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4 DAVID SUSKI, et al.,
5 Plaintiffs,
6 v.
7 MARDEN-KANE, INC., et al.,
8 Defendants.
9

10 Case No. 21-cv-04539-SK
11

**12 ORDER GRANTING IN PART AND
13 DENYING IN PART DEFENDANTS'
14 MOTIONS TO DISMISS**

15 Regarding Docket Nos. 87, 88
16
17

18 This matter comes before the Court upon consideration of the motions to dismiss filed by
19 Defendant Marden-Kane, Inc. (“Marden-Kane”) and by Coinbase Global, Inc. (“Coinbase”)
20 (collectively referred to as “Defendants”). Having carefully considered the parties’ papers,
21 relevant legal authority, and the record in the case, and having had the benefit of oral argument,
22 the Court hereby GRANTS IN PART and DENIES IN PART both Defendants’ motion for the
23 reasons set forth below.

24 BACKGROUND

25 Plaintiffs David Suski, Jaimee Martin, Jonas Calsbeek and Thomas Maher (collectively,
26 “Plaintiffs”) filed this purported class action on behalf of themselves and persons who opted into
27 Coinbase’s \$1.2 million Dogecoin (DOGE) sweepstakes in June 2021, and who purchased or sold
28 Dogecoin on a Coinbase exchange for a total of \$100 or more between June 3, 2021 and June 10,
2021. (Dkt. No. 83 (Third Amended Complaint, ¶ 95.) Coinbase hired Marden-Kane as the
administrator of the Dogecoin Sweepstakes. (*Id.*, ¶ 23)

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

1 **... If you have a dispute with Coinbase, we will attempt to resolve**
2 **any such disputes through our support team. If we cannot resolve the**
3 **dispute through our support team, you and we agree that any**
4 **dispute arising under this Agreement shall be finally settled in**
5 **binding arbitration, on an individual basis, in accordance with**
6 **the American Arbitration Association's rules for arbitration of**
7 **consumer-related disputes (accessible at**
8 **<https://www.adr.org/sites/default/files/Consumer%20Rules.pdf>)**
9 **and you and Coinbase hereby expressly waive trial by jury and**
10 **right to participate in a class action lawsuit or class-wide**
11 **arbitration.** The arbitration will be conducted by a single, neutral
12 arbitrator and shall take place in the county or parish in which you
13 reside, or another mutually agreeable location, in the English
14 language. The arbitrator may award any relief that a court of
15 competent jurisdiction could award, including attorneys' fees when
16 authorized by law, and the arbitral decision may be enforced in any
17 court. . . .

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

21 **... If we cannot resolve the dispute through the Formal**
22 **Complaint Process, you and we agree that any dispute arising out**
23 **of or relating to this Agreement or the Coinbase Services,**
24 **including, without limitation, federal and state statutory claims,**
25 **common law claims, and those based in contract, tort, fraud,**
26 **misrepresentation, or any other legal theory, shall be resolved**
27 **through binding arbitration, on an individual basis (the**
28 **"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>).

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

35 * * *

36 The arbitration will be conducted by a single, neutral arbitrator and
37 shall take place in the county or parish in which you reside, or another
38 mutually agreeable location, in the English language. The arbitrator
39 may award any relief that a court of competent jurisdiction could
40 award and the arbitral decision may be enforced in any court.

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

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

6 Plaintiffs then participated in Coinbase's June 2021 sweepstakes. The "Official Rules" for
7 the Dogecoin Sweepstakes identifies Coinbase as the sponsor and Marden-Kane as the
8 administrator and states:

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

12 (Dkt. No. 83-1, Ex. A (Official Rules), ¶ 1.) The Official Rules further provide:

13 THE CALIFORNIA COURTS (STATE AND FEDERAL) SHALL
14 HAVE SOLE JURISDICTION OF ANY CONTROVERSIES
15 REGARDING THE PROMOTION AND THE LAWS OF THE
16 STATE OF CALIFORNIA SHALL GOVERN THE PROMOTION.
17 EACH ENTRANT WAIVES ANY AND ALL OBJECTIONS TO
18 JURISDICTION AND VENUE IN THOSE COURTS FOR ANY
19 REASON AND HEREBY SUBMITS TO THE JURISDICTION OF
20 THOSE COURTS. Claims may not be resolved through any form of
21 class action.

22 (*Id.*, ¶10.)

23 The Court denied Coinbase's earlier motion to compel arbitration, which Coinbase then
24 appealed to the Ninth Circuit. (Dkt. Nos. 53, 58.) The Court also granted in part and denied in
25 part Coinbase's alternative motion to dismiss. (Dkt. No. 53.) The Court granted the motion as to
26 Plaintiffs' claim that the Dogecoin Sweepstakes constituted an illegal lottery under California
27 Penal Code § 320 but provided Plaintiffs with leave to amend. (*Id.*) Marden-Kane did not move
28 to compel arbitration or dismiss any of Plaintiff's claims at that time. Plaintiffs filed their Third
Amended Complaint in response. (Dkt. No. 83.)

29 In their Third Amended Complaint, Plaintiffs bring the following claims against both
30 Defendants: (1) violations of the California Unfair Competition Law, California Business and
31 Professions Code §§ 17200, *et seq.* ("UCL") based on California Penal Codes §§ 319 and 320

1 regarding unlawful lotteries; (2) violations of UCL based on California Business and Professions
2 Code § 17539.15 regarding solicitation materials for sweepstakes; (3) violation of California
3 Business and Professions Code §§ 17500, *et seq.*, (“FAL”) for false advertising; (4) violation of
4 UCL for false advertising; (5) violation of UCL for unfair business practices; (6) violations of
5 California’s Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq.* (“CLRA”); and (7)
6 violations of UCL based on unlawful acts under the CLRA. (Dkt. No. 83.)

7 ANALYSIS

8 A. Applicable Legal Standard on Motion to Dismiss.

9 A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the
10 pleadings fail to state a claim upon which relief can be granted. On a motion to dismiss under
11 Rule 12(b)(6), the Court construes the allegations in the complaint in the light most favorable to
12 the non-moving party and takes as true all material allegations in the complaint. *Sanders v.*
13 *Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). Even under the liberal pleading standard of Rule
14 8(a)(2), “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires
15 more than labels and conclusions, and a formulaic recitation of the elements of a cause of action
16 will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*,
17 478 U.S. 265, 286 (1986)). Rather, a plaintiff must instead allege “enough facts to state a claim to
18 relief that is plausible on its face.” *Id.* at 570.

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

27 As a general rule, “a district court may not consider material beyond the pleadings in ruling
28 on a Rule 12(b)(6) motion.” *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994), *overruled on*

1 other grounds, *Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) (citation omitted).
2 However, documents subject to judicial notice, such as matters of public record, may be
3 considered on a motion to dismiss. *See Harris v. Cnty of Orange*, 682 F.3d 1126, 1132 (9th Cir.
4 2011). In doing so, the Court does not convert a motion to dismiss to one for summary judgment.
5 *See Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986), *overruled on other*
6 *grounds by Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991). “The court need
7 not . . . accept as true allegations that contradict matters properly subject to judicial notice . . .”
8 *Sprewell v. Golden State Warriors*, 266 F. 3d 979, 988 (9th Cir. 2001).

9 **B. Defendants’ Motions to Dismiss.**

10 Each Defendant joined in the other’s arguments made in the respective motions.
11 Therefore, the Court will address both motions together. However, in the future, the parties are
12 required to make the arguments they are on which they relying and opposing in their own briefs.
13 The Court will not refer to a separate brief in evaluating a party’s argument.

14 **1. Arbitration.**

15 In their motion to dismiss, Marden-Kane moves to enforce the arbitration provision in
16 Coinbase’s User Agreement, an agreement between Coinbase and Plaintiffs as Coinbase users.
17 Coinbase joins in the motion.

18 **i. Coinbase.**

19 This Court no longer has jurisdiction over the issue of whether the arbitration clause of
20 Coinbase’s User Agreement applies to Coinbase. Coinbase appealed the Court’s denial of its
21 motion to compel arbitration to the Ninth Circuit, and that appeal deprives this Court of
22 jurisdiction over the issue of arbitration. *See Griggs v. Provident Consumer Discount Co.*, 459
23 U.S. 56, 58 (1982) (“The filing of a notice of appeal is an event of jurisdictional significance – it
24 confers jurisdiction on the court of appeals and divests the district court of its control over those
25 aspects of the case involved in the appeal.”). Coinbase’s cites to *Medidata Solutions, Inc. v. Veeva*
26 *Systems, Inc.*, 748 F. App’x 363 (2nd Cir. 2018), which held that the filing of an amended
27 complaint divested the circuit court’s jurisdiction over the appeal of the denial of motion to
28 compel arbitration based on the prior complaint. If Coinbase believes that Plaintiffs’ filing of their

1 Third Amended Complaint divested the Ninth Circuit of jurisdiction over the pending appeal, then
2 Coinbase should withdraw its appeal. As the Supreme Court has made clear, “a federal district
3 court and a federal court of appeals should not attempt to assert jurisdiction over a case
4 simultaneously.” *Griggs*, 459 U.S. at 58. Unless and until the Ninth Circuit remands the
5 arbitration issue back to this Court or Coinbase withdraws its appeal, this Court does not have
6 jurisdiction over the arbitration issue. Moreover, the Court notes that, in *Medidata Solutions*, the
7 Second Circuit observed, without providing any factual detail, that the amended complaint
8 contained new factual allegations which superseded the allegations of the prior complaint.
9 *Medidata Solutions*, 748 F. App’x at 365. Here, while Plaintiffs filed an amended complaint, the
10 new factual allegations do not affect the arbitration analysis in any manner.

11 **ii. Marden Kane.**

12 Absent an applicable exception, Marden-Kane does not have standing to enforce an
13 arbitration provision in an agreement to which it is not a party. *Britton v. Co-op Banking Grp.*, 4
14 F.3d 742, 744 (9th Cir. 1993) (“An entity that is neither a party to nor agent for nor beneficiary of
15 the contract lacks standing to compel arbitration.”). The legal theories on which Marden-Kane
16 rely to support standing – equitable estoppel and successor in interest – are inapplicable. *See*
17 *Goldman v. KPMG, LLP*, 173 Cal. App. 4th 209, 213-14 (2009) (“The *sine qua non* for allowing a
18 nonsignatory to enforce an arbitration clause based on equitable estoppel is that the claims the
19 plaintiff asserts against the nonsignatory are dependent on or inextricably bound up with the
20 contractual obligations of the agreement containing the arbitration clause.”). Here, none of
21 Plaintiffs’ claims against either Defendant are inextricably bound up with the contractual
22 obligations of the User Agreements. *See also Allen v. Shutterfly, Inc.*, 2020 WL 5517172, at *8
23 (N.D. Cal. Sept. 14, 2020) (“To the extent Plaintiff argues the new Shutterfly (Shutterfly LLC)
24 lacks standing to enforce the Arbitration Agreement, Plaintiff has provided no authority and
25 articulated no arguments as to why a restructured successor is barred from enforcing an arbitration
26 agreement entered into by its predecessor.”) And Marden-Kane does not even argue and can point
27 to no evidence showing that it is a successor-in-interest to Coinbase, so Marden-Kane cannot
28 enforce the terms of the User Agreements on that basis.

1 Therefore, the Court denies both Defendants' motions with respect to the issue of
2 arbitration.

3 **2. Pre-Arbitration Dispute Process**

4 Three of the four User Agreements between Plaintiffs and Coinbase provide:

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

11 (Dkt. Nos. 33-8, 33-9, 33-10.)

12 Marden-Kane – but notably not Coinbase – argues that the Court must dismiss Plaintiffs'
13 claims because Plaintiffs failed to comply with this process for contacting Coinbase before filing
14 suit. However, as discussed above, Marden-Kane lacks standing to enforce the User Agreements
15 between Plaintiffs and Coinbase.

16 Moreover, even if the Court could find that Marden-Kane had standing, the provision in
17 the User Agreements with three of the Plaintiffs is inapplicable to this lawsuit, according to its
18 terms. The provision explicitly applies only to claims filed in arbitration or small claims court:
19 "You agree to use this process before filing any arbitration claim or small claims action." (Dkt.
20 Nos. 33-8, 33-9, 33-10.) Here, Plaintiffs filed suit in federal court and did not file an arbitration
21 claim or small claims action, and thus the plain terms of the User Agreements do not apply.
22 Because Marden-Kane lacks standing and because this provision is simply inapplicable, the Court
23 need not address whether it is unconscionable.

24 **3. Class Action Waiver in Official Rules.**

25 Defendants both argue that the Court should enforce the class action waiver in the
26 Dogecoin Sweepstakes Official Rules. However, where, as here, a class action waiver is not
27 coupled with an arbitration provision, California law on unconscionability applies.¹ California

28 ¹ Coinbase argues that *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) bars

1 courts apply a three-part inquiry in order to determine whether a class action waiver in a consumer
2 contract is unconscionable:

3 (1) whether the agreement is a consumer contract of adhesion drafted
4 by a party that has superior bargaining power; (2) whether the
5 agreement occurs in a setting in which disputes between the
6 contracting parties predictably involve small amounts of damages;
and (3) whether it is alleged that the 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.

7 *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 983 (9th Cir. 2007) (quotation marks
8 omitted) (summarizing how California courts have construed *Discover Bank v. Superior Court of
9 Los Angeles*, 36 Cal. 4th 148 (Cal.2005)).

10 Defendants do not contest that the Official Rules is a consumer contract of adhesion, that
11 Coinbase had superior bargaining power, or that Plaintiffs allege that Coinbase carried out a
12 scheme to cheat consumers.² Instead, Defendants focus on the second requirement of
13 unconscionability above: whether Plaintiffs' alleged damages do not "predictably involve small
14 amounts." Plaintiff David Suski spent \$100 to buy Dogecoins to enter the Dogecoin Sweepstakes.
(Dkt. No. 83, ¶ 27.) Plaintiff Jaimee Martin spent \$220 to buy Dogecoins to enter the Dogecoin
15 Sweepstakes. (*Id.*, ¶¶ 30, 31.) Plaintiff Jonas Calsbeek spent \$125 to buy Dogecoins to enter the
16 Dogecoin Sweepstakes. (*Id.*, ¶ 35.) Plaintiff Thomas Maher spent \$105 to buy Dogecoins to enter
17 the Dogecoin Sweepstakes. (*Id.*, ¶ 38.) Each Plaintiff's alleged damages are well under \$1,000,
18 and courts have found amounts of \$1,000 are small enough to satisfy the second element of the
19 *Discover Bank* test. *Shroyer*, 498 F.3d at 984 (citing cases).

20 Plaintiffs' request for attorneys' fees does not alter this analysis. *Id.* at 986 (noting "[t]he
21 California Supreme Court in *Discover Bank* rejected 'the rationale . . . that the potential
22

23 Plaintiffs' argument that the class action waiver is unconscionable. However, in *Concepcion*, the
24 Supreme Court merely held that the Federal Arbitration Act preempted California's *Discover Bank*
25 rule. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011). Where, as here, the class
26 action waiver in the Official Rules is not coupled with an arbitration provision, *Concepcion* does
not apply.

27 ² In its reply brief, Marden-Kane argues that Plaintiffs fail to allege facts to support its
28 unconscionability argument with sufficient particularity. However, a party cannot raise a new
argument for the first time in its reply brief. Regardless, the Court finds that Plaintiffs have
sufficiently alleged sufficient facts to satisfy all of the elements of the *Discover Bank* test.

1 availability of attorney fees to the prevailing party in arbitration or litigation ameliorates the
2 problem posed by such class action waivers.””) (quoting *Discover Bank*, 36 Cal. 4th at 162).

3 Lastly, Plaintiffs’ request for disgorgement and punitive damages does not enlarge their
4 damages to render the class action waiver conscionable. California law does not allow
5 “nonrestitutionary disgorgement,” meaning that Plaintiffs can recover disgorgement only for
6 amounts paid out of pocket. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1148-
7 49 (2003) (“nonrestitutionary disgorgement is not an available remedy in an individual action
8 under the UCL”); *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1113 (N.D. Cal. 2018) (“it
9 is well-established that nonrestitutionary disgorgement, which focuses on the defendant’s unjust
10 enrichment, is unavailable in a . . . class action under the FAL, CLRA, and UCL) (internal
11 quotation marks and citations omitted). Moreover, while Plaintiffs seek punitive damages,
12 punitive damages are only available under Plaintiffs’ CLRA claim. *See Roper v. Big Heart Pet
Brands, Inc.*, 510 F. Supp. 3d 903, 926 (E.D. Cal. 2020) (“Punitive damages are generally not
13 available under the UCL or FAL.”). As discussed below, the Court finds that Plaintiffs cannot
14 state a claim under the CLRA as a matter of law. Therefore, Plaintiffs cannot recover punitive
15 damages. For these reasons, the Court finds that Plaintiffs’ claims predictably involve small
16 amounts of damages and that the class action waiver is unconscionable.

18 **4. Plaintiffs’ Illegal Lottery Claims.**

19 The Court previously rejected Plaintiffs’ contention that the Dogecoin sweepstakes
20 violates California Penal Code § 320. (Dkt. No. 53.) The Court held that:

21 [a]lthough Plaintiffs may not have been aware of it when they made
22 a trade of Dogecoins, they were not actually required to trade
23 Dogecoins in order to enter the sweepstakes and have a chance to win.
24 Because California penal statutes are construed strictly and because
25 no California court has held that being unaware of the free method of
26 entry is sufficient to demonstrate the required consideration, the Court
27 finds that Plaintiffs have not and cannot allege a violation of
28 California Penal Code § 320.

(*Id.* at p. 13.) In their Third Amended Complaint, Plaintiffs include allegations that in addition to
their subjective lack of knowledge of the free method of entry, “the ordinary, reasonable consumer
could not be expected to have known the truth that Defendants would privately allow Coinbase

1 users to” enter the sweepstakes without buying or selling Dogecoin on Coinbase and that the
2 “truth was reasonably and objectively knowable only to the Defendants themselves.” (Dkt. No.
3 83, ¶ 68.) Plaintiffs further allege that Defendants “objectively conceal[ed] from those consumers
4 and from the public at large that the consumers [could] obtain free chances to win.” (*Id.*, ¶ 74.)
5 Again, Plaintiffs’ allegations center around Defendants’ alleged misrepresentations and
6 disclosures, or lack of disclosures. As the Court previously stated “[b]ecause California penal
7 statutes are construed strictly and because no California court has held that being unaware of the
8 free method of entry is sufficient to demonstrate the required consideration, the Court finds that
9 Plaintiffs have not and cannot allege a violation of California Penal Code § 320.” Plaintiffs have
10 not cited to any authority to alter the Court’s conclusion. Accordingly, the Court GRANTS
11 Defendants’ motions as to Plaintiffs’ claims to the extent they are premised on allegations of an
12 illegal lottery. Moreover, because giving leave to amend would be futile, the Court dismisses such
13 claims with prejudice.

14 **5. Allegations Against Marden-Kane.**

15 Marden-Kane argues that Plaintiffs fail to allege sufficient allegations against it to support
16 their claims against Marden-Kane but merely group Marden-Kane together with Coinbase.
17 Plaintiffs allege that Coinbase hired Marden-Kane to help plan and execute the Dogecoin
18 Sweepstakes. (Dkt. No. 83, ¶ 6; *see also* ¶ 23 (Marden-Kane “contracted with Defendant
19 Coinbase to serve as Coinbase’s “Administrator” for the June 2021 Dogecoin sweepstakes.”).)
20 Plaintiffs further allege that Marden-Kane and Coinbase, in collaboration, drafted, structured and
21 designed the emails and digital ads for the Dogecoin Sweepstakes. (*Id.*, ¶ 7; *see also* ¶ 108
22 (Marden-Kane collaborated “with Coinbase to draft, design and structure Defendants’ digital ad
23 campaign for the “sweepstakes,” and to draft and finalize the “Official Rules[.]”).) Coinbase and
24 Marden-Kane knew that the advertisements had the likelihood, tendency and capacity to mislead
25 and confuse consumers. (*Id.*, ¶ 52.) Plaintiffs then describe an earlier sweepstakes for which
26 Coinbase and Marden-Kane had collaborated. (*Id.*, ¶¶ 53-56.) The Court finds that Plaintiffs
27 allege sufficient facts related to Marden-Kane to hold Marden-Kane liable for any
28 misrepresentations in the advertisements for the Dogecoin Sweepstakes. Accordingly, the Court

1 denies Marden-Kane's motion to dismiss on this ground.

2 **6. Plaintiffs' CLRA Claims.**

3 Both Coinbase and Marden-Kane move to dismiss Plaintiffs' CLRA claims. Plaintiffs
4 argue that, pursuant to Federal Rule of Civil Procedure 12(g), which prohibits successive motions
5 to dismiss, the Court should not consider Coinbase's arguments. However, some courts have held
6 that, although Rule 12(g) "technically prohibits successive motions to dismiss that raise arguments
7 that could have been made in a prior motion . . . courts faced with a successive motion often
8 exercise their discretion to consider the new arguments in the interests of judicial economy."
9 *Amaretto Ranch Breedables, LLC v. Ozimals, Inc.*, 2011 WL 2690437, *2 n. 1 (N.D. Cal. 2011)
10 ("Rule 12(g) merely prohibits them from raising it before filing an answer because they did not
11 raise it in their initial response under Rule 12(b). Plaintiffs do not dispute that Defendants would
12 simply be able to renew their motion as a Rule 12(c) motion for judgment on the pleadings after
13 filing an answer."); *see also Banko v. Apple, Inc.*, 2013 WL 6623913, at *2 (N.D. Cal. Dec. 16,
14 2013); *Green v. ADT, LLC*, 2016 WL 5339800, at *6 (N.D. Cal. Sept. 23, 2016) ("Some courts
15 have, however, exercised their discretion to consider the untimely arguments if they were not
16 interposed for delay and the final disposition of the case would thereby be expedited.") (quotation
17 marks omitted) (citing cases). Here, the Court finds that judicial economy warrants considering
18 Coinbase's arguments. As discussed below, the Court finds that Plaintiffs' CLRA claims fail as a
19 matter of law. The Court's reason for dismissing the claim against Marden-Kane applies equally
20 to Plaintiffs' CLRA claims against Coinbase, so applying that argument only to Marden-Kane and
21 forcing Coinbase to file a motion for judgment on the pleadings at a later date is not an efficient
22 way to address this issue.

23 The CLRA prohibits certain "unfair methods of competition and unfair or deceptive acts or
24 practices undertaken by any person in a transaction intended to result or which results in the sale
25 or lease of *goods or services* to any consumer." Cal. Civ. Code § 1770(a) (emphasis added). The
26 CLRA defines "goods" as "tangible chattels bought or leased for use primarily for personal,
27 family, or household purposes," and "services" as "work, labor, and services for other than a
28 commercial or business use, including services furnished in connection with the sale or repair of

1 goods.” Cal. Civ. Code § 1761(a), (b).

2 Interpreting these definitions, the California Supreme Court held that the CLRA’s
3 protections do not extend to the sale of life insurance. *Fairbanks v. Superior Court*, 46 Cal. 4th
4 56, 61 (2009). The Court reasoned life insurance contracts are not “tangible chattels,” and
5 therefore not “goods” under the CLRA. *Id.* The plaintiffs in that case also argued the work and
6 labor in connection with helping consumers select insurance policies, assisting policyholders to
7 maintain their policies, and processing claims were all “services” under the CLRA. *Id.* at 65. The
8 Court rejected that argument, as well: “Using the existence of these ancillary services to bring
9 intangible goods within the coverage of the [CLRA] would defeat the apparent legislative intent in
10 limiting the definition of ‘goods’ to include only ‘tangible chattels.’” *Id.* Following *Fairbanks*,
11 the California Court of Appeal concluded the CLRA’s prohibitions do not extend to mortgage
12 loans or the ancillary services connected with servicing home loans. *Alborzian v. JP Morgan*
13 *Chase Bank, N.A.*, 235 Cal. App. 4th 29, 33 (2015) (“*Fairbanks* applies with equal force to
14 lenders.”). Similarly, “[m]ost federal district courts that have considered the issue since *Fairbanks*
15 likewise have held that the CLRA does not apply to mortgage loan servicing.” *Jamison v. Bank of*
16 *Am.*, N.A., 194 F. Supp. 3d 1022, 1031 (E.D. Cal. 2016).

17 The parties agree that Dogecoin is cryptocurrency and thus is an intangible good outside
18 the purview of the CLRA. *See Doe v. Epic Games, Inc.*, 435 F. Supp. 3d 1024, 1046 (N.D. Cal.
19 2020) (“Plaintiff’s CLRA claim therefore fails because the virtual currency at issue is not a good
20 or service.”). Plaintiffs argue that, because Coinbase does not actually buy or sell Dogecoin but
21 rather facilitates other in trading it, Coinbase is akin to a broker and thus provides “standalone” as
22 opposed to ancillary services related to the cryptocurrency. However, the only authority on which
23 Plaintiffs rely is mere dicta. *See Sonoda v. Amerisave Mortg. Corp.*, 2011 WL 2690451, at *4
24 (N.D. Cal. July 8, 2011) (“To be sure, if Amerisave was not loaning money but instead acted only
25 as a broker for other third-party lenders, then *arguably* what Amerisave was selling was its work
26 or labor in finding a loan for Plaintiffs (rather than negotiating terms of its own loans). Such
27 brokerage services *might* well qualify as ‘services’ under the CLRA.”) (emphasis added).
28 However, another court actually considered and rejected this argument. *See Meyer v. Cap. All.*

1 *Grp.*, 2017 WL 5138316, at *6 (S.D. Cal. Nov. 6, 2017) (rejecting argument that plaintiffs’
2 services were distinguishable because they were not lenders themselves and merely served as loan
3 advertisers). As the court reasoned:

4 For services “in connection with” the sale of goods to qualify under
5 the CLRA, “goods” must themselves be covered by the CLRA. . . .
6 Since loans at their core are not “goods” or “services” under the
7 CLRA, advertising related to selling such intangible financial goods
8 are not “services furnished in connection with” any goods or services.
9 . . . It would seem wildly incongruous that the CLRA would apply to
10 advertising or marketing of loans but not apply to the loans
11 themselves. Indeed, bootstrapping the CLRA into this case in this
12 manner would, as the Supreme Court of California explained, “defeat
13 the apparent legislative intent in limiting the definition of” goods and
14 services, *Fairbanks*, 92 Cal. Rptr. 3d 279 . . . by greatly expanding
15 that definition.

16 *Id.*, 2017 WL 5138316, at *7 (internal citations omitted). The Court finds the reasoning of *Meyer*
17 persuasive. The case law is clear, and Plaintiffs do not argue otherwise, that if the Coinbase’s
18 alleged services were offered by an entity which sold cryptocurrency, such services would be
19 considered ancillary and would not be covered by the CLRA. The Court finds that Coinbase
20 offering the same services for others selling cryptocurrency does not meaningfully distinguish the
21 services. Therefore, the Court GRANTS both Defendants’ motions on Plaintiffs’ CLRA claims.
22 Because granting leave would be futile, the Court dismisses Plaintiffs’ CLRA claims with
23 prejudice.

24 **7. Plaintiffs’ Claims for Injunctive Relief.**

25 Plaintiffs do not oppose the dismissal of their request for injunctive relief. Therefore, the
26 Court GRANTS Defendants’ motion on this ground.

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CONCLUSION

For the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART Coinbase's and Marden-Kane's motions to dismiss. The Court GRANTS WITH PREJUDICE the motion to dismiss Plaintiffs' requests for injunctive relief, GRANTS WITH PREJUDICE the motion to dismiss Plaintiffs' CLRA claims 6 and 7 against both Defendants, and GRANTS WITH PREJUDICE Plaintiffs' claims 1 and 5 to the extent they are premised on an unlawful lottery. The Court DENIES the remainder of both motions.

IT IS SO ORDERED.

Dated: August 31, 2022

Sallie Kim
SALLIE KIM
United States Magistrate Judge

United States District Court
Northern District of California