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United States District Court  
Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DORA LEE,  
  
Plaintiff,  
  
v.  
  
POSTMATES INC.,  
  
Defendant.

Case No. [18-cv-03421-JCS](#)

**ORDER REGARDING MOTION TO  
COMPEL ARBITRATION AND  
MOTION FOR LEAVE TO FILE  
AMENDED COMPLAINT**

Re: Dkt. Nos. 14, 15

**I. INTRODUCTION**

In this putative class action regarding alleged employee misclassification, Defendant Postmates Inc. seeks to compel arbitration of Plaintiff Dora Lee’s claims under the Federal Arbitration Act (“FAA”), and Lee seeks leave to amend her complaint to add two additional named plaintiffs and a more explicit claim for public injunctive relief. The Court held a hearing on October 12, 2018. For the reasons discussed below, both motions are GRANTED, except that the Court DENIES Postmates’ motion to the extent that it requests a stay of new plaintiffs Kellyn Timmerman and Joshua Albert’s claims pending the resolution of Lee’s arbitration.<sup>1</sup>

**II. BACKGROUND**

**A. Claims of the Complaint**

Lee alleges that she worked as a courier for Postmates delivering “food and other merchandise to [Postmates’] customers at their homes and businesses.” Compl.<sup>2</sup> ¶ 8. She claims that Postmates willfully misclassified her and other drivers as independent contractors rather than employees, failed to pay minimum wage and reimburse expenses as required by the California

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<sup>1</sup> The parties have consented to the jurisdiction of the undersigned magistrate judge for all purposes pursuant to 28 U.S.C. § 636(c).

<sup>2</sup> The complaint, originally filed in state court prior to removal, appears in the record here as pages 7 through 15 of ECF docket entry 1-1, within Exhibit B to the declaration of Theane Evangelis.

1 Labor Code, and in doing so, engaged in unlawful business practices in violation of California’s  
 2 Unfair Competition Law (the “UCL”). *Id.* ¶¶ 30–33. Lee seeks to represent a class of similarly  
 3 situated Postmates couriers. *See id.* ¶¶ 21–29.

4 **B. The Fleet Agreement**

5 Postmates requires its couriers to agree to its “Fleet Agreement” before they can make  
 6 deliveries. Cartes Decl. (dkt. 14-1) ¶ 4. According to Postmates’ records, Lee agreed to a 2017  
 7 version of the Fleet Agreement (Cartes Decl. Ex. B) when she signed up to work for Postmates in  
 8 March of that year, and agreed to an amended version of the Fleet Agreement in 2018 (Cartes  
 9 Decl. Ex. C). *See* Cartes Decl. ¶¶ 7, 9. The two versions of the Fleet Agreement are substantively  
 10 identical for the purpose of the present motion. *See* Cartes Decl. Exs. B, C. The portion of the  
 11 Fleet Agreement relevant here is section 11, the “Mutual Arbitration Provision,” which requires  
 12 the parties to arbitrate all disputes under the Federal Arbitration Act, including most threshold  
 13 questions regarding the applicability of the arbitration provision. Cartes Decl. Ex. B § 11A(i)–(ii).

14 Within the section addressing arbitration, the agreement also includes a waiver of class and  
 15 representative actions:

16 CLASS ACTION WAIVER—PLEASE READ. Postmates and  
 17 Contractor mutually agree that any and all disputes or claims between  
 18 the parties will be resolved in individual arbitration. The Parties  
 19 further agree that by entering into this Agreement, they waive their  
 20 right to have any dispute or claim brought, heard, or arbitrated as a  
 class and/or collective action, or to participate in any class and/or  
 collective action, and an arbitrator shall not have any authority to hear  
 or arbitrate any class and/or collective action (“Class Action  
 Waiver”).

21 *Id.* § 11B(ii); *see also id.* § 11B(iii) (including substantially identical language pertaining to “any  
 22 representative action”). Unlike other threshold questions of arbitrability, which the Fleet  
 23 Agreement states themselves must be arbitrated, any claim that the class or representative action  
 24 waiver is unenforceable or void must be determined by a court, and cannot be determined by an  
 25 arbitrator. *Id.* § 11B(iv).

26 The Fleet Agreement provides couriers the right to opt out of the arbitration requirement  
 27 within thirty days after they digitally execute the Fleet Agreement. *Id.* § 11B(ix). Modifications  
 28 to the Fleet Agreement do not provide a renewed opportunity to opt out of arbitration unless

1 Postmates modifies the arbitration provision. *Id.*

2 **C. Parties' Arguments**

3 **1. Postmates' Motion to Compel Arbitration and Stay Proceedings**

4 Postmates argues that Lee's claims must be arbitrated because when Lee signed up to make  
5 deliveries for Postmates, she signed Postmates' Fleet Agreement, which included an arbitration  
6 clause that applies to all claims between the parties, explicitly including claims related to Lee's  
7 classification as an independent contractor. Mot. to Compel (dkt. 14) at 1–3. The arbitration  
8 clause also includes an explicit waiver of Lee's right to have disputes resolved through a class  
9 action, and instead states her agreement to resolve all disputes through individual arbitration. *Id.*  
10 at 3 (citing Cartes Decl. Ex. B § 11B(ii), Ex. C § 11B(ii)). According to Postmates, Lee did not  
11 opt out of the arbitration provision within the thirty days allowed under the Fleet Agreement. *Id.*  
12 at 3–4. Postmates contends that Lee's claims are governed by the Federal Arbitration Act, and  
13 that pursuant to the terms of the Fleet Agreement, even “gateway” questions regarding the scope  
14 and application of the arbitration clause are to be decided by an arbitrator. *Id.* at 6–7. Postmates  
15 argues that the arbitration clause and class action waiver of the Fleet Agreement are valid and  
16 apply to all of Lee's claims, but that if the Court determines that any claims are not subject to  
17 arbitration, they must be stayed until arbitration is concluded. *Id.* at 7–11.

18 Lee argues that if she is permitted to amend her complaint to add Kellyn Timmerman and  
19 Joshua Albert as additional named plaintiffs, the fact that (according to Lee) they validly opted out  
20 of the arbitration clause should be imputed to other putative class members including Lee herself  
21 based on the Georgia Supreme Court's decision in *Bickerstaff v. Suntrust Bank*, 299 Ga. 459  
22 (2016). Opp'n to Arbitration (dkt. 16) at 5–8. Lee also contends that she and other Postmates  
23 couriers are exempt from the FAA based on an exception for transportation workers engaged in  
24 interstate commerce, codified at 9 U.S.C. § 1, because the statutory language regarding  
25 “employment contracts” is not limited to employees rather than independent contractors—or even  
26 if it is, the couriers are in fact employees—and because the couriers are sufficiently engaged in  
27 commerce by delivering items that may have originated out of state. Opp'n to Arbitration at 9–18.  
28 Lee argues, based on the California Supreme Court's decision in *McGill v. Citibank, N.A.*, 2 Cal.

1 5th 945 (2017), that the arbitration clause is invalid to the extent that it purport to bar claims for  
2 public injunctive relief under the UCL, Opp'n to Arbitration at 18–20, and finally asserts that the  
3 motion should be denied because couriers did not have sufficient notice of the arbitration clause to  
4 have provided valid consent to such an agreement, *id.* at 20–24 (relying primarily on *Cullinane v.*  
5 *Uber Techs., Inc.*, 893 F.3d 52 (1st Cir. 2018) (applying Massachusetts law)).

6 Postmates renews its argument in its reply that the arbitration clause of the Fleet  
7 Agreement covers all of the claims at issue. Reply re Arbitration (dkt. 23) at 2–3. Postmates  
8 contends that adding Timmerman and Albert as additional plaintiffs would not affect Lee’s claims,  
9 and that the Georgia Supreme Court’s *Bickerstaff* decision is inapplicable here and inconsistent  
10 with the FAA. *Id.* at 4–6. According to Postmates, the transportation worker exception to the  
11 FAA does not apply because couriers are not sufficiently engaged in interstate commerce and  
12 because as independent contractors they do not have “employment contracts,” although Postmates  
13 asks that if the Court consider the latter issue dispositive, the Court should withhold a decision  
14 until the Supreme Court decides a pending case that will likely resolve whether independent  
15 contractors fall within the exception. *Id.* at 6–9. Postmates also argues that—contrary to Ninth  
16 Circuit authority—the question of whether the exception applies is for the arbitrator to decide, and  
17 again asks this Court to withhold a decision on that issue until the Supreme Court addresses it. *Id.*  
18 at 9–10. If the exception does not apply to independent contractors, Postmates contends that this  
19 Court cannot determine as a threshold matter that the couriers are employees, because doing so  
20 before class certification would improperly allow potential class members to choose whether to  
21 opt out of the class after a significant decision on the merits has been resolved. *Id.* at 10–11.  
22 Postmates also argues that Lee does not and cannot seek public injunctive relief under the UCL  
23 and the FAA, and that she validly assented to the Fleet Agreement and its arbitration provision.  
24 *Id.* at 11–15. Postmates again asks the Court to stay any remaining claims pending arbitration. *Id.*  
25 at 15.

## 26 **2. Lee’s Motion for Leave to File an Amended Complaint**

27 Lee seeks to file a first amended complaint naming Kellyn Timmerman and Joshua Albert  
28 as additional plaintiffs and putative class representatives, so that the class claims may proceed

1 even if Lee is required to arbitrate her own claims. *See generally* Mot. to Amend (dkt. 15). Lee  
 2 asserts in her motion—but presents no evidence to support—that Timmerman and Albert opted  
 3 out of the arbitration requirement of their contract with Postmates. *See id.* at 4–5. She argues that  
 4 amendment should be permitted because there has been no undue delay or bad faith, amendment  
 5 would cause no prejudice to Postmates, and amendment would not be futile because Timmerman  
 6 and Albert are not required to arbitrate their claims. *Id.* at 4–6. The proposed amended complaint  
 7 also includes language explicitly seeking “public injunctive relief,” which Lee contend that she  
 8 herself may pursue outside of arbitration based on the California Supreme Court’s decision in  
 9 *McGill*. *See* Mot. to Amend at 3 n.2.

10 Postmates argues that leave to amend should be denied because amendment would be  
 11 futile, Postmates would be prejudiced, Lee lacks a good-faith basis for amendment, and any claims  
 12 that are not subject to arbitration should be stayed pending arbitration of other claims. *See*  
 13 *generally* Opp’n to Amendment (dkt. 22). Lee renews the arguments of her motion in her reply,  
 14 and argues that there is no basis to stay Timmerman and Albert’s claims even if Lee is required to  
 15 arbitrate. *See generally* Reply re Amendment (dkt. 25).

### 16 **III. ANALYSIS OF MOTION TO COMPEL ARBITRATION AND STAY**

#### 17 **A. Legal Standard**

18 Under the FAA, “[a] written provision in . . . a contract evidencing a transaction involving  
 19 commerce to settle by arbitration a controversy thereafter arising out of such contract or  
 20 transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law  
 21 or in equity for the revocation of any contract.” 9 U.S.C. § 2. Because arbitration is a matter of  
 22 contract, the question of arbitrability is, in principle, an issue for judicial determination. *Howsam*  
 23 *v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). The court’s role in addressing a question  
 24 of arbitrability is “limited to determining (1) whether a valid agreement to arbitrate exists, and if it  
 25 does, (2) whether the agreement encompasses the dispute at issue.” *Chiron Corp. v. Ortho*  
 26 *Diagnostic Sys. Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). If the court finds that both of these  
 27 requirements are met, the FAA requires it to enforce the provision in accordance with its terms.  
 28 *Id.*

1 The FAA “was created to counter prevalent judicial refusal to enforce arbitration  
2 agreements . . . and has been interpreted to embody ‘a liberal federal policy favoring arbitration.’”  
3 *Mortenson v. Bresnan Commc’ns, LLC*, 722 F.3d 1151, 1157 (9th Cir. 2013) (quoting *Moses H.*  
4 *Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) and citing *AT&T Mobility*  
5 *LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). Thus, the Supreme Court has held that “any  
6 doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether  
7 the problem at hand is the construction of the contract language itself or an allegation of waiver,  
8 delay, or a like defense to arbitrability.” *Moses H. Cone*, 460 U.S. at 24–25. Nonetheless,  
9 “[a]rbitration is strictly a matter of consent and thus is a way to resolve those disputes—but only  
10 those disputes—that the parties have agreed to submit to arbitration.” *Granite Rock Co. v. Int’l*  
11 *Bhd. of Teamsters*, 561 U.S. 287, 299 (2010) (internal quotation marks omitted). Consequently,  
12 courts may apply the “presumption favoring arbitration . . . only where it reflects, and derives its  
13 legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties  
14 intended because their express agreement to arbitrate was validly formed and . . . is legally  
15 enforceable and best construed to encompass the dispute.” *Id.* at 303. Even where such a  
16 presumption arises, the Court explained, arbitration should be ordered only if the presumption is  
17 not rebutted. *Id.* at 301. Where the presumption applies, courts “compel arbitration ‘unless it may  
18 be said with positive assurance that the arbitration clause is not susceptible of an interpretation that  
19 covers the asserted dispute.’” *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 746 (9th Cir.  
20 2014) (quoting *AT & T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 650 (1986)  
21 (internal quotation marks and citation omitted)).

22 The Supreme Court in *Granite Rock* explained that the presumption in favor of arbitration  
23 “is merely an acknowledgment of the FAA’s commitment to ‘overrule the judiciary’s  
24 longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the  
25 same footing as other contracts.’” 561 U.S. at 299 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of*  
26 *Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). The Supreme Court continued, “we  
27 have never held that this policy overrides the principle that a court may submit to arbitration ‘only  
28 those disputes . . . that the parties have agreed to submit.’ . . . Nor [has the Court] held that courts

1 may use policy considerations as a substitute for party agreement.” *Id.* (quoting *First Options of*  
2 *Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)).

3 Where the parties “clearly and unmistakably” indicate their intent to do so, an agreement  
4 may delegate “threshold issues” of arbitrability, including the “enforceability, revocability or  
5 validity” of an arbitration clause, to the arbitrator rather than to a court. *See Mohamed v. Uber*  
6 *Techs., Inc.*, 848 F.3d 1201, 1208–09 (9th Cir. 2016) (citations omitted).

7 As a general rule, courts apply state contract law in determining the validity and scope of  
8 an arbitration agreement. *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1210 (9th Cir. 1998).  
9 Thus, in determining whether there is a valid agreement to arbitrate, “courts must ‘apply ordinary  
10 state-law principles that govern the formation of contracts.’” *Id.* (quoting *First Options*, 514 U.S.  
11 at 944). The parties do not dispute that California law governs the Fleet Agreement as applied to  
12 Lee. *See, e.g.*, Opp’n to Arbitration at 23–24; Reply re Arbitration at 13. The Court therefore  
13 looks to California law in addressing whether a valid agreement to arbitrate exists between Lee  
14 and Postmates and (assuming it does) whether Lee’s claim falls within the scope of that  
15 agreement.

16 **B. Lee Agreed to the Fleet Agreement and Arbitration Clause**

17 According to Postmates’ records, Lee agreed to the 2017 version of the Fleet Agreement  
18 on March 27, 2017, and agreed to the updated 2018 version of the Fleet Agreement on May 15,  
19 2018. Cartes Decl. ¶¶ 6–9 & Ex. A (spreadsheet indicating Lee’s acceptance of the agreement),  
20 Ex. B (2017 Fleet Agreement), Ex. C (2018 Fleet Agreement). Postmates employs a “click-  
21 through’ process” in which prospective couriers “are presented with a link to the Fleet Agreement”  
22 during the process of signing up to make deliveries for Postmates, and must click either “Agree”  
23 or “Dismiss” before moving to the next step. Campbell Reply Decl. ¶¶ 14–16. Couriers who  
24 accept the agreement are emailed a copy of it and may also access it in the Postmates “Fleet App”  
25 after they sign up, and must follow the same process when Postmates updates its Fleet Agreement.  
26 *Id.* ¶¶ 17–18.

27 Notwithstanding Lee’s citation to authority requiring “conspicuous” notice of contract  
28 terms and “unambiguous manifestation of assent” under Massachusetts law, *see* Opp’n to

1 Arbitration at 20–21 (citing *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 61 (1st Cir. 2018)), courts  
 2 applying California law have typically held that procedures like the one employed by Postmates  
 3 here are sufficient to establish contract formation. *E.g.*, *Levin v. Caviar, Inc.*, 146 F. Supp. 3d  
 4 1146, 1157 (N.D. Cal. 2015) (collecting district court decisions). Lee has submitted no evidence  
 5 that she did not assent to or did not understand the Fleet Agreement. Although Postmates should  
 6 not have waited until its reply brief to submit some of the evidence supporting the existence of a  
 7 contract, *see generally* Campbell Reply Decl., there does not appear to be any real factual dispute  
 8 on this issue.

9 Lee also did not affirmatively opt out of the 2017 Fleet Agreement’s arbitration clause,  
 10 which she could have done within thirty days of accepting the 2017 Fleet Agreement. Cartes  
 11 Decl. ¶ 10 & Ex. B ¶ 11B(ix). The Fleet Agreement does not provide a renewed opportunity to  
 12 opt out when changes are made to the agreement unless such changes materially affect the  
 13 arbitration clause, which Lee has not argued is the case here.<sup>3</sup> *Id.* Ex. B ¶ 11B(ix); *compare id.*  
 14 Ex. B (2017 Fleet Agreement) ¶ 11B *with id.* Ex. C (2018 Fleet Agreement, reflecting materially  
 15 identical arbitration terms) ¶ 11B. Thus, although Lee attempted to opt out of the 2018 Fleet  
 16 Agreement on May 22 and 23, 2018, she was not permitted to do so at that time. Campbell Reply  
 17 Decl. ¶ 9.

18 At the hearing, Lee’s counsel raised for the first time arguments that Postmates acted  
 19 improperly in presenting the 2018 Fleet Agreement to Lee directly when she was represented by  
 20 counsel and had filed this action, that the 2017 Fleet Agreement was limited to a one-year term,  
 21 and that Lee’s attempt to opt out of arbitration should have been effective. None of those  
 22 arguments are included in Lee’s opposition brief. Counsel contended that the arguments were  
 23 proper because Postmates presented for the first time with its reply brief evidence regarding the  
 24 nature of the Fleet Agreement acceptance process and the fact that Lee attempted to opt out in  
 25 2018. That contention is unavailing. It is true that some of the evidence presented with  
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27 <sup>3</sup> Lee also has not challenged whether such a framework, preventing a worker from opting out of  
 28 arbitration even when other aspects of the contract change, is permissible under California law and  
 the FAA.



1 Postmates’ reply doubtless should have been included with its motion, and Postmates should not  
 2 have incorrectly—or perhaps misleadingly—asserted that Lee never opted out, at least without  
 3 acknowledging her attempt to opt out in 2018. *See* Cartes Decl. ¶ 10. Nevertheless, the text of  
 4 both the 2017 and 2018 Fleet Agreements were presented with the motion, as was the assertion  
 5 that Lee accepted the 2018 Fleet Agreement on May 15, 2018. Cartes Decl. ¶ 9 & Exs. B, C.  
 6 Lee’s attempt to opt out, while not addressed in Postmates’ motion or accompanying declaration,  
 7 is of course within Lee’s own knowledge. Lee therefore waived the arguments raised for the first  
 8 time at the hearing by failing to address them in her brief.

9 Based on the evidence submitted by Postmates and the lack of evidence to the contrary  
 10 from Lee, the Court concludes for the purpose of this order that, under California law, Lee validly  
 11 consented to the Fleet Agreement and its arbitration provision, and did not effectively opt out of  
 12 that provision.

13 **C. Lee May Not Avoid Arbitration Based on Other Putative Class Members**

14 Lee may not avoid arbitration on the basis that other putative class representatives opted  
 15 out of the arbitration agreement, when Lee herself did not. In the decision on which Lee relies for  
 16 that proposition, the Georgia Supreme Court held in *Bickerstaff v. Suntrust Bank* that the filing of  
 17 a class action complaint tolled the deadline for putative class members to opt out of an arbitration  
 18 requirement, analogizing to precedent tolling statutes of limitations. *See generally* 299 Ga. 459  
 19 (2016). Notably, the Georgia court rested its decision on the fact that the lead plaintiff filed his  
 20 complaint “within the deadline for rejecting arbitration for existing depositors, the class [he] seeks  
 21 to represent,” and the complaint could therefore be viewed as tolling the deadline from the date of  
 22 filing. *See id.* at 469. Here, the deadline for Lee to opt out of the Fleet Agreement’s arbitration  
 23 clause has passed, and under the logic of *Bickerstaff* the filing of a new complaint now by  
 24 someone who opted out of arbitration could no more save Lee’s claim than it could revive the  
 25 claims of someone for whom the statute of limitations already expired.

26 Regardless, the Ninth Circuit has rejected Lee’s proposed application of *Bickerstaff* in a  
 27 precedential opinion issued after the close of briefing in this case. *See* Statement of Recent  
 28 Decision (dkt. 27); *O’Connor v. Uber Techs., Inc.*, \_\_ F.3d \_\_, Nos. 14-16078 et al., 2018 WL

1 4568553, at \*4, 2018 U.S. App. LEXIS 27343, at \*12–13 (9th Cir. Sept. 25, 2018). Lee’s  
 2 criticism of that decision and desire to preserve the issue in the event that the decision is reversed  
 3 en banc are noted. *See* Case Mgmt. Statement (dkt. 28) at 7 & n.3. However, because this Court  
 4 is bound by *O’Connor*—and agrees with its reasoning—the addition of other plaintiffs in the  
 5 proposed amended complaint is not relevant to whether Lee’s claims must be arbitrated.

#### 6 **D. The Transportation Workers Exception**

7 The statutory language of the FAA excludes “contracts of employment of seamen, railroad  
 8 employees, or any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C.  
 9 § 1. The Supreme Court has interpreted this exception as governing “only contracts of  
 10 employment of transportation workers.” *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119  
 11 (2001). A court must “assess whether a Section 1 exemption applies before ordering arbitration”;  
 12 the parties’ agreement may not delegate that question to an arbitrator. *In re Van Dusen*, 654 F.3d  
 13 838, 846 (9th Cir. 2011); *see also Van Dusen v. Swift Transp. Co., Inc.*, 544 F. App’x 724 (9th Cir.  
 14 2013) (explaining that *In re Van Dusen* is precedential “law of the circuit” even though that  
 15 opinion denied a petition for mandamus to reverse the district court’s error).<sup>4</sup> The parties dispute  
 16 two aspects of the scope of this exception: whether a worker must be an employee rather than an  
 17 independent contractor in order to have an “employment contract,” and whether Lee was among a  
 18 class of workers “engaged in . . . interstate commerce.”

#### 19 **1. Employment Contract Requirement**

20 The Ninth Circuit applied the § 1 exception and the rule of *Circuit City* in *Harden v.*  
 21 *Roadway Package Sys., Inc.*, 249 F.3d 1137 (9th Cir. 2001), holding that a truck driver employed  
 22 to deliver packages “throughout the United States” was exempt from the FAA as a “transportation  
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24 <sup>4</sup> There is some disagreement among the courts of appeals on this issue. *See Oliveira v. New*  
 25 *Prime, Inc.*, 857 F.3d 7, 12–15 (1st Cir. 2017) (following the Ninth Circuit’s approach, but noting  
 26 that the Eighth Circuit reached the opposite conclusion in *Green v. Supershuttle Int’l, Inc.*, 653  
 27 F.3d 766 (8th Cir. 2011)), *cert. granted*, 138 S. Ct. 1164 (2018). Postmates therefore argues that  
 28 “*Van Dusen* is not sound precedent” and was “wrongly decided.” Reply re Arbitration at 9–10.  
 Regardless of its merit, *Van Dusen* is binding on this Court—and as with *O’Connor*, this Court  
 also agrees with its reasoning. While the Supreme Court will likely decide the matter conclusively  
 in its review of the First Circuit’s *Oliveira* decision, this Court will not wait for that opinion to  
 proceed with this case.

1 worker[] . . . engaged in interstate commerce.” 249 F.3d at 1140. The defendant in that case  
 2 argued that the driver was not exempt because he was an independent contractor, and therefore not  
 3 subject to an “employment contract,” but the court declined to consider that argument because the  
 4 defendant raised it for the first time on appeal. *Id.* at 1141.

5 The First Circuit addressed that question in *Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st  
 6 Cir. 2017), holding that despite the majority of district court decisions declining to apply to  
 7 exception to independent contractors, most such decisions had not examined the issue in detail,  
 8 and the plain language of the statute as used at the time of enactment in 1925 counseled in favor of  
 9 applying the exception to independent contractors as well as employees. 857 F.3d at 15–24 &  
 10 n.20 (citing, among many other examples, a 1925 Supreme Court of Oklahoma decision stating  
 11 that “the contract of employment between Tankersley and Casey was admitted in evidence without  
 12 objections, and we think conclusively shows that Casey was an independent contractor,”  
 13 *Tankersley v. Webster*, 243 P. 745, 747 (Okla. 1925)). The Supreme Court granted certiorari in  
 14 *Oliveira* and heard argument on October 3, 2018. *See New Prime Inc v. Oliveira*, 138 S. Ct. 1164  
 15 (2018) (granting certiorari).

16 Here, Postmates argues that independent contractors are not encompassed by the exception  
 17 based in part on Black’s Law Dictionary, which defines an “employment contract” as a “contract  
 18 between an employer and an employee,” but Postmates asks to Court to wait for the Supreme  
 19 Court to decide *Oliveira* if the issue would be dispositive. Reply re Arbitration at 8–9. Because  
 20 the Court holds below that Lee has not established that the interstate commerce requirement is  
 21 satisfied, the Court need not resolve the meaning of “employment contract” to hold that the  
 22 transportation worker exception does not apply.

## 23 **2. Interstate Commerce Requirement**

24 In rejecting an expansive view of the phrase “engaged in . . . interstate commerce” as  
 25 mirroring the full extent of Congress’s power to legislate under the Commerce Clause—and thus  
 26 encompassing most if not all employment contracts—the Supreme Court described the reach of  
 27 the § 1 exception as including “only contracts of employment of transportation workers.” *Circuit*  
 28 *City Stores*, 532 U.S. at 119. The Court did not meaningfully elaborate in that opinion on what

1 degree of connection “transportation workers” must have to interstate commerce, or whether they  
2 must be employees rather than contractors, although it noted “Congress’ demonstrated concern  
3 with transportation workers and their necessary role in the free flow of goods,” and described the  
4 exception as encompassing “those engaged in transportation.” *Id.* at 121. The Court noted the  
5 District of Columbia Circuit’s definition, requiring that workers be ““actually engaged in the  
6 movement of goods in interstate commerce,”” as one example of a definition more restrictive than  
7 the expansive view untethered to transportation that the Court rejected, but did not clearly adopt  
8 that definition as its own. *See id.* at 112 (quoting *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465,  
9 1471 (D.C. Cir. 1997)).

10 The Seventh Circuit has stated as its test that an employment contract must contemplate  
11 that transportation workers will cross state lines for at least some of their work, even if only a  
12 small portion of it, to fall within the exception, *see Int’l B’hood of Teamsters Local Union No. 50*  
13 *v. Kienstra Precast, LLC*, 702 F.3d 954, 957–58 (7th Cir. 2012), although the requirement of  
14 crossing state lines is arguably dicta, as this Court is aware of no Seventh Circuit decision  
15 addressing transportation workers who made exclusively intrastate deliveries. Some district court  
16 decisions have also held that local delivery drivers who do not cross state lines are not “engaged in  
17 . . . commerce” within the meaning of the statute. *E.g. Vargas v. Delivery Outsourcing, LLC*, No.  
18 15-cv-03408-JST, 2016 WL 946112, at \*3–5 (N.D. Cal. Mar. 14, 2016); *Levin v. Caviar, Inc.*, 146  
19 F. Supp. 3d 1146, 1152–55 (N.D. Cal. 2015). Judge Laporte’s decision in *Levin* also relied on the  
20 fact that the couriers in that case delivered prepared meals, and that any ingredients ultimately  
21 sourced from out of state “ended their interstate journey when they arrived at the restaurant where  
22 they were used to prepare meals.” *Levin*, 146 F. Supp. 3d at 1154.

23 The Fifth Circuit has held that because the statute enumerates “seamen” and “railroad  
24 employees” separately from “other classes of workers engaged in . . . commerce,” a seaman’s  
25 employment contract is exempt from the FAA even if the seaman is not engaged in commerce.  
26 *See generally Brown v. Nabors Offshore Corp.*, 339 F.3d 391 (5th Cir. 2003). The reasoning of  
27 that decision would not extend to Lee, who is neither a “seaman” nor a “railroad employee,” and  
28 thus must establish at least some connection to interstate commerce.

1           Somewhat more helpful to Lee is the Third Circuit’s decision in *Palcko v. Airborne*  
2 *Express, Inc.*, where the court held that the exemption included a supervisor of truck drivers and  
3 was not “limited to those truck drivers who physically move the packages,” but even there, the  
4 defendant employer was in the business of interstate and international deliveries. 372 F.3d 588,  
5 590–94 (3d Cir. 2004). While not entirely clear from the court’s opinion, it also seems likely that  
6 the drivers under the Plaintiff’s supervision crossed state lines in the course of “deliver[ing]  
7 packages from Airborne’s facility near the Philadelphia International Airport to their ultimate  
8 destinations in the Philadelphia area,” given the proximity of Philadelphia to the neighboring  
9 states of Delaware and New Jersey. *See id.* at 590. Regardless, the delivery of packages to and  
10 from the airport, and thus to or from the defendant’s interstate and international cargo flights,  
11 establishes a stronger nexus to interstate commerce than is present here. *See id.* Perhaps the most  
12 favorable circuit decision for Lee is *Bacashihua v. U.S. Postal Serv.*, 859 F.2d 402 (6th Cir. 1988),  
13 which held that “the concern was not whether the individual worker actually engaged in interstate  
14 commerce, but whether the class of workers to which the complaining worker belonged engaged  
15 in interstate commerce,” and thus that a postal worker who was not herself “*personally* engaged in  
16 interstate commerce” nevertheless fell within the § 1 exception. 859 F.2d at 405. Lee also cites a  
17 District of Colorado decision holding that an armored vehicle driver employed “to transport  
18 currency, a good that is undisputedly in the stream of interstate commerce,” by a defendant  
19 “engaged in the business of interstate transport of currency” was a member of “a class of workers  
20 engaged in interstate commerce and is therefore exempt from the FAA pursuant to Section 1,”  
21 even though there was no evidence that the plaintiff herself ever delivered goods across state lines.  
22 *Christie v. Loomis Armored US, Inc.*, No. 10-cv-02011-WJM-KMT, 2011 WL 6152979, at \*3 (D.  
23 Colo. Dec. 9, 2011).

24           The Eighth Circuit, in holding that a customer service representative for a freight company  
25 was not a transportation worker subject to the exception, identified seven non-exclusive factors  
26 that might be relevant to the inquiry, ranging from whether the plaintiff works in the transportation  
27 industry, to whether the plaintiff is “within a class of employees for which special arbitration  
28 already existed when Congress enacted the FAA,” to “whether a strike by the employee would

1 disrupt interstate commerce.” *Lenz v. Yellow Transp., Inc.*, 431 F.3d 348, 352 (8th Cir. 2005).

2 The parties here have not addressed those factors in their briefs.

3 Taken together, while there is some authority holding that a plaintiff need not personally  
4 deliver goods across state lines to qualify as a “transportation worker” under § 1 and *Circuit City*,  
5 even those cases concern plaintiffs with a much closer connection to interstate commerce than Lee  
6 has here. *See Palcko*, 372 F.3d at 590–94; *Bacashihua*, 859 F.2d at 405; *Christie*, 2011 WL  
7 6152979, at \*3. Lee has presented no evidence that, like the postal worker in *Bacashihua* or the  
8 delivery supervisor in *Palcko*, her job involved handling goods *in the course of interstate*  
9 *shipments*, or that, like the Postal Service and shipping company in those cases, or the armored  
10 transportation company in *Christie*, Postmates itself was in the business of transporting goods  
11 between states. The Court is aware of no authority holding that couriers who deliver goods from  
12 local merchants to local customers are “engaged in . . . interstate commerce” within the meaning  
13 of § 1 of the FAA merely because some such deliveries might include goods that were  
14 manufactured out of state—a possibility that, while likely here, Lee has also provided no evidence  
15 to support.

16 “A plaintiff opposing arbitration under the FAA has ‘the burden of demonstrating the  
17 exemption.’” *Vargas*, 2016 WL 946112, at \*3 (N.D. Cal. Mar. 14, 2016) (citation omitted); *see*  
18 *also Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1151 (9th Cir. 2008) (quoting  
19 *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987) for the proposition that the  
20 “burden is on the party opposing arbitration . . . to show that Congress intended to preclude a  
21 waiver of judicial remedies for the statutory rights at issue.”). Having produced no evidence that  
22 the work of Postmates couriers is meaningfully related to the interstate flow of goods, Lee has not  
23 met that burden here, and is not exempt from the FAA under the transportation worker exception.

#### 24 **E. McGill Does Not Bar Arbitration of Public Injunctive Relief**

25 Among the statutory remedies provided by the UCL is “public injunctive relief, i.e.,  
26 injunctive relief that has the primary purpose and effect of prohibiting unlawful acts that threaten  
27 future injury to the general public.” *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 951 (2017). Lee  
28 argues that her complaint includes a request for such relief, and seeks to state that request more

1 explicitly in her proposed amended complaint. Opp'n to Arbitration at 18–19 & n.22.  
2 Anticipating that Postmates would construe a claim for public injunctive relief as a representative  
3 action waived by the Fleet Agreement, Lee contends that such a waiver is invalid under the  
4 California Supreme Court's decision in *McGill*. *Id.* at 19–20. Postmates argues that the relief Lee  
5 seeks is not in fact “public injunctive relief” as that term has been used by the California courts,  
6 but that if it is, the claim should still be arbitrated because *McGill* is preempted by the FAA.  
7 Reply re Arbitration at 11–13.

8 In *McGill*, the California Supreme Court considered an arbitration clause that the parties  
9 agreed “purport[ed] to preclude [the plaintiff] from seeking public injunctive relief in arbitration,  
10 in court, or *in any forum*,” and held that the clause was “invalid and unenforceable under state law  
11 insofar as it purports to waive [the plaintiff's] statutory right to seek such relief.” 2 Cal. 5th at  
12 956, 961. The court noted that a request for public injunctive relief does not require a claim to be  
13 brought as a class or representative action, but is instead a remedy available to an individual  
14 private plaintiff, so long as that plaintiff has suffered injury sufficient for standing to bring a  
15 private action under the UCL. *Id.* at 959.

16 The class action waiver in the parties' Fleet Agreement here binds the parties to  
17 “individual arbitration,” “waive[s] their right to have any dispute or claim brought, heard or  
18 arbitrated as a class and/or collective action” or “representative action,” as well as any right to  
19 participate in such actions, and deprives the arbitrator of authority to arbitrate such actions. Cartes  
20 Decl. Ex. C § 11B(ii)–(iii). By its terms, the class action waiver does not prevent the arbitrator  
21 from awarding any form of relief that would be available in individual litigation—to the contrary,  
22 a separate provision of the section of the Fleet Arbitration governing arbitration provides that,  
23 except for the class action waiver, “the arbitrator may award all remedies to which a party is  
24 entitled under applicable law and which otherwise be available in a court of law,” although the  
25 arbitrator may not award relief “that would not have been available in a court of law for the claims  
26 presented.” *Id.* § 11B(vi)(4). Taking into account the California Supreme Court's holding in  
27 *McGill* that a request for public injunctive relief may be brought in an individual private action,  
28 and does not require a class or representative action, the Fleet Agreement therefore does not

1 purport to bar Lee from obtaining such relief in arbitration.<sup>5</sup> *Cf. DeVries v. Experian Info. Sols.,*  
 2 *Inc.*, No. 16-cv-02953-WHO, 2017 WL 2377777, at \*2–3 (considering an agreement that  
 3 permitted an arbitrator to “award injunctive relief only in favor of the individual party seeking  
 4 relief and only to the extent necessary to provide relief warranted by that party’s individual claim,”  
 5 and holding that whether such an agreement prohibits the arbitrator from awarding public  
 6 injunctive relief is a question for the arbitrator to decide). *McGill* therefore does not prevent  
 7 Postmates from requiring Lee to arbitrate her claims in this case, because unlike the agreement in  
 8 *McGill*, the Fleet Agreement here does not bar Lee from obtaining public injunctive relief in any  
 9 forum.

10 It is worth noting that after Judge Orrick ordered the plaintiff in *DeVries* to arbitrate his  
 11 claims, the arbitrator not only determined that the arbitration agreement “states that public  
 12 injunctive actions cannot be arbitrated,” but also interpreted *McGill* as holding that UCL claims  
 13 for public injunctive relief “should not be arbitrated.” *See DeVries*, ECF Doc. No. 68-1 ¶¶ 2–3  
 14 (arbitrator’s order dated December 12, 2017, and filed in the Court’s docket December 18, 2017).  
 15 The arbitrator held that the claim for public injunctive relief must therefore proceed in a court of  
 16 law. *Id.* ¶ 3. To the extent that the arbitrator interpreted *McGill* as barring arbitration of public  
 17 injunctive relief in all cases, even where such relief is not prohibited by the governing arbitration  
 18 agreement, this Court finds no basis for such an interpretation in the California Supreme Court’s  
 19 opinion, and respectfully disagrees. The *McGill* court began its analysis from the parties’  
 20 agreement that their contract prohibited awarding such relief in arbitration, and held that the  
 21 purported wholesale deprivation of the remedy provided by statute—not any question of what  
 22 forum might be empowered to award the remedy—rendered the clause invalid. *See* 2 Cal. 5th at  
 23 956; *see also Blair v. Rent-A-Center, Inc.*, No. C 17-02335 WHA, 2017 WL 4805577, at \*5 (N.D.  
 24 Cal. Oct. 25, 2017) (“The rule in *McGill*, in contrast, provides that parties *can* compel public  
 25 injunctive claims to arbitration. It merely prohibits contracts that waive such claims altogether.”)

26 \_\_\_\_\_  
 27 <sup>5</sup> At the hearing, counsel for Postmates noted her view that the relief Lee seeks is not actually  
 28 “public injunctive relief” and that Lee would face barriers such as lack of standing to pursue such  
 relief, but agreed that the arbitration provision of Fleet Agreement does not in itself prevent an  
 arbitrator from awarding public injunctive relief under the UCL.



1 (appeal pending, 9th Cir. Case No. 17-17221).

2 An older doctrine of the California Supreme Court, known as the *Broughton-Cruz* rule, in  
3 fact prohibited arbitration of claims under the UCL and similar statutes. *See generally Cruz v.*  
4 *PacifiCare Health Sys., Inc.*, 30 Cal. 4th 303 (2003); *Broughton v. Cigna Healthplans of Cal.*, 21  
5 Cal. 4th 1066 (1999). The Ninth Circuit, however, has held in a published opinion binding on this  
6 Court that the *Broughton-Cruz* doctrine is inconsistent with recent decisions of the United States  
7 Supreme Court interpreting the FAA, and thus is preempted. *Ferguson v. Corinthian Colleges,*  
8 *Inc.*, 733 F.3d 928, 934–37 (9th Cir. 2013). In reaching that conclusion, the Ninth Circuit strongly  
9 suggested that arbitrators have the authority to enter public injunctive relief against a defendant  
10 that has agreed to arbitrate such claims. *Id.* at 937 (rejecting the *Broughton* court’s “conclusion  
11 that the public injunction sought by the plaintiffs was ‘beyond the arbitrator’s power to grant.’”  
12 (quoting 21 Cal. 4th at 1079)). Reading the Fleet Agreement here in conjunction with *McGill* and  
13 *Ferguson*, Lee likely can and must arbitrate her claim for public injunctive relief, but at the very  
14 least must submit to the arbitrator the question of whether a claim for such relief falls within the  
15 arbitrator’s authority.

16 Because the Court holds that *McGill* presents no barrier to arbitration here, the Court does  
17 not reach Postmates’ argument that the rule of *McGill* is preempted by the FAA—and thus  
18 implicitly that *McGill*’s own analysis of FAA preemption was wrongfully decided. *See Reply re*  
19 *Arbitration* at 12–13; *but see Adkins v. Comcast Corp.*, Nos. 16-cv-05969-VC & 17-cv-06477-VC,  
20 2018 WL 4846548, at \*1 (N.D. Cal. Feb. 15, 2018) (“To the extent that Comcast argues  
21 the *McGill* rule is preempted by the Federal Arbitration Act, *McGill* itself explains why it is not.”).  
22 The Court also declines to consider Postmates’ argument that the relief Lee seeks is not, in fact,  
23 “public injunctive relief” within the meaning of California law, *see Reply re Arbitration* at 11–12,  
24 and instead reserves that question for an arbitrator to decide.

25 \* \* \*

26 As discussed above, the Court finds no basis to decline to enforce the parties’ arbitration  
27 agreement. Postmates’ motion to compel arbitration of all of Plaintiff Dora Lee’s claims is  
28 GRANTED.

**IV. ANALYSIS OF MOTION FOR LEAVE TO FILE AMENDED COMPLAINT****A. Legal Standard**

In general, when a party seeks to amend a pleading more than twenty-one days after serving it, or more than twenty-one days after service of a responsive pleading or motion, the party must obtain either the opposing party's consent or leave of the court. Fed. R. Civ. P. 15(a). The Federal Rules of Civil Procedure provide that "courts should freely give leave when justice so requires." *Id.* "Courts may decline to grant leave to amend only if there is strong evidence of 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment, etc.'" *Sonoma Cty. Ass'n of Retired Emps. v. Sonoma County*, 708 F.3d 1109, 1117 (9th Cir. 2013) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)) (alteration in original).

In the related context of timeliness for permissive intervention under Rule 24(b) of the Federal Rules of Civil Procedure, prejudice is evaluated based on the difference between a timely and untimely intervention, not based on the effect that intervention would have regardless of whether the intervenors had joined the case earlier. *See Kamakahi v. Am. Soc'y for Reprod. Med.*, No. 11-cv-01781-JCS, 2015 WL 1926312, at \*4 (N.D. Cal. Apr. 27, 2015) (citing *Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007)).

**B. Lee May Amend Her Complaint**

Lee argues for the first time in her reply brief that leave to amend is not necessary here because Postmates has not filed a "responsive pleading" or a "motion under Rule 12(b), (e), or (f)," as is required to start the twenty-one-day deadline for amendment as a matter of course under Rule 15(a). *See Reply re Amendment at 2.* Lee relies in part on a short order in *Lawson v. Deliv, Inc.*, where another judge of this Court quoted a 1986 decision of the Ninth Circuit for the proposition that a "motion to dismiss is not a "responsive pleading" within the meaning of the Rule," and therefore held that "no leave from this court was required in the first place" when the plaintiff sought to amend his complaint fifty days after the defendant filed a motion under Rule

1 12(b)(6). *Lawson*, No. 18-cv-03632-VC,<sup>6</sup> ECF Doc. No. 26 (N.D. Cal. Sept. 7, 2018) (quoting  
2 *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)). This  
3 Court respectfully disagrees with that decision. Unlike in 1986, Rule 15 now explicitly includes  
4 motions under Rule 12(b) as a basis for the deadline to amend by right. *Schreiber* and the earlier  
5 Ninth Circuit decisions on which it relied are therefore superseded by the new version of the Rule  
6 and are no longer good law on this issue.

7 That alone does not resolve the issue here, as it is not clear that Postmates' motion to  
8 compel arbitration is a motion under one of the enumerated subsections of Rule 12, which the  
9 motion does not cite. Some district court decisions have held that motions to compel under the  
10 FAA do not start to clock for the amendment deadline. *Croucier v. Credit One Bank, N.A.*, No.  
11 18cv20-MMA (JMA), 2018 WL 2836889, at \*2 (S.D. Cal. June 11, 2018); *Stockade Cos., LLC v.*  
12 *Kelly Rest. Grp., LLC*, No. 1:17-CV-143-RP, 2017 WL 2635285, at \*1 (W.D. Tex. June 19, 2017).  
13 Other courts have held that motions to stay can serve as a "responsive pleading" within the  
14 meaning of the Rule, and some have considered such motions under various subsections of Rule  
15 12(b). *E.g.*, *Palcko*, 372 F.3d at 588 (holding as a matter of Third Circuit law that motions to  
16 compel arbitration should be treated as motions to dismiss under Rule 12(b)(6)); *Armendariz v.*  
17 *Ace Cash Exp.*, No. 3:13-CV-00590-BR, 2013 WL 3791438, at \*3 (D. Or. July 19, 2013)  
18 (collecting cases that "have concluded motions to compel arbitration are dispositive motions  
19 and/or responsive pleadings that allow for amendment of the initial pleading under Rule  
20 15(a)(1)(B)"). The Court declines to resolve whether Lee is entitled to amendment by right under  
21 Rule 15(a)(1)(B), because even if she is not, the Court grants her leave to do so under Rule  
22 15(a)(2).

23 Assuming for the sake of argument that Lee's right to amend expired twenty-one days after  
24 Postmates filed its motion, Lee filed her motion for leave to amend only ten days after that  
25 deadline. A delay of only slightly more than a week, with Lee's motion filed well before  
26

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27 <sup>6</sup> Both parties erroneously cite this case as case number 18-cv-0362, rather than -03632. Reply re  
28 Amendment at 2; Case Mgmt. Statement at 8. The parties are reminded that incorrect citations,  
especially to unpublished decisions, complicate the Court's task of locating the sources on which  
the parties ask the Court to rely.

1 Postmates' motion had been decided, does not establish "undue delay" sufficient to overcome the  
2 policy in favor of permissive amendment.

3 Postmates argues that the proposed amendment to explicitly seek "public injunctive relief"  
4 is futile because the relief that she seeks is not in fact "public," and because the FAA and the Fleet  
5 Agreement do not permit Lee to pursue such relief. As discussed above, Lee likely can seek  
6 public injunctive relief in arbitration under *Ferguson* and *McGill*, but that is a question for the  
7 arbitrator to decide in the first instance. Allowing Lee to clarify her claim before the case is sent  
8 to arbitration poses no discernable prejudice to Postmates, and while the amendment does not alter  
9 the requirement that Lee arbitrate, the Court is not persuaded that the necessity of arbitration in  
10 itself renders the proposed amendment futile when Lee may be able to obtain the relief she seeks  
11 in arbitration.

12 Postmates devotes much of its opposition brief to attacking Lee's position that other named  
13 plaintiffs could bring her own claims out of arbitration under *Bickerstaff*. Opp'n to Amendment at  
14 4–7. As discussed above, the Ninth Circuit has rejected *Bickerstaff* in this context, and adding  
15 additional plaintiffs does not affect arbitration of Lee's own claims. See *O'Connor*, \_\_ F.3d at \_\_,  
16 2018 WL 4568553, at \*4. The proposed amendment therefore creates no prejudice to Postmates'  
17 desire to arbitrate Lee's claims. Nor is the Court persuaded that the arbitration of Lee's claim  
18 renders amendment to add other plaintiffs who might not be subject to arbitration futile.  
19 Arbitration of Lee's claim does not prevent Timmerman and Albert from pursuing their own  
20 claims or seeking to represent a class of Postmates couriers who opted out of or are otherwise not  
21 subject to arbitration, to the extent that such a class might exist.

22 Adding Timmerman and Albert as plaintiffs is neither futile nor prejudicial. For the most  
23 part, the burden on Postmates of responding to those plaintiffs' claims would have occurred  
24 regardless of whether they had been included from the start, and thus cannot be said to result from  
25 delayed amendment. To the extent that Postmates might now be required to file two motions to  
26 compel arbitration rather than one consolidated motion, the added burden is minimal, and much  
27 the same as what would have occurred if Lee had filed the amended complaint within the twenty-  
28 one days allowed by right after Postmates filed its motion. Any burden from the amendment is

1 also no greater than what Postmates would face if leave to amend were denied and Timmerman  
2 and Albert filed their own separate action. Postmates has not shown that prejudice weighs in favor  
3 of denying the motion.

4 Finally, Postmates' argument that Lee and the putative additional plaintiffs lack a good  
5 faith basis for amendment is unavailing. Postmates notes that Albert is "particularly suspect,  
6 given that [he] signed up to be a courier *after* Postmates filed its motion to compel, completed his  
7 first delivery just three days before [Lee] filed her motion for leave to amend, and opted out the  
8 *same day* that Lee filed her motion." Opp'n to Amendment at 10 (citing Campbell Opp'n Decl.  
9 (dkt. 22-1) ¶ 15). Regardless of whether Albert signed up to work for Postmates for the purpose  
10 of joining this action, Postmates does not explain why denying leave to amend and prompting  
11 Albert to file a separate action is preferable to allowing amendment to add him as a plaintiff here,  
12 particularly given that his presence in the case will not affect the arbitrability of Lee's existing  
13 claims. Moreover, while it remains to be seen whether any class claims are viable, attempting to  
14 pursue such claims is not in itself an improper aim, and courts routinely permit the addition of new  
15 putative class representatives upon determination or argument that an existing named plaintiff is  
16 unable to represent the proposed class. *See, e.g., Yucesoy v. Uber Techs., Inc.*, No. 15-cv-00262-  
17 EMC (N.D. Cal. Mar. 5, 2018) (permitting amendment years into litigation to allow the addition  
18 of plaintiff not subject to an arbitration clause); *Wixon v. Wyndham Resort Dev. Corp.*, No. C 07-  
19 02361 JSW, 2010 WL 424603, at \*3 (N.D. Cal. Jan. 27, 2010) (granting leave to amend to add  
20 new named plaintiffs after adjudication of a class certification motion); *Amparan v. Plaza Home*  
21 *Mortg., Inc.*, No. C 07-4498 JF (RS), 2009 WL 2776486, at \*2 (N.D. Cal. Aug. 28, 2009).

22 Lee's motion for leave to file her proposed first amended complaint is GRANTED. This  
23 order does not decide the question of whether either Timmerman or Albert is subject to the Fleet  
24 Agreement's arbitration provision, which Postmates may pursue in a separate motion.<sup>7</sup>

25  
26  
27  
28 <sup>7</sup> Postmates argues in a footnote that Timmerman is required to arbitrate because, like Lee, she failed to opt out after agreeing to the 2017 Fleet Agreement, and thus had no renewed right to opt out after agreeing to the revised 2018 Fleet Agreement. *See* Opp'n to Amendment at 5 n.5.

1 **V. STAY PENDING ARBITRATION**

2 The FAA provides that while arbitration is pending, a court “shall on application of one of  
3 the parties stay the trial of the action until such arbitration has been had in accordance with the  
4 terms of the agreement.” 9 U.S.C. § 3. Nevertheless, the decision of whether “to stay litigation  
5 among the non-arbitrating parties pending the outcome of the arbitration . . . is one left to the  
6 district court . . . as a matter of its discretion to control its docket.” *Moses H. Cone Mem’l Hosp.*  
7 *v. Mercury Constr. Corp.*, 460 U.S. 1, 21 n.23 (1983).

8 Courts faced with circumstances similar to this case have declined to stay the claims of  
9 plaintiffs who opted out of arbitration while other plaintiffs were required to arbitrate. *E.g.*,  
10 *McClellan v. Fitbit, Inc.*, No. 3:16-cv-00036-JD, 2017 WL 4551484, at \*5 (N.D. Cal. Oct. 11,  
11 2017); *Congdon v. Uber Techs., Inc.*, 226 F. Supp. 3d 983, 990 (N.D. Cal. 2016). Judge Donato’s  
12 reasoning in *McClellan* is persuasive:

13 Arbitration is a matter of contract. Dunn opted out of arbitration in  
14 order to have access to courts. Requiring Dunn to stay his claims  
15 while the remaining plaintiffs proceed with arbitration would  
16 undermine the effect of the opt-out provision and improperly extend  
17 the arbitration agreement made by the other plaintiffs. Delayed  
18 enforcement of an opt-out right, just like belated enforcement of an  
19 arbitration provision, is “a less substantial interference than a refusal  
20 to enforce it at all, [but] nonetheless significantly disappoints the  
21 expectations of the parties and frustrates the clear purpose of their  
22 agreement.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 225  
(1985) (White, J., concurring).

19 Parallel proceedings may raise the risk of inconsistency, but the FAA  
20 contemplates “*requir[ing]* piecemeal resolution when necessary to  
21 give effect to an arbitration agreement.” *Moses H. Cone*, 460 U.S. at  
22 20 (emphasis in original). Moreover, inconsistency is possible even if  
the Court were to grant a stay: Fitbit has not shown that the outcome  
of the arbitration proceedings will have any effect on this Court’s  
consideration of Dunn’s claims.

23 *McClellan*, 2017 WL 4551484, at \*5 (alterations in original). As in that case, to the extent that  
24 Timmerman and Albert might have validly opted out of arbitration, they have a right to bring their  
25 claims in court that should not be delayed without good reason, and it is not clear that a stay would  
26 prevent the risk of inconsistent outcomes.

27 **VI. CONCLUSION**

28 For the reasons discussed above, both Postmates’ motion to compel arbitration of Lee’s

1 claims and Lee's motion for leave to file an amended complaint are GRANTED, except that  
2 Postmates' request to stay the claims of new plaintiffs Timmerman and Albert is DENIED. Lee  
3 shall file the first amended complaint as a separate docket entry no later than October 22, 2018.  
4 Postmates shall respond to Timmerman and Albert's claims in that complaint by answer or motion  
5 in due course.

6 **IT IS SO ORDERED.**

7 Dated: October 15, 2018

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10 JOSEPH C. SPERO  
11 Chief Magistrate Judge

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