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 GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF PLAINTIFFS' COMPLAINT [98]

Before the court is Defendants Crow Vote LLC, Darrin Austin, and Edward Matney's (collectively, "Defendants") Motion for Summary Judgment of Plaintiffs' Complaint or, in the Alternative, for Partial Summary Judgment ("Motion" or "Mot."). (Dkt. 98.) Defendants' Motion is supported by the declaration of Plaintiff Darrin Austin ("Austin Decl.") and exhibits. (*Id.*) On July 14, 2022, Plaintiffs Bridget Ward and Lisa Ward (collectively, "Plaintiffs") filed an Opposition to the Motion ("Opposition" or "Opp.") and a Request for Judicial Notice ("RJN"). (Dkts. 104, 105.) Plaintiffs' Opposition is supported by the declarations of Plaintiffs Bridget Ward ("B. Ward Declaration" or "B. Ward Decl.") and Lisa Ward ("L. Ward Declaration" or "L. Ward Decl."). (Dkts. 104-2, 104-3.) On July 21, 2022, Defendants filed a Reply ("Reply") and Evidentiary Objections. (Dkt. 107.) Based on the state of the record, as applied to the applicable law, the Motion is **GRANTED.**

I. PROCEDURAL BACKGROUND

On April 16, 2021, Plaintiffs filed a Complaint in the Superior Court of California, County of Orange ("Complaint" or "Compl."). (Dkt. 1-1.) The Complaint alleges two causes of action: violations of (1) California's Unfair Competition Law under California Business and Professions Code § 17200, *et seq.* (the "UCL"); and (2) Civil Racketeer Influenced and Corrupt Organizations ("RICO") under "18 U.S.C. § 1961(c)."[1] (*Id.*)

On June 24, 2021, Defendants removed the case to federal court based on 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

[1] The court notes that there is no code provision under "18 U.S.C. § 1961(c)" and that the Complaint appears to contain a typographical error instead of listing 18 U.S.C. § 1964(c).

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.) The motion for class certification is fully briefed. (Dkts. 101, 103.)

On June 24, 2022, Defendants filed the Motion. (Dkt. 98.) On July 14, 2022, Plaintiffs opposed the Motion. (Dkts. 104, 105.) On July 21, 2022, Defendants filed a Reply and Evidentiary Objections. (Dkt. 107.) The court held a hearing on the Motion on August 11, 2022. (Dkt. 115.) At the conclusion of the hearing on the Motion, the court took the matter under submission. (*Id.*)

II. REQUEST FOR JUDICIAL NOTICE

a. Legal Standard

The court may take judicial notice of facts that are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Courts cannot take judicial notice of facts subject to reasonable dispute. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001), *overruled on other grounds by Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *see also Bell Atl. Corp. v. Twombly,* 550 U.S. 554, 555 n.11 (2007) ("Under Federal Rule of Evidence 201(b), a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the

trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.") (internal quotation marks omitted).

For example, "courts routinely take judicial notice of letters published by the government . . . as well as records and reports of administrative bodies." *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 851 n.10 (9th Cir. 2016) (citations and internal quotation marks omitted). Additionally, courts "may consider material which is properly submitted as part of the complaint on a motion to dismiss without converting the motion to dismiss into a motion for summary judgment," if the material is "physically attached to the complaint." *Lee*, 250 F.3d at 688 (citations and internal quotation marks omitted). "But a court cannot take judicial notice of disputed facts contained in such public records." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018).

b. Application

Plaintiffs request that the court take judicial notice of seven exhibits in support of the Opposition. (*See* RJN.)

1. Exhibit 1 is a copy of the official rules of the Favorite Chef Competition, previously filed at Dkt. 12-2.
2. Exhibit 2 is a copy of the Session Laws from the State of Arizona 1987 session of the Arizona legislature.
3. Exhibit 3 is a copy of the rules of American Idol, publicly available at URL https://idolvote.abc.com/#faq.
4. Exhibit 4 is a copy of the article "'American Idol' Final 2021: What the Winner Actually Wins," published in Newsweek by Samuel Spencer on May 23, 2021.
5. Exhibit 5 is a copy of excerpts of the Declaration of Jeffrey Wilens in support of Plaintiffs' Motion for Class Certification and excerpts of Defendants' responses to interrogatories, previously filed at Dkt. 89-1.

6. Exhibit 6 is a copy of a press release regarding Kellogg's contest, "The Great Eggo Waffle Off," publicly available at URL https://newsroom.kelloggcompany.com/newsreleases?item=131434.
7. Exhibit 7 is a copy of the rules of the promotion "Barclays Small Business Big Wins 2022 Contest," publicly available at URL https://barclayssmallbizbigwins.com/rules/

(RJN, Exhs. 1-7.)

The court declines to take judicial notice of Exhibits 3, 4, 6, and 7 because the court need not rely on the documents to decide the Motion. *See Gerritsen v. Warner Bros Ent. Inc.*, 112 F. Supp. 3d 1011, 1026-30 (C.D. Cal. 2015) (declining to take judicial notice of documents irrelevant to motion to dismiss); *Warner v. Tinder Inc.*, 105 F. Supp. 3d 1083, 1090 (C.D. Cal. 2015) (declining to incorporate by reference documents because the "court need not consider the exhibits to grant [the] requested relief").

As for Exhibits 1 and 5, which are copies of documents previously filed at Dkts. 12-2 and 89-1, a court may take judicial notice of the filings on the docket in a case before that court. *See United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980) ("In particular, a court may take judicial notice of its own records in other cases, as well as the records of an inferior court in other cases."); *Gerritsen*, 112 F. Supp. 3d at 1034 ("It is well established that a court can take judicial notice of its own files and records under Rule 201 of the Federal Rules of Evidence."); *United States v. Lincir*, 2021 WL 2224423, at *1 n.1 (C.D. Cal. June 1, 2021) ("[O]n a motion for summary judgment, a court considers evidence in the record, including declarations.").

As to Exhibit 2, which is a copy of the Session Laws from the State of Arizona's 1987 legislative session, a court may take judicial notice of documents published by a government body. *See Smith*, 830 F.3d at 851 n.10 ("[C]ourts routinely take judicial notice of letters published by the government . . . as well as

records and reports of administrative bodies.") (citations and internal quotation marks omitted).

Accordingly, the court **GRANTS** Plaintiffs' Request for Judicial Notice as to Exhibits 1, 2, and 5, and **DENIES** Plaintiffs' Request as to Exhibits 3, 4, 6, and 7.

III. EVIDENTIARY OBJECTIONS

"A trial court can only consider admissible evidence in ruling on a motion for summary judgment." *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002); *see also In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 385 (9th Cir. 2010) ("A district court's ruling on a motion for summary judgment may only be based on admissible evidence."). In the context of a summary judgment, a district court "must also rule on evidentiary objections that are material to its ruling." *Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010). "A court can award summary judgment only when there is no genuine dispute of material fact. It cannot rely on irrelevant facts, and thus relevance objections are redundant." *Burch v. Regents of Univ. of Cal.*, 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006). Additionally, "when evidence is not presented in an admissible form in the context of a motion for summary judgment, but it may be presented in an admissible form at trial, a court may still consider that evidence." *Id*. at 1120.

"'[O]bjections to evidence on the ground that it is irrelevant, speculative, and/or argumentative, or that it constitutes an improper legal conclusion are all duplicative of the summary judgment standard itself' and unnecessary to consider here." *Holt v. Noble House Hotels & Resort, Ltd*, 370 F. Supp. 3d 1158, 1164 (S.D. Cal. 2019) (alteration in original) (quoting *Burch*, 433 F. Supp. 2d at 1119) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "Moreover, Federal Rule of Evidence 403 objections are unnecessary at the summary judgment stage because there is no jury that can be misled and no danger of confusing the issues." *Holt*, 370 F. Supp. 3d at 1164 (citing *Montoya v. Orange Cnty. Sheriff's Dep't*, 987 F. Supp. 2d 981, 994 (C.D. Cal. 2013)). "Accordingly, the Court does not consider any objections on the

grounds that the evidence is irrelevant, speculative, argumentative, prejudicial, that it constitutes hearsay or inadmissible lay opinion, or that there is a lack [of] personal knowledge." *Id*. (citing *Burch*, 433 F. Supp. 2d at 1122). "Similarly, the Court will not consider the parties' objections to the characterization of or purported misstatement of the evidence represented." *Id*. (citing *Hanger Prosthetics & Orthotics, Inc. v. Capstone Orthopedic, Inc.*, 556 F. Supp. 2d 1122, 1126 n.1 (E.D. Cal. 2008)).

In this case, the court notes that the several of the parties' objections concern the phrasing or interpretation of a certain fact. (*See, e.g.*, Dkt. 104-1 (Plaintiffs' Statement of Genuine Disputes of Material Fact and Additional Uncontroverted Facts) ¶ 12) (disputing whether votes cast in the Favorite Chef Competition had any intrinsic value of their own).) The court does not construe these specific disputes regarding the parties' characterizations of the underlying evidence to be adequate evidentiary objections. Instead, the court notes where the parties dispute the phrasing or interpretation of any fact separately below.

a. Plaintiffs' Evidentiary Objections

Plaintiffs makes three evidentiary objections in their Statement of Genuine Disputes of Material Fact and Additional Uncontroverted Facts ("SGDMF"). (Dkt. 104-1.)

1. Plaintiffs' "Vague" Objection to SUF ¶ 2

Plaintiffs object to SUF ¶ 2, which states, "No chef-competitor paid any entry fee or paid anything of value in order to participate in the Competition." (Dkt. 104-1 at 3). Specifically, Plaintiffs object on the grounds that the "stated fact is 'vague' with respect to the part 'paid anything of value." (*Id*.) In reviewing SUF ¶ 2, the court does not find the supporting evidence to be vague or ambiguous based on the plain meaning of the words. Therefore, the objection is **OVERRULED**.

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2. Plaintiffs' Opinion of Law and Not a Statement of Fact Objection to SUF ¶ 12 and Lack of Foundation Objection to SUF ¶ 13

In support of their arguments that Plaintiffs suffered no economic injury, Defendants provide the Declaration of Darrin Austin (the "Austin Declaration" or "Austin Decl."). (Dkt. 98-1.) The Austin Declaration sets forth the declarant's background and qualifications:

> I am the managing member of one of the members of Crow Vote LLC ("Crow Vote") and have been since 2016. I am readily familiar with all aspects of the operation of Crow Vote, including, but not limited to, all aspects of its operation of the Favorite Chef Competition (the "Competition") that is the subject of this action. Throughout the entirety of my tenure with Crow Vote since 2016, my job duties and responsibilities including, but are not limited to, general oversight of day-to-day operations. Specifically, with respect to the Competition, my job duties and responsibilities included, but were not limited to, overseeing general operations and negotiations.

(Austin Decl. ¶ 3; Dkt. 98-1.)

The evidence offered by Defendants that Plaintiffs incurred no economic injury is set forth in SUF ¶¶ 12 and 13,[2] and is based on paragraph 11 of the Austin Declaration:

> The paying voters always received exactly the number of votes that they purchased. There was no involvement of chance skill, or a future contingent event in obtaining the exact number of votes bargained for; instead, if Plaintiffs wish to purchase 10 votes, they simply bought 10 votes and received 10 votes. There was no ability for Plaintiffs or other third-party voters to receive anything other than the number of votes that they

[2] SUF ¶ 12 states: "There was no ability for Plaintiffs, or any other voters, to receive anything of value or otherwise other than the number of votes that they agreed to purchase." SUF ¶ 13 states: "Plaintiffs, and all other voters, always received the exact number of votes that they purchased."

> agreed to purchase, and Plaintiffs, as well as all other third-party votes, always received the exact number of votes that they purchased.

(Austin Decl. ¶ 11; Dkt. 98-1.)

Plaintiffs object to SUF ¶ 12 on several grounds, including, (1) "THIS IS AN OPINION OF LAW NOT A STATEMENT OF FACT;" (2) "[t]he statement of fact is not supported by the evidence;" (3) "[t]he alleged undisputed material fact is a legal conclusion not a fact;" (4) "Mr. Austin does not claim to have personal knowledge nor does he reference any business records that support the statement;" (5) "[t]he evidence cited in the Austin declaration is simply a legal conclusion;" and (6) "the statement is not conclusive or undisputed." (Dkt. 104-1 at 6-7.) Plaintiffs object to SUF ¶ 13 on "LACK OF FOUNDATION" grounds stating that "the statement by Mr. Austin in paragraph 11 that no voter ever received other than the exact number of votes is not supported by personal knowledge, nor does he reference any business records that support the statement." (*Id*. at 7.)

In *United States v. Lloyd*, the Ninth Circuit described the parameters of lay witness testimony:

> Under Federal Rule of Evidence 701, a lay witness may testify "in the form of an opinion" if it is "(a) rationally based on the perception of the witness; (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge." Fed. R. Evid. 701. "Rule 701(a) contains a personal knowledge requirement." *United States v. Lopez*, 762 F.3d 852, 864 (9th Cir.2014). "In presenting lay opinions, the personal knowledge requirement may be met if the witness can demonstrate firsthand knowledge or observation." *Id*. "A lay witness's opinion testimony necessarily draws on the witness's own understanding, including a wealth of personal information, experience, and education, that cannot be placed before the jury." *Gadson*, 763 F.3d at 1208. But a lay opinion witness "may not testify based on speculation, rely on hearsay or interpret unambiguous, clear statements." *United States v. Vera*, 770 F.3d 1232, 1242 (9th Cir. 2014).

807 F.3d 1128, 1154 (9th Cir. 2015).

"Rule 701 . . . is meant to admit testimony based on the lay expertise a witness personally acquires through experience, often on the job." *United States v. Maher*, 454 F.3d 13, 24 (1st Cir. 2006); *see also Hynix Semiconductor Inc. v. Rambus Inc.*, 2008 WL 504098, at *4 (N.D. Cal. Feb. 19, 2008) (stating "the rules of evidence have long permitted a person to testify to opinions about their own businesses based on their personal knowledge of their business"). "Although a lay witness may give an opinion on an ultimate issue to be decided by the trier of fact, Fed. R. Evid. 704(a), she may not offer legal conclusions." *Chiate v. Morris*, 972 F.2d 1337, 1992 WL 197591, at *6 (9th Cir. 1992).

For the purposes of the Motion, the court finds the Austin Declaration lays a sufficient foundation establishing Mr. Austin's familiarity with the operation of Crow Vote, the operation of the Competition, and that he oversaw the operations of the Competition. (Austin Decl. ¶ 3; Dkt. 98-1.) The court concludes the testimony contained in SUF ¶¶ 12 and 13 is admissible based on Mr. Austin's experience, qualifications, and personal perceptions on how the Competition was administered. Accordingly, the court **OVERRULES** Plaintiffs' evidentiary objections to SUF ¶¶ 12 and 13, and the court will consider the evidence based on Mr. Austin's perceptions of the Competition and his job duties overseeing general operations. (Austin Decl. ¶ 3; Dkt. 98-1.)

b. Defendants' Evidentiary Objections

Defendants raise twelve evidentiary objections to Plaintiffs' evidence submitted in support of their Opposition. (*See* Dkt. 107-2.) The court notes that Defendants' objections to Exhibits 3, 4, 6, and 7 are addressed by the court's denial of Plaintiffs' request for judicial notice of these exhibits, and Defendants' objections as to those exhibits are now moot. The remainder of Defendants' objections pertain to portions of the Declarations of Plaintiffs Bridget Ward and Lisa Ward regarding their knowledge of whether the Favorite Chef Competition was illegal gambling. (Dkts.

107-2, 104-2, 104-3.) Defendants object on the ground that Plaintiffs' statements are improper legal conclusions under Federal Rule of Evidence 701. (Dkt. 107-2.) The court agrees that Plaintiffs may not testify as to their lay opinions on whether the Favorite Chef Competition was illegal gambling under Arizona law. *See* Fed. R. Civ. 701 ("If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."); *Chiate*, 1992 WL 197591, at *6 ("Although a lay witness may give an opinion on an ultimate issue to be decided by the trier of fact, Fed. R. Evid. 704(a), she may not offer legal conclusions."). Accordingly, the court **SUSTAINS** each of Defendants' evidentiary objections.[3]

IV. FACTUAL BACKGROUND

Although the parties' characterizations of the material facts differ, the court concludes the material facts that form the basis of the court's Order as reflected by the cited evidentiary record are not in dispute.[4] To the extent either party disputes the phrasing or interpretation of a fact, the court notes the basis for the dispute below.

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[3] Although the court does not consider Plaintiffs' opinions on whether the Competition constituted gambling, the court considers Plaintiffs' remaining statements in the B. Ward and L. Ward Declarations. Specifically, as discussed further below, the court considers Plaintiffs' statements regarding their perceived benefit from the Competition. *See, e.g.*, *Lincir*, 2021 WL 2224423, at *1 n.1 ("[O]n a motion for summary judgment, a court considers evidence in the record, including declarations.").

[4] The court recognizes "[t]he Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *see also United States v. Fred A. Arnold, Inc.*, 573 F.2d 605, 606 (9th Cir. 1978) ("A summary judgment cannot be granted if a genuine issue as to any material fact exists."). Though the parties assert that certain facts are materially disputed, the

Defendant Crow Vote operated the Favorite Chef Competition (the "Competition"). (SUF ¶ 1.) Chef-competitors voluntarily entered the Competition and were eligible to win the prize package if they received the most votes among all

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court determines the facts relied on by the court in its Order are undisputed for the purposes of the Motion because the parties' arguments concern their respective *characterizations* of the supporting evidence rather than sufficiently demonstrating the existence of genuine disputes as to the underlying evidence itself. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (noting "the [triable] issue of fact must be 'genuine'" to survive a motion for summary judgment); *Pierre-Canel v. Am. Airlines*, 375 F. Supp. 3d 1044, 1052 (D. Ariz. 2019) (stating "[t]he dispute over material facts must be genuine"). For example, SUF ¶ 12 (based on the Austin Decl. ¶ 11) proffered by Defendants, purports to state "[t]here was no ability for Plaintiffs, or any other voters, to receive anything of value or otherwise other than the number of votes that they agreed to purchase." (Dkt. 99.) Plaintiffs argue this fact is disputed because the Declarations of Bridget Ward and Lisa Ward indicate that Plaintiffs "cast votes for Curtis Ward to *help* him win the $65,000 prize" even though "[t]he votes had no intrinsic value of their own." (*See* Dkt. 104-1.) (emphasis added). The court's careful review of the parties' supporting evidence reveals there is no material dispute of the facts in SUF ¶ 12 relating to what Plaintiffs received in value for paying for casting votes, e.g., paying for and receiving the votes themselves, but instead offers a different characterization of the facts relating to Plaintiffs' motives in purchasing the votes. (*See id.*) Accordingly, the court makes its determination of what constitutes a disputed fact based on its review of the record, including the Statement of Uncontroverted Facts, supporting evidence, and its ruling on the parties' objections raised in connection with the Motion. *See AFMS LLC v. United Parcel Serv. Co.*, 105 F. Supp. 3d 1061, 1071 (C.D. Cal. 2015) ("In deciding the motions for summary judgment, the [c]ourt examines the underlying evidence, not the summary statements or . . . compound paragraphs offered in the parties' statements of undisputed facts.") (citation omitted), *aff'd sub nom. AFMS LLC v. United Parcel Serv., Inc.*, 696 F. App'x 293 (9th Cir. 2017); *Bischoff v. Brittain*, 183 F. Supp. 3d 1080, 1084 (E.D. Cal. 2016) ("[T]he court will not consider [] objections aimed at the characterization or purported misstatement of the evidence as represented . . . . The court's decision relies on the evidence submitted rather than how that evidence is characterized in the statements.") (citation omitted); *Holt v. Noble House Hotels & Resort, Ltd*, 370 F. Supp. 3d 1158, 1164 (S.D. Cal. 2019) ("[T]he [c]ourt will not consider the parties' objections to the characterization of or purported misstatement of the evidence represented.") (citing *Hanger Prosthetics & Orthotics, Inc. v. Capstone Orthopedic, Inc.*, 556 F. Supp. 2d 1122, 1126 n.1 (E.D. Cal. 2008)).

the chef-competitors in the final round. (*Id.*) No chef-competitor paid any entry fee to participate in the Competition. (*Id.* ¶ 2.) Plaintiffs dispute whether a chef-competitor could "pa[y] anything of value" to participate in the Competition. (*See* Plaintiffs' SGDMF ¶ 2.) The winner of the Competition was not picked at random, such as in a lottery, but was decided by a plurality vote of the general public. (SUF ¶ 3.) The Competition did not provide for taste-testing by a panel of judges or the voters. (*Id.* ¶ 4.) Instead, the chef-competitors had to generate supporting votes by appealing to as many voters as possible; in essence, this was a popularity competition, and a chef-competitor's ability to win was not based solely on their ability to cook. (*Id.* ¶ 5.) Every person with a Facebook account could cast one free vote per day. (*Id.* ¶ 6.)

The parties do not dispute that every person who was not a chef-competitor could purchase the right to cast more votes, called "Hero Votes." (*Id.* ¶ 7.) Hero Votes generated the only revenue obtained by Crow Vote in operating the Competition. (*Id.*) Plaintiffs maintain the rules did not prohibit competitors from purchasing votes for other chef-competitors. (Plaintiffs' SGDMF ¶ 7.) After each round of the Competition preceding the final round, a select number of chef-competitors advanced based on the hierarchy of votes received during that round. (SUF ¶ 8.) In the final round, the chef-competitor that received the most votes won the Competition. (*Id.* ¶ 9.)

There were two distinct groups of persons in the Competition: (1) chef-competitors, who paid no consideration to participate in the Competition, could not purchase Hero Votes, and were eligible to win a prize based upon their ability to obtain the most votes; and (2) paying voters, such as Plaintiffs, who did not compete in the Competition and were not eligible to win anything from or as a result of the Competition. (*Id.* ¶ 10.) Plaintiffs agree that the two groups are distinct but maintain that they are potentially overlapping. (Plaintiffs' SGDMF ¶ 10.) Every vote for a chef-competitor improved that chef competitor's chances of winning. (SUF ¶ 11.)

Defendants maintain that the only items of value Plaintiffs, or any other voters, could receive were the number of votes that they agreed to purchase. (*Id.* ¶ 12.) Plaintiffs maintain the votes had no intrinsic value of their own. (Plaintiffs' SGDMF ¶ 12.)

Generally, the cost of a vote was $1 for one vote, and there was a $10.00 minimum purchase. (SUF ¶ 14.) The winner of the Favorite Chef contest was promised a cash prize of $50,000 and a magazine spread with an estimated value of $15,000. (*Id.* ¶ 15.) About 1,430,000 individuals cast votes in the Favorite Chef contest. (*Id.* ¶ 16.) Roughly 110,000 individuals paid to cast votes, while about 1.32 million individuals cast free votes. (*Id.* ¶ 17.) Approximately 9.6 million paid votes were cast and an estimated 3.9 million free votes were cast for a total of 13.5 million votes. (*Id.* ¶ 18.) In other words, about 8% of the voters (110,000) cast about 71% of the votes (9.6 million). (*Id.*) The aggregate amount paid by the 110,000 class members was $6.6 million. (*Id.* ¶ 19.)

The winner of the Competition was determined by the number of "votes" from members of the public. (*Id.* ¶ 20.) All the contestants were divided into groups and the contest period was divided into phases. (*Id.*) For example, in the first phase, the top 15 recipients of votes in each group would advance to the next round and everyone else would be eliminated. (*Id.*) As each phase was completed, the number of remaining contestants was reduced until there were four quarterfinalists; then two semifinalists; and finally, one champion. (*Id.*) In the later phases, voting was reset, meaning that contestants who might have had 1,000 votes in prior phases started at zero votes; thus, they would need to recruit new votes to advance further. (*Id.*) The parties dispute whether the contest was designed to make it unlikely or impossible that a chef-competitor could win without paid voting. (*See* Dkt. 107-1 ("Defendants' Response to Plaintiffs' Statement of Genuine Disputes") ¶ 21.)

V. LEGAL STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a

matter of law." Fed. R. Civ. P. 56(a). An issue of fact is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). A fact is "material" if it may affect the outcome of the case. *Id*. at 248. "Under Federal Rule of Civil Procedure 56(a), a party may move for summary judgment as to a claim or part of each claim." *Am. Student Fin. Grp., Inc. v. Dade Med. Coll., Inc.*, 180 F. Supp. 3d 671, 677-78 (S.D. Cal. 2015).

"As to materiality, the substantive law will identify which facts are material." *Anderson*, 477 U.S. at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id*. The moving party bears the initial burden of identifying the elements of the claim or defense on which summary judgment is sought and evidence that it believes demonstrates the absence of an issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Where the non-moving party will have the burden of proof at trial, the movant can satisfy its initial burden by pointing out that there is an absence of evidence to support the non-moving party's case. *Id.* at 325; *see also Horphag Rsch. Ltd. v. Garcia*, 475 F.3d 1029, 1035 (9th Cir. 2007) ("The moving party bears the initial burden to demonstrate the absence of any genuine issue of material fact."). The non-moving party then "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250 (quoting prior version of Fed. R. Civ. P. 56(e)); *see also Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 997 (9th Cir. 2001) (In opposing summary judgment, "the non-moving party must go beyond the pleadings and by its own evidence 'set forth specific facts showing that there is a genuine issue for trial'"); *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1389 (9th Cir. 1990) ("The non-moving party may not oppose summary judgment by allegations but must show specific trial-worthy facts."). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*

Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting *First Nat. Bank of Ariz. v. Cities Serv. Co*., 391 U.S. 253, 289 (1968)). "In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). The court must draw all reasonable inferences in the non-moving party's favor. *In re Oracle Corp. Sec. Litig*., 627 F.3d 376, 387 (9th Cir. 2010) (citing *Anderson*, 477 U.S. at 255).

Nevertheless, "inferences are not drawn out of thin air, but from evidence." *Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1247 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898 (9th Cir. 1987). "[M]ere disagreement or the bald assertion that a genuine issue of material fact exists" does not preclude summary judgment. *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989). "[S]ummary judgment will not lie if the dispute about a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248 (internal quotation marks omitted). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Id.* at 247-48; *see also United States v. Fred A. Arnold, Inc.*, 573 F.2d 605, 606 (9th Cir. 1978) ("A summary judgment cannot be granted if a genuine issue as to any material fact exists.").

In *In re Oracle Corp. Sec. Litig.*, the Ninth Circuit described the burdens of proof in the summary judgment process:

> The moving party initially bears the burden of proving the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case. *Id.* at 325, 106 S.Ct. 2548. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts

> demonstrating the existence of genuine issues for trial. *Id*. at 324, 106 S.Ct. 2548. This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The non-moving party must do more than show there is some "metaphysical doubt" as to the material facts at issue. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In fact, the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor. *Anderson*, 477 U.S. at 252, 106 S.Ct. 2505. In determining whether a jury could reasonably render a verdict in the non-moving party's favor, all justifiable inferences are to be drawn in its favor. *Id*. at 255, 106 S.Ct. 2505.

627 F.3d 376, 387 (9th Cir. 2010).

"[T]he plain language of Rule 56(c) mandates the entry of summary judgment. . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 884 (1990) (citation omitted). "Where no such showing is made, the moving party is entitled to a judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id.* (cleaned up).

VI. DISCUSSION

A. Defendants' Arguments for Summary Judgment and Partial Summary Judgment

Defendants move for summary judgment arguing "there is no genuine issue as to any material fact and that Defendants are entitled to judgment as a matter of law for the reasons that [(1)] the undisputed facts concerning the 'Favorite Chef Competition' prove that it does not constitute unlawful gambling under Arizona law and, therefore, Plaintiffs do not have a predicate offense for their UCL or RICO claims, [(2)] Plaintiffs have not asserted and cannot prove an economic injury to them, which is

necessary to state a cause of action under both the UCL and RICO statutes, [(3)] California's public policy does not allow Plaintiffs to pursue a UCL claim based upon their involvement in alleged gambling transactions (legal or illegal), and [(4)] Plaintiffs' involvement in allegedly unlawful gambling transactions makes them *in pari delicto* and prohibited from pursuing their UCL, and RICO claims." (Dkt. 98 ("Notice of Motion") at 2.)

Alternatively, Defendants seek partial summary judgment. (*Id*.) Defendants argue partial summary judgment is appropriate on the UCL cause of action because "Plaintiffs have not suffered economic injury under Proposition 64, are prohibited from seeking restitution for participation in alleged gambling, and Plaintiffs are *in pari delicto*." (*Id*.) Defendants seek partial summary judgment on the second cause of action "because Plaintiffs suffered no injury to their business or property by reason of a violation of RICO." (*Id*.) The court will address the second cause of action under RICO first, followed by the first cause of action under the UCL.

B. The Undisputed Facts Demonstrate the Competition Does Not Qualify as Illegal Gambling Under Arizona Law

In this case, as an initial matter, the court considers whether the undisputed facts demonstrate that the Favorite Chef Competition (the "Competition") constitutes unlawful gambling under Arizona law. The court finds that there is no material dispute between the parties as to the rules governing the Competition. (*See* SUF ¶¶ 1-21.) Defendants argue the Competition does not meet the statutory definition of unlawful gambling under Arizona law, and therefore, Plaintiffs do not have a predicate offense on which to base their claims for violations of the UCL, Business & Professions Code § 17200, *et seq*. and RICO, 18 U.S.C. § 1961, *et seq*. (Mot. at 1-3.) Plaintiffs argue the Competition meets the statutory standard, and to the extent there is a factual dispute about whether Plaintiffs paid money for the "opportunity to obtain a benefit" from the Competition, this creates a genuine dispute of material fact that precludes granting summary judgment. (Opp. at 10-26.)

The statute at issue here, Ariz. Rev. Stat. Ann. § 13-3301(6),[5] defines gambling as follows:

> "Gambling", "gamble" or "wager" means one act of risking or 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 but does not include bona fide business transactions that are valid under the law of contracts including contracts for the purchase or sale at a future date of securities or commodities, contracts of indemnity or guarantee, life, health or accident insurance and fantasy sports contests as defined in section 5-1201 and conducted pursuant to title 5, chapter 1.

Ariz. Rev. Stat. Ann. § 13-3301(6).

Under the statute, 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." *Id*. § 13-3301(2). A "player" is defined as "a natural person who participates in gambling." *Id*. § 13-3301(7). The statute also provides several statutory exceptions to illegal gambling for amusement gambling, social gambling, regulated gambling, and certain types of gambling at state, county, or district fairs. *See* Rev. Ariz. Jury Instructions (Criminal),

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[5] Based on the filings, Plaintiffs have taken the position that the Arizona statute is the relevant statute for the predicate offense. (*See, e.g.,* Opp. at 7 (stating "[t]he parties agree the contest was conducted in Arizona" and "[a]n illegal gambling business … operates in violation of the law of the State in which it is conducted"); *accord* Mot. at 2 (stating that for the causes of action in the Complaint that Plaintiffs "*now* assert as their predicate offense that the Competition violates Arizona gambling laws") (emphasis in original).) The court also notes that, in opposing Defendants' Motion to Compel Arbitration, Transfer or Dismiss Case, Plaintiffs argued that "[W]e must look at the substance of the allegations to see if the competition was illegal gambling under Arizona law . . . both parties agree Arizona substantive law controls although the UCL violation can be based on violations of Arizona law committed in the State of California. Also, the RICO claim will be premised on violation of Arizona gambling law." (*See* Dkt. 21 at 27-28.) Therefore, the court's predicate offense analysis for the RICO and UCL violations will concern Arizona's gambling law.

33.021 (5th ed.) ("Exclusions"). "Benefit" is defined as "anything of value or advantage, present or prospective." Ariz. Rev. Stat. Ann. § 13-105; *see also Boies v. Bartell*, 310 P.2d 834, 837 (1957) ("Generally, it may be said that the elements of gambling are payment of a price for a chance to gain a prize.").

The parties make clear that there is limited controlling legal authority applying Arizona's gambling statute to the facts presented in this case. (*See* Mot. at 15 ("Here, in the absence of 'explicit legislative intent or specific statutory language,' Plaintiffs cannot establish their legal interpretation is correct."); Opp. at 17 ("Neither Arizona case law nor Arizona Attorney General Opinions have addressed the legality of contests structured similarly to the Favorite Chef contest, that is, where one person pays money for the opportunity to win $65,000 but must designate another person to receive the money."). Nor is the court aware of any such legal authority applying the law to a competition similar to the one at issue in this case. Given the limited case law in this area, the court considers persuasive authority from the Arizona Attorney General's Office regarding the correct interpretation and application of Arizona's gambling statute. The Arizona Attorney General's Office has issued two such Opinions that are relevant to this case: Opinion No. I98-002 and Opinion No. I91-024.

In Opinion No. I98-002, the Arizona Attorney General's Office considered whether the following activities constitute illegal gambling if conducted on the premises of an establishment licensed to manufacture, sell, or distribute liquor: (1) sports pool contests based on squares arranged in a grid format; (2) fantasy football contests; (3) card and dice games; (4) games of skill such as pool, darts, or intellectual games; and (5) video games where there is no payoff other than the satisfaction of getting the highest score or winning a replay. *See* Ariz. Op. Att'y. Gen. No. I98-002 (Ariz. A.G.), 1998 WL 48550, at *1 (Jan. 21, 1998) ("Opinion No. I98-002").

The Arizona Attorney General's Office explained that "[t]o qualify as gambling, three elements must be present: (i) an act of risking or giving something of

value, (ii) for the opportunity to obtain a benefit, and (iii) from a game or contest of chance or skill or a future contingent event." *Id.* at *2. Under the first element, "[i]f the participant risks something with an economic, monetary, or exchange value (such as money wagered or used to operate or participate in a game or contest), then the first element is satisfied." *Id.* "However, if no money or nothing of value is required to participate, then the conduct is not gambling." *Id.* "The second element of gambling requires a determination of whether the participant is entitled to receive anything of value or advantage as a result of playing the game or contest." *Id.* "The third element requires that the games or contests to be of chance, skill, or contingent upon future events." *Id.*

The Arizona Attorney General's Office opined that sports pools, fantasy football contests, card and dice games, and games of skill satisfy the second element of an "opportunity to gain or benefit" because "the participant purchases a chance to win all or a percentage of the entire amount wagered," "the participant plays for a chance to win something of value (usually money)," or "the winner is entitled to receive all or part of the amount wagered." *Id.* at *2. However, in the case of a video game where "there is no payoff other than the satisfaction of getting the highest score . . . the satisfaction of getting the high score alone fails to meet the requirements of the second element [of requiring an opportunity to gain or benefit]." *Id.*

In Opinion No. I91-024, the Arizona Attorney General's Office considered whether a "shake-a-shift" game, "in which a patron of an establishment is allowed to purchase one roll of the dice [per an employee's shift] entitling him to receive all or a portion of the money in a jar kept at the establishment if a particular result is achieved" constitutes illegal gambling. *See* Ariz. Op. Att'y Gen. No. I91-024 (Ariz. A.G.), 1991 WL 488340, at *1 (June 20, 1991) ("Opinion No. I91-024"). The Attorney General's Office opined that "'shake-a-shift' clearly constitutes gambling under Arizona law because the player risks something of value (cash) for the

opportunity to obtain a benefit (all the cash in the jar) from a game of chance (throwing dice)." *Id*.

Plaintiffs challenge Defendants' interpretation of "benefit" and "player" under the statute, arguing that nothing in § 13-3301 limits the "benefit" to a "material benefit like a cash prize" and the statute "does not expressly state that the person who pays the money has to be the same person with the opportunity to win the cash prize." (Opp. at 23.) Plaintiffs provide several hypotheticals outlining different applications of their theory. (*Id*. at 23-26.) Based on the record, the court concludes the undisputed material facts, (*see* SUF ¶¶ 1-21), demonstrate that the Competition is not illegal gambling under Arizona law for the following reasons.

1. Plaintiffs' Argument Regarding the Benefit Received by Voters is not Adequately Supported by Evidence in the Record

Plaintiffs now argue that the "benefit" here was the "opportunity to obtain the benefit that their favored candidate would win $65,000." (Opp. at 22.) Plaintiffs further argue that individuals "paid money to help their ally win $65,000, so the benefit was monetary, and not purely psychological." (*Id*. at 25.) The court observes that Plaintiffs' argument regarding the "benefit" received by paying voters contradicts declarations previously filed by Plaintiffs in this case.[6]

Plaintiffs previously submitted the declarations of several putative class members in support of Plaintiffs' Motion for Class Certification identifying the "benefit" that each individual voter received. (*See* Dkt. 89-1.) Each declaration provides the same explanation of the purported benefit received by paying voters: "[t]he personal benefit I got from paying money to cast votes was in the *satisfaction* I

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[6] In addition to the judicial notice requested by the parties, the court takes judicial notice of Plaintiffs' prior filings as reflected on the docket. *See* Fed. R. Evid. 201(c); *Wilson*, 631 F.2d at 119 ("In particular, a court may take judicial notice of its own records in other cases, as well as the records of an inferior court in other cases."); *Lincir*, 2021 WL 2224423, at *1, n.1 ("[O]n a motion for summary judgment, a court considers evidence in the record, including declarations.").

felt in improving the chance that this person would win the contest." (*See* Dkt. 89-1 (emphasis added)). The court finds that Plaintiffs' earlier argument that the benefit was not a monetary one—e.g., that they purchased votes for the psychological benefit of increasing a competitor's chances of winning—is more consistent with the undisputed evidence demonstrating that Plaintiffs only expected an increased probability their chosen candidate might succeed. In other words, there is no evidence Plaintiffs *themselves* stood to obtain anything "of value" from the Competition, as that term is understood and interpreted by the Arizona Attorney General's advisory opinions. Accordingly, the court finds that Plaintiffs' argument regarding the alleged benefit received by paying voters is not sufficiently supported by evidence in the record.

2. Plaintiffs' Theory Fails to Meet the Elements of Arizona's Gambling Statute

Second, the court finds that Plaintiffs' theory is not consistent with the Opinions issued by the Arizona Attorney General's Office regarding the correct application of Arizona's gambling statute. Specifically, the court finds that Plaintiffs do not adequately demonstrate how the three elements of gambling under Arizona law are met: "(i) an act of risking or giving something of value, (ii) for the opportunity to obtain a benefit, *and* (iii) from a game or contest of chance or skill or a future contingent event." Opinion No. I98-002 at *2 (emphasis added). The court addresses the first and second elements of the gambling statute below.

Under the first element—that an individual must risk or give something of value—there appears to be no dispute between the parties that chef-competitors and voters were *not required* to pay a fee to participate or vote in the Competition. Indeed, Plaintiffs do not dispute the following facts regarding the Competition. Chef-competitors voluntarily entered the Competition and were eligible to win the prize package if they received the most votes amongst all the chef-competitors in the final round. (SUF ¶ 1.) No chef-competitor paid any entry fee to participate in the

Competition. (SUF ¶ 2.) Approximately 1.32 million individuals cast free votes. (SUF ¶ 17.) Approximately 3.9 million free votes were cast. (SUF ¶ 18.) And it is undisputed that any individual with a Facebook account was able to cast one free vote per day. (SUF ¶ 6.)

Opinion No. I98-002 provides that "*if no money or nothing of value is required to participate*, then the conduct is not gambling." *See* Opinion No. I98-002, at *2 (emphasis added). Plaintiffs do not sufficiently address why their espoused interpretation of Arizona's gambling law satisfies the first element when there is no dispute that, although certain voters paid for votes, other voters and chef-competitors were able to participate in the Competition for free. (*See generally* Opp.; SUF ¶¶ 17-18.) Accordingly, the court finds that the first element of gambling is not satisfied because, based on the undisputed facts regarding the rules and structure of the Competition, chef-competitors and voters with Facebook accounts were not required to "ris[k] or giv[e] something of value" to participate in the Competition. *See* Opinion No. I98-002, at *2; SUF ¶¶ 1, 2, 6, 17, 18.

Under the second element—that there must be an opportunity to obtain a benefit—the court finds that the benefit identified by Plaintiffs materially differs from the benefit in games identified by the Arizona Attorney General's Office as illegal gambling. In Opinion No. I98-002, the Arizona Attorney General's Office advised that sports pools, fantasy football contests, card and dice games, and games of skill satisfy the second element of an "opportunity to gain or benefit" because "the participant purchases a chance to win all or a percentage of the entire amount wagered"; "the participant plays for a chance to win something of value (usually money)"; or "the winner is entitled to receive all or part of the amount wagered." *See* Opinion No. I98-002, at *2. In Opinion No. I91-024, the Arizona Attorney General's Office opined that "shake-a-shift" games are illegal gambling because "the player risks something of value (cash) for the opportunity to obtain a benefit (all the cash in the jar) from a game of chance (throwing dice)." *See* Opinion No. I91-024, at *1.

Regardless of how Plaintiffs explain the benefit received by voters in the Competition—either as the satisfaction of helping a competitor or the opportunity to help that individual win $65,000—none of the examples identified as illegal gambling by the Arizona Attorney General's Office involve a psychological benefit *or* a monetary benefit that only accrues to a third-party. Indeed, Opinion No. I98-002 highlights that "[t]he second element of gambling requires a determination of whether the *participant* is entitled to receive anything of value or advantage as a result of playing the game or contest." *See* Opinion No. I98-002, at *2 (emphasis added); *see also id.* (playing a video game is not illegal gambling because where "there is no payoff other than the satisfaction of getting the highest score . . . the satisfaction of getting the high score alone fails to meet the requirements of the second element [of requiring an opportunity to gain or benefit]."). In other words, per Opinion Nos. I91-024 and I98-002, the second element of gambling focuses on what item of value Plaintiffs *themselves* were entitled to receive from the Competition. Just as the satisfaction of receiving the highest score in a video game is not construed as gambling under Arizona law, the court finds that Plaintiffs' satisfaction in obtaining the highest number of votes for their chosen candidate falls outside the ambit of the statute. Accordingly, the court concludes that the second element of gambling is not satisfied because the undisputed material facts do not demonstrate, (*see* SUF ¶¶ 12-21), and Plaintiffs have not provided sufficient support for the proposition, that the "benefit" under the Arizona gambling statute can mean either a psychological benefit or a monetary benefit that only accrues to a third-party, (*see* B. Ward Decl. ¶ 3; L. Ward Decl. ¶ 3).

Finally, Plaintiffs urge the court to interpret Arizona's gambling statute in a manner that does not require all three elements to be satisfied by the same person. (*See* Opp. at 25) ("Of course, Defendants argue that there can be no 'gambling' unless the person who pays the money must be the same person who has the opportunity to personally receive the $65,000. But that is an unreasonable although perhaps

ingenious interpretation of the statute that would create a massive loophole."). However, Plaintiffs do not point to sufficient legal authority supporting such a novel reading of the statute. (*See generally* Opp.) Additionally, the court is guided by the Arizona Supreme Court's reasoning in *State v. Am. Holiday Ass'n, Inc*., 727 P.2d 807, 812 (1986) advising against novel readings of the gambling statute.[7] In *State*, the Arizona Supreme Court explained its reluctance to broadly construe "gambling" under Arizona law:

> In the absence of explicit legislative intent or specific statutory language, we are reluctant to adopt a statutory interpretation which would turn sponsors of golf, tennis or bridge tournaments, rodeos, livestock, poultry, and produce exhibitions, track meets, spelling bees, beauty contests, and the like into class 6 felons operating gambling games.

727 P.2d at 812.

Based on the Arizona Supreme Court's ruling in *State*, the court declines to adopt a novel interpretation of the statute in the "absence of explicit legislative intent or specific statutory language." *Id*.

3. The Court Cannot Find Support for Plaintiffs' Interpretation of Arizona's Gambling Statute in the Gambling Statutes of Other States

Third, the court finds that Plaintiffs' interpretation of Arizona's gambling statute does not track the definitions of illegal gambling set forth by other states. In

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[7] Plaintiffs argue that the persuasive value of *State* is limited because the opinion was issued in 1986, prior to Arizona's restructuring of the gambling statute. (Opp. at 18-20.) The court declines to accept Plaintiffs' argument that post-revision, Arizona's gambling statute should now be "construed liberally" to encompass Plaintiffs' theory. (*Id*. at 19.) *See* 1987 Ariz. Sess. Laws ch. 71 § 1 (the statute should "be liberally construed to *effectuate its penal and remedial purposes*") (emphasis added). As discussed here, the court finds that Plaintiffs have not met the elements of "gambling" under Arizona law.

the Complaint, Plaintiffs identify California and Illinois as states with "substantially similar definition[s] of what constitutes an illegal lottery." (*See* Compl. ¶ 70.) The court considers the gambling statutes of California and Illinois below.

Under California Penal Code § 330, gambling is defined as follows:

> Every person who deals, plays, or carries on, opens, or causes to be opened, or who conducts, either as owner or employee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noire, rondo, tan, fan-tan, seven-and-a-half, twenty-one, hokey-pokey, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or other representative of value, and every person who plays or bets at or against any of those prohibited games, is guilty of a misdemeanor.

Id.

Under Illinois's gambling statute, gambling is defined as follows:

> (a) A person commits gambling when he or she:
> (1) knowingly plays a game of chance or skill for money or other thing of value, unless excepted in subsection (b) of this Section;
> (2) knowingly makes a wager upon the result of any game, contest, or any political nomination, appointment or election;
> (3) knowingly operates, keeps, owns, uses, purchases, exhibits, rents, sells, bargains for the sale or lease of, manufactures or distributes any gambling device;
> (4) contracts to have or give himself or herself or another the option to buy or sell, or contracts to buy or sell, at a future time, any grain or other commodity whatsoever, or any stock or security of any company, where it is at the time of making such contract intended by both parties thereto that the contract to buy or sell, or the option, whenever exercised, or the contract resulting therefrom, shall be settled, not by the receipt or delivery of such property, but by the payment only of differences in prices thereof; however, the issuance, purchase, sale, exercise, endorsement or guarantee, by or through a person registered with the Secretary of State pursuant to Section 8 of the Illinois Securities Law of 1953,1 or by or through a person exempt from such registration under said Section 8, of a put, call, or other option to buy or sell securities which have been registered with the Secretary of State or which are

> exempt from such registration under Section 3 of the Illinois Securities Law of 19532 is not gambling within the meaning of this paragraph (4);
> (5) knowingly owns or possesses any book, instrument or apparatus by means of which bets or wagers have been, or are, recorded or registered, or knowingly possesses any money which he has received in the course of a bet or wager;
> (6) knowingly sells pools upon the result of any game or contest of skill or chance, political nomination, appointment or election;
> (7) knowingly sets up or promotes any lottery or sells, offers to sell or transfers any ticket or share for any lottery;
> (8) knowingly sets up or promotes any policy game or sells, offers to sell or knowingly possesses or transfers any policy ticket, slip, record, document or other similar device;
> (9) knowingly drafts, prints or publishes any lottery ticket or share, or any policy ticket, slip, record, document or similar device, except for such activity related to lotteries, bingo games and raffles authorized by and conducted in accordance with the laws of Illinois or any other state or foreign government;
> (10) knowingly advertises any lottery or policy game, except for such activity related to lotteries, bingo games and raffles authorized by and conducted in accordance with the laws of Illinois or any other state;
> (11) knowingly transmits information as to wagers, betting odds, or changes in betting odds by telephone, telegraph, radio, semaphore or similar means; or knowingly installs or maintains equipment for the transmission or receipt of such information; except that nothing in this subdivision (11) prohibits transmission or receipt of such information for use in news reporting of sporting events or contests; or
> (12) knowingly establishes, maintains, or operates an Internet site that permits a person to play a game of chance or skill for money or other thing of value by means of the Internet or to make a wager upon the result of any game, contest, political nomination, appointment, or election by means of the Internet. This item (12) does not apply to activities referenced in items (6), (6.1), (8), (8.1), and (15) of subsection (b) of this Section.

See 720 Ill. Comp. Stat. Ann. 5/28-1.

Based on the plain text of these statutes that Plaintiffs note are similarly worded to Arizona's gambling law, the court finds that the definition of gambling presented by Plaintiffs—where an individual acts either for the satisfaction of improving a third

party's chances of winning a competition or to help that third party win money—is also not reflected in California or Illinois's gambling statutes.

C. Summary Judgment is Proper as to the RICO Cause of Action

In the second cause of action, Plaintiffs allege Defendants engaged in conduct "which constituted violations of 18 U.S.C. § 1952 (relating to racketeering) and 18 U.S.C. § 1955 (relating to the prohibition of illegal gambling businesses)," and the Contest "constituted an 'illegal gambling business.'" (Compl. ¶¶ 66-67.) "A plaintiff may bring a private civil action for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO)." *See* Ninth Circuit Manual of Model Civil Jury Instructions § 8 (2021); *see also* 18 U.S.C. § 1964(c); *Harmoni Int'l Spice, Inc. v. Hume*, 914 F.3d 648, 651 (9th Cir. 2019) (stating "[t]he RICO statute provides a cause of action to any person injured in his business or property by reason of a violation of the statute") (citation and internal quotation marks omitted). "The elements of a civil RICO claim are as follows: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as predicate acts) (5) causing injury to plaintiff's business or property." *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005) (citations and internal quotation marks omitted).

"[A] RICO plaintiff 'only has standing if, and can only recover to the extent that, he has been injured in his business or property by [reason of] the conduct constituting the violation.'" *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 279 (1992) (O'Connor, J., concurring) (second alteration in original) (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985)). "[T]he requirement of injury in one's 'business or property' limits the availability of RICO's civil remedies to those who have suffered injury in fact." *Id.* (O'Connor, J., concurring).

"To constitute racketeering activity, the relevant conduct must consist of at least one of the indictable predicate acts listed in 18 U.S.C. § 1961." *See* Ninth Circuit Manual of Model Civil Jury Instructions § 8 (2021); *see also Sedima*, 473 U.S. at 495 (stating "'racketeering activity' consists of no more and no less than commission of a

predicate act"). "'[R]acketeering activity means (A) any act or threat involving murder, kidnapping, *gambling*, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical . . . which is chargeable under State law and punishable by imprisonment for more than one year . . . section 1952 (relating to racketeering) . . . section 1955 (relating to the prohibition of illegal gambling businesses." 18 U.S.C. § 1961(1) (emphasis added). Additionally, "[w]here RICO is asserted against multiple defendants, a plaintiff must allege at least two predicate acts by each defendant." *In re WellPoint, Inc. Out-of-Network UCR Rates Litig.*, 903 F. Supp. 2d 880, 914 (C.D. Cal. 2012) (citing *United States v. Persico,* 832 F.2d 705, 714 (2d Cir.1987), *cert. denied,* 486 U.S. 1022 (1988)).

18 U.S.C. § 1952 "condemns interstate travel or the use of interstate facilities in the furtherance of 'any unlawful activity,' defined as including 'any business enterprise involving *gambling* . . . offenses in violation of the laws of the State in which they are committed or of the United States.'" *United States v. Polizzi*, 500 F.2d 856, 869 (9th Cir. 1974) (emphasis added). "A violation of § 1952 thus must be premised upon another distinct violation of state or federal law." *Id*.

18 U.S.C. § 1952(a) and (b) provide:

> (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to--
> (1) distribute the proceeds of any unlawful activity; or
> (2) commit any crime of violence to further any unlawful activity; or
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
> and thereafter performs or attempts to perform--
> (A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or
> (B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

> (b) As used in this section (i) "unlawful activity" means (1) any business enterprise involving *gambling*, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title and (ii) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

Id. (emphasis added).

Plaintiffs allege the Competition constitutes an illegal gambling business under 18 U.S.C. § 1955. (Compl. ¶¶ 67-68.) 18 U.S.C. § 1955 "requires that three elements be established to constitute an offense: there must be a *gambling operation* which (1) is a violation of the law of a State or political subdivision in which it is conducted; (2) involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business; and (3) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day." *United States v. Sacco*, 491 F.2d 995, 998 (9th Cir. 1974) (emphasis added). "It is participation in the gambling business that is a federal offense, and it is only the gambling business that must violate state law." *Sanabria v. United States*, 437 U.S. 54, 70 (1978) (footnote omitted).

18 U.S.C. § 1955 (a) and (b) provide:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.
> (b) As used in this section--
> (1) "illegal gambling business" means a gambling business which--
> (i) is a violation of the law of a State or political subdivision in which it is conducted;

> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.
>
> (2) "insured credit union" shall have the meaning given the term in section 101 of the Federal Credit Union Act (12 U.S.C. 1752).
>
> (3) "insured depository institution" shall have the meaning given the term in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).
>
> (4) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.
>
> (5) "savings promotion raffle" means a contest in which the sole consideration required for a chance of winning designated prizes is obtained by the deposit of a specified amount of money in a savings account or other savings program, where each ticket or entry has an equal chance of being drawn, such contest being subject to regulations that may from time to time be promulgated by the appropriate prudential regulator (as defined in section 1002 of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5481)).
>
> (6) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Id. (emphasis added).

1. The RICO Cause of Action is not Supported by the Alleged Racketeering Predicate Act of Illegal Gambling

Defendants argue that if the court finds that the Competition is not illegal gambling, "summary judgment should be entered in favor of Defendant on Plaintiffs' UCL and RICO claims because there is no underlying violation of Arizona law." (Mot. at 18.) The court agrees. Plaintiffs' RICO claim depends upon the Competition qualifying as illegal gambling under Arizona law to satisfy the racketeering predicate acts element. As discussed above, the court finds that the undisputed record

demonstrates the Competition is not illegal gambling, such that no predicate offense underlies Plaintiffs' RICO claim. (*See* SUF ¶¶ 1-21.) *See also H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 237 (1989) (reiterating two predicate acts are necessary but may not be sufficient to sustain a claim under RICO) (citing *Sedima*, 473 U.S. at 496, n.14).

Based on the state of the record, as applied to the applicable law, the court finds Defendants have met their initial burden demonstrating there is no genuine issue of material fact as to whether the Competition qualifies as illegal gambling under Arizona law. The court further finds Plaintiffs have failed to meet their shifted burden that a genuine issue of material facts exists as to whether the Competition qualifies as illegal gambling. Therefore, because the undisputed facts demonstrate Defendants' conduct does not qualify as illegal gambling under Arizona law, (*see* SUF ¶¶ 1-21), Plaintiffs have "failed to make a sufficient showing on an essential element of [their] case with respect to which [they have] the burden of proof" regarding the RICO cause of action. *Lujan*, 497 U.S. at 884; *see also Celotex*, 477 U.S. at 323 (stating "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial"); *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1222 (9th Cir. 1995) (affirming a district court's granting of summary judgment where a party "failed to establish the existence of an element essential to its case on which it will bear the burden of proof at trial").

For the reasons set forth above, the court finds no triable issue of fact exists as to Plaintiffs' claim against Defendants based on the second cause of action under

RICO. Accordingly, summary judgment is **GRANTED** for Defendants on the Second Cause of Action under RICO. [8]

2. The Undisputed Facts Show there is No Injury to Business or Property under RICO

Defendants also argue Plaintiffs "do not allege nor can they prove any failure to obtain the benefit of their bargain and thus cannot prove an injury to their business or property." (Mot. at 19.) In support of their arguments, Defendants submit the Austin Declaration stating that Plaintiffs (and other Competition participants) received the votes they agreed to purchase. (*See* SUF ¶¶ 12-13, Austin Decl. ¶ 11 (Dkt. 98-1).) More specifically, paragraph 11 of the Austin Declaration provides:[9]

> The paying voters always received exactly the number of votes that they purchased. . . . [I]f Plaintiffs wish to purchase 10 votes, they simply bought 10 votes and received 10 votes. There was no ability for Plaintiffs or other third-party voters to receive anything other than the number of votes that they agreed to purchase, and Plaintiffs, as well as all other third-party votes, always received the exact number of votes that they purchased.

(Austin Decl. ¶ 11.)

In the Opposition, Plaintiffs claim they suffered economic injury for purposes of RICO because "they would not have paid for votes if they had known the contest

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[8] Moreover, to the extent Plaintiffs assert a RICO conspiracy cause of action, the RICO conspiracy cause of action would also be subject to summary judgment in favor of Defendants. *See Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 367 n.8 (9th Cir. 1992) (where a Plaintiff "has failed to allege the requisite substantive elements of RICO, the conspiracy cause of action cannot stand"); *see also Ochoa v. Hous. Auth. of City Los Angeles*, 47 F. App'x 484, 487 (9th Cir. 2002) ("Although a civil RICO conspiracy claim can survive even if the substantive RICO claim does not, where the plaintiff has failed to allege the requisite substantive elements of RICO, a RICO conspiracy claim cannot stand.").

[9] As discussed above, the court has previously overruled Plaintiffs' objections to the Austin Declaration.

was illegal gambling." (Opp. at 28.) Plaintiffs also argue they "are suing because they paid money for no tangible thing except a 'chance' for their ally to win $65,000." (*Id*.) In support of their assertions, Plaintiffs rely on paragraphs 2 to 5 of the Declaration of Bridget Ward ("B. Ward Declaration" or "B. Ward Decl.") and paragraphs 2 to 5 of the Declaration of Lisa Ward ("L. Ward Declaration" or "L. Ward Decl."). (Dkts. 104-2, 104-3.) Paragraph 3 of the B. Ward Declaration states:

> I paid $100 on March 11, 2021 to the Favorite Chef contest for the sole purpose of casting votes for Curtis Ward. I wanted to obtain the benefit from the Favorite Chef contest of helping Curtis win the prize, which had a total value of $65,000. The votes had no intrinsic value of their own.

(B. Ward Decl. ¶ 3.)

Paragraph 3 of the L. Ward Declaration states:

> I paid a total of $490 on various dates between February 16, 2021 to March 21, 2021 to the Favorite Chef contest for the sole purpose of casting votes for Curtis Ward. I wanted to obtain the benefit from the Favorite Chef contest of helping Curtis win the prize, which had a total value of $65,000. The votes had no intrinsic value of their own.

(L. Ward Decl. ¶ 3.)

As referenced above, a civil RICO cause of action requires injury to a plaintiff's business or property as an element. *See Living Designs, Inc.*, 431 F.3d at 361 (listing "causing injury to plaintiff's business or property" as the fifth element). Therefore, "[a]bsent damages, [a] RICO claim can not be sustained." *First Pac. Bancorp, Inc. v. Bro*, 847 F.2d 542, 547 (9th Cir. 1988) (footnote omitted); *see also Schwartz v. Upper Deck Co.*, 104 F. Supp. 2d 1228, 1231 (S.D. Cal. 2000) ("Section 1964(c) gives standing to private persons not because of the objectionable nature of the racketeering conduct, but because a person's business or property is injured by the activity."). Moreover, "[w]ithout a harm to a specific business or property interest-a categorical

inquiry typically determined by reference to state law-there is no injury to business or property within the meaning of RICO." *Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005). Personal injury and emotional distress are not viable economic damages under civil RICO causes of action. *See Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990) ("[H]old[ing] that, as a matter of law, personal injury, including emotional distress, is not compensable under section 1964(c) of RICO.").

In this case, the court finds Defendants have met their initial burden by demonstrating there is an absence of evidence of injury to Plaintiffs' business or property. (*See* SUF ¶¶ 12-13.) The burden thus shifts to Plaintiffs to "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250. The court finds the evidence presented, including the B. Ward Declaration and L. Ward Declaration, do not yield a genuine issue for trial as to injury to Plaintiffs' business or property. (*See, e.g.* SUF ¶¶ 12-13, B. Ward Decl. ¶¶ 2-5; L. Ward Decl. ¶¶ 2-5.) Notably, the court finds Plaintiffs' alleged disputed evidence is merely a different characterization of Defendants' evidence showing *why* Plaintiffs spent money to cast votes rather than providing any triable issue demonstrating any injury to Plaintiffs' business or property. *See United States v. 403 1/2 Skyline Dr., La Habra Heights, CA,* 797 F. Supp. 796, 798 (C.D. Cal. 1992) (stating "mere disagreement or the bald assertion that a genuine issue of material fact exists, no longer precludes the use of summary judgment"); *see also Bischoff v. Brittain*, 183 F. Supp. 3d 1080, 1084 (E.D. Cal. 2016) ("[T]he court will not consider [] objections aimed at the characterization or purported misstatement of the evidence as represented . . . . The court's decision relies on the evidence submitted rather than how that evidence is characterized in the statements.") (citation omitted). Plaintiffs' motive behind the purchase of the votes does not change the undisputed facts showing that Plaintiffs received what they bargained for, resulting in there being no triable issue as to injury to Plaintiffs' business or property. *Anderson*, 477 U.S. 242, 249 (1986) (stating "there

is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party").

In addition, the court has considered Plaintiffs' evidence stating they "wanted to obtain the benefits from the Favorite Chef contest of helping win Curtis win the prize" (B. Ward Decl. ¶ 3; L. Ward Decl. ¶ 3), which raises the inference or suggestion that there was some type of disappointment or emotional damage to Plaintiffs when Curtis did not win. *In re Oracle*, 627 F.3d at 387 ("In determining whether a jury could reasonably render a verdict in the non-moving party's favor, all justifiable inferences are to be drawn in its favor."). Disappointment and emotional distress are not recoverable damages under a RICO cause of action and thus do not create a genuine issue of material fact. *See Berg,* 915 F.2d at 464 (holding that "personal injury, including emotional distress, is not compensable under section 1964(c) of RICO").

The court concludes Plaintiffs have not demonstrated a genuine issue of material fact as to the fifth element for the RICO cause of action, namely, causing injury to Plaintiffs' business or property. Accordingly, summary judgment is **GRANTED** in favor of Defendants.[10] *See First Pac. Bancorp*, 847 F.2d at 547 ("Since actual injury must be reasonably controverted to prevent summary judgment, under 18 U.S.C. § 1962 and § 1964, and appellants failed to make a showing of actual injury, we uphold the grant of summary judgment.").

D. Summary Judgment is Proper as to the UCL Cause of Action

1. There is no Viable Predicate Offense Under the Unlawful Prong of the UCL

The First Cause of Action alleges Defendants violated the UCL. (*See* Compl. ¶¶ 14-61.) The UCL "prohibits, and provides civil remedies for, unfair competition,

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[10] The court makes this ruling as an alternative and independent basis to grant summary judgment on the RICO cause of action. In other words, the court finds that the undisputed facts demonstrate there is no predicate offense (illegal gambling) and no injury to Plaintiffs' business or property under RICO.

which it defines as 'any unlawful, unfair or fraudulent business act or practice.'" *Kwikset Corp. v. Superior Ct.*, 51 Cal. 4th 310, 320 (2011) (quoting Cal. Bus. & Prof. Code § 17200); *see also Williams v. Gerber Prod. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (stating the UCL "prohibits any unlawful, unfair or fraudulent business act or practice") (citation and internal quotation marks omitted). "A UCL action is an equitable action by means of which a plaintiff may recover money or property obtained from the plaintiff or persons represented by the plaintiff through unfair or unlawful business practices. It is not an all-purpose substitute for a tort or contract action." *Cortez v. Purolator Air Filtration Prod. Co.*, 23 Cal. 4th 163, 173 (2000).

"To bring a UCL claim, a plaintiff must show either an (1) 'unlawful, unfair, or fraudulent business act or practice,' or (2) 'unfair, deceptive, untrue or misleading advertising.'" *Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1043 (9th Cir. 2003) (citing to Cal. Bus. & Prof. Code § 17200). "Because . . . section 17200 is written in the disjunctive, it establishes three varieties of unfair competition-acts or practices which are unlawful, or unfair, or fraudulent." *Id*. (citation omitted). "The UCL's purpose is to protect both consumers and competitors from unlawful, unfair or fraudulent business practices by promoting fair competition in commercial markets for goods and services." *Hall v. Time Inc.*, 158 Cal. App. 4th 847, 852 (2008) (citation and internal quotation marks omitted).

"Under its 'unlawful' prong, 'the UCL borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL.'" *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1554 (2007) (citing *Lazar v. Hertz Corp.*, 69 Cal. App. 4th 1494, 1505 (1999)). "Thus, a violation of another law is a predicate for stating a cause of action under the UCL's unlawful prong." *Berryman*, 152 Cal. App. 4th at 1554. In other words, to be "unlawful" under the UCL, Defendants' conduct must violate another "borrowed" law. *In re Google Assistant Priv. Litig.*, 457 F. Supp. 3d 797, 841 (N.D. Cal. 2020). "[V]irtually any law or regulation—federal or state, statutory or common law—can serve as [a] predicate for a [Business and

Professions Code section] 17200 'unlawful' violation." *Paulus v. Bob Lynch Ford, Inc.*, 139 Cal. App. 4th 659, 681 (2006) (citation omitted).

"A UCL action is equitable in nature; damages cannot be recovered." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144 (2003). "[U]nder the UCL, '[p]revailing plaintiffs are generally limited to injunctive relief and restitution.'" *Id*. (citing *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 179 (1999)); *see also Kwikset*, 51 Cal. 4th at 337 ("Injunctions are 'the primary form of relief available under the UCL to protect consumers from unfair business practices,' while restitution is a type of 'ancillary relief.'") (citation omitted).

For a private plaintiff to possess standing to bring a UCL claim, the plaintiff must: "(1) establish a loss or deprivation of money or property sufficient to qualify as an injury in fact, i.e., economic injury, and (2) show that economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim." *Kwikset*, 51 Cal. 4th at 322; *see also Cappello v. Walmart Inc.*, 394 F. Supp. 3d 1015, 1019 (N.D. Cal. 2019) (stating that "if Plaintiffs cannot allege both that they suffered injury in fact and that they lost money or property as a result of an unlawful, unfair, or fraudulent business practice, then they lack statutory standing to sue under the UCL"); *Ghazarian v. Magellan Health, Inc.*, 53 Cal. App. 5th 171, 193 (2020) ("A party has standing when they have expended money due to the defendant's acts of unfair competition."). "Notably, lost money or property—economic injury—is itself a classic form of injury in fact." *Kwikset*, 51 Cal. 4th at 323. Thus, "[a] plaintiff must have suffered an 'injury in fact' and have 'lost money or property as a result of such unfair competition' to have standing to pursue either an individual or a representative claim under the California unfair competition law, Business and Professions Code section 17200 et seq." *Hall*, 158 Cal. App. 4th at 849; *see also Hale v. Sharp Healthcare*, 183 Cal. App. 4th 1373, 1381 (explaining that Proposition 64 "amended the UCL to provide that a private person has standing to bring a UCL action only if he or she has suffered injury in fact and has lost money or

property as a result of the unfair competition") (citations and internal quotation marks omitted).

In *L. Offs. of Mathew Higbee v. Expungement Assistance Servs.*, a California appellate court described economic injury under the UCL:

> There are innumerable ways in which economic injury from unfair competition may be shown. A plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary . . . The foregoing list is not exhaustive and the notion of "lost money" under the UCL is not limited. (*Ibid.*) Moreover, "the quantum of lost money or property necessary to show standing is only so much as would suffice to establish injury in fact" and "it suffices . . . to '"allege some specific, 'identifiable trifle' of injury."' . . . '"The basic idea . . . is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation."'

214 Cal. App. 4th 544, 561 (2013) (citations omitted).

As with their arguments regarding the RICO cause of action, Defendants contend the undisputed facts demonstrate that the Competition does not qualify as illegal gambling under the Arizona Statute, and, thus, there is no predicate offense for the UCL cause of action. The court agrees. As discussed above, the court finds the undisputed facts show that the Competition is not illegal gambling, such that there is no predicate offense (illegal gambling) underlying Plaintiffs' UCL claims. (*See* SUF ¶¶ 1-21.) Therefore, because there is no viable underlying violation of law sustaining Plaintiffs' UCL cause of action, summary judgment is **GRANTED** in favor of Defendants on the second cause of action under the UCL. *See Berryman*, 152 Cal. App. 4th at 1554 (stating "a violation of another law is a predicate for stating a cause of action under the UCL's unlawful prong").

2. The Undisputed Facts Demonstrate no Economic Injury under the UCL

Defendants also argue summary judgment is appropriate because Plaintiffs did not suffer economic injury as required by the UCL cause of action. (Mot. at 18.) The court agrees. The court finds Defendants have met their initial burden for summary judgment by demonstrating undisputed facts that Plaintiffs received the benefit of their bargain in the Competition, that is, the Plaintiffs received the votes they purchased. (*See* SUF ¶¶ 12-13.)

Having had the burden shifted to them, the court finds Plaintiffs have not met their burden to show economic injury, because as demonstrated in the undisputed facts, (*see* SUF ¶¶ 12-13), "[i]f one gets the benefit of his bargain, he has no standing under the UCL." *Johnson v. Mitsubishi Digital Elecs. Am., Inc.*, 365 F. App'x 830, 832 (9th Cir. 2010); *see also Hall*, 158 Cal. App. 4th at 855 (finding no injury in fact under the UCL where the plaintiff ordered a book, received the book, and did not allege "he did not want the book, the book was unsatisfactory, or the book was worth less than what he paid for it").[11] Because the undisputed facts demonstrate Plaintiffs received the benefit of their bargain in the purchase of the votes, they did not suffer

[11] The court is also cognizant that it is "sufficient to allege economic injury" where plaintiff "would not have bought the product but for the misrepresentation." *Kwikset*, 51 Cal. 4th at 330. However, in this case, the court concludes the undisputed facts do not demonstrate a misrepresentation or that Plaintiffs did not get the benefit of their bargain. (*See* SUF ¶¶ 12-13.)

economic injury under the UCL.[12] Accordingly, summary judgment is appropriate and **GRANTED** in favor of Defendants.[13]

VII. CONCLUSION

The court finds that Defendants have met their burden of demonstrating there are no genuine disputes as to any material fact for the causes of action in the Complaint and that they are entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."). The court further finds that Plaintiffs have not "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248; *see also Harper,* 877 F.2d at 731 (summary judgment is not precluded by "mere disagreement or the bald assertion that a genuine issue of material fact exists."). For the reasons set forth above, the court **GRANTS** the Motion.[14]

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[12] This analysis and conclusion, demonstrating there are no disputed material facts regarding economic injury, apply with equal force to Plaintiffs' alternative theory discussed in the Complaint at paragraph 57 that Defendants violated the UCL under California Business and Professions Code § 17539.1(a) because "a plaintiff must 'demonstrate some form of economic injury'" for any UCL claim or theory. *In re Google Assistant Priv. Litig.*, 457 F. Supp. 3d at 841 (citation omitted).

[13] The court makes this ruling as an independent basis to grant summary judgment on the UCL cause of action. In other words, the court finds both that the undisputed facts demonstrate there is no predicate offense (illegal gambling) and no economic injury under the UCL.

[14] In light of the court's granting the Motion for the reasons set forth above, the court declines to address Defendants' additional arguments that summary judgment and/or summary adjudication is appropriate based on the following: (1) California's public policy does not allow Plaintiffs to pursue a UCL claim based upon their involvement in alleged gambling transactions; and (2) Plaintiffs' involvement in allegedly unlawful gambling transactions makes them *in pari delicto* and prohibited from pursuing their UCL, and RICO claims. (Notice of Motion at 1, Dkt. 98.)

VIII. DISPOSITION

For the reasons set forth above, the Motion is **GRANTED**. Defendants are **ORDERED** to lodge a proposed judgment within **five (5)** days of entry of this Order.

IT IS SO ORDERED.

DATED: October 7, 2022

Honorable Fred W. Slaughter
UNITED STATES DISTRICT JUDGE