UNITED STATES U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

U.S. SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

SERGII "SERGEY" GRYBNIAK and OPPORTY INTERNATIONAL, INC.,

Defendants, and

CLEVER SOLUTION, INC.

Relief Defendant.

Civil Action No. 1:20-cv-00327-EK-MMH

BRIEF OF AMICUS CURIAE INVESTOR CHOICE ADVOCATES NETWORK IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae submits the following corporate disclosure statement: Investor Choice Advocates Network ("ICAN") is a nonprofit, public interest organization working to expand access to markets by underrepresented investors and entrepreneurs.[1] ICAN has no parent corporation, and no publicly held company has a 10% or greater ownership in ICAN.

[1] Defendants have consented to the filing of this brief. Plaintiff's counsel has not consented. No party or party's counsel, and no person other than ICAN and its counsel, authored this brief in whole or in part or contributed money intended to fund preparing or submitting the brief.

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STATEMENT OF INTEREST

Investor Choice Advocates Network ("ICAN") is a nonprofit organization that advocates for expanding access to markets—including markets for digital assets—for underrepresented investors and entrepreneurs who do not share the same access and market power as those with more assets and resources.

Amicus has a significant interest in clarifying the scope of the U.S. Securities and Exchange Commission's (the "SEC" or "Commission") regulatory power to those functions authorized by statute and permissible under the United States Constitution. As an organization speaking on behalf of underrepresented market participants, *amicus* also has a significant interest in ensuring the SEC's power to regulate securities does not improperly hamper the ability of individuals, and organizations seeking to engage in the sort of digital asset transactions that Congress has not elected to regulate. The Court's possible expansive interpretation and application of the Securities Act of 1933 ("Securities Act") and rules promulgated thereunder to digital assets will have far-reaching consequences on digital asset and blockchain innovation across the country, as well as the wider securities offering market. In this case, the SEC has impermissibly attempted to narrow certain exemptions from the registration requirements of the Securities Act that apply to digital assets deemed to be securities and also apply more broadly to all kinds of securities offerings. If the Court were to adopt the SEC's artificial distinction and unsupported position, otherwise eligible ordinary investors would have fewer investment opportunities available to them and businesses and entrepreneurs would have less flexibility to raise capital globally.

The interest of *amicus* differs from that of Defendants Sergii Grybniak, and Opporty International, Inc., who the SEC alleges violated the provisions of the federal securities laws. As stated above, *amicus* is a nonprofit organization that seeks to ensure that the SEC's power to regulate securities does not improperly hamper the ability of individuals and organizations seeking to engage in the sort of digital asset transactions that Congress has elected not to regulate.

I. INTRODUCTION

The U.S. Securities and Exchange Commission's ("SEC" or "Commission") complaint rests on two basic assumptions. First, the SEC asks the Court to conclude that the tokens at issue in this case are securities. Defendants have ably addressed that argument, and *Amicus ICAN* will not repeat that issue here. Second, assuming the tokens are securities, which *Amicus ICAN* submits the tokens are not, the SEC assumes that the exemptions from the Securities Act's registration requirements available under Regulation S and Regulation D are not available for concurrent offerings provided in a single website. The SEC's position is not correct, and should not be adopted by the Court.

Regulation D provides that offers and sales of securities outside the U.S. that are conducted "in accordance with" Regulation S may rely on the Regulation S safe harbor "even if coincident offers and sales are made in accordance with Regulation D inside the United States." 17 C.F.R. § 230.500(g). Rule 152 provides that "in determining whether two or more offerings are to be treated as one for the purpose of . . . qualifying for an exemption from registration under the [Securities] Act, offers and sales will not be integrated if, based on the particular facts and circumstances, the issuer can establish . . . that an exemption from registration is available for the particular offering." 17 C.F.R. § 230.152(a). If a Regulation S channel makes clear that it is directed towards non-U.S. persons, and U.S. persons are directed to the Regulation D channel notwithstanding the lack a separate website, nothing in Regulation S or Regulation D precludes the availability of each exemption to such concurrent offerings.

Amicus draws this issue to the Court's attention because the SEC's position (1) is unsupported, and (2) will have enormous impact, not just in this case and against the individual defendants, but more broadly on all holders of digital assets nationwide and indeed on anyone participating in securities offerings reliant on the Regulation S and Regulation D exemptions to

registration. The SEC has provided no basis from which the Court can conclude that the transactions at issue in this case could not rely on both the Regulation S and Regulation D exemptions.

II. ARGUMENT

A. Legal Background

The offer and sale of a security must be registered under the Securities Act absent an available exemption. Certain extraterritorial offers and sales are not subject to the federal securities laws. Regulation S provides an express exemption from registration for offers and sales of securities that occur outside of the U.S. Transactions that comply with the conditions of either Rule 903 or 904 will be deemed to be outside of the U.S., and therefore exempt from the registration requirements. Rules 903 and 904 permit the issuance and resale of unregistered securities under specified conditions. Two general conditions must be met to qualify under both the issuer Safe Harbor and the resale Safe Harbor: (i) the offer or sale must be made in an "offshore transaction"; and (ii) no "directed selling efforts" may be made in the U.S. An "offshore transaction" takes place when the offer is not made to a person in the U.S. and either the buyer is outside of the U.S. (or the offeror reasonably believes that the buyer is outside of the U.S.) or the transaction is executed on an established foreign securities exchange. "Directed selling efforts" means any activities that condition the U.S. market for such securities (e.g., a roadshow in the U.S., placing an advertisement in a U.S. newspaper, etc.).

Regulation D, or Rule 506(c), provides an exemption from registration and allows a company to broadly solicit and generally advertise the offering and still be deemed to be in compliance with the exemption's requirements if: (1) the investors in the offering are all accredited investors; and (2) the company takes reasonable steps to verify that the investors are

accredited investors, which could non-exclusively include reviewing documentation, such as W-2s, tax returns, bank and brokerage statements, credit reports, and the like.

B. Defendants' Separate and Concurrent Regulation D and Regulation S Offerings Were Exempt from Registration Requirements

Concurrent Regulation S and Regulation D offerings are permitted. Regulation D provides that offers and sales of securities outside the U.S. that are conducted "in accordance with" Regulation S may rely on the Regulation S safe harbor "even if coincident offers and sales are made in accordance with Regulation D inside the United States." 17 C.F.R. § 230.500(g). Additionally, Section 230.152(b)(2) states that no integration analysis under this section is required, if any of the following non-exclusive safe harbors apply: "Offers and sales made in . . . compliance with §§ 230.901 through 230.905 (Regulation S) will not be integrated with other offerings[.]" The Commission has stated that "[c]oncurrent offshore offerings that are conducted in compliance with Regulation S will not be integrated with domestic unregistered offerings that are conducted in compliance with Rule 506 . . . ." *Eliminating the Prohibition against Gen. Solicitation & Gen. Advert. in Rule 506 & Rule 144A Offerings*, SEC Rel. No. 33-9415 § IV, 2013 WL 3817300, at *24 (July 10, 2013).

In November 2020, the SEC adopted a new integration rule, Securities Act Rule 152, 17 C.F.R. § 230.152, to streamline the Securities Act's various integration provisions. *See Facilitating Cap. Formation & Expanding Inv. Opportunities by Improving Access to Cap. in Priv. Mkts.*, Rel. No. 33-10884, 2020 WL 6581195 (Nov. 2, 2020). Rule 152 provides that "in determining whether two or more offerings are to be treated as one for the purpose of . . . qualifying for an exemption from registration under the [Securities] Act, offers and sales will not be integrated if, based on the particular facts and circumstances, the issuer can establish . . . that an exemption from registration is available for the particular offering." 17 C.F.R. § 230.152(a).

Thus, the SEC reaffirmed its view and stated that concurrent offshore offerings that are conducted in compliance with Regulation S *will not be integrated* with domestic unregistered offerings that are conducted in compliance with Rule 506, a view that is consistent with prior policy positions taken with respect to Regulation S offerings and registered offerings (or exempt offerings) concurrently conducted in the United States.

C. Hosting One Website for Concurrent Offerings Is Not Fatal

The SEC seems to be integrating Regulation D and Regulation S offerings and suggests that the failure to set up two separate websites is fatal. However, the SEC fails to provide any judicial support for a position that will have enormous impact, not just in this case and against the individual defendants, but more broadly on holders of digital assets nationwide, and indeed on anyone participating in securities offerings reliant on the Regulation S and Regulation D exemptions to registration.

The Commission's 1998 guidance on use of Internet websites to offer securities advises that the "posting or offering of solicitation materials" on websites will not be considered a U.S. offering "[w]hen offerors implement adequate measures to prevent U.S. persons from participating in an offshore Internet offer," i.e., "procedures that are reasonably designed to guard against sales to U.S. persons in the offshore offering." *Interpretation re Use of Internet Web Sites to Offer Sec., Solicit Sec. Transactions, or Advertise Inv. Servs. Offshore*, International Series Release No. 1125, 63 Fed. Reg. 14806-01, 1998 WL 135626, at *14808 (Mar. 27, 1998).

In the present case, in order to purchase the OPP Tokens, each investor—whether residing in or outside of the U.S. —was required to go to Opporty's website. *See* SEC Statement of Material Facts on Motion for Partial Summary Judgment Under Local Rule 56.1, ¶ 61. From there, investors were required to undergo one of two verification procedures. *Id*. ¶ 63. U.S. investors were routed to a third-party website to undergo verification for accredited investors, *id*.

¶ 64, while foreign investors went through a "know your customer" process to confirm their identity, domicile, and other basic information not included in the accreditation verification, *id*. ¶¶ 66-67.

Additionally, the fact a website exists and is hosted in the U.S. does not alone mean this is not an offshore transaction. The SEC appears to believe that because Opporty's website was hosted in the United States, the foreign investor transactions did not take place "offshore" for purposes of Regulation S. However, for purposes of Regulation S, a "transaction" is definitively "offshore" where, as here, "the offer is not made to a person in the United States" and "[a]t the time the buy order is originated, the buyer is outside the United States, or the seller and any person acting on its behalf reasonably believe that the buyer is outside the United States[.]" 17 C.F.R. § 230.902(h)(1). Defendants hosted one website. The website was divided into two parts. Non-U.S. investors were accepted only if they verified to a third party that they are not U.S. persons, that they reside out of the U.S., and they were not resident U.S. aliens. It is plain that Opporty's offer to sell SAFTs without accredited investor verification was restricted solely to foreign investors, thus allowing coincident sales under Regulation D to U.S. purchasers.

If the Regulation S channel made clear that it was directed towards non-U.S. Persons and U.S. persons were directed to the Regulation D channel notwithstanding the lack of a separate website, this supports that such offerings were held concurrently but separately, which is clearly permitted.

To state otherwise would be inconsistent with the U.S. Supreme Court's test regarding the extraterritorial reach of the U.S. securities laws in *Morrison* and the Second Circuit's "transactional domesticity test" in *Absolute Activist*. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 267 (2010) (holding that claims under Section 5 of the Securities Act cover "only

transactions in securities listed on domestic exchanges, and domestic transactions in other securities[]"); *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 67–69 (2d Cir. 2012) (holding that transactions are domestic only if parties "incur[] irrevocable liability" for them, or title to alleged securities passes, in the U.S.). *See also, Anderson v. Binance*, No. 20-cv2803 (ALC), 2022 WL 976824, at *4 (S.D.N.Y. Mar. 31, 2022) ("Plaintiffs must allege more than stating that Plaintiffs bought tokens while located in the U.S. and that title 'passed in whole or in part over servers located in California that host Binance's website.'"); *Williams v. Block One*, No. 20-cv-2809 (LAK), 2022 WL 5294189, at *6-7 (S.D.N.Y. Aug. 15, 2022) (rejecting plaintiffs' argument that crypto-asset trades were domestic because a plurality of blockchain nodes were located in the U.S.).

Lastly, the SEC's argument that the information posted on a website would, were it to occur in the U.S., constitute an "offer" within the meaning of Section 5(c) and thus be a "directed selling effort" is misplaced when an issuer conducts a concurrent offering that permissibly allows general solicitation.

D. "Insignificant Deviations" Do Not Preclude Exemption Availability

Even if coincident Regulation D and Regulation S offerings somehow nullified the availability of either exemption when conducted on a single website, which is not the case, 17 C.F.R. § 230.5-08(a) provides a saving provision for "insignificant deviations" that applies here. Specifically, Regulation D, Rule 508 states in relevant part that a failure to comply with a term, condition or requirement of Rule 504, 505 or 506 will not result in the loss of the exemption from the requirements of section 5 of the Securities Act if the person relying on the exemption shows:

> (1) The failure to comply did not pertain to a term, condition or requirement directly intended to protect that particular individual or entity; and

(2) The failure to comply was insignificant with respect to the offering as a whole, provided that any failure to comply with paragraph (c) of Rule 502, paragraph (b)(2) of Rule 504, paragraphs (b)(2)(i) and (ii) of Rule 505 and paragraph (b)(2)(i) of Rule 506 shall be deemed to be significant to the offering as a whole; and

(3) A good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements of Rule 504, 505 or 506.

17 C.F.R. § 230.5-08(a). The SEC has made no showing that any errors by defendants were in bad faith or were anything more than "insignificant." Accordingly, the Regulation D and Regulation S exemptions should remain available.

III. CONCLUSION

For all the aforementioned reasons, the Court should grant Defendants' Motion for Summary Judgment.

Dated: May 19, 2023

Respectfully submitted,
PAUL HASTINGS LLP

By: /s/ *Kevin Broughel*

Kevin Broughel
Nick Morgan (*pro hac vice forthcoming*)
Ken Herzinger
Eric Sibbitt (*pro hac vice forthcoming*)
Lisa Rubin (*pro hac vice forthcoming*)

Counsel for Amici Curiae
Paul Hastings LLP
200 Park Ave
New York, New York 10166
Telephone: 1 (212) 318-6000

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the Counsel for Defendants Glenn Manishin, at glenn@paradigmshiftlaw.com, and on the following attorney for Plaintiff on May 19, 2023, via email:

Nicholas C. Margida
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-5720
margidan@sec.gov

/s/ *Kevin Broughel*
Kevin Broughel