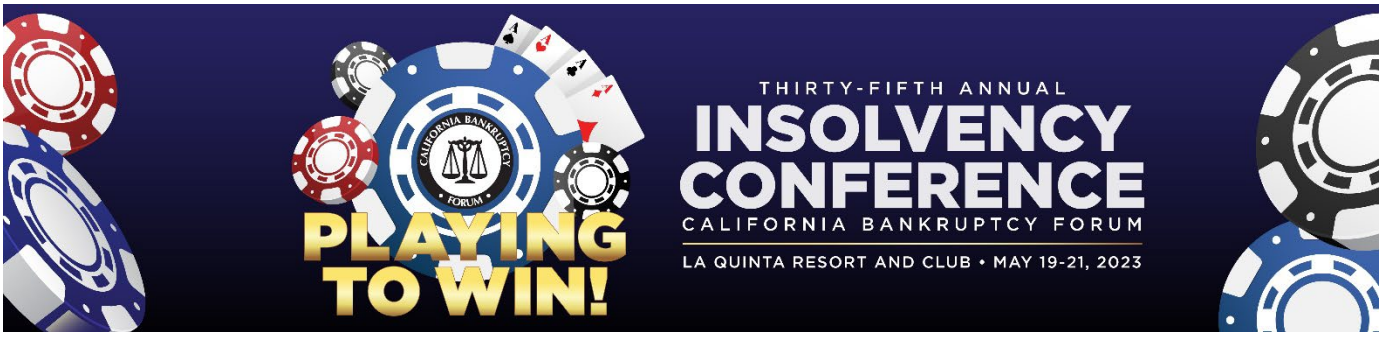

Session Date: Friday, May 19, 2023

Session Time: 4:30pm – 5:30pm

Session Name: House of Cards? A Look at the Rise and Fall of the Cryptocurrency Industry and Its Future

Total Minutes: 60

Total Credit Hours: 1

House of Cards? A Look at the Rise and Fall of the Cryptocurrency Industry and Its Future

Panelists:

- Hon. Hannah Blumenstiel, U.S. Bankruptcy Court, Northern District of California
- John LaBella, AlixPartners, San Francisco
- Christopher Hughes, Nossaman LLP, Sacramento
- Paul Hemesath, US Department of Justice, Sacramento

Synopsis: Virtual currencies and the companies that support them enjoyed multi-billion dollar valuations, high demand, and celebrity endorsements. In 2022, the value of bitcoin dropped 65%, lesser known cryptocurrencies collapsed in value, and multiple cryptocurrency firms filed for chapter 11 protection. In this session, our panelists will discuss the historic rise of the cryptocurrency industry, allegations that cryptocurrency firms operated as Ponzi schemes, and whether the industry can survive the 2022 fallout

Syllabus:

- *In re Celsius Network LLC*, 647 B.R. 631 (Bankr. S.D.N.Y. 2023)

- *In re Voyager Dig. Holdings, Inc.*, No. 22-10943 (MEW), 2022 Bankr. LEXIS 2178, 2022 WL 3146796 (Bankr. S.D.N.Y. Aug. 5, 2022)

- Joanna Dreaver, Consumer Point, *Cryptocurrency is a Misnomer*, ABI Journal Vol. XL, No. 8 August 2021

- Amanda Wise, Consumer Counterpoint, *Cryptocurrency is Currency*, ABI Journal Vol. XL, No. 8 August 2021

- Adam Back, *Lien on Me: Uniformity is Coming to Crypto-Backed Transactions*, ABI Journal Vol. XLI, No. 12 December 2022

- Legislative Update, *Crypto and Congress: An Overview of Key Developments This Year*, ABI Journal Vol. XLI, No. 12 December 2022

- Jaden Banks, *Code to Code: A Password by Any Other Name…Remains a Digital Asset*, ABI Journal Vol. XLII, No. 22, February 2023

2023 WL 34106
Only the Westlaw citation is currently available.
United States Bankruptcy Court, S.D. New York.

IN RE: **CELSIUS NETWORK** LLC, et al., Debtors.

Case No. 22-10964 (MG) (Jointly Administered)
|
Signed January 4, 2023

Synopsis

Background: Chapter 11 debtors, the operator of a cryptocurrency lending platform and several of its affiliates, filed motion for entry of order establishing ownership of cryptocurrency assets valued at approximately $4.2 billion that had been deposited prepetition in some 600,000 "Earn Accounts" by debtors' account holders, permitting the sale of $18 million worth of "stablecoins," a type of cryptocurrency, to fund debtors' cases, and granting related relief. Account holders and numerous creditors objected to the extent motion sought determination that assets belonged to debtors, and United States Trustee (UST) and multiple state securities regulators objected to proposed sale of stablecoins.

Holdings: The Bankruptcy Court, Martin Glenn, Chief Judge, held that:

[1] under New York law, pursuant to the unambiguous terms of use of debtors' "clickwrap" contracts, and subject to any reserved defenses, the cryptocurrency assets became debtors' property when they were deposited in the Earn Accounts, and thus the assets and any proceeds thereof became property of debtors' bankruptcy estates on the petition date, and

[2] regardless of whether proposed sale of stablecoins would be in the ordinary course of business, sale would be approved outside the ordinary course of business.

Ordered accordingly.

Procedural Posture(s): Motion to Use, Sell, or Lease Property Outside the Ordinary Course of Business; Motion to Sell Property Free and Clear of Interests; Request for Declaratory Judgment.

West Headnotes (40)

[1] **Bankruptcy** Priorities
Bankruptcy Unsecured creditors and equity holders, protection of

Recovery by unsecured creditors in a Chapter 11 case depends on the distributions to unsecured creditors under a confirmed Chapter 11 plan, or under the Bankruptcy Code's priority rules in the event of liquidation.

[2] **Bankruptcy** Distribution

A fundamental principle of the Bankruptcy Code is equality of distribution.

[3] **Bankruptcy** Creation of estate; time
Bankruptcy Legal or equitable interests in general

Under the Bankruptcy Code, property of the bankruptcy estate consists of all legal or equitable interests of debtor in property as of commencement of the case. 11 U.S.C.A. § 541.

[4] **Bankruptcy** Operation of Business; Contracts

Bankruptcy Code allows a debtor to enter certain transactions in the "ordinary course of business." 11 U.S.C.A. § 363(c)(1).

[5] **Bankruptcy** Time for sale; emergency and sale outside course of business

Bankruptcy court may approve a debtor's transactions which are not in the ordinary course of business if the debtor demonstrates a "sound business purpose" for the transaction. 11 U.S.C.A. § 363(b)(1).

[6] **Bankruptcy** Nature and form; adversary proceedings

With respect to the procedural requirements governing disputes over ownership of estate property, the bankruptcy rules do not require every declaratory action to be brought as an adversary proceeding, only those that relate to a subject that is already required to be brought as an adversary proceeding. 11 U.S.C.A. § 541; Fed. R. Bankr. P. 7001, 7001(9).

[7] **Bankruptcy** Application of state or federal law in general

In the absence of any asserted conflict in legal rules, the bankruptcy court may apply the law of the forum state to a particular dispute.

[8] **Contracts** Elements in general

Under New York law, contract requires offer and acceptance thereof, that is, mutual assent, consideration, and intent to be bound.

[9] **Contracts** Form and contents of instrument

Under New York law, the requirements for formation of a contract are not different for electronic contracts; courts have adapted traditional principles of contract formation to fit the digital era.

[10] **Contracts** Necessity of assent

Contracts Form and contents of instrument

Under New York law, although mutual assent, as required for formation of a contract, traditionally was conceptualized as the culmination of a bargaining process, with an emphasis on both parties' intent to be bound following an active negotiation of terms, digital contracts between companies and consumers often involve a fundamentally different process, where consumers' participation is limited to deciding if they will participate; accordingly, given consumers' passive role in negotiating many electronic contracts, the issue of mutual assent to such contracts may turn on whether a consumer should have been aware that they were being bound by the relevant terms.

[11] **Contracts** Acceptance of Offer and Communication Thereof

Under New York law, in evaluating "mutual assent" in the context of a digital contract between a company and a consumer, to determine what a reasonably prudent consumer would have been aware of, courts generally evaluate the method of manifesting acceptance and the conspicuousness of the terms that were purportedly accepted.

[12] **Copyrights and Intellectual Property** Technology and software licenses

Under New York law, "clickwrap agreement" is a digital contract whose terms of use require a consumer to manifest assent by clicking a button confirming that they accept the terms or a button that implies that they have accepted the terms, but do not necessarily require the consumer to actually view the terms.

[13] **Copyrights and Intellectual Property** Technology and software licenses

Under New York law, clickwrap contracts, that is, digital contracts whose terms of use require consumers to manifest assent by clicking a button confirming that they accept the terms or a button that implies that they have accepted the terms, but do not necessarily require consumers to actually view the terms, are valid and enforceable contracts.

[14] **Contracts** Acceptance of Offer and Communication Thereof

Under New York law, in determining "mutual assent" in the context of a digital contract between a company and a consumer, in particular, what a reasonably prudent consumer would have been aware of, in evaluating how apparent it was that the contract's terms would apply to the assenting party the ultimate inquiry is whether a reasonable person would have known about the terms and the conduct that would be required to assent to them; in making this determination, courts look to see if terms were reasonably conspicuous, with emphasis on considerations like clutter on page that contained terms or link thereto, whether hyperlinks were in different color or style of font, and presence or absence of spatial and temporal coupling with acceptance.

[15] **Contracts** Necessity in general

Contracts Nature and Elements

Under New York law, contract must be supported by "consideration"; this requirement is not exacting, and each party must simply receive something of value.

[16] **Contracts** Adequacy

Under New York law, in determining whether requirements for contract formation have been satisfied, courts generally will not opine on adequacy of consideration.

[17] **Contracts** Contracts subject to modification

Under New York law, contract that provides for modification may be modified and requires same elements as original contract formation.

[18] **Contracts** Parol modification

Under New York law, written agreement that expressly states it can be modified in writing generally cannot be modified orally.

[19] **Contracts** Presumptions and burden of proof

Under New York law, party seeking to enforce alleged contract bears burden of establishing the contract to be enforced.

[20] **Contracts** Consideration for Modification

Under New York law, with respect to consideration in the context of a contract modification, a service provider's notice of a change to the terms of service and a customer's choice to continue using the service is valid consideration.

[21] **Contracts** Application to Contracts in General

Under New York law, when contract's terms are unambiguous, courts must apply them as written.

[22] **Evidence** Showing Intent of Parties as to Subject Matter

Under New York law, extrinsic evidence of parties' intent may be considered only if agreement is ambiguous.

[23] **Contracts** Existence of ambiguity

Under New York law, contract is "unambiguous" if, on its face, it is reasonably susceptible of only one meaning.

[24] **Evidence** Creation of ambiguity in general

Under New York law, extrinsic evidence cannot be used to create ambiguity where words of parties' agreement are otherwise clear and unambiguous.

[25] **Contracts** Existence of ambiguity

Under New York law, contract is "ambiguous" if provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.

[26] **Bankruptcy** Security purchase rescission claims

Bankruptcy Code subordinates claims "arising from" the purchase or sale of a security to the claims of general unsecured creditors. 11 U.S.C.A. § 510(b).

[27] **Bankruptcy** Deposits and securities; bonds

Under New York law, pursuant to unambiguous "Terms of Use" of clickwrap contracts used by Chapter 11 debtors, the operators of a cryptocurrency lending platform, and subject to any reserved defenses, cryptocurrency assets deposited in "Earn Accounts" by account holders became debtors' property upon deposit, and so assets and any proceeds thereof became property of debtors' bankruptcy estates on petition date; Terms and modifications thereto formed valid, enforceable contract between debtors and each account holder who accepted Terms, as mutual assent was established by account holders' checking of "agree" box and continued use of platform, consideration was debtors' payment of Earn Assets proceeds as "rewards," and account holders were not shown to have lacked intent to be bound, and, despite use of words "loan" and "lending" elsewhere in contract, Terms' "Transfer of Title Clause" clearly transferred title and ownership of digital assets from account holders to debtors upon deposit. 11 U.S.C.A. § 541.

[28] **Contracts** Elements in general

Under New York law, a valid, enforceable contract requires "mutual assent," i.e., one party makes offer and other party accepts offer, "consideration," i.e., each party exchanges service or good, and "intent to be bound," i.e., both parties intended to enter into contract.

[29] **Copyrights and Intellectual Property** Technology and software licenses

Under New York law, updated "Terms of Use" of clickwrap contracts used by Chapter 11 debtors, the operators of a cryptocurrency lending platform, constituted valid, enforceable contract modifications; each version of Terms allowed debtors' unilateral modification of contract terms and provided that account holders' continued use of platform following update operated as consent to updated Terms, and, with

respect to particular version of Terms, process required account holder to view pop-up stressing importance of reading updated Terms and required two clicks, that is, one check box and one "Accept," pop-ups contained hyperlinks to read full updated Terms, account holders were informed of impact of declining updated Terms, and pop-ups met standard for "clear and conspicuous," as they appeared clean and compact, and contained pertinent information in close proximity with a clearly-bounded or full-screen window.

[30] **Contracts** Request or advertisement for proposals

Under New York law, advertisements generally do not constitute offers, for purposes of determining validity of modifications to a contract.

[31] **Bankruptcy** Evidence; witnesses

Evidence Contracts and agreements in general

New York law strictly limits use of extrinsic evidence to prove proper interpretation of contract.

[32] **Contracts** Language of Instrument

Under New York Law, contracts are interpreted and enforced in accordance with their plain meaning and their clear and unambiguous terms.

[33] **Contracts** Loans and advances

Under New York law, loan of money or property to another creates debtor-creditor relationship.

[34] **Bankruptcy** Perfection or recordation under state law, in general

Absent perfected security interest in tangible or intangible property, in event of debtor's bankruptcy, creditor holds only unsecured claim.

[35] **Currency Regulation** Currency Regulation

"Cryptocurrency" is not money because it is not a medium of exchange created, authorized, or adopted by a domestic or foreign government, or by an intergovernmental organization or by agreement between two or more countries.

[36] **Secured Transactions** Necessity of Filing

Since cryptocurrency and other digital assets are intangible and therefore not capable of possession, a security interest therein may be perfected only by the filing of a financing statement in the digital asset as a general intangible.

[37] **Bankruptcy** Perfection or recordation under state law, in general

Bankruptcy Trustee as representative of debtor or creditors

Even if parties' contract purports to provide creditor with security interest in debtor's property, unless security interest is perfected under applicable nonbankruptcy law, bankruptcy trustee can assert its strong-arm power under the Bankruptcy Code to avoid the lien. 11 U.S.C.A. § 544(a).

[38] **Contracts** Construction as a whole

Under New York law, it is a bedrock principle of contract interpretation that courts should not adopt an interpretation of a contract that has the effect of rendering at least one clause superfluous

or meaningless but, rather, to the extent possible, should seek to read contractual provisions in harmony.

[39] **Bankruptcy** Time for sale; emergency and sale outside course of business

Regardless of whether proposed sale of $18 million worth of "stablecoins," a type of cryptocurrency, to fund the cases of Chapter 11 debtors, the operators of a cryptocurrency lending platform, would be in the ordinary course of business, the sale would be approved outside the ordinary course of business; stablecoins belonged to debtors' estates, it was undisputed that debtors' liquidity was precipitously running out, and debtors needed to generate liquidity to fund their cases and continue down the path either of a standalone plan reorganization, a sale of assets, or even a liquidation plan, such that debtors demonstrated a sound business justification for selling stablecoins. 11 U.S.C.A. § 363(b)(1).

[40] **Bankruptcy** Operation of Business; Contracts

Bankruptcy Code's "ordinary course of business" standard was intended to allow a debtor-in-possession the flexibility required to run its business. 11 U.S.C.A. § 363.

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MEMORANDUM OPINION AND ORDER REGARDING OWNERSHIP OF EARN ACCOUNT ASSETS

MARTIN GLENN, CHIEF UNITED STATES BANKRUPTCY JUDGE

***1** Who owns the cryptocurrency assets deposited in Earn Accounts (defined below) by Celsius's account holders before the July 15, 2022 petition date (the "Petition Date")? This is a gating issue at the center of many disputes in this case. As explained below, the Court concludes, based on Celsius's unambiguous Terms of Use, and subject to any reserved defenses, that when the cryptocurrency assets (including stablecoins, discussed in detail below) were deposited in Earn Accounts, the cryptocurrency assets became Celsius's property; and the cryptocurrency assets remaining in the Earn Accounts on the Petition Date became property of the Debtors' bankruptcy estates (the "Estates").

At the Petition Date, Celsius had approximately 600,000 accounts in its Earn program ("Earn Program," and such assets, including any proceeds thereof, the "Earn Assets" and such accounts, the "Earn Accounts"). These Earn Accounts held cryptocurrency assets with a market value of approximately $4.2 billion as of July 10, 2022. (*Declaration of Alex Mashinsky, Chief Executive Officer of Celsius Network LLC, In Support of Chapter 11 Petitions and First Day Motion*s, "Mashinsky Declaration," ECF Doc. 23, ¶ 49.) Included in the Earn Accounts at the Petition Date were a type of cryptocurrency known as stablecoins, valued at $23 million as of September 2022. (*Debtors' Motion Seeking Entry of an Order (I) Permitting the Sale of Stablecoin in the Ordinary Course and (II) Granting Related Relief*, "Original Motion," ECF Doc. # 832, ¶ 9.)

The issue of ownership of the assets in the Earn Accounts is a contract law issue. The Debtors and Committee argue that the cryptocurrency assets deposited in Earn Accounts were owned by the Debtors and are now property of the Estates. Many Earn account holders ("Account Holders") argue that the Account Holders, rather than Celsius, own the cryptocurrency assets in the Earn Accounts and that cryptocurrency assets should promptly be returned to them.

Celsius adopted eight versions of the Terms of Use (collectively, the "Terms of Use" and each a version (e.g., "Terms Version 8"), which are detailed as exhibits A-1 through A-8 to the *Declaration of Alexander Mashinsky, Chief Executive Officer of Celsius Network LLC, Providing Terms Dating Back to February 18, 2018* ("Terms Affidavit," ECF Doc. # 393). For the avoidance of doubt this opinion refers to the "Terms of Use" identified in the Amended Motion as "Terms Version 8," and Terms Version 8 (effective April 15, 2022) is the controlling document for this memorandum opinion.

The Debtors and the Official Committee of Unsecured Creditors ("Committee") contend that under unambiguous provisions in Terms Version 8,

a clickwrap contract governed by New York law, Celsius held "**all right and title to such Eligible Digital Assets, including ownership rights**" in the cryptocurrency assets (including stablecoins) in the Earn Accounts. (*See* ECF Doc. # 1325 ¶ 39 (citing Terms Version 8 § 13) (emphasis added)). The Debtors' uncontroverted evidence shows that 99.86% of the Earn Account holders accepted Terms Version 6 or a later version. ("Original Blonstein Declaration," ECF Doc. # 1327, ¶ 20.) Earlier Terms Versions 1–5 of the Terms of Use, in effect beginning on February 1, 2018, and updated at various dates by new versions, were also clickwrap contracts accepted by the overwhelming percentage of Earn Account holders.

***2** **[1]** **[2]** If the cryptocurrency assets in the Earn Accounts are owned by the Debtors, the Account Holders are unsecured creditors and their recovery depends on the distributions to unsecured creditors under a confirmed chapter 11 plan, or under the Bankruptcy Code's priority rules in the event of liquidation. A fundamental principle of the Bankruptcy Code is equality of distribution. There simply will not be enough value available to repay all Account Holders in full. If only some Account Holders prevail with their arguments that they own the cryptocurrency assets in their accounts, they hope to recover 100% of their claims, while most of the Account Holders are left as unsecured creditors and may recover only a small percentage of their claims.

The Debtors and the Committee argue that under settled legal precedent the unambiguous language of the Terms of Use controls the ownership issue, making extrinsic evidence inadmissible, and, therefore, the cryptocurrency assets in the Earn Accounts are property of the estate. The objecting Account Holders argue that the Terms of Use are either clear that the Account Holders own the assets in the Earn Accounts, or the Terms of Use are ambiguous, preventing the Court from resolving the issue of ownership without considering extrinsic evidence. The objectors say that numerous statements by Celsius's former Chief Executive Officer ("CEO"), Alex Mashinsky, and possibly other extrinsic evidence, demonstrate that the Account Holders have always owned the assets in the Earn Accounts.

The Debtors filed an amended motion[2] that "only seeks two broadly applicable rulings: (i) that the plain language of the Terms of Use unambiguously provides that the cryptocurrency assets in the Earn Program are the property of the Debtors' estates and (ii) that the Terms of Use are an enforceable contract (subject to certain individualized contract formation defenses). In other words, the Amended Motion seeks a presumption that each Account Holder is party to a binding contract with the Debtors, which presumption is rebuttable to the extent an Account Holder succeeds on an individual contract formation defense in the future." (*Debtors' Reply in Support of Debtors' Amended Motion for Entry of an Order (I) Establishing Ownership of Assets in the Debtors' Earn Program, (II) Permitting the Sale of Stablecoin in the Ordinary Course and (III) Granting Related Relief* ("Debtors' Reply," ECF Doc. # 1578, ¶ 3.))

The Amended Motion also seeks authority for the Debtors to sell approximately $18 million (in value) of stablecoins in the Earn Accounts, arguing that such stablecoins are property of the Estates and that a sale by the Debtors is permissible under section 363(c)(1) of the Bankruptcy Code in the ordinary course of business, or alternatively, under section 363(b)(1) other than in the ordinary course of business. The United States Trustee ("U.S. Trustee") and multiple state securities regulators argue that a sale of stablecoins should not be approved at the present time because the Debtors have sufficient liquidity at least over the next few months. The Committee argues that the proposed sale would not be in the ordinary course of business (under section 363(c)(1)) but should be approved under section 363(b)(1) because the Debtors have shown a good business reason for the sale (to pay ongoing administrative expenses). The Court concludes it is unnecessary to resolve whether the proposed sale of stablecoins would be in the ordinary course of business because the sale should be approved outside the ordinary course of business. In the exercise of its business judgment, the Debtors have established a good business reason to permit the sale.

I. BACKGROUND

A. The Original Motion

***3** On September 15, 2022, the Debtors filed the Original Motion seeking authority to sell certain stablecoins in their possession in the ordinary course of business to fund operating expenses, including the costs of administering these chapter 11 cases. (*See generally* Original Motion.) The Debtors received numerous responses to the Original Motion, most of which raised concerns regarding the title and ownership status of the stablecoins the Debtors proposed to sell. The Original Motion did not explicitly seek a determination on the ownership of Earn Assets.

B. The Amended Motion

Subsequently, on November 11, 2022, the Debtors submitted the Amended Motion with a broader scope, seeking entry of an order (i) establishing ownership of assets in the Debtors' Earn Program (as defined below) (ii) permitting the sale of stablecoins in the ordinary course and (iii) granting related relief. In support of the Amended Motion the Debtors submitted declarations of Chris Ferraro, Interim Chief Executive Officer, Chief Restructuring Officer, and Chief Financial Officer ("Ferraro Declaration," ECF Doc. # 1326); Oren Blonstein, Head of Innovation and Chief Compliance Officer ("Original Blonstein Declaration," ECF Doc. # 1327 and the "Supplemental Blonstein Declaration, ECF Doc. # 1584); and Robert Campagna, Managing Director of Alvarez & Marsal North America, LLC, a restructuring advisory firm ("Campagna Declaration," ECF Doc. # 1328).

Prior to the filing of the Amended Motion, on October 21, 2022, the Court entered the *Final Order (I) Authorizing the Debtors to (A) Continue to Operate Their Cash Management System, (B) Honor Certain Prepetition Obligations Related Thereto, (C) Maintain Existing Business Forms, and (D) Continue to Perform Intercompany Transactions, (II) Granting Related Superpriority Administrative Expense Status to Postpetition Intercompany Balances, and (III) Granting Related Relief* ("Final Cash Management Order," ECF Doc. # 1152). Pursuant to paragraph 5 of the Final Cash Management Order, the Debtors cannot liquidate or convert any cryptocurrency into cash absent an order of the Court. The Court observed that the Debtors' liquidity is anticipated to tighten significantly in the new year. (*See generally* Campagna Declaration; *Memorandum Opinion and Order Granting Motion to Approve Bidding Procedures in Connection with the Sale of Substantially All the Debtors' Assets,* ECF Doc. # 1167, at 19) ("[T]he reality is that the Debtors will have significant liquidity issues to continue operating in 2023.").

The Amended Motion garnered a significant response from individual creditors, state regulatory agencies, the U.S. Trustee, and the Committee. In total, the Court received over thirty fives responses to the Amended Motion.

The Amended Motion seeks two categories of relief. First, the Amended Motion seeks to establish the Debtors' title and ownership rights over the cryptocurrency assets placed into the Earn Program and any proceeds thereof. If the Debtors own the Earn Assets, the Earn Assets became property of the Debtors' bankruptcy estates ("Estates") when the Debtors filed for relief under Chapter 11 of the Bankruptcy Code on the Petition Date. Second, the Amended Motion also seeks authority to sell multiple variations of a cryptocurrency called "stablecoin" in the ordinary course of business to create liquidity to fund the Debtors' business. Each issue is discussed in turn.

1. Ownership of Earn Assets

The Debtors' Amended Motion seeks a determination that under the Terms of Use, accepted by Celsius Account Holders when they opened their accounts (and, accepted modifications thereof), the cryptocurrency assets in the Earn Accounts presumptively are property of the estate.

***4** The Debtors assert that ownership of the Earn Assets is an issue of contract interpretation and that the Terms of Use constituted a valid and enforceable contract between Celsius and its Account Holders. (Amended Motion, ¶ 3.) The Amended Motion relies on the elements of contract formation (mutual assent, consideration, and an intent to be bound by the contract) and submits that each amendment to the

Terms of Use was binding on Account Holders who transferred their assets to the platform before the effectiveness of the subsequently amended Terms of Use (e.g., an Account Holder who deposited coins in July 2020 is bound by the Terms of Use version currently in effect). (*See generally id.* ¶¶ 18–37.)

The Debtors contend that the Terms Version 8 are explicit and unambiguous with respect to the ownership of Earn Assets. (Amended Motion ¶ 3.) Terms Version 8 states the following:

> In consideration for the Rewards payable to you on the Eligible Digital Assets using the Earn Service ... and the use of our Services, **you grant Celsius ... all right and title to such Eligible Digital Assets, including ownership rights, and the right, without further notice to you, to hold such Digital Assets in Celsius' own Virtual Wallet or elsewhere, and to pledge, re-pledge, hypothecate, rehypothecate, sell, lend, or otherwise transfer or use any amount of such Digital Assets, separately or together with other property, with all attendant rights of ownership, and for any period of time, and without retaining in Celsius' possession and/or control a like amount of Digital Assets or any other monies or assets, and to use or invest such Digital Assets in Celsius' full discretion**. You acknowledge that with respect to Digital Assets used by Celsius pursuant to this paragraph:
>
> 1. You will not be able to exercise rights of ownership;
>
> 2. Celsius may receive compensation in connection with lending or otherwise using Digital Assets in its business to which you have no claim or entitlement; and
>
> 3. **In the event that Celsius becomes bankrupt, enters liquidation or is otherwise unable to repay its obligations, any Eligible Digital Assets used in the Earn Service or as collateral under the Borrow Service may not be recoverable, and you may not have any legal remedies or rights in connection with Celsius' obligations to you other than your rights as a creditor of Celsius under any applicable laws**.

(*Id.* (quoting Terms Version 8) (emphasis added).)

The Debtors state that the above excerpt is in addition to at least four other references (express or implied) to Earn Assets (including income thereon) being the Debtors' property. (Amended Motion ¶ 40 (citing Terms Version 8 §§ 2, 4, 10, 12).)

Moreover, the Debtors assert that, to the extent prior versions of the Terms of Use are relevant, they also support the Debtors' position. (*Id.* ¶ 41.) The Debtors represent that every version of the Terms of Use has (i) allowed the Debtors to make unilateral updates to the Terms of Use and (ii) been clear that the Debtors had the right to "pledge and repledge from time to time" assets transferred to the Debtors. (*Id.* ¶ 43.) Celsius states that, starting with Terms Version 2, each iteration explicitly stated that the Debtors had "all attendant rights of ownership" to such assets. (*Id.*)

2. Sale of Stablecoins

The Debtors contend that because the Earn Assets, including stablecoins, are property of the Estates, the Debtors can sell stablecoins to create liquidity to fund administrative expenses associated with these bankruptcy cases. (*Id.*) The Ferraro Declaration asserts that, before the Petition Date, the Debtors monetized stablecoin assets as needed to fund operations in the ordinary course of business. (Ferraro Declaration ¶ 25.) As of the filing of the Amended Motion, the Debtors or their affiliates held eleven different forms of stablecoins totaling approximately $23 million in their "Fireblocks account." (Campagna Declaration ¶ 10.) The Amended Motion seeks Court authority to sell approximately $18 million worth of stablecoins free and clear of another party's interests and maintains that the stablecoins are not subject to any encumbrances defined under section 363(f) of the Bankruptcy Code (discussed in further detail below). (Amended Motion ¶¶ 49, 54.)

***5** The Debtors assert that although cryptocurrency presents a novel issue, the relief it requests—to sell assets akin to unencumbered inventory—is not. (*Id.* ¶ 50.) The Amended Motion submits that the sale of stablecoins is a reasonable exercise of the Debtors' business judgment to fund the significant cost of administering the Estates while the Debtors'

income has been substantially reduced. (*Id.* ¶ 53.) The Debtors assert that selling stablecoins would meaningfully extend its liquidity runway. (Campagna Declaration ¶ 9.) Furthermore, the Debtors note that they have reserved sufficient stablecoins to avoid prejudice to any creditors of the Custody Program, Withhold Program, or Borrow Program whose rights are reserved pending a ruling on ownership of these assets. (*Id.* ¶ 10.)

C. Summary of Responses

The Amended Motion garnered responses from nearly thirty creditors, fourteen states, the Committee, the U.S. Trustee, and other parties. The creditors' responses share common features and arguments, as do the responses from states. Those filings are each discussed as a group.

1. Objection of the U.S. Trustee

The U.S. Trustee filed a limited objection to the Amended Motion. Most significantly, the U.S. Trustee takes no position on whether the cryptocurrency assets in the Earn Accounts are property of the Estates. The U.S. Trustee's limited objection argues only that the Court should not permit the Debtors to sell stablecoins at the present time. ("U.S. Trustee Objection," ECF Doc. # 1489, at 2–3.) The U.S. Trustee contends that the Original and Amended Motions lack the required evidentiary basis showing that (1) the Debtors own and therefore have the authority to sell the stablecoins and, if they do, (2) what the proceeds of the sale of stablecoins will fund. (U.S. Trustee Objection at 2.)

First, the U.S. Trustee asserts, the Debtors commingled assets of their customers in such a way that it is unclear how the Debtors can accurately identify the owners of the stablecoins. (*Id.*) Even if the Debtors can establish ownership, the U.S. Trustee also questions how a stablecoins sale may impact the Debtors' ability to make distributions "in kind" to customers. (*Id.*)

Second, the U.S. Trustee states that the Original and Amended Motions fail to explain how the proceeds of the sale of $18 million worth of stablecoins will be used. (*Id.*) The U.S. Trustee submits that the sale will provide one month of additional liquidity beginning in March 2023 based on the Ferraro and Campagna declarations. (*Id.* at 2–3.) The U.S. Trustee contends that the Debtors must explain how this future liquidity justifies a current sale, and further claims that the Amended Motion should state that it intends to use the proceeds solely for administrative expenses, if that is indeed the case. (*Id.* at 3.) Finally, the U.S. Trustee asserts that the Debtors fail to explain the extent to which the proceeds of any stablecoins will be used to fund the mining business or GK8, an affiliate. (*Id.*)

2. Limited Objection of the Committee

The Committee filed a Limited Objection to the Amended Motion ("Committee Objection," ECF Doc. # 1502). The Committee noted that 55% of the Debtors' currently existing customers were already customers prior to July 22, 2022. (*Id.* ¶ 3.) The Committee contended that the unambiguous Terms of Use are binding on these customers considering the Debtors' screen shots and testimony demonstrating how these customers accepted Terms Version 6. (*Id.*) However, the Committee asserted that the Debtors had not provided any evidence or testimony showing how the 44% of account holders who created accounts after July 22, 2021 accepted the Terms of Use, notwithstanding the Committee requests that the Debtors do so. (*Id.*) The Committee stated the Court cannot determine whether the Terms of Use is binding on this latter 44% of customers until the Debtors cure this evidentiary gap. (*Id.*)

***6** Notably, the Committee asserted that the Terms Version 8 unambiguously provides that Account Holders who elected to participate in the Earn Program transferred title to their relevant digital assets to Celsius and authorized Celsius to sell or otherwise use such digital assets in its sole discretion without further permission from the Account Holders. (Committee Objection ¶ 4.) Furthermore, each version of the Terms of Use since September 2020 contained a similar, unambiguous statement. (*Id.*) Therefore, the Committee argued that to the extent that the Court determines that a customer entered an enforceable contract through any version of the Terms of Use after September 2020, that customer agreed to transfer ownership of digital assets to Celsius. (*Id.* ¶ 5.)

In evaluating the Debtors' Terms of Use and various arguments relating to the use of the word "loan," the Committee contended that the transfer of title and the creation of a loan are not mutually exclusive concepts. (*Id.*) More importantly, the Committee asserted, reading the reference to a "loan" in the Terms of Use to mean that title did not transfer would require the reader to ignore several provisions from the Terms of Use, including provisions regarding the transfer of title and Celsius's ability to sell or otherwise transfer digital assets (including rights of ownership). (*Id.*) The Committee stated that it is a bedrock principle of contract interpretation that courts should not adopt an interpretation of a contract that has the effect of rendering at least one clause superfluous or meaningless, but rather, to the extent possible, should seek to read contractual provisions in harmony. (*Id.* ¶ 6.)

The Committee's primary objection was to the disposal of proceeds from a sale of stablecoins for purposes other than to fund the Estates. Although the Committee argued that a sale would not be in the ordinary course of business, it believes the Debtors have established cause to sell stablecoins outside of the ordinary course of business to fund these cases provided that they are being operated for the benefit of the Estates. (*Id.* ¶ 7.)

3. Objections of States

a. State of Vermont

The State of Vermont filed a limited objection to the extent that the Amended Motion seeks to spend proceeds from a sale of stablecoin because (i) ownership of Earn Assets has not been determined; (ii) as demonstrated by the Examiner's[3] Interim Report (ECF Doc. # 1411), the Debtors did not segregate Earn Assets from Custody and Withhold Assets; and (iii) the Debtors should not spend funds unnecessarily while the future of these Chapter 11 proceedings remains unclear. ("Vermont Objection," ECF Doc. # 1484, ¶ 8.) Should the Court permit the Debtors to sell stablecoins, Vermont requests that any proceeds be placed in escrow. (*Id.* at 3.)

As a practical matter, Vermont is concerned that the Debtors' commingling of Earn Assets with Custody and Withhold Assets will make it difficult to determine who owns which assets. (*Id.* ¶ 12.) Vermont states that it does not take a position on the ownership of Earn Assets, but notes that it is not clear, based on the Terms of Use provided by the Debtors, how ownership could be conveyed from Account Holders to Celsius in a temporary fashion. (*Id.* ¶ 11.) The State of Washington joins in the Vermont Objection. ("Washington Joinder," ECF Doc. # 1497.)

b. State of New Jersey

***7** The State of New Jersey filed an objection and reservation of rights ("New Jersey Objection," ECF Doc. # 1498). New Jersey asserts that Celsius operated in violation of the state's securities laws by selling unregulated securities. It contends that any determination on the ownership of Earn Assets is premature while the Examiner completes her investigation, and that any determination of ownership should be made with the procedural safeguards present in an adversary proceeding. (New Jersey Objection at 2.) New Jersey takes the position that the Earn Assets are owned by Celsius's customers. (*Id.*) To the extent the Court permits the sale of stablecoins, New Jersey requests that the proceeds be held in escrow subject to a determination of ownership and until after the Examiner providers her final report. (*Id.*)

c. State of Texas

The Texas State Securities Board and Department of Banking (collectively, "Texas") objects to the Amended Motion because it asserts that the Debtors' process for the Amended Motion is expedited, premature, and should be done through an adversary proceeding with the appropriate safeguards provided by the Bankruptcy Rules. ("Texas Objection," ECF Doc. # 1496, ¶ 1.) Texas contends that a contract may not have been formed between the Debtors and its customers because the Debtors have not offered sufficient documentation to show that Account Holders actually agreed to the Terms of Use. (*Id.* ¶¶ 16–17.) Should the Court find that the stablecoins are property of the Estates, Texas objects to the use of

any proceeds from a sale to pay administrative costs, and instead contends that proceeds should be held for the benefit of creditors and addressed through a confirmable reorganization plan or liquidation. (*Id.* ¶ 25.)

d. Coordinating States Objection

The States of Alabama, Arkansas, California, Hawaii, Idaho, Maine, North Dakota, Oklahoma, and South Carolina, and the District of Columbia (collectively, the "Coordinating States") object to the Amended Motion ("Coordinating States Objection," ECF Doc. # 1492). The Coordinating States assert that the Terms of Use have evolved over time, and it is not clear that customers really understood the nature of these changes. (Coordinating States Objection at 3.) The Coordinating States note that the Debtors are under investigation in several states for marketing securities without necessary registrations and without complying with state regulatory frameworks and federal law, and therefore the Debtors cannot rely on the arguably unlawful Terms of Use to determine the purported ownership of these assets and what rights they have in them. (*Id.*)

With respect to the language in the Terms of Use, the Coordinating States note that "loan" was used ubiquitously, and that the Terms of Use states that "you grant Celsius, ... for the duration of the period during which the Eligible Digital Assets are *loaned* to us through your Celsius Account, all right and title to such Digital Assets, including ownership rights." (*Id.* at 4 (emphasis added in the Coordinating States Objection).) The Coordinating States contend that Account Holders would not meaningfully understand the Terms of Use to be a transfer of ownership because customers could withdraw their assets without notice or conditions whenever and in the same form as the initial deposit. (*Id.* at 4–5.)

Finally, the Coordinating States submit that an actual transfer of ownership would have constituted a taxable event, yet the Debtors paid no taxes on these transactions. (*Id.* at 4.) Washington joins in the Coordinating States Objection. (*See* Washington Joinder.)

4. Creditor Responses

The Court received over twenty responses from creditors, some *pro se* and some represented by counsel, objecting to the Amended Motion (collectively, "Creditor Responses"). A common objection is that the Terms of Use are ambiguous within the four corners of the document because the Terms of Use, despite the key transfer of title and ownership clause that the Debtors rely on, ubiquitously use the terms "loan" and "lending" to describe the transaction whereby Account Holders deposit assets into Earn Accounts.[4] Therefore, a layperson would understand the Terms of Use to leave title and ownership of Earn Assets to Account Holders while temporarily providing use of the assets to Celsius. (*Id.*)

***8** Creditors also assert that Celsius's statements on its website, social media, and particularly the statements of former Chief Executive Officer Alexander Mashinsky in his "Ask Mashinsky Anything" videos constituted an oral modification of the contract such that, notwithstanding the written Terms of Use, the transactions between the Account Holders and Debtors did not transfer title and ownership to the Earn Assets.[5]

Several creditors, in addition to the Coordinating States and Washington, contend that if Account Holders transferred title to their assets to Celsius then the transaction would have created a taxable event, yet Celsius did not pay taxes on these transactions or issue tax documents to Account Holders.[6] As a procedural matter, several creditors believe this issue should be handled via an adversary proceeding, rather than by motion practice.[7] Others submit that a decision determining Earn Asset ownership is premature at this stage of the Debtors' bankruptcy proceedings because the Debtors' business was a Ponzi scheme, which the Examiner's forthcoming final report may demonstrate.[8] If so, they assert that the underlying contract formed by the Terms of Use is void as a matter of public policy.[9] Creditors state that a decision is also premature because the Debtors' liquidity will not run out until March 2023.[10] Finally, some creditors believe that a decision at this stage is

premature because the expedited schedule to determine ownership of the Earn Assets violated the creditors' individual due process rights. [11]

The Creditor Responses contend that they have several defenses to contract formation and modification that apply to creditors as a class, which render the contract void and unenforceable, including that (i) the contract lacked consideration [12]; (ii) the contract was unconscionable, because Celsius, a company with access to sophisticated legal advice, obtained title and ownership to significant assets of laypersons via a complex Terms of Use document and modifications thereto [13]; (iii) Celsius failed to uphold its fiduciary duties under the contract established by the Terms of Use [14]; (iv) Account Holders lacked the requisite intent to transfer ownership [15]; (v) when Account Holders agreed to updated Terms of Use they may not have understood that they were agreeing to a contract and instead may have wanted to see the balance of their account(s) [16]; (vi) Celsius fraudulently misrepresented its product and finances, therefore the Account Holders should not be bound by the Terms of Use [17]; and (vii) Celsius operated illegally by violating the securities laws of several states. [18]

***9** Finally, several responses raise breach of contract claims [19], some of which raise individual contract claims regarding the creditor's specific account circumstances. [20] Additional responses assert that Celsius commingled assets, therefore, there is no factual difference between Earn, Custody, and Withhold Accounts and this Amended Motion relies on a factually inaccurate premise (i.e., that the Earn Assets are legally different from the Custody and Withhold Assets). [21] At least one creditor argues that to the extent that Celsius issued withdrawals while it was insolvent, those transactions were funded by incoming deposits and were therefore fraudulent conveyances, which should be returned to the depositing Account Holder. [22]

In addition to Creditor Responses, creditor Immanuel Herrmann submitted three letters signed by creditors. Four hundred fifty-two (452) creditors join the objections of creditors Eric Wohlwend and Rebecca Gallagher. (*See* "452 Creditor Joinder," ECF Doc. # 1599, joining the Wohlwend Objection and Gallagher Objection.) Three hundred forty (340) creditors join the objection of Keith and Jennifer Ryals. (*See* "340 Creditor Joinder, ECF Doc. # 1602, joining Ryals Objection.) Three hundred ninety-seven (397) creditors signed a statement of dissatisfaction with the Committee Objection, asserting that the Committee, through its objection, abdicated its responsibility to represent creditors interests. (*See* "397 Creditor Statement," ECF Doc. # 1559.) The 397 Creditor Statement also calls for the Court to add creditors to the Committee to better represent the interests of unsecured creditors. (*Id.*)

5. The Debtors' Reply

On December 2, 2022 the Debtors filed the Debtors' Reply and the Supplemental Blonstein Declaration, which substantially responded to the Committee Objection. The Debtors' Reply maintains that a valid, enforceable contract was formed by the Terms of Use between Celsius and each Account Holder who accepted the Terms of Use (Debtors' Reply ¶¶ 15–17), and that the Terms of Use unambiguously state that Earn Assets are the Debtors' property and therefore became property of the Estates when the Debtors filed for bankruptcy (*id.* ¶¶ 18–19). Finally, the Debtors reassert that they may sell stablecoins in the ordinary course of business and, if the Court disagrees, that the Court should nonetheless approve the sale as an exercise of the Debtors' sound business judgment. (*Id.* ¶¶ 21–23.)

The Debtors rebut explicit and implicit statements by creditors regarding the Debtors' motives (*see, e.g.,* Debtors' Reply ¶ 5) and reject certain creditors' arguments that the Amended Motion is procedurally improper and should be addressed in an adversary proceeding. (*Id.* ¶ 24.) The Debtors reiterate that they seek a declaratory judgment establishing a presumption that each Account Holder is party to a binding contract with the Debtors, which presumption is rebuttable to the extent an Account Holder succeeds on an individual contract formation defense in the future. (*Id.* ¶ 25.)

II. LEGAL STANDARD

A. Property of the Bankruptcy Estate Under the Bankruptcy Code

The Debtors contend that the Earn Assets are property of the Estates. Section 541 of the Bankruptcy Code provides, in relevant part, that:

> ***10** (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. § 541(a)(1).

[3] The Estates therefore consist of "all legal or equitable interests of the debtor in property as of the commencement of the case." *In re Lehman Bros. Holdings. Inc.*, 422 B.R. 407, 418 (Bankr. S.D.N.Y. 2010) (emphasis removed) (citing 11 U.S.C. § 541(a)(1)).

[4] Section 363(c)(1) of the Bankruptcy Code allows a debtor to enter certain transactions in the ordinary course of business, and provides:

> If the business of the debtor is authorized to be operated under section 721, 1108, 1183, 1184, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

11 U.S.C. § 363(c)(1).

[5] The Court may approve transactions which are not in the ordinary course of business if the debtor demonstrates a "sound business purpose" for the transaction. *See* 11 U.S.C. § 363(b)(1); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983) (holding that judicial approval under section 363 of the Bankruptcy Code requires a showing that there is a good business reason); *see also In re Glob. Crossing Ltd.*, 295 B.R. 726, 743 (Bankr. S.D.N.Y. 2003) (same).

[6] With respect to the procedural requirements governing disputes over estate property ownership, the Bankruptcy Rules do not require every declaratory action to be brought as an adversary proceeding, only those that relate to a subject that is already required to be brought as an adversary proceeding. FED. R. BANKR. P. 7001(9) (requiring an adversary proceeding for any matters "relating to any of the foregoing" issues described in sections 1–8 of Rule 7001 [23] that must be brought as an adversary proceeding under this rule).

B. Elements of a Valid, Enforceable Contract

***11** **[7]** The Terms of Use expressly provide that they are governed by New York law. (Terms Version 8 § 33.) No one argues to the contrary. The governing legal principles do not appear to vary substantially even if the law of other states applied. In the absence of any asserted conflict in legal rules, the Court can, in any event, apply New York law as the forum state law. *See Paypolitan OU v. Marchesoni*, 21-CV-5397 (RA) (RWL), 2022 WL 17541091, at *4 n.6 (S.D.N.Y. Aug. 26, 2022); *see also Aviles v. S&P Glob., Inc.*, 380 F. Supp. 3d 221, 307 (S.D.N.Y. 2019).

[8] The Debtors assert that the Earn Assets are property of the Estates because the Terms of Use that Account Holders accepted constituted a valid,

enforceable contract which accorded title to and ownership of the Earn Assets to the Debtors. A contract requires an offer and acceptance thereof (mutual assent), consideration, and an intent to be bound. *See* *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 427 (2d Cir. 2004) (reciting the requirements for formation of a contract).

[9] These requirements are not different for electronic contracts, and courts have adapted traditional principles of contract formation to fit the digital era. *See* *id.* at 403 ("While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract."); *see, e.g.*, *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 384–85 (E.D.N.Y. 2015) ("Most Americans now do some business over the Internet —whether making purchases or participating in a community at the pleasure of a forum host. When we do, we are almost always presented (clearly or opaquely) with contractual terms governing our use of the site. The studies conducted to date and their implications reinforce the need to reconsider principles underlying contract law, developed in an age of paper and orality.") (internal citations omitted).

1. Mutual Assent (Offer and Acceptance)

[10] Traditionally, mutual assent was conceptualized as the culmination of a bargaining process, with an emphasis on both parties' intent to be bound following an active negotiation of terms. Donald P. Harris, *Trips and Treaties of Adhesion Part II: Back to the Past or a Small Step Forward?*, 2007 Mich. St. L. Rev. 185, 191 ("Adhesion Contracts") ("The exemplary contract is one between parties of relatively equal bargaining power, and achieved through a negotiation process that reflects this power balance.") (citing E. Allan Farnsworth, Contracts § 4.26 (4th ed. 2004)).

Digital contracts between companies and consumers —here, Account Holders—often involve a fundamentally different process, where consumers' participation is limited to deciding if they will participate. *See* *Register.com*, 356 F.3d at 403 ("It is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree."); *see also* Adhesion Contracts at 192 ("The only alternative to complete adherence is outright rejection.").

[11] Given consumers' passive role in negotiating many electronic contracts, the issue of mutual assent often turns on whether a consumer should have been aware that they were being bound by the relevant terms. *See* *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 74–75 (2d Cir. 2017) ("Where there is no evidence that the offeree had actual notice of the terms of the agreement, the offeree will still be bound by the agreement if a reasonably prudent Account Holder would be on inquiry notice of the terms."). To determine what a "reasonably prudent Account Holder" would have been aware of, courts generally evaluate the method of manifesting acceptance and the conspicuousness of the terms that were purportedly accepted. *See* *Valelly v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 464 F. Supp. 3d 634, 640 (S.D.N.Y. 2020) (discussing the means for manifesting acceptance); *Uber Techs.*, 868 F.3d at 75–78 (evaluating the conspicuousness of a Terms of Service hyperlink).

***12** **[12]** **[13]** With respect to the first inquiry, courts have categorized electronic contracts based on the process for accepting their terms. The primary categories are (i) "scrollwrap" agreements, (ii) "clickwrap" agreements, and (iii) "browsewrap" agreements.[24] Under this framework, the Debtors' Terms of Use are a "clickwrap" agreement, which require an Account Holder to manifest assent by clicking a button confirming that they accept the terms or a button that implies that they have accepted the terms, but do not necessarily require the Account Holder to actually view the terms. (Original Blonstein Declaration ¶ 18.) Clickwrap contracts are routinely enforced under New York law. *Whitt v. Prosper Funding LLC*, No. 15-00136 (GHW), 2015 WL 4254062, at *4 (S.D.N.Y. July 14, 2015) ("In New York, clickwrap agreements are valid and enforceable contracts.") (quoting *Centrifugal Force, Inc. v.*

Softnet Commc'n, Inc., No. 08-05463 (CM), 2011 WL 744732, at *7 (S.D.N.Y. Mar. 1, 2011)).

[14] The second, and closely related, aspect courts evaluate is how apparent it was that the contract's terms would apply to the assenting party. The ultimate inquiry is "whether [a reasonable pe[rson] ... would have known about the terms and the conduct that would be required to assent to them." *Uber Techs.*, 868 F.3d at 74–75. In making this determination, courts look to see if the terms were "reasonably conspicuous," with an emphasis on considerations like the clutter on the page that contained the terms (or a link thereto), whether hyperlinks were in a different color or style of font, and the presence (or absence) of spatial and temporal coupling with acceptance. *See*, *e.g.*, *Uber Techs.*, 868 F.3d at 74–75 ("[T]he presentation of these terms at a place and time that the consumer will associate with the initial purchase or enrollment, or the use of, the goods or services from which the recipient benefits at least indicates to the consumer that he or she is taking such goods or employing such services subject to additional terms and conditions that may one day affect him or her.")

2. Consideration

[15] **[16]** A contract must also be supported by "consideration." This requirement is not exacting—each party must simply receive "something of value." *Apfel v. Prudential-Bache Secs. Inc.*, 81 N.Y.2d 470, 600 N.Y.S.2d 433, 616 N.E.2d 1095, 1097 (1993) (observing that anything with "real value in the eye of the law" can serve as consideration) (quoting *Mencher v. Weiss*, 306 N.Y. 1, 114 N.E.2d 177, 181 (1953)). Courts generally will not opine on the adequacy of consideration. *Id.* ("Absent fraud or unconscionability, the adequacy of consideration is not a proper subject for judicial scrutiny.") (citations omitted).

3. Modification

[17] **[18]** **[19]** A contract that provides for modification may be modified and requires the same elements as an original contract formation. *Janover v. Bernan Foods, Inc.*, 901 F. Supp. 695, 700 (S.D.N.Y. 1995) ("[T]here is no question that a contract may be modified if the contract provides for its modification."); *Ward v. TheLadders.com, Inc.*, 3 F. Supp. 3d 151, 159 (S.D.N.Y. 2014) (stating that modification of a contract requires the same elements as contract formation).[25] Under New York law, "[i]n general ... a written agreement that expressly states it can be modified in writing cannot be modified orally." *Towers Charter & Marine Corp. v. Cadillac Ins. Co.*, 894 F.2d 516, 522 (2d Cir. 1990) (applying New York state law). The party seeking to enforce an alleged contract bears the burden of establishing the contract to be enforced. *See* *Paz v. Singer Co.*, 151 A.D.2d 234, 542 N.Y.S.2d 10, 11 (App. Div. 1st Dep't 1989) ("It is black letter law that the burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it.").

***13** **[20]** With respect to consideration in the context of a contract modification, a service provider's notice of a change to the terms of service and a customer's choice to continue using the service is valid consideration. *See Byrne v. Charter Commc'ns*, 581 F. Supp. 3d 409, 419 (D. Conn. 2022) ("[T]he service provider is required to provide notice of the intended change [to the terms], and the customer has the choice of accepting the new arrangement or ceasing to use the services, and these respective promises by the parties together are sufficient to constitute valid consideration.") (citing *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004)).

C. Contract Interpretation

[21] **[22]** Under New York law, when a contract's terms are unambiguous, courts must apply them as written. *In re Enron Corp.*, 292 B.R. 752, 762 (Bankr. S.D.N.Y. 2003) ("If the contract language is 'unambiguous,' this Court must enforce the plain, ordinary, and common meaning of those terms as a matter of law without reference to extrinsic evidence."). Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous.

See, e.g., *W.W.W. Assoc. v Giancontieri*, 77 N.Y.2d 157, 162, 565 N.Y.S.2d 440, 566 N.E.2d 639 (1990).

[23] **[24]** **[25]** A contract is unambiguous if "on its face [it] is reasonably susceptible of only one meaning." *Greenfield v. Philles Records*, 98 N.Y.2d 562, 570, 750 N.Y.S.2d 565, 780 N.E.2d 166 (2002). Extrinsic evidence cannot be used to create an ambiguity where the words of the parties' agreement are otherwise clear and unambiguous. *Innophos, Inc. v Rhodia, S.A.*, 38 A.D.3d 368, 369, 832 N.Y.S.2d 197 (1st Dept. 2007), *aff'd*, 10 N.Y.3d 25, 852 N.Y.S.2d 820, 882 N.E.2d 389 (2008). Conversely, "[a] contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *New York City Off-Track Betting Corp. v. Safe Factory Outlet, Inc.*, 28 A.D.3d 175, 177, 809 N.Y.S.2d 70 (1st Dept. 2006) (internal quotation marks and citation omitted).

III. DISCUSSION

The issues before the Court are (a) whether the Terms of Use are a contract by which complete title and ownership of Earn Assets transferred from Account Holders to Celsius when the Account Holders deposited cryptocurrency in their Earn Accounts; and (b) if so, whether the Debtors may sell stablecoins in the ordinary course of business or outside the ordinary course of business.

For the reasons detailed below, the Court finds, on the evidence before it, that the Terms of Use formed a valid, enforceable contract between the Debtors and Account Holders, and that the Terms unambiguously transfer title and ownership of Earn Assets deposited into Earn Accounts from Accounts Holders to the Debtors. The Court also finds that stablecoins, like other Earn Assets, are property of the Estates and the Debtors may sell the stablecoins outside of the ordinary course of business to provide liquidity for these Chapter 11 proceedings.

To be clear, this finding does not mean holders of Earn Assets will get nothing from the Debtors.[26] Account Holders have unsecured claims against the Debtors in dollars or in kind (depending on the terms of any confirmed plan). The amount of allowed unsecured claims is subject to later determination in this case (through the claims allowance process) and may potentially include damages asserted by Account Holders, including breach of contract, fraud or other theories of liability.

***14** The Court has read every submission filed in connection with the Amended Motion and appreciates the significant time and effort that creditors, regulators and other parties in interest have undertaken on these very important issues. But based on the unambiguous contract terms, subject to any reserved defenses, the Court finds and concludes that the cryptocurrency assets deposited in Earn Accounts are presumptively property of the estate and not property of the Account Holders.

[26] Based on the limited scope of findings sought by the Amended Motion,[27] the Court's decision does not determine the ownership of assets in the Debtors' Custody Program, Withhold Accounts, or Borrow Program or whether any individual Account Holder has valid defenses to the contract between Account Holders and the Debtors. The Court's findings also do not decide the rights of any state or state agencies regarding whether Celsius violated state securities laws by marketing unregistered securities.[28]

A. Ownership of Earn Assets

[27] Determining ownership of the Earn Assets requires a two-step inquiry regarding (i) whether the Terms of Use formed a valid, enforceable contract between the Debtors and each Account Holder who accepted the Terms of Use, including whether subsequent versions of the Terms of Use constitute a valid, enforceable modification of a contract; and (ii) if the answer to the former questions is in the affirmative, whether the Terms of Use unambiguously transferred title and ownership of Earn Assets from Account Holders to the Debtors when Account Holders deposited their assets into the Earn Program.

1. The Terms of Use Formed a Valid, Enforceable Contract

[28] A valid, enforceable contract requires mutual assent (i.e., one party makes an offer and the other party accepts the offer), consideration (i.e., each party exchanges a service or good), and intent to be bound (i.e., both parties intended to enter into the contract). *See* *Register.com, Inc.*, 356 F.3d at 427. Accounts Holders entered a contract with the Debtors governed by the Terms of Use through a "clickwrap" agreement (*see, e.g.,* Original Blonstein Declaration ¶ 18), which requires a user to manifest assent by clicking a button confirming that they accept the terms, or a button that implies that they have accepted the terms, but do not necessarily require the user to view the terms.

***15** Exhibits to the Supplemental Blonstein Declaration provide screen captures of the sign-up process for users who signed up via the website, for all Terms of Use versions, and the mobile app for the effective period of Terms Versions 5 through 8. (Supplemental Blonstein Declaration, Exhibits A–E.) The Supplemental Blonstein Declaration explains that applicants could not advance to the next page and complete sign up unless they agreed to the Terms of Use. (*Id.* ¶ 6.)

New York Courts overwhelmingly accept "clickwrap" agreements as sufficient to constitute mutual assent. *Uber Techs.*, 868 F.3d at 75 ("Courts routinely uphold clickwrap agreements for the principal reason that the Account Holder has affirmatively assented to the terms of agreement by clicking 'I agree.' "). The Restatement (Second) of Contracts further supports the validity and enforceability of a clickwrap contract in Comment B, "Assent to known terms," where it recognizes the common knowledge that many users never read the full terms of a clickwrap agreement before checking an "agree" box. Restatement (Second) of Contracts, § 211 cmt. b. It explains, in relevant part:

> Customers do not in fact ordinarily understand or even read the standard terms. They trust to the good faith of the party using the form and to the tacit representation that like terms are being accepted regularly by others similarly situated. *But they understand that they are assenting to the terms not read or not understood*, subject to such limitations as the law may impose.

(*Id.* (emphasis added).)

Here, the Original Blonstein Declaration provides testimony demonstrating that 99% of Account Holders completed this sign-up process and affirmatively assented to the contract terms contained in the Terms of Use effective at the time of sign-up. (Original Blonstein Declaration ¶ 14.)[29] The Court finds that Account Holders understood that they were assenting to a contract governed by the Terms of Use even if the Account Holders chose to read some or none of the provisions. The Court empathizes with the frustrations Account Holders may feel if they did not read or understand the specific terms of the Terms of Use. Frankly, though, the rules provide needed certainty and predictability required for modern commerce in the digital era. The law in the Second Circuit is clear that clickwrap contracts such as the Terms of Use are valid and binding. The Debtors have sufficiently shown the mutual assent element of contract formation.

With respect to consideration, the Terms of Use clearly spell out the "benefit of the bargain": "Our Earn Service allows you to earn a financing fee from Celsius, referred to as 'Rewards,' in the form of Digital Assets ... in exchange for entering into open-ended loans of your Eligible Digital Assets to Celsius under the terms hereof." (Terms Version 8 § 4.D.) The Ryals Objection argues that the Debtors' consideration is illusory because the Terms of Use allow the Debtors to opt-out of fulfilling their end of the bargain.[30] However, the Debtors put forth evidence that the Debtors' consideration was the payment of proceeds from Earn Assets to Account Holders as "rewards."[31] The Ryals Objection concedes that the Debtors fulfilled this promise (Ryals Objection ¶ 15), and no party submits evidence that the Debtors did not do so.

***16** Nor does any party provide evidence that Celsius and its Account Holders, as a class or as an individual, lacked intent to be bound by the contract terms. Certain Creditor Responses argue that the Account Holders did not intend certain effects of the contract,[32] but no objection argues that *all* Account Holders lacked intent to enter a contract governed by the Terms of Use. Moreover, many responses to the Amended Motion attempt to hold Celsius to a different reading of the contract terms, i.e., that Account Holders retained title of Earn Assets under the Terms of Use. That certain Account Holders disagree with the Debtors' reading of the Terms of Use is a contract interpretation issue discussed *infra* at III.A.3.

For the foregoing reasons, the Debtors have convincingly argued that the three elements required to form a valid, enforceable contract were satisfied by the Account Holders' acceptance of the Terms of Use via the clickwrap agreement.

2. Updated Terms of Use Constituted Valid, Enforceable Contract Modifications

[29] Modification to a contract requires the same elements—mutual assent, consideration, and intent to be bound—that are required to form an original contract. Each version of the Terms of Use allowed the Debtors' modification of the contract terms and provided that the Account Holders' continued use of the platform following an update constituted consent to the updated Terms of Use.[33]

The Terms of Use, beginning with Terms Version 1, provide that (i) the Debtors can unilaterally modify the Terms of Use without notice and (ii) the Account Holders' continued use of the platform following an update constitutes consent to the amended Terms of Use. (*See* "Terms Affidavit Modification Provisions," Terms Affidavit Ex. A-1 at "Changes to Terms," Ex. A-2 § 31, Ex. A-3 § 32, Ex. A-4 § 32, Ex. A-5 § 32, Ex. A-6 § 31, Ex. A-7 § 31, and Ex. A-8 § 31.) The Terms Affidavit and Original Blonstein Declaration provide evidence that the Debtors could modify the contract and that Account Holders' continued use of the platform constituted acceptance of the updated Terms of Use, even if the Account Holders did not affirmatively accept the updated terms. (*See id.*; Original Blonstein Declaration ¶ 15.)

Notwithstanding the language in the Terms of Use permitting modification by the Debtors, the Debtors specifically required all Account Holders to affirmatively accept Terms Version 6, thus replacing the existing contract for any Account Holders who opened an account before Terms Version 6 became effective. (*See* Original Blonstein Declaration ¶ 16). The Supplemental Blonstein Declaration provides evidence showing the affirmative consent that Celsius required Account Holders to give to continue using the platform when Terms Version 6 became effective, as well as the communications distributed for the updates to Terms Versions 7 and 8. (Supplemental Blonstein Declaration ¶¶ 4–15, Ex. F, G.)

Acceptance of Terms Version 6 occurred on the Debtors' platform. (*See* Original Blonstein Declaration ¶ 18.) Regardless of whether an Account Holder accessed the platform from a mobile device or a computer, an in-application pop-up window appeared, stating in large letters: "We have updated our Terms." (*See Id.* ¶ 18, Exhibit C.) The pop-up then noted that "[i]t's tempting to skip reading Terms, but it's important to establish what you can expect from continuing using our product. These are not all of the changes, please read the updated Terms in full." (*See id*.) This text was followed by a few bullets highlighting key changes and a hyperlink reading "Read the full Terms," which linked to the full Terms of Use. (*Id.*) Below the hyperlink, the pop-up contained three check boxes adjacent to statements, one of which was "I have read and agree to the new Terms." (*Id.*) In addition, the acceptance button itself included the word "Agree." (*Id.*)

***17** This process requires an Account Holder to view a pop-up stressing the importance of reading the updated Terms of Use and required two clicks (one check box, one "Accept"). The pop-ups contained hyperlinks to read the updated Terms of Use, and Account Holders were informed of the impact of declining the updated Terms of Use. The pop-ups appear clean and compact, and contained pertinent information in close proximity with a clearly-bounded or full-screen window. Together, these characteristics meet the standard for "clear and conspicuous." *See,*

e.g., *Uber Techs.*, 868 F.3d at 74–75 ("[T]he presentation of these terms at a place and time that the consumer will associate with the initial purchase or enrollment, or the use of, the goods or services from which the recipient benefits at least indicates to the consumer that he or she is taking such goods or employing such services subject to additional terms and conditions that may one day affect him or her." (internal citations omitted)).

If an Account Holder did not affirmatively accept the updated Terms Version 6 within two weeks, the Account Holder's account was suspended until such time as the Account Holder affirmatively accepted the latest version of the Terms of Use. (*Id.* ¶ 18.)

It is not until Terms Version 8 that the Terms of Use provide for modification in writing. (*Id.*, Ex. A-8, "Introduction.") Therefore, as certain of the Creditor Responses correctly point out, the evidence does not support Debtors' argument that the Terms of Use provided for modification in writing, therefore prohibiting oral modification as a matter of law. (*See* Amended Motion ¶ 47 ("Under New York law, '[i]n general ... a written agreement that expressly states it can be modified in writing cannot be modified orally.' " *Towers Charter & Marine Corp. v. Cadillac Ins. Co.*, 894 F.2d 516, 522 (2d Cir. 1990).) Nonetheless, because modifications to a contract require the same three elements as an original contract, the modifications alleged by the Creditor Responses lack evidence.

[30] **[31]** Multiple Creditor Responses argue that the Debtors modified the Terms of Use through advertisements, media uploaded to Celsius's social media channels, and the oral statements of Alex Mashinsky. (*See, e.g.* Gallagher Objection at 6.) As a threshold matter, this media was not submitted to the Court as evidence and the Court may consider only evidence admitted into the record. The Court provided a chance for objectors to submit evidence. None did.[34] Even if this media was submitted as evidence, advertisements and other statements like those identified by certain creditors generally do not constitute offers, and an offer is a necessary predicate for any "amendment" to the Terms of Use.[35] *See* *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116, 122–24 (S.D.N.Y. 1999), *aff'd*, 210 F.3d 88 (2d Cir. 2000) ("The general rule is that an advertisement does not constitute an offer.") (internal quotation marks omitted). No Creditor Response asserts that this media satisfied the three elements of contract formation or modification—these responses hew closer to contract interpretation, rather than modification, arguments.

The Court concludes that updates to the Terms of Use constituted valid modifications of the contract that an Account Holder entered when they created an account with Celsius.

3. The Terms of Use Unambiguously Transfer Ownership of Earn Assets to the Debtors

[32] Having established that a valid contract was formed between the Debtors and its Account Holders, the Court's next inquiry is if the Terms of Use are unambiguous with respect to whether Account Holders retained ownership or transferred ownership of cryptocurrency assets by depositing the assets into Earn Accounts. A contract is unambiguous if "on its face [it] is reasonably susceptible of only one meaning." *Greenfield v. Philles Records*, 98 N.Y.2d 562, 570, 750 N.Y.S.2d 565, 780 N.E.2d 166 (2002). Under New York Law, contracts are interpreted and enforced in accordance with their plain meaning and their clear and unambiguous terms. *In re Condado Plaza Acquisition LLC*, 620 B.R. 820, 831 (Bankr. S.D.N.Y. 2020); *In re Lehman Bros. Holdings Inc.*, 439 B.R. 811, 825 (Bankr. S.D.N.Y. 2010) ("[T]he ultimate objective in interpreting an agreement is to determine "the intention of the parties as derived from the language employed.") (quoting *Tom Doherty Assocs. Inc. v. Saban Entm't Inc.*, 869 F. Supp. 1130, 1137 (S.D.N.Y. 1994)).

***18** Terms Version 1 does not contain any clauses regarding Celsius taking rights of ownership upon deposit of Earn Assets. (*See generally* Terms Affidavit, Ex. A-1.) Terms Versions 2–4 contains the following text that discusses ownership, but not transfer of title:

> In consideration for the rewards earned on your Account and the use of our Services, you grant

> Celsius the right, subject to applicable law, without further notice to you, to hold the Digital Assets available in your account in Celsius' name or in another name, and to pledge, re-pledge, hypothecate, rehypothecate, sell, lend, or otherwise transfer or use any amount of such Digital Assets, separately or together with other property, with all attendant rights of ownership .... You acknowledge that with respect to assets used by Celsius pursuant to this paragraph.
>
> (i) You may not be able to exercise certain rights of ownership.

(Terms Affidavit, Ex. A-4 § 14.)

Terms Version 5 introduced the transfer of title clause that has been the subject of scrutiny in this matter. Every version of the Terms of Use beginning with Terms Version 5 includes a clause that Account Holders "grant Celsius ... all right and title to such Digital Assets, including ownership rights" (the "Transfer of Title Clause"). (Terms Affidavit, Ex. A-5 § 14, A-6 § 13, A-7 § 13, A-8 § 13.) Account Holders who agreed to Terms of Use Version 5 or later, whether by signing up for the first time or by continuing to use the platform with an existing account, entered a contract which contained unambiguous and clear language regarding transfer of title and ownership of assets in Earn Accounts. At the hearing on this matter, Blonstein testified that 90% of Account Holders representing 99% of Earn Assets had assented to Terms Version 6 or later. (December 5, 2022 H'rg Tr. 103:3–7.) Thus, the Court finds that title to and ownership of all Earn Assets unequivocally transferred to the Debtors and became property of the Estates on the Petition Date.

The crux of many objections to the Amended Motion is that Celsius's ubiquitous use of the word "loan," "lending," and other variations sits in direct conflict with the singular clause transferring all title and rights of ownership to the Debtors. These responses argue that this creates an ambiguity within the four corners of the contract. But the use of the term "loan," or variations of that term, do not contradict transfer of ownership of cryptocurrency assets to Celsius. The Account Holders argue that a layperson's understanding of the term "loan" means the Account Holder retains ownership of their Earn Assets but temporarily allows the use of the assets by the Debtors [36] —but the Court cannot ignore the plain and clear language in the Transfer of Title Clause.

[33] **[34]** Further, even if the Court found that Account Holders loaned digital assets to Celsius, Account Holders would still be unsecured creditors. It is blackletter law that a loan of money or property to another creates a debtor-creditor relationship. *In re Masterwear Corp.*, 229 B.R. 301, 310 (Bankr. S.D.N.Y. 1999) ("Under New York law, a bank and its depositor stand in a debtor-creditor relationship that is contractual in nature. The bank owns the deposit, the depositor has a claim to payment against the bank, and the bank has a corresponding obligation to pay its depositor. Accordingly, a bank's temporary freeze of an account, without more, is 'neither a taking of possession of [the depositor's] property nor an exercising of control over it, but merely a refusal to perform its promise.' ") (internal citations omitted). And absent a perfected security interest in tangible or intangible property, in the event of the debtor's bankruptcy, the creditor holds only an unsecured claim. *See* *In re Motors Liquidation Company*, 430 B.R. 65, 96 (S.D.N.Y. 2010) ("Indeed, by definition, an unsecured creditor has no particularized property interest in the Debtors' estates."); *see also* 4 COLLIER ON BANKRUPTCY

***19** **[35]** **[36]** But, more importantly:

> By current definition, cryptocurrency is not money because it is not a medium of exchange created, authorized, or adopted by a domestic or foreign government, or by an intergovernmental organization or by agreement between two or more countries. Moreover, since cryptocurrency, NFTs and other digital assets are intangible and therefore not capable of possession, a security interest currently can be perfected only by the filing of a financing statement in

> the digital asset as a general intangible.

Lorraine S. McGowen, TRANSFERRING DIGITAL ASSETS (INCLUDING CRYPTOCURRENCIES) UNDER PROPOSED AMENDMENTS TO THE UNIFORM COMMERCIAL CODE, The Quarterly Journal of INSOL International, 4TH Quarter 2022, at 16 (discussing proposed amendments to the Uniform Commercial Code, creating a new Chapter 12 to govern the transfer (whether as a sale or as a financing) of digital assets, including cryptocurrency, digital tokens and non-fungible tokens).

[37] Thus, even if the parties' contract purports to provide the creditor with a security interest in property, unless the security interest is perfected under applicable non-bankruptcy law, a trustee can assert strong-arm power under section 544(a) of the Bankruptcy Code to avoid the lien. 11 U.S.C. § 544(a). *See also In re Castle Ventures, Ltd.*, 167 B.R. 758, 765 (Bankr. E.D.N.Y. 1994) ("However, section 544(a) of the Code, also referred to as the 'strong arm' clause, allows a trustee in bankruptcy to avoid liens and security interests against the debtor's estate which were not properly perfected under state law prior to the debtor's bankruptcy filing.").

Here, the language in the Terms of Use transferring all ownership interest to Celsius in the cryptocurrency assets deposited in the Earn Accounts makes it very clear that no ownership interest or lien in favor of the Account Holders was intended.[37] And certainly no lien in favor of the Account Holders was perfected. *U.S. v. Joyeros*, 410 F. Supp. 2d 121, 125 (E.D.N.Y. 2006) ("General, unsecured creditors lack a particularized interest in *specific* assets. [A]lthough general creditors can claim an interest in their debtors' estates, they cannot claim an interest in any *particular* asset that makes up that estate." (internal citation omitted) (emphasis added)); *see also In re Castle Ventures, Ltd.*, 167 B.R. at 765 ("If an unperfected security interest is avoided by the trustee, the secured creditor loses the lien and is reduced to the status of a general unsecured creditor.").

[38] To read the Terms of Use such that "loan" overrides the unequivocal language transferring title and ownership of assets deposited into Earn Accounts to Celsius would be to read the Transfer of Title Clause out of the contract entirely. As the Committee notes, "it is a bedrock principle of contract interpretation that courts should not adopt an interpretation of a contract that has the effect of rendering at least one clause superfluous or meaningless, but rather, to the extent possible, should seek to read contractual provisions in harmony." (Committee Objection ¶ 6.)

***20** The Court can read "lend" in harmony with the Transfer of Title Clause, and the transfer of title and the creation of a loan are not mutually exclusive concepts. As an example, the Committee notes that, in the securities context, it is common for a loan of securities to a broker to also constitute a transfer of title thereto (or the incidents of ownership thereof) so that the broker can sell, lend, hypothecate, or rehypothecate the securities. (Committee Objection ¶ 6.) In that instance, title to the securities is transferred to the securities broker, and the securities broker has a contractual obligation to return equivalent securities (but not the exact same securities) to the initial transferor. (*Id.*)

Therefore, notwithstanding the frequent use of the word "loan" in the Terms of Use and the colloquial interpretation of a "loan" as a transaction in which the entity making the loan (here, the Account Holder) retains ownership over the asset being loaned (here, the cryptocurrency), the Terms Versions 5 and later are consistent and clear: Account Holders granted Celsius "all right and title to such Eligible Digital Assets, including ownership rights." (Terms § 13.)

B. Creditors' Rights with Respect to Defenses to Contract Formation and Breach of Contract Claims are Reserved for the Claims Resolution Process

Many of the Creditors' Responses consist of (i) contract interpretation arguments that rely on extrinsic evidence,[38] which, as discussed *supra* at II.C., the Court may not consider; or (ii) individual circumstances that present colorable contract defense claims that may have merit in the claims resolution process, but do not bear on the question of title and ownership presented in the Amended Motion. Even

valid contract defenses would not necessarily give rise to Account Holders claims to ownership of the cryptocurrency assets they deposited.

A common concern raised by Creditor Responses is that statements by former Celsius CEO, Alex Mashinsky, influenced Account Holder decisions to join Celsius, keep coins on Celsius's platform, and deposit additional assets. State responses further note that Celsius may have violated state securities laws, rendering the entire contract void for all Account Holders. These parties could have colorable defenses to contract formation as individuals and as a group.

The Court takes seriously potential violations of state law and non-bankruptcy federal law, as well as the litany of allegations including, but not limited to, fraudulent inducement into the contract, fraudulent conveyance, breach of contract, and that the contract was unconscionable. These allegations may (or may not) have merit, and the creditors' rights with respect to such claims are explicitly reserved for the claims resolution process. But importantly, as a prerequisite to those claims, the Court first must establish that a contract was formed and must interpret the contract terms. In other words, a hypothetical determination that the Debtors breached the contract with an account holder or that Alex Mashinsky's statements fraudulently induced a creditor to open an account requires a preliminary finding that there was a contract between Celsius and the Account Holders and a determination of each party's rights and obligations under this contract. The Court makes that finding here. Specifically, the Court finds that there was a valid contract between Celsius Account Holders and Celsius and that the contract terms unambiguously transferred all right and title of digital assets to Celsius.

C. Stablecoins May Be Sold as an Approved Transaction Outside of the Ordinary Course of Business

***21** **[39]** **[40]** Because the Court finds that Earn Assets are property of the Estates, it follows that stablecoins, as a type of cryptocurrency among Earn Assets, also belong to the Estates. The Debtors seek to sell stablecoins in the ordinary course of business. The "ordinary course of business" standard was intended to allow a debtor in possession the flexibility required to run its business. *See* *In re Roth Am., Inc.*, 975 F.2d 949, 952 (3d Cir. 1992) ("The framework of section 363 is designed to allow a trustee (or debtor-in- possession) the flexibility to engage in ordinary transactions without unnecessary creditor and bankruptcy court oversight."). "Ordinary course of business" is not defined within the Bankruptcy Code.

In contrast, the Court may approve transactions which are not in the ordinary course of business if the debtor demonstrates a "sound business purpose" for the transaction. *See* 11 U.S.C. § 363(b)(1). It is unnecessary here to determine whether the sale of stablecoins will be in the ordinary course of business —particularly, now, that Celsius may not have any ordinary course of business. The Court finds that the Debtors have shown sufficient cause to permit the sale of stablecoins outside of the ordinary course of business and need not reach the question of whether the Debtors have shown that such a transaction is within the ordinary course of business.

A rare point of agreement among all parties is that the Debtors' liquidity is precipitously running out. [39] The Debtors need to generate liquidity to fund these Chapter 11 cases and continue down the path either of a standalone plan reorganization, a section 363(b) sale, or even a liquidation plan. The Debtors project that additional liquidity will be needed in early 2023. The Debtors demonstrate a sound business justification for selling stablecoins, and the Court agrees that it is appropriate to grants authority to do so.

IV. CONCLUSION

For the foregoing reasons, the Court finds that Earn Assets in Earn Accounts constitute property of the Estates, and that the Debtors may sell stablecoins outside of the ordinary course of business. The Court does not take lightly the consequences of this decision on ordinary individuals, many of whom deposited significant savings into the Celsius platform. As has been said repeatedly in this opinion, creditor's rights with respect to various defense to and breach of contract claims are reserved. Creditors will have every

opportunity to have a full hearing on the merits of these arguments during the claims resolution process.

IT IS SO ORDERED.

All Citations

--- B.R. ----, 2023 WL 34106

Footnotes

1 Numerous *pro se* creditors made or joined in objections. The names of these creditors are identified in footnotes 4, 6, 8, 11, 14, 18, 20, and 22.

2 *Amended Motion for Entry of an Order (I) Establishing Ownership of Assets in the Debtors' Earn Program, (ii) Permitting the Sale of Stablecoin in the Ordinary Course and (iii) Granting Related Relief* ("Amended Motion," ECF Doc. # 1325).

3 On August 18, 2022, the United States Trustee filed a *Motion for Entry of an Order Directing the Appointment of an Examiner.* (ECF Doc. # 546.) On September 14, 2022, this Court entered an order directing the United States Trustee to appoint an examiner. (ECF Doc. # 820.) On September 29, 2022, the United States Trustee filed a Notice of Appointment. (ECF Doc. # 920.) That same day, this Court entered an order appointing an Examiner. (ECF Doc. # 923.)

4 "Gallagher Objection," ECF Doc. # 1416; Wohlwend Objection; "Little Objection," ECF Doc. # 1463; "Flora Objection," ECF Doc. # 1464; "Saraiva Objection," ECF Doc. # 1485; "Breher Joinder," ECF Doc. # 1486; "Ryals Objection," ECF Doc. # 1490; "McLean Objection," ECF Doc. # 1491; Tornetta Joinder; "Hoffing Objection," ECF Doc. # 1506; "Pinto Joinder," ECF Doc. # 1499; "Herrmann Omnibus Objection," ECF Doc. # 1519; Frishberg Joinder; "Steadman Joinder," ECF Doc. # 1537; "Flora Joinder," ECF Doc. # 1538; "Jelbert Objection," ECF Doc. # 1545 (the Jelbert Objection was untimely).

5 Gallagher Objection; Saraiva Objection; Ryals Objection; McLean Objection; Tornetta Joinder; Pinto Joinder; Frishberg Joinder; Steadman Joinder; Flora Joinder.

6 Wohlwend Objection; Saraiva Objection; Breher Joinder; Tornetta Joinder; Pinto Joinder, "Georgiou Objection," ECF Doc. # 1517; Herrmann Omnibus Objection; Frishberg Joinder.

7 Saraiva Objection; Tornetta Joinder; Pinto Joinder; Frishberg Joinder.

8 "Tuganov Objection," ECF Doc. # 1495; Herrmann Omnibus Objection.

9 *Id.*

10 Ubierna Objection.

11 "Frishberg Objection," ECF Doc. # 1400.

12 Ryals Objection; McLean Objection; Tornetta Joinder; Pinto Joinder; Frishberg Joinder; Steadman Joinder; Flora Joinder.

13 Ryals Objection; McLean Objection; Tornetta Joinder; Pinto Joinder; Herrmann Omnibus Objection; Frishberg Joinder; Steadman Joinder; Flora Joinder.

14 "Medley Objection," ECF Doc. # 1507.

15 Altunbay Objection.

16 Ubierna Objection.

17 Gallagher Objection.

18 Gallagher Objection; Little Objection; Saraiva Objection; Ryals Objection, McLean Objection; Tornetta Joinder; Pinto Joinder; "Altunbay Objection," ECF Doc. # 1511; Frishberg Joinder; "Ubierna Objection," ECF Doc. # 1535; Steadman Joinder; Flora Joinder.

19 Frishberg Objection; Saraiva Objection; Pinto Joinder.

20 *See, e.g.,* Medley Objection; Altunbay Objection (asserting that the "clickwrap" style agreement is not enforceable because it was not in the Account Holder's native language, therefore the Account Holder could not fully understand the terms); "Romauld Objection," ECF Doc. # 1554 (same) (this objection was untimely); Georgiou Objection; Ubierna Objection.

21 Altunbay Objection.

22 "Crews Objection," ECF Doc. # 1515.

23 Issues required to be brought as an adversary proceeding under Fed. R. Bankr. P. 7001 include a "(1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002; (2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, but not a proceeding under Rule 3012 or Rule 4003(d); (3) a proceeding to obtain approval under § 363(h) for the sale of both the interest of the estate and of a coowner in property; (4) a proceeding to object to or revoke a discharge, other than an objection to discharge under §§ 727(a)(8),1 (a)(9), or 1328(f); (5) a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan; (6) a proceeding to determine the dischargeability of a debt; (7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief; and (8) a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination; (9) a proceeding to obtain a declaratory judgment relating to any of the foregoing; or (10) a proceeding to determine a claim or cause of action removed under 28 U.S.C. § 1452." Rule 7001(10), requiring an adversary proceeding to determine a claim or cause of action removed under 28 U.S.C. § 1452, is not relevant here.

24 *See Plazza v. Airbnb, Inc.*, 289 F. Supp. 3d 537, 548 (S.D.N.Y. 2018) ("Clickwrap agreements are generally defined by the requirement that Account Holders 'click' some form of 'I agree' after being presented with a list of terms and conditions. Browsewrap agreements, on the other hand, are usually found 'where a website's terms and conditions are ... posted on the website via a hyperlink at the bottom of the screen' and a Account Holder's assent is given merely by his or her use of the website and nothing more.") (internal citations omitted); *Uber Techs.*, 868 F.3d at 75 ("Some online agreements require the Account Holder to scroll through the terms before the Account Holder can indicate his or her assent by clicking 'I agree.' ") (citing *Berkson*, 97 F. Supp. 3d at 386, 398 (labeling such agreements "scrollwraps")).

25 *See also* *In re Coudert Bros.*, 487 B.R. 375, 393–94 (S.D.N.Y. 2013) ("Under New York law, it is [f]undamental to the establishment of a contract modification [that] proof of each element requisite to the formulation of a contract be shown.") (internal quotation marks omitted).

26 The Court notes that even if the Terms of Use indicated that coins were property of the customers, which they do not, as Debtors' counsel pointed out at the December 5, 2022 hearing "we do not have enough coin to give everybody their coin back in kind." (December 5, 2022 H'rg Tr. 109:21–24). Thus, even if the contract's terms conferred title on customers, customers would still not get back 100% of their coins. The Court is committed to overseeing a fair process that ensures that all creditors are made as whole as possible.

27 *See* Amended Motion § 16 ("For the avoidance of doubt, this Amended Motion does not seek findings with respect to (x) the ownership of assets in the Debtors' Custody Program, Withhold Accounts, or Borrow Program or (y) whether any Account Holder has valid defenses to the purported contract between Account Holders and the Debtors under the Terms of Use, and all parties' rights are reserved with respect to each of the foregoing.").

28 The Court makes no determination as to these security issues but notes that if Earn Assets are determined to be securities, it is likely that Earn Account holders would still be unsecured creditors. Section 510(b) of the Bankruptcy Code subordinates claims "arising from" the purchase or sale of a security to the claims of general unsecured creditors. 11 U.S.C. § 510(b). Thus, here to the extent that creditors argue that they have recission claims for the unlawful sale of security, these claims would likely squarely fall within the broad reach of section 510(b)'s claim "arising from" the purchase or sale of a security. 11 U.S.C. § 510(b); *see* *In re Worldcom, Inc.*, 329 B.R. 10, 14 (Bankr. S.D.N.Y. 2005) ("So long as the nature of the damage or harm complained of by a shareholder can be said to result as a consequence of his having purchased or sold share of stock or other securities of the debtor, the claimant falls within the scope of Section 510(b).")

29 Of the approximately 600,000 Account Holders listed on the Debtors schedules, 89% created accounts by first accepting Terms Version 5 or later, while 10% first accepted Terms 4 or earlier. (Original Blonstein Declaration ¶ 14.) The Debtors lack records for 1% of Account Holders. (*Id.*)

30 Ryals Objection ¶¶ 13–15 ("If the Terms of Use are determined to govern the relationship of the parties, it is evident from the language that any ultimate obligations of the Debtors' were illusory in nature ... The Debtors ... drafted the Terms of Use in such a way to create options and circumstances under which the Debtors could walk away from any obligation.); *id.* ("A contract lacks consideration when the obligation of one party is illusory, meaning only one side is bound to perform." (citing *Curtis Props. Corp. v. Greif Cos.*, 212 A.D.2d 259, 628 N.Y.S.2d 628, 632 (1st Dep't 1995)).

31 *See supra*, Terms Version 8 § 4.D. ("Our Earn Service allows you to earn a financing fee from Celsius, ... in exchange for entering into open-ended loans of your Eligible Digital Assets ....").

32 *See, e.g.,* Altunbay Objection.

33 *See* Amended Motion ¶ 36 ("Each historical iteration of the Terms of Use provided that the Debtors could amend the Terms of Use by posting them to their website, that the amended terms would replace the prior terms, and that continued use of the Debtors' services following such posting would be deemed consent to the updated terms.").

34 "Do any of the objectors wish to offer evidence in support of their objections? ... Hearing no response, the Court determines that the objectors have rested as well." (December 5, 2022 H'rg Tr. 103:20–23.)

35 New York law also strictly limits the use of extrinsic evidence to prove the proper interpretation of a contract. *See, e.g.*, *Topps Co. v. Cadbury Stani S.A.I.C.*, 526 F.3d 63, 69 (2d Cir. 2008) ("New York's parol evidence rule generally bars admission of extrinsic evidence to vary or contradict the terms of a fully integrated writing.").

36 The Vermont Objection observes that the Terms of Use uses the term "loan" to describe the transaction between the Account Holder and the Debtors even in the clause purportedly transferring ownership to Celsius: "You grant Celsius ... for the duration of the period during which the Digital Assets are *loaned* to us ... all right and title to such Digital Assets, including Ownership rights." (Vermont Objection (citing Terms Versions 6–8 (emphasis added).)

37 *See* Terms of Use Version § 4.D (not granting a security interest to users and, to the contrary, providing that "once such Eligible Digital Assets are received by Celsius ... they shall be Celsius' property, in every sense and for all purposes.")

38 Moreover, the objecting parties did not submit evidence at the December 5, 2022 hearing. The evidence admitted includes the Ferraro Declaration, Campagna Declaration, Original Blonstein Declaration, Supplemental Blonstein Declaration, and the Terms Affidavit. No other evidence was offered.

39 *See, e.g.,* U.S. Trustee Objection; Campagna Declaration at 19. To the extent the U.S. Trustee argues that the Debtors' do not face a liquidity crisis and have not established cause to sell stablecoin, that objection is overruled.

In re Voyager Digital Holdings, Inc.

United States Bankruptcy Court for the Southern District of New York

August 5, 2022, Decided

Chapter 11, Case No. 22-10943 (MEW) (Jointly Administered)

Reporter
2022 Bankr. LEXIS 2178 *; 2022 WL 3146796

In re: VOYAGER DIGITAL HOLDINGS, INC. et al., Debtors.

Core Terms

Customer, Cryptocurrency, funds, cases, insolvency proceedings, rights, deposit

Case Summary

Overview

HOLDINGS: [1]-The customers should be permitted to withdraw funds actually held for them in the two "for the benefit of" accounts at the bank because such funds were not property of the debtors' bankruptcy estates under *11 U.S.C.S. § 541* as the debtors did not have either legal title or equitable interests to the funds in the "for the benefit of" accounts.

Outcome

Motion to permit withdrawals granted.

Counsel: [*1] For Voyager Digital Holdings, Inc., Debtor: New York, NY; Joshua Sussberg, Kirkland & Ellis LLP, New York, NY.

For United States Trustee, U.S. Trustee: Richard C. Morrissey, Office of the U.S. Trustee, New York, NY.

For Official Committee Of Unsecured Creditors, Creditor Committee: Darren T. Azman, McDermott Will & Emery LLP, New York, NY.

Judges: Honorable Michael E. Wiles, United States Bankruptcy Judge.

Opinion by: Michael E. Wiles

Opinion

DECISION AS TO MOTION TO PERMIT WITHDRAWALS BY CUSTOMERS OF FUNDS HELD IN FBO ACCOUNTS AT METROPOLITAN COMMERCIAL BANK

Voyager Digital Holdings, Inc. and its affiliated debtors and debtors-in-possession in these cases (the "Debtors") have filed a motion seeking, among other things, to permit customers to withdraw funds from two "for the benefit of" (or "FBO") accounts held at Metropolitan Commercial Bank ("MC Bank"). The Debtors argued, among other things, that the funds that are actually on deposit in the FBO accounts belong directly to Voyager's customers and are not property of the Debtors' bankruptcy estates. The Official Committee of Unsecured Creditors (the "Committee"), and MC Bank, have filed papers in support of this request for relief, and no party in interest has opposed **[*2]** the relief. During a hearing on the motion held on August 4, 2022 (the "Hearing"), the Committee and MC Bank concurred with the Debtors' contentions that the funds in the relevant bank accounts belong to customers and are not property of the estates.

The Customer Agreement that governs the Debtors' relationships with customers, as updated through January 7, 2022, was submitted as an attachment to the Debtors' motion. [ECF No. 73.] The Customer Agreement has different provisions regarding the manner in which cash and cryptocurrency will be held. With respect to cash, paragraph 5(A) of the Customer Agreement states that customers may deposit cash that will be held in an omnibus account at MC Bank. More particularly, it states:

> Cash deposited into the Customer's Account is maintained in an omnibus account at Metropolitan Commercial Bank (the "Bank"), which is a member of the Federal Deposit Insurance Corporation ("FDIC"). Voyager maintains an agreement with the

> Bank whereby the Bank provides all services associated with the movement of and holding of USD in connection with the provision of each account. Therefore, each Customer is a customer of the Bank. All U.S. regulatory obligations **[*3]** associated with the movement of, and holding of, USD in connection with each Account are the responsibility of the Bank. For purposes of clarity, any services pertaining to the movement of, and holding of, USD are not provided by Voyager or its Affiliates. Cash in the Account is insured up to $250,000 per depositor by the FDIC in the event the Bank fails if specific insurance deposit requirements are met.

See Customer Agreement, ¶ 5(A).

Different arrangements were set forth with respect to cryptocurrencies. Paragraph 5(C) of the Customer Agreement states that "Customer authorizes and instructs Voyager to hold Customer's Cryptocurrency . . . on its behalf. Customer understands that Voyager may hold Customer's Cryptocurrency together with the Cryptocurrency of other Voyager customers in omnibus accounts or wallets." *Id.* ¶ 5(C). The same paragraph then warns that the treatment of such cryptocurrency holdings in the event of an insolvency proceeding was uncertain:

> In the event that Customer, Voyager or a Custodian become subject to an insolvency proceeding it is unclear how Customer Cryptocurrency would be treated and what rights Customer would have to such Cryptocurrency. How an insolvency **[*4]** court would characterize and treat Customer Cryptocurrency is a highly fact-depending inquiry that necessarily depends upon the circumstances of each individual case. In addition, within the U.S. there is notably little case law addressing insolvency proceedings involving Cryptocurrency. As such, the law governing the likely treatment of Customer Cryptocurrency in the event of a Customer, Voyager or Custodian insolvency proceeding remains largely unsettled. Voyager does not make any representation as to the likely treatment of Customer Cryptocurrency in the event of a Customer, Voyager, or Custodian insolvency proceeding whether in the U.S. or in any other jurisdiction. Customer explicitly understands and acknowledges that the treatment of Customer Cryptocurrency in the event of a Customer, Voyager or Custodian insolvency proceeding is unsettled, not guaranteed, and may result in a number of outcomes that are impossible to predict, including but not limited to Customer being treated as an unsecured creditor and/or the total loss of all Customer Cryptocurrency.

Id. ¶ 5(C). Paragraph 5(D) then specified that cryptocurrency would be held in Voyager's own name, and granted certain rights **[*5]** to Voyager with respect to the use, lending, "staking" and rehypothecation of such cryptocurrency, "with all attendant rights of ownership:"

> Customer grants Voyager the right, subject to applicable law, without further notice to Customer, to hold Cryptocurrency held in Customer's Account in Voyager's name or in another name, and to pledge, repledge, hypothecate, rehypothecate, sell, lend, stake, arrange for staking, or otherwise transfer or use any amount of such Cryptocurrency, separately or together with other property, with all attendant rights of ownership, and for any period of time and without retaining a like amount of Cryptocurrency, and to use or invest such Cryptocurrency at Customer's sole risk.

Id. ¶ 5(D). The Debtors have contended that, pursuant to these terms, customers have only the rights of general unsecured creditors with respect to their cryptocurrency holdings. That particular contention has not been challenged at this stage of these cases and is not before the Court in connection with the present motion.

At the request of the Court the Debtors also filed copies of the agreements that govern the FBO accounts at MC Bank. [ECF No. 145.] One such agreement is the "FBO **[*6]** Account Payment Services Agreement," executed in 2019. The recitals to that agreement state that Voyager wishes to promote services to the public that entail "access to the payment system and a depository institution to hold USD denominated funds" and that the Bank desires to "support a program" under which "Bank provides cash management and payment concentration services through a custodial 'for the benefit of' or 'FBO' account established by and at the Bank." *See* FBO Agreement, p. 1. For that purpose, the Bank appointed Voyager as the Bank's representative to "market, offer and sell crypto currency exchange services." *Id.* ¶ 2.1. Voyager agreed to open FBO pooled accounts that would hold "all funds that the Customers remit to Bank . . ." *Id.* ¶ 3.4(a). The parties also agreed that "[f]or clarity, at no time shall [Voyager] or any Licensee ever collect, hold, or remit any Customer Program funds." *Id.* ¶ 3.6.

The FBO Agreement further stated that the Bank would be the "holder" of the FBO accounts through which funds sent by customers would be held. *Id.* ¶ 6.2. As a practical matter, Voyager gave instructions to the Bank with respect to movements of funds, and the FBO accounts were reconciled **[*7]** each business day. Voyager took responsibility for all expenses and losses resulting from fraud or certain processing errors. *Id.* ¶ 8.2. The Bank reserved rights of setoff against certain other accounts held in Voyager's name in the event of a breach of Voyager's obligations. *Id.* ¶ 8.4.

Voyager and MC Bank also executed an "ACH Origination Agreement" in 2018. It does not appear that this agreement has any terms that pertain to the ownership of the funds contained in the FBO accounts.

The Court also asked the Debtors to file copies of sample bank statements. [ECF No. 189.] The bank statements for the main FBO Account were issued in the name of "Metropolitan Commercial Bank FBO Voyager Customers." The statement for the other FBO account, used to handle wire transfers rather than ACH transfers, was issued in the name of "FBO Voyager Wires." Other accounts that Voyager held with MC Bank were stated to be in the names of various Voyager entities themselves.

During the course of the Hearing the Court asked the Bank to confirm whether it agreed that Voyager's customers were customers of the Bank for purposes of the cash held in the FBO accounts. The Bank's counsel did not wish to adopt that **[*8]** characterization, since the Bank did not have direct dealings and relationships with Voyager's customers. However, the Bank acknowledged that "FBO" accounts generally hold funds that are administered by one entity but that belong to someone else. The Bank also agreed that customers whose funds are held in such accounts have the benefit of FDIC insurance in the event of a failure by the bank. The Bank also confirmed that pursuant to the terms of the FBO Agreement Voyager itself is not permitted to hold or to take ownership of customer funds.

The FBO agreement included a number of terms that were capitalized but that were not defined, and it referred to the need for authorization by MC Bank of various "Programs" that apparently were not separately described or authorized. However, the Bank and Voyager assured the Court that all relevant agreements and documents had been provided.

The Debtors have argued that the Debtors have no legal or equitable rights to the funds in the FBO accounts. They have further contended that even if the Debtors had legal title to the funds in the FBO accounts that would be insufficient to permit those funds to be treated as property of the Debtors' estates, **[*9]** since the Debtors have no equitable or beneficial interests in such funds. The Debtors have cited numerous authorities in support of those propositions. [ECF No. 73]. It appears to the Court, based on the agreements cited above, that the Debtors do not have either legal title or equitable interests to the funds in the FBO accounts. No party in interest has argued to the contrary. The Debtors had administrative rights to direct cash movements, but that is all. The funds held in the FBO accounts therefore are not "property of the estate." *See* *11 U.S.C. § 541*.

Based on the foregoing, and for the reasons stated at the Hearing, the Court has determined that customers should be permitted to withdraw funds actually held for them in the two FBO accounts at MC Bank, and that such funds are not property of the Debtors' bankruptcy estates. A separate Order that has granted this and other relief has been entered by the Court.

One final word of caution: I am aware that the treatment of cash and cryptocurrency in this and similar cases is a subject of avid interest among investors and insolvency attorneys, and that similar issues may arise in other cases. These chapter 11 cases are somewhat unusual, in that the **[*10]** overwhelming percentage of claims are held by customers, with very few other creditors. As a result, there really were no parties before the Court who had any strong financial interests in disputing the relief sought with respect to the FBO accounts, or in presenting any competing arguments or facts as to how the funds in the FBO accounts should be treated. Other courts who may be presented with similar issues therefore should understand, not only that my decision in this case is based on the particular agreements that have been presented to the Court, but also that my decision has been rendered without the kind of vigorous opposition by competing creditors that may be present in other cases. This decision is not intended to be a ruling as to the rights that customers might have in cryptocurrency cases generally, or as a ruling on any issues that competing creditors might raise in other cases.

Dated: New York, New York

August 5, 2022

/s/ **Michael E. Wiles**

Honorable Michael E. Wiles

United States Bankruptcy Judge

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AMERICAN BANKRUPTCY INSTITUTE
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Consumer Counterpoint

BY AMANDA WIESE

Cryptocurrency Is Currency

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Cryptocurrency, and its poster child Bitcoin, seem to be everywhere these days, but it is nothing new: According to one description, "Bitcoin is the first implementation of a concept called 'cryptocurrency,' which was first described in 1998 by Wei Dai on the cypherpunks mailing list, suggesting the idea of a new form of money that uses cryptography to control its creation and transactions, rather than a central authority."[1] Bitcoin has become synonymous with cryptocurrency, but it is just one of thousands of other cryptocurrencies in existence.[2] Like other cryptocurrencies, Bitcoins can be used to make anonymous purchases and are not tied to any country, and are therefore not subject to regulation. They are typically stored in a "digital wallet" that acts as a virtual bank account, allowing the sending and receiving of cryptocurrency.[3]

Cryptocurrency might seem eccentric, but it has hit the mainstream,[4] and bankruptcy practitioners have to be cognizant of how it can impact their clients, whether debtor or creditor. Right now, cryptocurrency in the bankruptcy arena is a mystery. Few courts have even addressed cryptocurrency, and even fewer courts have provided guidance on how it should be treated and administered in bankruptcy. It seems that the first question that needs answered is whether cryptocurrency is currency or a commodity. As the name implies, cryptocurrency is currency and should be treated as such in bankruptcy.

Why is it so important to classify cryptocurrency? It is likely part of the bankruptcy estate. Pursuant to § 541 of the Bankruptcy Code, all of a debtor's legal and equitable interest in property as of the filing of the bankruptcy petition and commencement of the bankruptcy case becomes property of the bankruptcy estate.[5] The bankruptcy estate is purposely broad; the Seventh Circuit Court of Appeals has stated that "every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of § 541."[6] In addition, the Internal Revenue Service (IRS) "has defined cryptocurrency as an 'intangible asset' for investors, making it subject to capital gains and loss treatment using the realization method."[7] If owned by a debtor, cryptocurrency is certainly an asset of the bankruptcy estate — so why will bankruptcy courts not address it?

A recent law review article reflected on *In re HashFast Technologies LLC* as a missed opportunity for bankruptcy law to define cryptocurrency.[8] In that case, Dr. Marc Lowe was paid a commission amounting to $308,000 by Hashfast Technologies, a Bitcoin mining technology company, for his marketing services.[9] Dr. Lowe's commission was paid with 3,000 Bitcoins rather than U.S. currency.[10] After the company filed for bankruptcy, the chapter 11 trustee sought to avoid the payment to Dr. Lowe as a fraudulent transfer, seeking to recover the Bitcoin itself, or the Bitcoin's current value, and arguing that the Bitcoin should be treated as "a commodity, like gold, silver or pork belly, that fluctuates in price based upon market conditions."[11]

Competing summary-judgment briefs cited numerous authorities to support their respective positions, including the Commodities Futures Trading Commission, IRS guidance, the Treasury Department's Financial Crimes Enforcement Network, the Consumer Financial Protection

1 "Frequently Asked Questions," Bitcoin, *available at* bitcoin.org/en/faq (unless otherwise specified, all links in this article were last visited on June 28, 2021).
2 There are more than 4,000 cryptocurrencies as of 2021. Jacquelyn Bulao, "44 Amazing Cryptocurrency Statistics You Need to Know," TechJury, *available at* techjury.net/blog/cryptocurrency-statistics/?nowprocket=1.
3 Erin Jane Illman & Robert A. Cox, Jr., "Bitcoin and Bankruptcy: Why Creditors and Bankruptcy Practitioners Need to Understand Cryptocurrencies," *WestLaw Journal Bankruptcy* (Dec. 14, 2017).
4 A post on Bitcoin surfaces on social media every three seconds. *See* Bulao, *supra* n.2.
5 11 U.S.C. § 541(a)(1); *Fowler v. Shadel*, 400 F.3d 1016, 1018 (7th Cir. 2005).
6 *In re Yonikus*, 996 F.2d 866, 869 (7th Cir. 1993).
7 *See* Illman & Cox, *supra* n.3.
8 Megan McDermott, "The Crypto Quandary: Is Bankruptcy Ready?," 115 *Nw. U. L. Rev.* 1921 (2021).
9 *In re Hashfast Techs. LLC*, Ch. 11 No. 14-30725 (Bankr. N.D. Cal. 2014).
10 The value of the Bitcoins was now more than $1 million. *See* McDermott, *supra* n.8.
11 *Id.* at 33.

Bureau and the Securities and Exchange Commission.[12] Rather than take the critical first step toward developing a working approach to cryptocurrency in bankruptcy, the court issued a narrow ruling rejecting Dr. Lowe's argument that cryptocurrency should be treated as the equivalent of U.S. dollars.[13] The court felt there was no need to further address the issue, as the trustee had not yet established his claim for avoidance.[14]

Black's Law Dictionary defines "currency" as "an item (such as coin, government note, or banknote) that circulates as a medium of exchange."[15] If the belief that currency must be a tangible item is giving you pause, recall that banks do not mail cash to Starbucks when making a payment via a debit card and that the paycheck that you mobile-deposited puts cash in your account that you may never physically hold. Cryptocurrency, like currency, can be exchanged for goods and services, is circulated internationally, and can be exchanged for U.S. dollars.[16] In addition, an increasing number of major retailers are beginning to accept cryptocurrency such as Bitcoin as an acceptable form of payment.[17]

One of the strongest arguments against categorizing cryptocurrency as currency is that it is not issued by any government and does not have any intrinsic value. However, "government-issued paper currency arguably has no intrinsic value either, rather its value is a manifestation of the public's perception that others will view the paper currency as valuable and thus will trade other things of value for it."[18] Similar to currency, cryptocurrency is valuable because we deem it valuable; the rectangular piece of paper it is printed on is of no value at all. A commodity, on the other hand, is defined as "an article of trade or commerce. The term embraces only tangible goods, such as products or merchandise, as distinguished from services."[19] If anything, the cryptocurrency mining rigs are the valuable tangible goods that give cryptocurrency their value, not the cryptocurrency itself.[20]

Missed opportunity, you say? Yes. Since *In re Hashfast Technologies LLC*, bankruptcy law has come no closer to defining cryptocurrency than to say it is not U.S. dollars. Dr. Lowe wanted his Bitcoin to be classified as currency because the trustee would have been limited in his recovery to only $300,000 rather than the more than $1 million, the amount to which the Bitcoin had appreciated in value.[21] Cryptocurrency, as currency, offers substantial benefits to the administration of the bankruptcy estate and would likely put debtors in a better position with creditors, because, after all, the honest-but-unfortunate debtor is whom the Bankruptcy Code aims to protect.[22]

In re Hashfast Technologies LLC is just one example of how categorizing cryptocurrency as currency could positively impact a debtor's bankruptcy estate.[23] The Code already offers increased protection to currency, including certain immunities from the automatic stay and protection from being deemed a constructive fraudulent transfer thanks to swap agreements.[24] As currency, the exchange of cryptocurrency for U.S. dollars or other governments' currencies would also be considered swaps.[25]

Section 546(g) protects swaps by prohibiting the trustee from avoiding preferential transfers made before filing for bankruptcy, unless the transferor actually intended to hinder, delay or defraud creditors.[26] Therefore, parties in swaps may engage in lawful prebankruptcy planning to optimize creditors' claims and the debtor's fresh start without fearing that these transfers will be deemed fraudulent and thus reversed.[27] In addition, § 560 provides that contractual rights of swap participants to liquidate, terminate or accelerate a swap agreement cannot be suspended by the automatic stay or otherwise limited by the Code, a court or an administrative agency.[28] If classified as swaps, despite the automatic stay, any party to such a transaction could sue to enforce the provisions of the parties' contract and offset any debts owed between the parties.[29]

These protections would limit litigation surrounding cryptocurrency and expedite the administration of bankruptcy estates that include such assets.[30] Establishing cryptocurrency as currency under bankruptcy law creates challenges for the administration of the bankruptcy estate, but given the current framework for currency in bankruptcy law, and the typically debtor-friendly Bankruptcy Code, such classification is warranted. abi

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12 *Id.* at 33-34.
13 *Id.* at 34.
14 *Id.*
15 "Currency," *Black's Law Dictionary* (10th ed. 2014).
16 Chelsea Deppert, "Bitcoin and Bankruptcy: Putting the Bits Together," 32 *Emory Bankr. Dev. J.* 123 (2015).
17 Emily Nicolle, "It's Not Just Tesla that Will Take Bitcoin — These Shops Will Take Your Payment in Crypto too," *Financial News* (March 21, 2021), *available at* fnlondon.com/articles/its-not-just-tesla-that-takes-bitcoin-heres-a-list-of-retailers-accepting-payment-in-crypto-20210312.
18 Deppert, *supra* n.16 at 132.
19 "Commodity," *Black's Law Dictionary* (10th ed. 2014).
20 Deppert, *supra* n.16 at 132.
21 Under current bankruptcy law, if deemed to be a fraudulent transfer, the trustee would have been entitled to either the Bitcoins themselves or the value of the Bitcoins as of the date of bankruptcy filing. 11 U.S.C. § 550.
22 Cryptocurrency is extremely volatile and could lead to opportunistic debtor behavior that could ultimately lead to less funds for creditors. McDermott, *supra* n.8 at 35.
23 Less liability for the debtor means that more creditors can be paid from the assets of the bankruptcy estate.
24 11 U.S.C. §§ 362(b), 546(g) & 560.
25 Deppert, *supra* n.16 at 131.
26 11 U.S.C. §546(g).
27 Deppert, *supra* n.16.
28 11 U.S.C. § 560.
29 Deppert, *supra* n.16 at 148.
30 Treatment of currency under the Bankruptcy Code is already codified. There would likely be minimal litigation needed to clarify how cryptocurrency fits within that framework and less litigation between parties to determine the appropriate debtor/creditor treatment.

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Lien on Me

By Adam Back

Uniformity Is Coming to Crypto-Backed Transactions

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As the role of cryptocurrency continues to evolve in the commercial world, the Uniform Law Commission (ULC) and the American Law Institute (ALI), the sponsors of the Uniform Commercial Code (UCC), have taken thoughtful, meaningful action to address a key question: How can an interest in cryptocurrency be created and perfected in a uniform way as cryptocurrency's role on the global stage expands? Cryptocurrency is a type of virtual currency that tracks transactions on a distributed ledger, such as a blockchain, via cryptography.[1] Bitcoin, Ether and Litecoin are types of cryptocurrency. Approximately 16 percent of American adults have used or invested in cryptocurrencies,[2] and its adoption rate in the U.S. and around the world is expected to increase due to the improving ease of and comfort with transactions, security and potential privacy benefits and use as a means to diversify investment portfolios.

In recognition of the changing virtual currency landscape and other emerging technologies, the ULC and ALI formed a joint committee in 2019 to study issues and later draft amendments to the UCC centered on digital assets, bundled transactions and payments.[3] In July 2022, the ULC and ALI approved amendments to the UCC that address a host of matters related to digital assets, including the acquisition of security interests in virtual currency.[4] As states begin to adopt these amendments, there will eventually be more certainty and consistency when taking, perfecting and challenging secured claims against these assets at a time when their presence and importance continues to grow.

Currently, there are two prevailing ways to perfect an interest in cryptocurrency.[5] First, the cryptocurrency could be deemed a "financial asset"[6] by the parties giving and receiving an interest in the virtual currency so that the indirect holding system set out in Article 8 of the UCC may apply. This method requires the custodian or third-party entity that actually holds the virtual currency to meet two requirements. The custodian or third-party entity must (1) consent to the classification of the virtual currency as investment property; and (2) be a "securities intermediary"[7] that will comply with "entitlement orders,"[8] which gives control of the virtual currency to the entitlement party (*i.e.*, effectively, the secured party).

At its core, the custodian's involvement tracks UCC 8-503(a), which describes the ownership interest of a customer whose property is held by a third party, such as an exchange, when there is an agreement that the property is a financial asset. While effective, perfection via Article 8 can have practical limitations. These include its "opt-in" requirement and the additional drafting that is typically needed to document the transaction. Custodians also are

1 IRS Notice 2014-21 (April 14, 2014).
2 "President Biden to Sign Executive Order on Ensuring Responsible Development of Digital Assets," White House (March 9, 2022), *available at* whitehouse.gov/briefing-room/statements-releases/2022/03/09/fact-sheet-president-biden-to-sign-executive-order-on-ensuring-responsible-innovation-in-digital-assets (unless otherwise specified, all links in this article were last visited on Oct. 24, 2022).
3 "Uniform Commercial Code and Emerging Technologies," Uniform Law Comm'n Jan. 28-29, 2022, Comm. Meeting, *available at* uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c7232d9c-6f39-0576-935e-8ad76333240f&forceDialog=0, p. 1 (discussing formation and work of Joint Committee appointed by ULC and ALI).
4 "Uniform Commercial Code and Emerging Technologies," Uniform Law Comm'n (June 30, 2022), *available at* uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=67fe571b-e8ad-caf8-4530-d8b59bdca805&forceDialog=1.
5 Some states have enacted legislation that addresses perfection and priority issues concerning virtual currency via amendments to their version of Article 9 of the UCC. For example, Wyoming amended its Article 9 in July 2019 to create a variety of laws dealing with digital assets, specifically including virtual currency. *See* Wyo. Stat. 34-29 (2022). In addition, Arkansas (HB 1926, effective July 28, 2021), Texas (HB 4474, effective Sept. 1, 2021), Indiana (HB 351, effective March 14, 2022) and other states have recently addressed the creation of Article 9 security interests in virtual currency. However, the UCC choice-of-law rules in Article 9 often apply and likely do not consistently result in the application of the UCC from one of the jurisdictions that have specifically addressed security interests in virtual currency.
6 U.C.C. § 8-102(a)(9)(iii).
7 U.C.C. § 8-102(14).
8 U.C.C. § 8-102(8).

reluctant to face the potential application of other Article 8 provisions and possibly other federal law.

Second, a secured creditor can perfect an interest in cryptocurrency by filing an appropriate UCC-1 financing statement. Virtual currency, including cryptocurrency, is regularly considered personal property,[9] meaning that Article 9 of the UCC would apply as to the creation of a security interest. More specifically, most practitioners and commentators agree that virtual currency is a "general intangible,"[10] which is essentially a catch-all classification for personal property that does not fall within the more definite descriptions of property found elsewhere in Article 9. A valid security interest must first attach to a general intangible,[11] and to perfect this security interest, a secured creditor must file in the correct jurisdiction a financing statement that identifies the debtor and describes the collateral.[12]

Perfection via filing for virtual currency poses practical problems for secured parties. When using this method, a secured creditor must rely on the borrower to provide the private key that controls access to the cryptocurrency.[13] The secured creditor also must continue to monitor for (1) post-closing events such as the location of debtor, and (2) for release or subordination of earlier-filed financing statements that include general intangibles as part of the collateral.

Under the 2022 amendments to the UCC, the new Article 12 is the starting point for creating and perfecting an interest in cryptocurrency. Article 12 governs property rights in a "controllable electronic record" (CER), which is a record of information in electronic form that may be subject to "control" but is not certain, expressly listed property (such as electronic money or a deposit account),[14] which is defined and discussed elsewhere in the UCC.[15]

Control is the litmus test for Article 12. If an electronic record is not subject to control as defined in Article 12, then Article 12 does not apply to that electronic record. The test for control is met if a party can demonstrate (1) "the power to avail itself of substantially all of the benefit" of the CER; (2) the exclusive power to prevent others from doing so; and (3) the exclusive power to transfer control to another person.[16] In addition, a party that controls a CER must be identifiable, which could be by name, cryptographic key or otherwise, such as having those powers discussed in UCC 12-105(a).[17] The specific electronic records excluded from the definition of CER in Article 12 are governed elsewhere in the UCC or by law outside of the UCC, such as the Uniform Electronic Transaction Act or E-SIGN. While the definition of CER does not specifically note virtual currency — in fact, the terms "virtual currency" and "cryptocurrency" are not found in the UCC amendments at all — it is clear that CERs include cryptocurrency.[18]

Third parties, like wallet companies that store private cryptographic keys for owners, are essential when dealing with cryptocurrency, but their involvement could complicate an analysis focused on control. Since it is the cryptographic key that allows an entity to send, receive and spend cryptocurrency, it could be reasonable to argue that whoever has the cryptographic key controls the cryptocurrency. Fortunately, the drafters appreciated the practical reality of owning and transferring cryptocurrency — and other emerging technology assets — and specifically addressed the concept of exclusivity as it relates to control in Article 12.

The UCC amendments make clear that a power can be exclusive for CER purposes, even if the power is to be shared with another entity (*e.g.*, a multi-signature wallet) or the protocol built into the system where the CER is recorded requires a change to occur automatically.[19] An entity may also have the requisite control through another if there is proper acknowledgement of one acting on behalf of the other.[20] A contractual agreement would suffice for this purpose.[21]

A security interest in cryptocurrency or other CER may be perfected under amended Article 9 through two different means: filing a financing statement or obtaining control of the electronic record. The normal, existing rules regarding attachment continue to apply. Filing is an appropriate means of perfecting, since a CER is a general intangible under Article 9, and perfection by filing remains acceptable as described herein.[22] In fact, the amendments would not necessitate a new filing statement to perfect an interest in cryptocurrency since the cryptocurrency remains a general intangible.

Amended Article 9 now permits perfection by control of a CER. Control is determined pursuant to UCC 12-105.[23] Perfection by control is akin to possession, and accordingly, it is given a higher priority than simple notice via a filing statement. The amended UCC specifically provides that perfection via control takes priority over interests perfected by filing a financing statement.[24]

Article 12 allows a "qualifying purchaser" to acquire cryptocurrency or another CER "free of a claim of a property right,"[25] which may include a perfected security interest. A qualifying purchaser of a CER or an interest in it must provide value, in good faith, and without notice of a property right in the CER.[26] The qualifying purchaser protections should operate like the "take-free" protections in Article 8.[27]

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9 For example, the Internal Revenue Service classifies virtual currency as property for federal income tax purposes. I.R.S. Notice 2014-21 (April 14, 2014).

10 U.C.C. § 9-102(a)(42).

11 U.C.C. § 9-203(b).

12 U.C.C. §§ 9-502 and 9-516.

13 A private key is similar to a password that is necessary to access the cryptocurrency and should not be shared. In contrast, a public key is the means to make transactions and is publicly seen on the blockchain. The public key is matched with the private key to verify that the owner is who it is portrayed to be allowing transactions to occur.

14 U.C.C. § 12-102(a)(1).

15 Notably, "CERs are defined to include not only assets created using today's distributed ledger or 'blockchain' technology, but also any assets that may function similarly using future technologies." Uniform Law Comm'n, Overview of 2022 Amendments to the Uniform Commercial Code — Emerging Technologies, p. 1, *available at* uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=a116549b-6067-5f82-83ac-3501c7ad882d&forceDialog=1.

16 U.C.C. § 12-105(a).

17 U.C.C. § 12-105(b).

18 *See supra* n.1, at p. 4 (noting that Bitcoin is a "prototypical controllable electronic record").

19 U.C.C. § 12-102(b).

20 U.C.C. § 12-102(e).

21 The UCC also makes clear that absent an agreement or other law, an acknowledgment that an entity maintains control for the benefit of another does not owe any duty to the benefiting party. U.C.C. § 12-105(g). This provision should alleviate concerns about acknowledging control by another for UCC purposes, since that action alone will not expose a party to claims that might otherwise be made, such as claims based on fiduciary duties.

22 U.C.C. § 9-312A.

23 U.C.C. § 9-107A.

24 U.C.C. § 9-326A.

25 U.C.C. § 12-104(e).

26 U.C.C. § 12-102(a)(2).

27 *See, inter alia*, U.C.C. § 8-303, which defines a "protected purchaser" as a purchaser of certificated or uncertificated security who (1) gives value, (2) does not have notice of any adverse claim to the security and (3) obtains control of the certificated or uncertificated security.

Since the new method of perfection — control — trumps perfection via filing, parties that have perfected security interests in cryptocurrency under Article 9 will want to know how quickly the proposed amendments take effect once they are adopted in their jurisdiction. Moreover, a party that is perfected and senior in cryptocurrency via filing prior to enactment of the amendments could find itself junior to a party that has control, which does not perfect an interest in cryptocurrency at all prior to enactment. The ULC and ALI recognize that parties need a meaningful opportunity to protect their positions and to plan for transactions that will be completed after the effective date.

For this reason and because different states will surely enact changes at various times, the UCC amendments do not include a consistent effective date. However, the rules do provide a uniform "adjustment date," which would operate to hold the priority established before the effective date of the amendments for a reasonable period of time. In Annex A to the proposed UCC amendments, the legislative note suggests that each state should adjust the date in certain statutes so that the parties have at least one year from the date that the amendments take effect to address any concerns occasioned by the changes, specifically including the changes to the priority scheme.

The UCC amendments go a long way toward addressing the lingering issues and concerns about the role of cryptocurrency as collateral, and not a moment too soon. As states begin enacting these changes and case law develops around them, familiarity and comfort with cryptocurrency will continue apace. With the changes to Article 9 and the creation of Article 12, more certainty is on the horizon for cryptocurrency-backed secured transactions, helping solidify cryptocurrency's place in the mainstream commercial world. abi

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AMERICAN BANKRUPTCY INSTITUTE
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Consumer Point

By Joanna Dreaver

Cryptocurrency Is a Misnomer

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As of May 31, 2021, the combined value of Bitcoin, Litecoin, Monero, Ethereum and all other significant cryptocurrencies was roughly $1.5 trillion.[1] That is just under 4.3 percent of the value of all narrow, or traditional, money. As of the same date, $653 billion U.S. dollars, or 1.8 percent of the combined value of the world's narrow money supply, was Bitcoin exclusively.[2] As Bitcoin's use and value increase, it will increasingly show up as debtors' "assets" in bankruptcy cases.[3] Although some courts have characterized cryptocurrency as a currency, this article suggests that such a characterization is inconsistent with both the accepted definition of "currency" and the treatment of currency in the Bankruptcy Code. Therefore, bankruptcy courts should treat cryptocurrencies as commodities rather than currency.

What Is "Currency"?

"Currency" has been defined as "a medium of exchange for goods and services ... in the form of paper or coins, usually issued by a government and generally accepted at its face value as a method of payment [and used] as a medium of exchange."[4] Bitcoin is a decentralized — meaning it is not monitored, controlled or administered by any legal or governmental entity — "virtual currency" that was created in 2009.[5] It exists on a "blockchain," or a public ledger that keeps track of every Bitcoin created and who owns it.[6] It originates through a process called "mining," which involves users' running a continuous series of computations to add transactions to the blockchain.[7] Mined Bitcoins can be exchanged for government-issued currencies online, and used to purchase goods and services from merchants who accept them as a form of payment or transferred to another user.[8]

Bitcoins are neither backed by any government nor universally accepted as a method of payment.[9] Moreover, Bitcoins have no "face value" of which to speak, as their value is determined by market trust and willingness to trade established currency for it.[10] They are not backed by any legal market, nor is any entity required to accept them as a medium of exchange.[11] Although some companies such as Subway, Expedia, Dish Network, Etsy, Gap, JC Penney and Whole Foods have accepted Bitcoin as a form of payment in some fashion,[12] far more companies have not. It is not a "generally accepted" medium of exchange. Therefore, the definition of "currency" is not readily applicable to cryptocurrencies.

It is true that some appellate courts have characterized Bitcoin as a "currency" in their opinions,[13] but in none of those decisions was this characterization essential to the outcome. For example, in *United States v. Gratkowski*,[14] the issue was whether a search of the defendant's records of his Bitcoin transactions violated his Fourth Amendment rights against unreasonable searches. The court held that

1 Nathan Reiff, "How Much of All Money Is in Bitcoin?," Investopedia (May 31, 2021), *available at* investopedia.com/tech/how-much-worlds-money-bitcoin (unless otherwise specified, all links in this article were last visited on June 28, 2021).
2 *Id.*
3 *Id.*
4 *See* Jake Frankenfield, "Currency," Investopedia, *available at* investopedia.com/terms/c/currency.asp.
5 *See* Matthew Kien-Meng Ly, "Note, Coining Bitcoin's 'Legal-Bits': Examining the Regulatory Framework for Bitcoin and Virtual Currencies," 27 *Harv. J.L. & Tech.* 587, 590 (2014); *see also* Reuven Cohen, "The Top 30 Crypto-Currency Market Capitalizations in One Place," *Forbes* (Nov. 27, 2013), *available at* forbes.com/sites/reuvencohen/2013/11/27/the-top-30-crypto-currency-market-capitalizations-in-one-place.
6 Dominic Hobson, "What Is Bitcoin?," 20 XRDS 40, 42 (2013).
7 Chelsea Deppert, "Bitcoin and Bankruptcy: Putting the Bits Together," 32 *Emory Bankr. Dev. J.* 123 (2015).
8 Kien-Meng Ly, *supra* n.5, at 590.
9 "Consumer Advisory: Risks to Consumers Posed by Virtual Currencies," Consumer Fin. Prot. Bureau (2014), *available at* files.consumerfinance.gov/f/201408_cfpb_consumer-advisory_virtual-currencies.pdf. *See also United States v. Petix*, No. 15-cr-227A, 2016 WL 7017919, at *5 (W.D.N.Y. Dec. 1, 2016).
10 Casey Doherty, "Bitcoin and Bankruptcy: Understanding the Newest Potential Commodity," XXXIII *ABI Journal* 7, 38-39, 82, July 2014, *available at* abi.org/abi-journal.
11 Dep't of the Treas., Fin. Crimes Enf't Network, Fin-2013-G0001, Application of FinCen's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies (2013).
12 *Id.*
13 *United States v. Gratkowski*, 964 F.3d 307, 308-09 (5th Cir. 2020); *United States v. Costanzo*, 956 F.3d 1088, 1091 (9th Cir. 2020); *United States v. Lord*, 915 F.3d 1009, 1013 n.1 (5th Cir. 2019); *United States v. Brown*, 857 F.3d 334, 337 (6th Cir. 2017); *United States v. Harmon*, 474 F. Supp. 3d 76 (D.D.C. 2020).
14 964 F.3d 307 (5th Cir. 2020).

an individual has no expectation of privacy in information on the Bitcoin blockchain.

Similarly, in *United States v. Costanzo*,[15] the issue was not whether Bitcoin was currency, but whether transactions in Bitcoin affected interstate commerce in some way, which the court held they did. In no case did the court's decision turn on whether Bitcoin constituted "currency," even if the court so labeled it. In another recent case,[16] the district court concluded that Bitcoin was "money" within the meaning of the applicable criminal statute,[17] but the court noted that the defendant had conceded that Bitcoin was currency and a medium of exchange.

Why Bankruptcy Courts Should Conclude that Cryptocurrencies Are Commodities Rather than Currency

Section 541 of the Bankruptcy Code includes in the bankruptcy estate "all legal or equitable interests of the debtor in property as of the commencement of the case," with some exceptions.[18] "Congress intended a broad range of property to be included in the estate," so cryptocurrencies in which the debtor had an interest at the time of the bankruptcy filing certainly would qualify as property of a bankruptcy estate. However, bankruptcy courts need to decide how to handle them.[19]

If Bitcoin were labeled as a currency for bankruptcy purposes, then any exchange agreements of Bitcoin for cash would constitute "swap agreements," as the Code defines that term to include currency swaps.[20] This would render all Bitcoin transactions exempt from the automatic stay and immune from avoidance as fraudulent transfers.[21] This was certainly not the intent behind those Code provisions.

By contrast, a "commodity" is defined as "a basic good used in commerce that is interchangeable with other goods of the same type.... They tend to change rapidly from year to year."[22] Examples of commodities include grains, gold, beef, oil, natural gas, financial products such as foreign currencies and indexes, cellphone minutes and bandwidth.[23] Similar to gold and other commodities, Bitcoins are interchangeable and uniform, and their value relies heavily on their supply.

Although there is not yet a consensus, some courts have held cryptocurrency to be a commodity subject to the Commodity Futures Trading Commission's regulatory protections.[24] The Commodity Exchange Act defines "commodity" as not only including agricultural products but also "all other goods and articles ... and all services, rights, and interests ... in which contracts for future delivery are presently or in the future dealt in."[25] As one court stated, "Although the legal regulation of virtual currency is a relatively recent development, courts in this District have classified cryptocurrency as a 'commodity,'" observing that cryptocurrencies lawfully store or transfer value and may fluctuate in value much like any commodity.[26] In other words, cryptocurrency is something that money buys, and is not itself money.

Conclusion

Cryptocurrencies are expanding in scope. Although bankruptcy courts have not yet had to decide how to classify them for purposes of the Bankruptcy Code, they will undoubtedly have to do so sooner rather than later. Because cryptocurrencies fail to meet the normal definition of "currency" and because applying the Code provisions relating to swap agreements to cryptocurrencies would be inappropriate, bankruptcy courts should treat cryptocurrencies as commodities rather than currencies. abi

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15 956 F.3d 1088 (9th Cir. 2020).
16 *United States v. Harmon*, 474 F. Supp. 3d 76, 88 (D.D.C. 2020).
17 The statutes at issue dealt with federal and local statutes on money laundering.
18 *See* 11 U.S.C. § 541(a)(1) (2012).
19 *United States v. Whiting Pools Inc.*, 462 U.S. 198, 2004 (1983).
20 Erin Jane Illman & Robert A. Cox Jr., "Bitcoin and Bankruptcy: Why Creditors and Bankruptcy Practitioners Need to Understand Cryptocurrencies," *Thomson Reuters Westlaw* (Dec. 14, 2017); *see also* 11 U.S.C. § 101(53B).
21 11 U.S.C. §§ 362(b)(7) & 546(g).
22 Jason Fernando, "Commodity," Investopedia, *available at* investopedia.com/terms/c/commodity.asp.
23 *Id.*
24 *See, e.g., Commodity Futures Trading Comm'n v. Reynolds*, No. 19-05631, 2021 WL 796683 (S.D.N.Y. March 2, 2021); *BDI Capital LLC v. Bulbul Invs. LLC*, 446 F. Supp. 3d 1127 (N.D. Ga. 2020); *Commodity Futures Trading Comm'n v. My Big Coin Pay Inc.*, 334 F. Supp. 3d 492 (D. Mass. 2018); *Commodity Futures Trading Comm'n v. Gelfman Blueprint Inc.*, No. 17-7181, 2018 WL 6320656 (S.D.N.Y. Oct. 16, 2018); *Commodity Futures Trading Commission v. McDonnell*, 287 F. Supp. 3d 213 (E.D.N.Y. 2018).
25 7 U.S.C. § 1a(9).
26 *Lagemann v. Spence*, No. 18-12218, 2020 WL 5754800 (S.D.N.Y. May 18, 2020).

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Code to Code

By Jaden Banks

A Password by Any Other Name ... Remains a Digital Asset

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In recent years, more and more people have traded, bought or sold digital assets, to the point that some 40 million Americans have actively invested in cryptocurrencies.[1] The increased use of digital assets drove legislative changes to address the property rights associated with their use. In response, the Uniform Law Commission recommended changes to the Uniform Commercial Code recognizing digital assets as property and providing methods to sell, transfer and collateralize those assets, while several states have adopted their own approaches to regulating digital assets.[2] In so doing, these proposals have created broad definitions of digital assets applicable to cryptocurrencies, nonfungible tokens, stablecoins and other electronic records, but the proposals also extended the "digital asset" definition to encompass the tools and systems safeguarding those assets.

As a result, the pairing of a unique identifier combined with a secret code, private key or PIN (collectively "login credentials") comprise an often-overlooked digital asset.[3] These login credentials represent the electronic version of a physical lock and key, thus protecting everything from a debtor's digital wallets, digital assets, bank account information and social media accounts.[4] Login credentials identify the holder as the sole person with the power to access, use and exclude others from benefiting from the information and assets the credentials protect.

What Constitutes Estate Property?

"Estate property" under the Bankruptcy Code includes "all of the legal or equitable interests of the debtor in property as of the commencement of the case."[5] This definition is deliberately broad to encompass both tangible and intangible property.[6] Courts frequently look to state statutes to determine the nature and extent of a debtor's interest in estate property.[7]

As a result, courts recognize that under state property definitions, an online account, digital resource or other intangible asset qualifies as estate property.[8] Courts have also acknowledged that login credentials represent essential information necessary to access estate property, without concluding that login credentials qualify as estate property in their own right.

For example, in *In re CTLI LLC*, the bankruptcy court determined that the debtor's social media accounts were property of the bankruptcy estate.[9] The court concluded that although existing state law did not define social media accounts as property, the

1 "President Biden to Sign Executive Order on Ensuring Responsible Development of Digital Assets," White House (March 9, 2022), *available at* whitehouse.gov/briefing-room/statements-releases/2022/03/09/fact-sheet-president-biden-to-sign-executive-order-on-ensuring-responsible-innovation-in-digital-assets (unless otherwise specified, all links in this article were last visited on Dec. 20, 2022).

2 "Uniform Commercial Code and Emerging Technologies," Uniform Law Comm'n, Jan. 28-29, 2022, Comm. Meeting, p. 1 *available at* uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c7232d9c-6f39-0576-935e-8ad76333240f&forceDialog=0 (discussing formation and work of committee developing rules for digital assets). *See* Wyo. Stat. 34-29 (2022); Arkansas (HB 1926, effective July 28, 2021); Texas (HB 4474, effective Sept. 1, 2021); Indiana (HB 351, effective March 14, 2022).

3 Login credentials involve an identifier, such as a username that is unique to the holder, along with a unique passcode that demonstrates that the holder has the right or power to access the underlying system, record, account or asset.

4 Login credentials are regularly bought and sold on internet forums, with the login credentials for financial institutions demanding higher prices than those used for consumer websites and accounts. Part of the value intrinsic to stolen or compromised login credentials results from the habit to use the same or similar login information for different accounts or webpages. Davey Winder, "New Dark Web Audit Reveals 15 Billion Stolen Logins From 100,000 Breaches," *Forbes* (July 8, 2020), *available at* forbes.com/sites/daveywinder/2020/07/08/new-dark-web-audit-reveals-15-billion-stolen-logins-from-100000-breaches-passwords-hackers-cybercrime.

5 11 U.S.C. § 541(a)(1).

6 *United States v. Whiting Pools Inc.*, 462 U.S. 198, 205, 103 S. Ct. 2309, 2314 n.9 (1983).

7 *In re Northington*, 876 F.3d 1302, 1310 (11th Cir. 2017).

8 *See generally In re CTLI LLC*, 528 B.R. 359 (Bankr. S.D. Tex. 2015); *In re Marlin*, No. 19-41200-JMM, 2021 WL 815856 (Bankr. D. Idaho Feb. 26, 2021) (ordering debtor to turn over financial information about his income and expenses, and further ordering debtor to provide trustee with login credentials for debtor's VRBO and Airbnb accounts); *In re Ahlan Indus. Inc.*, No. BG 18-04650, 2020 WL 3620332 (Bankr. W.D. Mich. July 2, 2020) (ordering debtor to comply with asset-purchase agreement requiring debtor to transfer estate property and further noting that estate property included login information used to access debtor's G-suite and email accounts); *see also In re Money Ctrs. of Am.*, No. AP 16-51030 (CSS), 2020 WL 6709971, at *6 (D. Del. Nov. 16, 2020) (observing that right to use domain name comprises estate property and failure to disclose this right deprived creditors of information about estate assets).

9 *In re CTLI LLC*, 528 B.R. at 374 (Bankr. S.D. Tex. 2015).

accounts shared characteristics with other intangible property interests that qualified as property.[10] Further, the court noted that effective use of the social media accounts following the debtor's reorganization required the administrative access available through the login credentials controlling the business social media accounts.[11] The *CTLI* court also found the debtor's former majority owner's arguments that he used the same login credentials for everything to be unavailing, noting that he could have changed the login credentials before providing the new credentials to the debtor's management.[12] Although login credentials may be important to access estate property, changes in how states view digital assets may mean that login credentials qualify as more than information about estate property.

In 2019, Wyoming adopted sweeping changes to its commercial code, thereby recognizing the viability of digital property and providing mechanisms to use the same.[13] Wyoming's new law defined a "digital asset" as "a representation of economic, proprietary or access rights that is stored in a computer readable format, and includes digital consumer assets, digital securities and virtual currency."[14]

Digital Assets

In early 2022, Utah and Idaho followed Wyoming's lead and adopted similar statutory definitions for digital assets.[15] Utah's commercial code provides that a "digital asset" means a representation of economic, proprietary or access rights that is stored in a computer-readable format, and includes a digital asset used or bought primarily for consumptive, personal or household purposes.[16] Idaho defines a "digital asset" as "a representation of economic, proprietary, or access rights that is stored in a computer-readable format and includes an open blockchain token, digital commodity, digital security, virtual currency, and any other controllable electronic record."[17]

Login credentials represent the holder's right to access and use computer systems and information that are frequently associated with consumer software and accounts. Under the Wyoming definition, login credentials represent an access right stored in a computer-readable format, generated for the holder's personal use. Likewise, a court reviewing the definitions supplied by Idaho and Utah would conclude that login credentials represent computer-readable access rights and so fall under the definition of a "digital asset" and qualify as estate property.[18]

In July 2022, the Uniform Law Commission (ULC) proposed changes to the Uniform Commercial Code (UCC), which recognized digital assets as property while creating a new Article 12 governing property rights in digital assets.[19] The ULC also proposed significant changes to UCC Articles 2 and 9 to incorporate digital assets into the sale and creation of security interests in digital assets.[20]

Article 12 provides for the creation of a "controllable electronic record" (CER), consisting of a record of information in electronic form potentially subject to "control." However, a CER does not include electronic money, deposit accounts, electronic copies of documents representing chattel paper or title, or payment intangibles.[21] Article 12 applies to electronic records subject to "control," but does not apply to records governed in other parts of the UCC or by law outside of the UCC.[22] "Control" exists where a party demonstrates (1) "the power to avail itself of substantially all of the benefit" of the CER; (2) the exclusive power to prevent others from benefitting from or accessing the CER; and (3) the exclusive power to transfer control of the CER to another person.[23] Further, a party controlling a CER must be identifiable by other parties as having those powers exhibiting control.[24] Article 12 clarifies that representations of control, such as cryptographic keys, need not represent exclusive control and may be shared with a digital wallet or system controls, as long as there is some acknowledgment that the system or wallet is acting on the recordholder's behalf.[25]

Courts reviewing Article 12 will likely conclude that login credentials comprise a CER because they represent a "record of information stored in an electronic format" susceptible to control.[26] The official comments to UCC 12-102 specify that the phrase "electronic record" is a deliberately broad definition encompassing information retrievable in a perceivable form, which covers the numbers, symbols and/or letters used for login credentials.[27]

By their very nature, login credentials demonstrate that the holder has the power or right to obtain substantially all the benefits of the login credential or underlying record, while also preventing others from obtaining the same.[28] Furthermore, although most consumer login credentials have little monetary value, they are subject to a user agreement that the account provider act on behalf of the credentialholders.[29] Thus, login credentials are a controllable electronic record under Article 12 and qualify as property in states that enact Article 12.[30]

Estate Property vs. Related to Estate Property

The distinction between information related to estate property and "estate property" might lead one to believe

10 *Id.* at 366-67.
11 *Id.* at 365-70.
12 *Id.* at 378-79.
13 *See* S.F. 0125, 65th Sess. (Wyo. 2019).
14 Wyo. Stat. Ann. § 34-29-101(a)(i) (2019).
15 Idaho Code Ann. § 28-5303 (2022); Utah Code Ann. § 13-62-101 (2022).
16 Utah Code Ann. § 13-62-101(3)-(5).
17 Idaho Code Ann. § 28-5303.
18 "Consumer purpose" means that the item was purchased or used for consumption in a personal, household or family setting. U.C.C. § 9-102.
19 "Uniform Commercial Code and Emerging Technologies," Uniform Law Comm'n (June 30, 2022), *available at* uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=67fe571b-e8ad-caf8-4530-d8b59bdca805&forceDialog=1.
20 "Overview of 2022 Amendments to the Uniform Commercial Code — Emerging Technologies," Uniform Law Comm'n, p. 1, *available at* uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=a116549b-6067-5f82-83ac-3501c7ad882d&forceDialog=1.
21 U.C.C. § 12-102(a)(1).
22 U.C.C. § 12-102.
23 U.C.C. § 12-105(a).
24 U.C.C. § 12-105(b).
25 U.C.C. § 12-102(e). *See also* U.C.C. § 12-105(g).
26 Login credentials represent electronic information subject to control and also represent control over electronic information logically associated with an underlying electronic record or other digital asset, thereby bringing the concept within the phrase "electronic record." U.C.C. § 12-102(a)(1).
27 The comment uses examples of photos, music or databases, and a person's login credentials can be retrieved can be retrieved from a system log or other storage protocol in an alphanumeric representation. *See* U.C.C. § 12-102, cmt. 2.
28 U.C.C. § 12-105.
29 "User Agreement," LinkedIn (Feb. 1, 2022), *available at* linkedin.com/legal/user-agreement.
30 Some states have adopted portions of the July 2022 amendments to the UCC. However, only the District of Columbia has proposed adoption of Article 12. Uniform Commercial Code Amendment Act of 2022, B24-1052. (Oct. 3, 2022). *See also* Arkansas (HB 1926, effective July 28, 2021); Texas (HB 4474, effective Sept. 1, 2021); Indiana (HB 351, effective March 14, 2022).

that the terms represent a distinction without a difference. Regardless of the term being used, debtors have a duty to turn over both property of the estate and information about estate property on the trustee's request.[31] Debtors have similar duties, in respect to estate property and estate information, to provide both information and assets on request and assist the trustee in obtaining information and estate property.[32]

The Bankruptcy Code requires debtors to "'surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers' that relate to the property of the estate."[33] Further, debtors must maintain adequate records regarding their financial condition and provide financial information without formal discovery.[34] However, the Code does not require debtors to turn over financial information absent an inquiry from an interested party.[35] Where login credentials are simply information, debtors may — prior to a trustee's request for the credentials — change or lock their credentials and implement additional methods of control, such as multifactor authentication, without running afoul of their statutory duty.

However, where login credentials fall within the broad definition of digital assets, debtors have a duty to accurately disclose those assets.[36] Furthermore, although login credentials have little intrinsic value, absent abandonment any changes to them may delay a case and, in some instances, may make assets connected to the credentials inaccessible to the trustee.[37] In instances where a debtor's actions to lock or change login credentials prevent any access to the underlying account, the debtor may be forced to account for the account for any diminution of the bankruptcy estate from the loss of estate property.[38]

Conclusion

Returning again to *In re CTLI LLC*, the bankruptcy court — after making the novel determination that social media accounts are property — reminded the debtor's former majority owner that he would be subject to severe sanctions and potentially imprisonment if he refused to turn over property of the estate and continued using the same for his personal gratification.[39] As the court explained, social media accounts and administrative access to those accounts present a valuable tool to debtors.[40]

The court further acknowledged that access to social media accounts may be possible through a forced migration of the underlying page, information and features to a new page or where the host system provides alternative access, but those remedies may be unavailable.[41] The same holds true regarding login credentials, although a debtor may normally change or use login information as he/she sees fit; following the filing of a bankruptcy petition, the debtor's accounts and login credentials become part of the bankruptcy estate, and efforts to exercise control over either may delay the administration of the estate and diminish its value. abi

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31 11 U.S.C. § 542(a), (e).
32 11 U.S.C. § 521.
33 *In re Auld*, 561 B.R. 512, 518 (B.A.P. 10th Cir. 2017). *See also* 11 U.S.C. § 521.
34 *Id.* at 520. *See also In re Tello*, 640 B.R. 181, 200 (Bankr. D.N.D. 2022) (collecting cases regarding denial of discharge for concealing or transferring estate assets).
35 *Id.*
36 *See* 11 U.S.C. § 521(a)(4). *See also In re Trujillo*, 485 B.R. 238, 250 (Bankr. D. Colo. 2012) (collecting cases on debtor's duties and explaining that debtors have statutory duty to accurately disclose all assets and surrender those assets upon request by panel trustee).
37 11 U.S.C. §§ 541, 554(b).
38 11 U.S.C. § 362. *See also In re Korean W. Presbyterian Church of Los Angeles*, 618 B.R. 282, 286 (Bankr. C.D. Cal. 2020) (noting that automatic stay applies to debtor where debtor attempts to exercise control over estate property). *See generally In re Tello*, 640 B.R. at 200 (Bankr. D.N.D. 2022) (collecting cases regarding denial of discharge for concealing or transferring estate assets).
39 *In re CTLI LLC*, 528 B.R. at 366-67.
40 *Id.* at 376.
41 *Id.* at 377.

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Legislative Update

Crypto and Congress: An Overview of Key Developments This Year

The rapid growth of the cryptocurrency market and digital asset-trading platforms have been accompanied by increasing regulatory scrutiny and legislative concerns.[1] Forty-two bills were introduced in the 117th Congress containing the word "cryptocurrency," and the Biden administration and regulatory agencies have continued working to construct parameters for protecting consumers and financial institutions, while not stifling the nascent industry. This article will provide a brief overview of the top legislative and administration proposals released over the past year, insights into how the proposals might be of importance to practitioners, and prospects on future cryptocurrency legislation.

A key starting point regarding cryptocurrency proposals occurred this year on March 9 when President Joe Biden issued Executive Order 14067, "Ensuring Responsible Development of Digital Assets."[2] The Executive Order acknowledged that some digital asset-trading platforms and service providers had grown rapidly in size and complexity and that they might not be subject to or in compliance with appropriate regulations or supervision. "Digital asset issuers, exchanges and trading platforms, and intermediaries whose activities may increase risks to financial stability, should, as appropriate, be subject to and in compliance with regulatory and supervisory standards that govern traditional market infrastructures and financial firms, in line with the general principle of 'same business, same risks, same rules,'" according to the order. Many in the cryptocurrency community praised the order as an acknowledgement of cryptocurrency's importance and the necessity of ensuring proper regulation.[3]

Within the list of priorities, the Executive Order directed the Department of the Treasury and other agency partners to assess and develop policy recommendations to address the implications of the growing digital-asset sector and changes in financial markets for consumers, investors, businesses and equitable economic growth. The Executive Order also encouraged regulators to ensure sufficient oversight and safeguard against any systemic financial risks posed by digital assets. The Executive Order further encouraged the Financial Stability Oversight Council to identify and mitigate systemic financial risks posed by digital assets and to develop appropriate policy recommendations to address any regulatory gaps.

Since the Executive Order was issued, agencies across the government have worked to develop frameworks and policy recommendations that advance the six key priorities identified therein: (1) consumer and investor protection; (2) promoting financial stability; (3) countering illicit finance; (4) U.S. leadership in the global financial system and economic competitiveness; (5) financial inclusion; and (6) responsible innovation.

On Sept. 16, 2022, in connection with the reports mandated by the Executive Order, the White House released the "Comprehensive Framework for Responsible Development of Digital Assets," which encompassed the findings of various reports.[4] The reports encouraged regulators like the Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC), consistent with their mandates, to aggressively pursue investigations and enforcement actions against unlawful practices in the digital-asset space. The reports also encouraged the Consumer Financial Protection Bureau and Federal Trade Commission, as appropriate, to redouble their efforts to monitor consumer complaints and to enforce against unfair, deceptive or abusive practices.

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1 ABI thanks **Alan R. Rosenberg** of Markowitz, Ringel, Trusty + Hartog, PA (Fort Lauderdale, Fla.) for his contributions and insights to this article. He frequently writes and speaks on the intersection of cryptocurrency and bankruptcy, and he is a 2020 ABI "40 Under 40" honoree.

2 "Executive Order on Ensuring Responsible Development of Digital Assets," White House (March 9, 2022), *available at* whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets (unless otherwise specified, all links in this article were last visited on Nov. 7, 2022).

3 Kristin Smith, "President Biden's Crypto Order Is a Huge Step Forward for the Industry," CoinDesk (March 9, 2022), *available at* coindesk.com/layer2/2022/03/09/president-bidens-crypto-order-is-a-huge-step-forward-for-the-industry (op-ed from Blockchain Association).

4 "Fact Sheet: White House Releases First-Ever Comprehensive Framework for Responsible Development of Digital Asset," White House (Sept. 16, 2022), *available at* whitehouse.gov/briefing-room/statements-releases/2022/09/16/fact-sheet-white-house-releases-first-ever-comprehensive-framework-for-responsible-development-of-digital-assets.

Many crypto industry leaders thought the reports and proposed framework were too focused on risk. Specifically, "[w]hile intended to be part of a broader government and stakeholder effort to bring better regulation to crypto assets, these reports focus on risks — not opportunities — and omit substantive recommendations on how the United States can promote its burgeoning crypto industry," said Kristin Smith, executive director of the U.S.-based Blockchain Association.[5]

The focal point of intense crypto lobbying battles on Capitol Hill has been to address the grey area of classification and regulatory jurisdiction: Should cryptocurrencies not already under the regulatory umbrella of the SEC be considered a security and regulated by the SEC, or should they be considered a commodity and regulated by the CFTC? If considered a security, cryptocompanies must then comply with tighter SEC rules for registration and reporting. However, many in the industry advocate that cryptocurrencies are more like commodities and would prefer them to be subject to the CFTC's rules. Both SEC Chair Gary Gensler and CFTC Chair Rostin Behnam continue to advocate for their respective agencies to take the lead in cryptocurrency oversight.

Two pieces of legislation that have received considerable attention in the Senate (and were the subject of intense lobbying by the crypto industry) seek to classify cryptocurrency as a commodity and bring it under the oversight of the CFTC. The first is S.4760, the "Digital Commodities Consumer Protection Act of 2022," introduced on Aug. 3 by Senate Agriculture Committee Chair Debbie Stabenow (D-Mich.) and Ranking Member John Boozman (R-Ark.). The bill provides the CFTC with the authority to regulate the trading of digital commodities — mandating consistent, rigorous rules for all market participants.[6] While S.4760 received a hearing in the Senate Agriculture Committee on Sept. 15 and has a companion bill in the House,[7] it has yet to be brought up for a committee vote.

A larger legislative package was introduced earlier in the summer by Sens. Kirsten Gillibrand (D-N.Y.) and Cynthia Lummis (R-Wyo.). S.4356, the "Lummis-Gillibrand Responsible Financial Innovation Act," was introduced on June 7 and proposes to "create a complete regulatory framework for digital assets that encourages responsible financial innovation, flexibility, transparency and robust consumer protections while integrating digital assets into existing law," according to a Gillibrand press release.[8] The legislation was considered at a Senate Banking, Housing and Urban Affairs Committee hearing on Sept. 15, but has not yet come up for a committee vote. The bill has also been referred to the Senate Agriculture Committee for consideration.

The "commodity vs. security" debate is not just an interesting intellectual exercise; it is of critical importance to bankruptcy practitioners who are more routinely coming into contact with cryptocurrency and other digital assets. The recent explosion of crypto bankruptcies may ultimately force bankruptcy courts to classify cryptocurrency to render appropriate rulings. For example, if cryptocurrencies are securities, what additional hurdles and regulatory approvals will be required to conduct a § 363 sale? Will inappropriate uses of cryptocurrency result in nondischargeable debts under § 523(a)(19)? If cryptocurrency is considered a commodity, are trustees and debtors entitled to recover the appreciated value of crypto assets in avoidance actions? Without concrete regulatory guidance, the answer to these questions and many others, is unclear.

As stakeholders, regulators and lawmakers work to achieve a consensus on the question of jurisdiction — and, by extension, classification — Congress's legislative calendar left the key pieces of crypto legislation on life support. Complete consideration of these legislative items before the conclusion of the 117th Congress will be challenging, considering the current congressional recess for election season and short window of time before the session concludes. However, as the spotlight continues to be drawn to the growth and risks of cryptocurrency, prospects are likely that legislative proposals to address key issues such as jurisdiction, classification and other regulatory considerations will emerge quickly in the 118th Congress when it convenes next year. abi

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5 "Blockchain Association Reacts to Biden Administration's Executive Order on Digital Assets Findings," Blockchain Ass'n (Sept. 16, 2022), *available at* theblockchainassociation.org/blockchain-association-reacts-to-biden-administrations-executive-order-on-digital-assets-findings.

6 "Boozman, Stabenow, Booker and Thune Introduce Legislation to Regulate Digital Commodities," Senate Agriculture Committee (Aug. 3, 2022), *available at* boozman.senate.gov/public/index.cfm/2022/8/boozman-stabenow-booker-and-thune-introduce-legislation-to-regulate-digital-commodities.

7 H.R. 8730, the Digital Commodities Consumer Protection Act of 2022.

8 "Lummis, Gillibrand Introduce Landmark Legislation to Create Regulatory Framework for Digital Assets," Gillibrand Press Release (June 7, 2022), *available at* gillibrand.senate.gov/news/press/release/-lummis-gillibrand-introduce-landmark-legislation-to-create-regulatory-framework-for-digital-assets.

Hon. Hannah Blumenstiel
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Prior to her appointment, Judge Blumenstiel was an associate (2003 - 2008) and then a partner (2008-2012) with Winston & Strawn LLP, where she focused her practice on creditors' rights litigation in state and federal court, including bankruptcy court. From 2001 to 2003, Judge Blumenstiel was an associate with Murphy Sheneman Julian & Rogers LLP, where she represented debtors, creditors and trustees in bankruptcy cases and adversary proceedings.

Judge Blumenstiel served as Law Clerk to the Honorable Charles M. Caldwell of the United States Bankruptcy Court for the Southern District of Ohio (Eastern Division) from 1998 to 2001. From 1997 to 1998, Judge Blumenstiel represented the State of Ohio's interests in bankruptcy cases as an Assistant Attorney General with the Revenue Recovery Section of the Ohio Attorney General's Office.

Judge Blumenstiel earned her Juris Doctorate from Capital University Law School in 1997. During her first two years of law school, she worked full-time for the Columbus Bar Association as Director of its pro bono initiative "Lawyers for Justice." Judge Blumenstiel received her B.A. from The Ohio State University in 1992.

Judge Blumenstiel has served as Co-Chair of the Bench-Bar Liaison Committee of the United States Bankruptcy Court for the Northern District of California; Co-Chair of the Commercial Law & Bankruptcy Section of the Bar Association of San Francisco; and Chair of the Bankruptcy Section of the Barrister's Club of the Bar Association of San Francisco.

Judge Blumenstiel frequently lectures on bankruptcy, receivership and commercial litigation issues.

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John is a certified public accountant with more than 20 years of financial advisory experience, including in matters related to financial reporting and disclosure, litigation, forensic accounting, and restructuring. He has led public and private companies' financial reporting and accounting functions, has directed companies through the process of restating previously filed US Securities and Exchange Commission (SEC) financial reports, and has led forensic accounting investigations. His clients benefit from his broad experience in the reconstruction and analysis of complex financial records, and he regularly advises as to the applicability of generally accepted accounting principles (GAAP). John also handles restructuring and turnaround matters, focusing on the finance and accounting challenges of companies in distress.

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Chris Hughes is a litigator with extensive experience defending or pursuing fraudulent transfers and preferential payments. In addition, he counsels clients on numerous claims, including securities fraud, embezzlement, Ponzi schemes, contract disputes and challenges to corporate formations and retirement plans. His past cases have involved businesses in the hospitality, entertainment, healthcare, construction, agriculture, telecommunications and technology industries.

Chris' current practice focuses on representing bankruptcy trustees and creditors in a wide range of bankruptcy and commercial litigation matters. His experience includes objections to claims, assumption or rejection of executory contracts and leases, objections to exemptions and denials of discharge. He also addresses objections to the dischargeability of debts, lien priority disputes and relief from the automatic stay. He has handled numerous cases before the bankruptcy court, obtaining favorable settlements or, when necessary, favorable rulings upon the conclusion of litigation.

Prior to joining Nossaman, Chris practiced bankruptcy litigation at a boutique law firm in the Sacramento area.

Paul Hemesath
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Paul Hemesath is U.S. Digital Currency Counsel, Money Laundering & Asset Recovery Section for the U.S. Department of Justice (DOJ). He is a DOJ subject matter expert in cryptocurrency-related prosecutions, policy, and forfeitures. Paul is a member of DOJ's "Digital Currency Initiative" and "National Cryptocurrency Enforcement Team", which provide nationwide legal guidance and support to investigators, prosecutors, and government agencies on cryptocurrency prosecutions, seizures, and forfeitures. The Initiative expands cryptocurrency-related training and encourages policy dialogue concerning legislation, forfeiture, and prosecution. This includes the White House's Executive Order ensuring responsible development of digital assets.

Prior to his current role, Paul was an Assistant United States Attorney between 2009 and 2022. He was an associate at Nossaman LLP between 2003 and 2009, and clerked for the Hon. Michael W. Farrell at the U.S. Court of Appeals for the District of Columbia.