IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

George Kattula, Ashley Adams, John Alexander, Kenneth Axelsson, Tara Bennett, Al Bigonia, Joseph Blumetti, Darren Bradley, Dallas Bray, Franklin Calderón, Wayne Colt Carter, Allan Chiulli, Lolletta Cohen, Laleh Dallalnejad, Erick Eliezaire, Mark Gambell, Rodrigo Garcia, Mark Girshovich, Charles Glackin, Eldon Hastings, Roger Haston, Travis Houzenga, Dan Hyatt, Bobby Johnson, Jane Krieser, Eric Larson, Chris Longstreth, Ngoun Mang, Lisa Marcial, Bianca McWilliams, Victor Mechanic, Mihail Mihalitsas, Brady Lee Nessler, Frank Onimus, Vilasini Pillai, William Plyler, Edward Polhill, Steven Paperno, Luis Rodriguez, Earlando Samuel, Von Sims, Varun Singh, Larry Sowell, Vesselina Spassova, Richard Stefani, Christopher Suero, Natalie Tang, Daniel Tucker, Fatima Waheed, Eric White, Bob Whittington, and Karen Wright, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

Coinbase Global, Inc., and Coinbase Inc.,

Defendants.

CIVIL FILE ACTION

NO. 1:22-cv-03250-TWT

CLASS ACTION

JURY TRIAL DEMANDED

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' SECOND MOTION TO STRIKE

Defendants (or "Coinbase") have moved to strike every declaration submitted by Plaintiffs, except the Declaration of Bob Whittington [Dkt. 72] and a declaration of Plaintiffs' counsel [Dkt. 24]. As Defendants see it, only Coinbase is allowed to submit evidence, while Plaintiffs' personal experiences with Coinbase are "irrelevant." Like its one-sided arbitration proceedings, Coinbase's motions to strike seek to keep the evidence of what is happening on the Coinbase platform from ever seeing the light of day – whether before a judge, jury, or regulator.[1] Yet Coinbase itself has refuge in the court system when it receives no response from regulators; using the U.S. Courts as a sword when convenient and their arbitration agreement as a shield.[2] Then, when Coinbase is displeased with the application of American law, "***anything is on the table***," as Coinbase's CEO recently threatened, "***including, you know, relocating or whatever is necessary*** . . ."[3]

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[1] *See also* 2022 User Agreement § 7.2.1, Dkt. 62-1 (incorporating a webpage that deters reporting criminal activity to the authorities); Declaration of John Herman, Ex. C, Dkt. 24-3 at 3 (aforementioned Coinbase webpage).

[2] Coinbase, Inc. recently filed a Petition for Writ of Mandamus to the United States Securities and Exchange Commission. *See In re: Coinbase, Inc.*, No. 23-1779 (3d Cir. April 26, 2023).

[3] Emily Nicolle, *Coinbase CEO Won't Rule Out Relocating Company Away From US*, BLOOMBERG (Apr. 18, 2023), https://www.bloomberg.com/news/articles/2023-04-18/coinbase-ceo-won-t-rule-out-relocating-company-away-from-us#xj4y7vzkg (accessed on May 3, 2023). On March 22, 2023, Defendants received a "Wells Notice" from the Securities and Exchange Commission ("SEC") stating that the staff of the SEC "made a 'preliminary determination' to recommend that the SEC file an

Coinbase's second Motion to Strike (the "Motion") is procedurally improper and relies on the wrong legal standard for objecting to evidence on a motion to compel arbitration. Along with those deficiencies as a matter of law, some of the Motion's relevancy objections rely on documents Coinbase was ordered to turn over previously but failed to do so. The Motion and that Reply brief improperly use that new evidence of purported arbitration agreements to argue Plaintiffs' evidence is "irrelevant."[4] Well-established forfeiture and waiver rules, as well as this Court's Order, prohibit that.

LEGAL STANDARD

On a motion to compel arbitration, the court applies a "summary judgment-like standard" and views the facts in the light most favorable to the nonmovants, Plaintiffs.[5] Declarations in opposition to a motion for summary judgment must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.[6] Thus, "evidence does not have to be authenticated or otherwise presented in an admissible

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enforcement action against the Company alleging violations of the federal securities laws . . ." Coinbase Global, Inc., Current Report (Form 8-K) (Mar. 22, 2023).

[4] *See infra* § I.B.

[5] *See Hearn v. Comcast Cable Commc'ns, LLC*, 992 F.3d 1209, 1215 n.3 (11th Cir. 2021) (quoting *Bazemore v. Jefferson Cap. Sys., LLC*, 827 F.3d 1325, 1333 (11th Cir. 2016) and citing *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997)).

[6] Fed. R. Civ. P. 56(c)(4).

form to be considered at the summary judgment stage, 'as long as the evidence could ultimately be presented in an admissible form.'"[7]

To raise an objection at this pre-trial stage, the objecting party must identify the specific testimony and argue why it cannot be admissible at trial – not just that it has not been submitted in admissible form.[8] "'Thus under current Rule 56, an objection cannot be based solely on evidence not being authenticated—the objection must be that evidence *cannot* be presented in admissible form, not that the evidence *has not* been presented in admissible form.'"[9] As Defendants now recognize (after Plaintiffs pointed this out in response to Defendants' first motion to strike) but continue to ignore, objections to declarations should not be raised in a motion to

[7] *Smith v. Marcus & Millichap, Inc.*, 991 F.3d 1145, 1156 n.2 (11th Cir. 2021) (quoting *Lossia v. Flagstar Bancorp, Inc.*, 895 F.3d 423, 429 (6th Cir. 2018) and citing *Maurer v. Indep. Town*, 870 F.3d 380, 384 (5th Cir. 2017)).

[8] *See* Fed. R. Civ. P. 56(c)(2) ("A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence."); *Mercado-Reyes v. City of Angels, Inc.*, 320 F. Supp. 3d 344, 348, 350 (D.P.R. 2018).

[9] *Abbott v. Elwood Staffing Servs., Inc.*, 44 F. Supp. 3d 1125, 1135 (N.D. Ala. 2014) (quoting *In re Gregg*, No. 11-40125- JTL, 2013 WL 3989061, at *4 (Bankr. M.D. Ga. July 2, 2013)); *accord Forbo Flooring, Inc. v. Falcone Glob. Sols., LLC*, No. 1:19-CV-2876-MHC, 2022 WL 4596639, at *24 (N.D. Ga. July 22, 2022); *cf. Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 579 (2d Cir. 1969) (explaining that the now obsolete motion to strike "must be precise" and movants must "do more than swing [their] bludgeon wildly").

strike; "the proper method for challenging the admissibility of evidence in an affidavit is to file a notice of objection to the challenged testimony."[10]

ARGUMENT

Coinbase has the burden of identifying specific evidence and showing it cannot be presented in an admissible form at trial. Coinbase does not even attempt to carry that burden but argues certain testimony is inadmissible *as presented*.[11] The Motion then makes the sweeping request that the Court "strike and disregard the improper declarations, or in admissible portions thereof."[12] Although it seeks to strike eleven declarations, the Motion does not object to all the testimony in the referenced eleven declarations. For example, Coinbase does not object to testimony that Ms. Bennett did not accept a user agreement in 2022, much less accept it from Denmark. Nor does the Motion challenge the evidence that the arbitration clauses are contracts of adhesion.

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[10] *Sum of $66,839.59 v. IRS*, 119 F. Supp. 2d 1358, 1359 (N.D. Ga. 2000). *Cf. Carlson Corp./Se. v. Sch. Bd. of Seminole Cnty., Fla.*, 778 F. Supp. 518, 519 (M.D. Fla. 1991) (even procedurally proper motions to strike a pleading on the grounds of irrelevancy are often considered "time wasters" and will "usually be denied.")

[11] To the extent Coinbase's first Motion to Strike [Dkt. 66] raises objections to evidence in Plaintiffs' Opposition to the Motion, it fails to meet the standard applicable here and show Plaintiffs' evidence cannot be presented in an admissible form at trial.

[12] Motion at 7.

As to the testimony cited by the Motion, that testimony is competent and admissible evidence of the unconscionability of Coinbase's arbitration clauses. The challenged testimony is relevant, based on the (oftentimes miserable) personal experiences of Coinbase customers, and contains party admissions by Coinbase. Coinbase's arguments in the Motion rely, in large part, on case law applying the wrong evidentiary standard or no case law at all.

I. Plaintiffs' testimony about the preconditions to arbitration is relevant and based on personal experience.

Coinbase does not submit evidence to rebut Plaintiffs' extensive evidence that, at all relevant times, Coinbase's preconditions to arbitration have been a sham and never existed to fulfill a legitimate commercial need. Instead, Coinbase objects to Plaintiffs' evidence as irrelevant or not based on personal knowledge. However, Coinbase must accept the consequences of its decisions that put onerous preconditions to arbitration into the Arbitration Clauses.[13]

[13] "Arbitration Clauses" herein refers to the "2022-UA" and "2021-UA." Those are the two clauses relied upon in the Amended Motion to Compel Arbitration. *See* Pls.' Opp'n. Am. Mot. to Compel Arbitration, Dkt. 93 at 4. In its Reply brief, Coinbase made a belated attempt to argue some other agreement applied instead. (Dkt. 106 at 7). Coinbase waived or forfeited its right to enforce those other purported agreements, and to support those waived arguments, Coinbase violated this Court's Order (Dkt. 69-1) by selectively producing documents long after the production deadline.

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."[14] "Whether a proposition is of consequence to the determination of the action is a question that is governed by the substantive law."[15] Defendants do not cite any case law, under the rules of evidence or applicable substantive law, to substantiate their relevancy objections.[16] And Coinbase's "personal knowledge" objection is likewise unavailing and callous considering what Plaintiffs have endured.

A. Mr. Ware's Declaration is relevant to the unconscionability of Coinbase's Arbitration Clauses.

Coinbase characterizes Mr. Ware's testimony about racial epithets and expletives in its emails to him as "irrelevant." However, Mr. Ware's testimony about being spoken to by Coinbase Support in racist and profane language during one of the preconditions to arbitration is relevant to whether such preconditions can be

[14] Fed. R. Evid. 401.
[15] *United States v. Hall*, 653 F.2d 1002, 1005 (5th Cir. 1981); *see Schaaf v. SmithKline Beecham Corp.*, No. 1:04-CV-2346-GET, 2008 WL 11336408, at *1 (N.D. Ga. June 9, 2008) (quoting Jack B. Weinstein & Margaret A. Berget, Weinstein's Federal Evidence 401.04 [3] [b] (2d ed. 2007)).
[16] Further, merely citing Fed. R. Evid. 701 in passing does not raise an objection under the rule. *See* Motion at 2, 3.

enforced. It is also relevant to that issue that Coinbase ignored a letter Mr. Ware mailed to Coinbase after those emails.

Incanting the word "arbitration" does not allow a corporation to do whatever it wants to its customers. Coinbase's own drafting decisions make its outsourced, automated, and infiltrated operations relevant on a motion to compel arbitration. The Arbitration Clauses mandate users exhaust various months-long (if not longer) processes built on those operations. Thus, Mr. Ware's Declaration is relevant to the unconscionability of the Arbitration Clauses.

Coinbase's explanation – which invites further troubling questions[17] – concedes its internal dispute resolution process is so broken that its representatives are unwilling or unable to prevent (or address) abusive communications to customers. Further, Coinbase ignored the letter Mr. Ware mailed to it several months ago wherein he, in furtherance of engaging in the "dispute resolution process," requested that Coinbase address the verbal abuse. It took filing a Declaration in federal court for Coinbase to attempt to address the disturbing and

[17] The emails dated 8/19/2022, 3:50 PM and the email dated 8/19/2022 5:21 PM (which does not appear to be autogenerated) were sent after Coinbase was unquestionably already "on the case," as shown by the reference to a phone call in the email dated 8/19/2022, 1:58 PM. *See* Declaration of Gregory Ware, Ex.s A & B, Dkts. 82-1, 82-2.

extremely offensive emails Coinbase sent after he called Coinbase to address its security failings. Apparently, Coinbase did not bother to investigate what happened to him until his Declaration was filed, and it has yet to explain how it is possible that Coinbase Support sent a second email to Mr. Ware, addressed with profane language different than the first, or why it took a lawsuit and Declaration for there to be any action at all, however incomplete.

Coinbase contends its tripartite complaint structure is irrelevant because Plaintiffs' evidence about it occurred after contract formation.[18] That misstates the extent of Plaintiffs' evidence and ignores that Coinbase asserts agreements accepted as late as October 11, 2022.[19] Coinbase sent the offensive emails to Mr. Ware after he called Coinbase on August 19, 2022.[20] Coinbase knows, and has long known, that its so-called dispute resolution process is fatally infirm, yet it continues to incorporate that process into its agreements to induce its customers to believe that Coinbase will engage in the same with competence, diligence, and good faith.[21]

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[18] Motion at 6-7; Reply Br. Supp. Mot. to Compel Arbitration, Dkt. 106 at 10 (misstating the time periods covered by Plaintiffs' evidence).
[19] *See* Declaration of Tony Jankowski, Dkt. 78 at ¶ (g)(ii).
[20] Declaration of Gregory Ware, Ex.s A & B, Dkt. 82-1 & 82-2.
[21] Plaintiffs' other evidence goes back many years and includes the moments when Plaintiffs allegedly accepted the User Agreements at issue. For example, Coinbase's own admissions of legal violations and inadequate customer support go back to at least 2018. *See, e.g.*, NYDFS Consent Order, Dkt. 59-1 at 13.

Coinbase has not submitted any evidence in the arbitration agreements or otherwise to factually establish "business realities" that create "the special need" for the extra protection Coinbase affords itself in the one-sided, tripartite complaint process.[22] Plaintiffs' evidence, which is essentially unchallenged, confirms there has never been a "business reality" to justify the extreme lack of mutuality in the Arbitration Clauses. For instance, Coinbase does not show that what happened to Mr. Ware could not have happened (or did not happen) prior to 2022. Hence, even to the extent Plaintiffs' evidence occurred after the formation of certain contracts, it is still relevant to the condition, setting, purpose, and effect of the fundamentally broken preconditions to arbitration and Coinbase Support when the agreements were purportedly accepted. Since at least 2018, it is clear Coinbase cannot or will not fix its problems.[23]

Posting an arbitration clause on the internet is not a "get out of jail free" card. It does not allow a corporation to act with impunity and avoid scrutiny of one-sided preconditions that serve no legitimate business purpose and have in fact been abusive

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[22] *See Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 117 (2000) (the stronger party must "factually establish[]" the "business realities" that create "the special need" for giving it extra protection).

[23] *See generally* NYDFS Consent Order, Dkt. 59-1 (showing longstanding failure to correct legal violations despite the presence of an independent monitor and then receiver).

to certain customers.[24] Thus, the declarations of Mr. Ware and others are relevant to, among other issues, showing Coinbase's internal dispute resolution processes, which are a core feature of the Arbitration Clauses, are unconscionable.[25]

B. Coinbase cannot moot the unconscionability of its amended user agreement.

As part of a belated attempt to avoid scrutiny of its arbitration clauses, Coinbase submitted new arbitration agreements with its Reply brief for its Amended Motion to Compel Arbitration ("Coinbase's Reply brief"). The Order resolving Coinbase's emergency motions required Coinbase to produce by March 6, 2023 "[a]ll affirmatively accepted Wallet Terms of Service or Coinbase User Agreements" and "[s]creenshots from Coinbase's systems reflecting the date, time

[24] Coinbase's objection is a perverse application the rule that unconscionability be measured "at the time of formation." *See* Cal. Civ. Code. § 1670.5(a). The rationale for measuring a contract's unconscionability at the time of formation is to avoid considering changing circumstances beyond the parties' control, such as whether interest rates will rise. Coinbase applies the statute to dodge any judicial scrutiny of abusive business practices and the unlawful purpose its agreements. Evidence of a contract's "commercial setting, purpose, and effect" may "aid the court in making the determination" that a contract is unconscionable. Cal. Civ. Code § 1670.5(b); *see De La Torre v. CashCall, Inc.*, 5 Cal. 5th 966, 976 (2018); *Armendariz*, 24 Cal. 4th at 117.

[25] *See Bielski v. Coinbase, Inc.*, No. 3:21-07478-WHA, 2022 WL 1062049, at *5 (N.D. Cal. Apr. 8, 2022) (on appeal) (finding "[t]here is no legitimate commercial need for this many burdensome obstacles [in Coinbase's tripartite complaint process] prior to arbitrating disputes relating to a basic user agreement for services like those provided by Coinbase")*; see also Armendariz*, 24 Cal. 4th at 117.

and IP address of all affirmatively accepted Coinbase User Agreements for such individuals."[26] On April 28, 2023, after its deadline and after Plaintiffs' opposition to the Amended Motion to Compel Arbitration, Coinbase produced additional documents that it contends are evidence of certain Plaintiffs "affirmatively agree[ing] to updated versions of the UAs posted to Coinbase's website by . . . continuing to use their Coinbase accounts . . ."[27] Coinbase's Reply brief relied on these documents to argue, for the first time, that the Court could compel arbitration of certain Plaintiffs' claims based on various additional purported agreements.[28]

Several laws or legal doctrines prohibit the kinds of unilateral amendments Coinbase attempts to enforce here. To begin with, Coinbase's sole right to unilaterally amend the arbitration agreements is procedurally and substantively unconscionable.[29] Further, after a dispute arises, Coinbase is prohibited by the

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[26] Order, Dkt. 69-1 at § b.

[27] *See* Reply Br. Supp. Am. Mot. to Compel Arbitration, Dkt. 106 at 10; Letter from Philip J. George, April 28, 2023 (attached hereto as Exhibit A). The end date in the "Account Statement Period" at the top of each document reveals Coinbase created and had these statements prior to filing its Amended Motion to Compel Arbitration on March 3, 2023. *See* Dkt. Nos. 104-1 at 2; 104-2 at 2; 104-3 at 2; 104-4 at 2; 104-5 at 2; 104-6 at 2; 104-7 at 2; 104-8 at 2; 104-9 at 2; 104-10 at 2; 104-11 at 2.

[28] *See* Reply Br. Supp. Am. Mot. to Compel Arbitration, Dkt. 106 at 10.

[29] *See* Pls.' Opp'n. Am. Mot. to Compel Arbitration, Dkt. 93 at 16; *see also* Pls.' Opp'n. Am. Mot. to Compel Arbitration, Dkt. 93 at 25 n.106 (citing *Sevier Cnty. Sch. Fed. Credit Union v. Branch Banking & Tr. Co.*, 990 F.3d 470, 479 (6th Cir. 2021)).

implied covenant of good faith and fair dealing from changing a dispute resolution provision.[30] By failing to take a position (or taking a new position on Reply), Coinbase forfeited or waived its right to enforce its purported arbitration agreements.[31] And judicial estoppel prohibits Coinbase from again "deliberately changing positions according to the exigencies of the moment."[32]

Plaintiffs' evidence regarding Coinbase's amendments is relevant to these issues, particularly concerning the procedural and substantive unconscionability of the Arbitration Clauses. For example, while Mr. Plyler was in the midst of the sham dispute resolution process, Coinbase cited the 2021-UA as applicable to his

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[30] *See Avery v. Integrated Healthcare Holdings, Inc.*, 159 Cal. Rptr. 3d 444, 454 (Cal. Ct. App. 2013).

[31] *See generally* Pls.' Opp'n. Am. Mot. to Compel Arbitration, Dkt. 93 at 3-4, 18-19.

[32] *See New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (holding courts have uniformly recognized the purpose of judicial estoppel to prevent parties from "playing 'fast and loose' with the courts.'" Here, Defendants have changed positions as to identifying a contract that applies to each Plaintiff, despite this Court's Order. Additionally, Defendant Coinbase Global, Inc. should be estopped based on previously representing to a federal court that the 2022-UA would *not* be applied retroactively. *See* Coinbase Global Inc.'s Opp'n. to Pl.'s Mot. for a T.R.O. and Prelim. Inj. at 23, *Underwood v. Coinbase Global, Inc.*, No. 1:21-cv-08353-PAE (S.D.N.Y. Jan. 30, 2022), Dkt. No. 30 (emphasizing that the 2022-UA "shall be effective as of the time it is posted but **will not apply retroactively**" and that the 2022-UA "will govern from January 31, 2022.").

dispute.[33] Later, in the Amended Motion to Compel Arbitration, Coinbase contended a different agreement, the 2022-UA, applies to Mr. Plyler.[34] Thus, Mr. Plyler's testimony about the unilateral amendment of Coinbase's arbitration clause and Coinbase's changing position is at least relevant to: (1) the substantive unconscionability of the 2021-UA, which agreement allows Coinbase to amend the agreement after Coinbase learns of a claim from a one-sided precondition to arbitration; and (2) the procedural unconscionability of the 2022-UA, which was allegedly presented after Mr. Plyler's account was taken-over, after Coinbase got a "free peek" at his claim, after Coinbase indicated to Mr. Plyler that the 2021-UA applied to his dispute, and after this class action was filed.

[33] *See* Declaration of William Plyler, Ex. A, Dkt. 83-1 (Coinbase asserting a provision of the 2021-UA applies to Mr. Plyler's dispute).

[34] *See* Am. Mot. to Compel Arbitration, Dkt. 80 at 14-15 ("all but nine of the Plaintiffs affirmatively accepted the 2022 UA . . ."). In a catch-22, the Arbitration Clauses require users to submit certain information with their arbitration demand, but to obtain that information, users have to access their account to obtain information, which requires accepting a new arbitration agreement. *See, e.g.*, 2022-UA, App'x 5, § 1.4 (Dkt. 62-1 at 4); 2021-UA, § 8 (Dkt. 78-5 at 2). Coinbase holds user account hostage, putting customers seeking to prepare their taxes or otherwise find out what happened to their account in a similar predicament.

C. Coinbase's other objections to Plaintiffs' "personal beliefs" undermine its own arguments and should be denied.

The Motion objects that Plaintiffs lack the personal knowledge to testify about their experience as Coinbase customers.[35] These objections undermine Coinbase's positions on the Motion for a Receiver and the Amended Motion to Compel Arbitration.

> **(1)** "Apparently, the unauthorized access to my account either failed to generate any fraud detection warnings within Coinbase or it willfully turned a blind eye in an effort to reap illicit profits."[36]

Coinbase wrongly contends that this testimony may not be considered by the Court. Either the unauthorized account access triggered fraud detection warnings at Coinbase or it did not. Coinbase rejects this dichotomy as "rank speculation" but does not present an alternative.[37] Only one alternative logically follows from Coinbase's argument: if Coinbase rejects as speculative that its fraud detection system was or was not triggered, then ***Coinbase has no fraud detection warnings that could be triggered.***

In any event, Plaintiffs' declarations about their losses and interactions with Coinbase demonstrate their testimony is rationally based on their perceptions and

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[35] Motion at 4.
[36] *Id.* at 3.
[37] *Id.*

lived experiences as Coinbase customers. The two cases cited by Defendants are from the employment context, and their findings do not support Coinbase's position that a customer cannot testify about his or her own account at a financial institution.[38]

> **(2)** "I am surprised that Coinbase would contend that a provision in a 2022 amended User Agreement ("UA") would apply retroactively and shield Coinbase from responsibility for the misconduct in which Coinbase engaged in 2021 and caused me to lose my cryptocurrency."[39]

Coinbase objects to the above testimony of Mr. Plyler and similar testimony of Plaintiffs as not based on personal knowledge and "rank speculation." Coinbase's objections undermine its own arguments. First, if Plaintiffs lack personal knowledge of an arbitration clause, that supports finding the arbitration clause procedurally unconscionable because it must have been hidden, impossible to understand, and forced on customers without a meaningful choice. Second, if Plaintiffs' testimony is "rank speculation," then that supports finding the arbitration clause substantively

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[38] *See Hamilton v. Schneider Nat'l Carriers, Inc.*, No. 1:17-CV-3264-MHC-JSA, 2019 WL 11553744, at *21 (N.D. Ga. Jan. 24, 2019), *report and recommendation adopted*, 2019 WL 11553748 (N.D. Ga. Mar. 7, 2019) (excluding testimony by an employee about other employees' work schedules); *Exceptional Mktg. Grp., Inc. v. Jones*, 749 F. Supp. 2d 1352, 1358-59 (N.D. Ga. 2010) (excluding a declarant's testimony about a former employee's and business competitor's book of business and thought process regarding conduct violating a contract).

[39] *See* Motion at 3. As discussed below, Coinbase misquotes the Declaration of Mark Gambell (Dkt. 87 ¶ 7).

unconscionable because customers cannot rely on what Coinbase says while they exhaust the onerous preconditions to arbitration.

Coinbase wrongly suggests that Mr. Gambell's testimony is about the retroactivity of an arbitration clause.[40] Addressing Coinbase's attempt to stretch purported agreements for exchange accounts to the Coinbase Wallet, he testified:

> I am surprised that Coinbase, Inc. and Coinbase Global, Inc. would contend a provision in a "User Agreement" or "updated User Agreement" for a Coinbase ***exchange*** account shields them from responsibility for their misconduct that caused me to lose cryptocurrency from my Coinbase ***Wallet***.[41]

While misconstruing it, Coinbase does not actually object to the admissibility of this testimony about the Wallet. Moreover, **Coinbase has not moved to compel under *any* arbitration agreement for the Coinbase Wallet**. Instead, Coinbase attempts to compel arbitration of claims arising from the Coinbase Wallet based on purported arbitration agreements it contends pertain to Coinbase *exchange* accounts.

II. Coinbase's hearsay challenges fail.

Coinbase again objects to Plaintiffs testifying about communications Coinbase cannot dispute came from Coinbase Support. Coinbase suggests such testimony is inadmissible "hearsay" because Plaintiffs fail to establish that Coinbase

[40] *Id.* at 3-4 (citing twice to Dkt. 87 at ¶ 7).
[41] Declaration of Mark Gambell, Dkt. 87 at ¶ 7 (emphasis added).

made the statements. Coinbase suggests Plaintiffs cannot establish that communications they receive from Coinbase are actually statements made by authorized agents of Coinbase.[42] In other words, it seems Coinbase wants to know whether the communications from inside Coinbase itself truly were from "Elliot Anderson" (the cybercriminal-themed alias of a bad actor inside Coinbase),[43] the "David" at Coinbase who seems to respond to every "Formal Complaint" at all times of day, or an unsigned communication with "Coinbase Support."

Crucially, the Motion does not deny any of the referenced communications were made by an agent of Coinbase. Thus, they are admissible statements of a party opponent,[44] and Coinbase bears the burden of demonstrating that the communications *cannot be* admissible. Coinbase has failed to do so.

Like Coinbase's other objections, the hearsay objections undermine Defendants' Amended Motion to Compel Arbitration and their defenses to the Motion to Appoint a Receiver. By arguing Plaintiffs cannot establish the communications that they received from Coinbase were made by an agent of

[42] Motion at 5.
[43] Plaintiff Bob Whittington received emails from an "Elliot Anderson" at Coinbase Support (help@coinbase.com). Declaration of Bob Whittington, Ex.s A & B, Dkt. 72-2 & 72-3. "Elliot Anderson" appears to be an alias combining the names of cybercriminal characters from the T.V. show Mr. Robot and movie The Matrix.
[44] *See* Fed. R. Evid. 802(d)(2).

Coinbase, Coinbase suggests its internal dispute resolution processes are unreliable and/or infiltrated by uncontrollable bad actors. Even worse, Coinbase's objection suggests Plaintiffs have no way of knowing when or how the so-called pre-dispute resolution process ends. Regardless of whether communications from Coinbase Support were from a duly authorized agent of Coinbase, the statements show the Arbitration Clauses are unconscionable and cannot be enforced.

III. Defendants' authenticity and best evidence rule challenges.

At the summary judgment stage, objections based on failure to comply with authentication requirements or the best evidence rule are inappropriate.[45] All of Coinbase's cited cases use the wrong standard for admitting evidence. Those cases involve objections at trial, not the pre-trial standard under Fed. R. Civ. P. 56.[46]

[45] *See Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301, 1313 (11th Cir. 2020) (affirming admission of evidence about a defendant's communications and holding that the 2010 amendment Fed. R. Civ. P. 56 eliminated authentication requirement); *Smith*, 991 F.3d at 1156 n.2 (holding evidence need not be authenticated at summary judgment stage).

[46] *See United States v. Tombrello*, 666 F.2d 485 (11th Cir. 1982) (appeal of a criminal conviction cited by Coinbase to show application of the Best Evidence Rule); *United States v. Dickerson*, 248 F.3d 1036 (11th Cir. 2001) (appeal of a criminal conviction cited by Coinbase to show application of business record exception to hearsay); *United States v. Henry*, 307 F. App'x 331, 333 (11th Cir. 2009) (appeal of a criminal conviction cited by Coinbase for application of best evidence rule).

Accordingly, Defendants' authenticity and best evidence rule objections are improper as a matter of law and fail to carry Defendants' burden.

Even if Defendants' legal standard were applied, there is no merit in the authentication and "best evidence rule" objections. Plaintiffs may testify to their recollection of their communications with Coinbase without submitting the corroborative tape recordings or documents.[47] For example, Mr. Rodriguez's testimony shows crucial and obvious security flaws at Coinbase. He implored Coinbase to fix one flaw in particular – the addition of a disposable "yopmail" email address during an account takeover.[48] Those are facts to which Mr. Rodriguez may testify without submitting an email (which Coinbase should have) as a separate exhibit.

CONCLUSION

Coinbase's sweeping objections are emblematic of how it treats its customers under its unconscionable Arbitration Clauses. Coinbase wants to deny its customers

[47] *See, e.g.*, *United States v. Holland*, 223 F. App'x 891, 898 (11th Cir. 2007).
[48] *See* Declaration of Luis Rodriguez, Dkt. 88 at ¶ 10. Because the pre-dispute resolution process is not designed to address issues in earnest, Coinbase did not heed the warning in Mr. Rodriguez's email, or any other warnings it may have received prior to Mr. Rodriguez's. After Mr. Rodriguez's warning in an email to Coinbase on August 30, 2021, Coinbase allowed a bad actor to add a disposable "yopmail" email to another Plaintiff's account during an account takeover in February 2022. *See* Declaration of Tara Bennett, Dkt. 84 at ¶ 4.

their right to not just a jury trial or class action but also their right to report criminal activity to the authorities and even their right to testify before an arbitrator at a hearing.

Although the Court does not need to consider Plaintiffs' evidence to deny the Amended Motion to Compel in its entirety, the Court may consider all of Plaintiffs' evidence, and the Court should deny Defendants' second Motion to Strike.

Respectfully submitted, this 3rd day of May, 2023.

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CERTIFICATE OF COMPLIANCE WITH LR 5.1

I hereby certify that the foregoing document is written in 14-point Times New Roman font in accordance with Local Rule 5.1.

/s/ John C. Herman
John C. Herman
(Ga. Bar No. 348370)
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Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing document with the Clerk of the District Court, and the CM/ECF system will send notification of such filing to all attorneys of record.

Dated: May 3, 2023

/s/ John C. Herman
John C. Herman
Counsel for Plaintiffs