APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed July 11, 2022]

No. 22-15566

ABRAHAM BIELSKI, on behalf of himself and all others similarly situated,

Plaintiff-Appellee,

v.

COINBASE, INC.,

Defendant-Appellant.

D.C. No. 3:21-cv-07478-WHA
Northern District of California, San Francisco

ORDER

Before: SILVERMAN and COLLINS, Circuit Judges.

Appellant's motion to stay proceedings in the district court pending this appeal (Docket Entry No. 10) is denied.

The established briefing schedule remains in effect.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed May 27, 2022]

No. 22-15209

DAVID SUSKI; *et al*.,

Plaintiffs-Appellees,

v.

COINBASE, INC.,

Defendant-Appellant,

and

MARDEN-KANE, INC.; COINBASE GLOBAL, INC.,

Defendants.

D.C. No. 3:21-cv-04539-SK
Northern District of California, San Francisco

ORDER

Before: BYBEE and HURWITZ, Circuit Judges.

The motion for a stay pending appeal (Docket Entry No. 16) is denied. *See Nken v. Holder*, 556 U.S. 418, 433-34 (2009). The request for an administrative stay to permit en banc reconsideration of *Britton v. Co-op Banking Group*, 916 F.2d 1405 (9th Cir. 1990) is denied.

The existing briefing schedule remains in effect.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Filed April 8, 2022]

No. C 21-07478 WHA

ABRAHAM BIELSKI,

Plaintiff,

v.

COINBASE, INC.,

Defendant.

ORDER RE MOTION TO COMPEL ARBITRATION

INTRODUCTION

In this action accusing defendant cryptocurrency exchange platform of violating the Electronic Funds Transfer Act and Regulation E, defendant moves to compel arbitration. Because the delegation clause and the broader arbitration provision are unconscionable for the same reasons, the motion is **DENIED.**

STATEMENT

Defendant Coinbase, Inc. operates a currency exchange. But beyond fiat currencies like dollars and yen, Coinbase also allows users to buy and trade in various forms of cryptocurrency. Cryptocurrency is a decentralized, digital representation of value secured through cryptography. Novelty and the lure of large returns have resulted in speculation in cryptocurrency

like bitcoin and ethereum gaining mainstream popularity. To that end, new currency exchange platforms like Coinbase facilitate investment by allowing account holders to easily store their newly-acquired cryptocurrency in digital wallets.

Plaintiff Abraham Bielski created his Coinbase account in 2021. Unfortunately, he was soon targeted by a scammer who purported to be a PayPal representative. Bielski granted this unknown individual remote access to his Coinbase account, which the perpetrator used to transfer the equivalent of $31,039.06 out of Bielski's digital wallet (Bielski Decl. ¶¶ 6-7).

Bielski alleges that, after the scammer drained his account, he turned to Coinbase for help. He encountered a customer-service nightmare. Coinbase had become a large company with a market capitalization of $65 billion, 68 million users, and over two-thousand employees. But allegedly, its customer service remained meager and ineffective (Sec. Amd. Compl. ¶ 3 n.3). Upon realizing he had been swindled, Bielski initiated a "live chat" with a Coinbase representative, which turned out to be a mere bot that provided canned responses. Bielski then called the specific customer service "hotline" specified in his user agreement as where to get help for a compromised account. He was once again unable to speak with a human. Bielski then wrote two letters to Coinbase at its San Francisco office pleading for help. It was not until this lawsuit that Coinbase deigned to respond, albeit again with only automated inquiries (Bielski Decl. ¶ 8).

Bielski seeks to represent a class of similarly situated individuals with claims against Coinbase for violations of the Electronic Funds Transfer Act and

Regulation E therein. Here, Coinbase moves to compel arbitration based on its user agreement. This order follows full briefing and oral argument.

ANALYSIS

Pursuant to Section 2 of the Federal Arbitration Act, an agreement to submit a dispute to arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The savings clause concluding Section 2 recognizes that arbitration agreements are subject to general contract principles. *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 339 (2011).

Under the Act, a district court determines the two gateway issues of "whether a valid arbitration agreement exists and, if so, whether the agreement encompasses the dispute at issue." *Lifescan, Inc. v. Premier Diabetic Servs., Inc.,* 363 F.3d 1010, 1012 (9th Cir. 2004). But the parties to an arbitration agreement can further agree to arbitrate these gateway issues so long as the delegation is "clear and unmistakable." *Rent-A-Center, West, Inc. v. Jackson,* 561 U.S. 63, 69 n.1 (2010).

"Where a delegation provision exists, courts first must focus on the enforceability of that specific provision, not the enforceability of the arbitration agreement as a whole." *Brice v. Haynes Invs., LLC,* 13 F.4th 823, 827 (9th Cir. 2021). Under California law, a contract provision is unenforceable if it was "unconscionable at the time it was made." Cal. Civ. Code § 1670.5(a); *see also Circuit City Stores, Inc. v. Adams,* 279 F.3d 889, 892 (9th Cir. 2002). Unconscionability has both procedural and substantive elements. These elements are analyzed on a sliding scale: the more substantively unfair, the less

procedurally unconscionable a provision need be for a finding it is unenforceable, and vice-versa. *Sanchez v. Valencia Holding Co.,* 61 Cal. 4th 899, 910 (2015). The party resisting arbitration bears the burden of demonstrating unconscionability. *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC,* 55 Cal. 4th 223, 246-47 (2012).

1. UNCONSCIONABILITY.

Bielski does not contest that he agreed to be bound by the Coinbase user agreement in effect when he signed up for his user account, nor that it covers this dispute. Instead, he argues that the arbitration agreement is unconscionable because it lacks even a modicum of bilaterality (Opp. 1).[*]

Under California law, substantive unconscionability relates to the fairness of an agreement's actual terms and assesses whether they are overly harsh or one-sided. Substantively unconscionable contract terms will shock the conscience. *See Pinnacle,* 55 Cal. 4th at 246. A delegation clause "may be found substantively unconscionable where it imposes an unfair burden

[*] Coinbase requests judicial notice of the relevant user agreement as recorded in the Internet Archive's Wayback Machine (Dkt. No. 28). Other courts in our district have previously taken judicial notice of the contents of web pages available through the Wayback Machine as facts that can be accurately and readily determined from a source whose accuracy cannot reasonably be questioned. This order will do the same. *See* Fed. R. Evid. 201; *Steinberg v. Icelandic Provisions, Inc.*, 2022 WL 220641, at *2 n.1 (N.D. Cal. Jan. 25, 2022) (Judge Edward M. Chen); *Arroyo v. IA Lodging Santa Clara, LLC*, 2021 WL 2826707, at *2 (N.D. Cal. July 7, 2021) (Judge Lucy H. Koh); *Erickson v. Neb. Mach. Co.*, 2015 WL 4089849, at *1 n.1 (N.D. Cal. July 6, 2015) (Judge James Donato). The undersigned's previous order in *Doe v. Xytex Corp.*, 2016 WL 3902577, at *1 n.1 (N.D. Cal. July 16, 2016), involved concerns not present here.

that is different from the inherent features and consequences of delegation clauses." *Pinela v. Neiman Marcus Grp., Inc.,* 238 Cal. App. 4th 227, 246 (2015) (citation omitted); *see also Rent-A-Center,* 561 U.S. at 68-69.

A delegation clause lacking mutuality imposes an unfair burden that qualifies as unconscionable. "The paramount consideration in assessing substantive conscionability is mutuality." *Nyulassy v. Lockheed Martin Corp.*, 120 Cal. App. 4th 1267, 1281 (2004) (cleaned up, citation omitted). In other words, to be enforceable, a delegation provision, as well as an arbitration agreement generally, must have a "modicum" of bilaterality. *See Armendariz v. Found. Health Psycare Servs., Inc.*, 24 Cal. 4th 83, 117 (2000).

Coinbase's user agreement contains a clear and unmistakable delegation clause that is expressly anchored in the defined term "Arbitration Agreement":

> This Arbitration Agreement includes, without limitation, disputes arising out of or related to the interpretation or application of the Arbitration Agreement, including the enforceability, revocability, scope, or validity of the Arbitration Agreement or any portion of the Arbitration Agreement. All such matters shall be decided by an arbitrator and not by a court or judge

(User Agreement § 8.3, Dkt. No. 28-1, emphasis omitted). This order focuses, at this point, "on the enforceability of the delegation provision specifically." *Brice*, 13 F.4th at 826.

Coinbase argues the delegation clause is bilateral because it states: "*All* such matters shall be decided by

an arbitrator and not by a court or judge" (Reply Br. 5, quoting User Agreement § 8.3, emphasis added). But Coinbase does not address the relevancy of the preceding sentence in the provision as reflected above. The delegation clause as a whole does not *generally* delegate the arbitrability of *all* disputes between Coinbase and its users to the arbitrator. Rather, it *specifically* delegates arbitrability of the "Arbitration Agreement," an expressly defined term in the user agreement. Defined terms are given their defined meaning. This order can only conclude that Coinbase's user agreement, as defined by Coinbase, means what it says and that the defined terms therein govern its interpretation. *See Turlock Irrigation Dist. v. FERC*, 903 F.3d 862, 872 (9th Cir. 2018); *Pemberton v. Nationstar Mortgage LLC*, 331 F. Supp. 3d 1018, 1037-38 (S.D. Cal. 2018) (Judge Cynthia Bashant); *Facebook, Inc. v. Rankwave Co., Ltd.*, 2019 WL 8895237, at *4 (N.D. Cal. Nov. 14, 2019) (Judge Jon S. Tigar); *Kanno v. Marwit Cap. Partners II, L.P.*, 18 Cal. App. 5th 987, 1011-12 (2017).

Consequently, whether the delegation clause imposes an unconscionable burden that differs from a generic delegation clause requires backtracking through the nested provisions of Coinbase's "Arbitration Agreement" and the tripartite dispute resolution procedure it sets out. From the delegation clause, we must proceed to the arbitration provision itself, which defines "Arbitration Agreement":

> If we cannot resolve the dispute through the Formal Complaint Process, you and we agree that any dispute arising out of or relating to this Agreement or the Coinbase Services . . . shall be resolved through binding arbitration,

> on an individual basis (the "Arbitration Agreement")

(User Agreement § 8.3, emphasis omitted). The defined term "Arbitration Agreement" incorporated into the delegation clause thus explicitly includes the precondition of engagement in the "Formal Complaint Process," another defined term.

The Formal Complaint Process is laid out in Section 8.2 of the user agreement (emphasis omitted):

> Formal Complaint Process. If you have a dispute with Coinbase (a "Complaint"), you agree to contact Coinbase through our support team to attempt to resolve any such dispute amicably. If we cannot resolve the dispute through the Coinbase support team, you and we agree to use the Formal Complaint Process set forth below. You agree to use this process before filing any arbitration claim or small claims action. If you do not follow the procedures set out in this Section before filing an arbitration claim or suit in small claims court, we shall have the right to ask the arbitrator or small claims court to dismiss your filing unless and until you complete the following steps.

The Formal Complaint Process thus includes its own antecedent requirement of an informal attempt to resolve the complaint with Coinbase's support team. Should that fail to resolve the issue, the formal process requires users (upon pain of dismissal) to file a complaint form, upon which, within fifteen business days (and no later than thirty-five business days), Coinbase will: (1) resolve the dispute as requested; (2) reject the complaint and explain why; or (3) provide an alternative solution (*id.* §§ 8.2.1, 8.2.2).

To sum up then, like nesting boxes, the delegation clause incorporates several defined terms that specify the matters delegated to the arbitrator. The defined terms outline the user agreement's tripartite dispute resolution procedure. *First,* the user must contact Coinbase's support team. *Second,* should that fail, upon pain of dismissal, the user must pursue the formal complaint process. *Third,* should that process fail to resolve the grievance then, and only then, may the consumer seek arbitration.

The plain language of the informal and formal complaint procedures prior to arbitration only contemplates complaints raised by the consumer, not by Coinbase. The informal complaint process specifies "If *you* have a dispute *with Coinbase* (a "Complaint"), *you* agree to contact Coinbase" (User Agreement § 8.2, emphasis added). The formal complaint process states that, if the informal process fails, "*you and we agree* to use the Formal Complaint Process set forth below" *(ibid.,* emphasis added). But only the *user* is required to file a formal complaint upon pain of dismissal, and the procedures for handling a formal complaint outlined in the agreement anticipate only a user's complaint and Coinbase's eventual response, not the reverse scenario.

The "Arbitration Agreement" in the user agreement imposes no obligation on Coinbase to arbitrate. Using a litigation gimmick, Coinbase contends that the arbitration agreement itself is "explicitly bilateral" (Reply Br. 5), pointing to the language "you and we agree that any dispute arising out of or relating to this Agreement or the Coinbase Services . . . shall be resolved by binding arbitration" (User Agreement § 8.3). But Coinbase conspicuously ignores the introductory clause preceding the very language it

cites. The full sentence states: "If *we* cannot resolve the dispute through the Formal Complaint Process, *you and we* agree that any dispute arising out of or relating to this Agreement or the Coinbase Services . . . shall be resolved by binding arbitration, on an individual basis (the "Arbitration Agreement")" *(ibid.,* emphasis added). Coinbase noted the latter clause multiple times in the hearing. Not once, however, did counsel acknowledge the preceding clause, opting to simply start in the middle of the sentence.

The arbitration provision as a whole addresses only those disputes that have previously gone through the pre-arbitration complaint procedure. Because only Coinbase users can raise a complaint though the pre-arbitration complaint procedure, the arbitration provision imposes no obligation on Coinbase itself to submit its disputes with users to binding arbitration. Two further points support this conclusion.

First, Coinbase's interpretation renders the first clause of the arbitration provision surplusage. This is problematic especially because the first clause contains a defined term and informs the meaning of the second clause of the sentence, the clause that Coinbase relies upon. "[W]hen courts construe an instrument, a judge is not to insert what has been omitted, or to omit what has been inserted." *Edwards v. Arthur Andersen LLP,* 44 Cal. 4th 937, 954 (2008) (quotation omitted); *see also U.S. v. 1.377 Acres of Land,* 352 F.3d 1259, 1265-66 (9th Cir. 2003); *Brinderson-Newberg Joint Venture v. Pac. Erectors, Inc.,* 971 F.2d 272, 278-79 (9th Cir. 1992).

Second, the rest of Section 8.3 (like the first clause that Coinbase ignores) only imposes obligations on the user. The arbitration provision continues:

> Subject to applicable jurisdictional requirements, you may elect to pursue your claim in your local small claims court rather than through arbitration so long as your matter remains in small claims court and proceeds only on an individual (non-class and non-representative) basis. Arbitration shall be conducted in accordance with the American Arbitration Association's rules for arbitration of consumer-related disputes

(User Agreement § 8.3, emphasis omitted). The further specifics described in this passage do not say the user *and* Coinbase may elect to pursue their claim in small claims court. It singles out the user once again and subjects them to the low-dollar limits of small claims court. Thus, Coinbase would interpret Section 8.3 to at first apply only to the user (the informal and formal complaints), then apply to both parties (arbitration), and then go back to only applying to the user (small claims court). This order finds such a variable interpretation untenable. A plain reading of the user agreement, in contrast, construes the "Arbitration Agreement," as defined by Coinbase, to be explicitly conditioned upon use of the "Formal Complaint Process," and only users must submit to that procedure. Because the delegation clause imposes no requirements on Coinbase, it lacks the requisite modicum of bilaterality.

Although the user agreement lacks mutuality, our analysis continues. The California Supreme Court has "confirmed that a one-sided contract is not necessarily unconscionable." *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1030-31 (9th Cir. 2016). Pre-arbitration dispute procedures can recite legitimate "extra protection" for the stronger party and present "laudable" mechanisms

to resolve disputes informally. Pretextual or unduly onerous preconditions to arbitration, however, remain substantively unconscionable. *See Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237, 1250 (2016); *Nyulassy*, 120 Cal. App. 4th at 1282-83.

Coinbase asserts that its "Formal Complaint Process is a far cry from the cumbersome, lopsided pre-arbitration procedures" found unconscionable in other decisions (Reply Br. 9; Dkt. No. 38). The opinions Coinbase cites, however, analyzed employment contracts and other, similar agreements. *See, e.g.*, *Pokorny*, 601 F.3d at 991-92 ("independent business owners"); *Nyulassy*, 120 Cal. App. 4th at 1282 (employment); *Serpa v. Cal. Sur. Investigations, Inc.*, 215 Cal. App. 4th 695, 699, 710 (2013) (employment).

In contrast to the more substantial relationship between employee and employer, the Coinbase user agreement governs a less formal, less particularized, consumer relationship. An unconscionability determination is highly context-specific, where the context "includes both the commercial setting and purpose of the arbitration contract and any procedural unconscionability in its formation." *OTO, LLC v. Kho*, 8 Cal. 5th 111, 136 (2019); *see also De La Torre v. CashCall, Inc.*, 5 Cal. 5th 966, 984 (2018). As discussed, Coinbase's tripartite complaint process requires users to jump through multiple, antecedent hoops before initiating arbitration. This order pauses to note the agreement also mentions a separate "hotline" for users to call if their account is compromised, a further checkbox for a user who has seen their account drained. There is no legitimate commercial need for this many burdensome obstacles prior to arbitrating disputes relating to a basic user agreement for services like those provided by

Coinbase. *See Aremendariz*, 24 Cal. 4th at 117-18; Pokorny, 601 F.3d at 998-1000.

The lack of mutuality in Coinbase's complaint process is expressly incorporated into the delegation clause via defined terms. In other words, the delegation clause only delegates questions of arbitrability that emerge from the user agreement's tripartite dispute-resolution procedure, not arbitration, generally. Because the delegation clause imposes an onerous, unfair burden beyond that of a typical delegation clause, this order finds it substantively unconscionable.

* * *

We turn next to procedural unconscionability. Procedural unconscionability addresses the circumstances of contract negotiation and formation and concentrates on two factors: oppression and surprise. *Pinela*, 238 Cal. App. 4th at 243. "Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form." *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1317 (2005) (quotation and citation omitted).

First, considering oppression, the user agreement here clearly qualifies as a contract of adhesion — a "standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Pinela*, 238 Cal. App. 4th at 242 (quotation omitted). Coinbase drafted and presented the user agreement to Bielski on a take-it-or-leave-it basis, which deprived him of both the ability to negotiate and meaningful choice.

Second, this order recognizes that, under the prevailing law, consumers can be forced to arbitrate even federal claims that Congress has expressly authorized for the federal district court. But even though a federal claim for relief can be forced into arbitration, this order holds that the "right" to arbitrate may not be further conditioned on onerous procedural preconditions, as here employed. For example, the user agreement recites: "If you do not follow the procedures set out in this Section before filing an arbitration claim or suit in small claims court, we shall have the right to ask the arbitrator or small claims court to dismiss your filing unless and until you complete the following [pre-arbitration complaint] steps" (User Agreement § 8.2). This order finds that such a broad prohibition on access to formal resolution procedures would surprise the average consumer for this type of service.

Again, the procedural unconscionability of the user agreement's dispute resolution procedure is expressly incorporated into the delegation clause. Coinbase does not contest the user agreement contains at least some level of procedural unconscionability (Reply Br. 4). This order concludes that, given the level of substantive unconscionability inherent in the delegation clause previously discussed, the level of procedural unconscionability merits the finding that the delegation clause is unconscionable and, thus, unenforceable.

Having found the delegation clause unenforceable, this order must consider whether the arbitration agreement as a whole is unenforceable. *See Pinela*, 238 Cal. App. 4th at 250. Our court of appeals has stated that "*Rent-A-Center* contemplate[d] that a delegation provision may be unenforceable for the same reason as

the broader arbitration agreement." *Brice*, 13 F.4th at 827. Because of the manner in which Coinbase crafted its user agreement, all the analysis above regarding the delegation clause applies to the arbitration agreement, generally. *See Saravia v. Dynamex, Inc.*, 310 F.R.D. 412, 422 (N.D. Cal. 2015). The "Arbitration Agreement" imposes a burdensome and unfair pre-arbitration dispute process on users and sends their complaints, but not Coinbase's complaints, to binding arbitration. This order finds the arbitration agreement as a whole unconscionable and, hence, unenforceable.

2. SEVERANCE.

Finally, having determined that the delegation clause and the arbitration provision as a whole are unconscionable, this order must consider the possibility of severance.

California Civil Code Section 1670.5(a) provides:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

In *Armendariz*, the California Supreme Court explained: "the statute appears to give a trial court some discretion as to whether to sever or restrict the unconscionable provision or whether to refuse to enforce the entire agreement. But it also appears to contemplate the latter course only when an agreement is 'permeated' by unconscionability." 24 Cal. 4th at 122.

Here, unilaterality pervades both the delegation clause and the arbitration agreement as a whole. As explained above, the relevant provisions of the user agreement's dispute resolution procedure employ defined terms such that the various provisions outlining the informal complaint, formal complaint, and arbitration procedures are nested one inside the other. The formal and informal complaint processes precondition arbitration. Unilaterality, accordingly, permeates the whole. The arbitration agreement is "simply too tainted to be saved through minor adjustments." *Pokorny*, 601 F.3d at 1005.

Coinbase would have this order strike the phrase "If we cannot resolve the dispute through the Formal Complaint Process," which would leave: "[Y]ou and we agree that any dispute arising out of or relating to this arbitration agreement . . . shall be resolved through binding arbitration, on an individual basis (the "Arbitration Agreement")" (Reply Br. 11). In effect, Coinbase asks this order to revise a term Coinbase itself defined, "Arbitration Agreement." As explained above, defined terms govern the interpretation of the contract, so this change would rewrite the dispute resolution procedure the user agreement sets out. This order "strive[s] to interpret the parties' agreement to give effect to *all* of a contract's terms." *Brandwein v. Butler*, 218 Cal. App. 4th 1485, 1507 (2013) (emphasis added). Coinbase's suggestion is a non-starter and the inability to cleanly remove the unconscionable language weighs against severance. *See Pinela*, 238 Cal. App. 4th at 256. Coinbase's revision, moreover, would have little efficacy: another provision in the contract similarly requires the user "to agree to use this [pre-arbitration] process before filing any arbitration claim or small claim action" (User Agreement ¶ 8.2). The inclusion of the requirement for

users to engage in an onerous pre-arbitration procedure in multiple provisions further indicates that severance is not possible here. *See Nyulassy*, 120 Cal. App. 4th at 1287. This order further notes that Coinbase's proposed change would be binding only in this case and would leave Coinbase free to insist on its burdensome and one-way preconditions in all other cases. In short, severance is not feasible.

CONCLUSION

For the reasons stated, Coinbase's motion to compel arbitration is **DENIED**.

IT IS SO ORDERED.

Dated: April 8, 2022

/s/ William Alsup
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Filed January 11, 2022]

Case No. 21-cv-04539-SK

DAVID SUSKI, et al.,

Plaintiffs,

v.

MARDEN-KANE, INC., et al.,

Defendants.

ORDER REGARDING MOTIONS TO COMPEL ARBITRATION AND TO DISMISS

Regarding Docket Nos. 33, 41

This matter comes before the Court upon consideration of the motion to compel arbitration or, in the alternative, to dismiss filed by Coinbase Global, Inc. ("Coinbase"). Having carefully considered the parties' papers, relevant legal authority, the record in the case, and oral argument, the Court hereby DENIES Coinbase's motion to compel arbitration and GRANTS IN PART and DENIES IN PART Coinbase's alternative motion to dismiss for the reasons set forth below. The Court GRANTS Plaintiffs' request for judicial notice pursuant to Federal Rule of Evidence 201. (Dkt. No. 41.)

BACKGROUND

Plaintiffs David Suski, Jaimee Martin, Jonas Calsbeek and Thomas Maher (collectively, "Plaintiffs") filed this purported class action on behalf of themselves and persons who opted into Coinbase's $1.2 million Dogecoin (DOGE) sweepstakes in June 2021, and who purchased or sold Dogecoins on a Coinbase exchange for a total of $100 or more between June 3, 2021 and June 10, 2021. (Dkt. No. 36 (Second Amended Complaint ("SAC"), p. 2.)

Plaintiffs are Coinbase users with Coinbase accounts, which they created before the sweepstakes began. When they created their Coinbase accounts, each Plaintiff agreed to the Coinbase User Agreement which indisputably contains an arbitration provision. Suski agreed to a User Agreement with the following provision:

> . . . If you have a dispute with Coinbase, we will attempt to resolve any such disputes through our support team. If we cannot resolve the dispute through our support team, you and we agree that any dispute arising under this Agreement shall be finally settled in binding arbitration, on an individual basis, in accordance with the American Arbitration Association's rules for arbitration of consumer-related disputes (accessible at https://www.adr.org/sites/default/files/Consumer%20Rules.pdf) and you and Coinbase hereby expressly waive trial by jury and right to participate in a class action lawsuit or class-wide arbitration. The arbitration will be conducted by a single, neutral arbitrator and shall take place in the county or parish in which you reside, or another mutually agreeable

> location, in the English language. The arbitrator may award any relief that a court of competent jurisdiction could award, including attorneys' fees when authorized by law, and the arbitral decision may be enforced in any court. . . .

(Dkt. No. 33-7 (Attached as Exhibit 6 to the Declaration of Carter McPherson-Evans) (emphasis in original).) Martin, Calsbeek, and Maher agreed to a User Agreement with the following provision:

> . . . If we cannot resolve the dispute through the Formal Complaint Process, you and we agree that any dispute arising out of or relating to this Agreement or the Coinbase Services, including, without limitation, federal and state statutory claims, common law claims, and those based in contract, tort, fraud, misrepresentation, or any other legal theory, shall be resolved through binding arbitration, on an individual basis (the "Arbitration Agreement"). Subject to applicable jurisdictional requirements, you may elect to pursue your claim in your local small claims court rather than through arbitration so long as your matter remains in small claims court and proceeds only on an individual (non-class and non-representative) basis. Arbitration shall be conducted in accordance with the American Arbitration Association's rules for arbitration of consumer-related disputes (accessible https://www.adr.org/sites/default/files/Consumer%20Rules.pdf).
>
> This Arbitration Agreement includes, without limitation, disputes arising out of or related to the interpretation or application of

> the Arbitration Agreement, including the enforceability, revocability, scope, or validity of the Arbitration Agreement or any portion of the Arbitration Agreement. All such matters shall be decided by an arbitrator and not by a court or judge.
>
> * * *
>
> The arbitration will be conducted by a single, neutral arbitrator and shall take place in the county or parish in which you reside, or another mutually agreeable location, in the English language. The arbitrator may award any relief that a court of competent jurisdiction could award and the arbitral decision may be enforced in any court.

(Dkt. Nos. 33-8, 33-9, 33-10 (Exhibits 7, 8, 9 to the McPherson-Evans Decl.) (emphasis in original).)

Suski accepted Coinbase's User Agreement on January 24, 2018; Martin accepted on February 12, 2021; Calsbeek accepted on May 13, 2021; and Maher accepted on April 5, 2020. (Dkt. Nos. 33-3, 33-4, 33-5, 33-6 (Exhibits 2 through 5 to the McPherson-Evans Decl.).)

Plaintiffs then participated in Coinbase's June 2021 sweepstakes. Coinbase's advertisements for its sweepstakes stated:

> Trade DOGE. Win DOGE. Starting today, you can trade, send, and receive Dogecoin on Coinbase.com and with the Coinbase Android and iOS apps. To celebrate, we're giving away $1.2 million in Dogecoin. Opt in and then buy or sell $100 in DOGE on Coinbase by

> 6/10/2021 for your chance to win. Terms and conditions apply.

(Dkt. No. 36, ¶ 8.) Below that language was a link to "See all rules and details" in smaller font. (*Id*., ¶ 8.) The Sweepstakes advertisements then stated: "What you can win," "1 Winner will receive $300,000 in DOGE," "10 Winners will receive $30,000 in DOGE," and "6,000 Winners will receive $100 in DOGE." (*Id*., ¶ 8.) Immediately below those statements about prizes was a large, bright blue box that said, "See how to enter." (*Id*., ¶ 8.) Below the blue box in light small print was the following text:

> Not investment advice or a recommendation to trade Dogecoin. NO PURCHASE NECESSARY TO ENTER OR WIN. PURCHASES WILL NOT INCREASE YOUR CHANCES OF WINNING. Opt-in required. Alternative means of entry available. Sweepstakes open to legal residents of the fifty (50) United States and the District of Columbia (excluding Hawaii). Void where prohibited by law. Must be age of majority in state of residence as of 6/3/21. Promotion ends 11:59 PM (PT) on 6/10/21. Winners must have a Coinbase account on Coinbase.com to receive a prize. Receipt and use of prizes subject to Coinbase terms and conditions. Odds of winning depend on the number of eligible entries received. One entry per person. Sponsor: Coinbase: Coinbase Sweepstakes, 100 Pine Street, Suite #1250, San Francisco, CA 94111. See Official Rules for details.

(*Id*., ¶¶ 66.)

When Plaintiffs clicked on the blue box with "See how to enter", they were taken to another page stating in large, bolded letters: "Trade DOGE. Win DOGE." (*Id*., ¶ 10.) Underneath it stated:

> Dogecoin is now on Coinbase, and we're giving away $1.2 million in prizes to celebrate. Opt in and then buy or sell $100 in DOGE on Coinbase by 6/10/2021 for your chance to win.
>
> Limit one entry per person. Opting in multiple times will not increase your chance of winning."

(*Id*.) Below, in smaller text, was a link to "View sweepstakes rules." Below that link, in a bright blue box was a link in larger text to "Opt in." (*Id*.) At the bottom of the advertisement was the same paragraph in small, light print regarding no purchase necessary. (*Id*., ¶ 67.)

Upon clicking "Opt-in," Plaintiffs were taken to another screen which stated in large, bolded text: "You're one step closer to winning." (*Id.*, ¶ 11.) Below the large text stated:

> "You've successfully opted in to our Dogecoin Sweepstakes. Remember, you'll still need to buy or sell $100 in Dogecoin on Coinbase by 6/10/2021 for a chance to win."

(*Id*.) Below, in smaller text, was a link to "View sweepstakes rules." Below that link, in a bright blue box was a link in larger text to "Make a trade." (*Id*.) Again, at the bottom of the advertisement was the same paragraph in small, light print regarding no purchase necessary. (*Id*., ¶ 67.)

Upon clicking "Make a trade," Plaintiffs were taken directly to Coinbase's trading platform, where they

could sell or buy Dogecoins for $100 or more on Coinbase. (*Id*., ¶ 12.)

However, Coinbase users were not required to buy or sell $100 or more in Dodge to enter the sweepstakes. Instead, individuals were able to mail an index card with their name, contact information and date of birth, without a purchase, to enter the sweepstakes. (*Id*., ¶ 15.) Coinbase provided that information in the sweepstakes rules and details webpage. (*Id*., ¶ 16.) Coinbase, based on in-depth, empirical data from a previous sweepstakes, knew that the wording, design, and presentation of their Dogecoin sweepstakes advertisements would cause most users never to see the information about the alternative ways to enter on the separate "rules and details" webpage. (*Id*., ¶ 54.)

Coinbase's "Official Rules" for its Dogecoin sweepstakes states:

> Participation [in the Sweepstakes] constitutes entrant's full and unconditional agreement to these Official Rules and [Coinbase's] and [its] Administrator's decisions, which are final and binding in all matters related to the Sweepstakes."

(Dkt. No. 22-1, Ex. A[1] (Official Rules), ¶ 1.) The Official Rules further provide:

> THE CALIFORNIA COURTS (STATE AND FEDERAL) SHALL HAVE SOLE JURISDICTION OF ANY CONTROVERSIES REGARDING THE PROMOTION AND THE

[1] Plaintiffs did not attach a copy of the Official Rules for the Dogecoin sweepstakes to their Second Amended Complaint. If Plaintiffs file a Third Amended Complaint in accordance with this Order, they shall attach a copy of the Official Rules.

> LAWS OF THE STATE OF CALIFORNIA SHALL GOVERN THE PROMOTION. EACH ENTRANT WAIVES ANY AND ALL OBJECTIONS TO JURISDICTION AND VENUE IN THOSE COURTS FOR ANY REASON AND HEREBY SUBMITS TO THE JURISDICTION OF THOSE COURTS.

(*Id*., ¶10.) With respect to entry, the Official Rules state:

> Two methods of entry:
>
> Method 1: Existing account holders and new* account holders must opt-in to participate in the Sweepstakes and must complete $100usd (cumulative the transaction fee)) in trade (buy/sell) of Dogecoin on Coinbase.com (.com and/or Coinbase app) during the Promotion Period to earn one (1) entry into the Sweepstakes.
>
> . . .
>
> Method 2: To enter via mail, hand write the following on the front of a 3x5 card, your name, address, city, state, zip, e-mail address, telephone number and date of birth. Insert single card in an envelope and mail with sufficient postage to: . . .Only one (1) entry per person. . . . Winners that entered via mail will be required to create a new Coinbase account on Coinbase.com and agree to the respective terms of use and privacy notice, or have a valid Coinbase account standing, to receive their prize. If you do not create a new Coinbase account and agree to such terms of use and privacy notice within the timeframe

> indicated by Sponsor, you will be ineligible to receive a prize.
>
> Note: Your chances of winning are the same regardless of method of entry.

(*Id.*, ¶ 3.)

At the hearing on this matter, Coinbase stated that an individual who won through the mail-in process would be required to open a Coinbase account to collect the winnings.

Plaintiffs allege that Coinbase's sweepstakes was an unlawful lottery in violation of California Penal Code § 320, that its solicitations for the sweepstakes violated California Business and Professions Code § 17539.15, and that Coinbase's conduct violated California Civil Code § 1770. Plaintiffs brings claims under California Business and Professions Code § 17200, California's Unfair Competition Law ("UCL") based on this alleged unlawful and unfair conduct. Plaintiffs also bring a claim for false advertising under California Business and Professions Code §§ 17200 and 17500, California's False Advertising Law ("FAL") and for violation of California Civil Code § 1750, California's Consumers Legal Remedy Act ("CLRA"). (Dkt. No. 36.)

Coinbase now moves to compel arbitration under its User Agreement or, in the alternative, to dismiss Plaintiffs' claims for failure to state a claim.

ANALYSIS

A. Legal Standard Applicable to Motions to Compel Arbitration.

Pursuant to the Federal Arbitration Act ("FAA"), arbitration agreements "shall be valid, irrevocable,

and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Once the Court has determined that an arbitration agreement involves a transaction involving interstate commerce, thereby falling under the FAA, the Court's only role is to determine whether a valid arbitration agreement exists and whether the scope of the parties' dispute falls within that agreement. *United Computer Systems v. AT&T Corp.*, 298 F.3d 756, 766 (9th Cir. 2002); *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000); 9 U.S.C. § 4.

The FAA represents the "liberal federal policy favoring arbitration agreements" and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Under the FAA, "once [the Court] is satisfied that an agreement for arbitration has been made and has not been honored," and the dispute falls within the scope of that agreement, the Court must order arbitration. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400 (1967).

Notwithstanding the liberal policy favoring arbitration, by entering into an arbitration agreement, two parties enter into a contract. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479 (1989) (noting that arbitration "is a matter of consent, not coercion."). The principles of state contract law are applied in determining the validity of the arbitration agreement. *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944 (1995); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 (9th Cir. 2002). A party seeking to compel arbitration must prove by a preponderance of

the evidence the existence of an arbitration agreement, and a party opposing arbitration bears the burden of proving by a preponderance of evidence any fact necessary to its defense. *Olvera v. El Pollo Loco, Inc.,* 173 Cal.App.4th 447, 453 (2009) (citing *Rosenthal v. Great Western Fin. Securities Corp.,* 14 Cal.4th 394, 413 (1996)).

Both the arbitrability of the merits of a dispute and the question of who has the primary power to decide arbitrability depend on the agreement of the parties. *See First Options of Chicago*, 514 U.S. at 943. "But, unlike the arbitrability of claims in general, whether the court or the arbitrator decides arbitrability is an issue for judicial determination unless the parties *clearly and unmistakably provide otherwise.*" *Oracle Am., Inc. v. Myriad Group A. G.*, 724 F.3d 1069, 1072 (9th Cir. 2013) (internal quotation marks and citations omitted) (emphasis in original). Thus, "there is a presumption that courts will decide which issues are arbitrable." *Id.*

B. Coinbase's Motion to Compel.

Here, the parties do not dispute that: (1) Plaintiffs agreed to Coinbase's User Agreement; (2) Coinbase's User Agreement contains a valid arbitration agreement; and (3) Plaintiffs subsequently agreed to the Dogecoin sweepstakes' Official Rules; and (4) the Dogecoin sweepstakes' Official Rules provides that California courts have exclusive jurisdiction over any controversies regarding the sweepstakes. Plaintiffs also do not dispute that their claims would fall within the scope of Coinbase's User Agreement arbitration provision, had they not agreed to the subsequent exclusive jurisdiction provision in the Dogecoin sweepstakes' Official Rules. The issues are thus which contract (Coinbase's User Agreement or the Dogecoin

sweepstakes' Official Rules) governs this dispute and who decides which contract applies (this Court or the arbitrator).

1. Who Decides Which Contract Governs.

Whether the Court or the arbitrator determine which contract applies "is an issue for judicial determination unless the parties *clearly and unmistakably provide otherwise.*" *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 738 (9th Cir. 2014) (emphasis in original) (quoting *Oracle Am., Inc. v. Myriad Group A. G.,* 724 F.3d 1069, 1072 (9th Cir. 2013)). Therefore, "there is a presumption that courts will decide which issues are arbitrable." *Id*. Coinbase argues that the arbitration provisions in the Coinbase User Agreements clearly delegate the issue of arbitrability to the arbitrator. Three of the four Plaintiffs agreed to the arbitration provision in the Coinbase User Agreement, which provides:

> This Arbitration Agreement includes, without limitation, disputes arising out of or related to the interpretation or application of the Arbitration Agreement, including the enforceability, revocability, scope, or validity of the Arbitration Agreement or any portion of the Arbitration Agreement. All such matters shall be decided by an arbitrator and not by a court or judge.

(Dkt. Nos. 33-8, 33-9, 33-10 (Exhibits 7, 8, 9 to the Declaration of McPherson-Evans) (emphasis omitted).) For Suski, the User Agreement explicitly incorporated and adopted the American Arbitration Association's ("AAA") Consumer Arbitration Rules (and included a link to the text of those rules) to govern any dispute between Coinbase and the user. (Dkt. No.

33-7 (Ex. 6 to the McPherson-Evans Decl.).) Rule 14(a) of the AAA Rules (titled "Jurisdiction") states that the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." *See* AAA Consumer Arbitration Rules, https://www.adr.org/sites/default/files/Consumer%20Rules.pdf (effective September 1, 2014).

While disagreements over the scope of the arbitration provisions were delegated to the arbitrator, the dispute here is not over the scope of the arbitration provision, but rather whether the agreement was superseded by another separate contract. In other words, Plaintiffs do not dispute that their claims would fall within the scope of the arbitration provision if they had not agreed to the Official Rules of the Dogecoin sweepstakes. Moreover, because Plaintiffs agreed to a subsequent agreement with an exclusive jurisdiction provision, the dispute over how to address the interaction between two separate contracts is not clearly and unmistakably delegated in the arbitration provision to the arbitrator. Or, as another district court explained, the required "clear and unmistakable evidence of intent to arbitrate arbitrability does not exist where an arbitration provision has been excluded from superseding agreements." *Ingram Micro Inc. v. Signeo Int'l, Ltd.*, 2014 WL 3721197, at *3 (C.D. Cal. July 22, 2014). In light of the presumption that the Court address this issue, the Court will determine which contract applies.

2. Which Contract Governs.

"[A]rbitration is a matter of contract," *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). "Where the arbitrability of a dispute is contested, we

must decide whether the parties are contesting the *existence* or the *scope* of an arbitration agreement. If the parties contest the *existence* of an arbitration agreement, the presumption in favor of arbitrability does not apply." *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 742 (9th Cir. 2014) (emphasis in original). When determining whether parties have agreed to submit to arbitration, courts apply general state-law principles of contract interpretation. *Mundi v. Union Sec. Life Ins. Co.,* 555 F.3d 1042, 1044 (9th Cir. 2009).

Here, after agreeing to the Coinbase User Agreement with the arbitration provision, Plaintiffs agreed to the Official Rules for the Dogecoin sweepstakes, which contains an exclusive forum selection clause designating California courts for all disputes regarding the sweepstakes. The arbitration clause and the forum selection provision in the two contracts are conflicting. As in *Applied Energetics, Inc. v. NewOak Cap. Markets, LLC*, the language in the sweepstakes Official Terms "that '[a]ny dispute' between the parties 'shall be adjudicated' by specified courts stands in direct conflict with the [Coinbase User] Agreement's parallel language that 'any dispute . . . shall be resolved through binding arbitration.' Both provisions are all-inclusive, both are mandatory, and neither admits the possibility of the other." *Id.*, 645 F.3d 522, 525 (2d Cir. 2011) (finding the adjudication clause specifically precludes and, thus, supersedes the arbitration provision). Although Coinbase tries to reconcile the two, arguing that the sweepstakes Official Rules only applies to non-Coinbase users, there is no support in the contract language for this distinction. The Official Rules does not limit to whom it applies. Instead, by its terms, it applies to all sweepstakes' "entrants." (Dkt. No. 22-1, Ex. A, ¶¶ 1, 10.)

Because the arbitration provision and the forum selection clause conflict, the subsequent contract supersedes the first. *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 742-43 (9th Cir. 2014) (finding an arbitration clause was superseded by a forum selection clause in a subsequent agreement); *see also Applied Energetics*, 645 F.3d at 525-26 (same); *Capili v. Finish Line, Inc.*, 116 F. Supp. 3d 1000, 1004 n. 1 (N.D. Cal. 2015) (Under California law, "[t]he general rule is that when parties enter into a second contract dealing with the same subject matter as their first contract without stating whether the second contract operates to discharge or substitute for the first contract, the two contracts must be interpreted together and the latter contract prevails to the extent they are inconsistent.") (quoting 17A C.J.S. Contracts § 574).

Therefore, the Court DENIES Coinbase's motion to compel arbitration and, thus, turns to the alternative motion to dismiss for failure to state a claim.

C. Applicable Legal Standard on Motion to Dismiss.

A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the pleadings fail to state a claim upon which relief can be granted. On a motion to dismiss under Rule 12(b)(6), the Court construes the allegations in the complaint in the light most favorable to the non-moving party and takes as true all material allegations in the complaint. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). Even under the liberal pleading standard of Rule 8(a)(2), "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing

Papasan v. Allain, 478 U.S. 265, 286 (1986)). Rather, a plaintiff must instead allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

"The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . When a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557) (internal quotation marks omitted). If the allegations are insufficient to state a claim, a court should grant leave to amend, unless amendment would be futile. *See, e.g. Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990); *Cook, Perkiss & Lieche, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990).

As a general rule, "a district court may not consider material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994), *overruled on other grounds, Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) (citation omitted). However, documents subject to judicial notice, such as matters of public record, may be considered on a motion to dismiss. *See Harris v. Cnty of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2011). In doing so, the Court does not convert a motion to dismiss to one for summary judgment. *See Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986), *overruled on other grounds by Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991). "The court need not . . . accept as true allegations that contradict matters properly subject to judicial notice . . . ." *Sprewell v. Golden State Warriors*, 266 F. 3d 979, 988 (9th Cir. 2001).

D. Coinbase's Motion to Dismiss.

1. California Penal Code § 320.

Plaintiffs allege that the Dogecoin sweepstakes violates California Penal Code § 320. Coinbase argues that the Dogecoin sweepstakes was not an illegal lottery under California law because it provided free alternative methods of entry. As a result, Coinbase argues that Plaintiffs' UCL claims, predicated on violation of the lottery law, fail as a matter of law.

Lotteries are illegal under California law. *See* Cal. Penal Code § 320. California law defines a lottery as:

> any scheme for the disposal of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property . . . upon any agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance.

Cal. Pen. Code § 319. This statute is strictly construed. *Haskell v. Time, Inc.*, 965 F. Supp. 1398, 1404 (E.D. Cal. 1997) ("A penal statute is strictly construed."). The essential elements of a lottery are chance, consideration, and the prize. *People v. Cardas*, 137 Cal. App. Supp. 788, 790 (1933); *Cal. Gasoline Retailers v. Regal Petroleum Corp.*, 50 Cal. 2d 844, 851 (1958). If any one of the three elements is missing, the game or scheme at issue is not a lottery. *Haskell*, 965 F. Supp. at 1403.

In *Cardas*, tickets for a promotional scheme were distributed with programs in the neighborhood of the theater, with two thousand distributed to passing motorists and others handed out to patrons and non-patrons in front of the theater. 137 Cal. App. Supp. at

789. It was unnecessary to buy an admission ticket to secure a prize ticket or to claim the prize. *Id*. The court held there was no lottery because "those who purchased admission tickets and received price tickets, . . ., could not be said to have paid a consideration for the prize tickets since they could have received them free." *Id*. at 791. In *People v. Carpenter*, 141 Cal. App. 2d 884, 889-90 (1956), the court found that the movie theater's contest was not a lottery because tickets were offered to customers and non-customers and no consideration was paid for the chance of winning. Anyone who wanted to participate could do so for free. *Id*. Similarly, in *Regal*, the participating gas stations did not conduct a lottery where they distributed tickets for free before and after purchases at the gas stations and elsewhere, including homes, drive-in theaters, and baseball games. The Court clarified that, as long as any person could have received a ticket without paying anything for it, it did not matter how many tickets were distributed with a purchase. *Regal*, 50 Cal. App. 2d at 858-59.

In contrast, in *People v. Gonzales* the court held that a promotion was a lottery because "[t]here was no general or indiscriminate distribution of the drawing tickets to persons irrespective of whether they paid admission." 62 Cal. App. 2d 274, 279 (1944). Instead, a person had to purchase at least one admission ticket in order to participate in the drawing. *Id*. at 280.

Summarizing the "implicit holdings" of these leading lottery cases, the court in *People v. Shira* explained:

> in order for a promotional giveaway scheme to be legal any and all persons must be given a ticket free of charge and without any of

> them paying for the opportunity of a chance to win a prize. Conversely, a promotional scheme is illegal where any and all persons cannot participate in a chance for the prize and some of the participants who want a chance to win must pay for it.

62 Cal. App. 3d 442, 459 (1976); *see also Haskell v. Time, Inc.*, 965 F. Supp. 1398, 1404 (E.D. Cal. 1997) ("California courts have consistently held that business promotions are not lotteries so long as tickets to enter are not conditioned upon a purchase.").

Although a close case, the Court finds that, as currently alleged in the Second Amended Complaint, the Dogecoin sweepstakes was not an illegal lottery. In the California cases finding no consideration, the tickets were clearly and widely distributed for free. *Cardas*; 137 Cal. App. Supp. at 789; *Regal*, 50 Cal. App. 2d at 852-53; *Carpenter*, 141 Cal. App. 2d at 889-90. However, the holdings of those cases did not turn on a wide and obvious method of free ticket distribution. Although Plaintiffs may not have been aware of it when they made a trade of Dogecoins, they were not actually required to trade Dogecoins in order to enter the sweepstakes and have a chance to win. Because California penal statutes are construed strictly and because no California court has held that being unaware of the free method of entry is sufficient to demonstrate the required consideration, the Court finds that Plaintiffs have not and cannot allege a violation of California Penal Code § 320. Therefore, the Court GRANTS Coinbase's motion to dismiss as to Plaintiffs' first claim (violation of Cal. Bus. & Prof. Code § 17200) in full and Plaintiffs' second claim (violation of Cal. Bus. & Prof. Code §§ 17200, 17539.15) and sixth claim (violation of Cal.

Civ. Code § 1750) to the extent they are is premised on a violation of Penal Code § 320. At oral argument, Plaintiffs advanced a theory that they conceded they had not explicitly pleaded in the Second Amended Complaint, and the Court GRANTS leave to amend to advance this theory.

2. Disclosure and Misrepresentation Claims.

That many people may not have been aware that there was a free method of entry is significant for Plaintiffs' claims for disclosure and misrepresentation under the UCL, FAL, and CLRA. Under the FAL, the CLRA, and the fraudulent prong of the UCL, conduct is considered deceptive or misleading if the conduct is "likely to deceive" a "reasonable consumer." *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). Because the same standard for false advertising or misrepresentations governs all three statutes, courts often analyze the three statutes together. *Hadley v. Kellogg Sales Co.*, 243 F. Supp. 3d 1074, 1089 (N.D. Cal. 2017). Upon review of Coinbase's advertising materials as alleged in the Second Amended Complaint, the Court finds that Plaintiffs state a claim that the materials were likely to deceive a reasonable consumer that they needed to make a trade to participate in the sweepstakes. While Coinbase may have actually disclosed the free method in the Dogecoin sweepstakes' Official Rules, its advertising methods heavily directed people to make a trade in order to participate in this sweepstakes. Additionally, Coinbase's statements regarding "no purchase necessary" were ambiguous in light of the other statements regarding the need to "buy or sell" Dogecoin. Persons could have reasonably believed they were required to buy *or sell* Dogecoin to participate, which

would have been consistent with not making a purchase but still requiring them to make a trade.

Additionally, California law requires sweepstakes sponsors to include a "clear and conspicuous statement of the no-purchase-or-payment-necessary message" in solicitation materials. *See* Cal. Bus. & Prof. Code § 17539.15(b).[2] The statute defines the "no-purchase-or-payment-necessary" statement to mean a statement substantially similar to: "No purchase or payment of any kind is necessary to enter or win this sweepstakes." Cal. Bus. & Prof. Code § 17539.15(k)(1). There are no cases construing this statute. Therefore, the Court considers the language of the statute, which requires a "clear and conspicuous statement" that "no purchase or payment of any kind" is required to enter or win. The Court finds that Plaintiffs have alleged sufficient facts to show that Coinbase's advertisements were not "clear and conspicuous" as to whether all persons could enter for free.

Accordingly, the Court finds that Plaintiffs have alleged sufficient facts as to the remainder of their claims and DENIES Coinbase's motion to dismiss as to Plaintiffs' second through seventh claims to the extent they are not premised on a violation of California Penal Code § 320.

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[2] California Business and Professions Code § 17539.15(b) provides: "Solicitation materials containing sweepstakes entry materials or solicitation materials selling information regarding sweepstakes shall include a clear and conspicuous statement of the no-purchase-or-payment-necessary message, in readily understandable terms, in the official rules included in those solicitation materials and, if the official rules do not appear thereon, on the entry-order device included in those solicitation materials."

CONCLUSION

For the foregoing reasons, the Court DENIES Coinbase's motion to compel arbitration and GRANTS IN PART and DENIES IN PART Coinbase's alternative motion to dismiss for failure to state a claim. Therefore, the Court GRANTS WITH LEAVE TO AMEND Coinbase's motion to dismiss as to Plaintiffs' first claim (violation of Cal. Bus. & Prof. Code § 17200) in full and Plaintiffs' second claim (violation of Cal. Bus. & Prof. Code §§ 17200, 17539.15) and sixth claim (violation of Cal. Civ. Code § 1750) to the extent they are is premised on a violation of Penal Code § 320. The Court DENIES Coinbase's motion to dismiss as to the remainder of Plaintiff's claims. Plaintiffs shall file their amended complaint, if any, by no later than February 1, 2022.

IT IS SO ORDERED.

Dated: January 11, 2022

/s/ Sallie Kim
SALLIE KIM
United States Magistrate Judge

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Filed June 7, 2022]

No. C 21-07478 WHA

ABRAHAM BIELSKI, on behalf of himself and others similarly situated,

Plaintiffs,

v.

COINBASE, INC.,

Defendant.

ORDER DENYING MOTION TO STAY PENDING APPEAL AND VACATING HEARING

In this putative class action, defendant moves to stay proceedings pending appeal of an order denying a motion to compel arbitration. For the reasons herein, defendant's motion is **DENIED**.

A previous order described our facts (Dkt. No. 42). Defendant Coinbase, Inc. operates a cryptocurrency exchange platform where, in brief, users can buy and trade various forms of cryptocurrency and hold their assets in digital wallets. After the equivalent of $31,039.06 was transferred out of plaintiff Abraham Bielski's Coinbase account, he turned to Coinbase for assistance but ran into egregious barriers to adequate customer service (Bielski Decl. ¶¶ 6-8).

Bielski filed this lawsuit against Coinbase in September 2021. An April 2022 order denied Coinbase's motion to compel arbitration on the grounds that its delegation provision and the broader arbitration agreement contained unconscionable terms (Dkt. No. 42). Coinbase appealed that order and now seeks a motion to stay all proceedings pending the outcome of its appeal (Dkt. Nos. 43, 48).

Denial of a motion to compel arbitration does not result in an automatic stay of proceedings pending appeal of that order. *See Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990). District courts apply four factors when evaluating whether to issue a stay pending appeal: (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits or that its appeal raises "serious legal questions;" (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 426 (2009); *Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011). These factors are then weighed on a sliding scale such that "a stronger showing of one element may offset a weaker showing of another." *Leiva-Perez*, 640 F.3d at 964.

First, Coinbase claims that "serious legal questions are raised" in its appeal (Dkt. No. 48). This order recognizes that reasonable minds may differ over whether the onerous burdens placed on the right to arbitrate were so onerous as to invalidate the arbitration clause. This provides some support for a stay.

Second, Coinbase argues that absent a stay, it will be forced to expend time and resources litigating in

this forum, which would defeat the anticipated advantages of arbitration. Coinbase's concern about wasting resources is hypothetical, for discovery conducted here would be usable should this dispute ever shift to arbitration. *See Leiva-Perez,* 640 F.3d at 96465, 968. Mere litigation expenses do not generally constitute irreparable injury, and any appeal of the order denying arbitration will be resolved long before the expenses of trial. *See Adams v. Postmates, Inc.*, 2020 WL 1066980, at *5 (N.D. Cal. Mar. 5, 2020) (Judge Saundra B. Armstrong) (citing *Renegotiation Bd. v. Bannercraft Clothing Co. Inc.*, 415 U.S. 1, 24 (1974)); *Jimenez v. Menzies Aviation Inc.*, 2015 WL 5591722, at *3 (N.D. Cal. Sept. 23, 2015) (Judge William H. Orrick) (same).

Third, a stay would significantly prejudice Bielski. Coinbase argues that a delay in litigation is not a cognizable harm compared to the potential wasted time and money that would result from proceeding with this litigation (Dkt. No. 48 at 15). Bielski, however, would experience significant prejudice from delay in vindicating his rights. Coinbase is a large company. Bielski is a single individual. He would suffer if forced to wait for a remedy in the face of significant financial loss (Dkt. No. 50 at 14). This order agrees that there is a strong risk of harm to Bielski if a stay is imposed and further finds Coinbase has not shown that the balance of hardships tips in its favor.

Fourth, Coinbase asserts that the public interest would be served by a stay because there is a strong federal policy in favor of arbitration and a stay would conserve judicial resources (Dkt. No. 48 at 15-16). A federal policy favoring arbitration "does not, by itself, require a stay." *Jimenez*, 2015 WL 5591722, at *4. This is further offset by the prevailing public interest in a

"just, speedy, and inexpensive" determination of civil actions, as contemplated by Rule 1. A stay would not be speedy.

Defendant's motion for a stay of the entire action pending appeal of the order denying arbitration is **DENIED**. However, this is without prejudice to possibly postponing any merits motions should they be made. The hearing on this motion will not be useful and is **VACATED**.

IT IS SO ORDERED.

Dated: June 7, 2022

/s/ William Alsup
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Filed April 19, 2022]

Case No. 21-cv-04539-SK

DAVID SUSKI, et al.,

Plaintiffs,

v.

MARDEN-KANE, INC., et al.,

Defendants.

ORDER DENYING MOTION TO STAY

Regarding Docket Nos. 59, 70

This matter comes before the Court upon consideration of Coinbase, Inc.'s motion to stay pending appeal of the Court's Order denying its motion to compel arbitration. Having carefully considered the parties' papers, relevant legal authority, the record in the case, and having had the benefit of oral argument, the Court hereby DENIES Coinbase's motion for the reasons set forth below.

The Court FURTHER DENIES Plaintiffs' motion to strike Marden-Kane, Inc.'s brief. However, Marden-Kane is admonished that, in the future, the Court will only consider the briefs filed by the party who filed the motion.

ANALYSIS

In the Ninth Circuit, a district court's order denying a motion to compel arbitration does not automatically result in a mandatory stay of proceedings pending appeal of that order. *See Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990). A stay pending appeal is a matter of judicial discretion, not of right. *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (citing *Nken v. Holder*, 556 U.S. 418, 433 (2009)). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [the Court's] discretion." *Nken*, 556 U.S. at 433.

In deciding whether to exercise that discretion, courts consider the following factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. (citation omitted). The first two factors are the most important. *Leiva-Perez v. Holder*, 640 F.3d 962, 964 (2011) (citing *Nken*, 556 U.S. at 434). The party seeking the stay "must show either a probability of success on the merits and the possibility of irreparable injury, or that serious legal questions are raised and the balance of hardships tips sharply in [the party's] favor." *Id.* at 964.

Here, Coinbase does not argue that this matter raises "serious legal issues." Instead, Coinbase argues that there is a reasonable probability that the Ninth Circuit will disagree with the Court, but Coinbase fails to show how the Court erred. The Court found

that the Coinbase's User Agreement and the Dogecoin sweepstakes' Official Rules conflicted and that the superseding Dogecoin sweepstakes' Official Rules governs the specific claims in this action. (Dkt. No. 53.) Coinbase argues generally that, where possible, agreements should be reconciled but fails to show how the two agreements could be reconciled. Accordingly, the Court finds that Coinbase fails to show there is a reasonable probability that the Ninth Circuit will disagree with the Court.

With respect to the possibility of irreparable injury, Coinbase argues that it would lose the benefits of arbitration if the Court does not say the case pending the appeal. However, in this case there are two defendants, only one of which is subject to an arbitration agreement. As Defendant Marden-Kane argued at the hearing, the claims against both defendants are intertwined, and Coinbase would be required to respond to discovery in relation to the claims against Marden-Kane, even if the Court stayed the case against Coinbase. Additionally, Plaintiffs argued that, even if their individual claims against Coinbase were ultimately resolved in arbitration, the claims of the purported class would remain. While the Court could stay the entire case or, alternatively, allow litigation to continue with resolution of Plaintiffs' individual claims resolving the purported class claims as well, the issue of irreparable injury is not clear cut and does not weigh strongly in favor of a stay.

Because the Court finds that Coinbase has not made an adequate showing on the first two factors, the Court need not address the remaining two. *See Mount Graham Coalition v. Thomas*, 89 F.3d 554, 558 (9th Cir. 1996) (declining to continue analysis where moving party failed to satisfy first factor's threshold

requirement); *see also Stiner v. Brookdale Senior Living, Inc.*, 383 F. Supp. 3d 949, 956 (N.D. Cal. 2019) ("Because Brookdale fails to satisfy the first two crucial factors, the Court need not reach the remaining factors in its analysis.") Coinbase fails to show that a stay is warranted.

CONCLUSION

For the foregoing reasons, the Court DENIES Coinbase's motion for a stay pending appeal.

IT IS SO ORDERED.

Dated: April 19, 2022

/s/ Sallie Kim
SALLIE KIM
United States Magistrate Judge

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE SALLIE KIM

No. 21-CV-04539 SK

DAVID SUSKI, *et al*.,

Plaintiffs,

v.

COINBASE GLOBAL, INC., *et al*.,

Defendant.

SAN FRANCISCO, CALIFORNIA
MONDAY, APRIL 18, 2022

TRANSCRIPT OF PROCEEDINGS OF
THE OFFICIAL ELECTRONIC SOUND

RECORDING 9:50 A.M. - 10:22 A.M.

[Pages 1-26]

APPEARANCES:

FOR PLAINTIFF	FINKELSTEIN & KRINSK, LLP 550 WEST C STREET, SUITE 1760 SAN DIEGO, CALIFORNIA 92101 BY: DAVID J. HARRIS, JR., ESQUIRE

FOR DEFENDANT COINBASE GLOBAL, INC.	COOLEY, LLP 3 EMBARCADERO CENTER, 20TH FLOOR SAN FRANCISCO, CALIFORNIA 94111 BY: TRAVIS LEBLANC, ESQUIRE
FOR DEFENDANT MARDEN-KANE, INC.	VENABLE, LLP 2049 CENTURY PARK EAST, SUITE 2300 LOS ANGELES, CALIFORNIA 90067 BY: LAURA ANN WYTSMA, ESQUIRE
TRANSCRIBED BY:	JOAN MARIE COLUMBINI, CSR #5435, RPR RETIRED OFFICIAL COURT REPORTER, USDC

* * *

[14] RULES ON THIS ISSUE, HOW IS THAT A VIOLATION OF DUE PROCESS?

MR. HARRIS: NO. YOU'RE RIGHT, YOUR HONOR. THE COURT DOES HAVE — HAS DISCRETION TO STAY CASES IN A VARIETY OF CIRCUMSTANCES. BUT I DO BELIEVE THOSE ARE ENUMERATED SITUATIONS. JUDICIAL ECONOMY IS OBVIOUSLY VERY BROAD.

AND I HAVEN'T HEARD AN ARGUMENT FROM THE DEFENSE THAT REALLY FOSTERS JUDICIAL ECONOMY AT THE END OF THE DAY. MR. LEBLANC POINTED OUT THAT WHILE PLAINTIFFS MIGHT GET RELIEF, AND THEN THERE WOULD BE NOTHING LEFT IN THIS COURT IF THE PLAINTIFFS GET RELIEF IN

ARBITRATION. BUT WHAT WE DON'T HAVE IN ARBITRATION ARE ANY CLASS CLAIMS, AND WHAT WE WOULD HAVE IN COURT ARE CLASS CLAIMS WHERE OTHER PEOPLE ARE BEING REPRESENTED AS WELL. AND THERE'S A BUNCH OF CASE LAW SAYING THAT YOU CAN'T MOOT A CLASS ACTION JUST BY, YOU KNOW, PROVIDING A REMEDY TO ONLY THE NAMED PLAINTIFF. SO WE STILL HAVE A CASE IN COURT THAT WAY.

THE COURT: I MEAN, LET ME TELL YOU WHAT MY CONCERN IS, AND THE REASON WHY I'M ASKING THESE QUESTIONS IS, LET'S ASSUME FOR THE SAKE OF ARGUMENT THIS CASE GOES TO THE NINTH CIRCUIT AND THEY SAY I'M WRONG — AND THE REASON I SAY THIS COULD HAPPEN IS THIS IS A VERY UNUSUAL SET OF CIRCUMSTANCES. I HAVE NOT SEEN A CASE THAT HAS A SIMILAR SET OF FACTS. WE SEE SO MANY CASES IN ARBITRATION, BUT THIS PARTICULAR WEIRD SET OF FACTS I'VE NOT SEEN.

AND I THINK THAT — SO I DON'T THINK THAT — I DON'T [15] KNOW IF I COULD SAY THERE'S A REASONABLE POSSIBILITY THE NINTH CIRCUIT COULD OVERTURN MY DECISION, BUT I COULD SEE A DIFFERENT LEGAL SET OF MINDS LOOKING AT THIS FACTUAL PATTERN AND SAYING I WAS WRONG. I MEAN, I CAN SEE THAT FROM THE BEGINNING BECAUSE I MADE THE BEST DECISION I COULD, BUT I'M NOT ALWAYS RIGHT.

IT'S SUCH A STRANGE SET OF CIRCUMSTANCES, EVEN I HAD TO SPEND A LOT OF TIME THINKING ABOUT WHETHER I THOUGHT IT

WAS THE RIGHT DECISION. I THINK I MADE THE RIGHT DECISION. I HOPE THE NINTH CIRCUIT AGREES WITH ME.

BUT I SORT OF FEEL LIKE IF WE PUT EVERYTHING — IF WE STAY EVERYTHING, HAVE THE NINTH CIRCUIT DECIDE IT AND THEY TELL ME I'M RIGHT, GREAT, WE GO FORWARD ALL GUNS BLAZING. IF THEY TELL ME I'M WRONG, THEN I HAVE TO FACE THIS ISSUE WITH WHAT TO DO WITH MARDEN — THE CASE AGAINST MARDEN-KANE, AND I'LL LOOK AT THE STATUTE. OBVIOUSLY, THERE WILL BE BRIEFING AND DISCUSSION AT THAT TIME.

THEN IF I'M WRONG, THEN YOU'LL GO FORWARD IN ARBITRATION, BUT THE PARTIES WILL HAVE SPENT A LOT OF — BOTH SIDES, ALL THREE SIDES WILL HAVE SPENT A LOT OF TIME AND MONEY DEALING WITH THINGS THAT YOU WOULD NOT HAVE OTHERWISE HAD TO DEAL WITH IF I'M WRONG. AND THAT'S THE ONLY REASON WHY I'M REALLY HESITATING.

I'M RIGHT ON THE EDGE ON THIS MOTION, I GOT TO TELL YOU, BECAUSE IT'S SUCH A STRANGE UNUSUAL FACT PATTERN, I CAN'T SAY WITH A HUNDRED PERCENT CERTAINTY THAT THE NINTH CIRCUIT IS [16] GOING TO AFFIRM MY DECISION. USUALLY, I CAN — ON THE MOTIONS TO COMPEL, I FEEL PRETTY CONFIDENT. ON THIS ONE I'M JUST NOT SURE. I MADE THE BEST DECISION I CAN.

THAT'S WHY I'M ASKING ABOUT THE HARM TO THE PLAINTIFFS. IS SOMETHING REALLY BAD GOING TO HAPPEN TO THEM WHEN I BALANCE THAT AGAINST THE POSSIBILITY

THAT I COULD JUST BE WRONG ON THE INITIAL DECISION AND THAT — WHAT HARM WOULD HAPPEN JUST TO PUT THINGS SORT OF ON ICE FOR A WHILE? THAT'S WHAT I'M THINKING ABOUT RIGHT NOW, MR. HARRIS.

MR. HARRIS: YOUR HONOR, IF I COULD JUST RESPOND TO THAT QUICKLY?

SO I'M GLAD YOU RAISED THE POSSIBILITY OF SUCCESS, BECAUSE THAT IS, OBVIOUSLY, A KEY FACTOR, AND, ACTUALLY, UNDER THE NINTH CIRCUIT PRECEDENTS, NOT JUST A FACTOR, THAT'S ACTUALLY AN ELEMENT THEY HAVE TO BE ABLE TO SHOW — IT'S A FUZZY —

(SIMULTANEOUS COLLOQUY.)

THE COURT: DON'T YOU THINK THAT'S A WEIRD FACTOR, THOUGH, BECAUSE WHAT DISTRICT JUDGE IS GOING TO SAY, YOU KNOW WHAT, I ACTUALLY MADE A MISTAKE. IF THAT'S THE CASE, THEN I WOULD JUST OVERTURN MYSELF. SO I JUST FOUND THAT TO BE A REALLY — I THOUGHT — I SPENT A LOT OF TIME THINKING ABOUT THAT. UNDER WHAT CIRCUMSTANCES WOULD A PERSON SAY, I'M JUST WRONG AND THE NINTH CIRCUIT IS GOING TO OVERRULE ME?

MR. HARRIS: SURE. I MEAN, YOUR HONOR JUST SAID IT, [17] UNDER THE STANDARD, RIGHT, THAT I COULD SEE WHERE MAYBE THIS IS A UNIQUE SITUATION, MAYBE IT COULD GO THE OTHER WAY. AND THAT'S WHY THE NINTH CIRCUIT OVER TIME — ORIGINALLY, IT SAID THAT THE MOVANT HAS TO SHOW A STRONG PROBABILITY OF SUCCESS ON THE MERITS. TO YOUR HONOR'S POINT, NO COURT IS GOING TO

HOLD THAT. SO THEY SINCE LOOSENED IT TO SAY, LOOK, BASICALLY IS THERE A FAIR DEBATE THERE, IS REALLY THE QUESTION. AND —

THE COURT: I APPRECIATE THE HONESTY FROM YOU, MR. HARRIS. THAT'S VERY CANDID. THANK YOU.

MR. HARRIS: RIGHT, RIGHT. AND SO HERE ARE THE REASONS WHY I WOULD SAY, YOUR HONOR, THERE'S NOT REALLY A FAIR DEBATE HERE, AND I WOULD ACTUALLY SAY THAT THE COURT WAS SO CLEARLY RIGHT THAT COINBASE CAN'T EVEN MEET THE DIMINISHED STANDARD.

COINBASE ADDRESSES A LOT OF CASE LAW ABOUT ARBITRATION AND ARBITRABILITY, BUT THE ONE THEY DON'T ADDRESS IS THE COURT'S RULING. THE COURT PROVIDED RESPONSES TO THE ARGUMENTS THAT THEY'RE MAKING NOW, AND THEY'RE UNABLE TO EXPLAIN HOW THERE WAS ANYTHING WRONG WITH THE COURT'S REASONING.

THEY DON'T ADDRESS THE CASES THAT THE COURT RELIED UPON, WHICH INCLUDED THE GOLDMAN SACHS CASE AND THE APPLIED ENERGETICS CASE. YOUR HONOR JUST SAID THAT, YOU KNOW, THIS IS KIND OF A UNIQUE SITUATION, BUT, ACTUALLY, THOSE CASES WERE VERY ON POINT. AS THE COURT HELD, THERE'S A SITUATION WHERE

* * *

[24] MATTER TO THE ARBITRATOR TO DECIDE THOSE ISSUES AND STAYED THESE PROCEEDINGS IN THEIR ENTIRETY PENDING THE

DECISION BY THE ARBITRATOR ON APPLICABILITY, SCOPE, ENFORCEABILITY, AND REVOCABILITY OF THE ARBITRATION CLAUSE.

AND MAYBE THE ARBITRATOR WOULD HAVE SENT IT BACK TO THE COURT AND CONCLUDED THAT THE OFFICIAL RULES HAD SUPERCEDED. WE DON'T BELIEVE THAT WOULD HAVE BEEN THE CASE, BECAUSE THE USER AGREEMENT AND THE OFFICIAL RULES DO NOT CONFLICT, AND THEY MUST BE READ IN HARMONY UNDER PRINCIPLES OF CONTRACT INTERPRETATION. WE CITED PETERSON VERSUS MINIDOKA COUNTY. WE CITED HUGHES AIRCRAFT COMPANY VERSUS NORTH AMERICAN VAN LINES.

CONTRARY TO PLAINTIFF'S ASSERTIONS, A STAY IS NOT LIMITED TO CASES THAT RAISE QUESTIONS OF FIRST IMPRESSION OR QUESTIONS OF LAW, AS I INDICATED.

MOREOVER AND IMPORTANTLY, THERE'S A VERY SERIOUS CIRCUIT SPLIT AS TO WHETHER A STAY OF PROCEEDINGS OUGHT TO BE AUTOMATICALLY GRANTED PENDING APPEAL OF AN ORDER DENYING A MOTION TO COMPEL ARBITRATION. THIS PROVIDES AN ADDITIONAL BASIS TO STAY.

THE COURT: NO, NO. AT THIS POINT IN TIME THE NINTH CIRCUIT IS CLEAR AS TO WHAT MY ROLES ARE IN TERMS OF HOW I DECIDE THIS. I'M NOT GOING TO WORRY ABOUT THE CIRCUITS SPLIT. I CAN'T WORRY ABOUT THAT RIGHT NOW, TO BE CANDID WITH YOU.

SO, OKAY. YOU'VE GIVEN ME MUCH TO THINK ABOUT. I'LL TAKE IT UNDER SUBMISSION —

* * *

[27] CERTIFICATE OF TRANSCRIBER

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT, TO THE BEST OF MY ABILITY, OF THE ABOVE PAGES OF THE OFFICIAL ELECTRONIC SOUND RECORDING PROVIDED TO ME BY THE U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, OF THE PROCEEDINGS TAKEN ON THE DATE AND TIME PREVIOUSLY STATED IN THE ABOVE MATTER.

I FURTHER CERTIFY THAT I AM NEITHER COUNSEL FOR, RELATED TO, NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTION IN WHICH THIS HEARING WAS TAKEN; AND, FURTHER, THAT I AM NOT FINANCIALLY NOR OTHERWISE INTERESTED IN THE OUTCOME OF THE ACTION.

/s/ Joan Marie Columbini
JOAN MARIE COLUMBINI
APRIL 22, 2022

APPENDIX H

9 U.S.C. § 16

§ 16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

(Added Pub.L. 100-702, Title X, § 1019(a), Nov. 19, 1988, 102 Stat. 4670, § 15; renumbered § 16, Pub.L. 101-650, Title III, § 325(a)(1), Dec. 1, 1990, 104 Stat. 5120.)