the communication is abusive, misleading, coercive, or otherwise
14 affects the administration of justice in the context of a putative class action lawsuit. As the Ninth
15 Circuit held in *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 756 (9th Cir. 2010), *judgment*
16 *vacated on other grounds*, 132 S.Ct. 74 (2011), “. . .Rule 23(d) gives district courts the power to
17 regulate the notice and opt-out processes and to impose limitations when a party engages in behavior
18 that threatens the fairness of the litigation.” Such a threat may exist regardless of whether the
19 communication to the class is denominated as “business” in nature. No court has held that the
20 characterization of the communication as official business in and of itself immunizes such a
21 communication from Rule 23(d) scrutiny. At most, the existence of a possible business purpose may
22 counsel that any regulation imposed by the Court be narrowly tailored. *Montgomery v. Aetna*
23 *Plywood, Inc.*, No. 95-cv-3193, 1996 WL 189347, at *6 (N.D. Ill. Apr. 16, 1996) (noting that
24 communications ban was narrowly tailored in that it was limited to “communications regarding the
25 litigation”).

26 Cases cited by Uber are distinguishable in that they involved or envisioned purely business
27 communications, completely unrelated to litigation that had no substantial effect on class members
28 rights therein. See e.g., *Cobell v. Norton*, 212 F.R.D. 14, 20 (D.D.C. 2002) (not addressing any

1 particular business communication but allowing “regular sorts of business communications” that “do
2 not purport to extinguish the rights of the class members in this litigation.”).

3 The Court notes it would be particularly inappropriate to insulate the subject
4 communications from review under Rule 23(d) where, as here, there is a distinct possibility that the
5 arbitration provision and class waiver imposed by Uber was motivated at least in part by the
6 pendency of class action lawsuits which preceded the new Licensing Agreement. Suspicion that the
7 new Licensing Agreement’s arbitration provision was intended by Uber as a means to thwart
8 existing class action litigation is heightened by the misleading nature of the communication and the
9 unusually onerous procedures for opting out discussed *infra*.

10 Uber’s third argument that this Court must make an affirmative finding of misconduct before
11 exercising control over class communications misconstrues binding precedent. In general, district
12 courts have both a duty and broad authority to control communications to putative class members
13 even before class certification and to enter appropriate orders governing the conduct of counsel and
14 the parties. *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981). The Supreme Court’s articulation
15 of the requisite factual finding for a district court to limit class communications pursuant to Rule
16 23(d) does not require a finding of actual misconduct:

17 “[A]n order limiting communications between parties and potential
18 class members should be based on a clear record and specific findings
19 that reflect a weighing of the *need for a limitation* and the *potential*
20 *interference* with the rights of the parties. Only such a determination
21 can ensure that the court is furthering, rather than hindering, the
22 policies embodied in the Federal Rules of Civil Procedure, especially
23 Rule 23. In addition, such a weighing-identifying the potential abuses
24 being addressed-should result in a carefully drawn order that limits
25 speech as little as possible, consistent with the rights of the parties
26 under the circumstances.”

23 *Gulf Oil*, 452 U.S. at 101-02 (emphasis added). The key is whether there is “potential interference”
24 with the rights of the parties in a class action. *See In re Currency Conversion Fee Antitrust*
25 *Litigation*, 361 F. Supp. 2d 237, 251 (S.D.N.Y. 2005) (describing right to join potential class action),
26 *order amended on other grounds*, 2005 WL 1871012 (S.D.N.Y. Aug. 9, 2005). Wilful misconduct
27 on the defendant’s part is not required so long as the effect is to interfere with class members’ rights.
28 In *In re School Asbestos Litigation*, 842 F.2d 671, 682 (3d Cir. 1988), the court upheld the district

1 court’s finding that a booklet was misleading as a matter of law and impliedly rejected appellant’s
2 contention that the district court’s findings “fail[ed] to present. . . evidence of ‘actual or threatened
3 misconduct of a serious nature.’” In *In re Currency Conversion Fee Antitrust Litigation*, 361 F.
4 Supp. 2d 237 (S.D.N.Y. 2005), *order amended* by No. M 21-95, 2005 WL 1871012 (S.D.N.Y., Aug.
5 9, 2005), the district court rejected defendant’s contention that *Gulf Oil* requires a “specific finding
6 of abuses.” Relying on Rule 23(d), the district court found that it had the authority to prevent
7 misleading communications, and in particular, those communications that would “undermine Rule
8 23 by encouraging class members not to join the suit.” *Id.* at 254.

9 In *Balasanyan*, discussed *infra*, the district court found it sufficient to exercise control under
10 Rule 23(d) where defendant’s failure to disclose pending litigation when it circulated its arbitration
11 agreement for approval “create[d] an incentive to engage in misleading behavior.” *Balasanyan*,
12 2012 WL 760566, at *3. The court noted that one purpose of Rule 23 is to “prevent improper
13 contacts that could jeopardize the rights of the class members,” including inducing putative class
14 members from participating in the class action. *Id.* See also *Piekarski v. Amedisys Illinois, LLC*,
15 No. 12-CV-7346, 2013 WL 605548, at *2 (N.D. Ill. Nov. 12, 2013) (finding improper, abusive, and
16 misleading arbitration program implemented during pendency of action which involved onerous opt-
17 out procedure that likely prevented participation in the class action).

18 The cases cited by Uber do not support the opposite conclusion. In *Mevorah*, for example,
19 the court described its prior ruling where the alleged misconduct involved similar potential abuses as
20 those at play here. *Mevorah v. Wells Fargo Home Mortg., Inc.*, No. C05-1175 MHP, 2005 WL
21 4813532, at *3 (N.D. Cal., Nov. 17, 2005). The court stated, “For example, this court has restricted
22 a defendant’s ability to communicate with potential class members following the defendant’s
23 publication of a notice that, in relevant part, failed to disclose the pendency or scope of the class
24 action and may have caused confusion among potential class members regarding their rights.” *Id.*
25 The court noted that a limitation on class communications must be “based on a clear record and
26 specific findings that reflect a weighing of *the need* for a limitation and the *potential interference*
27 with the rights of the parties.” *Id.* (citing *Gulf Oil Co.*, 452 U.S. at 101) (emphasis added). Hence,
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1 *Mevorah* is consistent with this Court’s reading of *Gulf Oil* that the focus is on the *effect* of
2 interfering with the fair administration of a class action lawsuit.²

3 Here, the risk of interfering with the pending class action and the need for a limitation on
4 communication with the class that adversely affects their rights is palpable. The communication
5 which is the subject of this motion is likely to mislead potential class members about their right to
6 join the current class action. The arbitration provision at issue includes a class action waiver,
7 purporting to contractually bar Uber drivers from participating and benefitting from any class
8 actions. Yet, the waivers were shrouded under the confusing title “How Arbitration Proceedings
9 Are Conducted.” Despite the title’s innocuous wording, only a single paragraph is devoted to
10 discussing the what and how-to of arbitration. The remaining four paragraphs set forth three
11 waivers of substantive rights – class action, collective action, private attorney general action.
12 Furthermore, the arbitration provision is not conspicuous and was not presented as a stand alone
13 agreement. Instead, it is one of many provisions in the Licensing Agreement.

14 Uber drivers likely did not know the consequences of assenting to the Licensing Agreement.
15 Many likely were not aware they were losing the right to participate in this or any other lawsuit.
16 Indeed, Uber drivers have no meaningful way of learning of the current lawsuit since there has been
17 no class notice. Although Uber characterizes some of its drivers as large, sophisticated
18 “transportation companies,” they do not dispute Plaintiffs’ factual contention that many, if not the
19 majority of, Uber drivers are smaller outfits run by immigrants for whom English is not their native
20 language. Docket No. 56 (Hearing Transcript, at pgs. 17:14-18:4). Uber made no effort to inform
21 drivers of the legal consequence of the arbitration provision barring them from participation in
22 pending and future class action lawsuit brought on their behalf. Moreover, Uber drivers who desired
23 to continue using Uber’s mobile phone application, and as a consequence to continue receiving leads
24 from Uber, were *required* to assent to the terms of the Licensing Agreement, including its arbitration
25 provision.

27 ² Even if intentional abuse or misconduct were required, as discussed above, there is a basis
28 for inferring that the arbitration provision at issue here was imposed by Uber as a means of
undermining pending class action lawsuit against it.

1 While the Licensing Agreement did afford Uber drivers thirty (30) days to opt out of the
2 arbitration provision, the opt-out provision is buried in the agreement. It is part of the arbitration
3 provision, which itself is part of the larger, overall Licensing Agreement. The opt-out clause itself is
4 ensconced in the penultimate paragraph of a fourteen-page agreement presented to Uber drivers
5 electronically in a mobile phone application interface. In sum, it is an inconspicuous clause in an
6 inconspicuous provision of the Licensing Agreement to which drivers were required to assent in
7 order to continue operating under Uber.

8 Even if a driver were aware of the arbitration provision, and its consequence, and of the opt-
9 out clause, the opt-out procedure is extremely onerous. Whereas, opting in only requires an Uber
10 driver to swipe a button on their mobile phones, opting out required Uber drivers to send a letter via
11 *hand delivery or overnight mail* to Uber’s general counsel, clearly indicating their desire to opt out.
12 Defendants failed, at the hearing or in briefing, to rebut Plaintiff’s contention that many Uber drivers
13 are not native English speakers. Uber’s requirement that an opt-out letter be hand delivered or
14 overnighted goes beyond simply ensuring receipt. Other, less burdensome, means – *e.g.*, email or
15 first class mail with return receipt requested – could credibly have accomplished the same end.³

16 In sum, the promulgation of the Licensing Agreement and its arbitration provision, runs a
17 substantial risk of interfering with the rights of Uber drivers under Rule 23. The Court concludes it
18 has the authority to assert control over class communications in a manner that is narrowly tailored,
19 supported by the record, and balances the interests of all parties involved consistent with *Gulf Oil*.
20 While the Court will not regulate communications issued prior to the filing of this suit, as Plaintiffs
21 have cited no authority where a court has asserted control under Rule 23(d) over class
22 communications issued *prior* to the filing of a class action complaint, the Court clearly has the
23 authority and jurisdiction to regulate post-filing communications by Uber under Rule 23(d). *See*

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25 ³ Tellingly, Defendants cite no case where an opt-out procedure that mandates such onerous
26 means has been upheld. Defendants’ opt-out procedure is significantly more burdensome than
27 others upheld in this circuit. *See e.g., Meyer v. T-Mobile USA Inc.*, 836 F. Supp. 2d 994, 1002 (N.D.
28 Cal. 2011) (providing for thirty-day opt-out period via a toll free number or online form); *Alvarez v.*
T-Mobile USA, Inc., No. 10-cv-2373 WBS, 2011 WL 6702424, at *2 (E.D. Cal. Dec. 21, 2011)
(same); *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199 (9th Cir. 2002) (providing thirty-
day opt out period by mailing one-page form).

1 *Gulf Oil*, 452 at 99-100 (noting district court’s duty and broad authority to “enter appropriate orders
2 governing the conduct of counsel and parties”). This discretion includes requiring the issuance of
3 corrective notices and action to ameliorate confusing or misleading communications. *See e.g.*,
4 *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 353 (6th Cir. 2009) (affirming district court’s corrective
5 notice and extension of the opt-out period to “unwind the confusion” caused by plaintiffs’ attorney
6 unilateral communication with putative class members to procure post-certification opt-outs) (citing
7 *Gulf Oil*); *Belt v. Emcare, Inc.*, 299 F. Supp. 2d 664, 667 (E.D. Tex. 2003) (relying on *Gulf Oil* to
8 enter “appropriate orders,” such as requiring defendant to issue corrective notice to inform potential
9 class members of their right to join a putative class action, where defendant sent letter discouraging
10 participation in pending class action).

11 Uber drivers must be given clear notice of the arbitration provision, the effect of assenting to
12 arbitration on their participation in this lawsuit, and reasonable means of opting out of the arbitration
13 provision within 30 days of the notice. These requirements shall apply to new drivers
14 (prospectively) and past and current drivers (retrospectively). As for arbitration provisions which
15 have already been distributed after the filing of the complaint in this action (August 16, 2013) to past
16 and current drivers who have approved the arbitration provision without opting out (or for whom
17 approval during the 30 day notice period has begun to run but is still pending), Uber must seek
18 approval of the arbitration provision for these drivers anew, giving them 30 days to accept or opt out
19 from the date of the revised notice.

20 The foregoing approach is narrowly tailored as required under *Gulf Oil* and is based on
21 factual findings discussed herein.

22 **III. CONCLUSION**

23 Based on the foregoing, the Court hereby rules as follows:

24 (1) The Court declines to rule on the alleged unconscionability of the arbitration
25 provision in the Licensing Agreement, as that issue is not yet ripe for adjudication.

26 (2) Uber’s efforts to seek approval of the arbitration provision in the Licensing
27 Agreement during the pendency of this class action is potentially misleading, coercive, and threatens
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1 to interfere with the rights of class members. This Court shall exercise its discretion and authority to
2 control communications to the putative class, pursuant to Rule 23(d), as follows:


3 (a) The parties shall meet and confer within seven (7) days of this Order to
4 discuss and stipulate to the appropriate form, content, and procedures of the
5 corrective notices consistent with this order. If the parties are unable to agree on a
6 proposed corrective notice, they shall notify the Court by submitting their respective
7 proposed notices and procedures for review and decision by the Court within fourteen
8 (14) days of this Order.

9 (b) Until revised notices and procedures are approved by the Court and sent to
10 drivers, Uber shall not issue to Uber drivers or prospective drivers the Licensing
11 Agreement or any other agreement containing an arbitration provision which waives
12 putative class members rights herein.

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14 This order disposes of Docket No. 15.

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16 IT IS SO ORDERED.

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18 Dated: December 6, 2013

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21 EDWARD M. CHEN
22 United States District Judge
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