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Anderson v. Binance,

No. 1:20-CV-2803 (ALC), 2022 WL 976824 (S.D.N.Y. Mar. 31, 2022)

This is an important decision and order by Judge Carter dismissing one of the last of the 11 suits filed jointly by Roche Freedman LLP and Selendy Gay Elsberg PLLC in April 2020 against token issuers and exchanges for issuing and transacting in unregistered securities. Judge Hellerstein dismissed the suit against Bprotocol in February 2021 and Judge Cote dismissed the suit against Bibox in April 2021. Holsworth v. BProtocol Found., No. 20-cv-2810 (AKH), 2021 WL 706549, at *3 (S.D.N.Y. Feb. 22, 2021); In re Bibox Grp. Holdings Ltd. Sec. Litig., 534 F. Supp. 3d 326 (S.D.N.Y. 2021). Thereafter, plaintiffs' attorneys voluntarily withdrew numerous actions but continued with this one against Binance.

The Second Amended Complaint considered on this motion to dismiss was 327 pages and included 154 causes of action under the Securities Act, Exchange Act, and state Blue Sky laws. In particular, like Roche and Selendy's other exchange cases and like Risley below, plaintiffs alleged that Binance operates as an unregistered exchange and broker dealer and also issues unregistered securities, violating Sections 12(a)(1) of the Securities Act and 29(b) of the Exchange Act.

Similar to other cases like this one, the question of whether the various tokens at issue are securities under Howey was not litigated at the motion to dismiss stage. Instead, defendants argued that the claims were barred by the statute of limitations and Morrison.

With respect to the statute of limitations, the Court held, as others have before it, that claims under Section 12(a)(1) of the Securities Act must be brought within one year after the at-issue tokens are purchased. The Court further held that no equitable doctrine permitted imposition of a discovery rule and therefore all claims related to tokens purchased bought more than a year before filing suit were time barred.

As for Section 12(a)(1) claims related to two tokens purchased within one year of the filing of the lawsuit, the Court held that these were time barred as well because the only route by which plaintiffs could bring these claims would be by contending the defendants were statutory sellers under a solicitation theory and they only alleged solicitation acts that occurred more than one year before the suit was brought. That is, the "violation" upon which plaintiffs were bringing suit under the Securities Act was solicitation and "[t]he statute of limitations runs for one year 'after the violation upon which it was based.'" (quoting 15 U.S.C. § 77(m)).

With respect to the Exchange Act Section 29(b) claims, the Court held that those were subject to a discovery rule, but that plaintiffs alleged only that they had learned of new legal rights not new facts upon the SEC staff's publication in April 2019 of a new framework for analyzing crypto tokens under Howey. The Court held this was not enough, both because the discovery rule requires learning facts not law and because, in any event, the SEC staff's April 2019 publication was a "nonbinding interpretation of Howey."

The Court next considered whether Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 267 (2010) barred the claims in light of its holding that "the federal securities laws apply to those transactions in securities listed on domestic exchanges, and domestic transactions in other securities." The Court held that plaintiffs had identified only one infrastructure connection between Binance and the U.S.: that its Amazon Web Services computer servers were U.S. based. The Court held this connection, even combined with use of English on Binance's website, a handful of employees in California, and U.S. job postings was "insufficient to deem Binance" a "domestic exchange." The Court further held that plaintiffs' allegations that they were physically in the U.S. when they purchased their tokens and purchased over servers located in California were insufficient to render their purchases "domestic transactions" because these allegations alone could not show that "irrevocable liability is incurred or title passes with the United States" (quoting Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 66, 67 (2d Cir. 2012)).

Finally, the Court held that plaintiffs' Blue Sky claims under the laws of states from which plaintiffs did not even allegedly trade could be disregarded for lack of a sufficient nexus with the claims. The Court further held that plaintiffs' claims under the state laws of the five states from which they purchased tokens were also dismissed under the same Morrison analysis applicable to the federal claims.

Digilytic Int'l FZE v. Alchemy Fin., Inc.,

No. 20 CIV. 4650 (ER) 2022 WL 912965 (S.D.N.Y. Mar. 29, 2022)

This is a decision and order by Judge Ramos granting in part a motion to dismiss by an individual plaintiff, the CEO of Alchemy Finance, representing himself pro se.

The complaint alleges that the two co-founders of Alchemy Finance conspired to take advantage of booming interest in crypto in early 2018 by writing a fake white paper and then inducing traders to invest in a fake ICO, including by promoting the project with fake claims of investment by a Dubai-based investor. Using these strategies, the complaint alleges that defendants induced plaintiffs to execute a token purchase agreement and consulting agreements and to transfer funds to defendants. It brings claims for breach, fraudulent inducement, unjust enrichment, violations of Exchange Act Section 10(b) and Rule 10b-5, violations of Securities Act Sections 12(a)(1) and 17(a), and RICO violations, among others.

After an assessment of numerous arguments by plaintiff, the Court held that unjust enrichment claims were duplicative of fraudulent inducement claims and that plaintiff had abandoned its Securities Act 17(a) claims but that all other claims survive.

Diamond Fortress Techs., Inc. v. EverID, Inc.,

2022 Del. Super. LEXIS 151 (Super. Ct. Del. Apr. 14, 2022)

The case is a breach of contract action arising out of Defendant EverID's alleged failure to compensate Plaintiffs for its assistance developing EverID's cryptocurrency trading platform and mobile application. Under the parties' contract, EverID was to remunerate Plaintiffs with "ID Tokens," EverID's token, upon ID Tokens' initial and any subsequent offerings. Plaintiff filed suit following multiple offerings of ID Tokens and Defendant's failure to provide any tokens. EverID never appeared and Plaintiff filed for a default judgment.

The Court first noted the limited history where courts applying Howey have determined cryptocurrency is a security, citing to Hodges v. Harrison, 372 F. Supp. 3d 1342, 1348 (S.D. Fla. 2019), Balestra v. ATBCOIN LLC, 380 F. Supp. 3d 340, 347, 353 (S.D.N.Y. 2019), S.E.C. v. Telegram Grp. Inc., 448 F. Supp. 3d 352, 364–65 (S.D.N.Y. 2020), S.E.C. v. Kik Interactive Inc., 492 F. Supp. 3d 169 (S.D.N.Y. 2020). After an assessment of the Howey factors, and stating that "[c]ourts commonly classify a cryptocurrency as a security when the economic harm directly relates to or arises from its ICO," the Court likewise held that the at-issue ID Tokens were securities.

After finding that ID Tokens are securities, the Court also found that CoinMarketCap "is a reliable cryptocurrency valuation tool" and that the methodology for calculating damages should be the "Highest Value Within A Reasonable Time" method, also known as the New York Rule, which is regularly applied in failure-to-deliver-securities cases.

Complaint, *Liang v. Bara*,
(D. Conn. Apr. 14, 2022), (No. 3:22-cv-00541)

This case concerns the digital asset platform Olympus, the founders of which are known only by the screen names "Zeus" and "Apollo." Plaintiff alleges [he] has identified Apollo as Daniel Bara from Connecticut, brings claims for breach, conversion, common law fraud, and civil conspiracy, and asserts damages may exceed $2 billion.

Plaintiff filed a complaint alleging that he provided Olympus seed capital pursuant to a "Token Purchase Agreement" (the "TPA") and consulting agreement, which promised Plaintiff a total of 4 million "pOHM" tokens. Olympus initially committed that Plaintiff would be able to exchange these pOHM contracts, for which there is no secondary market, 1:1 for popular OHM tokens via a series of smart contracts.

However, Plaintiff alleges, after Olympus achieved financial success, it unilaterally withdrew the pOHM Smart Contracts, eliminating Plaintiff's ability to generate any value from his investment.

Complaint, *Risley v. Universal Navigation Inc.*,
(S.D.N.Y. Apr. 4, 2022), (No. 1:22-cv-02780)

This is a class action against Uniswap, its CEO, and its investors contending that they offered and sold unregistered securities on the decentralized exchange including EthereumMax, Bezoge Earth, Matrix Samurai, AlphawolfFinance, Rocket Bunny, and BoomBaby.io.

Plaintiffs bring causes of action against Uniswap for issuing unregistered securities under the Securities Act and operating as an unregistered exchange and unregistered broker dealer in violation of the Exchange Act and causes of action against Uniswap's CEO and investors for control person liability.

Complaint, *Ford v. Koutoulas*,
(M.D. Fla. Filed Apr. 1, 2022), (No. 6:22-cv-00652)

This is another class action against a token issuer for issuance of unregistered securities, this time for LGB Tokens.

The same plaintiffs' attorneys have brought variants on these claims against others as well in past months, including Dfinity and Coinbase, as well as other differently styled plaintiff-side crypto class actions in connection with EthereumMax, Robinhood, and DAG Tokens.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to elizabeth.urquhart@quinnemanuel.com.

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