

1 Ricardo J. Prieto (Admitted *PHV*)
rprieto@eoc.net
2 SHELLIST | LAZARZ | SLOBIN LLP
11 Greenway Plaza, Suite 1515
3 Houston, Texas 77046
Telephone: (713) 621-2277
4 Facsimile: (713) 621-0993

5 Melinda Arbuckle (Cal. Bar No. 302723)
marbuckle@eoc.net
6 SHELLIST | LAZARZ | SLOBIN LLP
402 West Broadway, Suite 400
7 San Diego, California 92101
Telephone: (713) 621-2277
8 Facsimile: (713) 621-0993

9 Robert R. Debes, Jr. (Admitted *PHV*)
bdebes@debeslaw.com
10 DEBES LAW FIRM
5909 West Loop South, Suite 510
11 Bellaire, Texas 77401
Telephone: (713) 623-0900
12 Facsimile: (713) 623-0951

13 *Counsel for Plaintiff, Jacob McGrath, and*
14 *Proposed Collective Action Members*

15 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
16 **SAN FRANCISCO DIVISION**

17 JACOB McGRATH, on behalf of himself and
all others similarly situated,

18 Plaintiff,

19 vs.

20 DOORDASH, INC.,

21 Defendant.

Case No: 3:19-cv-05279-EMC

**PLAINTIFF’S MOTION FOR LEAVE TO
FILE MOTION FOR
RECONSIDERATION OF ORDER
COMPELLING ARBITRATION [ECF NO.
199]**

Action Filed: August 23, 2019

Judge: Edward M. Chen

Date: N/A

Time: N/A

Place: Courtroom 5, 17th Floor

1 **MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION OF ORDER**
2 **COMPELLING ARBITRATION [ECF NO. 199]**

3 Pursuant to Northern District of California Civil Local Rule 7-9 (b)(3), Plaintiff Jacob
4 McGrath moves this Court for an order granting him leave to file a Motion for Reconsideration
5 of this Court’s November 5, 2020 Order Granting Defendant’s Motion to Compel Arbitration
6 (ECF No. 199) (the “Order”). As required by Civil Local Rule 7-9, Plaintiff respectfully
7 contends, as discussed more fully below, that the Order is “[a] manifest failure by the Court to
8 consider material facts or dispositive legal arguments which were presented to the Court before
9 such interlocutory order.”

10 Plaintiff files this Motion for Leave approximately one week from when the Court issued
11 the Order, and as such, satisfies L.R. 7-9’s ‘diligence’ requirement.

12 **I. INTRODUCTION**

13 Under Northern District Civil Local Rule 7-9, a party may seek leave to file a motion for
14 reconsideration any time before judgment. L.R. 7-9(a). A Motion for Reconsideration may be
15 made on one of three grounds: (1) a material difference in fact or law exists from that which was
16 presented to the Court, which, in the exercise of reasonable diligence, the party applying for
17 reconsideration did not know at the time of the order; (2) the emergence of new material facts or
18 a change of law; or (3) a manifest failure by the Court to consider material facts or dispositive
19 legal arguments presented before entry of judgment. L.R. 7-9 (b)(1)-(3). *Accord School Dist. No.*
20 *IJ, Multnomah Cty. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (“Reconsideration is
21 appropriate if the district court (1) is presented with newly discovered evidence, (2) committed
22 clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in
23 controlling law.”).

24 Plaintiff seeks leave to move for reconsideration of the Order because of, respectfully, a
25 manifest failure by the Court to consider material facts or dispositive legal arguments presented
26 before the entry of judgment, as evidenced by the following:

1 (1) The Court failed to consider Plaintiff's timely-lodged Objection (ECF No. 192),
 2 which objects to Defendant's current arbitration agreement roll-out that took place during this
 3 litigation. *See O'Connor v. Uber Technologies, Inc.*, 2013 WL 6407583, at *7 (N.D. Cal. Dec. 6,
 4 2013) (Chen, J.) (refusing to enforce arbitration agreements which were presented to putative
 5 class members during the pendency of an action);

6 (2) Moreover, the Court erred when it failed to consider Plaintiff's Objection
 7 concerning Defendant's cram down of its current arbitration agreement to Opt-In Plaintiffs
 8 without notifying their undersigned counsel. *See* Cal. R. of Prof'l Conduct 4.2(a); and

9 (3) Defendant's Motion to Compel Arbitration (ECF No. 116) did not seek to compel
 10 every Opt-In Plaintiff in this case (see ECF No. 187-1; Exhibits B and C to the Declaration of
 11 Stanley Tang).¹ Thus, the Court committed error when it compelled all Opt-In Plaintiffs (with the
 12 exception of opt-outs), which was not requested by Defendant or supported by the evidence
 13 presented with Defendant's original Motion to Compel Arbitration as is required by the Federal
 14 Arbitration Act ("the FAA").

15 II. ARGUMENT AND AUTHORITY

16 A. Plaintiff's Objection (ECF No. 192) raised Material Facts and Dispositive Legal 17 Arguments Critically Relevant to Defendant's Motion to Compel Arbitration. The 18 Court Erred When It Failed to Consider Plaintiff's Objection.

19 Plaintiff objected to Defendant's late-filed evidence in support of its Motion to Compel
 20 Arbitration because it did not provide the Opt-In Plaintiffs with an adequate opportunity to
 21 respond. (*See* ECF No. 192). However, nowhere in its Order did the Court address Plaintiff's
 22 Objection. Had the Court provided the Opt-In Plaintiffs with an opportunity to respond to
 23 Defendant's late-filed evidence, they would have demonstrated that DoorDash's latest iteration
 24 of its arbitration agreement is not enforceable, at least as to some of the Opt-In Plaintiffs,

25 _____
 26 ¹ Defendant sought to compel 2,662 individuals out of the current total of approximately
 27 3,256 Plaintiffs.

1 because the agreement was rolled-out during this litigation *and* to Opt-in Plaintiffs that were
2 represented by legal counsel not notified of the arbitration roll out. (*Compare, e.g.*, ECF No. 45,
3 Ex. 23 consent form for Yassim Ali filed on 12/20/19, *with* ECF No. 187-1 declaring that Mr.
4 Ali accepted Defendant's CPR agreement on 5/8/20).

5 **1. Defendant's Efforts to Compel Arbitration as to the CPR Agreement Are In**
6 **Violation of Its Counsel's Obligation to Present Legally Operative**
7 **Documents to Counsel for the Opt-in Plaintiffs.**

8 In his to-be filed Motion for Reconsideration, Plaintiff will present further argument and
9 evidence that Defendant's counsel violated their ethical obligation to present documents with
10 binding legal effect to counsel for the Opt-in Plaintiffs, instead using their client as an instrument
11 for their coercive and inappropriate communications, and that this violation should result in the
12 ineffectiveness of such arbitration agreements. *See* Cal. R. of Prof'l Conduct 4.2(a) ("In
13 representing a client, a lawyer shall not communicate directly **or indirectly** about the
14 subject of the representation with a person* the lawyer knows* to be represented by
15 another lawyer in the matter, unless the lawyer has the consent of the other lawyer.") (emphasis
16 added).

17 Each of the Opt-in Plaintiffs filed their consent to join in this action with the intent of
18 participating in federal court while represented by Plaintiff's counsel. (*See, e.g.*, ECF No. 5-1
19 (Smiley Consent to Become A Party Plaintiff) (agreeing to be bound by judgment by the Court
20 and recognizing representation by Plaintiff's counsel)). Nonetheless, on or about November 9,
21 2019 (see ECF No. 116 at p. 4), over seven months after the filing of the initial lawsuit against
22 DoorDash by Plaintiff's Counsel, the *Goldman-Hull* lawsuit (filed with this Court on March 22,
23 2019), and over two months after the filing of this lawsuit, DoorDash rolled out a new arbitration
24 agreement to all of its workers. There is clear evidence that Defense counsel was the architect of
25 the CPR arbitration agreement (or at least played a significant role in its creation and
26
27
28

1 implementation),² and communication of the arbitration agreement to the Opt-in Plaintiffs was
2 not a party to party communication that stemmed from DoorDash's own instance.

3 Notwithstanding Defense counsel's clear knowledge and understanding that Plaintiff's
4 counsel represented dashers who could be affected by that roll out, at no time did Defendant
5 notify Plaintiff's counsel of its presentation of the CPR agreement to represented Opt-in
6 Plaintiffs. The CPR arbitration agreement itself purports to encourage dashers to seek counsel.
7 (*See* ECF No. 116-1; Exhibit E at p. 51 ("CONTRACTOR has the right to consult with counsel
8 of CONTRACTOR'S choice concerning this Mutual Arbitration Provision (or any other
9 provision of this Agreement")), yet Defense counsel could not be bothered to confer with
10 Plaintiff's counsel regarding the roll out.

11 In the case of Mr. Ali, who had been represented since December of 2019, Defense
12 counsel had knowledge of the representation for over **four months** between when Mr. Ali filed
13 his consent form and when he purportedly agreed to the CPR arbitration agreement, yet still
14 presented the arbitration agreement directly to Mr. Ali without the knowledge of Plaintiff's
15 counsel. (*Compare, e.g.*, ECF No. 45, Ex. 23 consent form for Yassim Ali filed on 12/20/19,
16 *with* ECF No. 187-1 declaring that Mr. Ali accepted Defendant's CPR agreement on 5/8/20).
17 Defense counsel's failure to communicate with Plaintiff's counsel regarding the arbitration roll-
18 out affects potentially dozens or hundreds of other Opt-in Plaintiffs.³ This issue is critical
19 because had Plaintiff's counsel been made aware of the new CPR agreement, counsel would
20 have advised the Opt-in Plaintiffs to exercise the arbitration agreement's opt-out provision and
21 provided legal assistance to that end. *See Balasanyan v. Nordstrom, Inc.*, No. Civ. A. 11-cv-
22 2609-JM-WMC, 2012 WL 760566, at *1-2, 4 (S.D. Cal. Mar. 8, 2012) (refusing to enforce

23
24 ² *See* ECF No. 199 at p. 14, summarizing findings by Judge Alsup in *Abernathy v.*
25 *DoorDash, Inc.*, No. C-19-7545 WHA (N.D. Cal.) (Docket No. 177) (Order at 7).

26 ³ Plaintiff is currently reviewing records to determine affected Opt-in Plaintiffs. Plaintiff
27 will present the result of such review in the Motion for Reconsideration.

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.