No. 23-3

IN THE
Supreme Court of the United States

COINBASE, INC.,
Petitioner,

v.

DAVID SUSKI, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX – VOLUME II OF II

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID SUSKI, JAIMEE MARTIN, JONAS CALSBEEK, and THOMAS MAHER, Individually and On Behalf of All Others Similarly Situated,

Plaintiffs,

v.

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

Defendants.

Case No.: 3:21-cv-04539-SK

SECOND AMENDED CLASS ACTION COMPLAINT FOR:

(1) VIOLATIONS OF CALIFORNIA FALSE ADVERTISING LAW, Cal. Bus. & Prof. Code §§ 17500, *et seq.*;

(2) VIOLATIONS OF CALIFORNIA UNFAIR COMPETITION LAW, Cal. Bus. & Prof. Code §§ 17200, *et seq.*;

(3) VIOLATIONS OF CALIFORNIA CONSUMER LEGAL REMEDIES ACT, Cal. Civ. Code §§ 1750, *et seq.*

JURY TRIAL DEMANDED

Filed 10/20/21

"When you see these sort[s] of practices done by both scammers and legitimate entities, it makes it really hard to distinguish between the two of them."

-Benjamin Powers, Coindesk.com (June 4, 2021)

Pursuant to Fed. R. Civ. P. 23, Plaintiffs David Suski, Jaimee Martin, Jonas Calsbeek and Thomas Maher bring this class action individually and on behalf of all other 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, inclusive. Plaintiffs make the following allegations based upon the investigation of their counsel, and based upon personal knowledge as to themselves and their own acts and dealings with the Defendants. Plaintiffs and their counsel believe that substantial, additional

evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery.

INTRODUCTION

1. Founded in 2012, Defendant Coinbase, Inc. ("Coinbase," or the "Company") is a newly public company and one of the largest online cryptocurrency exchanges in the world. Coinbase has approximately 60 million active users worldwide, consisting primarily of retail consumers, who buy and sell cryptocurrencies online through the Company's website, www.coinbase.com, and through the Coinbase mobile app.

2. Coinbase collects trading fees (or "commissions") from its users for each crypto purchase or sale they execute with Coinbase. Trading fees are generally calculated as a percentage of the dollar price (or Euro price, or Yen price, etc.) of the cryptocurrencies being bought or sold. Coinbase's financial health depends upon its ability to buy, offer, sell, and resell cryptos to consumers in exchange for traditional currencies, like U.S. dollars.

3. Among the many different cryptocurrencies that Coinbase buys and sells is a cryptocurrency called "Dogecoin," or "DOGE." Dogecoin was created in December 2013 by two software engineers, who decided to create a new digital payment system as a joke, making light of the speculative trading that was occurring in cryptocurrencies generally. After all, if arbitrary computer codes like "Bitcoins" could be invented out

of thin air, and sold for thousands of dollars each, then why not invent and sell "Dogecoins" too?

4. The software engineers' joke eventually became a hit, especially among millennials and younger generations. As the retail prices of many cryptocurrencies skyrocketed in recent years, so too did the retail price of the "coin" known as "DOGE." The retail price of one Dogecoin was less than a penny as of January 2021, before spiking as high as $0.70 per DOGE in May 2021.

5. Coinbase, one of the world's preeminent crypto dealers, took notice of DOGE's meteoric ascent in popularity, and in response, decided to add Dogecoins to the list of cryptos that Coinbase would offer to its customers.

6. On June 1, 2021, for the first time, Coinbase started allowing users to transfer "Dogecoins" into their Coinbase trading accounts. Coinbase announced that it would start allowing its users to buy and sell Dogecoins on or after June 3, 2021, "if liquidity conditions are met." *See* https://blog.coinbase.com/dogecoin-doge-is-launching-on-coinbase-pro-1d73bf66dd9d (last visited Jun. 9, 2021). Given the huge amount of

commissions that Coinbase could earn from millions of users buying and selling DOGE on its platform, Coinbase had no intention of leaving DOGE's "liquidity conditions" up to chance, or up to natural consumer sentiment. Instead, Coinbase decided to incentivize as much Dogecoin trading as possible on its platform. To do this, Coinbase hired Defendant Marden-Kane Inc. ("MKI") to design, market, and execute a $1.2 million "Dogecoin sweepstakes," which began on June 3, 2021.

7. On June 3, 2021 (the first day that Coinbase opened for Dogecoin trading), Coinbase directly emailed Plaintiffs and millions of its users, and also displayed to them on its website and mobile app, advertisements of a $1.2 million Dogecoin "sweepstakes." Defendants' direct-to-user emails and digital ads were drafted, structured and designed collaboratively by MKI and Coinbase, and then ultimately transmitted to users by Coinbase.

8. Defendants' direct-to-user emails and digital ads displayed large, colorful graphics and large print stating:

> 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.

Defendants' email solicitations also displayed large, bold text, showing "What you can win," highlighting that "1 Winner will receive $300,000 in DOGE," that "10 Winners will receive $30,000 in DOGE," and that

"6,000 Winners will receive $100 in DOGE." Immediately below those flashy statements about prizes was a large, bright blue button that said, "See how to enter." Sandwiched in between those large, prominent statements was a much smaller-font link stating, "See all rules and details." The first "screen-page" of Defendants' email ads looked like the image below.

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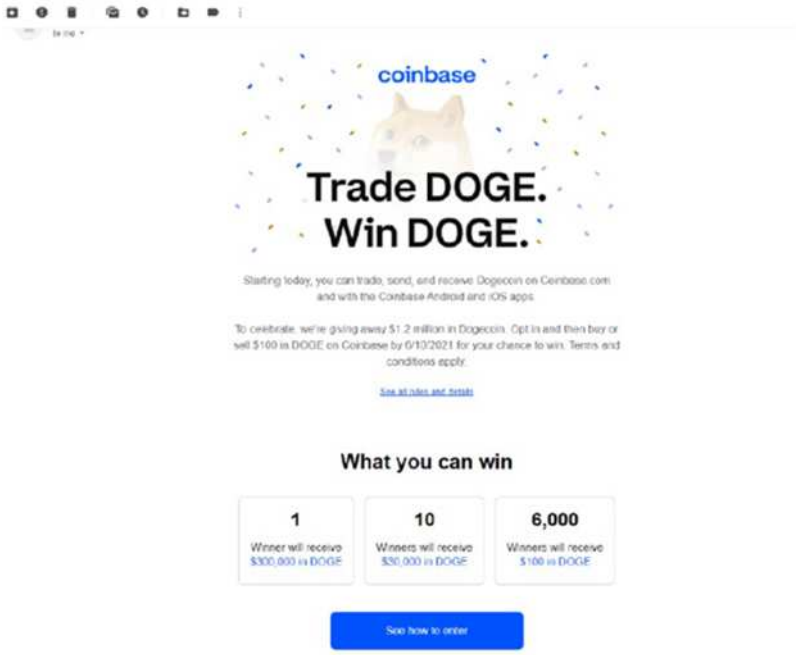
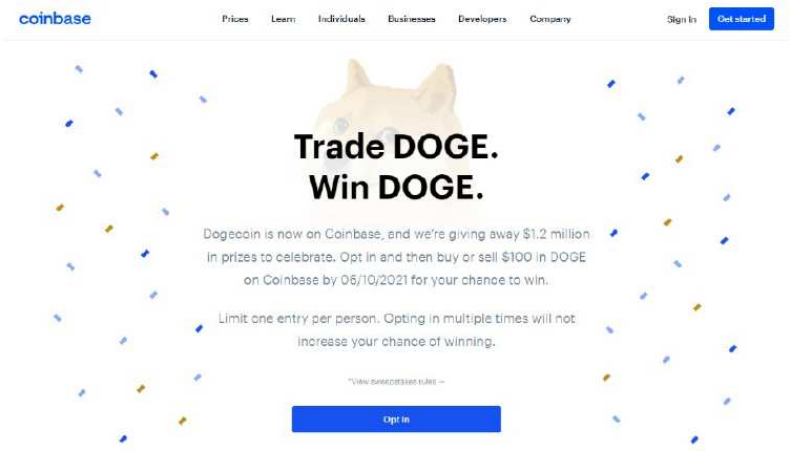


9. Defendants' "sweepstakes" ads on Coinbase's website and mobile app were substantially identical.

10. When Plaintiffs and other consumers clicked the big, bright blue "See how to enter" button (before clicking the smaller, "See all rules and details" link), they were taken to a Coinbase web advertisement containing similar, prominent instructions on how to enter the Company's sweepstakes. Once again, the ad stated in large, bold letters, with graphics: "Trade DOGE. Win DOGE." This web ad reiterated the main assertions in the email ad, stating that "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." Once again, there was a much smaller, fainter link, beneath

the prominent text, that said "View sweepstakes rules," and then a much larger, bright-blue button prompting the customer to "Opt-in."[1]



11. Upon clicking "Opt-in," Plaintiffs and other consumers would see the large text and the bright blue button change. The large text changed to say:

> "You're one step closer to winning. 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.*" (emphasis added)

At the same time, Defendants' large, bright blue button changed from saying "Opt in," to saying "Make a trade." All other aspects of this digital ad remained unchanged upon clicking the "Opt in" button. Thus, Defendants affirmatively represented to Plaintiffs and the Class that "buy[ing] or sell[ing] $100 in

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[1] The faint and tiny "View sweepstakes rules" link displayed above did not even link to the sweepstakes rules, but rather, to a footnote at the bottom of the page containing generalized, ambiguous statements about *some* aspects of the sweepstakes rules.

Dogecoin on Coinbase by 6/10/2021" was necessary to enter "for a chance to win." (See the image below.)

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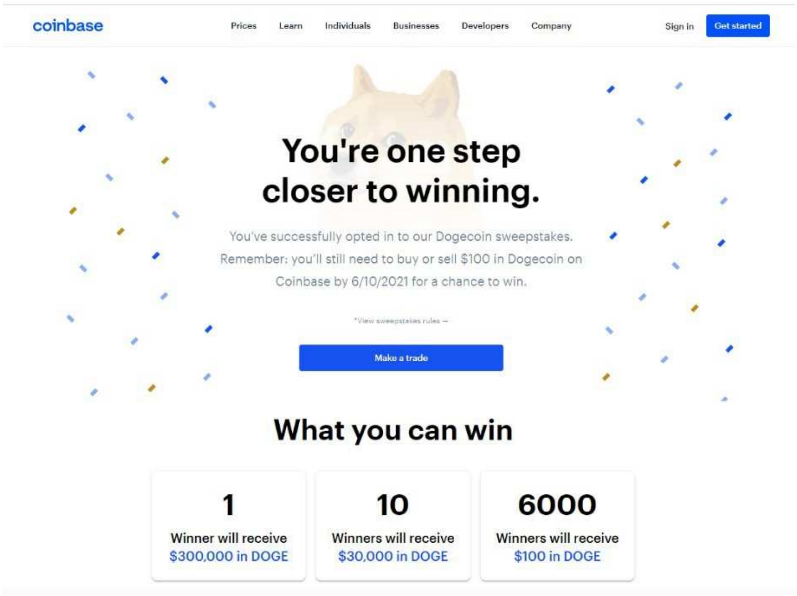

12. Upon clicking "Make a trade," customers were taken directly to Coinbase's trading platform, where they could sell or buy Dogecoins for $100 or more on Coinbase, minus trading commissions.

13. If users happened to scroll down Defendants' digital ads a bit before "opting in" or "making a trade," they would see other large, bold-font statements. The digital ads' second and third "screen pages" further highlighted the sweepstakes prizes, and the process for entering to win.

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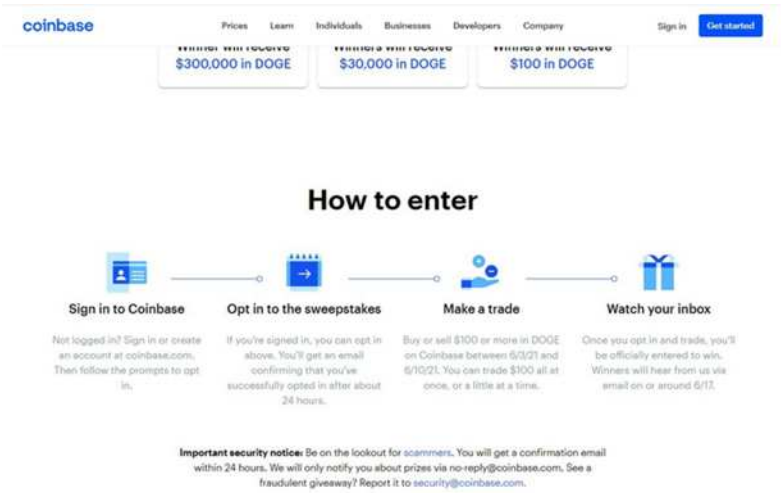

14. Thus, according to Defendants' prominent, repeated instructions, the process for entering their Dogecoin sweepstakes was as follows.

(a) "**Sign in to Coinbase**. Not logged in? Sign in or create an account at coinbase.com. Then follow the prompts to opt in."

(b) "**Opt in to the sweepstakes**. If you're signed in, you can opt in above. You'll get an email confirming that you've successfully opted in after about 24 hours."

(c) "**Make a trade**. Buy or sell $100 or more in DOGE on Coinbase between 6/3/21 and 6/10/21. You can trade $100 all at once, or a little at a time."

(d) "**Watch your inbox**. Once you opt in and trade, you'll be officially entered to win. Winners will hear from us via email on or around 6/17."

15. Defendants' above email, web, and mobile app advertisements to Plaintiffs and the Class were materially false and misleading when disseminated. The truth was that users did *not* "need" to buy or sell "$100 or more in DOGE" to enter Defendants' sweepstakes. Instead, users could buy or sell *almost* $100 in DOGE, *or* simply mail the Defendants a 3x5-inch index card stating the user's name, contact information, and date of birth.

16. Defendants ultimately stated those truths on their separate "rules and details" webpage. Defendants, however, specifically crafted their digital ads with the knowledge and intent that their ads' text, structure, and design would lead *most* consumers to "Opt in" and "Make a trade" before discovering any free entry option. As detailed herein, Defendants made other false and misleading statements to Class members, all to deceive Class members into believing that buying or selling $100 or more "in Dogecoin" was necessary to enter the sweepstakes.

17. Defendants directly and affirmatively deceived Plaintiffs and the Class for the purposes of extracting hundreds of millions of dollars from them, thereby ensuring that Coinbase's "liquidity conditions" would be met as soon as the Company's platform opened for Dogecoin trading. https://blog.coinbase.com/dogecoin-doge-is-launching-on-coinbase-pro-1d73bf66dd9d (last visited Jun. 9, 2021) ("Trading will begin on or after 9AM Pacific Time (PT) Thursday June 3, if liquidity conditions are met.").

18. Defendants' deceptive digital ad campaign caused Plaintiffs and millions of Class members to pay hundreds of millions of dollars in "Dogecoin" purchases and trading fees to Coinbase, which they would

not otherwise have paid absent Defendants' affirmative misstatements and omissions. This nationwide class action seeks judicial relief from Defendants' wrongful conduct, on behalf of Plaintiffs and all other Class members.

PARTIES

19. Plaintiff David Suski is a citizen of New York, and has a personal account with Coinbase that allows him to sell and buy cryptocurrencies directly to and from Coinbase via www.coinbase.com, as well as the Company's mobile app.

20. Plaintiff Jaimee Martin is a citizen of Oregon, and has a personal account with Coinbase that allows her to sell and buy cryptocurrencies directly to and from Coinbase via www.coinbase.com, as well as the Company's mobile app.

21. Plaintiff Jonas Calsbeek is a citizen of California, and has a personal account with Coinbase that allows him to sell and buy cryptocurrencies directly to and from Coinbase via www.coinbase.com, as well as the Company's mobile app.

22. Plaintiff Thomas Maher is a citizen of Missouri, and has a personal account with Coinbase that allows him to sell and buy cryptocurrencies directly to and from Coinbase via www.coinbase.com, as well as the Company's mobile app.

23. Founded in 2012, Defendant Coinbase, Inc. ("Coinbase") is a Delaware corporation with its primary offices located in San Francisco, California. Coinbase is one of the largest online cryptocurrency dealers in the world. Coinbase has approximately 60 million active users worldwide, consisting primarily of consumers who buy and sell cryptocurrencies through

the Company's website, www.coinbase.com. In 2021, the common stock of Coinbase's parent company, Coinbase Global, Inc., began trading publicly on the NASDAQ global stock exchange under ticker symbol "COIN."

24. Defendant Marden-Kane, Inc. ("MKI") is a New York corporation with its primary offices located in New York. MKI specializes in designing, creating, executing, and analyzing various advertising and promotional campaigns for corporate clients, and specializes particularly in administering digital sweepstakes campaigns. In or before 2021, Defendant MKI contracted with Defendant Coinbase to serve as Coinbase's "Administrator" for the June 2021 Dogecoin sweepstakes.

JURISDICTION AND VENUE

25. This Court has jurisdiction under 28 U.S.C. § 1332(d) because the aggregate amount in controversy exceeds $5,000,000, and Plaintiffs and most Class members are citizens of States different from the Defendants' home States.

26. This Court has, at minimum, specific personal jurisdiction over both Defendants because Defendants' official sweepstakes rules and terms provide that "the California courts (state and federal) shall have sole jurisdiction of any controversies regarding the [sweepstakes] promotion, and the laws of the State of California shall govern the promotion." *See* Ex. A, Official Rules, ¶10, *available at* https://www.coinbase.com/sweepstakes-doge-terms (last visited Jun. 11, 2021).

27. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(1), because a substantial part of the events and omissions giving rise to the claims

occurred in this district, and a substantial part of the property at issue in this action is situated within this district.

SUBSTANTIVE ALLEGATIONS

Plaintiffs' Experiences With Defendants' DOGE Sweepstakes

28. On or about June 8, 2021, Plaintiff David Suski viewed Defendants' email and internet ads, without knowing that he could enter the Dogecoin sweepstakes simply by mailing in a 3x5 index card stating his name, birthday, and contact information. Before seeing all of Defendants' sweepstakes "rules and details," Plaintiff Suski followed the more conspicuous statements and action buttons contained in Defendants' ads to "See how to enter," to "Opt in" to the sweepstakes, and to "Make a trade" on Coinbase's platform by buying Dogecoins from Coinbase for $100. Nowhere did Defendants' ads make clear to Plaintiff Suski that there was a 100% free, mail-in option for entering the sweepstakes: an option that required no Dogecoin purchases or sales. In fact, as soon as he clicked the big blue button to "Opt in" to the sweepstakes, Defendants' digital ad affirmatively misrepresented to Plaintiff Suski that he would "*need* to buy or sell $100 in Dogecoin on Coinbase by 6/10/2021 for a chance to win."[2] Plaintiff Suski relied upon Defendants' material misrepresentations and omissions to his own detriment.

29. If Defendants' ads had made clear to Plaintiff Suski that there was a trade-free entry option, then

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[2] All emphasis within quotations marks is added unless otherwise stated herein.

he would not have given Coinbase his $100, or paid any trading commissions to buy Dogecoins from Coinbase. The only reason that Plaintiff Suski undertook to buy Dogecoins from Coinbase was because Defendants led him to believe that doing so was necessary to enter a $1.2 million sweepstakes.

30. On or about June 4, 2021, Plaintiff Jaimee Martin viewed a screenshot of Defendants' email advertisement for the Dogecoin sweepstakes. Upon reviewing the screenshot of Defendants' email ad, Plaintiff Martin reasonably believed that buying or selling $100 or more in DOGE was necessary to enter the sweepstakes. In reliance upon Defendants' misleading email advertisement, Plaintiff Martin immediately went on Coinbase and bought Dogecoins she would not otherwise have purchased, for a total of approximately $120 (including commissions). She had not yet opted into the sweepstakes at this time.

31. Days later, on or about June 9, 2021, Plaintiff Martin once again viewed Defendants' Dogecoin sweepstakes ad, but this time on her Coinbase mobile app. Defendants' digital sweepstakes ad again led Plaintiff Martin to believe that buying or selling $100 or more in DOGE was necessary to enter the sweepstakes. In reliance upon Defendants' false and misleading ads, Plaintiff Martin clicked Defendants' prominent "Opt in" button, and then purchased additional Dogecoins from Coinbase for a total of $100 (including commissions). She made this purchase even after making her prior, $120 purchase because: (a) when she clicked Defendants' prominent "Opt in" button, the ad falsely represented to her that *"you'll still need to buy or sell $100 in Dogecoin on Coinbase by 6/10/2021 for a chance to win"*; and because (b) she

had still not received any email from Coinbase confirming her sweepstakes entry, despite her $120 Dogecoin purchase from Coinbase days earlier.[3]

32. Plaintiff Martin opted into the sweepstakes, and made each of her Dogecoin purchases, without knowing that she could have entered the Dogecoin sweepstakes simply by mailing Coinbase an index card stating her name, birthday, and contact information. Before seeing all of Defendants' sweepstakes "rules and details," Plaintiff Martin followed the more conspicuous statements and action buttons in Defendants' ads to "See how to enter," to "Opt in" to the sweepstakes, and to "Make a trade" on Coinbase's platform, by buying Dogecoins from Coinbase for a total of $220. Nowhere did Defendants' ads make clear to Plaintiff Martin that there was a 100% free, mail-in option for entering the sweepstakes, an option that required no Dogecoin purchases or sales. Indeed, as soon as she clicked the big blue button to "Opt in" to the sweepstakes, Defendants' digital ad affirmatively misrepresented to Plaintiff Martin that she would "*need* to buy or sell $100 in Dogecoin on Coinbase by 6/10/2021 for a chance to win." Plaintiff Martin relied upon Defendants' material misrepresentations and omissions, to her own detriment.

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[3] Coinbase sent Plaintiff Martin an email confirmation of her "opting in" almost instantly after she clicked "Opt in," yet Coinbase inexplicably delayed for several days in sending her an email confirmation of her *entry*. Coinbase's delayed entry-confirmation email left Plaintiff Martin unsure of whether she had successfully entered the sweepstakes with her first purchase, so she made a second purchase to ensure that she would be entered. Coinbase did not send her entry-confirmation email until June 10, 2021.

33. If Defendants' digital ads had made clear to Plaintiff Martin that there was a 100% free, mail-in entry option, then she would not have given Coinbase her $120, or her subsequent $100, or paid any trading commissions to buy Dogecoins from Coinbase.

34. On or about June 3, 2021, Plaintiff Jonas Calsbeek viewed Coinbase's email and internet ads, without knowing that he could enter the Dogecoin sweepstakes simply by mailing Coinbase an index card with his name, birthday, and contact information on it. Before seeing all of Defendants' sweepstakes "rules and details," Plaintiff Calsbeek followed Defendants' more conspicuous statements and action buttons in the ads to "See how to enter," to "Opt in" to the sweepstakes, and to "Make a trade" on Coinbase's platform by buying Dogecoins for a total of $125 (including trading fees). Nowhere did Defendants' digital sweepstakes ads make clear to Plaintiff Calsbeek that there was a 100% free, mail-in option for entering this sweepstakes, an option that required no Dogecoin purchases or sales. In fact, as soon as Plaintiff Calsbeek clicked the big blue button to "Opt in" to the sweepstakes, Defendants' digital ad affirmatively misrepresented to Plaintiff Calsbeek that he would "*need* to buy or sell $100 in Dogecoin on Coinbase by 6/10/2021 for a chance to win." Plaintiff Calsbeek relied upon Defendants' misrepresentations and omissions to his own detriment.

35. If Defendants' ads had made clear to Plaintiff Calsbeek that there was a 100% free, mail-in entry option, which did not require any DOGE trading, then he would not have given Coinbase his $125 or paid Coinbase any trading fees. In fact, the only reason Plaintiff Calsbeek undertook to buy Dogecoins from

Coinbase was that Defendants led him to believe that doing so was necessary to enter a $1.2 million sweepstakes.

36. On or about June 3, 2021, Plaintiff Thomas Maher viewed Coinbase's email and internet ads, without knowing that he could enter the Dogecoin sweepstakes simply by mailing Coinbase an index card with his name, birthday, and contact information on it. Before seeing all of Defendants' sweepstakes "rules and details," Plaintiff Maher followed Defendants' more conspicuous statements and action buttons to "See how to enter," to "Opt in" to the sweepstakes, and to "Make a trade" on Coinbase's platform by buying Dogecoins for a total of $105 (including trading fees). Nowhere did Defendants' digital sweepstakes ads make clear to Plaintiff Maher that there was a 100% free, mail-in option for entering this sweepstakes, an option that required no Dogecoin purchases or sales. In fact, as soon as Plaintiff Maher clicked the big blue button to "Opt in" to the sweepstakes, Defendants' digital ad affirmatively misrepresented to Plaintiff Maher that he would "*need* to buy or sell $100 in Dogecoin on Coinbase by 6/10/2021 for a chance to win." Plaintiff Maher relied upon Defendants' misrepresentations and omissions to his own detriment.

37. As with Plaintiff Martin, Coinbase delayed in sending Plaintiff Maher a contemporaneous (or even same-day) email confirming his opt-in and entry into the sweepstakes. Coinbase's delayed email confirmations left Plaintiff Maher unsure of whether he had successfully entered the sweepstakes with his $105 purchase, so he made a *second* DOGE purchase from Coinbase on June 4, 2021, spending an additional $100, to ensure that he would be entered. Coinbase

eventually sent Maher an email confirmation of his opt-in on June 5, 2021, and an email confirmation of his sweepstakes entry on June 6, 2021.

38. If Defendants' ads had made clear to Plaintiff Maher that there was a 100% free, mail- in entry option, which did not require any DOGE trading, then he would not have given Coinbase his $205 or paid Coinbase any trading fees. In fact, the only reason Plaintiff Maher undertook to buy Dogecoins from Coinbase was that Defendants led him to believe that doing so was necessary to enter a $1.2 million sweepstakes.

39. Defendants' sweepstakes ads were specifically known and designed by Defendants to deceive and confuse each Plaintiff, and most layperson-consumers, into believing that they would "need" to buy or sell Dogecoins on Coinbase's platform to enter the sweepstakes. Defendants' ads were designed to deceptively induce, and did deceptively induce, Plaintiffs and the Class to pay $100 or more to Coinbase on that false pretense.

Defendants' Additional False And Misleading Statements And Omissions To Class Members

40. In addition to misrepresenting the necessity of "making a trade," Defendants also misrepresented the dollar amount of purchase or sale transactions that would be (purportedly) necessary to enter.

41. Specifically, Defendants' ads stated that "[W]e'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." *See* ¶¶9-12, *supra*. Likewise, upon clicking Defendants' "Opt in" button, Defendants' ads stated that "you'll still need to buy or sell *$100 in Dogecoin* on Coinbase by 6/10/2021 for a

chance to win." These statements reasonably conveyed the message that the total value *of the Dogecoins* purchased or sold during the entry period must be greater than or equal to $100.

42. When purchasing cryptocurrencies on Coinbase, users select the digital token that they wish to buy (*e.g.,* Bitcoin, Litecoin, Dogecoin, etc.) and input the dollar amount that they wish to spend. Coinbase then shows users the dollar amount of trading commissions that will be deducted from their purchase (or sale), and then displays the quantity of cryptocurrency that will be purchased with the remaining dollar amount.

43. For example, if a Coinbase user goes to purchase Dogecoins, and enters a dollar amount of $100, Coinbase displays to that user a "preview" of the transaction. Coinbase's transaction preview will show a "Total" price of $100, a "Coinbase fee" of approximately $3 to $4, and a *"Purchase"* price of approximately $96 to $97. The transaction preview also shows the user how many Dogecoins will be purchased with the $96 or $97 that remain *after* deducting commissions.

44. Thus, when Defendants advertised to Class members that they "need[ed]" to buy or sell "$100 *in DOGE*" or "$100 *in Dogecoin*" to enter, Defendants effectively communicated that users would have to pay a transaction "Total" of *more than* $100 to account for the transaction fee, and ensure that the previewed DOGE "Purchase" price was greater than or equal to $100.

45. Indeed, that is why Plaintiff Martin made a purchase "Total" of $120, instead of $100 even. That is also why Plaintiff Calsbeek's purchase "Total" was $125, instead of $100 even. That is also why Plaintiff Maher's June 3, 2021 purchase "Total" was $105,

instead of $100 even. Based on the plain language in Defendants' ads, each of them believed they needed to buy "$100 in Dogecoin," *after* deducting the "Coinbase fee," because that fee was *not* part of the previewed "Purchase" price for the Dogecoins. Once again, Defendants' sweepstakes ads were both untrue and materially misleading.

46. The truth was that a purchase or sale transaction "Total" of *$100 even*—and hence, a Dogecoin "Purchase" price of less than $100 (in other words, *less than* "$100 in DOGE")—would have sufficed for Plaintiffs and the Class to enter the sweepstakes. Defendants buried this truth only in the fine print of their official sweepstakes rules, which provided:

> 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.

(emphasis added).

47. The false and misleading "$100 in DOGE" and "$100 in Dogecoin" language in Defendants' ads caused most Class members to make purchases totaling *more than* $100, to avoid having their "Coinbase fee" reduce the previewed value of their Dogecoin "Purchase" below $100. This subtle deception by the Defendants allowed Coinbase to fleece millions of Class members out of several more dollars each, which Class members never needed to spend to enter. Defendants' deception in this regard further inflated Coinbase's fee-based profits by at least millions of dollars, and further ensured that Coinbase's "liquidity

conditions" for DOGE trading would be immediately satisfied on June 3, 2021.

48. In sum, Defendants successfully deployed multiple, misleading and deceptive advertising tactics to induce millions of consumers to spend *over* $100 that they did not need to spend to enter Defendants' $1.2 million sweepstakes.

Defendants' Knowledge and Intent in Crafting Their Misleading "Sweepstakes" Solicitations

49. Coinbase and its sweepstakes "Administrator," Defendant MKI, knew that their ads had the likelihood, tendency and capacity to mislead and confuse consumers like Plaintiffs because Defendants had already executed and analyzed a nearly identical, digital "sweepstakes" on Coinbase just two months prior to this DOGE Sweepstakes.

50. Specifically, in April 2021, Defendants had collaborated to execute a $2 million *Bitcoin* sweepstakes. The only substantive difference between this Bitcoin sweepstakes and Defendants' subsequent Dogecoin sweepstakes was that, instead of purporting to require people to "make a trade" to enter, Defendants' Bitcoin sweepstakes ads purported to require people to "[s]ign up for an account at coinbase.com," and "verify [their] identity." Aside from that one difference, the digital structure, aesthetic design, and language that Defendants' used in their Bitcoin sweepstakes ads were identical to what they used in their Dogecoin sweepstakes ads.

51. In Defendants' earlier Bitcoin sweepstakes—just like in the subsequent Dogecoin sweepstakes—there was a different, less intrusive entry-option provided *not* on the ads or on the entry webpages, but instead on a separate "rules" and "details" webpage. Rather

than providing social security numbers, drivers' licenses, and other sensitive, personally identifying information ("PII") to Coinbase (*i.e.,* "verify[ing] [their] identity"), users had the *alternative* option to enter by mailing Coinbase a 3x5-inch index card with the customer's name, contact information, and birthday on it.

52. The digital ads that Defendants used in their earlier Bitcoin sweepstakes were designed and presented to consumers in a manner substantially identical to the digital ads they used in their June 2021 Dogecoin sweepstakes.

53. In executing their April 2021 Bitcoin sweepstakes, Defendants had collected, reviewed and analyzed a wealth of data about consumers' specific behaviors and reactions to various parts of this ad campaign. Both Coinbase and MKI knew exactly how many consumers had "create[d] a Coinbase account" and rigorously "verif[ied] [their] identities" (Coinbase's desired outcome), versus how many had simply mailed in an index card with their name, birthday, and contact information on it (*not* Coinbase's desired outcome). Even more specifically, however, Defendants collected and analyzed the following consumer-behavior data from their Bitcoin sweepstakes: (a) how many Bitcoin sweepstakes entrants had navigated to the "rules and details" webpage upon reviewing these sweepstakes ads; and (b) how ad recipients navigated the various "web paths" that one might take from reviewing the ads, to ultimately entering the sweepstakes.

54. Indeed, MKI's own website touts its sophisticated, in-depth data analysis and reporting capabilities as follows.

Tracking and Reporting

> Each client promotion includes two levels of tracking and reporting: (1) website traffic and (2) promotion registration database tracking. Information we provide via website traffic analysis includes aggregate and daily information on key metrics, such as site hits, unique visitors, top pages, operating systems, entry and exit paths, and top promotion referrers. Promotion registration data analysis includes the aggregate and daily number of unique registrants and entries. At the close of each promotion, we provide clients with a detailed analysis of how their promotion performed in the marketplace, including the effectiveness of media tactics in driving engagement, demographics, age and gender, opt-ins, and responses to any survey questions related to brand awareness and purchase intent.

See http://www.mardenkane.com/sweepstakes (last visited Jun. 11, 2021). As of June 2021, Defendants already knew—based on in-depth, empirical data from their Bitcoin sweepstakes in April 2021—that the precise ways they were wording, designing, and presenting their Dogecoin sweepstakes ads to users would have a high likelihood, capacity, and tendency to cause most users to never see their separate "rules and details" webpage. Yet Defendants' separate, "rules and details" webpage was the *only* place where they disclosed their free, mail-in entry option for this "sweepstakes."

55. Defendants were not merely guessing that their digital sweepstakes ads would tend to conceal the true sweepstakes-entry options from most viewers' eyes. Instead, Defendants knew as a matter of empirical

proof (from their earlier Bitcoin sweepstakes) that their substantially identical, digital ads for the DOGE sweepstakes would have a likelihood, capacity, and tendency to conceal the free, mail-in entry option from most consumers' eyes.

56. It was never any surprise to Defendants that their digital sweepstakes ads to Class members would achieve (and did achieve) an outcome in which consumers would unwittingly pay hundreds of millions of dollars collectively, just to enter a sweepstakes that they could have entered for free. Defendants' digital sweepstakes ads were not only objectively false and misleading to Plaintiffs and the Class, but also known and specifically intended by Defendants' to be misleading (and damaging) to Plaintiffs and the Class.[4]

Contemporaneous Media Reports Further Suggest That Defendants' Ads Were Materially Misleading to Reasonable Viewers

57. Defendants' Dogecoin sweepstakes ads were communicated to and publicized by several online media outlets in June 2021.

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[4] The only reason why Defendants inconspicuously slipped a free entry option into their separate, "rules and details" webpage was that Defendants sought to avoid the legal conclusion that they were conducting an unlawful "lottery," as opposed to a "sweepstakes." The elements of a "lottery" are: (i) consideration given by an entrant; (ii) in exchange for a chance; (iii) to win a prize. *See, e.g., Trinkle v. California State Lottery*, 105 Cal.App.4th 1401, 1406 (Cal. Ct. App. 2003). Defendants here attempted to conduct a profitable *non*-lottery by offering a free entry option *that most reasonable consumers would never know about*. As detailed *infra*, Defendants' attempt was and remains insufficient to avoid California's "lottery" laws, and was additionally insufficient to comply with California's "sweepstakes" laws.

58. For example, on June 3, 2021, *Business Insider* published an online news article regarding Defendants' sweepstakes. The headline stated: "Coinbase is giving away $1.2 million in dogecoin as it starts letting users trade the meme cryptocurrency." *See* https://www.businessinsider.com.au/coinbase-dogecoin-sweepstakes-users-can-trade-meme-cryptocurrency-2021-6 (last visited Aug. 9, 2021). The entire body of the article read as follows:

> Coinbase said on Thursday that it plans to give away $1.2 million in dogecoin to encourage users to take advantage of its newest cryptocurrency trading option.
>
> ***Users must buy or sell $100 in DOGE through Coinbase by June 10 to be eligible for the sweepstakes, the company said.*** Coinbase said it plans to give out one prize worth $300,000, 10 prizes worth $30,000, and 6,000 prizes worth $100 by around June 17.
>
> The sweepstakes follows the company's announcement on Tuesday that it would start letting Coinbase Pro users trade dogecoin on its platform. The announcement, along with a tweet from Elon Musk referencing the meme currency, sent dogecoin's value climbing by as much as 41%.
>
> At $52.3 billion, dogecoin had the sixth-largest market cap among all cryptocurrencies as of Thursday evening, according to CoinMarketCap, after seeing a massive rally in May that sent its market cap soaring to more than $85 billion.

> Dogecoin was started as a joke by two engineers in 2013, but has since gained immense popularity thanks to Redditors as well as endorsements from Musk and other high-profile celebrities, leading other crypto trading platforms like Robinhood, eToro, and Gemini to start accepting trades in recent weeks.

Id. (emphasis added). Nowhere did this *Business Insider* article reference any free, mail-in entry option for the sweepstakes, because nowhere did Defendants' sweepstakes ads state that such a free entry option existed.

59. Similarly, on June 7, 2021, *InvestorPlace.com* published an online article regarding Defendants' sweepstakes. That article was titled, "Coinbase Dogecoin Sweepstakes: What to Know About the $1.2M DOGE Giveaway." *See* https://investorplace.com/2021/06/coinbase-dogecoin- sweepstakes-what-to-know-about-the-1-2m-doge-giveaway (last visited Aug. 9, 2021). The article's subtitle said, "Here's what crypto investors may want to know about the Coinbase Dogecoin Sweepstakes taking the market by storm today." The body of the article stated as follows:

> Today, investors in **Coinbase** (NASDAQ:COIN) are seeing a green day. For everyone's favorite Shiba Inu-inspired meme currency, **Dogecoin** (CCC:DOGE- USD) not so much. However, any green day is a good day for investors in COIN stock, given the recent ride Coinbase has been on. One might be curious as to the primary reason for today's move. Perhaps part of the answer is the recently launched Coinbase Dogecoin Sweepstakes.

Source: Shutterstock

Most investors know how popular Dogecoin has become of late. Whether due to the incessant tweeting of Elon Musk, or simply the momentum of this moonshot cryptocurrency, Dogecoin is still ranked No. 6 among all cryptocurrencies in market capitalization. That's right, a meme cryptocurrency with no real utility is valued at nearly $50 billion.

There are a variety of reasons for this. However, most investors know just how catchy the simplistic marketing behind this digital coin has been. Today's recent moves reflect yet another marketing stunt from Dogecoin and its purveyors.

Whether this maneuver ultimately pays off for investors remains to be seen. However, news of the Coinbase Dogecoin sweepstakes certainly has the DOGE crowd barking.

What Is the Coinbase Dogecoin Sweepstakes All About?

Last week, Coinbase announced the launch of a Dogecoin giveaway. This sweepstakes is in honor of Dogecoin's recent listing on Coinbase

> Pro. Indeed, that's news in and of itself. But when an exchange like Coinbase offers $1.2 million in prizes to celebrate such an announcement, crypto investors perk up.
>
> What's the catch?
>
> ***Well, crypto investors simply need to opt in to the sweepstakes and buy or sell $100 in DOGE on Coinbase by June 10. That's it.***
>
> Each crypto investor gets one entry per person. One winner will receive $300,000 in DOGE, 10 winners will received $30,000 in DOGE, and 6,000 winners will receive $100 in DOGE.
>
> The simplicity of this sweepstakes makes this a no-brainer for most investors to get in on the action. For those bullish on DOGE, adding an additional $100 in exposure sure seems like a good idea, given the recent dip in Dogecoin prices. For those bearish on DOGE, selling $100 worth of this digital token still provides an entry. There's really no downside to entering, for those interested.
>
> ***Of course, Coinbase's business model is one which is fee-based. The more volume Coinbase can generate, the more money this platform stands to earn. Those behind this marketing stunt have undoubtedly done the math.*** However, if it proves successful, this could pave the way for future giveaways in an attempt to rekindle retail investor enthusiasm in this sector.

Id. (underlined emphasis added).

60. Like the June 3 article from *Business Insider*, this June 7 article from *InvestorPlace* failed to

mention any free, mail-in entry option because nowhere did Defendants' sweepstakes ads— to which the article directly linked—state that such a free entry option existed.

61. Moreover, on June 5, 2021, the Business webpage on *NJ.com* published a similar article stating that: "Coinbase is giving away $1.2 million worth of Dogecoin. ***To be eligible, you have to 'opt in' and buy or sell $100 worth of the meme-inspired cryptocurrency by June 10.***" *See* https://www.nj.com/business/2021/06/dogecoin-coinbase-giveaway-how-to-opt-in-to-sweepstakes-and-how-to-buy-dogecoin.html (last visited Aug. 9, 2021) (emphasis added) (linking to Coinbase's sweepstakes advertisement). Nowhere did this *NJ.com* article reference any free, mail-in entry option for the sweepstakes because nowhere did Defendants' sweepstakes ads state that such an entry option existed.

62. Finally, even after Defendants' Dogecoin sweepstakes ended, *Newsweek* published an online article materially misstating the sweepstakes entry requirements. In a June 18, 2021 article titled, "Why Coinbase Dogecoin Sweepstake[s] Winners Haven't Been Announced Amid Confusion Online," *Newsweek* stated that "[t]he sweepstake[s] ended on June 10 at 11:59 p.m. PDT, ***by which time entrants needed to have opted in and completed a $100 trade of Dogecoin to be eligible***. ***Coinbase said entrants would receive an email once they had met both requirements***." *See* https://www.newsweek.com/why-coinbase-dogecoin-sweepstake-winners-havent-been-announced-confusion-online-1601996 (last visited Aug. 9, 2021). Like the other three articles referenced above, nowhere did this *Newsweek* article reference

any free entry option because nowhere did Defendants' sweepstakes ads state that any free entry option existed.

63. In sum, numerous, reasonable viewers of Defendants' sweepstakes ads—including members of the media and the public—were misled into believing that buying or selling $100 worth of Dogecoins on Coinbase was necessary to enter Defendants' June 2021 sweepstakes.

The Ambiguous Fine Print in Defendants' "Sweepstakes" Solicitations Did Not Comply With California Law, and Did Not Correct Defendants' More Conspicuous Misstatements

64. California law provides specific requirements for "solicitation materials containing sweepstakes entry materials," such as Defendants' sweepstakes ads here.

> *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.

Cal. Bus. & Prof. Code § 17539.15(b). Defendants' "sweepstakes" ads were "solicitation materials" containing both "sweepstakes entry materials" and "entry-order device[s]." *Id.* The "sweepstakes entry materials" contained in Defendants' ads consisted of Defendants' plain-text sweepstakes entry instructions. *E.g.,* ¶¶9-12, *supra*. The "entry-order devices"

contained in Defendants' ads consisted of the bright blue "Opt in" and "Make a trade" buttons, the webpages and mobile app screens on which those buttons appeared, and Coinbase's online crypto trading interface (to which Defendants' "Make a trade" button directly routed users). See the images below.

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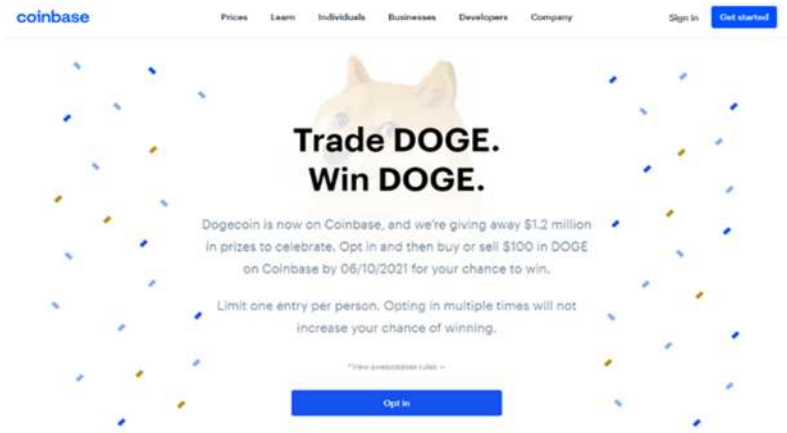

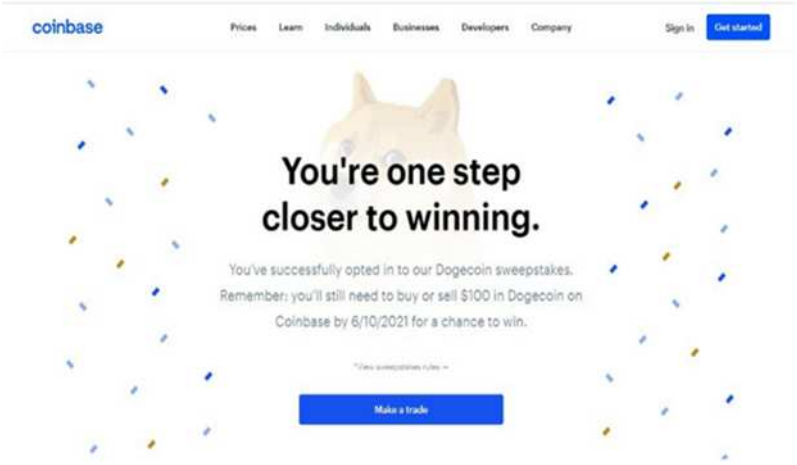

Defendants' were required by statute to include "a clear and conspicuous" statement of the "no-purchase-or-payment-necessary message" in their official rules. *Id.* Moreover, because Defendants' "official rules d[id] not appear" on their "solicitation materials," Defendants were also required to "include a clear and conspicuous statement of the no-purchase-or-payment-necessary message . . . *on the entry-order device* included in those solicitation materials containing sweepstakes entry materials."[5] If Defendants' Dogecoin "sweepstakes" did *not* constitute an unlawful

[5] The statute defines "official rules" as "the formal printed statement, however designated, of the rules for the promotional sweepstakes appearing in the solicitation materials." Cal. Bus. & Prof. Code § 17539.15(k)(2). Defendants' "formal printed statement . . . of the rules for the [Dogecoin] sweepstakes" did not "appear" on Defendants' email, website, or mobile app ads for the DOGE sweepstakes. Instead, what "appeared" on Defendants' ads was only a small hyperlink to the "formal printed statement . . . of the rules," which "appeared" on a separate webpage, and not on the "solicitation materials" themselves.

lottery[6], then Defendants' sweepstakes ads violated Cal. Bus. & Prof. Code § 17539.15(b) in several, independent respects.

65. The statute expressly required Defendants' "statement of the no-purchase-or- payment-necessary message" on the "entry-order device" to be "clear and conspicuous," and to be made "in readily understandable terms." Cal. Bus. & Prof. Code § 17539.15(b). The statute defines the "no-purchase-or-payment-necessary message" to mean "the following statement or a statement substantially similar to the following statement: 'No purchase or payment of any kind is necessary to enter or win this sweepstakes.'" Cal. Bus. & Prof. Code § 17539.15(k)(1).

66. To the extent that Defendants made such a statement *at all* in their sweepstakes email, web, or mobile app ads, they made it using 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

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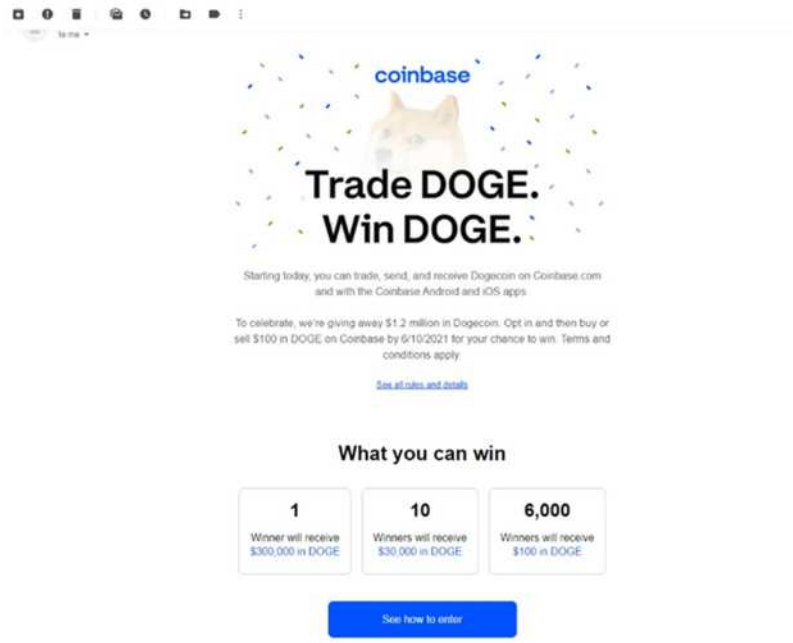
[6] An unlawful "lottery" is excluded from the statutory definition of a "sweepstakes." Cal. Bus. & Prof. Code § 17539.5(a)(12) ("'Sweepstakes' means any procedure for the distribution of anything of value by lot or chance that is not unlawful under other provisions of law including, but not limited to, the provisions of Section 320 of the Penal Code."); *see also* Cal. Penal Code § 320 ("Every person who contrives, prepares, sets up, proposes, or draws any lottery, is guilty of a misdemeanor.").

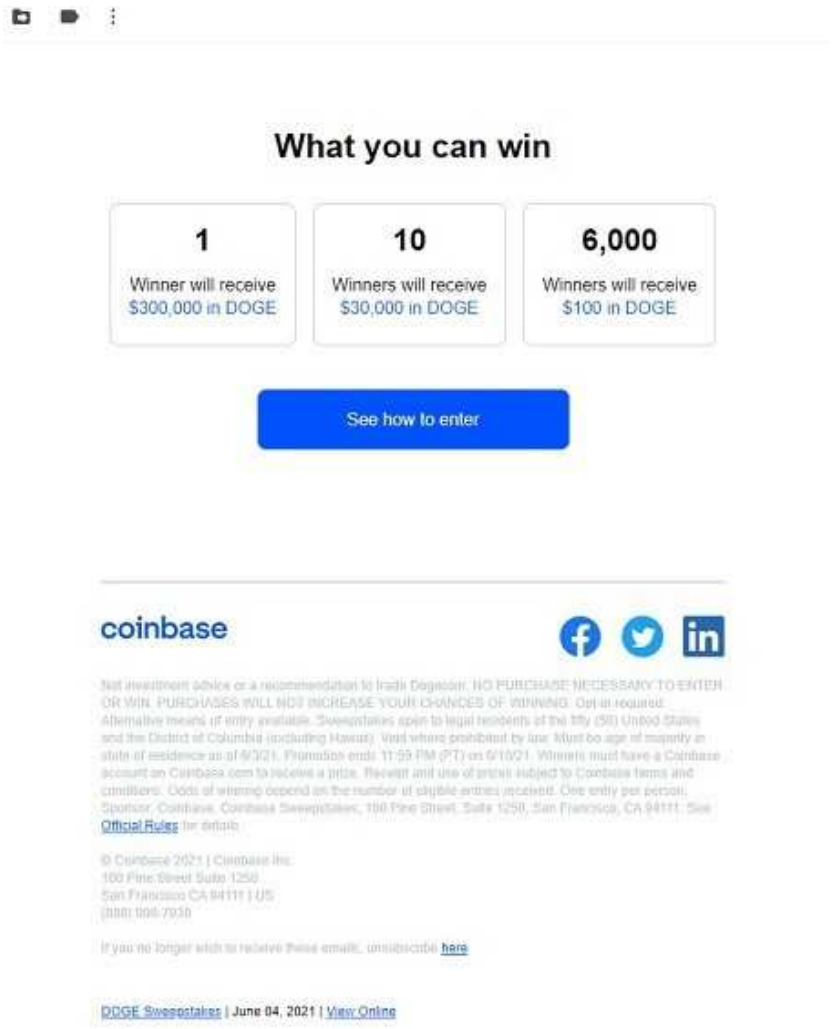
> majority in state of residence as of 6/3/21. Promotion ends 11:59 PM (PT) on 6/10/21. Winners must have a Coinbase account on Coinbase.com to receive a prize. Receipt and use of prizes subject to Coinbase terms and conditions. Odds of winning depend on the number of eligible entries received. One entry per person. Sponsor: Coinbase: Coinbase Sweepstakes, 100 Pine Street, Suite #1250, San Francisco, CA 94111. See Official Rules for details.

First, the above text was not stated "conspicuous[ly]" on or around Defendants' solicitation materials or "entry-order device[s]." Instead, this text appeared in faint, fine print at the bottom of Defendants' multi-page/multi-screen email solicitations. To view the above text at all, recipients would have to have scrolled down to the bottom of the email, which did *not*

require any scrolling before clicking the "See how to enter button."

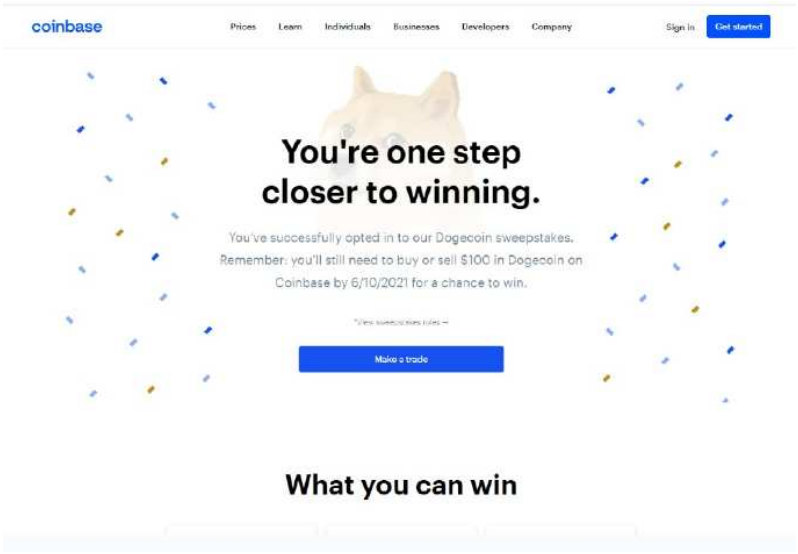


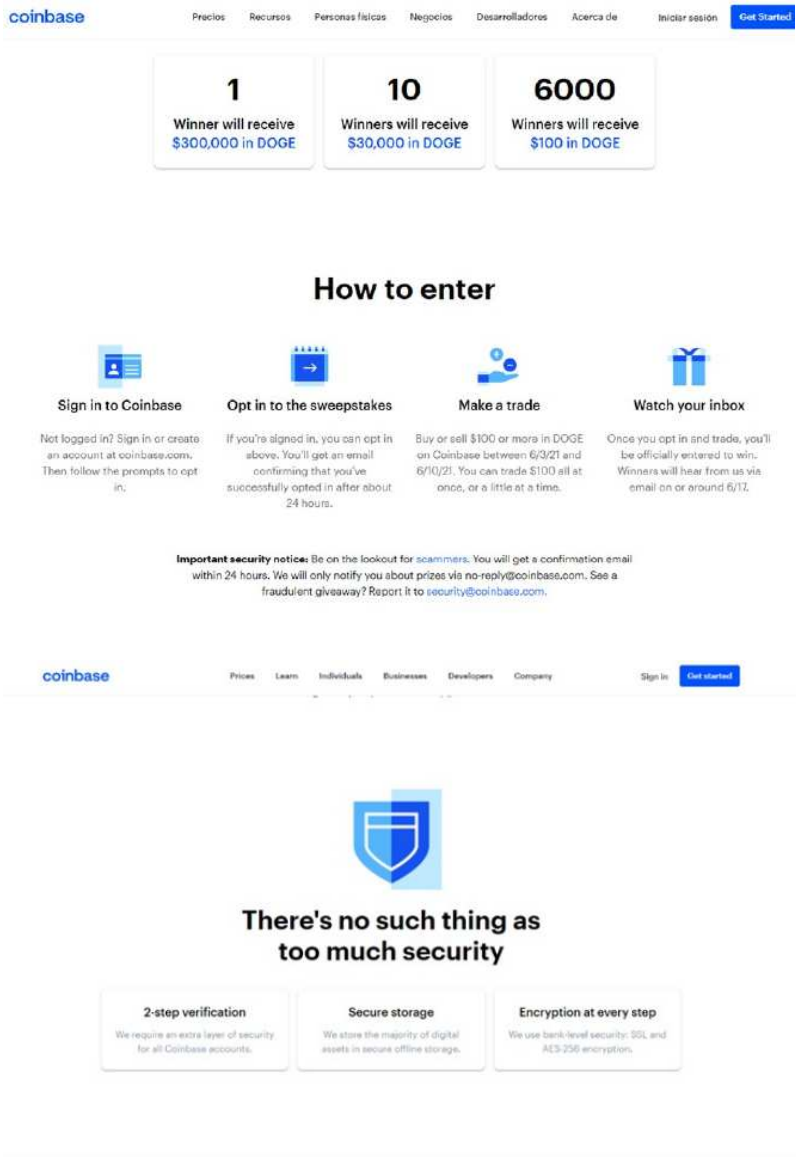
Only upon scrolling down to the bottom of this email would recipients see Defendants' "NO PURCHASE NECESSARY" statement in fine, gray-colored print.

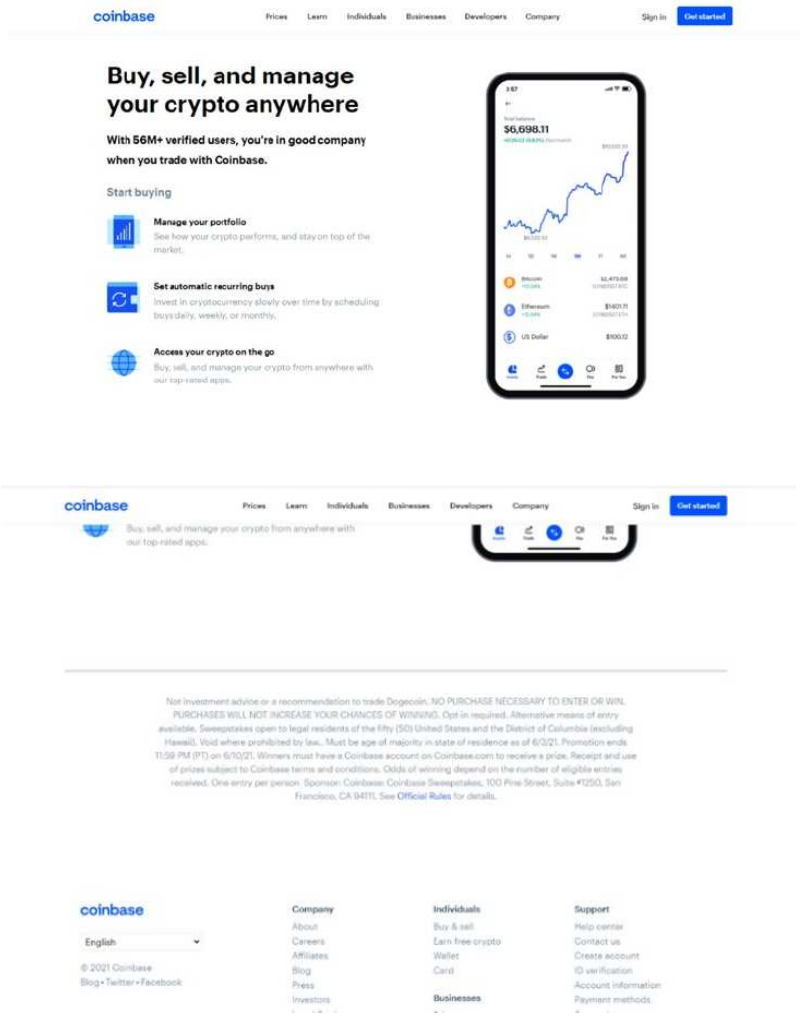


This was not a "conspicuous" statement of the "no-purchase-or-payment-necessary message" on (or near) Defendants' "entry-order device"—as required by § 17539.15(b)—because users' eyes might not even *see* Defendants' fine print *at all* before clicking "See how to enter," and thereby being taken immediately to a separate webpage (or mobile app screen) containing Defendants' "Opt in" and "Make a trade" buttons.

67. Similarly, Defendants buried the same faint, fine-print text at the bottom of their "Opt in" and "Make a trade" webpages and mobile screens, requiring users to scroll down several pages to see the above text at all. Below is the sequence of screen-pages that users would see, *if* they scrolled to the bottom of the page before clicking Defendants' "Opt in" and "Make a trade" buttons.




coinbase
Precios
Recursos
Personas físicas
Negocios
Desarrolladores
Acerca de
Iniciar sesión
Get Started
1
Winner will receive
$300,000 in DOGE
10
Winners will receive
$30,000 in DOGE
6000
Winners will receive
$100 in DOGE
How to enter
Sign in to Coinbase
Not logged in? Sign in or create an account at coinbase.com. Then follow the prompts to opt in.
Opt in to the sweepstakes
If you're signed in, you can opt in above. You'll get an email confirming that you've successfully opted in after about 24 hours.
Make a trade
Buy or sell $100 or more in DOGE on Coinbase between 6/3/21 and 6/10/21. You can trade $100 all at once, or a little at a time.
Watch your inbox
Once you opt in and trade, you'll be officially entered to win. Winners will hear from us via email on or around 6/17.
Important security notice: Be on the lookout for scammers. You will get a confirmation email within 24 hours. We will only notify you about prizes via no-reply@coinbase.com. See a fraudulent giveaway? Report it to security@coinbase.com.
coinbase
Prices
Learn
Individuals
Businesses
Developers
Company
Sign in
Get started
There's no such thing as too much security
2-step verification
We require an extra layer of security for all Coinbase accounts.
Secure storage
We store the majority of digital assets in secure offline storage.
Encryption at every step
We use bank-level security: SSL and AES-256 encryption.



This was by no means a "conspicuous" statement of the "no-purchase-or-payment- necessary message" on (or near) Defendants' "entry-order device," as required by § 17539.15(b). Many users' eyes would not see this fine print, at the bottom of a multi-page site, before clicking the large, blue "Opt in" and "Make a trade" buttons at the very top of the website or mobile-app screen.

68. Upon clicking Defendants' prominent "Make a trade" button, users were rerouted directly to Coinbase's trading platform, which contained no sweepstakes-related disclosures at all.

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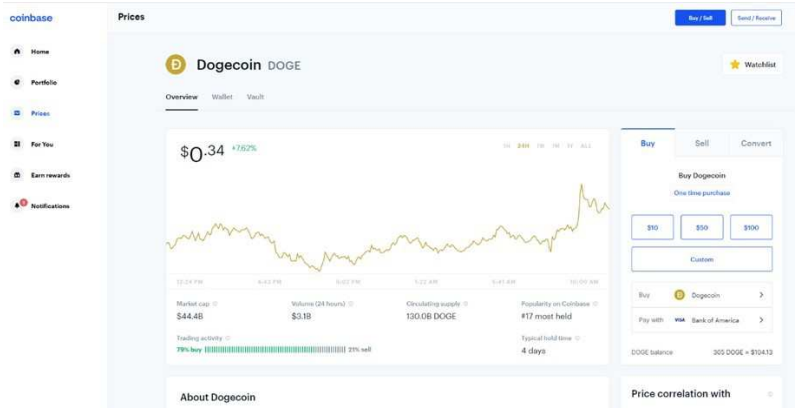

Defendants' above-pictured trading interface also constituted an "entry-order device," as each Class member *completed* their sweepstakes "entry" by executing a purchase or sale "order" on this interface. Yet this crypto trading interface (this "entry-order device") did not contain any "no- purchase-or-payment-necessary message," let alone a "clear and conspicuous" one. Cal. Bus. & Prof. Code § 17539.15(b).

69. ***Second***, Defendants' faintly colored, fine-print disclaimer was not stated "clear[ly" or in "readily

understandable terms" when read within the context of Defendants' more prominent statements in their sweepstakes ads. Defendants' "NO PURCHASE NECESSARY" statement was at best *ambiguous* when read in context, and could be reasonably understood as *consistent* with Defendants' more prominent misstatements in their sweepstakes ads.

> 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.

70. Specifically, Defendants' direct-to-user email ads 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.

Similarly, Defendants' webpage and mobile app screens prominently stated the following, right above the big, blue "Opt in" in button:

> 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.

Thus, Defendants' most prominent text made clear that either a DOGE purchase ***or*** sale on Coinbase would suffice for entry into the sweepstakes. So when Defendants' faint, fine-print disclaimer at the bottom of each page said "NO PURCHASE NECESSARY"—and that "PURCHASES WILL NOT INCREASE YOUR CHANCES OF WINNING"—readers could reasonably understand that statement to be consistent with Defendants' more prominent entry instructions, which made clear that a DOGE ***sale*** transaction of $100 or more would suffice for entry. The same is true of Defendants' fine-print disclaimer that "[a]lternative means of entry [were] available." In context, reasonable recipients (who were fortunate enough to even *see* this fine print at the bottom of Defendants' solicitation materials) could fairly understand the "[a]lternative means of entry" to be exactly what Defendants' had advertised more prominently: (a) buy $100 or more in DOGE; or, "alternative[ly]," (b) sell $100 or more in DOGE. There was simply nothing in the text of Defendants' faint, fine-print disclaimer that clearly corrected Defendants' main

assertion: namely, that users must "Trade DOGE" (*i.e.,* either buy *or* sell DOGE) for a chance to win.

71. Defendants' fine-print disclaimer was particularly "[un]clear" regarding any free entry option, when read in conjunction with the *large*-print statement directly above Defendants' big "Make a trade" button.

> You're one step closer to winning. 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*.

Defendants conspicuously stated that a Dogecoin purchase or sale *was* necessary to enter "for a chance to win." So when Defendants later said only that no "*purchase*" was "necessary," reasonable readers could well understand that disclaimer to be *consistent with* Defendants' (false) statement that a Dogecoin purchase *or* sale was necessary to enter. Obviously, no purchase transaction is necessary if—as Defendants had already highlighted—a sale transaction suffices.

72. In sum, Defendants' "NO PURCHASE NECESSARY" statement was not only designed and placed *inconspicuously* away from Defendants' "entry-order device[s]," but in addition, Defendants' "NO PURCHASE NECESSARY" statement was *unclearly* worded and *not* "readily understandable," when read in the context of Defendants' more prominent instructions and misstatements regarding sweepstakes entry. Cal. Bus. & Prof. Code § 17539.15(b). Nothing in Defendants' fine-print disclaimer clearly or objectively corrected the false and misleading nature of the most prominent, material misstatements and omissions in Defendants' sweepstakes solicitations.

73. ***Third,*** the "NO PURCHASE NECESSARY" statement in Defendants' sweepstakes solicitations was not "substantially similar" to the statement required by statute. The "no-purchase- *or-payment*-necessary message" required by § 17539.15 "means the following statement or a statement substantially similar to the following statement: 'No purchase *or payment of any kind* is necessary to enter or win this sweepstakes.'" Cal. Bus. & Prof. Code § 17539.15(k)(1). By contrast, the "NO PURCHASE NECESSARY" statement at the bottom of Defendants' sweepstakes ads left open the possibility that payments of some kind, other than DOGE purchases might be necessary to enter: such as the "payment" of *a transaction fee* to Coinbase for *selling* $100 or more worth of Dogecoins.

74. Defendants omitted the required "payment of any kind" language from their "NO PURCHASE NECESSARY" message to avoid contradicting their more prominent assertions to users that trading Dogecoins (and paying Coinbase's customary transaction fees) was necessary for entry.[7]

75. ***Fourth,*** Defendants' fine-print disclaimer expressly stated *"Opt-in required,"* while presenting users with a big, bright *"Opt in"* button on the entry webpage and mobile app screen. This was materially false and misleading, as it created a reasonable

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[7] Defendants did include the required "payment of any kind" language in their "official rules," but because those official rules did not "appear" on Defendants' "[s]olicitation materials containing sweepstakes entry materials," Defendants were also required to include the "payment of any kind" language "on the entry-order device included in those solicitation materials." Cal. Bus. & Prof. Code § 17539.15(b). Defendants failed to do so.

impression that clicking Defendants' conspicuous *"Opt in"* button was "required" for entry. But in fact, clicking Defendants' "Opt in" button was *not* necessary for entry.

76. Instead, mailing in a 3x5 index card with one's name, contact information, and birthdate on it would suffice for entry. Defendants' "Opt in required" disclaimer was thus affirmatively misleading when read within the context of the entire solicitation email, webpage, and mobile app screen.

77. Moreover, upon (unnecessarily) clicking the "Opt-in" button, that button would transform into a big, bright "Make a trade" button topped off with the following large-font text: "Remember, you'll still need to buy or sell $100 in Dogecoin on Coinbase by 6/10/2021 for a chance to win." This statement was flatly untrue.

78. Defendants' ambiguous, fine-print disclaimer at the very bottom of their "entry-order device[s]" (*i.e.,* the emails, webpages and mobile app screens containing the "See how to enter," "Opt in," and "Make a trade" buttons) was not just legally insufficient under § 17539.15(b). It was also affirmatively false and materially misleading, when read in the full context of Defendants' solicitation materials.

No Arbitration Or Class Action Waiver

79. Pursuant to Coinbase's "Official Rules" for its Dogecoin Sweepstakes, "[p]articipation [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." *See* Ex. A, Official Rules, ¶1, *available at* https://www.coinbase.com/sweepstakes-doge-terms

(last visited Jun. 11, 2021). The Official Rules further provide that "THE CALIFORNIA COURTS (STATE AND FEDERAL) SHALL HAVE SOLE JURISDICTION OF ANY CONTROVERSIES REGARDING THE PROMOTION AND THE 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. Although the same paragraph provides that "[c]laims may not be resolved through any form of class action," *id.*, such class action waivers are *unconscionable and unenforceable* as a matter of California law (in the absence of an agreement to arbitrate), where, as here, a class action waiver "is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that a party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party from responsibility for its own fraud, or willful injury to the person or property of another. Under these circumstances, such waivers are unconscionable under California law and should not be enforced." *Discover Bank v. Superior Court*, 36 Cal.4th 148, 162-63 (2005), *abrogated on other grounds by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (internal citations omitted).

CLASS ACTION ALLEGATIONS

80. Plaintiffs bring this action as a class action pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3) on behalf of themselves and all other 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, inclusive. Excluded from the Class are Defendants, the officers and directors of Defendants at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which either Defendant has or had a controlling interest.

81. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiffs at this time, and can be ascertained only through appropriate discovery, Plaintiffs believe that there are millions of members of the proposed Class. Members of the Class may be identified and located from database records maintained by Defendants, and may be notified of the pendency of this action by electronic mail and/or regular mail, using the form of notice similar to that customarily used in class actions.

82. Plaintiffs' claims are typical of other Class members' claims, as all members of the Class are similarly affected by Defendants' wrongful conduct in violation of law, as complained of herein.

83. Plaintiffs will fairly and adequately protect the interests of Class members and have retained counsel competent and experienced in class action litigation. Plaintiffs have no interests antagonistic to or in conflict with those of the Class.

84. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

a. whether Defendants' uniform, digital advertising campaign for the June 2021 DOGE sweepstakes was materially false, deceptive, and misleading when disseminated to Plaintiffs and the Class;

b. whether Defendants' June 2021 Dogecoin "sweepstakes" in fact constituted an unlawful "lottery" within the meaning of California Penal Code § 320;

c. whether Defendants violated Cal. Bus. & Prof. Code § 17539.15 by, *inter alia*, failing to make the required "clear and conspicuous statement[s]" of the "no-purchase-or-payment-necessary message";

d. whether Defendants, individually and together, violated California's False Advertising Law, by designing, drafting, creating, analyzing, and presenting to Class members a uniform advertising campaign that was materially false, deceptive, and misleading when disseminated to Class members;

e. whether Defendants violated the unlawful or unfair prongs of California's Unfair Competition Law when they designed, drafted analyzed and presented to Class members a uniform digital advertising campaign that was materially false, deceptive, and misleading when disseminated to Class members;

f. whether Plaintiffs and the Class suffered harm as a result of Defendants' conduct, and the forms of judicial relief to which Class members are entitled, including, but not limited to, public and permanent injunctive relief, restitution of the money Class members

paid to Coinbase, and disgorgement of Defendants' ill-gotten gains; and

g. whether Plaintiffs and the Class are entitled to reasonable attorneys' fees and expenses as a result of Defendants' wrongful conduct as set forth herein.

85. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy, as the joinder of all members is impracticable. Furthermore, because the financial harm suffered by individual Class members may be relatively small, the expense and burden of individual litigation would make it difficult if not impossible for members of the Class to redress the wrongs done to them on an individual basis. There will likely be no substantial difficulty in the management of this case as a class action.

FIRST CAUSE OF ACTION

Violations of Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* – Unlawful Business Acts and Practices (Unlawful Lottery)

86. Plaintiffs hereby incorporate by reference the allegations contained in all other paragraphs of this Complaint.

87. California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* ("UCL"), prohibits "unfair competition," meaning "any unlawful, unfair or fraudulent business act or practice."

88. California Penal Code § 320 provides that "[e]very person who contrives, prepares, sets up, proposes, or draws any lottery" is guilty of a misdemeanor. Defendant Coinbase committed an "unlawful" business act or practice by "contriv[ing], prepar[ing], set[ting] up," and "propos[ing]" and

conducting an unlawful "lottery" within the meaning of Cal. Penal Code § 320, when it contrived, prepared, set up, broadly advertised, and then ultimately conducted its $1.2 million Dogecoin "sweepstakes" in June 2021. Defendant MKI likewise committed an "unlawful" business act or practice by "contriv[ing], prepar[ing], set[ting] up, propos[ing]," and randomly "draw[ing]" the winners of an unlawful "lottery" at its offices in Syosset, NY on or about June 17, 2021, within the meaning of Cal. Penal Code § 320, as it contrived, prepared, set up, and ultimately administered, and randomly drew the winners of, Defendants' $1.2 million Dogecoin "sweepstakes."

89. The elements of a "lottery" are: (i) consideration given by an entrant; (ii) in exchange for a chance; (iii) to win a prize. *See, e.g., Trinkle v. California State Lottery*, 105 Cal.App.4th 1401, 1406 (Cal. Ct. App. 2003). Defendants' Dogecoin "sweepstakes" solicitations sent to Plaintiffs and the Class affirmatively represented that consideration (in the form of buying or selling Dogecoins on Coinbase for $100 or more, and paying Coinbase the attendant transactions fees) "need[ed]" to be given for Plaintiffs and other Class members to enter for a chance to win prizes of various dollar values. Relying upon Defendants' affirmative representations that paying consideration to Coinbase *was* necessary to enter—and being reasonably and subjectively unaware of the omitted truth that a free, mail-in entry option existed—Plaintiffs and other Class members in fact paid consideration to Coinbase in the forms described herein, in exchange for a chance to win one of Defendants' advertised prizes.

90. Defendants' unlawful Dogecoin "sweepstakes" was structured by Defendants to distribute the

advertised prizes by chance, within the meaning of a "lottery," as all prize winners (none of whom are Plaintiffs here) were randomly selected from among millions of eligible entrants on or about June 17, 2021. Defendant MKI, as "administrator," conducted the random prize drawings at its offices in Syosset, New York. Defendant MKI also assisted Coinbase in "contriv[ing], prepar[ing], [and] set[ting] up" the June 2021 Dogecoin "sweepstakes" by collaborating with Coinbase to draft, design and structure Defendants' digital ad campaign for the "sweepstakes," and to draft and finalize the "official rules," a copy of which is attached hereto as "Exhibit A."

91. The lottery "prizes" distributed by the Defendants to their randomly drawn winners included: (a) to one winner, a large number of Dogecoins priced at a retail value of approximately $300,000; (b) to ten other winners, a large number of Dogecoins priced at a retail value of approximately $30,000; and (c) to six thousand other "winners," a number of Dogecoins priced at a retail value of approximately $100.

92. Hence, Defendants conducted an unlawful "lottery" within the meaning of Cal. Penal Code § 320 because Defendants, by fraud, affirmatively induced Plaintiffs and the Class to pay "consideration" to Coinbase in exchange for a random "chance" to win a "prize" of some dollar value. Defendants' June 2021 Dogecoin "sweepstakes" was, in substance, an unlawful, million-dollar "lottery," which Plaintiffs and the Class unwittingly paid many millions of dollars to enter.

93. As a result of Defendants' unfair and unlawful conduct as described herein, Plaintiffs and the Class have lost money and property by purchasing and/or

selling Dogecoins for $100 more on coinbase.com, and by paying the attendant transaction fees to Coinbase, between June 3, 2021 and June 10, 2021. Plaintiffs, on behalf of themselves and the Class, and as appropriate, on behalf of the general public, seek permanent injunctive relief prohibiting Defendants from continuing such wrongful practices, and such other equitable relief, including full restitution of all monetary payments that Class members made in consideration of their entries into Defendants' June 2021 DOGE "sweepstakes," and of all other ill-gotten gains derived from Defendants' wrongful conduct to the fullest extent permitted by law.

SECOND CAUSE OF ACTION[8]

Violations of Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* – Unlawful Business Acts and Practices (Violations of Cal. Bus. & Prof. Code § 17539.15)

94. Plaintiffs hereby incorporate by reference the allegations contained in all other paragraphs of this Complaint.

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[8] Plaintiffs hereby plead this, their Second Cause of Action, in the alternative to their First Cause of Action, in case the Court (or a jury) ultimately finds that Defendants' June 2021 Dogecoin sweepstakes did *not* constitute a "lottery" within the meaning of Cal. Penal Code § 320. Plaintiffs' First Cause of Action and Second Cause of Action are pled in the alternative because, as a matter of California statutory law, the definitions of the terms "lottery" and "sweepstakes" are mutually exclusive. Cal. Bus. & Prof. Code § 17539.5(a)(12) ("'Sweepstakes' means any procedure for the distribution of anything of value by lot or chance *that is not unlawful under other provisions of law including, but not limited to, the provisions of Section 320 of the Penal Code*.") (emphasis added).

95. California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* ("UCL"), prohibits "unfair competition," meaning "any unlawful, unfair or fraudulent business act or practice."

96. Under California law, a "[s]weepstakes" is "any procedure for the distribution of anything of value by lot or chance that is not unlawful under other provisions of law including, but not limited to, the provisions of Section 320 of the Penal Code." Cal. Bus. & Prof. Code § 17539.5(a)(12); *see also* Cal. Penal Code § 320 ("Every person who contrives, prepares, sets up, proposes, or draws any lottery, is guilty of a misdemeanor."). Thus, an unlawful "lottery" is excluded from the statutory definition of a "sweepstakes."

97. If the Court or a jury in this case ultimately concludes that Defendants' June 2021 Dogecoin sweepstakes did *not* constitute a "lottery" within the meaning of Cal. Penal Code § 320, then Plaintiffs hereby allege, in the alternative, that Defendants' June 2021 Dogecoin sweepstakes constituted a "sweepstakes" within the meaning of Cal. Bus. & Prof. Code § 17539.15(b), which provides that:

> *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.

Cal. Bus. & Prof. Code § 17539.15(b) (emphasis added). Defendants' "sweepstakes" ads were

"solicitation materials" containing both "sweepstakes entry materials" and "entry-order device[s]." *Id.* The "sweepstakes entry materials" contained in Defendants' solicitations consisted of Defendants' plain-text sweepstakes entry instructions. *E.g.,* ¶¶9-12, *supra*. The "entry-order devices" contained in Defendants' solicitations consisted of Defendants' bright blue "Opt in" and "Make a trade" buttons, the webpages and mobile app screens on which those buttons appeared, and Coinbase's online crypto trading interface (to which the "Make a trade" button immediately rerouted users). *E.g.,* ¶¶65-69, *supra*.

98. The term "official rules" means "the formal printed statement, however designated, of the rules for the promotional sweepstakes appearing in the solicitation materials." Cal. Bus. & Prof. Code § 17539.15(k)(2).

99. The term "no-purchase-or-payment-necessary message" means "the following statement or a statement substantially similar to the following statement: 'No purchase or payment of any kind is necessary to enter or win this sweepstakes.'" Cal. Bus. & Prof. Code § 17539.15(k)(1).

100. Defendants Coinbase and MKI were each a "sweepstakes sponsor" within the meaning of Cal. Bus. & Prof. Code § 17539.15, as each Defendant was a "person or entity that operate[d] or administer[ed] a sweepstakes as defined in paragraph (12) of subdivision (a) of Section 17539.5." Cal. Bus. & Prof. Code § 17539.15(*l*)(2)(A).

101. The "formal printed statement" of Defendants' "official rules" did not "appear" on Defendants' sweepstakes entry "solicitation materials." Consequently, Defendants were required to include "a clear and

conspicuous statement of the no-purchase-or-payment-necessary message, in readily understandable terms," *on "the entry-order device"*: namely, on their direct-to-user emails, webpages and mobile app screens displaying the "See how to enter," "Opt in," and "Make a trade" buttons, on which Plaintiffs and each Class member clicked to enter Defendants' digital sweepstakes. Defendants failed to satisfy this statutory requirement for several, independent reasons.

102. ***First,*** the "NO PURCHASE NECESSARY" statement on Defendants' entry-order devices was *not* "substantially similar" to the statement required by statute. The "no-purchase-or-payment- necessary message" required by § 17539.15 "means the following statement or a statement substantially similar to the following statement: 'No purchase *or payment of any kind* is necessary to enter or win this sweepstakes.'" Cal. Bus. & Prof. Code § 17539.15(k)(1). By contrast, the "NO PURCHASE NECESSARY" statement at the bottom of (some of) Defendants' entry-order devices omitted the material fact that that no "payment of any kind" was necessary to enter, such as the "payment" of a transaction fee for *selling* Dogecoins on Coinbase. Defendants' unlawfully omitted the required "payment of any kind" language from their sweepstakes entry emails, webpages, and mobile app screens, for the particular purpose of concealing any truly free, sweepstakes-entry option from Plaintiffs' and the Class's eyes. *E.g.,* ¶¶74-75, *supra*.

103. ***Second***, Defendants' "NO PURCHASE NECESSARY" statement on their "entry-order devices" was not stated "clear[ly]," or in "readily understandable terms," when read within the context of

Defendants' more prominent statements in their sweepstakes solicitation materials. *E.g.,*¶¶70-73, *supra*.

104. ***Third***, Defendants' "NO PURCHASE NECESSARY" statement on their "entry-order devices" was not stated "conspicuous[ly]" on or around Defendants' solicitation materials or "entry- order device[s]." Instead, Defendants' textually inadequate statement appeared only in faint, fine print at the very bottom of Defendants' multi-page emails, webpages and mobile app screens. To view Defendants' textually inadequate statement at all, recipients would have to have scrolled down to the bottom of Defendants' entry-order webpages and mobile app screens, which did *not* require any scrolling to click Defendants' far more conspicuous "See how to enter," "Opt in," and "Make a trade" buttons. *E.g.,* ¶¶65-69, *supra*.

105. ***Fourth***, Defendants' Dogecoin trading interface also constituted an "entry-order device," as each Class member *completed* their sweepstakes "entry" by executing a Dogecoin purchase or sale "order" on this interface. Yet this crypto trading interface (this "entry-order device") did not contain any "no-purchase-or-payment-necessary message," let alone a "clear and conspicuous" message. Cal. Bus. & Prof. Code § 17539.15(b). *See* ¶69, *supra*.

106. For each of the above, independent reasons, Defendants violated Cal. Bus. & Prof. Code § 17539.15(b) by failing to include the required "clear and conspicuous statement" of the "no- purchase-or-payment-necessary message" in or on the "entry-order devices" included in their "solicitation materials containing sweepstakes entry materials." Cal. Bus. & Prof. Code

§ 17539.15(b). Defendants' failure to make the clear and conspicuous disclosures expressly required by statute caused Plaintiffs and other Class members (as well as members of the media) to remain unaware of any purchase-free, payment-free option for entering Defendants' advertised sweepstakes in June 2021.

107. As a result of Defendants' unfair and unlawful conduct as described herein, Plaintiffs and the Class have lost money and property by purchasing and/or selling Dogecoins for $100 more on coinbase.com, and by paying the attendant transaction fees to Coinbase, between June 3, 2021 and June 10, 2021. Plaintiffs, on behalf of themselves and the Class, and as appropriate, on behalf of the general public, seek permanent injunctive relief prohibiting Defendants from continuing such wrongful practices, and other equitable relief, including full restitution of all monetary payments that Class members made in consideration of their entries into Defendants' June 2021 DOGE sweepstakes, and of all other ill-gotten gains derived from Defendants' wrongful conduct to the fullest extent permitted by law.

THIRD CAUSE OF ACTION

Violation of CAL. BUS. & PROF. CODE §§ 17500, *et seq.* - Untrue, Misleading and Deceptive Advertising

108. Plaintiffs hereby incorporate by reference the allegations contained in all other paragraphs of this Complaint.

109. California Business and Professions Code, Section 17500, makes it unlawful for any person:

> to make or disseminate or cause to be made or disseminated before the public in this state, or

> to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.

110. Before and during the June 2021 Dogecoin sweepstakes alleged herein, Defendant Coinbase made and disseminated from this state to the public nationwide, over the Internet and through wireless phone networks, digital advertising devices which falsely and misleadingly asserted to consumers that entry into Defendants' Dogecoin sweepstakes was, in fact, contingent upon such consumers "opting in" online, and purchasing or selling Dogecoins for $100 more on Coinbase's digital trading platform, between June 3, 2021 and June 10, 2021, when in fact, no Dogecoin purchase or sale transaction was required for entry into Defendants' sweepstakes.

111. Likewise, before and during the June 2021 Dogecoin sweepstakes alleged herein, Defendant MKI caused such materially false and misleading advertising to be made and disseminated from this state to the public nationwide, over the Internet and through wireless phone networks. Defendant MKI caused such false and misleading advertising statements to be

made and disseminated nationwide, from California, because MKI personally created, drafted, designed and structured Defendants' digital sweepstakes ads, including but not limited to the direct-to-consumer email, website and mobile app advertisements depicted and alleged herein, with the full knowledge and intent that Coinbase would electronically disseminate MKI's false and misleading ads to members of the public nationwide.

112. Defendants' advertisements of their June 2021 DOGE Sweepstakes affirmatively misrepresented, concealed and omitted the material truth regarding the requirements for sweepstakes entry. Defendants' advertisements were made to consumers and emanated from Coinbase's primary offices within the State of California, to millions of consumers within the State of California and nationally or internationally, and are within the meaning of advertising as provided in Cal. Bus. & Prof. Code §§ 17500, *et seq*., in that such promotional materials were intended as inducements to purchase products and services on Coinbase.com and are statements made and disseminated by Defendants, and caused by Defendants to be made and disseminated, to Plaintiffs and other members of the Class. Each Defendant knew, or in the exercise of reasonable care should have known, that their advertising statements about their June 2021 DOGE Sweepstakes would be and were false, misleading, confusing, and deceptive to a substantial segment if not the vast majority of layperson- consumers.

113. In furtherance of Defendants' false and misleading advertising scheme, Coinbase and MKI, individually and in collaboration, designed, created, prepared, structured, tested, reviewed, analyzed and

disseminated via the Internet digital advertisements misleadingly suggesting, and overtly and falsely stating, that their June 2021 DOGE Sweepstakes in fact *required* entrants to purchase or sell Dogecoins for $100 more on Coinbase, between June 3, 2021 and June 10, 2021. Defendants also materially falsified their digital sweepstakes ads and misled consumers by representing that sweepstakes entrants had to buy or sell *"$100 in DOGE"* or *"$100 in Dogecoin,"* when in fact consumer purchases or sales of marginally less than "$100 in Dogecoin" would have sufficed for entry. *See* ¶¶41-49, *supra*. Consumers, including Plaintiffs and members of the Class, reasonably relied on Defendants' multiple, material misstatements regarding their sweepstakes entry requirements because all members of the Class were demonstrably exposed to such statements. Consumers, including Plaintiffs and members of the Class, were among the specifically intended targets of Defendants' material misrepresentations.

114. Defendants' above acts—in designing, creating, preparing, structuring, testing, reviewing, analyzing and disseminating via the Internet such misleading and deceptive statements throughout the United States to Plaintiffs and the Class—were demonstrably likely to deceive, mislead, and confuse, and did deceive, mislead and confuse, reasonable consumers by obfuscating the true requirements (and non-requirements) for entry into Defendants' Dogecoin sweepstakes, and thus were violations of Cal. Bus. & Prof. Code §§ 17500, *et seq*.

115. Defendants' materially false and misleading sweepstakes advertising devices caused Plaintiffs and other members of the Class to suffer personal

financial injuries, in the form of paying Coinbase hundreds of millions of dollars in purchases and commissions that they would not otherwise have spent to enter the sweepstakes. Had Plaintiffs and members of the Class known that Defendants' solicitation materials, advertisements and inducements misrepresented, obfuscated and concealed the true entry requirements for Defendants' sweepstakes, they would not have purchased or sold Dogecoins for $100 or more on Coinbase's trading platform between June 3, 2021 and June 10, 2021 (inclusive).

116. Plaintiffs, on behalf of themselves and the Class, seek permanent injunctive relief prohibiting Defendants from continuing such wrongful practices, and such other equitable relief, including full restitution of all payments Class members made to Coinbase to facilitate their entries into the June 2021 DOGE sweepstakes, and disgorgement of all other ill-gotten gains derived from Defendants' wrongful conduct to the fullest extent permitted by law.

FOURTH CAUSE OF ACTION

Violations of Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* – Unlawful Business Acts and Practices (False Advertising)

117. Plaintiffs hereby incorporate by reference the allegations contained in all other paragraphs of this complaint, as if fully set forth herein.

118. As a result of Defendants' unfair and unlawful conduct as described herein, Plaintiffs and the Class have lost money and property by purchasing and/or selling Dogecoins for $100 or more and paying the attendant purchase and sale transaction fees on Coinbase between June 3, 2021 and June 10, 2021, when

in fact no Dogecoin purchase or sale transactions were required for entry into Defendants' sweepstakes.

119. As a result of Defendants' above unlawful acts and practices of false and misleading advertising detailed herein, Plaintiffs, on behalf of themselves and the Class, and as appropriate, on behalf of the general public, seek permanent injunctive relief prohibiting Defendants from continuing such wrongful practices, and such other equitable relief, including full restitution of all payments Class members made to Coinbase to facilitate their entries into the June 2021 DOGE Sweepstakes, and of all other ill-gotten gains derived from Defendants' wrongful conduct to the fullest extent permitted by law.

FIFTH CAUSE OF ACTION

Violations of Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* – Unfair Business Acts and Practices

120. Plaintiffs hereby incorporate by reference the allegations contained in all other paragraphs of this complaint, as if fully set forth herein.

121. Defendants' actions alleged herein violate the laws and public policies of California, as set out in the preceding paragraphs of this complaint.

122. There is no benefit to consumers, competition or the general public from allowing Defendants to deceptively market and sell million-dollar "sweepstakes" (really, "lottery") entries to millions of consumers, in violation of California law, and under the false guise of executing a cryptocurrency sales "promotion."

123. The gravity of harm suffered by Plaintiffs and the Class, who have unnecessarily lost hundreds of millions of dollars collectively, outweighs any

legitimate justification, motive or reason for Defendants' deceptive sweepstakes marketing. Accordingly, Defendants' actions are immoral, unethical, unscrupulous and offend the public policies of California, and are substantially injurious to Plaintiffs and the Class.

124. Defendants' above acts and practices were and are likely to deceive—and in fact, did deceive—reasonable consumers as to the true requirements for entering Defendants' $1.2 million Dogecoin sweepstakes, and further, were likely to conceal and did conceal from reasonable consumers the true options and requirements for sweepstakes entry.

125. As a result of Defendants' unfair and unlawful conduct as described herein, Plaintiffs and the Class have lost money and property by purchasing and/or selling Dogecoins for $100 more and paying the attendant transaction fees on Coinbase, between June 3, 2021 and June 10, 2021, when in fact no Dogecoin purchase or sale transactions were required for entry into Defendants' sweepstakes.

126. Plaintiffs, on behalf of themselves and all others similarly situated, and as appropriate, on behalf of the general public, seek permanent injunctive relief prohibiting Defendants from continuing their wrongful advertising practices, and such other equitable relief, including full restitution of all payments Class members made to Coinbase to facilitate their entries into the June 2021 DOGE sweepstakes, and of all other ill-gotten gains derived from Defendants' wrongful conduct to the fullest extent permitted by law.

SIXTH CAUSE OF ACTION

Violation of Cal. Civ. Code §§ 1750, *et seq.* – (Misrepresenting That a "Transaction" Involves Certain "Obligations")

127. Plaintiffs hereby incorporate by reference the allegations contained in all other paragraphs of this complaint, as if fully set forth herein.

128. California's Consumer Legal Remedies Act, Cal. ("CLRA") provides that "[t]he following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer are unlawful: . . . (14) [r]epresenting that a transaction confers or involves rights, remedies, or *obligations* that it does not have or involve, or that are prohibited by law." Cal Civ. Code § 1770(a)(14).

129. Plaintiffs' and the Class's entries into Defendants' June 2021 Dogecoin sweepstakes constituted "transactions" which Defendants "intended to result," and which did result, in the sale of goods and services to consumers ("goods" in the form of Dogecoins, and "services" in the form of cryptocurrency trade-execution, for a fee). As detailed throughout this complaint, Defendants' June 2021 Dogecoin sweepstakes solicitations—including, but not limited to, Defendants' direct-to-user email, website, and mobile app advertisements—affirmatively "represent[ed] that" Plaintiffs' and the Class's sweepstakes entries "involved" and "conferred" on all entrants the "obligation" to buy or sell "$100 in DOGE" on Coinbase's trading platform between June 3 and June 10, 2021, when in fact, entry into Defendants' DOGE sweepstakes did *not* involve or confer that "obligation" on any Class member,

because Defendants in fact made available an alternative, *free* mail-in option for entering their sweepstakes. In representing to Plaintiffs and the Class that they "need[ed]" to trade Dogecoins on Coinbase to enter for a chance to win one of Defendants' sweepstakes prizes, Defendants affirmatively misrepresented the "obligations" involved in Class members' sweepstakes entry transactions, in violation of Cal Civ. Code § 1770(a)(14).

130. In addition, Defendants' affirmative misrepresentation to Plaintiffs and the Class that they "need[ed] to" buy or sell Dogecoins on Coinbase—and pay Coinbase's attendant trading commissions—constituted an affirmative representation to Plaintiffs and the Class that they were obligated to pay *consideration* to Coinbase for a *chance* to win a *prize*. In making that representation to Plaintiffs and the Class, Defendants represented that a "transaction" (Plaintiffs' and the Class's entries) involved and conferred on all Class members an "obligation" that was and remains "prohibited by law" (*i.e.,* an "obligation" to pay consideration, in exchange for a chance, to win a prize). *See* Cal. Penal Code § 320 (providing that "[e]very person who contrives, prepares, sets up, proposes, or draws any lottery" is guilty of a misdemeanor); *see also Trinkle v. California State Lottery*, 105 Cal.App.4th 1401, 1406 (Cal. Ct. App. 2003) (explaining that the elements of an unlawful "lottery" are (i) consideration given by an entrant; (ii) in exchange for a chance; (iii) to win a prize). Thus, Defendants independently violated Cal Civ. Code § 1770(a)(14) in this second way.

131. Moreover, Defendants' affirmatively misrepresented that sweepstakes entrants had an "obligation" to buy or sell *"$100 in DOGE"* or *"$100 in Dogecoin*,"

when in fact, the truth was that consumer purchases or sales of marginally *less than* "$100 in Dogecoin" would have sufficed for entry. *See* ¶¶41-49, *supra*. Defendants thus independently violated Cal Civ. Code § 1770(a)(14) in a third way, as they misrepresented the *dollar value* of DOGE trades that Class members were (purportedly) "obligat[ed]" to make in exchange for their sweepstakes entries.

132. Plaintiffs and members of the Class reasonably relied on Defendants' multiple, material misstatements regarding their sweepstakes entry "obligations," as all members of the Class were demonstrably exposed to such statements, and each paid $100 or more to Coinbase as a direct result of Defendants misrepresentations, which were prohibited by Cal Civ. Code § 1770(a)(14) in several respects.

133. On account of Defendants' unlawful acts and misrepresentations detailed herein, Plaintiffs, on behalf of themselves and the Class, and as appropriate, on behalf of the general public, seek permanent injunctive relief prohibiting Defendants from continuing such wrongful practices, and such other equitable relief, including full restitution of all payments Class members made to Coinbase to facilitate their entries into Defendants' June 2021 DOGE Sweepstakes, and disgorgement of all other ill-gotten gains derived from Defendants' wrongful conduct to the fullest extent permitted by law.

134. At the time that Plaintiffs filed their First Amended Class Action Complaint (Dkt. 22) ("FAC"), Plaintiffs and the Class expressly declined to "seek their actual damages at law for violations of Cal Civ. Code § 1770(a)(14), [and] instead, reserve[d] their statutory rights to amend [the FAC] to include a

request for damages and other relief at law after complying with Cal. Civ. Code § 1782(a)." Dkt. 22, ¶134.

135. On or about September 12, 2021, Plaintiffs provided Defendants with notices of their alleged, respective violations of the CLRA pursuant to California Civil Code § 1782(a) via certified mail, demanding that Defendants correct such violations.

136. On or about October 12, 2021, Defendants provided Plaintiffs with responsive letters, denying that Defendants violated the CLRA or any other law, and declining to undertake any of the corrective actions demanded by Plaintiffs. In light of Defendants' respective refusals to take any corrective action in response to Plaintiffs' demand letters, Plaintiffs and the putative Class hereby seek all available damages under the CLRA for all violations complained of herein, including, but not limited to, their actual damages, punitive damages, attorneys' fees and costs, as well as injunctive and any other equitable relief that the Court may deem proper.

SEVENTH CAUSE OF ACTION

Violations of Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* – Unlawful Business Acts and Practices (Violations of Cal Civ. Code § 1770(a)(14))

137. Plaintiffs hereby incorporate by reference the allegations contained in all other paragraphs of this complaint, as if fully set forth herein.

138. As a result of Defendants' unfair and unlawful conduct as described herein, Plaintiffs and the Class have lost money and property by purchasing and/or selling Dogecoins for $100 or more and paying the attendant purchase and sale transaction fees on

Coinbase between June 3, 2021 and June 10, 2021, when in fact no Dogecoin purchase or sale transactions were required for entry into Defendants' sweepstakes.

139. As a result of Defendants' above unlawful acts and practices in violation of Cal. Civ. Code § 1770(a)(14), Plaintiffs, on behalf of themselves and the Class, and as appropriate, on behalf of the general public, seek permanent injunctive relief prohibiting Defendants from continuing such wrongful practices, and such other equitable relief, including full restitution of all payments Class members made to Coinbase to facilitate their entries into the June 2021 DOGE Sweepstakes, and of all other ill-gotten gains derived from Defendants' wrongful conduct to the fullest extent permitted by law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment against Defendants as follows:

A. Determining that the instant action may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, and certifying Plaintiffs as Class Representatives, and the law firm of Finkelstein & Krinsk LLP as Class Counsel;

B. Requiring Defendants to pay the actual damages sustained by Plaintiffs and the Class by reason of the acts and transactions alleged herein, plus punitive damages;

C. For an order of restitution necessary to restore to Plaintiffs and each Class member all money and personal property that Defendants have acquired from Plaintiffs and the Class by means of Defendants' unlawful conduct as described herein, and an order for

the disgorgement of all of Defendants' ill-gotten gains from the unlawful conduct alleged herein;

D. For an order permanently and publicly enjoining Defendants from continuing to engage in the unlawful and unfair business acts and practices alleged herein;

E. Ordering Defendants to pay Plaintiffs' and the Class's reasonable attorneys' fees, expert fees, and other costs and expenses of this litigation; and

F. Ordering such other equitable relief as this Court may deem just and proper.

JURY DEMAND

Plaintiffs hereby demand a trial by jury.

Dated: October 19, 2021 Respectfully submitted,

FINKELSTEIN & KRINSK LLP

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID SUSKI, JAIMEE MARTIN, JONAS CALSBEEK, and THOMAS MAHER, Individually and On Behalf of All Others Similarly Situated,

Plaintiffs,

v.

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

Defendants.

Case No.: 3:21-cv-04539-SK

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO COINBASE'S MOTION TO COMPEL ARBITRATION AND TO DISMISS

423
Hearing: January 10, 2022
Time: 9:30 a.m.
Courtroom: C

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I. INTRODUCTION

In hindsight, Defendant Coinbase, Inc. ("Coinbase") regrets its own contractual decisions. In June 2021, Coinbase contractually required all "Entrants" in its Dogecoin Sweepstakes to bring their Sweepstakes-related "controversies" before a court like this one. Dkt. 22-1, ¶10. Plaintiffs, being Sweepstakes "Entrants," did just that. Dkt. 1; Dkt. 36. Coinbase now wishes that it had not required Plaintiffs to adhere to its Sweepstakes terms and conditions.

Congress did not enact the Federal Arbitration Act ("FAA") to save corporations from regretting their own adhesive contracts. The FAA requires courts to enforce private agreements to arbitrate. 9 U.S.C. § 2. It does not, however, require or even permit courts to ignore private agreements to litigate. *Id.* Originally, the parties' User Agreement required the arbitration of all disputes. Later, the parties' "Official Rules" agreement required the litigation of all Sweepstakes-related disputes. There is only one way to interpret these agreements together; the parties historically agreed to arbitrate all disputes, but in June 2021, agreed to litigate all Sweepstakes-related disputes and to arbitrate all other disputes. The Court cannot grant Coinbase's motion to compel arbitration, without ignoring the plain language of the parties' Sweepstakes agreements, which Coinbase itself drafted and insisted upon as a condition of conducting the Sweepstakes.

On the merits, Coinbase argues that its Dogecoin Sweepstakes complied with California's lottery statutes, sweepstakes statutes, and other consumer protection statutes. Coinbase argues that its Sweepstakes was not a "lottery" because its ads linked to a

webpage showing a free, alternative method of entry (or "FAME"). Coinbase contends that, as a matter of law, the consideration element of a "lottery" is necessarily lacking so long as entrants can *somehow* obtain a free chance to win. California lottery law is not that simple. No court has addressed the precise lottery question presented here: namely, whether a defendant can evade California's lottery statutes by expressly advertising that consideration is required for entry, while technically permitting a free method of entry. Coinbase told Plaintiffs and the Class here that they would "need to" trade Dogecoins on Coinbase to obtain a chance to win prizes. Consequently, Plaintiffs and the Class traded Dogecoins on Coinbase to obtain a chance to win prizes. That is "consideration," and therefore an unlawful lottery, plain as day. No court has held otherwise in a comparable case.

Even if the Court or a jury ultimately deems this "Sweepstakes" to be a non-lottery, Coinbase's Sweepstakes was still unlawfully conducted for lack of the clear and conspicuous disclosures required by California law. Coinbase maintains that it complied with California's sweepstakes law by typing the words "no purchase necessary" into the fine print of its ads. Yet Coinbase fails to address Plaintiffs' detailed allegations that its "no purchase necessary" disclosure was neither clearly nor conspicuously stated on *any* "entry-order device." Cal. Bus. & Prof. Code § 17539.15(b). Coinbase's only response to Plaintiffs' allegations under § 17539.15(b) is that such allegations are "not credible." Dkt. 33 at 19. That is not a defense at the motion to dismiss stage.

Coinbase also says that its Sweepstakes ads were not false or misleading because any reasonable

consumer would have learned the truth by reading the "no purchase necessary" statement at the bottom of its ads. Yet Coinbase's motion fails to address Plaintiffs' allegations that the "no purchase necessary" statement was *itself* misleading, and failed to objectively correct the more prominent misstatements in Coinbase's ads. Both the large print and the fine print of Coinbase's ads were false and misleading, so those ads were most certainly false and misleading.

For the reasons summarized above, and the reasons detailed below, the Court should deny Coinbase's self-contradicting motion to compel or to dismiss. Dkt. 33.

II. STATEMENT OF FACTS

A. Merits-Related Facts

Coinbase is one of the largest online cryptocurrency exchanges in the world. ¶1.[1] In or about May 2021, Coinbase decided to add a cryptocurrency called "Dogecoin" (or "DOGE") to the list of cryptocurrencies it sells to users. ¶¶3-5. Coinbase opened for DOGE trading on June 3, 2021. ¶7. That same day, Coinbase launched a "Sweepstakes" promotion. *Id.* Coinbase's goals in launching DOGE trading and the Sweepstakes on the same day were: (1) to ensure that there would be enough trading activity to support a "liquid" market for DOGE on Coinbase; and (2) to maximize the trading fees that Coinbase would earn from users' DOGE transactions. ¶¶2, 6, 47.

On June 3, 2021, Coinbase emailed and otherwise directly solicited Plaintiffs and millions of Coinbase

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[1] References to ¶_ or ¶¶___ are to Plaintiffs' Second Amended Class Action Complaint (Dkt. 36) ("SAC"), unless otherwise indicated.

users to enter the Dogecoin Sweepstakes. ¶¶7-9. Coinbase's mass emailing and digital advertising displayed large, colorful graphics and language stating:

> *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.*

Id.[2] Below that text was a link to the Sweepstakes' official rules, as well as a larger and bolder action button stating, "See how to enter." *Id.* If recipients clicked the link before the button, then they were taken to Coinbase's "Official Rules" webpage; if recipients clicked the button before the link, then they were taken to another web or mobile-app page (Coinbase's "Opt in" page). ¶¶9-10.

Plaintiffs clicked the button before the link, and were thereby taken to Coinbase's "Opt-in" page. ¶¶28-39. The Opt in page contained similar, colorful graphics and text, which said:

> *Trade DOGE. Win DOGE.* 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.*

¶10. Below that text was a link labeled "*View sweepstakes rules," and then a larger and bolder action

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[2] All emphasis in quotations contained herein is added unless otherwise stated.

button stating, "Opt in." *Id.* If recipients clicked the link before the button, then they were taken to a footnote at the bottom of the page, which contained a link to the "Official Rules" page. But if they clicked the button before the link, they would see the "Opt in" page change slightly and state:

> You're one step closer to winning. 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.*

¶¶10-11. Below that text, the "*View sweepstakes rules" link would remain, and the larger, bolder "Opt in" button would digitally morph into a "Make a trade" button. *Id.*

Plaintiffs first clicked the "Opt in" button, and thus saw Coinbase's assertion that they would "need" to buy or sell "$100 in Dogecoin" on Coinbase "for a chance to win" prizes. ¶¶28-39. Because Plaintiffs believed Coinbase's assertion, they clicked the "Make a trade" button, and were thereby routed directly to Coinbase's trading platform. There, Plaintiffs made their purportedly "need[ed]" trades, before clicking any link to the Official Rules webpage. *Id.*; ¶¶12-14.

Coinbase's solicitation emails, "Opt in" pages, and "Make a trade" pages displayed false and misleading statements of fact. The solicitations reasonably suggested (and affirmatively represented) to Plaintiffs and the Class that they "need[ed] to buy or sell $100 in Dogecoin on Coinbase by 6/10/2021 for a chance to win." *Id.*; ¶15. Coinbase's emails and digital ads were false and misleading because the true facts were that: (1) mailing an index card would have sufficed for

entry; and (2) opting in and buying *less than* "$100 in DOGE" would have sufficed for entry. *Id.*; *see also* ¶¶40-48, ¶¶57-63. Those facts were (somewhat) disclosed on the Official Rules page, to which Coinbase's ads linked. ¶16; Dkt. 22-1, ¶3. Yet Coinbase designed its digital ads "with the knowledge and intent" that they would cause most users to "Opt in" and "Make a trade"—*i.e.*, spend their money—before seeing the Official Rules page. ¶¶16, 49-56.

Coinbase successfully executed its "Sweepstakes" plan. Most entrants did not see Coinbase's "Official Rules" page until after they had traded at least "$100 in Dogecoin" to enter, and paid Coinbase's associated fees. ¶¶8-14, 28-39. Plaintiffs and the Class spent and lost many millions of dollars trading at least "$100 in DOGE" on Coinbase from June 3 to June 10, 2021: because Coinbase said that they "need[ed]" to do so "for a chance to win" prizes. ¶¶17-18.

Coinbase counters Plaintiffs' falsity allegations by pointing out that, in addition to linking to the Official Rules, all of its emails, "Opt in" pages and "Make a trade" pages stated the following:

> 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. [***] 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.

¶¶64-78. Plaintiffs acknowledge that Coinbase's digital ads contained that statement. *Id.*; ¶¶101-106. Yet Plaintiffs allege this statement was: (1) not "substantially similar" to the statement required by statute; (2) neither "clear" nor "conspicuous" as required by statute; and (3) misleading when read in the full context of Coinbase's ads. *Id.* Specifically, the statement "NO PURCHASE NECESSARY," standing alone, was logically consistent with the ads' false statement that users must "buy or *sell*" $100 in Dogecoin for a chance to win. *Id.* The same was true of the statement that "[a]lternative means of entry [were] available"; the ads prominently stated that entrants had the "[a]lternative" to buy or to sell Dogecoins. *Id.* Neither of those statements, when read in context, revealed that mailing an index card to Coinbase might suffice for entry. *Id.* The statement "Opt-in required" was also misleading because clicking Coinbase's "Opt in" action button was not actually "required" for entry. *Id.* Nor did the "no purchase necessary" paragraph reveal the true fact that opting in and buying *less than* "$100 in DOGE" would suffice for entry. ¶¶40-48.[3]

B. Contract-Related Facts

Lacking any real merits defense, Coinbase has moved to compel the arbitration of Plaintiffs' claims.

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[3] Coinbase's motion to dismiss (Dkt. 33) offers no substantive response to Plaintiffs' allegations that the "NO PURCHASE NECESSARY" paragraph was unclear, inconspicuous, misleading, and not "substantially similar" to the disclosure statement required by statute. *See generally* Dkt. 33.

At various times between January 2018 and May 2021, each Plaintiff created a Coinbase account. Dkt. 33 at 2-6. Upon creating their Coinbase accounts, Plaintiffs and the Class accepted Coinbase's adhesive "User Agreements," which contained mandatory arbitration clauses. *Id.*

Later, however, Coinbase solicited Plaintiffs and the Class to enter the DOGE Sweepstakes. Dkt. 36, ¶7. The Sweepstakes solicitations offered the chance to win a prize, by "[o]pt[ing] in and then buy[ing] or sell[ing] $100 in DOGE on Coinbase by 6/10/2021." ¶8. The solicitations conspicuously indicated that "[t]erms and conditions appl[ied]," and invited users to "[s]ee" and "view" the "sweepstakes rules" and "details." ¶¶8-11. Plaintiffs and the Class accepted Coinbase's Sweepstakes offers by "[o]pt[ing] in," and "buy[ing] or sell[ing] $100 in DOGE on Coinbase by 6/10/2021." *Id.*; ¶¶28-39. Plaintiffs, however, did not view the Sweepstakes "rules," "[t]erms and conditions" until after they bought DOGE to enter, per the solicitations' entry instructions. *Id.*

The "[t]erms and conditions" and Sweepstakes "rules" referenced in the solicitations included, *inter alia*, a mandatory forum-selection clause governing "any" Sweepstakes-related "controversies." Dkt. 22-1, ¶10. Specifically, Coinbase's adhesive Sweepstakes terms emphasized as follows.

> **Disputes:** All federal, state and local laws and regulations apply. THE CALIFORNIA COURTS (STATE AND FEDERAL) SHALL HAVE SOLE JURISDICTION OF ANY CONTROVERSIES REGARDING THE

> PROMOTION[4] AND THE 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. Claims may not be resolved through any form of class action.

Id. (original emphasis). The Sweepstakes terms also conditioned Plaintiffs' and the Class's entries and potential prizes upon their compliance with ¶10. *Id.*, ¶9 ("[Coinbase] reserves the right to prohibit the participation of an individual . . . if the participant fails to comply . . . with any provision in these Official Rules."); *id.*, ¶1 ("Winning a prize is contingent upon fulfilling all requirements set forth herein."). Thus, if Plaintiffs had filed suit outside of California, or filed an arbitration demand with the AAA to resolve their Sweepstakes-related claims, then they would have violated ¶10's mandatory, exclusive jurisdiction clause and faced potential *disqualification* from the Sweepstakes.

Hence, after Plaintiffs reviewed Coinbase's adhesive "Official Rules," and learned that they were deceived into paying for entry, they complied with Official Rules ¶10 by invoking this Court's exclusive "JURISDICTION" to resolve their Sweepstakes-related "CONTROVERSIES." Dkt. 1; Dkt. 22; Dkt. 36. In response, Coinbase seeks to disavow the parties'

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[4] The word "PROMOTION" here refers to the DOGE Sweepstakes. *See* Dkt. 22-1, ¶1.

express litigation agreement, which Coinbase itself drafted and insisted upon as a condition of conducting this Sweepstakes. Not one statute or judicial decision supports Coinbase's attempt to evade its own adhesive contract.

III. THE COURT MUST DENY COINBASE'S SELF-CONTRADICTING MOTION TO COMPEL AS A MATTER OF FEDERAL AND STATE LAW

A. The "Official Rules" formed a valid and enforceable contract between the parties

Plaintiffs do not dispute the validity of their original arbitration agreements with Coinbase, as those agreements existed on "March 31, 2021." *See* Dkt. 33-9 at 1 & ¶8.3.

On the other hand, Coinbase's motion does not dispute the validity of its subsequent "Official Rules" agreements with Plaintiffs, as those agreements have existed since June 2021. *See generally* Dkt. 33. The parties' "Official Rules" agreements are just as valid and enforceable as the parties' original arbitration agreements. *Rent-A-Center*, 561 U.S. at 67 (explaining that the FAA "places arbitration agreements on an equal footing with other contracts") *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, n.12 (1967) (holding that the FAA "make[s] arbitration agreements as enforceable as other contracts, *but not more so*"). Coinbase cannot unilaterally disavow its own Sweepstakes agreements with Plaintiffs and the Class, just because Coinbase has decided—after being sued—that it no longer likes its own Sweepstakes terms.

As Coinbase points out, "[o]nline agreements are enforceable when they put a 'website user on actual or

inquiry notice of [their] terms.'" Dkt. 33 at 9 (quoting *Peter v. DoorDash, Inc.*, 445 F.Supp.3d 580, 585 (N.D. Cal. 2020)). Courts enforce online agreements "where the *existence* of the terms was reasonably communicated to the user." *Id.* Here, Plaintiffs did not read the Official Rules agreement until after they had followed Coinbase's ads and action buttons to "See how to enter," "Opt in," and "Make a trade": per the ads' entry instructions. ¶¶10, 28-36.

Nevertheless, Plaintiffs admit that they and the Class were on reasonable inquiry notice of the *existence* of the Official Rules when they entered the DOGE Sweepstakes. *DoorDash, Inc.*, 445 F.Supp.3d at 583. Coinbase's email ads contained a conspicuous statement that "Terms and conditions [would] apply" to the Sweepstakes, as well as a reasonably conspicuous hyperlink inviting users to "[s]ee all rules and details" applicable to the Sweepstakes. ¶8. The combination of those statements was sufficient to put Plaintiffs on "inquiry notice" of the "existence" of Coinbase's Sweepstakes "rules" and "[t]erms and conditions." *DoorDash, Inc.*, 445 F.Supp.3d at 583; *see also Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014) (distinguishing case where a conspicuous hyperlink to terms "was reinforced" by language prompting users to "Review terms," from cases where a conspicuous hyperlink existed, but "no [other] notice to users" of the terms appeared on the website). The combination of Coinbase's conspicuous statement that "[t]erms and conditions appl[ied]"—coupled with reasonably conspicuous hyperlinks inviting users to "[s]ee" and "[v]iew" the same (¶¶8-11)—was enough to inform reasonable consumers that they would be subject to

Coinbase's Sweepstakes "[t]erms" and "rules" once they entered to win.[5]

Notably, Coinbase's motion to compel does not dispute that the parties' "Official Rules" agreement is an enforceable contract. *See generally* Dkt. 33.[6] Moreover, much of Coinbase's motion to dismiss assumes or affirmatively asserts that reasonable consumers would have been aware not only of the *existence* of the Sweepstakes terms, but also of the specific *contents* of those terms. *Id.* at 11-12 (arguing that Plaintiffs could have "easily navigate[d] to the Official Rules" agreement); *id.* at 21 (arguing that Plaintiffs should not have been deceived about the true entry requirements because "the Official Rules clearly disclosed both methods of entry"); *id.* at 24-25 (arguing that

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[5] It was not enough, however, to inform reasonable consumers that the ads' entry instructions were *affirmatively false and misleading* as to the true entry options. *Cf. Cheslow v. Ghirardelli Chocolate Co.*, 445 F.Supp.3d 8, 20 (N.D. Cal. 2020) ("'*Williams* stands for the proposition that if the defendant commits an act of deception, the presence of fine print revealing the truth is insufficient to dispel that deception.'") (citing *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 939-40 (9th Cir. 2008)). The common law of contract formation and the statutory law of false advertising ***are not the same thing***. That is why, for example, California's CLRA prohibits misrepresenting the contractual "rights" and "obligations" involved in a "transaction." Cal. Civ. Code § 1170(a)(14). It is easy for companies to *contractually* bind consumers to various "rights" and "obligations," while also lying to consumers about what their true contractual "rights" and "obligations" actually are. *Id.*

[6] Coinbase argues only that Official Rules ¶10 was not intended to apply to DOGE-trading "Entrants" like Plaintiffs. Dkt. 33 at 11-12. That argument is a far cry from contesting the formation of the parties' Official Rules agreement as a whole.

Plaintiffs should have known the Official Rules' specific contents before entering to win). Coinbase thus concedes the formation of its Official Rules contracts with Plaintiffs and other Class members.

Even if Coinbase contends on reply that Plaintiffs and other Class members were not on "inquiry notice" of the Sweepstakes terms, such an argument should fail for three more, independent reasons. First, arguments raised for the first time on reply are waived. *Luhr v. Berryhill*, 2018 WL 1536669, at *21 (N.D. Cal. Mar. 29, 2018); *Polion v. Colvin*, 2013 WL 3527125, at n.4 & n.7 (C.D. Cal. July 10, 2013). Second, courts do not allow website owners to disclaim the formation of their own, adhesive "browsewrap" agreements with individuals that the owners clearly meant to bind. *Nguyen*, 763 F.3d 1171 at n.2 (noting that "courts have been willing to enforce [browsewrap] terms of use against corporations, but have not been willing to do so against individuals"). Third, Plaintiffs admit they were on *actual notice* of Coinbase's Sweepstakes terms, albeit not until they had already bought DOGE to enter. *See* ¶¶28-36, 79. Because of such actual notice, Plaintiffs brought their Sweepstakes-related "CONTROVERSIES" before this Court, to comply with Coinbase's Sweepstakes terms. *Id.*; Dkt. 1, ¶29 (June 11 complaint, quoting the "Official Rules" agreement).

In fact, Coinbase left Plaintiffs with no choice but to adhere to the Official Rules' forum selection clause. Under the Official Rules, an "individual['s]" failure to comply with "any provision" thereof could result in the forfeiture of their paid entries and any prizes they might have won. Dkt. 22-1, ¶1 ("Winning a prize is contingent upon fulfilling all requirements set forth

herein."); *id.*, ¶9 ("[Coinbase] reserves the right to prohibit the participation of an individual . . . if the participant fails to comply . . . with any provision in these Official Rules."). If—when this action commenced on June 11, 2021—Plaintiffs or any Class member had filed their Sweepstakes-related "CONTROVERSIES" in an arbitration forum, then they would have violated the plain language of ¶10, and thereby subjected themselves to *disqualification* from the Sweepstakes. *Id.*

For all of the above reasons, Coinbase does not and cannot dispute that its "Official Rules" for the Dogecoin Sweepstakes formed valid and enforceable contracts with Plaintiffs and the Class.

B. The Court must apply ordinary state-law principles of contract interpretation.

"The FAA reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010). It merely "places arbitration agreements on an equal footing with other contracts." *Id.* Consequently, "a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); *see also Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 302-03 (2010) ("[T]he FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties."). Sometimes, it is unclear whether contracting parties intended to submit a particular dispute to arbitration. Courts have settled rules for discerning the parties' intent, when their intent is unclear from the plain text of their contract (or contracts).

Under the FAA, ambiguities concerning the scope of an arbitration clause, as applied to a particular dispute, create a rebuttable presumption in favor of arbitration. *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 742-43 (9th Cir. 2014). In other words, ambiguities in arbitration clauses themselves give rise to a rebuttable presumption in favor of arbitration. *Id.* Importantly, however, ambiguities concerning the *existence* of an agreement to arbitrate a dispute create no presumption. *Id.* Instead, ambiguities concerning the existence of an agreement to arbitrate must be resolved by ordinary rules of contract interpretation. *Id.* (citing *Applied Energetics, Inc. v. NewOak Capital Markets, LLC*, 645 F.3d 522 (2d. Cir. 2011)). Where—as here—the interpretive question does not concern the scope of an arbitration clause itself, but rather, concerns whether a later forum-selection clause "superseded" or modified an earlier arbitration clause, the dispute is one "over the existence, rather than the scope, of the agreement to arbitrate." *Id.* Ordinary rules of contract interpretation therefore apply, and "the presumption in favor of arbitrability [does] not apply." *Id.*

In this case, there is no dispute about the scope of the parties' original arbitration agreements, as set forth in the User Agreements. Indeed, Plaintiffs concede that their instant claims *would have* fallen within the plain terms of the parties' original arbitration agreements. That is not the contractual issue here. The contractual issue here is whether the parties' more recent, more specific "Official Rules" agreement for the DOGE Sweepstakes (Dkt. 22-1) "superseded" or modified the parties' original arbitration agreements. *Id.* Therefore, the parties' contractual

dispute here concerns the existence—not the scope—of an agreement to arbitrate Plaintiffs' claims. *Id.*

In particular, Plaintiffs say that Official Rules ¶10 modified and superseded the parties' earlier, generalized arbitration agreements, by specifically and unambiguously requiring "EACH" Sweepstakes "ENTRANT" to litigate all Sweepstakes-related "CONTROVERSIES" in a federal or state court in California. ¶79; Dkt. 22-1, ¶10. Coinbase, for its part, argues that Official Rules ¶10 does not apply to "EACH ENTRANT," but instead, applies only to "ENTRANTS" who have no User Agreement with Coinbase. Dkt. 33 at 11-12. Given the parties' positions here, they disagree not about *which types of disputes* Coinbase's *arbitration agreement* originally covered, but rather, about *which types of people* Coinbase's *litigation agreement* covers. Hence, Coinbase's motion only further highlights that the parties are disputing the existence, not the scope, of an agreement to arbitrate Plaintiffs' and the Class's claims. *Goldman, Sachs & Co.*, 747 F.3d at 742-43; *Applied Energetics*, 645 F.3d at 524-26. Thus, once again, there is no presumption in favor of arbitration here. *Id.* The Court must apply state-law rules of contract interpretation to decide whether the parties agreed to litigate or to arbitrate their Sweepstakes-related disputes. Applying those rules to the facts here shows that the parties agreed to litigate—not arbitrate—Plaintiffs' and other Class members' Sweepstakes-related claims.[7]

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[7] Coinbase's motion concedes Plaintiffs' claim that in the absence of an agreement to arbitrate Sweepstakes-related disputes, the

C. The parties' Sweepstakes agreements "superseded" and modified the parties' previous agreements to arbitrate all disputes.

The parties' User Agreements and subsequent Official Rules agreements contain California choice-of-law clauses. *E.g.*, Dkt. 22-1, ¶10; Dkt. 33-9, ¶9.10. Thus, California law applies. *Id.* "As the California Supreme Court has explained, [t]he primary object of all [contract] interpretation is to ascertain and carry out the intention of the parties." *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1131-32 (9th Cir. 2002). "[T]he parties' intent 'is to be ascertained from the writing alone, if possible.'" *Id.* (quoting Cal. Civ. Code § 1639). Here, there are two "writing[s]" relevant to determining the parties' intent for resolving their Sweepstakes-related disputes: the parties' original User Agreements, and their subsequent "Official Rules" agreements for the DOGE Sweepstakes. *Id.*

"[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." *Capili v. Finish Line,*

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class action waiver in Coinbase's adhesive *litigation agreement* is unconscionable and thus unenforceable. *See* ¶79; Dkt. 33 (no dispute). Any new argument to the contrary that Coinbase might raise on reply is waived. *Luhr*, 2018 WL 1536669, at *21; *Polion*, 2013 WL 3527125, at n.4 & n.7. Class action waivers are also unenforceable under the CLRA in a *litigation* context (Cal Civ. Code § 1751), even if the CLRA's anti-waiver provisions are preempted in an *arbitration* context. *DIRECTV v. Imburgia*, 577 U.S. 47, 50-51 (2015).

Inc., 116 F.Supp.3d 1000, n.1 (N.D. Cal. 2015). Here, the parties originally formed User Agreements requiring the arbitration of all disputes, but later, formed "Official Rules" agreements requiring the litigation of "ANY CONTROVERSIES REGARDING THE [Sweepstakes] PROMOTION." To the extent that the parties' original arbitration agreements and subsequent litigation agreements cover "the same subject matter," and are "inconsistent" with each other, the Court must find that the later, more specific agreement "supersedes" and "prevails" over the former, more general agreement. *Id.*; *Goldman, Sachs & Co*., 747 F.3d at 742-43; *Applied Energetics*, 645 F.3d at 524-26; *see also Southern Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 891 (9th Cir. 2003) ("A standard rule of contract interpretation is that when provisions are inconsistent, specific terms control over general ones."); *Chan v. Society Expeditions, Inc*., 123 F.3d 1287, 1296 (9th Cir. 1997) ("Under well-settled contract principles, specific provisions control over more general terms.").

1. The parties' original arbitration agreement and subsequent litigation agreement deal with "the same subject matter."

There is no disputing that Plaintiffs' claims fall within the plain terms of the parties' original arbitration clauses, as such claims "arise[] out of or relate[] to [Plaintiffs'] use of the Coinbase services." Dkt. 33 at 11. Similarly, there is no disputing that Plaintiffs' claims constitute "CONTROVERSIES REGARDING THE SWEEPSTAKES." Dkt. 22-1, ¶10. Hence, the parties' original arbitration clauses and Official Rules ¶10 unambiguously "deal[] with the same subject

matter": namely, the proper forum for resolving Plaintiffs' claims. *Capili*, 116 F.Supp.3d 1000, n.1.

2. The parties' original arbitration agreement and subsequent litigation agreement are "inconsistent" as to Plaintiffs' Sweepstakes-related claims

Coinbase argues that "there is no conflict between the terms of the User Agreement and the Official Rules." Dkt. 33 at 11. Specifically, Coinbase surmises that "[t]he 'Disputes' section of the Official Rules applies [only] to Dogecoin Sweepstakes participants *who never agreed to [Coinbase's] User Agreement*." Dkt. 33 at 11-12. That argument lacks merit.

The Official Rules provide that "[p]articipation constitutes *entrant's* full and unconditional agreement to these Official Rules . . . ." Dkt. 22-1, ¶1. It further provides that all Sweepstakes "*[p]articipants* must comply with these Official Rules and the Conditions of Entry." *Id.*, ¶3. The Official Rules clearly purport to bind all Sweepstakes "entrants," regardless of whether such entrants have Coinbase accounts. Moreover, Official Rules ¶10 unambiguously applies to "EACH ENTRANT," regardless of each "ENTRANT's" preexisting contractual status with Coinbase. Dkt. 22-1, ¶10. There is no legal basis for surmising that ¶10 somehow applies only "to [Sweepstakes] participants who never agreed to the User Agreement." Dkt. 33 at 11-12. Where Coinbase intended to distinguish between mail-in "entrants" and other entrants, it did so expressly. E.g., Dkt. 22-1, ¶5 (referencing "[p]otential winners *that entered the Sweepstakes by mail*"). In sum, Official Rules ¶10 unambiguously applies to

Plaintiffs and all Class members as Sweepstakes "ENTRANTS."

As applied to Plaintiffs and the Class, Official Rules ¶10 is manifestly "inconsistent" with the parties' original arbitration agreements. *Capili*, 116 F.Supp.3d 1000, n.1. Coinbase does not dispute this. *See generally* Dkt. 33. Coinbase correctly points out that Plaintiffs' claims are "dispute[s] that arise[] out of or relate[] to the use of the Coinbase Services" (*id*. at 11); thus, the parties agree that the plain text of their original arbitration agreements *mandated* an *arbitration forum* as the *exclusive* forum for resolving Plaintiffs' claims. *Id.*

The problem for Coinbase, however, is that Official Rules ¶10 plainly *mandates a judicial forum* as the *exclusive* forum for resolving Plaintiffs' claims. Dkt. 22-1, ¶10. Indeed, ¶10 expressly provides that "THE CALIFORNIA COURTS (STATE AND FEDERAL) SHALL HAVE SOLE JURISDICTION OF ANY CONTROVERSIES REGARDING THE [Sweepstakes] PROMOTION." *Id.* Such a mandatory and exclusive forum selection clause cannot reasonably be read as consistent with the parties' prior, mandatory arbitration clause. *See Goldman, Sachs & Co.*, 747 F.3d at 743-46 (holding that a provision stating that "all actions and proceedings . . . shall be brought in the . . . District of Nevada" expressly "superseded" a party's default obligation to arbitrate); *Applied Energetics*, 645 F.3d at 525-26 (holding that language stating that "'any dispute' between the parties 'shall be adjudicated' by specified courts stands in direct conflict" with parties' earlier arbitration agreement); *cf. Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 77-78 (9th Cir. 1987) ("[I]n cases in which forum

selection clauses have been held to require litigation in a particular court, the language of the clauses clearly required *exclusive* jurisdiction.").

In sum, ¶10 unambiguously applies to Plaintiffs and the Class, and ¶10 is in direct conflict with the parties' earlier agreements to arbitrate all disputes. Interpreting the parties' earlier, general arbitration agreements "together" with the parties' later, specific litigation agreements for this Sweepstakes, the Court must find that the parties' Sweepstakes litigation agreement "supersedes," modifies, and "prevails" over the parties' original arbitration agreements. *Capili*, 116 F.Supp.3d 1000, n.1; *Goldman, Sachs & Co.*, 747 F.3d at 743-46; *Applied Energetics*, 645 F.3d at 525-26. No court has ever held otherwise in an analogous case. This conclusion is only bolstered by the plain language of ¶10, which expressly precludes "EACH ENTRANT" from disputing the jurisdiction of California courts "FOR ANY REASON." Dkt. 22-1, ¶10. The phrase "ANY REASON" clearly includes the parties' prior agreements to arbitrate. *Id.*

The FAA cannot save Coinbase from its own contractual choices and business decisions. If a company expressly demands that its customers litigate certain disputes in certain courts, and customers then litigate those disputes in a certain court, as expressly demanded by the company, then the court should hold the company to its own words. *Prima Paint*, 388 U.S. at n.12 (holding that the FAA "make[s] arbitration agreements as enforceable as other contracts, but not more [enforceable]").

D. Coinbase has no right to arbitrate the issue of how to resolve Sweepstakes disputes.

Coinbase's argument that an arbitrator must decide the arbitrability of Plaintiffs' claims (Dkt. 33 at 12-14) suffers from the same defect as its argument that an arbitrator must decide the merits of Plaintiffs' claims. Both arguments completely ignore the parties' Official Rules agreement.

"To be sure, before referring a dispute to an arbitrator, the court [must] determine[] whether a valid arbitration agreement exists." *Henry Schein, Inc. v. Archer & White Sales, Inc*., 139 S.Ct. 524, 530 (2019) (citing 9 U.S.C. § 2.). This rule holds true for disputes regarding arbitrability; courts can refer the question of arbitrability to an arbitrator only "if a valid [arbitration] agreement *exists, and* . . . the agreement delegates the arbitrability issue to an arbitrator." *Id.* But no agreement to arbitrate even *exists* where an express litigation agreement has "superseded" or modified an earlier arbitration agreement. *Goldman, Sachs & Co*., 747 F.3d at 742-43; Applied Energetics, 645 F.3d at 524-26.

Here, since Official Rules ¶10 "superseded" the parties' prior arbitration agreements, any prior agreement to arbitrate *Sweepstakes*-related disputes no longer exists. *Id.* It is thus nonsensical for Coinbase to say that an arbitrator must decide how to resolve the parties' Sweepstakes disputes, when as a matter of law, there is no contract to arbitrate Sweepstakes disputes. *Id.*

Furthermore, courts "should not assume that the parties agreed to arbitrate arbitrability unless there is *clear and unmistakable* evidence that they did so."

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943-44 (1995). In this case, the parties expressly agreed that courts within California would have exclusive jurisdiction over "ANY CONTROVERSIES REGARDING" the Sweepstakes. Dkt. 22-1, ¶10. The phrase "ANY CONTROVERSIES REGARDING" the Sweepstakes clearly encompasses the parties' "CONTROVERS[Y]" over how to resolve Sweepstakes disputes. This common-sense conclusion is only further bolstered by the plain language of ¶10, and by settled rules of contract interpretation.

The question of who decides arbitrability is fundamentally a question of who has "jurisdiction" to decide arbitrability. *Goldman, Sachs & Co*., 747 F.3d at 738; *cf. Westinghouse v. Hanford Atomic*, 940 F.2d 513, 516 (9th Cir. 1991) (explaining that the "threshold question of arbitrability" is a question of "jurisdiction"). Consequently, when ¶10 invoked the exclusive "JURISDICTION" of the courts to decided "ANY CONTROVERSIES" regarding the Sweepstakes, it necessarily excluded any arbitrator's "JURISDICTION." *Id.* Moreover, when Coinbase chose the word "CONTROVERSIES" for its mandatory forum-selection clause, it mirrored the text of the FAA, which requires courts to enforce agreements to arbitrate "a controversy." 9 U.S.C. § 2. Coinbase manifestly intended ¶10 to displace any arbitrator's "JURISDICTION," and to disclaim any influence from the FAA, over the parties' Sweepstakes-related "CONTROVERSIES."

Even if the Official Rules agreement is ambiguous as to who will decide the question of "JURISDICTION" over Sweepstakes-related "CONTROVERSIES," such ambiguity must be

resolved against Coinbase as the drafter of its Official Rules. *Gutierrez v. Wells Fargo Bank, N.A.*, 730 F.Supp.2d 1080, 1123 (N.D. Cal. 2010). In any event, it is hardly "clear and unmistakable" that the phrase "ANY CONTROVERSIES REGARDING" the Sweepstakes excludes "CONTROVERSIES REGARDING" the resolution of Sweepstakes disputes. *First Options*, 514 U.S. at 943-44.

In sum, to the extent there remains any agreement to arbitrate Sweepstakes-related disputes (there remains none), ¶10 at least creates some ambiguity as to whether the parties intended to arbitrate or to litigate "CONTROVERSIES" over how to resolve Sweepstakes disputes. The Court must resolve such ambiguities in favor of its own jurisdiction to decide the arbitrability issue. *See First Options*, 514 U.S. at 944-45 (explaining that with respect to the question of who decides arbitrability, "the law reverses the presumption" in favor of arbitration, such that courts must resolve any lack of clarity in favor of judicial resolution of the arbitrability question).

Coinbase's citations to cases involving the AAA rules are irrelevant, as none of those cases involved an express and unambiguous agreement *to litigate the precise disputes in question*. Also, even if the Court were to (improperly) read the parties' original User Agreements in isolation from ¶10, the Court still would not find "clear and unmistakable" evidence of an intent to arbitrate arbitrability here. Coinbase relies on language in its User Agreements that an arbitrator must decide disputes regarding "the *interpretation or application* of its Arbitration Agreement." Dkt. 33 at 13. But there is no dispute here about how to "interpret" the parties' original "Arbitration Agreement"; there is

only a dispute about how to "interpret" their *Official Rules agreement*. Moreover, the words "interpretation" and "application" are expressly limited by the words that follow it: "including *the enforceability, revocability, scope, or validity of the Arbitration Agreement*." *Id.*[8]

There is no dispute here that the parties' original "Arbitration Agreement" remains generally "valid" and "enforceab[le]," as modified by the Official Rules contract; the dispute here (if any) is whether the *parties' later Official Rules agreement* is valid and enforceable. Nor is there any dispute about the "scope" of the parties' original "Arbitration Agreement" as written; there is only a dispute about the "scope" of Official Rules ¶10. Nor do Plaintiffs seek to unilaterally "revo[ke]" the parties' "Arbitration Agreement"; rather, it is Coinbase who seeks to unilaterally revoke the parties' *subsequent litigation agreement*. *Cf. Welles v. Turner Entertainment Co*., 503 F.3d 728, 738 (9th Cir. 2007) ("The words `terminate,' `revoke' and `cancel,' . . . all have the same meaning, namely, the abrogation of so much of the contract as might remain executory at the time notice is given.").

This Court has mandatory, exclusive jurisdiction to decide whether Plaintiffs' Sweepstakes claims are justiciable or arbitrable because, based on the whole

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[8] These were limiting (not exemplary) words, as Coinbase used the word "including" here, instead of the phrase "includ[ing], *without limitation*," as Coinbase did earlier in the same sentence. Dkt. 33 at 13. *Murphy v. Directv, Inc*., 724 F.3d 1218, 1234 (9th Cir. 2013) ("[T]he rule of construction *expression unius est exclusion alterius* . . . is an aid to resolve the ambiguities of a contract.' ").

record, there is no "clear and unmistakable" evidence of a contrary intent here. *First Options*, 514 U.S. at 943-44. If Coinbase had intended to arbitrate any Sweepstakes-related disputes, including disputes over arbitrability or justiciability, then Coinbase's Sweepstakes terms and conditions would have looked very different. *See, e.g.,* Plaintiffs' Request for Judicial Notice, Ex. C, at ¶11.

IV. THE COURT SHOULD DENY COINBASE'S RULE 12(b)(6) MOTION

A. Standard of Review on Coinbase's Rule 12(b)(6) Motion to Dismiss

To survive a motion to dismiss, a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiffs at this stage are entitled to "the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.*; *see also Neitzke v. Williams*, 490 U.S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations."). The Court must "accept the plaintiffs' allegations as true and construe them in the light most favorable to plaintiffs." *Curry v. YelpInc.*, 875 F.3d 1219, 1224-25 (9th Cir. 2017).

B. The Court should not find, at this pleading stage, that Coinbase's DOGE Sweepstakes as a non-"lottery."

"A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, . . . whether called a lottery, raffle, or gift

enterprise, or by whatever name the same may be known." Cal. Penal Code § 319. It is unlawful for any person to "contrive[], prepare[], set[] up, propose[], or draw[] any lottery." Cal. Penal Code § 320. The elements of a "lottery" under § 319 are: (1) consideration given by entrants; (2) in exchange for a chance; (3) to win a prize. *Trinkle v. California State Lottery*, 105 Cal.App.4th 1401, 1406 (Cal. Ct. App. 2003). Coinbase disputes that its Sweepstakes contained the "consideration" element. Dkt. 33 at 15-18.

Coinbase says that its Sweepstakes lacked the element of consideration because it allowed participants to enter for free by mail, rather than by trading DOGE and paying the associated fees. *Id.* at 16 ("The difference between an unlawful lottery and a lawful sweepstakes is whether participants are required to pay valuable consideration to participate."); *id*. at 17 ("California lottery law is clear: if a FAME is available, a contest is not a lottery."). The truth is that lottery law is not that "clear," as the law varies according to the facts of each case. *E.g., Couch v. Telescope, Inc.*, 2:07-CV-039416, Dkt. No. 30, at *2-9 (C.D. Cal. Nov. 30, 2007) (sustaining "lottery" allegations where defendants advertised both paid and free entry options); *Couch v. Telescope, Inc*., 611 F.3d 629 (9th Cir. 2010) (holding that "no California court ha[d] addressed the precise question at issue," and finding no "substantial ground for difference of opinion" with the district court).

Under California law, there are two settled rules of decision that apply to the facts of the DOGE Sweepstakes. The first is that the "question of consideration is not to be viewed from the standpoint of the defendant, but from that of the [entrants]." *Cal. Gas.*

Retailers v. Regal Petroleum Corp., 50 Cal.2d 844, 860 (1958) (citing *People v. Cardas*, 137 Cal.App.Supp. 788 (1933)). Indeed, Penal Code "section 319 very clearly so states." *Id.* The statutory text simply requires that a defendant "distribut[e] property by chance, among persons who have paid . . . for the chance." Cal. Pen. § 319. It says nothing about "persons" who have *not* paid for the chance.

Here, Plaintiffs allege they bought DOGE and paid Coinbase's trading fees "for the chance" to win prizes. ¶¶28-38. Plaintiffs would not have made their purchases, but for the advertised chances. *Id.* The Court must accept Plaintiffs' allegations as true. *Curry*, 875 F.3d at 1224-25. Hence, viewing "the question of consideration" from the entrants' perspectives—not from Coinbase's perspective—Plaintiffs paid for their chances. *Regal Petroleum*, 50 Cal.2d at 860.

Additionally, Plaintiffs allege a fact that distinguishes this case from every "lottery" case cited by Coinbase. *Cf. Couch*, 611 F.3d at 634 (recognizing that "no California court ha[d] addressed the precise question at issue"). The fact is: Coinbase expressly represented that consideration *was* necessary to obtain a chance to win. *See, e.g*., ¶¶11, 28-38 ("Remember, you'll still *need* to buy or sell $100 in Dogecoin on Coinbase by 6/10/21 for a chance to win."). Even Coinbase's ***Official Rules*** stated that "account holders"—i.e., Plaintiffs and the Class—"***must*** opt-in to participate in the Sweepstakes and ***must*** complete $100usd" in DOGE trades "during the Promotion Period to ***earn*** [an] entry into the Sweepstakes." Dkt. 22-1, ¶3. The only way to read Coinbase's purported FAME (entry "Method 2") as being consistent with entry "Method 1" is to read "Method 2" as being available only to people

who are not "[e]xisting account holders" or "new* account holders." *Id.* Reading Official Rules ¶3 to make "Method 2" available to "[e]xisting account holders" and/or "new* account holders" would render the first sentence of "Method 1" entirely false. *Id.*[9]

No court has held that a defendant-operator can evade California's lottery statutes by telling entrants that consideration is necessary, and then blaming entrants for believing the operator. *People v. Shira*, 62 Cal.App.3d 442, 461 (1976) ("Courts [must] not tolerate subterfuge, however ingenious may be the scheme devised to evade the law"). To hold as much would upend the settled law that "the question of consideration" must be viewed from the entrants' perspective, not from the operator's perspective. *Regal Petroleum*, 50 Cal.2d at 860.

Coinbase cites *Haskell v. Time, Inc.*, 965 F.Supp. 1398 (E.D. Cal. 1997) for the proposition that "business promotions are not lotteries so long as tickets to enter are not conditioned upon a purchase." Dkt. 33 at 16-17. To the extent that proposition is persuasive, it proves Plaintiffs' point, not Coinbase's. Viewing the facts from the perspective of *entrants*, Coinbase

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[9] If Coinbase meant to communicate that Method 2 was available to "account holders," then the first sentence of its "Method 1" paragraph should have said something like: "Existing account holders and new* account holders ***may*** earn one entry into the Sweepstakes by opting in to participate in the Sweepstakes and completing $100usd in Dogecoin trades on Coinbase (.com and/or Coinbase app) during the Promotion Period." Coinbase did not say "may"; Coinbase said "***must***." *Cf. Shira*, 62 Cal.App.3d at 459 ("[A] promotional scheme is *illegal* where . . . *some* of the participants who want a chance to win must pay for it.") (original emphasis).

expressly "conditioned" Class members' "tickets to enter" upon their trading "$100 in DOGE." ¶11; *Haskell*, 965 F.Supp. at 1404. Coinbase's *conditional* promise of an entry was the primary impetus for Plaintiffs to spend $100-plus buying Dogecoins and paying Coinbase's trading fees. *Id.*; ¶¶28-39.

By contrast, the *Haskell* plaintiffs had conceded that "none of the defendants condition[ed] sweepstakes entry on a purchase[,] and none of the defendants promise[d] that a purchase [would] lead to additional mailings, entries, or other opportunities or benefits." *Haskell*, 965 F.Supp. at 1402. The *Haskell* court merely rejected those plaintiffs' theory of "*de facto* consideration," under which "there [was] no promise by the sweepstakes operator to send an entry upon a further [purchase]." *Id.* at 1403-04. Here, Coinbase told millions of people that trading $100 in DOGE was both "need[ed]" and sufficient to obtain a chance to win. ¶¶11, 28-39. Here, unlike in *Haskell*, there was "a promisor" (Coinbase); and the alleged "consideration" (DOGE trading) was "an inducement for [Coinbase's] promise" to give Class members their chances to win. *See Haskell*, 965 F.Supp. at 1403-04 (citing Cal. Civ. Code § 1605). At bottom, the element of consideration was clearly present from the perspectives of the alleged lottery entrants in this case. *Regal*, 50 Cal.2d at 860.

The second settled rule of decision is that consideration "need not be paid exclusively for the chance to win the prize." *Holmes v. Saunders*, 114 Cal.App.2d 389, 390 (1952). "It is sufficient that the consideration, as here, be paid for something else *and* the chance to win the prize." *Id.* Plaintiffs allege that they paid Coinbase for DOGE and for the chance to win prizes. ¶¶28-38.

Plaintiffs say they would not have made their relevant DOGE purchases *absent* the promised chance to win. *Id.* Hence, Plaintiffs gave "consideration" for their chances to win, notwithstanding the fact that they received "something else" at the same time. *Holmes*, 114 Cal.App.2d at 390.[10]

At bottom, Coinbase expressly advertised that consideration was necessary for a chance to win prizes. ¶¶11, 28-39; see also Dkt. 22-1, ¶3. For that reason, Plaintiffs and other Class members paid consideration for their chances to win. *Id.*; see also ¶¶17-18. Under § 319, and the totality of applicable case law, this Court should not hold at the pleading stage that the DOGE Sweepstakes was a non-lottery. The Court should deny Coinbase's motion to dismiss the "lottery" claims, and await a complete evidentiary record before making any final merits judgments on the lottery question.

C. Plaintiffs plausibly allege in the alternative that Coinbase violated the California sweepstakes statute by failing to make the required disclosures.

Even if the Court or a jury finds Coinbase's DOGE Sweepstakes to be a non-lottery, Coinbase

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[10] The district court in *Couch* failed to recognize this settled rule, which did not actually apply to the case before it. *Couch*, 2:07-CV-039416, Dkt. No. 30, at *6-9 (C.D. Cal. Nov. 30, 2007). The alleged lotteries in *Couch* did not involve the purchase or sale of products (*ibid*. at *2-9), which may explain why the *Couch* court wrongly overlooked the *Holmes* rule. And unlike Coinbase, the *Couch* defendants had not expressly represented to entrants that a financial transaction was required for entry. *Id*. at *2-9.

nonetheless violated California sweepstakes law by making inadequate disclosures.

> 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.

Cal. Bus. & Prof. Code § 17539.15(b). There is a dearth of case law on this statute, so the Court should rely primarily on the statutory text. Coinbase effectively concedes that it violated this statute.

In particular, Coinbase does not dispute Plaintiffs' allegations that its Sweepstakes solicitation emails, internet ads, and mobile ads were "[s]olicitation materials containing sweepstakes entry materials." *Id.*; ¶64 & n.5. Nor does Coinbase dispute Plaintiffs' allegations that the "formal printed statement" of its "official rules d[id] not appear thereon." *Id.* Consequently, Coinbase concedes that it was required to provide a "clear and conspicuous statement of the no-purchase-or-payment-necessary message . . . *on the entry-order device included in th[e] solicitation materials*." *Id.* Plaintiffs plainly allege that Coinbase's Opt in button, Make a trade button, and crypto trading interface were "entry-order devices" within the meaning of the statute. *Id.* Nowhere does Coinbase's motion dispute this. Dkt. 33 at 18-20. And nowhere does Coinbase contend that it made the required "clear and conspicuous statement" *on* (or even near) its "entry-order

devices." *Id.*; ¶64 & n.5. Thus, the Court must sustain Plaintiffs' UCL claims for violation of the sweepstakes statute.

Even if the required statement had appeared "on" Coinbase's "entry-order devices," Cal. Bus. & Prof. Code § 17539.15(b), the SAC shows in detail how Coinbase's "no purchase necessary" disclosure was *inconspicuously* placed. ¶¶65-68. Nowhere does Coinbase contend that its "no purchase necessary" disclosure was "conspicuous" within the meaning of the statute.

Additionally, the SAC explains how Coinbase's "no purchase necessary" disclosure was not "clear" or "readily understandable" within the meaning of § 17539.15(b), when read in the context of the solicitations' more prominent statements. ¶¶69-72. Objectively, Coinbase's "no purchase necessary" disclosure did nothing to alter the ads' prominent statements that a Dogecoin purchase or sale was necessary to obtain a Sweepstakes entry. *Id.* Plaintiffs thus allege that Coinbase's footnote was at best "ambiguous" when read in context, and therefore unclear. *Id.*; *cf. Tucker v. Chase Bank USA, N.A.*, 399 F.Supp.3d 105, 108, 114 (S.D.N.Y. 2019) (holding that statutory disclosures were not "clear and conspicuous" because such disclosures were ambiguous). Coinbase offers no argument explaining how its footnote "clear[ly]" stated that no purchase *or sale* transaction was "necessary" to enter. Dkt. 33 at 18-20.

Coinbase's only argument that its "no purchase necessary" footnote was "clear" is that "participants could easily navigate to the Official Rules." Dkt. 33 at 19-20. But as Plaintiffs allege—and as Coinbase's motion concedes—the "formal printed statement" of Coinbase's "Official Rules" did not "appear on" the

"sweepstakes solicitations" themselves. ¶64 & n.5; Cal. Bus. & Prof. Code § 17539.15(b). Hence, the "clear and conspicuous" statement was required to be displayed "*on the entry-order device[s].*" *Id.* Coinbase cannot refer to a "clear and conspicuous" statement contained in its Official Rules, when those rules did not "appear" on the solicitations themselves. *Id.*

The obvious purpose of the statutory language here is to ensure that people see the "no-purchase-or-payment-necessary message" *before* they enter the Sweepstakes. *Id.* By requiring the message to be displayed either "on the entry-device" or in "official rules" which "appear [o]n" the "[s]olicitation materials," the legislature ensured that people are likely to see the message before paying to enter. *Id.* Coinbase intentionally designed its solicitations so that most people would *not* see any FAME before paying to enter. If Coinbase had intended to communicate the existence of a transaction-free option for entering this Sweepstakes, then its solicitations and "entry-order devices" would have looked very different. *See, e.g.*, Plaintiffs' Request for Judicial Notice, Ex. A & Ex. B.

Regardless of whether the Court sustains Plaintiffs' "lottery" allegations, the Court should sustain Plaintiffs' UCL claims predicated on § 17539.15(b).

D. Coinbase's Sweepstakes ads were objectively false, misleading, and confusing to reasonable consumers.

California's False Advertising Law ("FAL") prohibits the dissemination, in "any advertising devise," of "any statement . . . which is untrue or misleading." Cal. Bus. & Prof. Code § 17500. "An advertising statement is misleading if members of the public are likely

to be deceived." *Rubenstein v. Gap, Inc*., 14 Cal.App.5th 870, 876 (2017). The Consumer Legal Remedies Act ("CLRA") prohibits "unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer." Cal Civ. Code § 1770(a). It outlaws advertising "that a transaction confers or involves rights, remedies, or obligations that it does not have or involve, or that are prohibited by law." Cal Civ. Code § 1770(a)(14).

Both statutes "prohibit not only advertising which is false, but also advertising which, although true, is either actually misleading *or* which has a capacity, likelihood, or tendency to deceive or confuse the public." *Williams v. Gerber Prods. Co*., 552 F.3d 934, 938 (9th Cir. 2008)). "[T]he primary evidence in a false advertising case is the advertising itself." *Id.* The question of whether an ad is false, misleading, or confusing to reasonable consumers is "usually" a "question of fact" that is "not appropriate" for resolution on a motion to dismiss. *See id*. at 938-39 (explaining that it is a "rare situation" for "granting a motion to dismiss [to be] appropriate" under the FAL).

Here, Plaintiffs plausibly allege that Coinbase's Sweepstakes ads were false, misleading, and (at best) had the "capacity" to "confuse" reasonable consumers. This is true because:

(1) The ads' disclaimer-footnote stated, "Opt in required," when in fact clicking Coinbase's bright blue "Opt in" button was not "required" for entry. ¶¶75-76.

(2) When consumers clicked the "Opt in" button, the ads falsely stated: "*Remember, you'll still need to*

buy or sell $100 in Dogecoin on Coinbase by 6/10/2021 for a chance to win." *E.g.*, ¶¶11, 110. This statement was false because obtaining "a chance to win" did not require "buy[ing] or sell[ing]" any DOGE.

(3) When consumers clicked the ads' "See how to enter" button, they were taken to the "Opt in" page, which contained four-step graphics and instructions for entering. ¶¶13-14. The instructions made no mention of any trade-free entry option, and thus misled reasonable consumers to believe that a DOGE purchase or sale was necessary for entry. *Id.*

(4) The text of Coinbase's faint, inconspicuous footnote-disclaimer did not objectively alter the literal meaning of the ads' prominent text, which made clear that a Dogecoin purchase *or* sale was necessary for entry. Indeed, "readers could reasonably understand [the footnote] to be consistent with Defendants' more prominent entry instructions." ¶¶69-72.

(5) The ads also stated that entrants must buy or sell "$100 in Dogecoin" or "$100 in DOGE." ¶¶40-48. That representation was misleading, especially in the context of Coinbase's trading interface, as it suggested that users would have to buy or sell *Dogecoins priced at $100 or more*. *Id.* The truth, however, was that buying Dogecoins at a "Purchase" price of marginally less than $100 sufficed for entry. *Id.*

Coinbase's only argument in response to those allegations is that consumers could have learned the truth by reviewing Coinbase's "Official Rules" before entering the Sweepstakes. Dkt. 33 at 20-21, 25. Those "Official Rules," however, did not appear on the ads themselves; they appeared only on a separate web or

mobile-app page. ¶¶16, 51. *But see Cheslow*, 445 F.Supp.3d at 20 ("*Williams* stands for the proposition that if the defendant commits an act of deception, the presence of fine print revealing the truth is insufficient to dispel that deception."). Moreover, Coinbase knew and intended that the structure and function of its digital ads would cause most consumers to enter based on the ads' misleading entry instructions, before seeing all of the Official Rules. ¶¶49-56.[11]

For avoidance of doubt, Coinbase's ads deceived even members of the media, as several of them asserted based on Coinbase's ads that: (1) entrants "must" trade "$100 in DOGE" (¶58); (2) entrants "need to" trade "$100 in DOGE"' (¶59); (3) entrants "have to" trade "$100 worth of the meme-inspired cryptocurrency" in order "[t]o be eligible" (¶61); and (4) entrants "needed to . . . complete[] a $100 trade of Dogecoin to be eligible." ¶62. Given that members of the media were misled by these ads, the ads clearly had the capacity to mislead or confuse layperson-consumers.

Coinbase's heavy reliance on *Freeman v. Time, Inc.*, 68 F.3d 285 (9th Cir. 1995) is futile. In *Freeman*, the sweepstakes ads displayed qualifying "if" statements *in the same sentences* as the misleading statements. *Id.* at 287. The only way consumers could be deceived was if consumers failed to read the complete sentences on the faces of the ads. *Id.* at 289-90. Reading only

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[11] Even if reasonable consumers happened to navigate to and review the Official Rules before entering, Official Rules ¶3 was itself misleading and confusing: insofar as it stated that "[e]xisting account holders and new* account holders ***must*** opt-in to participate and ***must*** complete [a $100 DOGE transaction on Coinbase." *See supra*, at 18 & n.9.

part of a sentence, instead of an entire sentence, is unreasonable. *Id.* By contrast, here, even careful readers of Coinbase's ads, including the ads' footnote-disclaimer, could and did reasonably conclude that buying or selling "$100 in Dogecoin" was necessary for entry. There is simply no logical similarity between the Freeman sweepstakes ads and Coinbase's Sweepstakes ads.

Likewise, Coinbase's cited cases involving asterisks and footnotes are inapplicable because: (1) the footnote in Coinbase's ads was itself misleading, and could be understood as consistent with the ads' deceptive entry instructions; and (2) Coinbase placed no asterisk or other qualifier next to its false and misleading statements. Advertising flat out lies and omitting material facts, while leaving consumers to somehow figure out the truth for themselves, does not constitute compliance with California's consumer protection statutes. *See Cheslow*, 445 F.Supp.3d at 20 ("As stated in *Ebner*, 838 F.3d at 966, '*Williams* stands for the proposition that if the defendant commits an act of deception, the presence of fine print revealing the truth is insufficient to dispel that deception.'") (citing *Ebner v. Fresh, Inc.*, 838 F.3d 958 (9th Cir. 2016), and *Williams*, 552 F.3d at 939-40). The Court should sustain Plaintiffs' FAL and CLRA claims, and their UCL claims predicated thereon.

E. Coinbase's Sweepstakes solicitations were "unfair" under the UCL.

Coinbase's motion argues that the SAC fails to satisfy any of the three standards for claims of "unfair" conduct under the UCL. Dkt. 33 at 22-23. Those arguments are meritless. First, Coinbase says that

Plaintiffs' allegations of "unfair" conduct "fail to tether the UCL claim to any specific California policy" or law. *Id.* at 22. That is untrue, as Plaintiffs' allege that Coinbase "violate[d] the laws and public policies of California, *as set out in the preceding paragraphs of this complaint*." ¶¶120-121. Plaintiffs incorporated California's specific laws and policies against lotteries, against false advertising, and in favor of adequate "sweepstakes" disclosures, into their claims under the UCL's "unfair" prong. *Id.*; ¶¶86-116. There is nothing conclusory about Plaintiffs' allegations.

Second, Coinbase argues that the public benefit of its Sweepstakes ads somehow outweighed the alleged harm to consumers. Dkt. 33 at 22-23. Coinbase asserts that because Plaintiffs "created accounts on Coinbase's platform well before the Dogecoin Sweepstakes occurred," they somehow suffered no "substantial injury" from the Dogecoin Sweepstakes. *Id.* at 23. That makes no sense. Creating a Coinbase account for free, and paying $100-plus to lose a cryptocurrency "Sweepstakes," are different acts with different results. The latter act results in a financial injury, while the former act results in no financial injury. Moreover, there is no public benefit in creating "liquid" markets (*i.e.*, consumer frenzies) for digital joke-tokens, particularly where such frenzies are created by a single company that disseminates abject lies to consumers for its own private (not public) gain.

Third, Coinbase argues that consumers could have "reasonably avoided" their financial losses by reading the ads' footnote-disclaimer. *Id.* at 23. But as Plaintiffs have shown, nothing in Coinbase's footnote-disclaimer revealed that there was a purchase-free *and* sale-free method for entering the Sweepstakes.

Coinbase's conduct in this Sweepstakes was fundamentally "unfair."

V. CONCLUSION

Legal rules of decision can be extremely nuanced at times. Such nuances, however, exist to ensure that justice gets done in any given "controversy." Dkt. 22-1, ¶10. Here, Coinbase expressly demanded that Plaintiffs bring any Sweepstakes-related claims in a "California court" like this one. *Id.* Justice would find that fact dispositive of Coinbase's double-talking motion to compel.

Coinbase also told Plaintiffs that they "needed" to pay, and that they "must" pay, for a chance to win. Consequently, Plaintiffs paid for their chances to win. Justice would find those facts sufficient to establish the consideration element of a lottery. Justice would also find that Coinbase's Sweepstakes ads were objectively false and misleading, or at best, likely to confuse many consumers.

As established herein, the law's nuanced rules of decision require justice in this case. Therefore, as a matter of law and justice, Plaintiffs respectfully request that this Court deny Coinbase's motion to compel and to dismiss (Dkt. 33).[12]

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[12] If the Court grants Coinbase's motion to compel arbitration, Plaintiffs respectfully request that the Court dismiss, rather than stay, Plaintiffs' claims against Coinbase. *Accord* Dkt. 33 at 14. Even in that event, however, the Court should not dismiss or stay this entire action because Defendant Marden-Kane, Inc. has never had any arbitration agreement with Plaintiffs or any Class member.

Dated: November 16, 2021 Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID SUSKI, JAIMEE MARTIN, JONAS CALSBEEK, and THOMAS MAHER, Individually and On Behalf of All Others Similarly Situated,

Plaintiffs,

v.

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

Defendants.

Case No.: 3:21-cv-04539-SK

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE IN OPPOSITION TO TO COINBASE'S

MOTION TO COMPEL ARBITRATION AND TO DISMISS

Hearing: January 10, 2022

Time: 9:30 a.m.

Courtroom: C

Plaintiffs David Suski, Jaimee Martin, Jonas Calsbeek, and Thomas Maher respectfully request that the Court take judicial notice of the documents attached hereto in support of their opposition to Defendant Coinbase, Inc.'s Motion to Compel Arbitration and to Dismiss Plaintiffs' Second Amended Class Action Complaint.

"In general, websites and their contents may be judicially noticed." *Threshold Enterprises Ltd. v. Pressed Juicery, Inc.*, 445 F.Supp.3d 139, 146 (N.D. Cal. 2020). Accordingly, Plaintiffs request that this Court take judicial notice of the following webpages on www.Coinbase.com:

Exhibit A: the "Opt in" webpage for a November 2021 sweepstakes, *available at* https://www.coinbase.com/sweepstakes/q4_nov_21_trading?utm_source=Iterable&utm_medium=email&utm_campaign=campaign_3175634 (last visited Nov. 12, 2021);

Exhibit B: the "Make a trade" webpage for a November 2021 sweepstakes, *available at* https://www.coinbase.com/sweepstakes/q4_nov_21_trading?utm_source=Iterable&utm_medium=email&utm_campaign=campaign_3175634 (last visited Nov. 12, 2021);

Exhibit C: the "Official Rules" webpage for a November 2021 sweepstakes, *available at* https://www.coinbase.com/sweepstakes/q4_nov_21_trading_rules (last visited Nov. 12, 2021).

Dated: November 16, 2021 Respectfully submitted,

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Counsel for Plaintiffs and the Putative Class

EXHIBIT C

Coinbase November 2021 Trading Sweepstakes

OFFICIAL RULES

NO PURCHASE, TRANSACTION, OR PAYMENT OF ANY KIND IS NECESSARY TO ENTER AND WILL NOT INCREASE YOUR CHANCES OF WINNING.

PARTICIPATING IN THE COINBASE NOVEMBER 2021 TRADING SWEEPSTAKES (THE "SWEEPSTAKES") CONSTITUTES YOUR ACCEPTANCE OF THESE OFFICIAL RULES. THESE OFFICIAL RULES CONTAIN A MANDATORY ARBITRATION PROVISION. BY PARTICIPATING IN THE SWEEPSTAKES, YOU REPRESENT AND WARRANT YOU MEET THE ELIGIBILITY REQUIREMENTS STATED IN THESE OFFICIAL RULES AND ACKNOWLEDGE THAT FAILURE TO MEET ALL ELIGIBILITY REQUIREMENTS WILL RESULT IN YOUR DISQUALIFICATION. THE SPONSOR/ADVERTISER IS THE SOLE DETERMINER OF SWEEPSTAKES COMPLIANCE. A COPY OF THESE OFFICIAL RULES WILL BE AVAILABLE FOR THE DURATION OF THE SWEEPSTAKES AT https://www.coinbase.com/sweepstakes/g4_nov_21_trading_rules.

PARTICIPATION IS LIMITED TO LEGAL RESIDENTS OF THE 50 UNITED STATES (EXCLUDING HAWAII) & THE DISTRICT OF COLUMBIA. VOID WHERE PROHIBITED.

THIS PROMOTION SHALL BE CONSTRUED ACCORDING TO AND GOVERNED EXCLUSIVELY BY U.S. LAW.

1. The Promotion begins on November 10, 2021 at 12:00 p.m. Pacific Time ("PT"), and ends on November 23, 2021 at 11:59 p.m. PT (the "Promotion Period"). Sponsor's computer systems or that of their designee is the official time-keeping device for the Sweepstakes.

2. Eligibility: The Coinbase November 2021 Trading Sweepstakes (the "Sweepstakes" or "Promotion") is open only to legal residents of the 50 United States (excluding Hawaii) and the District of Columbia, who are at least 18 years of age or older and the legal age of majority in their jurisdiction of residence (an eligible "Entrant"). Coinbase (the "Sponsor"), Ventura Associates, Intl (the "Administrator"), their respective parents, affiliates, subsidiaries, promotion agencies and each of their respective directors, officers, employees, and assigns (collectively "Released Parties") and their immediate family members and/or those living in the same household of each member" is defined as spouse, partner, parent, legal guardian, in-law, grandparent, child, or grandchild. The Sweepstakes is subject to all applicable federal, state and local laws and regulations. Winning a prize

is contingent upon fulfilling all requirements set forth herein. You do not need to have an existing account with Coinbase in order to participate in the Sweepstakes if you enter via Entry Method 2 below, however, potential winners will be required to have a new or existing account in order to receive their prize. Participants must comply with these Official Rules and the Conditions of Entry.

There is no purchase, transaction, or payment necessary to enter. Entering by buying/selling of any crypto during the Promotion Period will not increase your chances of winning. Your chances of winning are the same regardless of method of entry.

3. How to Enter: There are two (2) ways to enter:

Entry Method 1 (Trade Method of Entry): Complete the following two (2) steps:

Step A: Sign in to your Coinbase account (or create a Coinbase account if you do not have one) and then opt-in at https://www.coinbase.com/sweepstakes/g4_nov_21_trading.

Step B: Make a trade (buy/sell) of $100.00 or more of any crypto (including stable coins etc.). Trades can be cumulative trades, inclusive of transaction fees, on the Coinbase.com retail product (.com and app), during the Promotion Period.

These two steps can be completed in any order, but they both must be completed within the Promotion Period to earn an entry.

If you do not have a Coinbase account, provide required information as requested online at www.Coinbase.com (inclusive of Social Security number) and complete the required ID verification process (upload a valid and current driver's license, passport or state ID and complete a set of identity-verification questions). There is no fee or charge to create an account and become a registered Coinbase user. By submitting your information and creating an account, you agree to the Coinbase User Agreement and Privacy Policy. If you do not agree to the User Agreement and Privacy Policy, you cannot create a Coinbase account, and will be ineligible to enter the Sweepstakes.

TRADES MADE VIA COINBASE PRO (PRO.COINBASE.COM) ARE INELIGIBLE AND WILL NOT HELP YOU EARN A SWEEPSTAKES ENTRY.

Entry Method 2 (No Purchase Method of Entry): To enter via mail without making a trade on Coinbase.com, handprint and complete the following on the front of a card or paper: your name, address, city, state, zip, e-mail address, and telephone number. Insert single card or paper in an envelope and mail to: Coinbase November 2021 Trading

Sweepstakes, Ventura Associates, Intl., 494 8th Avenue, Suite 1700, New York, NY 10001. Mail-in entries must include all requested information herein to earn one (1) entry. Mail-in entries must be postmarked by November 24, 2021 and received by November 30, 2021. Mailed entries received without a name, address, city, state, zip, e-mail address, and telephone number address will be deemed incomplete and invalid. Requests for confirmation of receipt of mail-in entries will not be acknowledged. No photo copies, facsimiles or reproductions of mail-in entry will be accepted. Sponsor is not responsible for late, lost, damaged, stolen, incomplete, illegible, postage due, or misdirected entries. Proof of mailing does not constitute proof of delivery.

Potential winners (as further defined below) who do not have an existing Coinbase account will be required to create a new Coinbase account on www.coinbase.com and agree to the respective user agreement and privacy policy linked above, to receive their prize. If a potential winner does not create a new Coinbase account and does not agree to the Coinbase User Agreement and Privacy Policy within the timeframe indicated by Sponsor, the Potential winner will be disqualified and forfeit the prize, and an alternate Potential winner may be selected in Sponsor's sole discretion.

4. Regardless of the method of entry, there is a limit of one (1) entry per person/email address throughout the Promotion Period. Entries received from any person in excess of the stated limitation

will be void, and that person may be disqualified from entry and/or winning. Entries received from any person who attempts to cancel and create a new account, or who attempts to enter multiple times by creating an additional account, during the Promotion Period will be disqualified. Any attempt by any entrant to obtain more than the stated number of entries by using multiple/different email addresses or any other method will void that entrant's entries and that entrant may be disqualified. Use of any automated system to participate is prohibited and will result in disqualification. In the event of a dispute over the identity of a Potential winner, the entry will be declared made by the authorized account holder of the email address associated with the entrant's Coinbase account (or submitted with the mail-in entry, as applicable) ("Entrant's Email Address"), and a Potential winner may be required to provide identification sufficient to show that he/she is the authorized account holder of the email account. The "authorized account holder" is the natural person assigned to the applicable email account. Proof of submission of an entry does not constitute proof of delivery.

5. Random Drawing: One thousand and seven (1,007) Potential winners ("Potential winners") will be randomly drawn from all eligible entries received on or about December 2, 2021. The random drawing will be conducted by the Administrator at their offices in New York, NY, USA, an independent judging organization whose decisions are final and binding. The odds of winning a prize depend upon the number of eligible entries received. Limit one (1) prize per

person/household in this Promotion, regardless of method of entry.

6. Potential Winner Notification: Potential winners will be contacted via email at Entrant's Email Address by a representative of Coinbase, the Sponsor, with instructions on how to claim their prize and will be required to respond to such email within 48 hours of the date and time email was sent by Sponsor. Potential winners will be required to complete and return an Affidavit of Eligibility, Release of Liability or any other document needed to validate eligibility (the "Documents") within five (5) days (including Saturdays, Sundays and Holidays) of first attempted delivery of the same. In the event a Potential winner cannot be contacted, fails to respond to the email within the allotted time, refuses the prize, fails or refuses to timely return completed Documents, or if a prize/prize notification is returned as undeliverable, Potential winner will be disqualified without further notice and an alternate Potential winner may be selected in Sponsor's sole discretion.

To claim a prize in this Sweepstakes, all Potential winners will be required to have or create a Coinbase account (free to create an account) within the time specified in the notification. Potential Winners must have an active Coinbase account at the time of awarding the prize. Potential winners that do not have a Coinbase account and choose not to create a Coinbase account are ineligible to receive a prize. Acceptance of and agreement to the Coinbase User Agreement and Privacy Policy within the time

specified in their notification email, will forfeit the prize. ALL POTENTIAL WINNERS ARE SUBJECT TO VERIFICATION BY SPONSOR, WHOSE DECISIONS ARE FINAL AND BINDING. AN ENTRANT IS NOT A WINNER OF ANY PRIZE UNLESS AND UNTIL THAT ENTRANT'S ELIGIBILITY AND COMPLIANCE WITH ALL REQUIREMENTS TO CLAIM A PRIZE HAVE BEEN VERIFIED AND FULFILLED, AND THE ENTRANT HAS BEEN NOTIFIED THAT VERIFICATION IS COMPLETE.

7. Prizes and Prize Restrictions:

Tier 1: one (1) winner will receive Two Hundred Fifty Thousand Dollars ($250,000) in USDC.

Tier 2: six (6) winners will each receive Twenty-Five Thousand Dollars ($25,000) in USDC.

Tier 3: one thousand (1,000) winners will each receive One Hundred Dollars ($100) in USDC.

There are a total of 1,007 prizes offered in the Sweepstakes, with an estimated total retail value of approximately $500,000.

All prize values stated herein are in USD Coins ("USDC"). Each **USD Coin or USDC** is worth $1.00 USD, and is redeemable on a 1:1 basis for US dollars. All prizes will be fulfilled via an

upload of USDC to the winner's Coinbase account. Restrictions may apply. Fees apply when you buy and sell digital currency on Coinbase but fees do not apply when converting USDC to USD on the Coinbase site.

Prizes will be fulfilled within approximately 6-8 weeks of winner verification. Sponsor assumes no responsibility for undeliverable emails resulting from any errors or for insufficient space in the user's account to receive an email. Sponsor reserves the right to modify the notification procedures and applicable deadlines for responding in connection with the selection of any alternate winner. If a prize is legitimately claimed, it will be awarded. Upon prize forfeiture or inability to use a prize or portion thereof, no compensation will be given, and Sponsor will have no further obligation to that participant.

Prizes are non-transferable and no substitution will be made except as provided herein at the Sponsor's sole discretion. Sponsor reserves the right where lawful to substitute a prize for one of equal or greater value if the designated prize should become unavailable for any reason. Prizes consist of only the items specifically listed as part of the prize. In no event will more than the stated number of prizes be awarded. Winners are solely responsible for any/all applicable federal, state and local taxes and any other expenses related to the acceptance and use of a prize not specified herein. Prize details not specifically stated in these Official Rules will be determined in Sponsor's sole discretion. Sponsor is not responsible for, and

will not replace, any lost, damaged or stolen prize or prize component, including but not limited to any prize or prize component that may become the target of a cyber-attack or hack, or any prize that is undeliverable for any reason. Winners acknowledge that Sponsor is subject to U.S. economic restrictions and trade sanctions and other U.S. laws that apply to cryptocurrencies and other cryptographic assets; as such, Sponsor reserves the right to discontinue the Sweepstakes and/or deny distribution of any prize when required by applicable law. Participants waive the right to assert as a cost of winning a prize, any costs associated with claiming or seeking to claim a prize, or using a prize.

8. Taxes: Each winner is solely responsible for reporting and paying any and all applicable taxes related to the prize(s). Each winner will be subject to an onboarding verification process and is required to provide any requested tax reporting information before any prize is awarded including number. The value of any prize awarded to a winner will be reported for tax purposes as required by law. Any person receiving at least six hundred dollars from the Sponsor will receive an IRS Form 1099 at the end of the calendar year and a copy of such form will be filed with the IRS. Each winner is required to notify the Sponsor if any information provided hereunder changes, including the winner's address.

9. Release: Entrants (including winners) agree to release, discharge and hold harmless the Released Parties from and against any claim or cause of action

or liability (including but not limited to, personal injury, death or damage to or loss of property, and claims based on cryptocurrencies (including, without limitation, obtaining, using, trading, converting, and selling cryptocurrency), publicity rights, defamation and invasion of privacy) arising out of or in connection with participation in the Sweepstakes or acceptance/receipt/use or misuse of any prize, and agree to be bound by the Official Rules and the decisions of the Sponsor, the Administrator and/or Sponsor's representatives, which are final and binding. Acceptance of a prize constitutes permission for the Sponsor and its agencies to use winner's name, Likeness, photograph and/or hometown and state for advertising and trade without further compensation, in any media, worldwide in perpetuity, unless prohibited by law.

10. General WARNING: ANY ATTEMPT BY AN INDIVIDUAL TO DELIBERATELY UNDERMINE THE LEGITIMATE OPERATION OF THIS PROMOTION IS A VIOLATION OF CRIMINAL AND CIVIL LAWS, AND SHOULD SUCH AN ATTEMPT BE MADE, SPONSOR RESERVES THE RIGHT TO SEEK DAMAGES FROM ANY SUCH INDIVIDUAL TO THE FULLEST EXTENT PERMITTED BY LAW. Sponsor will not be responsible for lost, late, damaged, misdirected or mutilated mail, misdirected email, or for any technical problems, faulty, lost, garbled, incomplete, incorrect or mistranscribed data transmissions, incorrect announcements of any kind, malfunctions, technical hardware or software failures of any kind including any injury, alteration, or damage to any person's

computer/mobile device related to or resulting from participating in or experiencing any materials in connection with this Sweepstakes. Sponsor is not responsible for malfunctions or breakdown of any network systems, unavailable service connections, lost, incomplete, faulty network connectivity of any kind, failures of any service providers, or any combination thereof, which may limit a person's ability to participate in this Promotion. Sponsor reserves the right to suspend, cancel or modify the Promotion if it cannot be executed as planned for any reason as determined by Sponsor in its sole discretion, including, but not limited to: any reason outside of Sponsor's reasonable control; if fraud, human error, technical failures, or any other factor impairs the integrity or proper functioning of the Promotion; if a virus, bug or other technical problem regulatory action related to Cryptocurrency the Sweepstakes can no longer continue as planned. If the Promotion is so cancelled or modified, Sponsor may, but shall not be required to award prizes from among all eligible entries received prior to such action and Sponsor shall have no further obligation to any participant in connection with this Promotion. Sponsor reserves the right to prohibit the participation of an individual if fraud or tampering is suspected or if the participant fails to comply with any requirement of participation as stated herein or with any provision in these Official Rules. In the event there is a discrepancy or inconsistency between disclosures or other statements contained in promotional materials and the terms and conditions of the Official Rules, the Official Rules shall prevail, govern and control. Sponsor will not be responsible for any typographical or other error in the printing of the

offer, administration of the Sweepstakes or in the announcement of the prizes.

11. Disputes, Class Action Waiver and Agreement to Arbitrate: As a condition of participating in the Promotion, and except as modified herein, Entrant agrees that the following disputes, claims, and causes of action arising among Entrant, Sponsor, Administrator and/or any other Released Parties shall be resolved individually, without resort to any form of class action, by following the Dispute Resolution Process (including binding arbitration) specified in Section 8 of the Coinbase Terms, which are incorporated herein by reference and available at https://www.coinbase.com/legal/user_agreement/united_states:

1. Any and all disputes, claims, and causes of action arising out of or related to this Promotion, including any dispute, claim, or cause of action relating to any prizes awarded in this Promotion; and,

2. any and all disputes, claims, and causes of action arising out of or related to the interpretation or application of this arbitration provision, including the enforceability, revocability, scope, or validity of this arbitration provision.

Notwithstanding this arbitration agreement, you or the Released Parties retain the right to (1) elect to have any claims heard in small claims court on an individual basis for disputes and actions within the

scope of said court's jurisdiction; and (2) seek equitable relief in court for infringement or other misuse of intellectual property rights (including but not limited to trademarks, trade dress, domain names, trade secrets, copyrights, and patents).

To increase the efficiency of administration and resolution of arbitrations, you and the Released Parties agree that in the event that there are one hundred (100) or more individual arbitrations of a of law firms or organizations within a thirty (30) day period (or otherwise in close proximity), the American Arbitration Association ("AAA") (1) will administer the arbitration demands in batches of 100 arbitration demands per batch (plus, to the extent there are less than 100 arbitration demands left over after the batching described above, a final batch consisting of the remaining arbitration demands); (2) appoint one arbitrator for each batch; and (3) provide for the resolution of each batch as a single consolidated arbitration with one set of filing and administrative fees due per side per batch, one procedural calendar, one hearing (if any) in a place to be determined by the arbitrator, and one final award. You and the Released Parties agree that arbitration demands are of a "substantially similar nature" if they arise out of the same event or factual scenario and raise the same or similar legal issues and seek the same or similar relief. You and the Released Parties agree to cooperate in good faith with AAA to implement the batch arbitration approach.

The arbitrator may award declaratory or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by the party's individual claim. Notwithstanding anything to the contrary in this Promotion, if a court decides by means of a final decision, not subject to any further appeal or recourse, that the limitations of this paragraph or the Class Action Waiver are invalid or unenforceable as to a particular claim or request for relief (such as a request for public injunctive relief), you and the Released Parties agree that that particular claim or request for relief (and only that particular claim or request for relief) shall be severed from the arbitration and may litigated in the federal courts located in the State of California. All other disputes shall be arbitrated. This paragraph does not prevent the parties from participating in a class-wide settlement of claims.

Entrant agrees that the laws of the State of California, without regard to principles of conflict of laws, will govern the Promotion and any dispute, claim, or cause of action arising out of or related to Promotion, except to the extent governed by United States federal law. This Promotion evidences a transaction involving interstate commerce and notwithstanding any other provision herein with respect to the applicable substantive law, the Federal Arbitration Act, 9 U.S.C. §1 et seq. ("FAA") will govern the interpretation and enforcement of the Dispute Resolution Process and any arbitration proceedings.

12. Limitation of Liability: TO THE EXTENT PERMITTED BY LAW, IN NO EVENT SHALL SPONSOR OR ADMINISTRATOR, OR THEIR AFFILIATES AND SERVICE PROVIDERS, OR ANY OF THEIR RESPECTIVE OFFICERS, DIRECTORS, AGENTS, JOINT VENTURERS, EMPLOYEES, OR REPRESENTATIVES, BE LIABLE FOR ANY AMOUNT GREATER THAN (A) THE HIGHEST VALUE OF ANY PRIZE OFFERED IN THIS PROMOTION OR (B) ANY LOST PROFITS OR ANY SPECIAL, INCIDENTAL, INDIRECT NEGLIGENCE, STRICT LIABILITY, OR OTHERWISE, ARISING OUT OF OR IN CONNECTION WITH THE PROMOTION, EVEN IF AN AUTHORIZED REPRESENTATIVE OF SPONSOR OR ADMINISTRATOR KNEW OR SHOULD HAVE KNOWN OF THE POSSIBILITY OF SUCH DAMAGES, AND NOTWITHSTANDING THE FAILURE OF ANY AGREED OR OTHER REMEDY OF ITS ESSENTIAL PURPOSE, EXCEPT TO THE EXTENT A FINAL JUDICIAL DETERMINATION IS MADE THAT SUCH DAMAGES WERE THE RESULT OF SPONSOR OR ADMINISTRATOR'S GROSS NEGLIGENCE, FRAUD, WILLFUL MISCONDUCT, OR INTENTIONAL VIOLATION OF LAW.

13. Entrant's Personal Information: Information collected from entrants is subject to Coinbase's Privacy Policy, which can be found at https://www.coinbase.com/legal/privacy. Sponsor assures that your information will be kept confidential in accordance with applicable data protection laws and regulations. Data will be stored in the United States and may be

shared with the Administrator and/or a third-party fulfillment company only to administer this Sweepstakes, verify winners and fulfill prizes unless you have given your prior express consent to receive additional information from Sponsor or a third party.

14. Winner List: For a list of winners, send a stamped, self-addressed envelope to Coinbase November 2021 Trading Sweepstakes Winners List, c/o Ventura Associates, 494 8th Avenue, Suite 1700, New York, NY 10001 (Att: KM) Requests must be received by December 31,2021. The winners List will be available after all winners have been verified, please allow 8-10 weeks to complete the verification process.

SPONSOR: Coinbase, Inc., 100 Pine Street, Suite #1250, San Francisco, CA 94111, USA.

ADMINISTRATOR: Ventura Associates Intl, 494 8th avenue, Suite 1700, New York, NY 10001.

Pages 1-37

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DAVID SUSKI, JAIMEE MARTIN, JONAS CALSBEEK, and THOMAS MAHER, Individually and On Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

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

Defendants.

Case No.: 21-cv-04539-SK

San Francisco, California

Zoom Videoconference

Monday, January 10, 2022

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE SALLIE KIM
UNITED STATES MAGISTRATE JUDGE

APPEARANCES: (Via Zoom Webinar)

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THE CLERK: Calling Civil Case 21-4539, Suski v. Coinbase Global, Inc., et al. Counsel, please state your appearances for the record, beginning with the Plaintiff.

MR. HARRIS: Good morning, Your Honor. This is David Harris with the law firm of Finkelstein & Krinsk on behalf of the Plaintiffs.

THE COURT: Good morning.

MR. RHODES: Good morning, Your Honor. Michael Rhodes and Joe Mornin of Cooley on behalf of Defendant Coinbase. And with the Court's leave, I will address the motion to compel arbitration and, pursuant to your standing order, we'd like to have our associate, Mr. Mornin, address any argument relating to the motion to dismiss the complaint.

THE COURT: Okay.

MS. WYTSMA: Good morning. This is Laura Wytsma of Venable on behalf of Defendant Marden-Kane.

THE COURT: Good morning. So I got the motion for -- to compel arbitration, and let me hear first from Mr. Rhodes and then I'll hear from Mr. Harris. I did get a chance to read the pleadings, but if there's anything you want to add, go ahead and then I might have some questions as well.

MR. RHODES: Okay. Thank you, Your Honor. Mindful that you've read the record, I'll be brief. It's a two-part test, obviously: Is there an arbitration

clause? And, if so, is it -- is the dispute at hand within the ambit of the clause?

The parties seem to be in agreement on point one. And if you need a record cite, if you can look at the opposition, ECF No. 40, at page 11 and 12 where Plaintiff seems to have conceded there was a valid arbitration clause and, thus, it does seem like kind of the sole issue presented for the Court to resolve is whether the promotion rules trump the prior agreement, the user agreement arbitration rule.

And as you know, the promotion here included a broader population of people than just registered users. There were two ways to get into a promotion. You traded Dogecoin and, by virtue of doing that, you had a Coinbase user agreement, user account, registered user to which there was an arbitration clause. And then anybody over the age of 18 in the United States could then freely participate in the promotion. And the promotion rules, which I believed are annexed to the first amended complaint as Exhibit 1, do not purport to be integrated or merged, do not purport to novate or supplant the prior arbitration agreement.

So the dispute between the parties is really how does the Court reconcile and harmonize these two instruments under the laws of arbitration. And in that regard, Your Honor, I think the case law surveyed at pages 3 and 4 of our reply brief probably lay out the best articulation but, if I may, with the Court's indulgence. The 2nd Circuit case in *Waxfield* and the 9th Circuit case of *Peterson* which we cite at page 2, line 16 of our reply brief, they both say kind of the standard proposition is this:

Under the case law, if there's a reading of the various agreements that permits the arbitration clause to remain in effect, the Court must choose it. And I think there are sort of four lines of judicial thinking here.

And, briefly, the *Goldman* case out of the 9th Circuit, there was a direct conflict between the two instruments. The *Morrow* case talked about a confusing set of agreements to try to figure out which was the contract itself. *Motorola* stands for the unremarkable proposition if yo have a kind of unitary transaction that has multiple contracts as part of it and one of them includes an arbitration clause, you can treat them as subject matter (ph) of the entirety. And then the move line of cases says that there's no intrinsic conflict because you have an arbitration clause and then a subsequent agreement with a jurisdictional reference.

Here, the easiest thing to think about is the parties actually delegated to the arbitrator the issue of arbitrability, so I think that's the gating item. The Court has to kick this thing to the arbitrator to decide any fact questions or issues pertaining to whether this is within the scope of the arbitration clause because, by contract, we did delegate that issue to the arbitrator. But even if the Court wants to go further in the analysis, I would submit that because there was a distinct population of people that were not bound by the arbitration clause who could enter the contest -- or the promotion -- excuse me -- through the submission of a card that you mail in, that's the way to harmonize these two instruments. There's a group of people that would be subject to the jurisdictional clause.

And then I would just leave you with the note that if you look at the move line of cases, where they say that

you can also have arbitration and collateral judicial proceedings as a matter of course, whether it's to enforce the prior arbitration award --might be a 1281.(a) type of injunction that's going alongside an arbitration or other people that are not bound by the arbitration who are then involved in the same subject matter would go to court.

So we think there's no conflict but, in the first instance, you would have to kick this to the arbitrator to decide any issues about the scope, enforceability, revocability of the arbitration clause.

Thank you, Your Honor.

THE COURT: So I have a question about -- a factual question about the users who actually signed up for this contest. So was it the case that the Plaintiffs in this situation were already customers of Coinbase and then they entered the contest? Or was it that --

MR. RHODES: Yes, they --

THE COURT: Yes. All of these Plaintiffs were?

MR. RHODES: Yeah. All four of the named representative Plaintiffs, Your Honor, were -- were registered users of Coinbase. There was a --

THE COURT: Before they entered the contest.

MR. RHODES: Yes.

THE COURT: Okay. Okay.

MR. RHODES: And there was -- to the content, you enter the contest by trading the Dogecoin. To do that, you have to have a Coinbase account. I would note that even the promotion says if you win, you're gonna have to register an account at that point, too, to receive the winnings, which are in the form of some kind of cryptocurrency.

THE COURT: Okay.

MR. RHODES: There was another population of people who did send in -- I think there were thousands of them -- who sent in cards who did not have an account with Coinbase and, therefore, would not have been a contract party to the user agreement.

THE COURT: What if someone actually won, sent in the card -- like didn't actually open an account, didn't trade -- but sent in the index card and that person won and then -- and then signed up for Coinbase -- with Coinbase to get the prize? Would that person then be bound by the user agreement with Coinbase?

MR. RHODES: That's a great question. I think the answer is yes, but I also would say to you that issue is not before the Court, but I do think it reflects something. Because one of the arguments that I think Mr. Harris seems to be making is the idea that the subsequent body of rules specific to the promotion were kind of intending to novate or to override or supersede the prior user agreement. And I would say the case that you just outlined suggests otherwise because Coinbase seems to be thinking that if you are not a currently registered user, you've entered the promotion, you win, and in order to receive the winnings, you have to then now register for a Coinbase account and that has an arbitration clause in it, it sure looks like they expect people that are going to be trading in Dogecoin on their platform have the arbitration agreement.

There are claims you could envision that might arise for people that never are registered either before or after the promotion.

THE COURT: Okay. So what if a person actually went on the website, saw the information about the contest, wasn't a previous Dogecoin -- customer of Coinbase, but then signed up for an account right then and there on the spot in order to enter the contest, understanding full well that he or she didn't have to, you know, send in the card. But let's say that that person signed up for the account as a result of seeing that contest. That person -- under your theory, that person would still be bound by the user agreement with Coinbase?

MR. RHODES: Yeah. I think they would be, Your Honor, and I don't think we're kind of dovetailing into the rule of unconscionability, which you often see in the -- I know you see these a lot in motion to compel litigation. But the parties here concede that there's a valid agreement for all of these. But the fact pattern of these four -- that's what we've got in this record -- is they were in fact registered users before we got into that.

And I agree we can spin out some interesting, you know, hypotheticals about what might be the case. That is the current state of play in this record. We don't have anybody who was not a user when they entered the promotion. The thing I note for you is that to receive the winnings, if you will, you would have to become a registered user and that would have entailed an arbitration clause.

Actually, in your hypothetical, I would also submit to you that that issue would go to the arbitrator to decide because issues of arbitrability have been designated -- or delegated, I should say -- in these user agreements to the arbitrator in the first instance.

THE COURT: Okay. What about the person who doesn't -- who doesn't sign up for an account with Coinbase and who sends in the index card, is upset and sues. Then that -- you concede that that person doesn't have to go to arbitration?

MR. RHODES: Correct, Your Honor. So the one I came up with is that I sent in my card. I'm not a registered user. And let's say they -- for whatever reason, I find out they don't consider me because it arrived a day late or something and I'm upset about that. I could file a judicial action. And then the jurisdictional delegation tells us where I do that.

THE COURT: Okay. Okay.

MS. WYTSMA: Your Honor, to that -- to that last hypothetical, may I --

THE COURT: Yeah. Sure.

MS. WYTSMA: -- add just one point? If there was an individual who participated via a postcard and then, you know, for whatever reason they thought they had a legal claim, that -- the nature of the injury that has been alleged in the amended complaint -- and the complaints were specifically amended to deal with the fact that there was no injury in fact pled in the original complaint -- is that there was a fee associated with trading the Dogecoin and that fee would not have been incurred if they hadn't relied on this sweepstakes.

THE COURT: I see.

MS. WYTSMA: And so our position would be that anybody that actually read the rules and figured out that they could send a free card in to win the sweepstakes would have -- would not have suffered the

injury that's alleged in the complaint at this point in time.

THE COURT: They would have a different injury from what's alleged. I understand. And I -- I just want to understand the lay of the land even though I do have a clear picture of what's actually alleged here and who the Plaintiffs are. But I'm just curious to know what would happen in these other situations because it helps me to understand sort of the context of the situation.

So -- okay. Mr. Harris, do you concede that there's a valid arbitration agreement between the Plaintiffs and the Defendant here?

MR. HARRIS: Your Honor, yes. We concede that at the time the user agreements were formed, before this new agreement was entered into, that there was a valid binding arbitration agreement. And, you know, our position under the *Goldman Sachs* line of cases is that when the parties entered into what we all agree was a binding and enforceable official rules agreement for this sweepstakes, that the arbitration agreement ceased to exist as to sweepstakes-related claims only.

THE COURT: Okay. And why -- if you just look at basic contract principles, what the Defendant says is that because the original arbitration agreement, the binding contract says that you can only amend it or supersede it by -- under certain circumstances, why is it that you think that they've met that -- that the Plaintiffs have met that burden here in terms of the amendment or superseding for your prior agreement?

MR. HARRIS: Sure, Your Honor, and that's a great question. The first thing I would say to that is that in their original motion, they essentially conceded that

the official rules agreement was valid. That was only -- that modification issue was only raised for the first time on reply, so our papers didn't get a chance to address it. But I'll address it now that Your Honor's raised it.

You know, first we would say it's waived because it wasn't -- the argument's waived because it wasn't -- the argument's waived because it wasn't raised in the opening motion.

THE COURT: Wait. Can you go back. I'm confused by this. Can you say that again? I don't understand your argument. I just want to make sure I understand it.

MR. HARRIS: So the argument about the modification clause in the original user agreement that Coinbase has raised, they basically say, Look, the modification clause in the user agreement set forth a procedure for modifying the user agreement and this didn't meet that. You know, our first position is that's a new argument raised for the first time in their reply.

THE COURT: Oh, that was in the original -- that was in the original motion.

MR. HARRIS: Okay. Well, I --

THE COURT: I saw that.

MR. HARRIS: -- I must be mis-remembering that then, Your Honor.

THE COURT: Maybe I'm mis-remembering it but let me go back and look at it because I remember seeing that in the original argument.

MR. RHODES: I'm looking for a cite for Your Honor.

THE COURT: Sure.

MR. RHODES: I'll try to find something here. Joe, if you find it quicker --

THE COURT: Hang on. I'm just looking. So -- let me just tell you where I thought I saw it. I'm just scrolling through.

MR. RHODES: Our opening motion, Your Honor, is Document 33, I believe.

THE COURT: Yeah. I'm looking at it now.

MR. RHODES: I'm not actually seeing it, Your Honor, to fair to the Court.

THE COURT: Okay. Then I must be mistaken because I thought I saw it. I'll go back and look at it. But thank you, Mr. Harris. Okay.

MR. HARRIS: And then, you know, to address it on the merits, Your Honor. The modification clause in the original agreement does say we may amend this agreement by "posting to the website" or something to that effect.

THE COURT: Uh-huh.

MR. HARRIS: There's no dispute here that these official rules were more than posted to the Coinbase website. It links to the more directed email to Coinbase users. Coinbase requested new consideration from Coinbase users in order to enter these -- this sweepstakes and accept these official rules.

So we believe even if the Court were to isolate the modification clause in the user agreements, that by posting the official rules to the website and by emailing them directly to all Coinbase -- to Coinbase users who entered the sweepstakes, you know, that that satisfied the modification clause, number one.

Number two, even if this more recent official rules agreement wasn't specifically intended as a replacement or specifically intended by Coinbase as a modification of the user agreement, it's still an enforceable contract that's separate from the user agreement, we all agree. And it conflicts. The term -- the terms conflict. The terms in paragraph 10 conflict with the user agreement.

So it's -- whether the official rules were intended to modify or replace -- and we don't argue they were intended to replace the user agreement. We just argue that this is a separate agreement entered into at a later point in time on a more specific issue. So our position is just that, look, this is the most recent, most specific agreement for dispute resolution between the parties on this subject.

THE COURT: Uh-huh.

MR. HARRIS: And, you know, we cite one case that Coinbase tries to distinguish. It's the *Capili v. Finish Line* case that basically says, Look, when the parties enter into two different agreements that cover the same subject matter and there's a conflict, the latter agreement controls. And Coinbase tries to distinguish that *Capili* case, but there are other cases that say the same thing. It's a well-settled principle of contract interpretation. I can give the Court a couple of cites that are in our papers because we didn't see the distinguishing argument until reply.

THE COURT: So you know what I'm going to do on this is that why don't you give me that in writing because it's just hard to do it on the fly.

MR. HARRIS: Sure.

THE COURT: Just send it to me tomorrow, you know, in writing and just make sure you send it to the other side as well just with the citations.

MR. HARRIS: Sure.

THE COURT: *Capili* is in your brief. But if you want to have additional citations.

MR. HARRIS: Sure. Would Your Honor like me to file a short brief or do you want me to just email case citations to everyone?

THE COURT: Just email case citations.

MR. HARRIS: Okay.

THE COURT: Send it to the skpo address.

MR. HARRIS: Okay. Thank you, Your Honor. Sure. And, you know, really all the parties agree here that, you know, the normal presumption in favor of arbitration does not apply, right, and that we have to decide, you know, how to -- how to resolve these disputes using normal principles of contract interpretation.

And I would give the Court three settled canons of contract interpretation that all cut in our direction. One is that specific provisions govern over more general provisions. Here, we had a hypergeneralized, all-encompassing arbitration agreement, and then later in time we had a very specific dispute resolution agreement about the Dogecoin sweepstakes only. And all the parties agree here we're dealing only with claims regarding the sweepstakes, controversies regarding the sweepstakes. So the specific traditionally controls over the general.

Number two is the canon we were just talking about where you have two separate contracts, the latter controls the older agreement.

And, third, you know, we all agree these were adhesive agreements, and generally under state contract law, ambiguities in adhesive consumer contracts are construed against the drafter. We all agree that Defendants were the drafters of this official rules agreement and of the user agreement.

THE COURT: Okay. Mr. Rhodes, do you want to comment and then we'll move on to the next -- the other portion.

MR. HARRIS: I --

THE COURT: Oh, I'm sorry. Go ahead.

MR. HARRIS: Actually, Your Honor -- sorry. I just wanted to touch on the threshold issue that Mr. Rhodes raised which is --

THE COURT: Arbitrability?

MR. HARRIS: Exactly -- who decides the arbitrability question. And with respect to that, the Supreme Court has been -- repeatedly said that it has to be clear and unmistakable that the parties intended to delegate the arbitrability question to an arbitrator; right? It has to be clear and unmistakable.

And the question of arbitrability is really a question of jurisdiction. It's who has jurisdiction to decide the merits. So it has to be clear and unmistakable that the parties intended to delegate the jurisdictional question away from the Court to the arbitrator.

Now, Coinbase would be correct if the user agreement were the only agreement in play here. But, again, we have to look to the official rules agreement and say do the official rules arguably speak to the jurisdictional question. And the answer is, yes, it arguably does. It's not unreasonable to say that our

controversy over the proper forum for resolving sweepstakes disputes is a controversy regarding the sweepstakes within the meaning of the official rules. If you look at the parties' arguments on page 5 of Coinbase's reply brief, you know, they're arguing this point. You know, this jurisdictional question they say is not a "controversy" regarding the sweepstakes. It's a controversy regarding the user agreement is what they say.

And then, you know, our position is, no, the jurisdictional question about the sweepstakes is arguably controversy. So what are we disputing? We're disputing the meaning of paragraph 10. We're disputing the meaning of the official rules, and the dispute about the meaning of the official rules is arguably a controversy regarding the sweepstakes.

So because -- because there's some nonfrivolus argument that you can make here that the parties just intended to have the Court resolve everything sweepstakes-related, it's not clear and unmistakable that the Court can't decide jurisdiction.

You know, in the *Goldman* case, the 9th Circuit said that, "Because the presumption in favor of arbitrability does not apply here, the forum selection clauses need only be sufficiently specific to impute to the parties the reasonable expectation that they would litigate any disputes in federal court."

And we really have that reasonable expectation here based on the plain language. And the arbitration clause -- arbitration agreement, user agreement may not be unconscionable, but Coinbase's interpretation of the official rules agreement would actually render the official rules agreement unconscionable.

And why do I say that? It's because any -- any layperson reading the disputes clause of paragraph ten in the official rules would understand that you have to bring your sweepstakes claims in a California court, state or federal. And they would also understand when the official rules say if you break any provision of these official rules, you're out of the sweepstakes.

What Coinbase is basically saying is that sweepstakes participants who read those rules and very reasonably bring their claims in court as required by the rules, under threat of disqualification, they should have somehow brought their claims in an arbitration forum. The problem is if they did that, then under the official rules, they could have been disqualified. But -- under the plain -- under the plain language of the official rules. I mean, they don't deal with the plain language of the official rules which uses -- which uses the words "participant" and "entrant." Each participant, each entrant, everyone is bound by this. When the officials rules intend to isolate mail-in entrants -- the official rules do that expressly in another part of the rules agreement -- so we just really think there's no common sense basis and there's no technical basis here for compelling arbitration.

THE COURT: Okay. Understood. Thank you. Mr. Rhodes.

MR. RHODES: I'll be very brief. I'll be very brief.

First, I think he's making this way too complicated. There's a valid arbitration agreement. Disputes over scope, enforceability, revocability, by the terms -- this is Exhibit 6, 7, 8, and 9 I believe to the -- to the declaration filed say it goes to the -- it goes to the arbitrator to decide issues of arbitrability, and he just gave you

a whole bunch of fact questions that are gating items to arbitrability and he's trying to compress them into the merits of the case.

I would also say -- it's interesting -- talked a lot about intent. There's nothing in the promotion terms that purports to novate, merge and integrate, supersede anything in the prior agreement. And there is a body of case law which we cited to you, and now it will entreat you to go look at that case law, that deals with the circumstance when you have multiple agreements touching on the subject matter, the overall standard is to try to enforce the arbitration clause if there is a reading that permits it. And here, there is a logical framework to understand why this is not a conflict.

There's a group of people that are not bound by the user agreement and the arbitration clause that might create a lawsuit. Under the rules of the promotion, they go to court. And those who have previously agreed to an arbitration clause, they have to have their issue decided in arbitration or at least the gating issue of scope of their claim and whether it maps to the arbitration clause has to be decided by the arbitrator.

Now -- and there is no conflict in the way that he's describing it because there is a distinct group of populations that are affected by these things.

Think of it this way. If I said to you, I want to form a relationship with you. We're going to have a service relationship or a product buy-in relationship and everything about our dispute's going to be arbitrated, and then I come up with a specific product or feature and I say, Oh, these are the unique rules that pertain to this product or feature and I don't purport to novate

or supersede or merge out and integrate the prior agreement, why wouldn't you be bound by the arbitration clause? This is just a smaller subset of things relative to registered users.

The jurisdictional clause is not in conflict because there's a whole identified population of people who could bring a lawsuit if they never agreed to the arbitration clause. So from that standpoint, the first job is to try to harmonize the instruments under the prevailing case law to say, Is there a way to make the arbitration clause survive -- because that's the Court's mandate.

So I think you get it. I've probably exceeded my observation of short commentary, so I'll -- I'll submit to that.

THE COURT: I will go back and read everything again. It's been very helpful. Sorry. Ms. Wytsma.

MS. WYTSMA: I just have a very brief point, but I think it's an important point that hasn't really been discussed today. There's a very simple way and very, as Mr. Harris says, common sense way to harmonize these two agreements. Paragraph 8.3, which is the arbitration provision, compels claims to arbitration but also allows individuals to pursue claims in small claims courts on an individual basis.

And that's exactly what the dispute resolution provision provides in the sweepstakes rules -- that claims cannot be resolved on a class action basis. They have to be resolved on an individual basis.

What that dispute resolution provision does is provide a location for where those disputes are going to be resolved, and that location is California. But there's nothing inconsistent between a dispute resolution

provision of general application which allows individuals to pursue individual claims in small claims court with a sweepstakes provision which provides essentially the same opportunity but in a specific location of California.

And so, you know, if we want to look at sort of a common sense way to harmonize these two agreements, I don't think there is really any inconsistency in the two. One is just simply pointing people to the location where they have to file their individual claim, not a class action claim. And that's how any layperson reading paragraph 10 of the dispute resolution of the sweepstakes rules would understand it. Claims may not be resolved through any form of class action.

And so I think that we're creating inconsistencies where there really is none. So I just wanted to emphasize that point -- that there is a consistency between the two that we haven't really talked about today.

THE COURT: Okay. Thank you. Okay.

MR. HARRIS: Your Honor, may -- may I just address that in under one minute?

THE COURT: One minute. Then we want to move on to the motion to dismiss.

MR. HARRIS: I would just point out, Your Honor, that Defendant Marden-Kane has not filed the motion. That's the first time I've heard that argument. Coinbase in their -- in their motion, in Footnote 7 of their opening motion, they said that Plaintiffs' claims wouldn't be allowed in small claims court. So the small claims court provision, that's a brand new thing. Nobody has raised that before Defendant Marden-Kane, who has not even answered the complaint yet.

So I don't believe that's a proper argument at this time.

THE COURT: Thank you. Okay. Mr. Mornin, would you like to address the motion to dismiss?

MR. MORNIN: Sure, Your Honor. Our arguments are laid out in the briefing and, in the interest of efficiency, I want to start by asking if the Court had any specific questions you would like to raise?

THE COURT: No. I'd just like to hear from you.

MR. MORNIN: Okay. So first I'd like to address the Plaintiffs' lottery claim. Under California law, an illegal lottery has three elements -- prize, distribution by chance, and consideration.

So it's black letter law that a contest is not a lottery where participants can enter for free. That's what separates a lawful sweepstakes from an illegal lottery. In the sweepstakes at issue here, the Plaintiffs could have entered in two different ways. First, they could have bought or sold Dogecoin on Coinbase's platform and, second, they could have entered for free by mailing an index card with their contact information.

Here, there is no dispute that a free alternative method of entry was available. That should end this fee analysis. And the Plaintiffs concede consideration was not required here and, therefore, under California lottery law, the Dogecoin sweepstakes was a lawful sweepstakes and not an illegal lottery.

So despite that, the Plaintiffs claim that the sweepstakes was unlawful because they were subjectively unaware of the free alternative method of entry, but that is not the law in California. Under the Plaintiffs' theory, anybody could file a lawsuit over any

sweepstakes and survive a motion to dismiss on the theory that they didn't know how to enter for free. That is simply not the law in California and the Plaintiffs' lottery claim should be dismissed.

THE COURT: Let me hear from Mr. Harris and then I'll come back to you on the next claim. Mr. Harris.

MR. HARRIS: Thank you, Your Honor. So I would say that Coinbase has slightly but materially misrepresented our position on this issue. Our position on the consideration issue is not that this was a lottery because our clients were -- my clients were unaware of the free entry option. Our position is -- and this has never been decided before anywhere, as far as I can tell -- our position is that this became a lottery because Coinbase objectively represented -- and Marden-Kane objectively represented -- to entrants that consideration was necessary. Therefore, they paid.

It wasn't that a free entry method was disclosed and we just didn't know about it, it wasn't disclosed well enough. This was -- they actually came out and stated, You must do this to enter and, therefore, we did that to enter, and that's -- that's what transforms this into consideration.

And --

THE COURT: But you also -- but you also concede that there are portions of the -- of the website that also said it's a free entry. All you have to do is fill out this entrance card and mail it in. Right?

MR. HARRIS: Yes, Your Honor. That is what the complaint says. And I have to admit -- I messed up the pleading on this a little bit. And the way I messed it up, I tried to correct in our brief. And when I read -- during the briefing period and not during the pleading

period -- when I read the official rules for a second time, I realized that method number -- it set forth two methods, right, and I glossed over this, unfortunately, when I first approached the rules. But method number one says, "New and existing Coinbase users must make a trade to enter." And then method two says you can enter by means of --

THE COURT: Can you give me the docket number citation to that so I can see it here?

MR. HARRIS: Yes, Your Honor. It's Docket 22-1 --

THE COURT: Okay.

MR. HARRIS: And it's paragraph 3 which is a long paragraph or -- is it paragraph 3 or paragraph 2? It's a long paragraph 3, I believe. It looks like -- let's see --

THE COURT: Part of the first amended complaint?

MR. HARRIS: No. I'm pointing to the official rules which are docketed at Docket No. -- ECF No. 22-1.

THE COURT: Right. It is part of your -- it's Exhibit A to the first amended complaint.

MR. HARRIS: Yes, Your Honor. Yes, Your Honor.

THE COURT: All right. Method one, "Existing accountholders and new accountholders must opt in to participate in the sweepstakes and must complete 100 dollar USD to trade, buy, sell."

MR. HARRIS: Right.

THE COURT: Okay.

MR. HARRIS: And then method two says, "To enter via mail, handwrite ..." blah, blah, blah.

THE COURT: Uh-huh.

MR. HARRIS: So if we were to read method two as being available to exist accountholders and new accountholders, that would render the first sentence of method one false. And Coinbase is doing a lot of talking about reconciling agreements. The only way to reconcile these agreements is to make the mail-in method available to non-Coinbase users.

THE COURT: So you're asking for leave to amend.

MR. HARRIS: Yeah, yeah. I guess I am, Your Honor.

THE COURT: All right. Okay. Mr. Mornin, why don't you go on to the next claim.

MR. MORNIN: So, again, I think here there's no dispute that consideration was not required to enter. I think the allegations that Coinbase somehow misrepresented or concealed the free method of entry, those might be relevant to the advertising claims under the UCL, FAL, and CLRA. But I think as to the lottery claim, there is no dispute that consideration was not required, that anybody could have mailed in an index card, and that ends the analysis as to whether this was an unlawful lottery.

THE COURT: I think that what Mr. Harris is saying is that -- and I'm looking at the agreement in front of me right -- I'm looking at the Exhibit A in front of me. It makes it look like if you are an existing accountholder or a new accountholder, you have to complete the $100 transaction. If you're not an existing accountholder or a new accountholder, you can enter for free. That's what Mr. Harris' argument is, which he wants to have leave to amend so he can make the argument. In other words, it's not only misleading; it could be objectively read to mean that if you actually currently are a Coinbase accountholder, you must

have this $100 transaction. Everybody else can just mail in this little card.

MR. MORNIN: I read the official rules differently, so the word "must" appears under method one.

THE COURT: Uh-huh.

MR. MORNIN: The word "must" does not appear under method two, so I read that to mean that to enter via method one, which is by buying or selling Dogecoin, you must opt in. But if you want to enter via method two, the index card, there's no requirement to opt in.

THE COURT: I have to say it is confusing. I mean, if I were entering this contest, I would be confused by this. I want to read the whole thing again, but I see what Mr. Harris' argument is, so let me think about it. Okay.

MR. MORNIN: Fair enough, Your Honor.

THE COURT: Mr. Mornin, why don't you move on to the next claim.

MR. MORNIN: Yeah. So the next claim is under Business & Professions Code 17539. Under that section, sweepstakes marketing materials must include a "no purchase or payment necessary message," readily understandable terms, and the message must be "substantially similar to the following statement: 'No purchase or payment of any kind is necessary to enter or win this sweepstakes.'"

So Coinbase included the phrase "No purchase necessary to enter or win" throughout its marketing materials -- including in the sweepstakes emails, in its website, in its mobile ads, and Plaintiffs concede this throughout their second amended complaint.

For instance, paragraphs 66, 69, 72, 73, 74.

THE COURT: Okay. Mr. Harris.

MR. MORNIN: This language is easily understandable.

THE COURT: Okay.

MR. MORNIN: It was presented clearly and conspicuously. It's clear that this language doesn't literally match the text that appears in Section 17539, but the statute doesn't require that language to appear verbatim. Instead, it requires a statement that is "substantially similar" to the statutory language presented in "readily understandable terms."

And, here, I think there's no reasonable dispute that Coinbase's version satisfies that requirement, and Plaintiffs' claim under that section should be dismissed.

THE COURT: Okay. Mr. Harris.

MR. HARRIS: Sure, Your Honor. So this is the first time Coinbase has actually argued that that disclosure was conspicuous within the meaning of the statute. We disagree with that fundamentally. It was a light-fonted fine print footnote at the bottom of each email and ad webpage or mobile ad page. We don't believe that meets the "conspicuous" requirement.

And as far as clarity, you know, we -- in our papers, we list several independent reasons why we think it's reasonable to say that this footnote disclaimer was ambiguous in the context of the whole ads. You can't read it in isolation. We have an ad that has bright flashing lights that says "Buy or sell Dogecoin. To enter ..." and then a footnote that says you don't have to buy anything. Okay. So you still have to buy or sell

something. And so we think that there's case law that says, Look, if it's ambiguous, it's not clear. And, you know, the statute says "no purchase or payment of any kind" for a reason, and it's because the legislature understood that, look, there's more than one way to squeeze consideration out of a person than buying a product or a service. And so we need to make clear that not just is a purchase unnecessary, but we want to make sure sweepstakes operators make clear that purchase or payment of any kind, any kind of consideration, any kind of financial benefit, and they just didn't put that language in the disclaimer which, again, was buried. It wasn't anywhere near the entry order device within the meaning of the statute. The entry order devices were the big bright "Click" buttons that said, "Opt in," "Make a trade," and then there was the trading interface which we say was also an entry order device because it's where you made your cryptocurrency order that completed your entry.

Unfortunately, there's not a lot of case law on this because it's a rather scarce statute and, you know, must people comply, I think, rather than --

THE COURT: Can I just say also that if this case were to go forward, one thing that I would want to see is what it looks like -- a tutorial that kind of walks through what the website looked like. In other words, if I went to the ad, what would I see at what point in time. Because I think those kinds of timing issues are what -- sort of like when things pop up actually make a difference -- or could make a difference. I don't know for sure if it would make a difference, but it might, potentially.

Now we're talking in sort of an abstract term and it's hard for me to visualize.

MR. HARRIS: Right.

THE COURT: I can imagine the fact-finder would have -- any kind of fact-finder, arbitrator, or jury, whoever, is going to have the same problem.

MR. RHODES: Your Honor, we'd be happy to provide something like that. I would just note for the record and for Your Honor's benefit -- and I know you know this -- if the Court were to deny arbitration, we would probably put in an immediate appeal and, you know, the case would be -- go over for some period of time.

THE COURT: Correct. Okay. Mr. Mornin, your next argument.

MR. MORNIN: Yeah. So, again, there is no case law on Section 17539, so we just have the plain language of the statute to go on.

THE COURT: Interesting.

MR. MORNIN: The statute says that you need language substantially similar to this: "No purchase or payment of any kind is necessary." All of Coinbase's materials -- the website, the emails, the mobile ads said "No purchase necessary to enter or win."

THE COURT: Okay.

MR. MORNIN: So I'll leave it at that.

THE COURT: Okay.

MR. MORNIN: With respect to the UCL, FAL, and CLRA claims, each of those claims depends on whether a reasonable consumer would have been misled by Coinbase's statements. And this is an objective standard. The standard is whether an objectively reasonable consumer would have been deceived.

And if a court determines that no reasonable consumer would have been deceived, it should dismiss deceptive advertising claims as a matter of law under Rule 12(b)(6).

Here, the Plaintiffs have identified five statements that they believe are deceptive. Coinbase's reply brief explains why each of those statements was not deceptive. I won't walk through each of them here, but I just want to make the point that all of Coinbase's marketing materials, as well as the official rules of the sweepstakes, did make it abundantly clear that any participant could enter for free.

And, indeed, in their opposition brief, the Plaintiffs concede that Coinbase's sweepstakes materials contain "conspicuous statements that terms and conditions applied." Plaintiffs also concede that these statements were "coupled with reasonably conspicuous hyperlinks" to the official rules. That's at the opposition brief at page 7.

THE COURT: I think Mr. Harris' argument that he brought up today, as he says for the first time, is that the reason that the advertising was deceptive is that an existing Coinbase user would think that he or she would have to actually make this transaction and that the free method applies to a non-existing Coinbase user. If I understand Mr. Harris' argument correctly today, that's the theory on which they're hanging their hat. And I agree that it's a new theory, but he's asking for leave to amend.

MR. MORNIN: I have a hard time understanding that theory because that assumes that each of those entrants is already aware of both methods of entry. And if they're aware of that method of entry, then

they've seen the statement, and I can't understand how they -- how Coinbase could have hidden the statement in a way that left them unaware of it.

THE COURT: Okay. Okay. Mr. Harris.

MR. HARRIS: Yeah. So, Your Honor, our -- our theory of the sweepstakes solicitations being false or misleading under the Consumer Protection laws, it doesn't hinge on the official rules -- it doesn't necessarily hinge on the official rules themselves being misleading. What we have here -- and we tried to lay it out as best we could. I agree with Your Honor it would be nice to have like a video showing -- showing how the webpages moved and all that. We tried to present that in screenshot form in our complaint. And between the screenshots and our verbal descriptions, tried to be able to paint a mental picture of -- of how this actually worked in practice. But -- what were we talking about?

We were talking about -- oh, whether it's false and misleading. So what we had was -- the way the ads were structured, as we laid out in the complaint, most people were going to click the "See How to Enter" button before navigating to the official rules because of the way it was presented. And when you click the "See How to Enter" button, then you would see an "Opt In" button with instructions to buy or sell. Once you click "Opt In," then the big bright ad would say, Remember, you still need to do this to enter. And it would say that to everybody, whether you were a Coinbase user or not. You still need to make a trade to enter. And then it had a big flashy "Make a Trade" button.

So -- so there's case law that we cite in our papers -- and I think we briefed this pretty well, so I'd refer the

Court to our papers -- but there's case law that we cite in our papers that we analogize that says, Look, you can't make big bright false statements and then have some fine print somewhere in the back or ten pages later that contradicts your big bright statements on the front of the box because, at the very least, that could be confusing. It doesn't have to be false. It can be true and misleading to a reasonable person. It can even be confusing to a substantial portion of the public. And I think that the ads standing alone, you know, before you click to the official rules, the ads standing alone were confusing and misleading, and Coinbase even says that part of it was objectively false. They say that anyone could enter for free; that's their position. But the ad undisputably said, you -- everybody -- you still need to trade to enter. So that statement was false according to them and that was the most prominent statement on the ads.

THE COURT: Okay. All right. I want to talk about the CMC because I'm not going to set any dates now. No matter how I rule on the motion to compel arbitration, one side is going to appeal. And so I want to -- what I want to do is go ahead and -- and also I got the dates that you suggested and they make no sense. I need to have actual dates. I can't tie it to something -- but I realize the dilemma you were in, is that you also see that this is going to be an issue -- the threshold issue of arbitrability, where it's going to go, whether it's going to be an arbitrator or not makes it impossible to figure out a schedule. So I appreciate that.

So here's what I'm going to do. I'm going to go ahead and set another CMC and at that point -- and I'll do it in two months because by then you'll for sure have an

order from me on this. And then we'll decide what we're going to do about the dates. If I say -- if I grant the motion to stay because I think that the arbitrator has to decide the issue of arbitrability, then I'll call off the CMC. But if I decide that I'm going to decide it, I'm going to make a decision and the case stays here, then we'll meet and then we'll talk about dates.

So let's look at the calendar and pick a date about two months from now that we can have a CMC. And that would take us to February. And I'm looking at February 28th.

MR. RHODES: Fine here, Your Honor.

THE COURT: I'm sorry?

MR. RHODES: Fine here, Your Honor.

THE COURT: Okay. At 1:30 p.m.

THE CLERK: You're actually marked unavailable that day.

THE COURT: It's okay, Melinda. I'm going to take the CMCs that day.

THE CLERK: Okay. All right. That sounds good.

MR. HARRIS: Your Honor, I'm sorry. I don't have my calendar and I should , but I believe I'm actually on a preplanned vacation that day.

THE COURT: Okay. How about March 7th at 1:30 p.m.?

MR. HARRIS: That would be perfect for me.

THE COURT: Okay.

MR. RHODES: That' s fine, Your Honor.

THE COURT: Okay. March 7th. And so by then, we'll know where you're going to be or what you're going to be feeling or what your status is.

Is there anything else people want to talk about for the CMC?

MS. WYTSMA: Not on behalf of Marden-Kane. Thank you, Your Honor.

THE COURT: Okay. All right.

MR. RHODES: Thank you, and good morning, Your Honor.

THE COURT: Okay.

MR. MORNIN: Thank you, Your Honor.

(Proceedings adjourned at 10:28 a.m.)

I, Peggy Schuerger, certify that the foregoing is a correct transcript from the official electronic sound recording provided to me of the proceedings in the above-entitled matter.

/s/ Peggy Schuerger — February 16, 2022
Signature of Approved Transcriber — Date

Peggy Schuerger

Ad Hoc Reporting

Approved Transcription Provider

for the U.S. District Court,

Northern District of California

PAGES 1 – 26

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

DAVID SUSKI, ET AL.,

PLAINTIFFS,

vs.

COINBASE GLOBAL, INC., ET AL.,

DEFENDANT.

Case No.: 21-cv-04539 SK

San Francisco, California

Monday, April 18, 2022

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND

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

APPEARANCES:

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TRANSCRIBED BY: ***JOAN MARIE COLUMBINI, CSR #5435, RPR RETIRED OFFICIAL COURT REPORTER, USDC***

MONDAY, APRIL 18, 2022 9:50 A.M.

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ELECTRONICALLY RECORDED PROCEEDINGS

THE CLERK: CALLING CIVIL CASE 21-4539, SUSKI VERSUS COINBASE GLOBAL, INC., ET AL.

COUNSEL PLEASE STATE YOUR APPEARANCES FOR THE RECORD.

MR. HARRIS: GOOD MORNING, YOUR HONOR. THIS IS DAVID HARRIS ON BEHALF OF THE PLAINTIFFS.

THE COURT: GOOD MORNING.

MR. LeBLANC: GOOD MORNING, YOUR HONOR. THIS IS TRAVIS LEBLANC ON BEHALF OF DEFENDANT COINBASE.

THE COURT: GOOD MORNING.

MS. WYTSMA: GOOD MORNING, LAURA WYTSMA APPEARING ON BEHALF OF DEFENDANT MARDEN-KANE.

THE COURT: ALL RIGHT. GOOD MORNING.

SO I HAVE A QUESTION ABOUT WHAT WOULD HAPPEN IF -- LET'S ASSUME FOR THE SAKE OF ARGUMENT THAT THE NINTH CIRCUIT GRANTED -- OVERTURNED MY DECISION AND SAID THAT THE CASE AGAINST COINBASE SHOULD GO TO ARBITRATION, BUT THE CASE AGAINST THE OTHER DEFENDANT, OBVIOUSLY, IS NOT GOING TO GO TO ARBITRATION?

WHAT WOULD HAPPEN IN THAT SITUATION? MS. WYTSMA, COULD YOU TELL ME WHAT WOULD HAPPEN IN THAT SITUATION?

MS. WYTSMA: SURE, I THINK THAT WE FILED A SHORT RESPONSE INDICATING THAT THE COURT HAS DISCRETION TO STAY THE CASE AS TO THE NON-SIGNATORY PARTIES TO A LITIGATION WHEN THE CLAIMS ARE, QUOTE, INHERENTLY INSEPARABLE.

AND HERE IF WE LOOK AT THE FIRST -- THE ORIGINAL COMPLAINT, THE FIRST AMENDED COMPLAINT, OR THE SECOND AMENDED COMPLAINT, THEY PLEAD ALL CLAIMS AGAINST DEFENDANTS GENERALLY.

FOR EXAMPLE, THE DEFENDANT'S LARGE BRIGHT BLUE BUTTON IN PARAGRAPH 11 OR DEFENDANT'S DOGECOIN TRADING INTERFACE IN PARAGRAPH 105. THERE'S BEEN NO ATTEMPT TO SEPARATE THE TWO DEFENDANTS AND TO ATTRIBUTE ANY PARTICULAR CONDUCT TO ONE PARTY OR THE OTHER. THE CLAIMS ARE ASSERTED GENERALLY AGAINST DEFENDANTS.

I THINK ONE THING TO BEAR IN MIND, SORT OF THE PREMISE OF THE QUESTION WAS THAT MARDEN-KANE, OBVIOUSLY, CANNOT BE PART OF THE ARBITRATION PROCEEDINGS. I THINK WE COULD ALWAYS CONSENT AND WE WOULD CONSIDER CONSENTING TO AN ARBITRATION IN THE EVENT THAT THE NINTH CIRCUIT DECIDES THE CLAIMS SHOULD HAVE BEEN COMPELLED TO ARBITRATION, BUT --

THE COURT: THE PLAINTIFFS HAVE TO AGREE TO THAT CONSENT ALSO, THOUGH.

MS. WYTSMA: I THINK THAT'S RIGHT. I HAVEN'T LOOKED AT IT SPECIFICALLY --

THE COURT: YOU COULDN'T COMPEL ARBITRATION AGAINST A PLAINTIFF AGAINST YOU JUST BECAUSE YOU CONSENTED. THE PLAINTIFF HAS TO AGREE AS WELL.

MS. WYTSMA: WELL, YOU KNOW, THERE IS A VERY LONG AND COMPLICATED AND, NOT SURPRISINGLY, SOMEWHAT INCONSISTENT LINE OF CASES IN THE CIRCUITS ABOUT WHETHER A NON-SIGNATORY WHERE IT'S BEING ACCUSED OF CONDUCT THAT IS PART AND PARCEL OF THE CLAIMS AGAINST A SIGNATORY PARTY CAN, AS A MATTER OF ESTOPPEL, ASSERT THAT.

BUT, YOU KNOW, WITHOUT GOING INTO THAT VERY COMPLICATED CASE LAW, I THINK THAT IN THIS PARTICULAR CASE, WHAT WE WOULD ASK THE COURT TO DO IS TO STAY THE LITIGATION AS TO MARDEN-KANE BECAUSE --

THE COURT: WHILE THE ARBITRATION IS GOING FORWARD?

MS. WYTSMA: WHILE THE ARBITRATION IS GOING FORWARD.

(SIMULTANEOUS COLLOQUY.)

THE COURT: WHY? WHY WOULD I DO THAT?

MS. WYTSMA: WELL, BECAUSE ANY BENEFITS TO COINBASE OF BEING ABLE TO ARBITRATE ITS CLAIMS ARE GOING TO BE LOST. IT'S GOING TO HAVE TO NECESSARILY COME IN AND BE DEPOSED AND PROVIDE THIRD-PARTY DISCOVERY. IT WILL ESSENTIALLY BE DRAGGED BACK INTO THE LITIGATION AS A THIRD PARTY IN THE EVENT

THE CASE GOES FORWARD, BECAUSE MOST OF THE INFORMATION SOUGHT AND MOST OF THE -- MOST OF THE ALLEGATIONS IN THE COMPLAINT ARE DIRECTED, REALLY, TO FEATURES OF COINBASE AND ITS ADVERTISING AND THE WAY IT'S -- YOU KNOW, IT SET UP THE SWEEPSTAKES ON ITS WEBSITE, YOU KNOW, THE BIG BLUE BUTTON. THAT WASN'T A MARDEN-KANE BIG BLUE BUTTON.

ESSENTIALLY, YOU KNOW, THERE WERE JURISDICTIONAL ALLEGATIONS THAT SEPARATED THE TWO, BUT THE REMAINDER OF THE ALLEGATIONS ARE AGAINST DEFENDANT'S GENERALLY. THERE ARE NO SEPARATE CLAIMS THAT CAN BE PARCELED OUT AND SEPARATELY LITIGATED WITHOUT INVOLVING COINBASE.

AND THE DISCOVERY DISPUTE THAT AROSE, I THINK, IS A GOOD ILLUSTRATION OF HOW COINBASE IS NOT GOING TO BE ABLE TO EXTRICATE ITSELF FROM THE LITIGATION AND PURSUE ITS DEFENSE SEPARATELY IN ARBITRATION, BECAUSE WHAT, YOU KNOW, WE HAVE IS A SITUATION HERE WHERE THE INFORMATION BEING SOUGHT IS ONLY AVAILABLE THROUGH COINBASE. COINBASE HAS ASSERTED CERTAIN PROTECTIONS AND PRIVILEGES WITH RESPECT TO THAT INFORMATION. AND, SO, WE WERE IN A SITUATION WHERE EVEN THOUGH PLAINTIFF'S COUNSEL WAS TRYING TO GET THE INFORMATION FROM MARDEN-KANE, THAT INFORMATION WAS REALLY COINBASE INFORMATION.

YOU CAN IMAGINE THAT COINBASE WOULD HAVE TO PRODUCE WITNESSES FOR DEPOSITION IF THE CASE PROCEEDED AGAINST MARDEN-KANE. IT WOULD HAVE TO PROVIDE DOCUMENTS. IT WOULD HAVE TO BE INVOLVED IN MAKING SURE THAT ITS RIGHTS WERE NOT SUBSTANTIVELY IMPACTED, BECAUSE YOU CAN -- AS THE CASES WE CITED, THE REAL RISK IS INCONSISTENT RULINGS. YOU KNOW, SHOULD AN ARBITRATOR DECIDE THAT --

THE COURT: SO LET ME JUST ASK YOU THIS. SO LET'S ASSUME I STAYED EVERYTHING AND ALLOWED THIS TO GO -- AND THE NINTH CIRCUIT RULED IT SHOULD BE IN ARBITRATION, AND THE CASE AGAINST COINBASE GOES TO ARBITRATION AND THE ARBITRATOR RULES ONE WAY OR ANOTHER. THAT'S NOT BINDING AGAINST MARDEN-KANE IN MY COURT, IS IT?

MS. WYTSMA: I THINK THERE WOULD BE ESTOPPEL PRINCIPLES THAT COULD BE APPLIED AGAINST THE PLAINTIFFS. THE ARBITRATION RULING WOULD NOT NECESSARILY BE BINDING ON MARDEN-KANE. AGAIN --

THE COURT: HOW WOULD IT BE BINDING ON THE PLAINTIFFS IF YOU'RE -- IF THE OTHER DEFENDANT IS NOT IN THAT LITIGATION? I'M PUZZLED BY THAT.

MS. WYTSMA: WELL, BECAUSE THE CONDUCT AT ISSUE -- IMAGINE THAT THE CASE GOES FORWARD AND AN ARBITRATOR

FINDS THAT COINBASE'S CONDUCT IN USING THE LARGE BRIGHT BLUE BUTTON IS NOT ACTIONABLE AND PLAINTIFFS HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE THAT ISSUE IN ARBITRATION, THEN THEY WOULDN'T BE ABLE TO TURN AROUND AND MAKE THE ARGUMENT THAT THAT SAME COINBASE LARGE BRIGHT BLUE BUTTON SOMEHOW MAKES MARDEN-KANE LIABLE IN THE DISTRICT COURT LITIGATION.

THE COURT: AND SO WHAT IF THE CASE WENT FORWARD AGAINST MARDEN-KANE FIRST? LIKE, LET'S SAY THERE WERE A RACE TO THE COURT TO A DECISION. ARBITRATION IS GOING AGAINST COINBASE. LITIGATION AGAINST MARDEN-KANE IS IN MY COURT. WE GOT A VERDICT FROM A JURY BEFORE A VERDICT -- A DECISION CAME OUT IN THE ARBITRATION. WOULD THAT BE BINDING AGAINST COINBASE?

MS. WYTSMA: I DON'T BELIEVE SO.

THE COURT: YOU COULD HAVE INCONSISTENT VERDICTS, RIGHT?

MS. WYTSMA: YOU COULD HAVE -- THAT IS A VERY REAL RISK. AND I THINK THAT THE REAL ISSUE HERE IS THAT COINBASE WILL LOSE THE BENEFITS OF ITS ARBITRATION AND ITS STATUTORY RIGHT TO PURSUE AN APPEAL OF THE COURT'S DECISION, BECAUSE IT IS GOING TO BE PUT BACK IN A POSITION OF HAVING TO PROVIDE DISCOVERY, EITHER AS A PARTY OR THIRD PARTY. AND EVEN IF IT'S PROVIDING THAT INFORMATION AS A THIRD PARTY, IT IS

LOSING THE BENEFITS OF AN ARBITRATION PROVISION.

THE MOTION HERE IS SIMPLY TO EFFECTUATE CONGRESS'S INTENT THAT THERE BE AN IMMEDIATE AND SPEEDY APPEAL OF DECISIONS WHERE AN ARBITRATION PROVISION IS NOT ENFORCED.

IT'S -- THIS IS NOT A GENERAL STAY MOTION. THIS IS NOT YOUR TYPICAL STAY MOTION, NO LESS THAN THE UNITED STATES SUPREME COURT HAS NOTED THAT THERE IS A VERY REAL RISK OF INCONSISTENT RULINGS WHEN YOU HAVE AN ARBITRATION GO FORWARD AGAINST A SIGNATORY AND A DISTRICT COURT ACTION GO FORWARD AGAINST A NON-SIGNATORY. AND THEY CITED AN APPROPRIATE CASE OF THAT RISK OF INCONSISTENT RULINGS -- SO I WOULD SAY FIRST THE INCONSISTENT RULINGS IS AN IMPORTANT ONE.

BUT, TWO, YOU KNOW, I REALIZE THAT THE SECOND AND NINTH CIRCUITS HAVE A DIFFERENT PERSPECTIVE ON AUTOMATIC STAYS THAN THE REST OF THE CIRCUITS. BUT I THINK THAT, YOU KNOW, ALL THE CASES RECOGNIZE THAT APPEALS ARISING OUT OF THE FAA ARE DIFFERENT AND THE BENEFITS WILL BE IRREPARABLY LOST IF A PARTY IS FORCED TO UNDERGO DISCOVERY OR LITIGATION COSTS PENDING AN APPEAL. AND IF THE CASE GOES FORWARD AGAINST MARDEN-KANE, THAT'S EXACTLY WHAT'S GOING TO HAPPEN, BECAUSE COINBASE WILL NECESSARILY HAVE TO BE PART OF THOSE

PROCEEDINGS, BECAUSE THE ALLEGATIONS ARE INHERENTLY INSEPARABLE IN THE COMPLAINT AS ALLEGED.

THAT WAS PLAINTIFF'S CHOICE TO ALLEGE -- YOU KNOW, HE'S HAD THREE SEPARATE PLEADINGS NOW TO -- YOU KNOW, TO IDENTIFY CONDUCT THAT'S SPECIFIC TO ONE PARTY OR ANOTHER, EVEN AFTER LEARNING OF, YOU KNOW, THE INTENTION TO MOVE TO COMPEL ARBITRATION. THE PLEADINGS HAVE NOT ATTEMPTED IN ANY WAY TO SEPARATE THE CONDUCT THAT MARDEN-KANE ALLEGEDLY ENGAGED IN THAT WAS WRONGFUL, SEPARATE AND APART FROM WHAT COINBASE --

THE COURT: UNDERSTOOD.

MS. WYTSMA: AND I JUST --

THE COURT: OKAY.

MS. WYTSMA: IF I CAN JUST VERY BRIEFLY? I DIDN'T WANT TO GET INTO IT IN PLEADINGS, AND I DIDN'T WANT TO ANTAGONIZE THE SITUATION, BUT I WAS A LITTLE LOST BY THE ACCUSATIONS IT BROUGHT WHEN, YOU KNOW, FROM JANUARY 25 ON --

THE COURT: SO LET'S NOT GET INTO THAT RIGHT NOW.

(SIMULTANEOUS COLLOQUY.)

MS. WYTSMA: OKAY.

THE COURT: I WANT TO FOCUS ON — I WANT TO HEAR FROM MR. LEBLANC. SO THANK YOU --

MS. WYTSMA: THANK YOU.

THE COURT: I KIND OF PUT YOU ON THE SPOT BY STARTING OUT WITH YOU.

MS. WYTSMA: THANK YOU.

THE COURT: BUT LET ME HEAR FROM MR. LEBLANC FIRST.

SO, MR. LEBLANC, HERE'S MY QUESTION TO YOU: IF I THINK THAT THIS CASE IS GOING TO BE PROCEEDING ON TWO TRACKS, THAT IS, LET'S SAY, I DON'T THINK ARBITRATION SHOULD GO FORWARD FIRST. EVEN IF THE NINTH CIRCUIT SAYS THAT THE CASE AGAINST COINBASE SHOULD BE IN ARBITRATION, ASSUME FOR THE SAKE OF ARGUMENT I THINK, NO, BOTH CASES ARE GOING TO GO FORWARD AT THE SAME TIME, BECAUSE THE PLAINTIFF DIDN'T AGREE TO ARBITRATION IN ANY CIRCUMSTANCES AGAINST MARDEN-KANE, AND I THINK THAT CLAIM SHOULD GO FORWARD IN MY COURT WITHOUT DELAY.

AND, SO, IF THOSE TWO CASES ARE GOING FORWARD AT THE SAME TIME, ISN'T THE FACT THAT COINBASE IS GOING TO BE DRAWN IN FOR DISCOVERY A REASON THAT I SHOULDN'T GRANT THE MOTION FOR STAY? IN OTHER WORDS, IF I'M LEANING TOWARDS THAT STRATEGY, WHICH IS TO HAVE TWO CASES GOING FORWARD AT THE SAME TIME, COINBASE IS GOING TO HAVE TO DEAL WITH DISCOVERY IN MY COURT NO MATTER WHAT.

MR. LeBLANC: THANK YOU VERY MUCH, YOUR HONOR. AND GOOD MORNING TO YOU AGAIN.

FIRST OF ALL I'D LIKE TO DISTINGUISH BETWEEN A STAY PENDING APPEAL AND A STAY IN ITS ENTIRETY, BECAUSE I THINK WHAT YOUR SCENARIO PRESENTS IS A SITUATION WHERE THE NINTH CIRCUIT ACTUALLY REFERS THE CASE FOR ARBITRATION, AND THEN YOUR CASE AGAINST -- THE CASE AGAINST MARDEN-KANE PROCEEDS IN THE DISTRICT COURT.

AND IN THE SCENARIO, WE -- FIRST OF ALL, THERE IS A FEDERAL LAW, 9 USC 3, THAT WOULD PERMIT MARDEN-KANE TO SEEK A STAY OF THE PROCEEDING IN THE DISTRICT COURT. AND IT'S MANDATORY, BY THE WAY. THE 9 USC 3 SPECIFICALLY STATES THAT ANY PARTY, UPON APPLICATION FOR A ISSUE REFERABLE TO ARBITRATION WHEN ITS BEEN REFERRED, SUCH APPLICATION SHALL BE GRANTED TO STAY THE ENTIRE PROCEEDING. SO MARDEN-KANE WOULD BE THE BENEFICIARY OF THAT OPPORTUNITY SHOULD -- SHOULD THE COURT FIND ITSELF IN THAT SCENARIO.

I WOULD ALSO ADD THAT, IF THE CASE WERE TO PROCEED BEFORE THE ARBITRATOR -- AND I BELIEVE YOU HAD A SCENARIO WHERE, YOU KNOW, THE ARBITRATOR WERE TO PROVIDE RELIEF TO THE PLAINTIFFS, I STRONGLY SUSPECT THAT THAT RELIEF WILL CURE THEM IN THEIR ENTIRETY, NOT SOMETHING WHERE THERE WOULD BE ANYTHING LEFT IN THE DISTRICT COURT TO ACTUALLY AWARD THEM, GIVEN THAT EVERYTHING IS PAST THE LOOKING. IT'S RETROSPECTIVE. IT'S ALL

PURELY MONETARY THAT WE'RE -- YOU KNOW, DAMAGES THAT WE'RE TALKING ABOUT HERE. AND THE ARBITRATOR WOULD HAVE THE ABILITY TO FULLY REMEDIATE ANY INJURY TO THE PLAINTIFFS AS WELL.

SO IT'S HARD TO IMAGINE WHAT THERE WOULD BE LEFT IN THE COURT, IN THE DISTRICT COURT, TO DO IN THAT SCENARIO, WHICH IS PROBABLY THE REASON WHY THE FEDERAL ARBITRATION POLICY IS SO STRONG IN FAVOR OF PERMITTING AN ARBITRATION TO PROCEED BEFORE THE DISTRICT COURT PROCEEDINGS CONTINUE.

AND THAT'S EMBODIED IN 9 U.S. 3. IT'S ALSO EMBODIED IN THE IMMEDIATE RIGHT OF APPEAL UNDER THE FEDERAL ARBITRATION ACT. A DENIAL OF AN -- A MOTION TO COMPEL ARBITRATION IS IMMEDIATELY APPEALABLE. THE GRANT, HOWEVER, IS ACTUALLY NOT IMMEDIATELY APPEALABLE SHOULD YOU HAVE GRANTED IT.

SO THE FEDERAL ARBITRATION ACT BUILDS IN THIS POLICY. AND AS MS. WYTSMA WAS POINTING OUT, THE SUPREME COURT AND SEVERAL CIRCUITS, THE THIRD, THE FOURTH, THE SEVENTH, THE TENTH THE ELEVENTH, AND D.C., IN AN UNPUBLISHED OPINION, HAVE ALL RECOGNIZED THAT IT IS A MATTER OF JURISDICTION AFTER THE -- AN ARBITRATION MOTION HAS BEEN DENIED, THAT AN APPEAL BE ALLOWED TO PROCEED SO THAT THE COURT CAN CONSIDER THE FEDERAL POLICY FIRST, THE JUDICIAL ECONOMY, THE AVOIDANCE OF NOT JUST THE INCONSISTENT

DECISION BETWEEN THE ARBITRATOR AND THE DISTRICT COURT, BUT ALSO THE INCONSISTENT DECISIONS THAT COULD HAPPEN BETWEEN THE NINTH CIRCUIT AND THE DISTRICT COURT IN PROCEEDING DURING THE PENDENCY OF APPEAL.

THE COURT: OKAY. THAT MAKES SENSE. THANK YOU. THANK YOU FOR MAKING THAT DISTINCTION.

MR. HARRIS, I WANT TO FOCUS ON THE PREJUDICE TO PLAINTIFFS. WHAT DO YOU THINK IS THE HARM TO PLAINTIFFS IF I WERE TO GRANT THIS MOTION TO STAY?

MR. HARRIS: YOUR HONOR, I WOULD SAY THERE'S A COUPLE OF ASPECTS OF IT, YOU KNOW, THAT THERE'S -- INITIALLY, THERE'S THE DELAY ASPECT STANDING ALONE. I MEAN, WE HAVE A CLAIM TO MONETARY DAMAGES, AND WE'RE SITTING HERE IN A HYPERINFLATIONARY ENVIRONMENT, AND SO GETTING THE CLAIMS RESOLVED SOONER THAN LATER IS A MEANINGFUL BENEFIT TO THE PLAINTIFFS.

AND I WOULD JUST POINT OUT THAT LEGALLY, UNDER THE NINTH CIRCUIT'S FOUR-PART TEST, COINBASE HAS TO SHOW IRREPARABLE HARM. THE PLAINTIFFS DO NOT HAVE TO SHOW IRREPARABLE HARM.

THE COURT: I UNDERSTAND.

MR. HARRIS: WE JUST HAVE TO SHOW HARM. AND SO THERE'S HARM IN THE DELAY ITSELF, PRIMARILY.

AND THEN, IN ADDITION, WITH MARDEN-KANE BEING INVOLVED -- YEAH, I'M JUST NOT SEEING FOR A VARIETY OF LEGAL REASONS THE PREMISE FOR STAYING MARDEN-KANE WHILE THE NINTH CIRCUIT RESOLVES COINBASE'S MOTION.

BUT IF THE COURT WERE TO DO THAT, YOU KNOW, NOW WE HAVE A SITUATION WHERE THE PLAINTIFFS HAVE, AS FAR AS WE KNOW TODAY, VIABLE CLAIMS FOR RELIEF VIS-A-VIS MARDEN-KANE. THERE'S NO DISPUTE THAT THERE'S NEVER BEEN ANY FORM OF ARBITRATION AGREEMENT BETWEEN THE PLAINTIFFS AND MARDEN-KANE. AND SO NOW WE HAVE, YOU KNOW -- I HAVEN'T ARGUED THIS YET, EXCUSE ME, BECAUSE OUR VIEW IS THAT MARDEN-KANE'S ARGUMENTS AREN'T PROPERLY BEFORE THE COURT.

BUT I WOULD ARGUE IF IT WAS PROPERLY BEFORE THE COURT, THAT THAT ACTUALLY PRESENTS A DUE PROCESS ISSUE, TO STAY THE CLAIMS AGAINST A PARTY WHERE THERE IS NO AGREEMENT TO ARBITRATE.

THE SUPREME COURT HAS EXPLAINED THAT, YOU KNOW, A CAUSE OF ACTION IS A SPECIES OF PROPERTY PROTECTED BY THE DUE PROTEST CLAUSE AND THE FEDERAL RULES OF CIVIL PROCEDURE ARE -- THEY EXIST TO PROVIDE THE DUE PROCESS THAT THE CONSTITUTION GUARANTEES. AND SO IF WE'RE JUST TO CUT THOSE CLAIMS OFF FOR NO COLORABLE CONTRACTUAL, STATUTORY, OR OTHER LEGAL REASON, I'M JUST NOT -- I'M SEEING A SUBSTANTIAL AMOUNT OF

PREJUDICE THERE AND POSSIBLY A CONSTITUTIONAL VIOLATION, HONESTLY.

THE COURT: SO DON'T I HAVE THE INHERENT POWER TO STAY UNDER THE LAW? I MEAN, I HAVE THAT POWER, DON'T I, TO STAY A CASE FOR A VARIETY OF REASONS. JUDICIAL ECONOMY, A NUMBER OF -- I MEAN, I HAVE STAYED CASES IN A LOT OF KINDS OF SITUATIONS. I DON'T KNOW WHAT THE EXACT STATUTORY IS, BUT I THINK I HAVE THAT POWER UNDER MANY DIFFERENT CIRCUMSTANCES, DON'T I?

MR. HARRIS: I WOULD AGREE --

THE COURT: I'M NOT CUTTING OFF THE PLAINTIFF'S CLAIM -- IF I WERE TO SAY I'M GETTING RID OF YOUR CLAIM WITH NOTHING, THAT WOULD BE ABSOLUTELY A VIOLATION OF DUE PROCESS. FOR ME TO SAY, I'M PUTTING THIS ON HOLD UNTIL THE NINTH CIRCUIT 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 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 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, 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 THERE'S A PRIOR GENERALIZED AGREEMENT TO ARBITRATE THEN THERE'S A SUBSEQUENT AGREEMENT TO LITIGATE, AND THAT'S SETTLED LAW NOW.

THE COURT: I THINK THE ONE TWIST IN THIS SITUATION WAS THERE WAS AN EXTRA STEP IN THIS CASE, WASN'T THERE, WHERE THE PERSON WHO WON -- IN ORDER TO ENTER THE SWEEPSTAKES, YOU HAD TO SIGN UP FOR AN ACCOUNT, AND THEN YOU HAD TO ACTUALLY AGREE TO ARBITRATE WHEN YOU SIGN UP FOR AN ACCOUNT.

MR. HARRIS: YEAH. THAT DIDN'T APPLY TO ANY OF THE NAMED PLAINTIFFS.

THE COURT: OH, THAT'S RIGHT. BECAUSE THEY ALREADY HAD ACCOUNTS.

MR. HARRIS: AND THAT WAS UNDISPUTED.

THE COURT: THAT'S RIGHT.

MR. HARRIS: EVEN IF WE DID THAT HYPOTHETICAL, THE LAW WOULD ACTUALLY WORK OUT THE SAME WAY. BUT FOR OUR PURPOSES, EVERYONE HAD A HISTORICAL ARBITRATION AGREEMENT.

THE COURT: THAT'S RIGHT.

MR. HARRIS: AND THEN A NEW AGREEMENT.

SO THEY DON'T ADDRESS ANY OF THE CASE LAW RELIED UPON BY THE COURT OR THE COURT'S REASONING. THEY DON'T ADDRESS THE PLAIN ENGLISH OF THE OFFICIAL RULES

AGREEMENT. THEIR ENTIRE APPEAL IS PREMISED ON THERE BEING A CONFLICT IN THE TERMS OF THE ARBITRATION -- I'M SORRY. THEIR ENTIRE APPEAL IS PREMISED ON THERE NOT BEING A CONFLICT BETWEEN THE TERMS OF THE ARBITRATION AGREEMENT AND THE TERMS OF THE OFFICIAL RULES AGREEMENT.

THE COURT ADDRESSED THE PLAIN ENGLISH OF THE OFFICIAL RULES AGREEMENT TO SAY, YEAH, I CAN'T RECONCILE THESE. AND THEY HAVEN'T BEEN ABLE TO EXPLAIN HOW THE OFFICIAL RULES AGREEMENT MEANS ANYTHING OTHER THAN WHAT IT SAYS.

AND THEN THEIR SECONDARY ARGUMENT IS, LOOK, OKAY, LET'S SAY THAT THERE IS A CONFLICT BETWEEN THE TWO AGREEMENTS. THAT ISSUE STILL GOES TO, THEY SAY, THE ENFORCEABILITY, THE REVOCABILITY, THE SCOPE, THE VALIDITY OF THE ARBITRATION AGREEMENT; THEREFORE, THE THRESHOLD QUESTION HAS TO GO TO ARBITRATION.

THAT ARGUMENT REVEALS A FLAW, BECAUSE, UNDER NINTH CIRCUIT LAW, UNDER THE *GOLDMAN* CASE, WHETHER THERE'S A CONFLICT BETWEEN THE TWO AGREEMENTS, IT DOES NOT GO TO ENFORCEABILITY, IT DOES NOT GO TO SCOPE OR VALIDITY. IT GOES TO EXISTENCE, AND SO THERE'S REALLY NO ISSUE HERE.

YOU KNOW, THE PRIMARY ARGUMENT IS, WELL, THE COURT HAS TO FIND A WAY TO HARMONIZE THE TWO AGREEMENTS. THAT'S NOT REALLY WHAT THEY'RE ASKING FOR.

WHAT THEY'RE ASKING FOR FROM THE NINTH CIRCUIT IS A HOLDING THAT ONCE AN AGREEMENT TO ARBITRATE IS MADE, NO FUTURE AGREEMENT MAY CONFLICT WITH IT, NO FUTURE AGREEMENT TO THE CONTRARY CAN EVER BE MADE. THERE'S ZERO SUPPORT IN ANY LAW FOR THAT HOLDING, THAT ONCE YOU MADE AN ARBITRATION AGREEMENT, THAT'S THE END, YOU CAN'T -- YOU CAN'T COUNTER IT IN THE FUTURE WITH A DIFFERENT AGREEMENT.

ALL OF THIS IS A MATTER OF CONTRACT. AS A MATTER OF CONTRACT IT'S VERY SIMPLE, AS THE COURT HELD, AND THEY HAVE NO RESPONSE TO THE SIMPLE CONTRACT INTERPRETATION.

THE COURT: THANK YOU FOR REMINDING ME.

MR. LEBLANC, HOW LONG ARE APPEALS TAKING IN THE NINTH CIRCUIT RIGHT NOW?

MR. LeBLANC: WELL, IT VARIES. BUT THEY TYPICALLY DO TAKE MORE THAN A YEAR AT THIS POINT.

I DO THINK, YOUR HONOR, THAT IT IS WORTH ME RESPONDING TO MR. HARRIS'S CHARACTERIZATIONS OF THE ARGUMENTS THAT WE MADE BOTH IN OUR MOTION PAPERS BEFORE YOU, AS WELL AS IN -- IN WHAT WE PLAN TO DO IN THE NINTH CIRCUIT.

FIRST AND FOREMOST, AS YOU, YOURSELF, POINTED OUT, COURTS REGULARLY GRANT MOTIONS TO STAY. COURTS, IN FACT, REGULARLY GRANT STAYS PENDING APPEALS

OF A DENIAL OF A MOTION TO COMPEL ARBITRATION.

ON PAGE 3 OF OUR MEMORANDUM OF POINTS AND AUTHORITIES, WE CITE A STRING OF THOSE CASES OVER, I BELIEVE, MORE THAN A DECADE OF CASE LAW THAT STRONGLY SUPPORTS THAT.

MOREOVER, THE TEST THAT IS USED TO ACTUALLY DETERMINE WHETHER OR NOT A STAY IS WARRANTED IS A SLIDING SCALE TEST. IT BALANCES ALL OF THE FACTORS, SUCH THAT A STRONGER SHOWING ON ONE ELEMENT MAY OFFSET A WEAKER SHOWING ON OTHERS.

MR. HARRIS HAS SPENT THE PREPONDERANCE OF HIS TIME FOCUSED JUST ON THE FIRST FACTOR OF THAT TEST; NAMELY, WHETHER OR NOT COINBASE'S APPEAL HAS A SUFFICIENT PROBABILITY OF SUCCESS ON THE MERITS. HE HIMSELF INDICATED TO YOU THAT IT WAS A RELATIVELY LOW STANDARD THAT REQUIRES ONLY A FAIR DISPUTE.

YOU KNOW, UNDER THE CASE LAW, IN THE *LEIVA PEREZ VERSUS HOLDER,* COINBASE NEED ONLY SHOW A MINIMUM QUANTUM OF LIKELY SUCCESS; THAT IS, IT HAS TO HAVE A REASONABLE PROBABILITY OR FAIR PROSPECT OF SUCCESS. IT CAN ALSO RAISE SERIOUS LEGAL QUESTIONS, BUT IT DOES NOT REQUIRE THE PRESENTATION OF AN ISSUE OF FIRST IMPRESSION.

PLAINTIFF'S SECOND AMENDED COMPLAINT DEFINES THE CLASS AS THOSE PERSONS WHO OPTED INTO THE DOGECOIN SWEEPSTAKES IN JUNE OF 2021 AND WHO PURCHASED OR SOLD DOGECOINS ON A COINBASE EXCHANGE FOR A TOTAL OF ONE HUNDRED OR MORE BETWEEN JUNE 3RD AND JUNE 10. THUS, OPTING INTO THE SWEEPSTAKES RULES WOULD NOT BE SUFFICIENT TO MAKE A PURCHASE OR SALE OF -- SUFFICIENT TO BE A CLASS MEMBER. SUCH INDIVIDUALS MUST ALSO VOLUNTARILY MAKE A PURCHASE OR SALE OF DOGECOIN AS A COINBASE USER WHO VOLUNTARILY AGREED TO COINBASE'S USER AGREEMENT INCLUDING ITS ARBITRATION CLAUSE.

THE COURT: CAN I PAUSE YOU THERE?

SO YOU'RE SAYING THAT THE CLASS AS DEFINED INCLUDES BOTH THE PREVIOUS COINBASE USERS AND PEOPLE WHO ENTERED INTO THE SWEEPSTAKES AND SIGNED UP TO COINBASE TO ACTUALLY BUY AND SELL A HUNDRED DOLLARS WORTH IN ORDER TO GET VALUE?

MR. LeBLANC: EXACTLY. THAT IS EXACTLY CORRECT, YOUR HONOR.

THE COURT: DO YOU AGREE, MR. HARRIS, THAT THE CLASS AS DEFINED ENCOMPASSES BOTH THOSE GROUPS OF PEOPLE? I KNOW THE NAMED PLAINTIFFS WERE ONLY IN GROUP ONE.

MR. HARRIS: SURE, YOUR HONOR. SO, YEAH, TECHNICALLY, I AGREE THERE MAY BE CLASS MEMBERS. THERE'S NO AFFIRMATIVE

EVIDENCE OF THIS, BUT THERE MAY BE CLASS MEMBERS WHO SIGNED UP TO ENTER THE SWEEPSTAKES. IN THAT CASE, THEY NECESSARILY AGREED TO THE ARBITRATION AGREEMENT BEFORE THEY AGREED TO THE OFFICIAL RULES AGREEMENT, GRANTED, CLOSE IN TIME, BUT LITERALLY, YOU HAD TO CLICK "I AGREE," "I AGREE TO ARBITRATE," AND THEN YOU ENTER THE OFFICIAL RULES AGREEMENT BY HAVING --

THE COURT: (INDISCERNIBLE.)

(SIMULTANEOUS COLLOQUY.)

MR. HARRIS: YEAH, BY HAVING NOTICE OF THE SWEEPSTAKES RULES, CLICKING THE BUTTONS TO ENTER AND MAKE A TRADE. SO EVERYONE IS IN THE SAME BOAT. YOU FIRST AGREED TO ARBITRATE AND WHETHER IT WAS FIVE YEARS OR FIVE MINUTES LATER, YOU AGREED TO LITIGATE THE SWEEPSTAKES DISPUTES.

AND MR. LEBLANC POINTS OUT THE STRING CITE. WE ACTUALLY ADDRESS THE STRING CITE AND POINT OUT THERE'S NOT ONE OF THOSE CASES THAT ADDRESS AN EXPRESS AGREEMENT TO LITIGATE THE PRECISE CONTROVERSY IN DISPUTE.

AND THAT'S WHAT WE HAVE HERE. WE HAVE SUCH SPECIFIC AGREEMENT OF EXCLUSIVE JURISDICTION IN THE COURTS FOR EXACTLY THESE CLAIMS. THIS IS REALLY JUST A BUNCH OF DELAY AND OBSTRUCTION, IN MY VIEW.

THE COURT: MR. LEBLANC, SORRY I INTERRUPTED YOU. GO BACK TO MR. LEBLANC.

MR. LeBLANC: NO PROBLEM.

BUT, YOUR HONOR, THAT IS EXACTLY WHERE YOU STARTED THE CONVERSATION A LITTLE WHILE AGO, RECOGNIZE THE UNIQUENESS OF THE SITUATIONS AND CIRCUMSTANCES THAT WE FIND OURSELVES IN WITH THIS CASE.

AND MR. HARRIS HIMSELF SEEMS TO AGREE. THERE IS A UNIQUE SET OF CIRCUMSTANCES THAT A PANEL OF THE NINTH CIRCUIT VERY WELL MAY DISAGREE WITH.

WHILE WE UNDERSTAND AND RESPECT THE CHALLENGE THAT YOU HAD AND EXPRESSED IN REACHING THE DECISION IN THIS CASE, WE BELIEVE THAT THE COURT ERRED IN DENYING THE MOTION TO COMPEL BECAUSE THERE IS A VALID AND BINDING ARBITRATION AGREEMENT BETWEEN COINBASE AND PLAINTIFFS, WHICH DELEGATES ALL DISPUTES REGARDING APPLICABILITY, SCOPE, ENFORCEABILITY, AND REVOCABILITY TO THE ARBITRATOR.

THE ALLEGED CONFLICT BETWEEN THE USER AGREEMENT AND THE SWEEPSTAKES RULES DIRECTLY IMPLICATES THE ISSUES AND MUST BE DECIDED BY THE ARBITRATOR. RATHER THAN DECIDING THE ISSUE OF SCOPE OR ENFORCEABILITY, WE RESPECTFULLY BELIEVE THE COURT SHOULD HAVE, PURSUANT TO THE PARTIES' AGREEMENT, REFERRED THE 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 --

MS. WYTSMA: YOUR HONOR, CAN I HAVE JUST 90 SECONDS?

THE COURT: YES.

MS. WYTSMA: OKAY.

THE COURT: I'M PUTTING YOU ON THE CLOCK.

MS. WYTSMA: OKAY. SO THERE'S NO QUESTION 40 YEARS AGO IN MOSES CONE MEMORIAL HOSPITAL, THE SUPREME COURT SAID IT MIGHT BE NECESSARY TO STAY AS TO AN NON-SIGNATORY PARTY.

WHEN WE TALK ABOUT HARDSHIP, PLAINTIFF'S COUNSEL RAISED THE ISSUE OF HYPERINFLATION. WE'RE TALKING ABOUT A CASE WHERE ALL THE CONDUCT ALLEGED TO BE WRONGFUL IS IN THE PAST. THERE'S NO ONGOING VIOLATION THAT'S ALLEGED. THERE'S NO INJUNCTIVE RELIEF SOUGHT. THERE'S NOTHING EXCEPT FOR THE, PERHAPS, DELAYED PAYMENT OF MONEY IN AN INFLATIONARY PERIOD.

AND MR. HARRIS, HIMSELF, IF THE COURT GOES BACK TO HIS DECLARATION AND LOOKS AT EXHIBIT A THAT HE SUBMITTED IN SOMEHOW TRYING TO SUGGEST THAT I DID SOMETHING NEFARIOUS, IF YOU LOOK AT THAT JANUARY 25 EMAIL, HE SAYS, WHY DON'T WE PUT OFF AMENDMENT -- FURTHER

AMENDMENT TO THE COMPLAINT -- IT WOULD BE THE FOURTH COMPLAINT IN THIS CASE -- UNTIL -- IF THE COURT GRANTS COINBASE'S MOTION, WHY DON'T WE PUT OFF ALL PROCEEDINGS, INCLUDING FILING AN AMENDED COMPLAINT, UNTIL AFTER THE NINTH CIRCUIT RULES ON THE APPEAL, BECAUSE HE DIDN'T WANT TO SPEND TIME AND MONEY IN PREPARING AN AMENDED COMPLAINT. THAT'S REALLY CLEAR IN HIS JANUARY 25TH EMAIL. HE SAYS --

THE COURT: I'M NOT GOING TO TAKE THAT INTO CONSIDERATION --

MS. WYTSMA: OKAY.

THE COURT: -- BECAUSE THAT'S NOT SOMETHING THAT I AM WORRIED ABOUT FOR NOW.

MS. WYTSMA: OKAY. THANK YOU, YOUR HONOR.

THE COURT: OKAY. ALL RIGHT. I'M GOING TO TAKE IT UNDER SUBMISSION, AND WE'LL MOVE TO THE NEXT MATTER. THANK YOU FOR YOUR COMMENTS. THEY'RE VERY HELPFUL.

MR. HARRIS: THANK YOU, YOUR HONOR.

MR. LeBLANC: THANK YOU, YOUR HONOR.

MS. WYTSMA: HAVE A GOOD DAY.

(PROCEEDINGS ADJOURNED AT 10:22 A.M.)

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

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID SUSKI, et al.,

Plaintiffs,

v.

MARDEN-KANE, INC., et al.,

Defendants.

Case No. 21-cv-04539-SK

Filed January 11, 2022

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:

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[1] Plaintiffs did not attach a copy of the Official Rules for the Dogecoin sweepstakes to their Second Amended Complaint. If

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

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Plaintiffs file a Third Amended Complaint in accordance with this Order, they shall attach a copy of the Official Rules.

> 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

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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."

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.

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

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-15209

DC No. 3:21-cv-04539-SK

OPINION

DAVID SUSKI; JAIMEE MARTIN; JONAS CALSBEEK; THOMAS MAHER, Individually and on Behalf of All Others,

Plaintiffs-Appellees,

v.

COINBASE, INC.,

Defendant-Appellant,

and

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

Defendants.

Appeal from the United States District Court
for the Northern District of California
Sallie Kim, Magistrate Judge, Presiding

Argued and Submitted November 18, 2022
San Francisco, California

Filed December 16, 2022

Before: A. Wallace Tashima and Richard A. Paez, Circuit Judges, and William K. Sessions III,* District Judge.

Opinion by Judge Tashima

SUMMARY[**]

Arbitration

The panel affirmed the district court's order denying Coinbase, Inc.'s motion to compel arbitration in a diversity suit brought by four Coinbase users who opted into Coinbase's Dogecoin Sweepstakes in June 2021.

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* The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader

When plaintiffs created their Coinbase accounts, they agreed to the "Coinbase User Agreement," which contained an arbitration provision. They later opted into the Sweepstakes' "Official Rules," which included a forum selection clause providing that California was the exclusive jurisdiction for controversies regarding the sweepstakes.

First, Coinbase challenged the district court's ruling that the Coinbase User Agreement did not delegate to an arbitrator the question of whether the forum selection clause in the Sweepstakes' Official Rules superseded the arbitration clause in the User Agreement. Coinbase argued that the issue of any superseding effect of the Sweepstakes' Official Rules concerned the scope of the arbitration clause and therefore fell within the User Agreement delegation clause. The panel held that the "scope" of an arbitration clause concerns how widely it applies, not whether it has been superseded by a subsequent agreement. The district court therefore correctly ruled that the issue of whether the forum selection clause in the Sweepstakes' Official Rules superseded the arbitration clause in the User Agreement was not delegated to the arbitrator, but rather was for the court to decide.

Second, Coinbase challenged the district court's ruling that the forum selection clause in the Sweepstakes' Official Rules superseded the User Agreement's arbitration clause. Coinbase argued that the User Agreement contained an integration clause, and procedures for amendment of the User Agreement, and the User Agreement therefore could not have been superseded by the Official Rules. The panel held that the district court correctly ruled that because the User Agreement and the Official Rules conflict on the

question whether the parties' dispute must be resolved by an arbitrator or by a California court, the Official Rules' forum selection clause supersedes the User Agreement's arbitration clause.

COUNSEL

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David J. Harris Jr. (argued), Finkelstein & Krinsk LLP, San Diego, California, for Plaintiffs-Appellees.

OPINION

TASHIMA, Circuit Judge:

Coinbase, Inc., an online cryptocurrency exchange, appeals the district court's order denying its motion to compel arbitration in a diversity suit brought by David Suski and three other Coinbase users who opted into Coinbase's Dogecoin Sweepstakes in June 2021. We affirm.

When plaintiffs created their Coinbase accounts, they agreed to the "Coinbase User Agreement," which contains an arbitration provision. They later opted into the Sweepstakes' "Official Rules," which include a forum selection clause providing that California courts have exclusive jurisdiction over any controversies regarding the sweepstakes. Plaintiffs brought claims under California's False Advertising Law, Unfair Competition Law, and Consumer Legal Remedies

Act against Coinbase and Marden-Kane, Inc., a company hired by Coinbase to design, market, and execute the sweepstakes. Coinbase filed a motion to compel arbitration, which the district court denied. The district court concluded that a delegation clause in the Coinbase User Agreement did not delegate to the arbitrator the issue of which contract governed the dispute. The district court further ruled that, under state-law principles of contract interpretation, the Official Rules superseded the Coinbase User Agreement and, therefore, that the User Agreement's arbitration clause did not apply.

We have jurisdiction under 9 U.S.C. § 16(a)(1). We review de novo the district court's order denying Coinbase's motion to compel arbitration. *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1207 (9th Cir. 2016).

I. The Delegation Clause

First, Coinbase challenges the district court's ruling that the User Agreement did not delegate to an arbitrator the question of whether the forum selection clause in the Sweepstakes' Official Rules superseded the arbitration clause in the User Agreement.

"[W]hether 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 Grp. A.G.*, 724 F.3d 1069, 1072 (9th Cir. 2013) (internal quotation marks and citations omitted). Issues of contract formation may not be delegated to an arbitrator. *Ahlstrom v. DHI Mortg. Co.*, 21 F.4th 631, 635 (9th Cir. 2021). But "if the parties [formed] an agreement to arbitrate containing an enforceable delegation clause, all arguments going to the scope or enforceability of the

arbitration provision are for the arbitrator to decide in the first instance." *Caremark, LLC v. Chickasaw Nation*, 43 F.4th 1021, 1030 (9th Cir. 2022); *see Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527 (2019) (recognizing that the Federal Arbitration Act "allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes").

The delegation clause in the User Agreement accepted by three plaintiffs provides that the arbitrator shall decide "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." Suski accepted a different version of the Coinbase User Agreement, but the American Arbitration Association rules incorporated in that agreement similarly grant the arbitrator the power to rule on "the existence, scope, or validity of the arbitration agreement."

Coinbase argues that the issue of any superseding effect of the Sweepstakes' Official Rules concerns the scope of the arbitration clause and therefore falls within the User Agreement's delegation clause. Coinbase cites *Mohamed*, which held that delegation clauses in the parties' arbitration agreements served as clear and unmistakable evidence of the parties' intent to delegate questions of arbitrability, even though the parties' agreements also contained forum selection clauses granting "'exclusive jurisdiction'" to state and federal courts in San Francisco over "'any disputes, actions, claims or causes of action arising out of or in connection with this Agreement.'" *Mohamed*, 848 F.3d at 1209. In *Mohamed*, however, the

delegation clause and the forum selection clause were included in the same contract, and there was no question about a later, potentially-superseding agreement. We held that the delegation clause remained clear and unmistakable despite the presence of the forum selection clause because any conflicts between them were "artificial." *Id*. ("It is apparent that the venue provision . . . was intended . . . to identify the venue for any other claims that were not covered in the arbitration agreement.").

We find well-taken plaintiffs' argument that under *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733 (9th Cir. 2004), the existence rather than the scope of an arbitration agreement is at issue here. In *Goldman*, plaintiff Goldman, a broker-dealer and member of the Financial Industry Regulatory Authority ("FINRA"), sought to enjoin a FINRA arbitration that the City of Reno had initiated against it. *Id*. at 735. As a FINRA member, Goldman had a default obligation under the FINRA Rules to arbitrate at the request of a customer such as Reno. *Id*. at 742. The contracts between the parties, however, included forum selection clauses providing that actions arising out of the contracts must be brought in the United States District Court for the District of Nevada. *Id*. at 736–37. *Goldman* held that the issue of whether the forum selection clauses applied and superseded Goldman's arbitration obligation was an issue of whether a contractual obligation to arbitrate existed. *Id*. at 743.

The "scope" of an arbitration clause concerns how widely it applies, not whether it has been superseded by a subsequent agreement. *See id*.; *cf. Portland Gen. Elec. Co. v. Liberty Mut. Ins. Co.*, 862 F.3d 981, 985–86 (9th Cir. 2017) (explaining that issues regarding

whether an arbitration agreement included a dispute were questions of the scope of the arbitration agreement, delegated to the arbitrators). The district court therefore correctly ruled that the issue of whether the forum selection clause in the Sweepstakes' Official Rules superseded the arbitration clause in the User Agreement was not delegated to the arbitrator, but rather was for the court to decide. *See Ahlstrom*, 21 F.4th at 635 (issues of contract formation may not be delegated to an arbitrator) .

II. The Forum Selection Clause

Coinbase also challenges the district court's ruling that the forum selection clause in the Sweepstakes' Official Rules superseded the User Agreement's arbitration clause.

When determining whether parties have agreed to submit to arbitration, courts apply state-law principles of contract formation and interpretation. *Holl v. U.S. Dist. Court (In re Holl)*, 925 F.3d 1076, 1083 (9th Cir. 2019). A contract containing a forum selection clause supersedes an arbitration agreement where "the forum selection clause[] . . . sufficiently demonstrate[s] the parties' intent to do so." *Goldman*, 747 F.3d at 741. 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.'" *Capili v. Finish Line, Inc.*, 116 F. Supp. 3d 1000, 1004 n.1 (N.D. Cal 2015) (quoting 17A C.J.S. Contracts § 574), *aff'd*, 699 F. Appx. 620 (9th Cir.

2017); *see also Williams v. Atria Las Posas*, 24 Cal. Rptr. 3d 341, 345 (Ct. App. 2018) (holding that later-signed arbitration agreement superseded parties' original agreement, which did not include an arbitration clause); *Masterson v. Sine*, 436 P. 2d 561, 563 (Cal. 1968) (Any "collateral agreement itself must be examined . . . to determine whether the parties intended the subjects of negotiation it deals with to be included in, excluded from, or otherwise affected by the writing").

Coinbase argues that the User Agreement contains an integration clause, and procedures for amendment of the User Agreement, and the User Agreement therefore could not have been superseded by the Official Rules. Coinbase also argues that the Official Rules concern a different subject matter from the User Agreement and do not evince the parties' intent to amend, revise, revoke, or supersede any prior agreement, including the User Agreement. An integration clause, however, does not preclude a superseding contract from being formed in the future. *See In re Ins. Installment Fee Cases*, 150 Cal. Rptr. 3d 618, 632 (Ct. App. 2012) ("'[A]n integration clause only covers antecedent and contemporaneous agreements; it does not foreclose the possibility of future agreements.'" (quoting *Nakashima v. State Farm Mut. Auto. Ins. Co.*, 153 P. 3d 664, 668 (N.M. Ct. App. 2007))). Coinbase is correct that the Official Rules contain no language specifically revoking the parties' arbitration agreement in the User Agreement. By including the forum selection clause, however, the Official Rules evince the parties' intent not to be governed by the User Agreement's arbitration clause when addressing

controversies concerning the sweepstakes. *See Goldman*, 747 F.3d at 741.

Coinbase contends that, even if the Official Rules amended the User Agreement, the two agreements can and should be read harmoniously. It argues that, like the forum selection clause in *Mohamed*, the forum selection clause here must be read to apply only to non-arbitrable claims and to suits seeking enforcement of any arbitration awards. *See Mohamed*, 848 F.3d at 1209. As stated above, however, *Mohamed* is distinguishable because there, the arbitration clause and the forum selection clause were included in the same contract. Coinbase also cites *Peterson v. Minidoka County School District No. 331*, 118 F.3d 1351, 1359 (9th Cir.), *amended by* 132 F.3d 1258 (9th Cir. 1997), for the proposition that in situations involving multiple contracts, the contractual provisions should be read "so that they harmonize with each other, not contradict each other." *Peterson*, however, also involved a single contract that incorporated a statute and a policy, rather than an original contract and a subsequent contract. *Id*.

Finally, as the district court explained, the Official Rules cannot be reconciled with the User Agreement. The Official Rules apply to all Sweepstakes entrants, including entrants who are not subject to the User Agreement because they used an alternative mail-in procedure. Despite Coinbase's arguments, the Official Rules make no distinction between entrants who are Coinbase users subject to the User Agreement's arbitration clause and those who are not because they used an alternative mail-in entry procedure.

The district court correctly ruled that because the User Agreement and the Official Rules conflict on the question whether the parties' dispute must be resolved by an arbitrator or by a California court, the Official Rules' forum selection clause supersedes the User Agreement's arbitration clause. *See Goldman*, 747 F.3d at 741. We therefore affirm the district court's order denying Coinbase's motion to compel arbitration.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID SUSKI; JAIMEE MARTIN; JONAS CALSBEEK; THOMAS MAHER, Individually and on Behalf of All Others,

Plaintiffs-Appellees,

v.

COINBASE, INC.,

Defendant-Appellant,

and

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

Defendants.

Filed: 02/23/2023

No. 22-15209
DC No. 3:21-cv-04539-SK

ORDER

Before: A. Wallace Tashima and Richard A. Paez, Circuit Judges, and William K. Sessions III,* District Judge.

The panel has voted to deny the petition for panel rehearing, and recommends that the petition for rehearing en banc be denied. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f). The petition for panel rehearing and the petition for rehearing en banc are denied.

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* The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.