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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

TODD JOHNSTON, individually and on behalf of a class of similarly situated persons, Plaintiff, vs. UBER TECHNOLOGIES, INC., a Delaware Corporation, Defendant.	Case No. 3:16-cv-3134-EMC [This case relates to Case No. 3:13-cv-3826-EMC] **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL ARBITRATION** Date: June 15, 2017 Time: 1:30 p.m. Judge: Hon. Edward M. Chen Courtroom: 5

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PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL ARBITRATION

COMES NOW Plaintiff Todd Johnston ("Plaintiff"), who submits this Memorandum in Opposition to Defendant Uber Technologies, Inc.'s ("Uber") Motion to Compel Arbitration. (Dkt. No. 66.) For the reasons set forth below, Defendant's Motion should be denied and the case should move forward into discovery.

I. INTRODUCTION

At the March 22, 2017 Case Management Conference ("the 3/22 CMC"), the Court partially lifted the stay in this case so that the parties could brief the discrete issue of whether the Worker Adjustment and Retraining Act ("WARN") Act provides a "contrary congressional command" overriding the Federal Arbitration Act ("FAA") and/or provides a substantive right to litigate WARN Act claims collectively (*i.e.*, through a class action) that would render Uber's class waiver unenforceable pursuant to the FAA's savings clause.[1] (3/22 CMC Tr. at 36:22, 43:10-12 (stating that the briefing is to "resolve the [WARN] Act slash FAA question").)

Uber devotes less than three (3) pages to this argument (Dkt. No. 66, at 18-21), and instead spends the bulk of its ink asserting that the December 2015 Arbitration Agreement is enforceable *in toto* in apparent disregard of both the scope of this briefing and of the Court's order that Uber must re-issue that agreement and that it may only be prospectively applied to current drivers. *O'Connor et al. v. Uber Tech., Inc.* No. 13cv3826, Dkt. No. 748, at 26-27, 34 (N.D. Cal. Aug. 18, 2016). Regardless, the class waiver provisions of all potentially applicable Arbitration Agreements uniformly provide that the class waiver is non-severable, and Uber does not contend that class arbitration is available. In other words, if the class waiver is found unenforceable by the Court (Uber agrees that enforceability of the class waiver is an issue properly before the Court, Dkt. No. 66 at 2, 11, 18)), it is undisputed that the entire Arbitration Agreement is void per its terms.

For the reasons set forth below, the WARN Act contains a "contrary congressional command" that overrides the FAA and/or provides covered workers a non-waivable substantive

[1] Plaintiff does not waive other arguments regarding the enforceability of Uber's arbitration and/or class waiver agreements with respect to this case.

right to collectively pursue and to have pursued on their behalf WARN Act claims. 29 U.S.C. §§ 2104(a)(5) & 2105. This contrary congressional command is apparent in the plain language, legislative history, and underlying purpose of the statute, and supporting Department of Labor ("DOL") regulations and rules are entitled to *Chevron* deference. Indeed, the WARN Act is unique in that there is no agency that enforces its mandates or vindicates the public interest. Moreover and separately, the WARN Act provides a non-waivable substantive right to litigate WARN Act claims collectively, and the Court should invoke the savings clause of the FAA to strike Uber's class waiver on illegality grounds. Congress's objective with the WARN Act was to legislatively guarantee certain non-waivable rights and remedies in a manner that could not be reduced by contract. The Court should strike the class waiver, void Uber's Arbitration Agreement, and deny Uber's Motion to Compel Arbitration.

II. STATEMENT OF ISSUE(S) TO BE DECIDED

1. Whether Uber's class action waiver barring a collective action under the WARN Act, 29 U.S.C. § 2101, *et seq.*, is enforceable; and,

2. If Uber's class action waiver is found unenforceable, whether Uber's Arbitration Agreement is void per its terms.

III. FACTUAL AND PROCEDURAL BACKGROUND

In or around December 2015, the Austin, Texas City Council passed an ordinance requiring transportation companies, such as Uber, to conduct fingerprint-based background checks on their drivers. (Compl. ¶ 10 (Dkt. No. 1).) In response, Uber created a political action committee and raised millions of dollars to gain signatures for a referendum on the ordinance. (Compl. ¶¶ 11-12.) The referendum occurred on Saturday May 7, 2016 and Austin's voters overwhelmingly approved of the ordinance, rejecting Uber's efforts to undo the Austin City Council's actions. (Compl. ¶ 12.) Two days later, on Monday May 9, 2016, Uber indefinitely terminated its Austin operations, and made the following written statement: "Disappointment does not begin to describe how we feel about **shuttering operations in Austin**." (Compl. ¶ 13.)

Plaintiff filed this single-count WARN Act proposed class action Complaint on June 9, 2016. The Complaint alleges that: Uber is an employer for WARN Act purposes; Uber's Austin

Drivers are employees for WARN Act purposes under applicable law; Uber's "shuttering operations in Austin" constituted a plant closing and/or mass layoff for which WARN Act notice was required; and Uber did not provide WARN Act notice in violation of the WARN Act.

Since November 21, 2016, this case along with several other related actions have been stayed by this Court due to pending appeals before the Ninth Circuit and U.S. Supreme Court. (Dkt. No. 47.) Because there is no appeal directly pertaining to the WARN Act's effect on Uber's class waiver and/or Arbitration Agreement generally, the Court partially lifted the stay in this case so that the parties may brief the interplay between the WARN Act and the FAA.

As urged by counsel for Plaintiff, "what we would ask is that this issue be carved out and we brief this issue … And then to the extent Your Honor finds in our favor on that issue, that might even dispose of the necessity of briefing on these other issues related to class waivers and arbitration agreements." (3/22 CMC Tr. at 30:19-25.) Over Uber's objection, the Court agreed: "I think it's distinct enough that we should brief this issue[.]" (3/22 CMC Tr. at 36:19-20.) The Court further clarified that discovery should not proceed because scope of the briefing was limited to "a statutory argument … And then depending on how that's resolved, then we can take it to the next step." (3/22 CMC Tr. at 43:7-15.)

Despite the clear limitations set forth by the Court at the 3/22 CMC, Uber's Motion to Compel Arbitration (Dkt. No. 66) goes far beyond the statutory argument envisioned by the Court. Regardless, as demonstrated clearly below, the Court should find Uber's class waiver unenforceable (the class waiver language in the June 2014 and December 2015 Arbitration Agreements is substantially identical), and then the Court should enforce the Arbitration Agreement per its terms by voiding the entire agreement and allowing this case to proceed to discovery.

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IV. LAW AND ARGUMENT

A. Sections 2104 and 2105 of the WARN Act Contain Contrary Congressional Commands that Override the FAA

1. The Text, Legislative History, and Underlying Purpose of the WARN Act Guarantee Non-Waivable Collective Rights and Remedies to Receive WARN Act Notice and to Pursue WARN Act Redress on a Collective Basis

As stated by the Supreme Court, the "[FAA's] mandate may be overridden by a contrary congressional command" that is "discernible from the text, history, or purposes of the statute." *Shearson/Am. Exp. Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987). The WARN Act – which was enacted more than sixty (60) years after the FAA and which explicitly states that its rights and remedies (which include a right to collective litigation) are non-waivable by contract – scores a direct hit on all fronts.

a) The Plain Language of 29 U.S.C. §§ 2104(a)(5) & 2105 Supplies a Contrary Congressional Command Requiring the Availability of Collective WARN Act Litigation

29 U.S.C. § 2104(a)(5) ("Section 2104(a)(5)") states the following:

> **A person seeking to enforce such liability, including a representative of employees … may sue either for such person or for other persons similarly situated, or both,** in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.
>
> (Emphasis added.)

29 U.S.C. § 2105 ("Section 2105") reads as follows: "**The rights and remedies provided to employees by this chapter are in addition to, and not in lieu of, any other contractual or statutory rights and remedies[.]**" 29 U.S.C. § 2105 (emphasis added).

The plain language of the Section 2104(a)(5) is clear, and legislatively provides for representative or class-based resolution of WARN disputes, which is in accord with the remainder of the statutory scheme, including specifically with regard to the other substantive right guaranteed by the statute: the right to receive notice. The notice provision of the WARN Act only requires that the WARN notice be provided to a representative of employees if such employees are represented. 29 U.S.C. § 2102(a)(1) (stating that notice shall be provided "to each representative

of the affected employees as of the time of notice, or if there is no such representative at that time, to each affected employee"). Congress contemplated representative notice to be sufficient because of the non-waivable collective action redress provisions in Sections 2104(a)(5) and 2105. *See also Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (stating that "reasonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole" (internal citations and quotation marks omitted)). Section 2104(a)(5) alone constitutes a sufficiently robust contrary congressional command to override FAA's interest (if there is any at all) in individual proceedings.[2]

The plain language of Section 2105 is equally clear and amplifies the command set forth in Section 2104(a)(5). Section 2105 explicitly provides that all of the "rights and remedies" under the WARN Act are "in addition to" other contractual arrangements between the parties. This means that WARN Act rights and remedies (including the right to collective WARN Act litigation) cannot be waived in contract.

Even if the combined effect of Sections 2104(a)(5) and 2105 did not so unambiguously create a non-waivable right to collective litigation of WARN Act claims, the Court should defer to the agency charged with the WARN Act's implementation, the DOL. *See* 29 U.S.C. § 2107 (granting the DOL the authority to "prescribe such regulations as may be necessary to carry out [the WARN Act]").[3] DOL has rightly interpreted Section 2105 as legislatively forbidding contractual waiver of any WARN Act rights or remedies, including those found in Section 2104(a)(5): "After considering the comments received, the Department concludes that the WARN requirements stand by themselves and cannot be set aside in favor of collective bargaining agreements[.]" Worker Adjustment and Retraining Notification Final Rule (hereinafter "DOL Final Rule"), 54 Fed. Reg. 16042, 16044, 1989 WL 278605 (Apr. 20, 1989) (discussion of 20

[2] To be clear, the portion of Uber's Arbitration Agreement that most offends Sections 2104(a)(5) and 2105 of the WARN Act is the class waiver; it is not the portions providing for an arbitral forum. Plaintiff does argue in the alternative, *infra* at III.A.3, that the WARN Act provides an "exclusive" venue in the federal courts for resolution of WARN Act claims.

[3] *See also Sides v. Macon County Greyhound Park, Inc.*, 725 F.3d 1276 (11th Cir. 2013) (finding that DOL regulations under WARN Act are entitled to *Chevron* deference); *Hotel Emps. & Rest. Emps. Int'l Union Local 54 v. Elsinore Shore Assocs.*, 173 F.3d 175, 183 (3d Cir. 1999) (same); *Mason v. GATX Tech. Servs. Corp.*, 507 F.3d 803, 808-09 (4th Cir. 2007) (same).

C.F.R. § 639.1(g)); *see also* 20 C.F.R. § 639.1(g) ("Collective bargaining agreements … may not reduce WARN rights."). These DOL interpretations (supported by both the text and the legislative history, discussed below) are entitled to *Chevron* deference, *see* n.3 *supra*.

The statutory text of Sections 2104(a)(5) and 2105 of the WARN Act differs substantially from other federal statutory schemes that litigants have argued created a federal right to class actions overriding the FAA. For example, it has been argued that the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, created a non-waivable right to pursue class relief based on the statute's reference to possible TILA class actions. *See, e.g.*, 15 U.S.C. § 1640(a)(1)(B) ("[I]n the case of a class action …."). However, as recognized by the Third Circuit, there is a difference between a statute that merely contemplates class treatment under Rule 23 (*e.g.*, TILA or the CROA) versus a statute, such as the WARN Act, that actually mandates the availability of a class action and contains explicit non-waiver language. *Johnson v. W. Suburban Bank*, 225 F.3d 366, 371 (3d Cir. 2000) ("Though the statute clearly contemplates class actions, there are no provisions within the law that create a right to bring them[.]"). The same analysis applies to the several similarly-worded and equally vague references to class actions in the Credit Repair Organizations Act ("CROA"), 15 U.S.C. § 1679 *et seq.*, *see infra* at n.5.

Congress doubtless was aware of Federal Rule of Civil Procedure 23 in its 1988 drafting the WARN Act, so any reading of Section 2104(a)(5) as simply a regurgitation of the obvious ignores the "exclusive remedies" provision of Section 2104(b), the non-waiver provision of Section 2105 relating to both "rights and remedies," and otherwise does injustice to the statute in a number of ways.

First, to read Section 2104(a)(5) as nothing more than a reminder that Rule 23 exists is to ignore the collective action-focused aim of the WARN Act and its subject matter, which is discussed in further detail below. The WARN Act shares a unique relationship with the National Labor Relations Act ("NLRA") and with the collective bargaining process as a whole. As discussed below, the WARN Act was originally proposed as an amendment to the NLRA "to make plant closing decisions and permanent layoffs a **mandatory subject of [collective] bargaining**." (*See* **Ex. 1** (Legislative History, at 590 (Aug. 17, 1987 House Committee Rep. on H.R. 1122

(emphasis added)).)[4] And as explained by the DOL in its Final Rule, the WARN Act was meant to legislatively supplant an area that was traditionally governed by employment contract. DOL Final Rule, 54 Fed. Reg. 16042, 16044 (in discussion of 20 C.F.R. § 639.1(g), stating that "[t]he Department also recognizes that certain of the provisions of WARN involves subjects which are typically covered in collective bargaining agreements"). And, of course, Section 7 of the NLRA has been found to provide for a substantive right to litigate employment-related claims collectively. *See Morris v. Ernst & Young, LLP*, 834 F.3d 975, 986 (9th Cir. 2016), *cert. granted* 137 S. Ct. 809 (2017). ("The rights established in § 7 of the NLRA – including the right of employees to pursue legal claims together – are substantive."). The Court should read the class action language in Section 2104(a)(5) with a healthy regard to the WARN Act's context, which supports a substantive interpretation of the class action language found therein.

Second, and besides, such a meaningless reading of Section 2104(a)(5) defies traditional principles of statutory interpretation. *Central Mont. Elec. Power Co-op, Inc. v. Admin. of Bonneville Power Admin.*, 840 F.2d 1472, 1478 (9th Cir. 1988) ("We avoid any statutory interpretation that renders any section superfluous and does not give effect to all of the words used by Congress." (citation omitted)). A reading of Section 2104(a)(5) as only demonstrating the possibility of WARN Act class actions is tantamount to deletion of the class-related language of Section 2104(a)(5) altogether.

Third, negating the class action mechanism and enforcing Uber's *individual* Arbitration Agreement opens a large backdoor that was not intended by Congress, and through which Uber presently wishes to walk. As stated above, the aim of the WARN Act was to legislate minimum "rights and remedies" in a manner that could not be reduced or waived by contract, *see* 29 U.S.C. § 2105 & 20 C.F.R. § 639.1(g), and in an area of the employer-employee relationship that was once subject to contractual arrangement alone. *See* DOL Final Rule, 54 Fed. Reg. 16042, 16044. If a contract could gut the WARN Act's minimum rights and remedies, as does Uber's Arbitration

[4] Pursuant to Federal Rule of Evidence 201(b), Plaintiff is filing a request that the Court take judicial notice of Exhibits 1, 2 and 3. For this and future citations to Exhibit 1, please refer to the original pagination of the compiled legislative history.

Agreement, the explicit non-waiver language of Section 2105 is both ignored and the entire purpose of the WARN Act is negated.

The Court should find that the plain language of Section 2104(a)(5) and Section 2105, providing for a non-waivable right/remedy to pursue class relief for WARN violations, consists of a contrary congressional command that overrides the FAA's negligible interest in enforcing the *individual* aspect of Uber's Arbitration Agreement. *Morris*, 834 F.3d at 985.

b) <u>The Legislative History and Underlying Purpose of the WARN Act</u>

The case law and the legislative history emphasize that the WARN Act is a "remedial statute[,]" *Day v. Celadon Trucking Servs., Inc.*, 827 F.3d 817, 835 (8th Cir. 2016), and that "Congress intended this protective legislation to be liberally construed[.]" (*See* **Ex. 1** (Legislative History, at 71 (Nov. 10, 1988 Ltr. from WARN Act Principal Authors to U.S. DOL)).) In evaluating Sections 2104(a)(5) and 2105 of the WARN Act, the Supreme Court has instructed that "reasonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole." *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442.

And indeed, context is revealing when it comes to the WARN Act. The chief objective of the WARN Act was to carve out a piece of the employer/employee contractual relationship (*i.e.*, the handling of mass layoffs and/or plant closings) and to legislate certain collective rights and collective remedies that could not be waived by contract. This much was recognized when DOL issued its Final Rule. *See* DOL Final Rule, 54 Fed. Reg. 16042, 16044.

As argued above, it would defy Congress's entire objective with the WARN Act to return to private contract what Congress explicitly deemed should be untouchable by contract. 29 U.S.C. § 2105 ("The rights and remedies provided to employees by this chapter are **in addition to**, and not in lieu of, any other contractual or statutory rights and remedies[.]"); *see also* 20 C.F.R. § 639.1(g) ("Collective bargaining agreements … may not reduce WARN rights.").

Senator Ted Kennedy, one of the sponsors of an early version of the WARN Act, wrote that the bill's provisions were "too important as a matter of public policy to be left to the vagaries

of private contract." (*See* **Ex. 1** (Legislative History, at 731 (June 2, 1987 Senate Committee Report on S. 538 prepared by Sen. Kennedy)).)

In addition, the WARN Act leans heavily on representatives of aggrieved employees for both the provision of notice and for the pursuit of WARN violation redress. The WARN Act's provision for a non-waivable right to collectively litigate WARN Act claims provided for in the plain language of Section 2104(a)(5) and Section 2105 is critically important to the WARN scheme due to the fact that the WARN Act (unlike all or nearly all other federal employment statutes) is not enforceable by any federal agency.

As found by DOL, the WARN Act is "unique" in that it is enforceable only through private civil litigation. *See* Dep't of Labor ("DOL") Final Rule, 54 Fed. Reg. 16042 (stating that "[t]he Department believes that in the unique WARN enforcement scheme, … all enforcement will occur in the context of private civil lawsuits …."); *see also* 20 C.F.R. § 639.1(d) ("Enforcement of WARN will be through the courts, as provided in section 5 of the statute."). This is consistent with the view of the WARN Act's principal sponsors. As stated by Senator Kennedy, the bill was drafted in "recognition of the fact that private plaintiffs will be functioning as private attorney-generals in enforc[ement]" of the WARN Act. (*See* **Ex. 1** (Legislative History, at 742 (June 2, 1987 Senate Committee Report on S. 538 prepared by Sen. Kennedy)).)

Finally, courts have routinely noted Congress's intent that WARN Act violations be pursued collectively. *See Finnan v. L.F. Rothschild & Co.*, 726 F. Supp. 460, 465 (S.D.N.Y. 1989) (stating that "[b]y its terms, WARN is applicable only in the context of employer action which affects a large number of employees"); *see also Cashman v. Dolce Int'l/Hartford, Inc.*, 225 F.R.D. 73, 90 (D. Conn. 2004) (WARN cases are "particularly amenable to class-based litigation"); *Shepherd v. ASI, Ltd.*, 295 F.R.D. 289, 294 (S.D. Ind. 2013) (observing that WARN Act claims "almost always involve large numbers of similarly situated plaintiffs whose claims may well be small when taken separately but significant in the aggregate.").

If the Court allowed contractual waiver of class or collective pursuit of alleged WARN Act violations, contrary to Congress's directives in Sections 2104(a)(5) and 2105, the WARN Act's

objective of shielding its "rights and remedies" from contractual waiver is undermined and the WARN Act itself becomes utterly devoid of enforcement authority.

2. The Supreme Court's "Contrary Congressional Command" Jurisprudence Is Distinguishable from the Specifics of this Case

As stated above, in balancing another federal statute with the Federal Arbitration Act ("FAA"), the U.S. Supreme Court's jurisprudence requires that there be a "contrary congressional command" instructing that the FAA's pro-arbitration policies are to stand down in the context of the particular federal statute under consideration. *See Am. Exp. Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012); *McMahon*, 482 U.S. at 226 (1987).

In *McMahon*, the Court first grappled with the interplay between the FAA and another federal statute, and introduced the standard that the "[FAA's] mandate may be overridden by a contrary congressional command" that is "discernible from the text, history, or purposes of the statute." 482 U.S. at 226-27. The specific statutes at issue in *McMahon* were the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, and the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78a *et seq.* The sole challenge to the arbitration agreement was one relating to the forum: "that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue" based simply upon the inclusion of federal venue provisions in the statutes. *McMahon*, 482 U.S. at 227. The Court found nothing in the text, history, or underlying purposes of either statute that conflicted with resolving those claims in the arbitral forum.

Similarly, in *CompuCredit*, the Court considered whether the Credit Repair Organizations Act ("CROA"), 15 U.S.C. § 1679 *et seq.*, contained a "contrary congressional command" that precluded the use of an arbitral forum. Again, like *McMahon*, the challenge to the arbitration agreement related solely to the forum. The plaintiffs/respondents argued that the disclosure provision of the CROA – which states that individuals were entitled to receive a statement stating that they "have a right to sue," § 1679c(a) – combined with a non-waiver provision, § 1679f(a), established a contrary congressional command requiring a judicial forum that precluded

arbitration, thus overriding the FAA. The Supreme Court disagreed, finding that the CROA did not establish a right to sue in a judicial forum; rather, it only established a right to receive the statement that contained the word "sue." *CompuCredit*, 565 U.S. at 99. Similarly, the Court found that vague statutory references to "actions" and "class actions"[5] and "courts" were sufficient to "call to mind a judicial proceeding" but not sufficient to demonstrate Congress's intent to preclude resolution of CROA claims in an arbitration forum. The Court disposed of the CROA's non-waiver provision by reasoning that a statutory non-waiver of rights cannot extend to cover that which the Court had already found was not a right. *Id.* at 101.

In *Italian Colors*, the Court for the first time considered an arbitration clause with a class waiver in the context of a federal statutory lawsuit. 133 S. Ct. 2304. The plaintiffs/respondents filed a proposed class action under federal antitrust laws, and the defendant/petitioner sought to compel individual arbitration. *Id.* at 2308. The Court rejected the "contrary congressional command" argument by remarking that nothing in the statutory text of the Sherman or Clayton Acts evidenced an intention to preclude waiver of class-action procedures. *Id.* at 2309. The focus of the *Italian Colors* decision was on the judge-made "no effective vindication" doctrine.

Importantly, these cases are of limited value to the instant dispute. Dissimilar to *McMahon* and *CompuCredit*, the WARN Act's chief grievance with Uber's Arbitration Agreement is not with the arbitral forum,[6] but rather with the inability to pursue *collective* WARN Act litigation. The collective litigation right of Section 2104(a)(5) is both an explicitly non-waivable statutory directive, as argued above, as well as a non-waivable substantive right guaranteed by the WARN Act, as detailed below. With respect to *CompuCredit*'s non-waiver, because the CROA did not establish a right to a class action or to judicial venue, the non-waiver provision, 15 U.S.C. § 1679f(a), could not be interpreted to reach non-rights. By contrast, the non-waiver provision of Section 2105 of the WARN Act provides that both "rights and remedies" are non-waivable, and

[5] The class action language in the CROA is vastly different from Section 2104(a)(5) of the WARN Act. The CROA contains several subsections beginning with, "In the event of a class action …." As with the Truth in Lending Act ("TILA"), discussed *supra* at IV.A.1.a), such vague references only demonstrate Congress's awareness of Rule 23.

[6] However, as stated below, Plaintiff does retain the right to challenge the Arbitration Agreement generally if necessary and once the stay is fully lifted in this case.

Section 2104(a)(5) decisively provides for a right to collectively litigate WARN Act claims. And in contrast to *Italian Colors*, wherein the antitrust laws at issue contained zero references to class relief whatsoever, the WARN Act's text, legislative history, and purpose (as well as agency interpretations entitled to *Chevron* deference) all provide clear evidence that Congress intended to provide non-waivable collective rights and remedies, including the right to pursue violations of the WARN Act in a class or collective proceeding.

3. Alternatively, the WARN Act Provides for "Exclusive" Venue in the "District Court[s] of the United States" Consisting of a Contrary Congressional Command Overriding the FAA

Alternatively, to the extent that the Court does not find that the WARN Act dictates a "contrary congressional command" providing a non-waivable right to pursue WARN Act violations on a class or collective basis, as argued *supra*, the Court should find that the WARN Act's "exclusive remedies" provision limits WARN enforcement to the federal courts, consisting of yet another contrary congressional command overriding the FAA.

Section 2104(a)(5) provides that WARN Act suits may be filed "in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business." Furthermore, Section 2104(b) provides that "[t]he remedies provided for in this section shall be the **exclusive remedies** for any violation of this chapter." (emphasis added).

As discussed above, the WARN Act does not provide for any federal agency enforcement authority. Rather, WARN Act compliance is – as stated by Sen. Ted Kennedy – completely reliant on "private plaintiffs [ ] functioning as private attorney-generals in enforc[ement.]" (**Ex. 1** (Legislative History, at 742).) For this reason, and just like the right to collectively litigate WARN violations, the DOL determined that federal court venue of WARN Act lawsuits is a critical component of the WARN scheme. *See* DOL Final Rule, 54 Fed. Reg. 16042, 16043 (discussing 20 C.F.R. § 639.1(d) and stating that "[t]he Department believes that in the **unique WARN enforcement scheme**, … **all enforcement will occur in the context of private civil lawsuits** …." (emphasis added)); *see also* 20 C.F.R. § 639.1(d) ("Enforcement of WARN will be through the

courts, as provided in section 5 of the statute."). DOL's determinations in this regard are entitled to *Chevron* deference, *see supra* at n.3.

The exclusive federal court venue provision in the WARN Act is substantially different from what the Supreme Court has encountered. In *CompuCredit*, the statute at issue (the CROA) did not contain an "exclusive remedies" provision like Section 2104(b) of the WARN Act, nor did it contain any explicit venue reference. 565 U.S. at 100 (citing 15 U.S.C. § 1679g). In addition, CROA charges the Federal Trade Commission ("FTC") with enforcement of the CROA. 15 U.S.C. § 1679h. With the WARN Act, private litigants are the exclusive enforcers of the statute and it explicitly and clearly provides for federal court venue as the "exclusive remedy" of the statute, as recognized by DOL.

McMahon is likewise distinguishable. In that case, the Exchange Act both provides for criminal enforcement as well as civil regulatory enforcement by the Securities and Exchange Commission ("SEC"). *See* 15 U.S.C. § 78aa. By contrast, the WARN Act's sole enforcement and is through private civil litigation. Furthermore, though the Exchange Act contains an "exclusive jurisdiction" statute for the federal courts, it is to the intended exclusion of state court venues. *McMahon*, 482 U.S. at 227-28 (reproducing 15 U.S.C. § 78aa). By contrast, Section 2104(b) states that the remedies found in Section 2104 are the "exclusive remedies" which is more expansive than the language in the Exchange Act.

The Court should draw guidance from the Supreme Court's *EEOC v. Waffle House, Inc.* decision. 534 U.S. 279 (2002). In that case, the Court determined that the EEOC could not be bound to arbitrate its Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, enforcement lawsuit pursuant to the employee's agreement to arbitrate. The lower court had held that, to the extent the EEOC was attempting to vindicate the private interests of the employee, the arbitration agreement precluded the EEOC from seeking that relief in court. The Supreme Court reversed, finding that when the EEOC files an enforcement action,

> the agency **may be seeking to vindicate public interest, not simply provide make-whole relief for the employee, even when it pursues victim-specific relief**. To hold otherwise would undermine the detailed enforcement scheme created by Congress

> simply to give greater to an agreement between private parties that does not even contemplate the EEOC's statutory function.

534 U.S. at 296 (emphasis added).

The same logic applies to the WARN Act. Again, as recognized by DOL, the WARN Act is unique among federal employment laws in that its sole enforcement mechanism is through class action and representative action lawsuits pursued in federal courts. *See* DOL Final Rule, 54 Fed. Reg. 16042, 16043; *see also* 20 C.F.R. § 639.1(d). In other words, when a "representative of employees" or a "person seeking to enforce such liability" files a WARN Act class action lawsuit, Congress necessarily contemplated that lawsuit serving both the public and private interests. In fact, Congress contemplated such lawsuits as the **only** means to enforce the WARN Act. The public interest component of private litigation under the WARN Act, secured through the federal court venue provision and the "exclusive remedies" provision of Section 2104(b), and protected from contractual waiver by Section 2105, would be utterly meaningless if WARN Act claims could be compelled to individual arbitration. If individual arbitrations were enforced, the statute would be a fish without fins, which is hardly what the principal WARN Act authors envisioned when they described a "remedial statute intended to provide significant protection to workers and local communities." (*See* **Ex. 1** (Legislative History, at 71).)

Like the Supreme Court in *Waffle House*, this Court should find that the WARN Act's public enforcement interest, which is vindicated solely through private civil class-based litigation in federal courts, outweighs the private interest in individual arbitration under the FAA.

B. The WARN Act's Non-Waivable "Rights and Remedies" Are Substantive and Trigger the FAA's Savings Clause with Respect to Uber's Class Waiver

Ultimately, the Court may find that it need not reconcile the WARN Act and the FAA, because the FAA's savings clause itself requires that Uber's class waiver be found unenforceable. *See* 9 U.S.C. § 2 ("… save upon such grounds as exist at law or in equity for the revocation of any contract."). Drawing from the above discussion and as detailed below, the WARN Act provides for a substantive and non-waivable right to collectively litigate WARN Act violations. 29 U.S.C. §§ 2104(a)(5) & 2105. This WARN Act right to collective redress is a specific Congressional expression of the "concerted action" substantive right found in Section 7 of the NLRA. *Morris*,

834 F.3d at 986. The class waiver in Uber's Arbitration Agreement infringes upon that substantive right and is therefore "illegal" and unenforceable under both the WARN Act and the FAA.

"The Supreme Court has often described rights that are the essential, operative protections of a statute as 'substantive' rights." *Morris*, 834 F.3d at 985 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). In contrast, so-called procedural rights are the "ancillary, remedial tools that help secure the substantive right." *Id.*; *see also CompuCredit*, 132 S. Ct. at 671 (describing the difference between the statute's "guarantee" and the provisions contemplating ways to enforce the guarantee).

The explicit text, the statutory structure, and the context of the WARN Act inevitably lead to the conclusion that the WARN Act contains two such guarantees: (1) a guarantee to receive (or have one's representative receive) the required notice in the event of a plant closing or mass layoff, *see* 29 U.S.C. § 2102 ("Section 2102"); and (2) a guarantee to be able to *collectively* pursue redress for violations of Section 2102, 29 U.S.C. § 2104(a)(5).

As explained above, the plain language of the WARN Act states that the substantive "rights and remedies provided to employees by this chapter" are non-waivable in contract. 29 U.S.C. § 2105; *see also* DOL Final Rule, 54 Fed. Reg. 16042, 16044; 20 C.F.R. § 639.1(g). The provision for pursuing class relief is one of those non-waivable "rights and remedies provided to employees by this chapter[.]" 29 U.S.C. §§ 2104(a)(5) & 2105. The fact that Congress specifically directed that both the "rights and remedies" of the WARN Act be non-waivable itself constitutes a legislative mandate that the right to pursue WARN Act violations on a class basis is "one of the essential, operative protections" of the WARN Act. *Morris*, 834 F.3d at 985. Such a reading also makes sense when placed in the context of the overall statutory scheme. As detailed above, the WARN Act is enforceable **only** through private class action lawsuits, *see supra* at IV.A.1.b) & IV.A.3. If courts allowed employers to contractually remove the ability of employees to pursue collective WARN Act litigation (*i.e.*, the only enforcement mechanism in the statute), the effect would be to deprive employees of "one of the essential, operative protections" of the statute.

Morris, 834 F.3d at 985. This much is demonstrated by the complete contractual nullification of WARN Act enforcement if the collective litigation right is allowed to be contractually waived.

The context of the WARN Act further supports a "collective litigation" substantive right found within the statute. An appropriate understanding of the WARN Act's passage is that Congress sought to take a subject then-"typically covered in collective bargaining agreements[,]" DOL Final Rule, 54 Fed. Reg. 16042, 16044, and then-negotiated through exercise of NLRA Section 7 rights, and to legislatively guarantee collective "rights and remedies" that could not be waived in contract. (*See* **Ex. 1** (Legislative History, at 731).)

As discussed above, the WARN Act shares a unique relationship with the NLRA and with the concerted action right specifically. The WARN Act was originally proposed as an amendment to the NLRA to "make plant closing decisions and permanent layoffs a **mandatory subject of [collective] bargaining**." (*See* **Ex. 1** (Legislative History, at 590 (emphasis added)).) And as noted by the DOL, the WARN Act was meant to legislatively supplant an area that was traditionally governed by employment contract. *See* DOL Final Rule, 54 Fed. Reg. 16042, 16044. Furthermore, federal courts have found that "[c]ase law interpreting the National Labor Relations Act can be helpful in interpreting the WARN Act[.]" *Saxion v. Titan-C-Mf'g, Inc.*, 86 F.3d 553, 561 (6th Cir. 1996) (citation omitted).

Against this backdrop, it becomes evident that the WARN Act's non-waivable right to collectively litigate alleged WARN Act violations is a specific Congressional expression of the concerted action substantive right first elaborated in Section 7 of the NLRA, and is a cornerstone guarantee of the WARN Act scheme as the statute's only enforcement mechanism to vindicate the public interest.

Since the right to collectively litigate WARN Act claims is a non-waivable substantive right conferred by Section 2104(a)(5) and Section 2105, the Court should readily come to the conclusion that Uber's class waiver interferes with that substantive right and is thus "illegal" for purposes of the FAA's savings clause. *Morris*, 834 F.3d at 985-86 (stating that the "FAA recognizes a general contract defense of illegality" and that "substantive rights cannot be waived in arbitration agreements" (citations omitted)); *Mitsubishi Motors*, 473 U.S. at 637 (stating if a

contract term in an arbitration agreement "operate[s] … as a prospective waiver of a party's right to pursue statutory remedies for substantive rights, we would have little hesitation in condemning the agreement").

The WARN Act provides substantive non-waivable "rights and remedies" including the substantive right to collectively litigate alleged WARN Act violations. 29 U.S.C. §§ 2104(a)(5) & 2105. Uber's class waiver interferes with that substantive right and is therefore illegal, triggering the FAA's savings clause. 9 U.S.C. § 2.

C. Uber's Arbitration Agreement Is Voided Due to the Unenforceability of the Class Waiver

The WARN Act contains clearly discernible statutory language creating a non-waivable substantive right to pursue violations of the WARN Act in a collective proceeding, *see* 29 U.S.C. §§ 2104(a)(5) and 2105, and to do so in federal court, §§ 2104(a)(5) and 2104(b). The legislative history and purpose of the WARN Act (namely, to legislatively carve out and protect from contract an area that was traditionally subject to employment contracts, 29 U.S.C. § 2105) as well as the DOL's interpretations of the statute's objective and text confirm that Sections 2104(a)(5) and 2105 create a non-waivable substantive right to collectively litigate WARN Act claims.

By contrast, the FAA's interest in enforcing the *individual* aspect of Uber's Arbitration Agreement is comparatively negligible. The FAA evidences a federal policy favoring arbitration, and not a policy favoring individual proceedings over class proceedings.

In this case, the Court need not examine FAA's stance on class arbitration proceedings. The FAA's interest is in enforcing the terms of arbitration agreements, and in this case those terms unambiguously and undisputedly provide for voiding the entire Arbitration Agreement if the class waiver is held unenforceable. The June 2014 Arbitration Agreement provides the following language:[7]

> You and Uber agree to resolve any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative action basis. The Arbitrator shall

[7] With respect to the class waiver, the language in the December 2015 Arbitration Agreement is substantially identical.

> have no authority to consider or resolve any claim or issue any relief on any basis other than an individual basis. The Arbitrator shall have no authority to consider or resolve any claim or issue any relief on a class, collective, or representative basis. **If at any point this provision is determined to be unenforceable, the parties agree that this provision shall not be severable**, unless it is determined that the Arbitration may still proceed on an individual basis only.

See O'Connor et al. v. Uber Tech., Inc., No. 3:13cv3826 (N.D. Cal. filed July 9, 2015) (Dkt. No. 302-11, at 17) (emphasis in original de-emphasized; emphasis added.)

As numerous courts have recognized, the policy favoring arbitration agreements only requires that courts place such agreements on "equal footing with other contracts … and enforce them according to their terms[.]" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citations omitted). The FAA's purpose is "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 & n.12 (1967).

If the Court finds, for the reasons stated above, that the WARN Act contains a "contrary congressional command" that overrides whatever interest the FAA has in enforcing an *individual* arbitration proceeding or a non-waivable substantive right to collective WARN Act litigation, the Court may find Uber's class waiver unenforceable. Uber agrees that the enforceability of the class waiver is an issue properly before the Court.

Assuming the Court finds Uber's class waiver unenforceable, the Court need not examine the arbitrability delegation issue. Plaintiff and Uber agree that the class waiver is non-severable from the remainder of the Arbitration Agreement, and Uber does not contend that class arbitration is available under either the 2014 or 2015 Arbitration Agreements. In other words, if the class waiver is unenforceable, there is no dispute that the entire Arbitration Agreement is void. The Court should not send this case to an arbitrator to determine the arbitrability of a question that is not disputed by the parties.

D. The District Court Opinions in the Three Cases Cited by Uber Offer No Persuasive Authority

Uber cites three (3) district court opinions (two out of the same district) in support of its position that the WARN Act does not provide an overriding contrary congressional command or

non-waivable substantive right to collective litigation. *Chambers v. Groome Transp. of Ala.*, 41 F. Supp. 3d 1327 (M.D. Ala. 2014); *Sides v. Macon Cnty. Greyhound Park, Inc.*, No. 3:10cv895, 2011 WL 2728926 (M.D. Ala. 2011); *Green v. Zachary Indus., Inc.*, 36 F. Supp. 3d 669 (W.D. Va. 2014). These cases are of no support to Uber.

In *Chambers*, the court was presented with the argument that "any restriction in the [a]rbitration [a]greement on their right to pursue a class action is *unconscionable under Alabama law*." 41 F. Supp. at 1350 (emphasis added). The remainder of the plaintiff's argument was characterized by the court as "largely … a policy argument." *Id.* at 1353. Plaintiff's argument in the instant case – that the WARN Act supplies a federal contrary congressional command overriding the FAA and/or that the WARN Act provides for a federal substantive right to litigate WARN claims collectively – was neither briefed nor taken up by the *Chambers* court. In fact, the phrases "contrary congressional command" and "substantive right" appear zero times in the plaintiff's briefing. *See Chambers*, No. 3:14cv237, Dkt. No. 18 (M.D. Ala. filed June 24, 2014) (attached as **Ex. 2**).

The relevant discussion in the *Sides* opinion was restricted to one short paragraph containing little analysis and offering little value to the Court's consideration of Plaintiff's arguments herein. *Sides*, 2011 WL 2728926, at *4-5. Similar to *Chambers*, the argument presented related to "public policy grounds" as stated by the court in its header on the discussion. *Id.* (header of discussion titled "Arbitration Agreement Is Not Void on Public Policy Grounds"). And like *Chambers*, neither the *Sides* court's circumscribed discussion nor the plaintiff's brief contained any reference to "contrary congressional command" or to "substantive right" whatsoever. *Id.*; *see also Sides*, No. 3:10cv895, Dkt. No. 29 (M.D. Ala. filed Jan. 5, 2011) (attached as **Ex. 3**).

In *Green*, the plaintiff argued that the arbitration agreement "is unenforceable because it violates the [NLRA.]" 36 F. Supp. 3d at 674. The court then explicitly relied upon conflicting circuit precedent to reject the argument. *Id.* at 675 ("Persuaded by the Fifth Circuit's reasoning in *D.R. Horton, Inc.* and the weight of available authority, the court finds that the [arbitration] agreement, which contains an implied class waiver, does not violate the NLRA[.]") As an initial

matter, Plaintiff does not directly argue in this brief that Uber's class waiver violates the NLRA;[8] rather, Plaintiff's position is that the WARN Act *itself* provides the contrary congressional command and/or non-waivable substantive right to litigate WARN Act claims collectively. And second, the *Green* court did not have the benefit of the Ninth Circuit's *Morris* opinion or the Seventh Circuit's opinion in *Lewis v. Epic Systems Corporation* in considering whether a class waiver of employment-related claims can violate the NLRA. 823 F.3d 1147 (7th Cir. 2016).

As detailed above, the cases cited by Uber are of no value the Court in addressing Plaintiff's arguments set forth in this brief.

E. Plaintiff Does Not Waive Other Challenges to Uber's Arbitration Agreement and Class Waiver

At the 3/22 CMC, the Court lifted the stay in this *Johnston* case for the limited purpose of briefing the issue distinct to this case as to whether Plaintiff's WARN Act claim under the WARN Act can be subject to Uber's Arbitration Agreement, and specifically Uber's class waiver. (Dkt. 802, 3/22/17 Minute Order at p. 2; 3/22/17 Tr. at 36:19-20 ("I think it's distinct enough that we should brief this issue, and then we'll go from there.")

Uber's motion to compel arbitration is overly broad and touches on arguments which remain currently stayed by order of the Court, except for a few paragraphs toward the end. (*See* Mot. at 20:23-21:22).

As set forth in detail above, Plaintiff's opposition is focused on the limited issue for which the stay was lifted, the interplay between the WARN Act, the FAA, and Uber's Arbitration Agreement, specifically the class waiver. Nevertheless, Plaintiff expressly raises and reserves the right to argue that the 2014 Arbitration Agreement (or, in the alternative, the 2015 Arbitration Agreement[9]) is invalid based on the following non-exhaustive list of reasons (some of which are subject to Ninth Circuit and U.S. Supreme Court proceedings):

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[8] Plaintiff intends to make such an argument once the stay is fully lifted, and to the extent the Court has not already struck Uber's Arbitration Agreement for the reasons stated herein.

[9] Plaintiff submits that the Court has already deemed the 2014 Arbitration Agreement applicable to the circumstances of this case. *O'Connor et al. v. Uber Tech., Inc.* No. 13cv3826, Dkt. No. 748, at 26-27, 34 (N.D. Cal. Aug. 18, 2016) (ordering that Uber must re-issue the 2015 Arbitration Agreement and that it may only be prospectively applied to current drivers).

- Whether provisions of Uber's Arbitration Agreement, including but not limited to the class waiver and/or supposed arbitrability delegation, are illegal under the NLRA, 29 U.S.C. § 157, *et seq.* The U.S. Supreme Court granted *certiorari* on that issue, *Morris*, 834 F.3d 975, *cert. granted* 137 S. Ct. 809 (2017). This issue has also been raised in the Ninth Circuit in *O'Connor v. Uber Technologies, Inc.*, 9th Cir. Case Nos. 15-17420, 15-17422, and oral argument is set to be the week of September 18, 2017 (Dkt. 98).
- Whether Uber's Arbitration Agreement, including but not limited to the class waiver, substantive provisions thereof, and/or the supposed arbitrability delegation is unconscionable. This issue has also been raised in the Ninth Circuit in *O'Connor v. Uber Technologies, Inc.*, 9th Cir. Case Nos. 15-17420, 15-17422.
- Whether Uber's Arbitration Agreement is unconscionable as applied to Plaintiff Todd Johnston.

To the extent the Court seeks further briefing on the other issues on which the arbitration agreement may be invalid, Plaintiff requests that the Court lift the stay entirely in this case and allow limited discovery and briefing on those issues to proceed.

V. CONCLUSION

For the foregoing reasons, the WARN Act supplies contrary congressional commands consisting of statutorily non-waivable rights to collectively litigate WARN Act claims in federal court that override the FAA, and/or the WARN Act provides for a non-waivable substantive right to collectively litigate WARN Act claims. The Court should find Uber's class action waiver and Arbitration Agreement unenforceable and void, and the Court should deny Uber's Motion to Compel Arbitration.

Dated: May 15, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Brian J. Malloy, hereby certify that on May 15, 2017, I caused to be electronically filed a true and correct copy of the following documents with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to counsel of record:

Plaintiff's Opposition to Defendant's Motion to Compel Arbitration

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct. Executed this 15th day of May, 2017 at San Francisco, California.

/s/ Brian J. Malloy
BRIAN J. MALLOY