UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BRIDGET WARD, et al.,

Plaintiffs,

v.

CROW VOTE LLC, et al.,

Defendants.

Case No.: SA CV 21-1110-FWS-DFMx

ORDER DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION [89]

Before the court is Plaintiffs Bridget Ward and Lisa Ward's (collectively, "Plaintiffs") Motion for Class Certification ("Motion" or "Mot."). (Dkt. 89.) In the Complaint ("Complaint" or "Compl."), Plaintiffs allege Defendants Crow Vote LLC, Darrin Austin, and Edward Matney (collectively, "Defendants") violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961, *et seq*. and California's Unfair Competition Law, Business & Professions Code §§ 17200, *et. seq*. (Dkt. 1-1.) Plaintiffs seek to certify a "Main Class" and a "California Subclass" under Federal Rule of Civil Procedure 23(b)(3). (Mot. at 11.) On June 29, 2022, Defendants opposed the Motion ("Opposition" or "Opp."). (Dkt. 101.) On July 13, 2022, Plaintiffs filed a Reply ("Reply"). (Dkt. 103.)

The court held a hearing on the Motion on July 28, 2022. (Dkt. 108.) At the conclusion of the hearing on the Motion, the court took the matter under submission. (*Id*.) Based on the state of the record, as applied to the applicable law, the court **DENIES** the Motion.

I. Background

A. Summary of Allegations

The parties' dispute relates to an online competition, "Favorite Chef," in which "[c]hefs from around the globe are invited to compete in an exclusive online competition." (*See* Dkt. 1-1 ("Compl.") ¶ 17.) Although the advertising stated that the winner would be declared the "World's Favorite Chef," Plaintiffs allege the competition did not involve a test of cooking skills. (*Id.* ¶ 24.) Instead, Plaintiffs allege the competition was "a cleverly designed lottery, where the winner was the person who had the most money spent on his behalf." (*Id.* ¶ 25.)

Plaintiffs allege Defendant Crow Vote LLC identified its business type as "online social crowd voting" to the Arizona Corporation Commission. (*Id.* ¶ 18.) Defendant Austin owns and created Defendant Crow Vote LLC. (*Id.* ¶ 19.) Defendant Matney promoted the competition, and on information and belief, was paid

a percentage of the revenue generated by the contest for hosting and promoting the competition. (*Id.* ¶¶ 22-23.)

To participate as a competitor in the contest, individuals were required to create a profile on the Favorite Chef website. (*Id.* ¶ 26.) Competitors could also advertise themselves on social media channels like Instagram, Twitter, or Tik Tok and ask other individuals to go to the Favorite Chef profile page to vote for them. (*Id.*) On the profile page, anyone could "vote" for the individual competitor. (*Id.*) Plaintiffs allege the competition was structured so that whoever obtained the most votes at the end of each round of voting would proceed to the next round, ultimately resulting in the competitor with the most votes winning the "competition" and receiving the title of "the World's Favorite Chef," $50,000 in cash, and a two-page advertisement spread in Bon Appétit magazine announcing their victory. (*Id.*)

Plaintiffs allege members of the public could cast one free vote each day if they had a Facebook account. (*Id.* ¶ 27.) Plaintiffs allege the Favorite Chef competition differs from other popularity contests because it encouraged contestants to pay "real money for a realistic chance of winning." (*Id.* ¶ 28.) Although contestants could not directly purchase votes, members of the public were permitted to spend money to purchase "extra votes" for the contestant of their choice. (*Id.* ¶ 29.) The paid "extra votes" were called "Hero Votes." (*Id.*) When purchasing "Hero Votes," members of the public could select a certain option on the website and designate how much money they wanted to spend to buy votes. (*Id.* ¶ 30.) The required minimum to buy a vote was $10, and, in exchange, voters would be given either one or two votes per dollar spent, with the conversion rate changing throughout the contest. (*Id.*) Defendants' website included the following language below the button to purchase the "Hero Votes": "Purchase votes benefiting Feeding America." (*Id.* ¶ 31.) Plaintiffs understand this language to refer to the "fairly well-known charity," Feeding America. (*Id.*) When voters clicked on the website link to purchase "Hero Votes," they were directed to another web page where they could enter an amount to spend. (*Id.* ¶ 32.)

Near the box used to specify the payment amount, the text stated: "Help [Competitor] become the Favorite Chef and a portion of the proceeds will be donated to Feeding America . . ." (*Id.*)

After voters entered the amount that they wanted to spend and clicked "continue," voters were taken to another page where they could designate the payment method. (*Id.* ¶ 33.) Plaintiffs allege that the bottom, left-hand corner of the payment page contained a disclosure in "small letters" that stated:

> You are purchasing [number] of votes for [competitor] and your card will be charged [amount] USD. You will have an opportunity on the receipt page to type a message to the competitor. Your purchase helps us provide the prize, run the competition, and donate a minimum of 25% of the proceeds to Feeding America®. Please review our terms [sic] for additional information.

(*Id.*)

Plaintiffs allege the fine print of the competition's terms and conditions, which were disclosed on a different web page, stated:

> At the end of the Competition, the Sponsor in its separate and sole capacity will be donating 25% of its proceeds earned from votes purchased to "Feeding America," a not-for-profit 501(c)(3) organization [sic] working to connect people with food and end hunger. THIS DOES NOT AMOUNT TO A DONATION BY VOTERS IN ANY WAY, SHAPE OR FORM.

(*Id.* ¶ 34.)

Plaintiffs allege the fine print of the terms and conditions contradicts the disclosure on the payment page, which indicated that a "minimum of 25% of the proceeds" would be donated to Feeding America. (*Id.*) On information and belief, Plaintiffs allege that Feeding America "did not actually receive 25% of all money paid to Defendants to buy votes." (*Id.* ¶ 35.) To the extent that there were various terms and conditions, rules, or a privacy policy that governed the competition, voters were not required to read any such material during the voting and payment process, nor

were these materials visible on any pages accessed by voters. (*Id.* ¶ 36.) Plaintiffs allege the "terms, rules and policy constituted at least 20 pages of dense single-spaced text." (*Id.*) Although Defendants' terms and conditions prohibited persons not of "eligible age" from casting a free vote or "Hero Vote," the term "eligible age" was undefined and there was no requirement for individuals purchasing votes to disclose their age. (*Id.* ¶ 37.) On information and belief, Plaintiffs allege numerous members of the public under the age of 18 paid for votes. (*Id.*)

Curtis Ward is a home chef who wanted to win the competition so that he could purchase a food truck, start his own business, and spend more time cooking and baking with his children. (*Id.* ¶ 38.) Curtis Ward requested that his family and friends cast free votes and pay for "Hero Votes" to have a chance at winning. (*Id.* ¶ 39.) Plaintiff Lisa Ward is the sister of Curtis Ward. (*Id.* ¶ 40.) Plaintiff Bridget Ward is the wife of Curtis Ward. (*Id.* ¶ 41.) In February and March 2021, Plaintiff Lisa Ward paid a total of $390.00 to purchase votes for Curtis Ward. (*Id.* ¶¶ 42-50.) In February and March 2021, Plaintiff Bridget Ward paid a total of $120.00 to purchase votes for Curtis Ward. (*Id.* ¶ 51.) Plaintiffs allege during the class period, hundreds or thousands of individuals paid to purchase votes for competitors. (*Id.* ¶ 52.)

Plaintiffs allege Defendants categorized the Favorite Chef Competition as a contest, but Defendants were actually operating an illegal lottery under Arizona law. (*Id.* ¶¶ 54, 71.) Plaintiffs allege the Favorite Chef Competition was unlawful because "it was a scheme to award (distribute) a valuable prize among persons who have paid to have a chance of winning the prize, even though the contestants had third parties pay money to improve their chances of winning the prize." (*Id.* ¶ 56.)

Based on these allegations, Plaintiffs seek to certify two classes: (1) a "Main Class" comprised of "[a]ll persons residing in the United States who, on or after February 16, 2021, paid for "Hero Votes" for contestants participating in the Favorite Chef contest;" and (2) a "California Subclass" comprised of "[a]ll persons residing in

California who, on or after February 16, 2021, paid for "Hero Votes" for contestants participating in the Favorite Chef contest." (*Id.* ¶¶ 7-8.)

B. Procedural History

On April 16, 2021, Plaintiffs filed a Complaint in the Superior Court of California, County of Orange. (Dkt. 1-1.) On June 24, 2021, Defendants removed the case to federal court on the basis of federal question jurisdiction under 28 U.S.C. § 1331. (Dkt. 1.) On July 1, 2021, Defendants moved to compel arbitration, or in the alternative to dismiss for lack of personal jurisdiction, transfer venue, or dismiss for failure to state a claim. (Dkt. 12.) On October 7, 2021, the court denied Defendants' motion in full. (Dkt. 46.) On October 21, 2021, Defendants filed a Notice of Appeal to the Ninth Circuit challenging the court's denial of Defendants' motion to compel arbitration and stay the action pending arbitration. (Dkt. 50.)

On October 22, 2021, Defendants filed a motion to stay proceedings pending Defendants' appeal. (Dkt. 51.) On November 29, 2021, the court denied Defendants' motion to stay. (Dkt. 63.) On January 21, 2022, the Ninth Circuit denied Defendants' motion to stay the District Court proceedings. (Dkt. 68.) On February 9, 2022, Defendants filed a motion seeking entry of a case management order and bifurcation of the proceedings. (Dkt. 72.) On March 17, 2022, the court denied the motion to bifurcate the proceedings. (Dkt. 78.) On May 30, 2022, Plaintiffs filed a motion for class certification. (Dkt. 89.) On June 29, 2022, Defendants opposed the Motion. (Dkt. 101.) On July 13, 2022, Plaintiffs filed a Reply. (Dkt. 103.)

II. Legal Standard

A. Motion for Class Certification

Under Federal Rule of Civil Procedure 23, plaintiffs must first demonstrate that the proposed class meets Rule 23(a)'s requirements: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and

adequately protect the interests of the class." Fed. R. Civ. P. 23(a). If Rule 23(a) is satisfied, plaintiffs must also meet the requirements of one of Rule 23(b)'s subsections. *See* Fed. R. Civ. P. 23(b).

Rule 23(b) allows for three different types of class actions. *Id.* First, under Rule 23(b)(1), a plaintiff may certify a class where "prosecuting separate actions by or against individual class members would create a risk of:"

> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

Id.

Second, under Rule 23(b)(2), a plaintiff may certify a class where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Id*.

Third, under Rule 23(b)(3), a plaintiff may certify a class if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Id.* Rule 23(b)(3) further provides that:

> The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Id.

"Rule 23 does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The party seeking class certification "bears the burden of demonstrating that [it] has met each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b)." *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001); *see also Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1308 (9th Cir. 1977) ("The burden of demonstrating that the elements of section (a) are satisfied is on the party seeking to have a class certified.") (citation omitted). "[T]here must not only be allegations relative to the matters mentioned in [Rule 23], but, in addition, there must be a statement of basic facts. Mere repetition of the language of the Rule is inadequate." *Gillibeau v. City of Richmond*, 417 F.2d 426, 432 (9th Cir. 1969).

"In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (quoting *Miller v. Mackey Int'l, Inc.*, 452 F.2d 424, 427 (5th Cir. 1971)). "The court is bound to take the substantive allegations of the complaint as true." *Blackie v. Barrack*, 524 F.2d 891, 901, n.17 (9th Cir. 1975). "Nevertheless, [the court is] at liberty to consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992) (citation and internal quotation marks omitted).

A class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 161 (1982). "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Dukes*, 564 U.S. at 351. "Therefore, in evaluating a motion for class certification, a district court need only consider 'material sufficient to form a reasonable judgment on each

[Rule 23(a)] requirement.'" *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1005 (9th Cir. 2018) (quoting *Blackie*, 524 F.2d at 901).

III. DISCUSSION

A. Requirements under Fed. R. Civ. P. 23(a)

a. Numerosity

Under Rule 23(a), "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable." *Id.* "The numerosity requirement is not tied to any fixed numerical threshold—it 'requires examination of the specific facts of each case and imposes no absolute limitations.'" *Rannis v. Recchia*, 380 F. App'x 646, 651 (9th Cir. 2010) (quoting *Gen. Tel. Co. of the Nw., Inc. v. Equal Emp. Opportunity Comm'n,* 446 U.S. 318, 330 (1980)). "In general, courts find the numerosity requirement satisfied when a class includes at least 40 members." *Rannis*, 380 F. App'x at 651. In contrast, "[o]n the low end, the Supreme Court has indicated that a class of 15 'would be too small to meet the numerosity requirement.'" *Id.* (quoting *Gen. Tel. Co.*, 446 U.S. at 330)). "The central question is whether Plaintiffs have sufficiently identified and demonstrated the existence of the numbers of persons for whom they speak." *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 680-81 (S.D. Cal. 1999).

Here, Plaintiffs maintain the Main Class contains about 110,000 class members, while the California Subclass contains at least 13,000 members. (Mot. at 12.) The calculations behind these figures are provided in the declaration of Plaintiffs' counsel. (*See generally* Wilens Decl.) Plaintiffs further argue the members are ascertainable from Defendants' business records, which includes the name, email address and zip code of individuals who paid money to vote in the contest. (Mot. at 13.)

Plaintiffs maintain that, per Defendants' discovery responses, approximately 1.32 million individuals cast free votes in the Favorite Chef Competition while approximately 110,000 individuals cast paid votes, for a total of 1.43 million

individuals. (Wilens Decl. ¶ 3.) Based on the same discovery responses, Plaintiffs estimate approximately 9.6 million paid votes and approximately 3.9 million free votes were cast in the Favorite Chef Competition for a total of 13.5 million votes. (*Id.*) Based on these figures regarding the number of voters and the number of votes cast, Plaintiffs estimate that "about 8% of the voters (110,000) cast about 71% of the [paid] votes (9.6 million)." (*Id.*) Plaintiffs further maintain that based on a spreadsheet produced by Defendants that identifies a sample of 9,648 class members, 1,234 of the class members have zip codes in California.[1] (*Id.* ¶¶ 3-5.) Based on these figures, Plaintiffs state it is reasonable to deduce that 12.7% of the Main Class is made up of the California Subclass. (*Id.* ¶ 5.)

Defendants argue Plaintiffs have failed to prove numerosity because "absent class members remain subject to their arbitration agreement with Crow Vote, which includes a delegation provision and a class action waiver" and that the only members of the proposed class are the two named Plaintiffs. (Opp. at 5-6.) The court finds that because Rule 23(a)'s numerosity requirement simply asks whether "the class is so numerous that joinder of all members is impracticable," Defendants' arguments regarding the arbitration agreement are more relevant to other factors under Rule 23(a). (*See* Fed. R. Civ. 23(a)(1).) The court addresses Defendants' arguments regarding the arbitration agreement in further detail below. As to Defendants' argument that the only members of the proposed class are the two named Plaintiffs, the court notes that the numerosity requirement centers on "whether Plaintiffs have sufficiently identified and demonstrated the existence of the numbers of persons for whom they speak." *Schwartz*, 183 F.R.D. at 680-81. The court finds that Plaintiffs

[1] The court observes there may be a dispute between the parties as to whether the computations of these calculations ran afoul of the Protective Order in this case. (Opp. at 22.) To the extent the parties believe there is a discovery dispute, the court notes that neither party has squarely presented such a dispute in a motion.

have sufficiently identified and demonstrated the existence of the putative class members here.

Accordingly, the court finds that Plaintiffs have sufficiently demonstrated numerosity.

b. Commonality

Under Rule 23(a)(2), a plaintiff must show that "there are questions of law or fact common to the class." *Id*. "Rule 23(a)(3) does not require that all the members of the class be identically situated, if there are substantial questions either of law or fact common to all." *Harris v. Palm Springs Alpine Ests., Inc*., 329 F.2d 909, 914 (9th Cir. 1964) (citation and internal quotation marks omitted). Courts take the "common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions, and that the issue may profitably be tried in one suit." *Blackie*, 524 F.2d at 902.

"An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (citation and internal quotation marks omitted). "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Dukes*, 564 U.S. at 349-50 (citation and internal quotation marks omitted). "What matters to class certification . . . is not the raising of common questions—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id*. at 350 (emphasis in original) (citation and internal quotation marks omitted). Instead, "[d]issimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.*

Here, Plaintiffs argue the common facts are that "all of the class members paid money to cast votes in the same contest pursuant to the same set of rules" and the common legal issue is "whether the contest, when conducted pursuant to the published rules, was legal or illegal under Arizona law." (Mot. at 13-14.) Defendants argue Plaintiffs' proposed common factual issue merely restates the proposed class definition. (Opp. at 6-7.) Defendants further argue Plaintiff's proposed common legal issue turns on individualized determinations of each paying voter's subjective intent in participating the Favorite Chef Competition. (*Id*. at 7-12.) The court is persuaded by Defendants' arguments regarding commonality.

The court considers whether Plaintiffs have sufficiently raised at least a single significant question of law *or* fact that can "generate common *answers* to common questions of law or fact that are apt to drive the resolution of the litigation." *See Mazza v. Am. Honda Motor Co*., 666 F.3d 581, 589 (9th Cir. 2012) (citation and internal quotation marks omitted), *overruled on other grounds by Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022). Here, Plaintiffs seek to certify two classes: (1) a "Main Class" comprised of "[a]ll persons residing in the United States who, on or after February 16, 2021, paid for 'Hero Votes' for contestants participating in the Favorite Chef contest;" and (2) a "California Subclass" comprised of "[a]ll persons residing in California who, on or after February 16, 2021, paid for 'Hero Votes' for contestants participating in the Favorite Chef contest." (Compl. ¶¶ 7-8.)

Based on these proposed classes, the court finds that Plaintiffs' proposed common issue of fact—that proposed class members paid money to cast votes—is not a question that can "generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350. Indeed, this proposed common issue of fact, as Defendants note, merely restates the proposed class definition. (Opp. at 6-7.) The court looks to *Dukes*, a case concerning a putative class comprised of "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998

who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices." *Id*. at 346. There, the Supreme Court explained the requirement of commonality as follows:

> For example: Do all of us plaintiffs indeed work for Wal–Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification . . . Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*.

564 U.S. 349-52.

As with the putative class in *Dukes*, the court finds that Plaintiffs' asserted question of fact will not resolve the core factual issues in this case. In other words, the proposed common fact that proposed class members paid money to cast votes will not "generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350.

The court further finds that Plaintiffs have not adequately raised a common issue of law because the question of whether the contest was illegal gambling under Arizona law requires examining individual voters' intent in casting votes. Defendants argue each putative class member's purpose for voting—and thus, whether each class member was gambling—requires an individualized inquiry. (Opp. at 7-12.) The court agrees.[2] The relevant Arizona statute here defines gambling as "one act of risking or

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[2] The Ninth Circuit has clarified the applicable standard regarding a district court's ability to consider the merits of claims when analyzing compliance with Rule 23(a)'s requirements. *See Ellis v. Costco Wholesale Corp*., 657 F.3d 970, 981 (9th Cir. 2011) ("[W]e take this opportunity to clarify the correct standard. As we explained above, the merits of the class members' substantive claims are often highly relevant when determining whether to certify a class. More importantly, it is not correct to say a

giving something of value for the opportunity to obtain a benefit from a game or contest of chance or skill or a future contingent event." (Compl. ¶ 71 (citing Ariz. Rev. Stat. Ann. § 13-3302).) Per the language of the statute, each act of gambling must be undertaken to "obtain a benefit." (*Id.*) The statute further provides that gambling is "conducted as a business" when it "is engaged in with the object of gain, benefit or advantage, either direct or indirect, realized or unrealized, but not if incidental to a bona fide social relationship." Ariz. Rev. Stat. Ann. § 13-3302(2). Defendants argue each putative class member's purpose in purchasing votes is an individualized question without any "common proof from which those motivations can be evidenced," as individuals may have purchased votes for reasons such as pure entertainment, the desire to make a charitable contribution to Feeding America, or to reduce another competitor's chances of winning. (Opp. at 9.)

Plaintiffs do not sufficiently address Defendants' arguments regarding the individualized questions involved in determining each voter's purpose, arguing in summary that "the existence of common questions is not negated by the identification of possible individual questions" and that Defendants' arguments are more appropriately addressed under the predominance inquiry of Rule 23(b)(3). (Reply at 9-10.) But "[c]lass certification is not an appropriate vehicle to adjudicate a theory of liability that would necessitate thousands of mini-trials." *In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, 325 F.R.D. 136, 166 (D.S.C. 2018).

Where the subjective intent of putative class members is at issue, federal courts have frequently declined to find that commonality exists under Rule 23(a). *See*

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district court *may* consider the merits to the extent that they overlap with class certification issues; rather, a district court *must* consider the merits if they overlap with the Rule 23(a) requirements."). Here, the court considers the merits of Plaintiffs' gambling theory for the limited purpose of determining whether Rule 23(a)'s requirements are met.

Schwartz, 183 F.R.D. at 676-77 (holding that commonality requirement not met where a proposed class was made up of "those who bought Defendant's product *for the purpose* of finding a chase card" because case would involve individualized questions of fact regarding each class member's purpose in purchasing the product) (emphasis added); *Schertzer v. Bank of Am*., *N.A*., 2022 WL 1004559, at *18 (S.D. Cal. Apr. 4, 2022) ("Numerous courts have denied certification where individualized inquiries are necessary to determine a class member's intent and/or consent."); *Herskowitz v. Apple, Inc*., 301 F.R.D. 460, 471 (N.D. Cal. 2014) (denying class certification where "[t]he critical question of assent or non-assent turns on an individualized inquiry for each customer"). In this case, Plaintiffs provide several declarations of putative class members in support of the Motion, with each declaration listing the putative member's relationship to the competitor, "sole purpose in paying to cast votes," and the "personal benefit" gained from casting a paid vote. (*See generally* Dkt. 89-1.) However, the court finds that these declarations only underscore that individualized assessments are embedded within Plaintiffs' proposed common issue of law.

Accordingly, the court finds that Plaintiffs have not sufficiently demonstrated commonality.

c. Typicality

Under Rule 23(a)(3), a plaintiff must demonstrate that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Id*. "The typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiff's claims." *Gen. Tel. Co*., 446 U.S. at 330. "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Ellis*, 657 F.3d at 984 (citing *Hanon*, 976 F.2d at 508). "[A] [p]laintiff can satisfy her burden of showing typicality through pleadings, affidavits or through evidence

presented in a class certification hearing." *Lewis v. First Am. Title Ins. Co.*, 265 F.R.D. 536, 556 (D. Idaho 2010).

Plaintiffs argue their injuries are typical of those of the class because Plaintiffs "had a person they preferred to win the contest and they paid money to increase the chance their preferred candidate would win." (Mot. at 14.) However, Defendants argue Plaintiffs cannot satisfy typicality because unlike the rest of the proposed class, Plaintiffs lack standing to challenge certain provisions of the Parties' arbitration agreement. (Opp. at 12.) Thus, according to Defendants, Plaintiffs "cannot 'vigorously prosecute' the absent class member's arguments regarding the delegation provision and class waiver in the absent class member's arbitration agreement with Crow Vote." (*Id.*) In Reply, Plaintiffs argue they have demonstrated typicality because "once the Ninth Circuit affirms this Court's prior order finding the exact same arbitration agreement all class members 'signed,' is unconscionable, neither Plaintiffs nor the class members can be compelled to arbitrate." (Reply at 10.)

The court briefly reviews the arbitration agreement at issue in this case. The "Terms & Conditions" of the Favorite Chef website provide a link to the Competition's "Rules." (Dkt. 46 at 2.) The "Rules" provide as follows:

> Any dispute or claim arising out of, or relating in any way, to the Competition, your participation in it, these Rules, the Terms and Conditions, (https://favchef.com/terms) or the Privacy Policy, including all issues concerning the construction, validity, interpretation, and enforceability of these Rules, Entrant or Voter rights and obligations, the rights and obligations of the Sponsor, or the extent of any waiver or release of claims by you, shall be settled by binding and unappealable arbitration administered by the American Arbitration Association by operation of these Rules in accordance with its Consumer Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. ALL ARBITRATION CLAIMS MUST BE BROUGHT IN YOUR INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS REPRESENTATIVE OR MEMBER OR OTHERWISE ON BEHALF OF OTHERS IN ANY

> PURPORTED CLASS, COLLECTIVE OR REPRESENTATIVE PROCEEDING.
>
> Claims shall be heard by a single arbitrator. The place of arbitration shall be Phoenix, Arizona. The arbitration shall be governed by the laws of the State of Arizona. Each party will, upon written request of the other party, promptly provide the other with copies of all relevant documents. There shall be no other discovery allowed. Hearings will take place pursuant to the standard procedures of the Consumer Arbitration Rules, although the parties can appear in person, by video or telephonically. The standard provisions of the Consumer Arbitration Rules shall apply. Arbitrators will only have the authority to grant relief as otherwise specified in these Rules. Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties. To the extent damages are awarded, the arbitration award shall be limited to actual out-of-pocket costs incurred. In addition, the prevailing party will be entitled to recover its attorneys' fees and arbitration costs.

(Dkt. 46 at 2-3.)

The court also restates the relevant procedural history. On July 1, 2021, Defendants moved to compel arbitration. (Dkt. 12.) On October 7, 2021, the court denied Defendants' motion in full and made the following findings regarding the arbitration agreement: (1) Defendants waived any challenges to the delegation provision, which states that "all issues concerning the construction, validity, interpretation, and enforceability of these Rules, Entrant or Voter rights and obligations, the rights and obligations of the Sponsor, or the extent of any waiver or release of claims by you" shall be determined in arbitration; (2) two provisions of the agreement—the confidentiality provision and provision limiting available remedies—are unconscionable; and (3) the arbitration agreement as a whole is unconscionable

because the unconscionable provisions cannot be severed. (*See* Dkt. 46 at 6-8, 14, 15.) At this juncture, these findings remain pending on appeal.[3]

Defendants' arguments focus on Plaintiffs' alleged lack of standing to challenge the delegation provision of the arbitration agreement. (Opp. at 12.) In short, Defendants argue they are "unable to assert [their] right to delegation of enforceability questions as to the two named Plaintiffs, but remain[n] able to do so as to all absent class members," such that Plaintiffs are inadequate class representatives. (*Id*. at 14.) Defendants cite several cases in support of the proposition that class certification is improper where named plaintiffs "do not share the same interest in a vital defense such as an arbitration agreement common to the class." (*See id*. at 13-14) (citing *Ellsworth v. Schneider Nat'l Carriers, Inc*., 2021 WL 6102514, at *6-8 (C.D. Cal. Oct. 28, 2021); *Lawson v. Grubhub, Inc.*, 13 F.4th 908 (9th Cir. 2021); *Markson v. CRST Int'l, Inc*., 2022 WL 790960, at *6 (C.D. Cal. Feb. 24, 2022)).

The court finds that, in this case, the difference between the named Plaintiffs and putative class members is somewhat narrower than the circumstances presented in *Ellsworth*, *Lawson*, and *Markson*. In those cases, there was no doubt that the named plaintiffs were, for various reasons, not subject to arbitration agreements that clearly bound all other putative class members. *See Ellsworth,* 2021 WL 6102514, at *2 (denying certification where defendant had waived its right to compel plaintiff to arbitrate, but "[a]ll but three of the putative class members are bound by Defendant's arbitration agreements"); *Lawson*, 13 F.4th at 913 (affirming denial of certification

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[3] On October 21, 2021, Defendants filed a Notice of Appeal to the Ninth Circuit challenging the court's denial of Defendants' motion to compel arbitration and stay the action pending arbitration. (Dkt. 50.) On October 22, 2021, Defendants filed a motion to stay proceedings pending Defendants' appeal. (Dkt. 51.) On November 29, 2021, the court denied Defendants' motion to stay. (Dkt. 63.) On January 21, 2022, the Ninth Circuit denied Defendants' motion to stay the District Court proceedings. (Dkt. 68.)

where "[a]ll members of [plaintiff's] putative class—except [plaintiff] and one other—signed agreements waiving their right to participate in a class action"); *Markson*, 2022 WL 790960, at *6 (declining certification where "nearly the entire class is subject to a settlement agreement from which the named Plaintiffs opted out").

At this juncture, the question of whether putative class members are bound by the arbitration agreement has yet not been resolved. Accordingly, the difference between Plaintiffs and putative class members is that Plaintiffs have the benefit of Defendants' waiver regarding the delegation provision. In other words, Defendants can no longer challenge that "all issues concerning the construction, validity, interpretation, and enforceability of these Rules, Entrant or Voter rights and obligations, the rights and obligations of the Sponsor, or the extent of any waiver or release of claims by you" must be determined by an arbitrator as to the named Plaintiffs, but retain the right to challenge the provision as to the putative class members. (Dkt. 46 at 2.)

The Ninth Circuit has previously held that class certification is improper where putative class members "have potential defenses that [the named plaintiff] would be unable to argue on their behalf." *Avilez v. Pinkerton Gov't Servs., Inc.*, 596 F. App'x 579, 579 (9th Cir. 2015). The same principle—that a named plaintiff's inability to raise arguments on behalf of putative class members renders that plaintiff atypical—was reaffirmed in *Lawson*. *See Tan v. Grubhub, Inc.*, 2016 WL 4721439, at *3 (N.D. Cal. July 19, 2016), *aff'd sub nom. Lawson*, 13 F.4th at 908 (declining certification where "[plaintiff]—having opted out of two separate agreements—would be unable to credibly make several procedural unconscionability arguments on behalf of unnamed class members").

Here, the court finds that Plaintiffs' inability to challenge the delegation provision means that Plaintiffs' claims or defenses are not "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The Supreme Court has explained that a "delegation provision is an agreement to arbitrate threshold issues concerning

the arbitration agreement" such as "whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-89 (2010). "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the [Federal Arbitration Act] operates on this additional arbitration agreement just as it does on any other." *Id.* at 70.

Here, the court previously found that Defendants waived asserting the delegation provision against the named Plaintiffs, and the arbitration agreement as a whole was unconscionable and unenforceable against Plaintiffs. (*See* Dkt. 46 at 6-15.) In the event that Defendants prevail in their appeal to the Ninth Circuit, it is possible that the question of who can determine the enforceability of the arbitration agreement—the court or an arbitrator—will be re-litigated. Plaintiffs' counsel conceded as much at oral argument during the July 28, 2022, hearing on Plaintiffs' Motion. Specifically, Plaintiffs' counsel conceded that if the Ninth Circuit were to reverse the court's prior ruling, the question of whether the agreement is unconscionable would be presented to an arbitrator. (*See* Dkt. 108.) However, if Defendants do not prevail on appeal, the court's prior Order will remain undisturbed. (*Id.*) Under this latter scenario, Defendants could potentially assert the delegation provision against the putative class members because Defendants' waiver was limited to the named Plaintiffs. (*Id.*) Accordingly, at this juncture, Plaintiffs are in possession of a defense that they cannot assert on behalf of the remainder of the putative class. Under these circumstances, the court finds that Plaintiffs' claims or defenses are not "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). *See also Avilez,* 596 F. App'x at 579 (plaintiff not adequate and typical where putative class members "have potential defenses that [the named plaintiff] would be unable to argue on their behalf.").

Accordingly, the court finds that Plaintiffs have not sufficiently demonstrated typicality.

d. Adequacy

Under Rule 23(a)(4), a plaintiff must demonstrate that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "To determine whether the representation meets this standard, we ask two questions: (1) Do the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003).

Plaintiffs represent that they are not aware of any conflicts of interest with other putative class members, are committed to working in the best interests of the classes, and understand their roles as class representatives. (*See* Mot. at 15; Bridget Ward Decl. ¶¶ 2-4; Lisa Ward Decl. ¶¶ 2-4.) As for Plaintiffs' counsel, counsel represent that they are "adequate" under Fed. R. Civ. P. 23(g)(1)(A) because they have "brought appropriate claims, defeated motions to compel arbitration and to dismiss the case, pressed for discovery compliance and have acquitted themselves well" and have extensive experience in prosecuting class actions. (*See* Mot. at 15; Wilens Decl. ¶¶ 2-23; Spencer Decl. ¶¶ 2–17.) Plaintiffs' counsel also indicate they have performed significant work in this matter, including personally filtering the spreadsheet containing contact information for 9,648 putative class members, contacting some of the putative class members and obtaining representative declarations. (Wilens Decl. ¶¶ 5-6.)

Defendants argue Plaintiffs are not adequate representatives because of their unique ability to assert Defendants' waiver of the delegation provision (Opp. at 14), which the court has previously addressed in its analysis of Rule 23(a)'s typicality requirement above. Defendants further argue Plaintiffs' counsel should not serve as class counsel because of claimed violations of the Protective Order in this case, counsel's alleged behavior in other cases, counsel's alleged failure to adequately communicate settlement offers to Plaintiffs, and counsel's alleged refusal to comply

with COVID precautionary measures. (Opp. at 21-24.) The court finds that there is insufficient evidence in the record to support making the findings requested by Defendants regarding the behavior of Plaintiffs' counsel in this matter or in other cases. To the extent that Defendants request specific findings on discovery violations or other possible violations, the court observes that there is no request for the court to make such findings through a noticed Motion or through a Request for Judicial Notice. (*See generally* Dkt.)

Accordingly, the court finds that Plaintiffs have sufficiently demonstrated adequacy.

B. Requirements under Fed. R. Civ. P. 23(b)(3)

Plaintiffs seek certification under Fed. R. Civ. P. 23(b)(3), which requires Plaintiffs to demonstrate that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). However, the court concludes that Plaintiffs have not sufficiently demonstrated commonality and typicality under Fed. R. Civ. P. 23(a). Because Plaintiffs have failed to meet the preliminary requirements of Rule 23(a), the court declines to consider the second step of the analysis under Rule 23(b). *See Falcon*, 457 U.S. at 161 ("With the same concerns in mind, we reiterate today that a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."); *Sherman v. CLP Res., Inc*., 2020 WL 2790098, at *3 (C.D. Cal. Jan. 30, 2020) ("Before certifying a class, the trial court must conduct a rigorous analysis to determine whether the party seeking certification has met the prerequisites of Rule 23 of the Federal Rules of Civil Procedure") (citation and internal quotation marks omitted); *Dukes*, 564 U.S. at 350 ("A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law

or fact, etc."); *Gross v. Vilore Foods Co., Inc*., 2022 WL 1063085, at *11 (S.D. Cal. Apr. 8, 2022) (declining to analyze arguments for certification under Rule 23(b) because "class certification is only proper if the Court is satisfied that Rule 23(a)'s prerequisites have been met.").

IV. DISPOSITION

For the reasons stated above, the court **DENIES** the Motion for Class Certification.

IT IS SO ORDERED.

DATED: October 7, 2022

Hon. Fred W. Slaughter
UNITED STATES DISTRICT JUDGE