

Uber Tech., Inc. v American Arbitration Assn., Inc.
2021 NY Slip Op 32080(U)
October 14, 2021
Supreme Court, New York County
Docket Number: Index No. 655549/2021
Judge: Robert R. Reed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ROBERT REED

PART

43

Justice

X

INDEX NO. 655549/2021

UBER TECHNOLOGIES, INC., UBER USA, LLC,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 001

- v -

AMERICAN ARBITRATION ASSOCIATION, INC.,

**DECISION + ORDER ON
MOTION**

Defendant.

X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 26, 27, 51, 53, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71, 72, 73, 76, 77, 80, 82, 83, 85, 86, 87, 88, 89

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR

Upon the foregoing documents, and following an evidentiary hearing, the motion is
DENIED.

In the wake of the killing of George Floyd and the protests and societal awakening that flowed therefrom, plaintiffs Uber Technologies, Inc. and Uber USA, LLC (collectively, Uber) initiated efforts to show support for the Black community at large, including, among other things, temporarily waiving its own delivery fees for certain food orders its customers placed at Black-owned restaurants. The complaint alleges essentially that non-party law firm Consovoy McCarthy PLLC (Consovoy) sought out thousands of Uber drivers to file claims through the firm alleging “reverse discrimination” stemming from Uber’s temporary waiver of delivery fees. Allegedly, Consovoy eventually was able to file more than 31,000 such claims against Uber in arbitrations before defendant American Arbitration Association, Inc. (AAA). The matter before this court does not in any way involve an analysis of the merits of the “reverse discrimination” claims asserted by Consovoy on behalf of its collected 31,000-plus Uber drivers. Rather, here Uber ultimately seeks a declaration that the amount of money AAA has demanded from Uber to

perform “case management” and other services is unreasonable and not justified by AAA’s costs and expenses. On this motion for a preliminary injunction, in particular, Uber seeks to limit or restrain the effect of a September 14, 2021 invoice from AAA which demands payment of \$10,879,400 for “case management fees” for 7,771 of the total arbitration cases filed via Consovoy (at a rate \$1400 per case). The urgency, Uber contends, arises from what it contends are the “draconian” ramifications of nonpayment of such invoice as a result of certain recently enacted consumer protection legislation in California. *See* California Code of Civil Procedure 1281.97 and 1281.98. The record does not reflect that Uber has sought judicial intervention in California to challenge that consumer protection legislation or to otherwise stay its “draconian” effect under the circumstances presented here.

Uber requires that its drivers (that is, all drivers using its platform) agree to arbitrate any dispute with Uber before the AAA. The agreement – prepared by Uber and its counsel -- is ironclad. The Uber agreement with its drivers is not subject to variation by any individual driver; if the driver desires to use the Uber platform, the driver must sign the agreement, as is. The agreement requires that Uber drivers proceed in arbitration through AAA by means of individualized cases. It forbids class actions, collective actions or representative cases. Any variation from the individualized case decision format during the arbitration format requires the written consent of both parties. The filing of more than 31,000 individual claims with AAA involving Uber as respondent and similarly situated drivers as claimants poses administrative challenges. In matters involving multiple case filings, it typically behooves all concerned to seek out administrative efficiencies whenever possible. To that end, AAA has in correspondence dated April 23, 2021 and again in correspondence dated September 14, 2021 enclosing the invoice under scrutiny in this action “strongly recommend[ed] [the] parties agree to maximize

the efficiency of the dispute resolution process ... [including] by agreeing to mediation of some or all case issues, appointment of a special master to decide common issues, documents-only hearings, using a rotating panel of arbitrators, a stipulated form of award, or a stipulated scheduling order.” “If agreed to by the parties,” the AAA noted in its September 14, 2021 correspondence, “the AAA would consider the impact these administrative efficiencies have on the AAA’s administrative work.” The AAA observed that “it is ultimately the responsibility of the parties to agree to efficiency measures.” Uber and Consovoy not having agreed on a more efficient method of handling the 31,00-plus cases, the AAA determined to prepare its “case management fees” based on the processing of 31,000-plus individualized cases.

Uber argues that charging \$1400 per case for more than 31,000-plus similarly situated cases (or for the 7,771 cases that are the subject of the September 14, 2021 invoice) is patently unreasonable. Uber argues that the AAA can achieve certain economies of scale, given the duplicative nature of the drivers’ claims. Thus, Uber argues, in effect, for a volume discount given the multiple case filings here. There is certainly common sense in that argument. Uber notes the AAA’s not-for-profit status, and asserts that the AAA should be bound by certain language in its *Consumer Due Process Protocols* to ensure that “case management fees” reflect its actual costs and expenses. The AAA, on the other hand, maintains that the charge of \$1400 per case for “case management fees” is set forth very clearly in its published fee schedules, and observes that Uber has certainly been specifically on notice of this particular per case fee since March 31, 2021, when the AAA charged Uber this exact amount with respect to an earlier batch of 477 cases on behalf of drivers by Consovoy.

The California consumer statutes which Uber argues could have a “draconian” impact upon it require essentially that where, as here, the drafter of an arbitration agreement is required

to pay certain fees or costs before an arbitration can proceed or continue, it will be in material breach of the arbitration agreement if it has failed to pay the necessary fees or costs within 30 days after the date on which such fees or costs are due. Material breach carries with it the loss of the right to compel arbitration, default, attorney's fees and costs, and other sanctions. This type of legislation is intended to serve the purpose of preventing the drafters of arbitration agreements (which are often viewed as contracts of adhesion, the product of unequal bargaining power) from frustrating the arbitral process by simply not paying the required fees or costs. The scenario the California legislature is worried about would involve a drafter of an arbitration agreement that forbids an employee or consumer from proceeding in court then, whether strategically or through neglect, preventing the employee or consumer from timely proceeding even before the mandated arbitral forum for mere lack of payment of required fees by the drafter. The legislation ensures that drafters of arbitration agreements are incentivized to move such cases forward in a timely manner.

The court heard argument and testimony on October 8, 2021 and October 13, 2021, with the testimony coming from Uber's Director of Litigation, two members of Uber's outside litigation and dispute resolution teams, a retired Commercial Division Justice now serving as an arbitrator here acting as an expert for Uber, and the AAA's Vice President. Each witness testified credibly from each one's particular perspective. Uber's witnesses testified largely to the administrative challenges posed by the processing of 31,000-plus individualized claims, including the potential timeframe for concluding such claims given the available qualified arbitrators, but also addressed what they viewed as the unreasonableness of the amount of the "case management fees" being charged by the AAA, given the type of economies of scale that could be achieved where multiple case filings are involved – essentially arguing for a volume

discount on such fees. The AAA witness testified that the invoice at issue reflected the per case “case management fee” stated in the AAA’s published fee schedules, of which Uber was fully aware and specifically on notice since at least March 31, 2021, and that Uber and Consvooy had not agreed to any alternative measures that would have allowed the AAA to consider alternative fee arrangements. Following the hearing and on the record, this court denied Uber’s preliminary injunction motion, stating its reasons therefor and directing Uber to obtain a transcript of the hearing for “so-ordering” by the court. In the interests of time, the court has drafted the within decision and order to summarize the basis for its findings and conclusions.

After hearing and upon all documents filed and received on this motion, the court finds that Uber has failed to establish by clear and convincing evidence its entitlement to the drastic remedy of preliminary injunction.

Irreparable Harm

The invoice at issue here is for a specific monetary amount: \$10,879,400. Uber conceded that it has the ability to pay the invoice, even offering to place the sum in escrow or to pay the amount into court pending the outcome of this action. Paying the specified amount of the invoice will not cause Uber to be insolvent. To the extent that Uber is unable to recoup such money as a result of arbitral immunity, that is a natural consequence of its business decision to require that all disputes with its drivers be initiated with the AAA. That was Uber’s business choice. There was no testimony that the AAA specifically sought out Uber as a contract partner or that the AAA entered into any type of special, negotiated contract with Uber. (The court notes the AAA’s argument that, in relation to the first batch of claims filed on behalf of Uber drivers, Uber has counterclaimed for recovery of, among other things, its arbitration fees and costs.)

To the extent that Uber is concerned about the potential “draconian” impact of the above-cited California consumer protection statutes should it not timely pay, that harm is entirely avoidable. It need only pay the invoiced amount by November 14, 2021 and none of the consequences feared would come into play.

Likelihood of Success on the Merits

Uber has not shown by clear and convincing evidence its entitlement to the ultimate relief it seeks. Uber chose to require its drivers to arbitrate disputes with the AAA and specifically forbade them from engaging in class actions, collective actions or any form of representative action. Within the arbitration context, Uber specifically required its drivers to pursue individualized cases. The AAA’s rates for its services are set pursuant to a published fee schedule. Presumably, Uber knew that when it required its drivers to arbitrate individualized cases with the AAA. Uber certainly was specifically on notice of these fees by March 31, 2021 – six months ago. Under the fee schedule, a “case management fee” of \$1400 per case is required. If one has 7,771 individual cases, the amount due pursuant to the AAA’s published fee schedule is \$10,879,400. The AAA’s published fee schedule does not reflect any discount off its “case management fees” for multiple case filings.

Uber has not demonstrated by clear and convincing evidence that the aspirational language of the AAA’s *Consumer Due Process Protocols* requires that the AAA deviate from its published fee schedules in matters involving multiple case filings.

The AAA argues it is entitled to arbitral immunity for all aspects of the arbitral engagement, including the manner of its fee billing, and has submitted significant case law in support of such argument. Based on that case law, as well, the court would be disinclined to find

that Uber has demonstrated by clear and convincing evidence that it is likely to succeed on the merits – as its ultimate case may indeed be subject to summary dismissal.

Balancing of the Equities

Uber has not shown by clear and convincing evidence that the balance of the equities tip in its favor. Uber has used its unequal bargaining power to require its drivers to pursue claims for relief against it in an arbitral forum, as individualized cases, in accordance with the AAA's published rules. That was a business choice Uber made – and Uber is now stuck with the decision, absent some negotiated agreement with the Consovoy, which, for its own strategic reasons, has not thus far agreed to any alternatives to the burdensome process required by Uber's agreement with its drivers. The AAA, while recognizing the unreasonableness and inefficiency of pursuing 31,000-plus claims in the manner prescribed by Uber's agreement with its drivers, is nevertheless bound to proceed individually. It is not inequitable for the AAA to require payment pursuant to its published fee schedule nor is it inequitable for the AAA to require the upfront payment of its published "case management fees" before undertaking the burdensome process of assigning the 7,771 cases in the second batch to its arbitrators and setting up the administration of those matters.

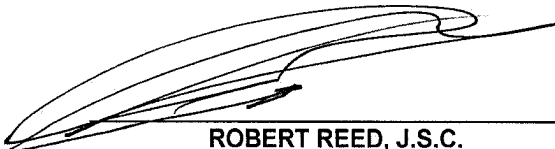
Public Interest

The court notes that Uber's principal argument for urgency is that it seeks to avoid the "draconian" effects of its potential noncompliance with the above-cited California consumer protection statutes. Uber does not argue to this court that the statutes are not applicable to it. Nor, to this court's knowledge, has Uber sought to challenge such statutes or to stay the effect of such statutes in a court in California. Such legislation appears to be an attempt, in the wisdom of the California legislature, to address a perceived problem posed by the type of agreements Uber has

required its drivers to sign. This court is not in any position to second-guess the wisdom of the California legislature in this area.

Accordingly, it is

ORDERED that Uber's motion for preliminary injunctive relief is DENIED.

<u>10/14/2021</u>			
DATE		ROBERT REED, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE
	☒ DENIED		