

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KENNETH DONOVAN, et al.,

Plaintiffs,

v.

COINBASE GLOBAL, INC., et al.,

Defendants.

Case No. 22-cv-02826-TLT

**ORDER REGARDING MOTIONS TO
COMPEL ARBITRATION**

Re: ECF No. 51, 59

Before the Court is defendants Coinbase Global, Inc. and Coinbase, Inc.’s (collectively “Coinbase”) motion to compel arbitration and to stay the action filed by plaintiffs Kenneth Donovan, Hussien Kassfy, and John Brambl. Coinbase’s Mot. to Compel (“Coinbase’s Mot.”), ECF No. 51. Defendant GMO Trust Company, Inc. (“GMO”) filed a separate motion to compel arbitration and stay proceedings. GMO’s Mot. to Compel (“GMO’s Mot.”), ECF No. 59.

In its discretion, the Court finds this motion suitable for determination without oral argument. Civ. L.R. 7-1(b). Having carefully considered the parties’ briefs, the relevant legal authority, and for the reasons below, the Court **GRANTS** Coinbase’s motion to compel arbitration (ECF No. 51) and **DENIES** GMO’s motion to compel arbitration (ECF No. 59). Accordingly, the hearings scheduled for January 10, 2023, are **VACATED**.

I. BACKGROUND

Coinbase operates a currency exchange, which allows users to buy and trade various forms of cryptocurrency. Coinbase’s Mot. 2; Decl. of Suellen Black (“Black Decl.”) ¶ 3, ECF No. 54. Cryptocurrency is a decentralized, digital representation of value secured through cryptography. Currency exchange platforms like Coinbase facilitate investment by allowing account holders to

1 store their cryptocurrency in digital wallets. Coinbase’s Mot. 2; Black Decl. ¶ 2. To use its
2 “services and make cryptocurrency transactions, prospective users are first required to create an
3 account and accept the Coinbase User Agreement.” Coinbase’s Mot. 2; Black Decl. ¶¶ 5, 7.

4 Plaintiffs Hussien Kassfy and John Brambl (the “Coinbase Plaintiffs”)¹ are investors in
5 digital assets and are customers of Coinbase. Pl. [’s] Opp’n to Coinbase’s Mot. (“Opp’n”) 2, ECF
6 No. 68. The Coinbase Plaintiffs allege that since they “created their accounts, the User Agreement
7 has been unilaterally modified more than 20 times.” Opp’n 2; Decl. of Julie C. Erickson
8 (“Erickson Decl.”) ¶ 2, ECF No. 68-1. The Coinbase Plaintiffs claim that an updated user
9 agreement was implemented in January 2022 (the “User Agreement”) and that “[u]nless and until
10 the Coinbase Plaintiffs accepted the updated User Agreement, they could not login to, view, or
11 access their Coinbase accounts, even though they held property in those accounts.” Opp’n 2; *see*
12 *also* Decl. of Hamzah Zia (“Zia Decl.”) ¶ 6, Exs. G-H, ECF No. 55.

13 The User Agreement contains an arbitration agreement. Coinbase’s Mot. 4; Black Decl.,
14 Ex. F, Appendix 5. Specifically, section 1.1 of the arbitration agreement states:

15
16 “Subject to the terms of this Arbitration Agreement, you and
17 Coinbase agree that any dispute, claim, disagreements arising out of
18 or relating in any way to your access to or use of the Services or of
19 the Coinbase Site, any Communications you receive, any product sold
20 or distributed through the Coinbase Site, the Services, or the User
Agreement and prior versions of the User Agreement, including
claims and disputes that arose between us before the effective date of
these Terms (each, a ‘Dispute’) will be resolved by binding
arbitration, rather than in court” *Id.* at § 1.1.

21 The Coinbase Plaintiffs do not dispute that they agreed to the User Agreement, nor do they
22 contest that that it contains an arbitration and a delegation clause. *See* Opp’n 2; *see also*
23 Coinbase’s Mot. 1-2. Instead, the Coinbase Plaintiffs claim that the Court should deny Coinbase’s
24 motion to compel arbitration because, (1) the arbitration provision in the User Agreement is
25 unconscionable and thus unenforceable, and (2) the delegation clause is inapplicable and
26 unconscionable. *See* Opp’n 2-22.

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 ¹ Plaintiff Kenneth Donovan does not allege any claims against Coinbase.

1 Coinbase argues that because the User Agreement “expressly delegates ‘gateway’
2 arbitration questions to the arbitrator—including questions about the enforceability, scope, and
3 interpretation of the arbitration agreement itself—this Court need not evaluate the agreement’s
4 validity or whether its arbitration clause encompasses [the Coinbase] Plaintiffs’ claims against
5 Coinbase.” Coinbase’s Mot. 5, 7; *see also* Black Decl., Ex. F, Appendix 5, § 1.6.

6 **II. LEGAL STANDARD**

7 The Federal Arbitration Act (“FAA”) governs the motion to compel arbitration. 9 U.S.C.
8 §§ 1 *et seq.* Under the FAA, a district court determines, (1) whether a valid agreement to arbitrate
9 exists and, if it does, (2) whether the agreement encompasses the dispute at issue. *Lifescan, Inc. v.*
10 *Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004).

11 “To evaluate the validity of an arbitration agreement, federal courts should apply ordinary
12 state-law principles that govern the formation of contracts.” *Ingle v. Circuit City Stores, Inc.*, 328
13 F.3d 1165, 1170 (9th Cir. 2003) (internal quotation marks and citation omitted). If the court is
14 satisfied “that the making of the arbitration agreement or the failure to comply with the agreement
15 is not in issue, the court shall make an order directing the parties to proceed to arbitration in
16 accordance with the terms of the agreement.” 9 U.S.C. § 4. “[A]ny doubts concerning the scope
17 of arbitrable issues should be resolved in favor of arbitration.” *Moses H. Cone Mem’l Hosp. v.*
18 *Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

19 “[A]rbitration is fundamentally a matter of contract.” *Momot v. Mastro*, 652 F.3d 982, 986
20 (9th Cir. 2011). “[G]ateway issues of arbitrability presumptively are reserved for the court.” *Id.* at
21 987. Even though judicial resolution, not arbitration, is the presumptive forum for disputes about
22 arbitrability, “parties may agree to delegate them to the arbitrator.” *Id.* “Courts should not assume
23 that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that
24 they did so.” *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). “When the parties’
25 contract delegates the arbitrability question to an arbitrator, the courts must respect the parties’
26 decision as embodied in the contract.” *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S.
27 Ct. 524, 528 (2019).

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1 **III. DISCUSSION**

2 As discussed above, the Coinbase Plaintiffs do not dispute they agreed to User Agreement,
3 nor do they contest that that it contains an arbitration and a delegation clause. Thus, the question
4 before the Court is whether there is clear and unmistakable evidence that the parties delegated
5 arbitrability questions to the arbitrator. Since arbitrability must be determined first, the Court does
6 not reach the issue of whether the arbitration agreement as a whole is unconscionable.

7 **A. The Delegation Clause Is Clear and Unmistakable**

8 Here, the User Agreement contains a delegation clause that delegates questions of
9 arbitrability to the arbitrator:

10 The arbitrator shall have exclusive authority to resolve any Dispute,
11 including, without limitation, disputes arising out of or related to the
12 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 . . .

13 Coinbase’s Mot. 5; Black Decl., Ex. F, Appendix 5, § 1.6. A delegation clause, which is “an
14 agreement to arbitrate threshold issues concerning the arbitration agreement,” constitutes clear and
15 unmistakable evidence of an intent to delegate. *Momot*, 652 F.3d at 988 (*quoting Rent-A-Center,*
16 *West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010)).

17 In addition, the User Agreement incorporates the American Arbitration Association
18 (“AAA”) rules. *See* Coinbase’s Mot. 10; Black Decl., Ex. F, Appendix 5, § 1.4. The AAA rules
19 provide that “[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including
20 any objections with respect to the existence, scope, or validity of the arbitration agreement or the
21 arbitrability of any claim or counterclaim.” Coinbase’s Mot. 10. Incorporation of arbitration rules
22 constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate
23 arbitrability. *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015); *Oracle Am., Inc. v.*
24 *Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013) (“[I]ncorporation of the American
25 Arbitration Association’s arbitration rules constitutes clear and unmistakable evidence that the
26 parties agreed to arbitrate arbitrability.”).

27 When arbitrability is clearly and unmistakably delegated to the arbitrator, a court must
28 enforce that delegation “in the absence of some other generally applicable contract defense, such

1 as fraud, duress, or unconscionability.” *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1209 (9th
2 Cir. 2016). Therefore, unless the Court finds that the delegation clause is unconscionable, as
3 Coinbase Plaintiffs contend, or “in the absence of some other generally applicable contract
4 defense, such as fraud [or] duress,” the Court must enforce the delegation clause. *Id.* The party
5 resisting arbitration bears the burden of demonstrating unconscionability. *Pinnacle Museum
6 Tower Ass’n v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 246–47 (2012).

7 **B. Unconscionability**

8 A party seeking to invalidate a contractual provision as unconscionable must prove both
9 procedural and substantive unconscionability. *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1023
10 (9th Cir. 2016) (citing *Armendariz v. Found. Health Psychcare Servs.*, 24 Cal. 4th 83, 114 (2000)).
11 However, “[a] sliding scale is applied so that the more substantively oppressive the contract term,
12 the less evidence of procedural unconscionability is required to come to the conclusion that the
13 term is unenforceable, and vice versa.” *Serafin v. Balco Props. Ltd., LLC*, 235 Cal. App. 4th 165,
14 178 (2015). When evaluating procedural unconscionability, courts focus on oppression or surprise
15 that results from unequal bargaining power. *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109,
16 1133 (2013). When evaluating substantive unconscionability, courts are more concerned with
17 overly harsh or one-sided results. *Id.* The Court will address whether the delegation clause in the
18 User Agreement is procedurally and substantively unconscionable.

19 **1. Procedural Unconscionability**

20 “Procedural unconscionability concerns the manner in which the contract was negotiated
21 and the respective circumstances of the parties at that time, focusing on the level of oppression and
22 surprise involved in the agreement.” *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 922 (9th
23 Cir. 2013). The analysis for procedural unconscionability “begins with an inquiry into whether
24 the contract is one of adhesion.” *OTO, L.L.C. v. Kho*, 8 Cal. 5th 111, 126 (2019) (quoting
25 *Armendariz*, 24 Cal. 4th at 113) (internal quotation marks omitted).

26 Generally, a contract of adhesion is a “standardized contract, which, imposed and drafted
27 by the party of superior bargaining strength, relegates to the subscribing party only the opportunity
28 to adhere to the contract or reject it.” *Pinela v. Neiman Marcus Grp., Inc.*, 238 Cal. App. 4th 227,

1 242 (2015) (quotation omitted). Where a contract is adhesive, the question shifts to “whether
2 circumstances of the contract’s formation created such oppression or surprise that closer scrutiny
3 of its overall fairness is required.” *OTO*, 8 Cal. 5th at 126.

4 Here, the Coinbase Plaintiffs argue that the delegation clause was presented as a contract
5 of adhesion, “presenting terms in inconspicuous font, buried in lengthy text.” Opp’n 23. The
6 Coinbase Plaintiffs also allege that “[t]he delegation clause in the [User Agreement] introduced
7 significant changes compared to the prior version. Yet these self-serving amendments were not
8 called out in the User Agreement or the pop-up box requiring user consent.” *Id.*

9 Coinbase contends that when the User Agreement “went live, existing Coinbase users were
10 routed to a landing page when logging into their accounts that presented the terms of the updated
11 Agreement. The landing page announced that Coinbase was ‘updating our User Agreement,’ and
12 prompted the user to ‘[r]eview [the] terms.’ [U]sers were directed to ‘review and accept [the]
13 updated terms and conditions to continue using [their] Coinbase account.” Coinbase’s Mot. 2
14 (internal citations omitted). Thus, according to Coinbase, “[the Coinbase] Plaintiffs were fairly
15 apprised of the User Agreement update and were free to reject it and trade their cryptocurrency
16 assets elsewhere if they did not wish to agree to arbitration.” Def. [s’] Reply to Opp’n 2
17 (“Reply”), ECF No. 72. Specifically, Coinbase argues that “[t]he **very same screen** on which
18 Coinbase Plaintiffs agreed to the updated User Agreement included a hyperlink to a Coinbase help
19 page which explained that any user who chose ‘not to accept these [forthcoming] changes’ could
20 ‘close [their] account’ and that Coinbase would ‘help [them] move [their] funds off the platform.’
21 Reply 7 (emphasis in original); *see also Mohamed*, 848 F.3d at 1211 (explaining that in the Ninth
22 Circuit, “an arbitration agreement is not adhesive if there is an opportunity to opt out of it”).

23 To determine whether a contract of adhesion is oppressive and therefore procedurally
24 unconscionable, California courts consider several factors, including: (1) the relative bargaining
25 power and sophistication of the parties, (2) the complaining parties’ access to reasonable market
26 alternatives, and (3) the degree to which an offending provision of a contract is “buried in a
27 lengthy . . . agreement.” *Shierkatz Rllp v. Square, Inc.*, Case No. 21-cv-08689-HSG, 2015 WL
28 9258082, *9 (N.D. Cal. Dec. 17, 2015).

1 Here, after balancing these factors, the Court finds a minimal degree of procedural
 2 unconscionability arising from the adhesive nature of the delegation clause. “While the relative
 3 bargaining power between the parties favors [Coinbase] and the...User Agreement was presented
 4 on a take-it-or-leave-it basis, nothing in the record suggests that Coinbase was [the] only option
 5 for cryptocurrency services. And while [the Coinbase] Plaintiff[s] argue that Coinbase’s ‘self-
 6 serving amendments were not called out in the User Agreement or the pop-up box requiring user
 7 consent,” the [delegation] provision in the... User Agreement is clearly labeled [‘Authority of the
 8 Arbitrator’] in bold print.”² *Alfia v. Coinbase Glob., Inc.*, No. 21-CV-08689-HSG, 2022 WL
 9 3205036, at *4 (N.D. Cal. July 22, 2022); Black Decl., Ex. F, Appendix 5, § 1.6.

10 2. Substantive Unconscionability

11 Substantive unconscionability focuses on the terms of the agreement and whether those are
 12 so “overly harsh” or “one-sided” as to “shock the conscience.” *Circuit City Stores, Inc. v. Najd*,
 13 294 F.3d 1104, 1108 (9th Cir. 2002). “Although California courts have characterized substantive
 14 unconscionability in various ways, all of these formulations point to the central idea that
 15 unconscionability doctrine is concerned not with a simple old-fashioned bad bargain but with
 16 terms that are unreasonably favorable to the more powerful party.” *Tompkins*, 840 F.3d at 1023
 17 (citations and internal quotations omitted).

18 The Coinbase Plaintiffs argue that the delegation clause is substantively unconscionable
 19 because of the several exceptions to the delegation clause, which “strip the delegation clause of
 20 mutuality.” Opp’n 24. For example, the Coinbase Plaintiffs claim that “[e]xception 2 for disputes
 21 regarding the payment of fees also only serves to benefit Coinbase as it is the one with the lion’s
 22 share of the financial obligation in arbitration.” *Id.* The Coinbase Plaintiffs further argue that
 23 “[o]ther terms as applied to the delegation clause render it unconscionable by impeding [the
 24 Coinbase] Plaintiffs’ ability to arbitrate the threshold issue of whether the arbitration agreement as
 25 a whole is unconscionable,” and the “attorneys’ fees provisions, especially the right to recover fees
 26 if successful in compelling arbitration, also apply with one-sided harshness to the delegation
 27

28 ² See footnote one. Plaintiff Kenneth Donovan does not allege any claims against Coinbase.

1 clause.” *Id.* (emphasis in original).

2 Coinbase argues that there are no such exceptions to the delegation clause, and “[Coinbase]
3 Plaintiffs misread four categories of ‘Disputes’ that are carved out from the Arbitration Clause and
4 call them exceptions to the Delegation Clause.” Reply 1. Coinbase further contends that
5 Coinbase Plaintiffs fail to explain “why the specific provisions of the delegation clause are
6 unfairly one-sided.” *Id.* at 2. “Instead, they identify a hodgepodge of *other provisions* within the
7 Arbitration Clause or User Agreement that supposedly unfairly favor Coinbase and thus render the
8 Delegation Clause unfair as well.” *Id.* (emphasis in original). And, according to Coinbase,
9 “[w]here arguments are not specifically directed to the delegation provision, but instead to the
10 arbitration agreement as a whole, the court must enforce the delegation provision.” *Id.*

11 The Court agrees with Coinbase and finds that the Coinbase Plaintiffs have not met their
12 burden of demonstrating substantive unconscionability. The delegation clause itself is not
13 substantively unconscionable based on the Coinbase Plaintiffs’ interpretation. The Coinbase
14 Plaintiffs have not shown that the delegation clause itself, and not the arbitration agreement as a
15 whole, imposes unfair terms and shocks the conscience. “The standard for substantive
16 unconscionability—the requisite degree of unfairness beyond merely a bad bargain—must be as
17 rigorous and demanding for arbitration clauses as for any contract clause.” *Sanchez v. Valencia*
18 *Holding Co., LLC*, 61 Cal. 4th 899, 912 (2015).

19 In sum, the delegation provision is not substantively unconscionable. Therefore, the
20 delegation provision is enforceable, and the Court finds that the Coinbase Plaintiffs’ challenges to
21 arbitrability have been delegated to the arbitrator.

22 **IV. GMO’S MOTION TO COMPEL ARBITRATION**

23 Defendant GMO filed a separate motion to compel arbitration and stay proceedings and
24 argues that the claims brought against GMO by the Coinbase Plaintiffs and plaintiff Kenneth
25 Donovan (collectively, “All Plaintiffs”) are bound to the Coinbase arbitration agreement under the
26 doctrine of equitable estoppel. *See* GMO Mot. 1. All Plaintiffs argue that the court should deny
27 GMO’s motion to compel arbitration because the doctrine of equitable estoppel does not apply.
28 Pl. [’s] Opp’n to GMO’s Mot. 1, ECF No. 67.

1 An individual who is a nonsignatory to an arbitration agreement may compel a signatory
2 plaintiff into arbitration if allowed by state contract law. *See Arthur Andersen LLP v. Carlisle*,
3 556 U.S. 624, 631–32 (2009); *see also Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1130 n.5
4 (9th Cir. 2013). In California, a nonsignatory may compel arbitration under the doctrine of
5 equitable estoppel where a plaintiff’s claims against the non-signatory are “based on the same
6 facts and are inherently inseparable” to those against a signatory. *Murphy v. DirecTV, Inc.*, 724
7 F.3d 1218, 1229 (9th Cir. 2013) (*quoting Metalclad Corp. v. Ventana Envtl. Organizational*
8 *P’ship*, 109 Cal. App. 4th 1705, 1713 (Cal. Ct. App. 2003)).

9 In *Kramer*, the plaintiffs were owners of Toyota Prius cars that were purchased from
10 Toyota dealerships. When they purchased their cars, they did so on credit by entering into
11 purchase agreements with the dealerships which contained arbitration provisions. The plaintiffs
12 filed a class action against Toyota (not the dealerships), asserting that they experienced defects in
13 their anti-lock brake systems. *Id.* at 1124. In response, Toyota argued, among other things, that
14 the action should be compelled to arbitration. The district court denied the motion to compel
15 arbitration and “found that Toyota, as a nonsignatory to the Purchase Agreements between
16 Plaintiffs and Dealerships, could not compel arbitration, and equitable estoppel did not require
17 arbitration.” *Id.* at 1125-26.

18 The Ninth Circuit held that “the arbitration agreements do not contain clear and
19 unmistakable evidence that Plaintiffs and Toyota agreed to arbitrate arbitrability. While Plaintiffs
20 may have agreed to arbitrate arbitrability in a dispute with the Dealerships, the terms of the
21 arbitration clauses are expressly limited to Plaintiffs and the Dealerships.” *Id.* at 1127; *see also id.*
22 at 1128 (“[T]he arbitration clause is limited to claims between ‘you and us’—i.e. Plaintiffs and the
23 Dealerships”); *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045 (9th Cir. 2009) (“The
24 arbitration agreement is premised on a disagreement between Wells Fargo and the borrower. In the
25 absence of such a disagreement, the arbitration provision does not apply. Thus, any disagreement
26 between the borrower and a third party, such as [the defendant], is simply not within the scope of
27 the arbitration agreement...”).

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1 Here, the User Agreement contains clear-cut language showing an intent to arbitrate
2 disputes between the signatories only. Specifically, section 1.1 of the arbitration agreement states:

3 “Subject to the terms of this Arbitration Agreement, **you and**
4 **Coinbase** agree that any dispute, claim, disagreements arising out of
5 or relating in any way to your access to or use of the Services or of
6 the Coinbase Site, any Communications you receive, any product sold
7 or distributed through the Coinbase Site, the Services, or the User
8 Agreement and prior versions of the User Agreement, including
9 claims and disputes that arose between us before the effective date of
10 these Terms (each, a ‘Dispute’) will be resolved by binding
11 arbitration, rather than in court” *Id.* at § 1.1.

12 Black Decl., Ex. F, Appendix 5. The bolded language indicates the arbitration obligation is
13 binding between All Plaintiffs and **Coinbase**. The agreement does not state that the obligations
14 and rights thereunder extend to a nonsignatory. At the very least, there is ambiguity as to whether
15 All Plaintiffs agreed to arbitrate arbitrability with a nonsignatory. *Kramer* requires that there be
16 clear and unmistakable evidence that a signatory agreed to arbitrate arbitrability with a
17 nonsignatory. *See Kramer*, 705 F.3d at 1127.

18 As such, GMO’s motion to compel arbitration is **DENIED**. However, in its discretion to
19 enter a stay under its inherent authority, the Court stays all proceedings pending resolution of the
20 Coinbase arbitration. *See Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20
21 n.23 (1983) (When a court compels arbitration, as “a matter of its discretion to control its docket,”
22 it may stay litigation among non-arbitrating parties pending the outcome of arbitrable claims or a
23 parallel arbitration.); *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (“[T]he power to stay
24 proceedings is incidental to the power inherent in every court to control the disposition of the
25 causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”).

26 **V. CONCLUSION**

27 For the above reasons, the Court **GRANTS** Coinbase’s motion to compel arbitration (ECF
28 No. 51) and **DENIES** GMO’s motion to compel arbitration (ECF No. 59). The Coinbase
Plaintiffs and Coinbase are ordered to submit their claims to arbitration as provided by their
agreement. 9 U.S.C. § 4. This action is stayed pending the Coinbase arbitration proceedings. The
parties shall file joint status reports every 120 days apprising the Court of the status of Coinbase
arbitration proceedings, with the first report due May 12, 2023.

United States District Court
Northern District of California

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IT IS SO ORDERED.

Dated: January 6, 2023



TRINA L. THOMPSON
United States District Judge