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Crypto Panel

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Introduction

Significant turmoil in the cryptocurrency industry has led to the filing of a number of recent high-profile chapter 11 cases, including cryptocurrency exchanges, lenders and miners. These cases have raised a myriad of novel questions for both investors and restructuring practitioners to consider. This panel and the accompanying materials will focus primarily on the major issues that have been raised in the cryptocurrency bankruptcies with a large customer universe and unsecured creditor pool (e.g., FTX, Celsius, Voyager), including, among others, valuation of cryptocurrency-based claims, analysis of preference claims, and customer privacy and regulatory issues.

Ordinary Course of Business

I. Defining "Ordinary Course of Business"

   a. Under section 363(c) of the Bankruptcy Code, a trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without a notice or hearing and may use property of the estate in the ordinary course of business.

II. "Ordinary Course" in Cryptocurrency Bankruptcies

   a. Cryptocurrency companies may consider the following actions "ordinary course":

      i. Buying and Selling Tokens

      ii. Hedging

      iii. Market-Making

      iv. Broker Dealer Operations

      v. Lending

      vi. Funding Investments and Capital Calls

Sealing Customer Information

I. Introduction

   a. The issue of sealing customer information in cryptocurrency bankruptcies has been uniquely relevant given the anonymity and permanency of on-chain transactions.

   b. Further, the release of customer information runs the risk of attracting online malefactors who target cryptocurrency holders to steal their assets.

II. Section 107 of the Bankruptcy Code

   a. Section 107(b) empowers Bankruptcy Courts to protect a debtor's trade secrets or confidential research, development, or information.

   b. Section 107(c) authorizes a Bankruptcy Court, for cause, to protect an individual's identifying information to the extent disclosure of that information would lead to identity theft or unlawful harm.

III. Applicable non-bankruptcy law

   a. The California Consumer Privacy Rights Act (CCPRA) permits consumers to prevent businesses from sharing their personal information, to correct inaccurate personal information, and to limit businesses' usage of sensitive information, including race, sexual orientation, and health data.

      i. Colorado, Connecticut, Utah, and Virginia have also passed similar laws.

   b. The General Data Protection Regulation (GDPR) is a regulatory scheme in the European Union and the United Kingdom that governs certain companies' and organizations' storage, usage, and transmission of individual customer data. The GDPR is more expansive than any U.S. data protection law, allowing customers to have their personal information erased from a company's data archives.

IV. Motions to seal customer identities have been filed in every cryptocurrency bankruptcy case to date. Courts' rulings on the sealing of such information have varied based on facts and circumstances.

a. *In re Cred, Inc.*, No. 20-12836 (JTD) (Bankr. D. Del. Dec. 21, 2020) [Docket No. 264] (order granting motion to seal individual customer names);

b. *In re Celsius Network LLC*, No. 22-10964 (MG) (Bankr. S.D.N.Y. Sept. 28, 2022) [Docket No. 910] (order denying motion to seal individual customer names);

c. *In re Voyager Holdings, Inc.*, No. 22-10943 (MEW) (Bankr. S.D.N.Y. July 08, 2022) [Docket No. 54] (order granting motion to seal names of any natural personal subject to UK GDPR and EU GDPR regulations);

d. *In re BlockFi, Inc.*, No. 22-19361 (MBK) (Bankr. D.N.J. Nov. 28, 2022) [Docket No. 4] (motion to seal individual customer names; motion remains *sub judice*);

e. *In re Genesis Global Holdco, LLC*, No. 23-10063 (SHL) (Bankr. S.D.N.Y. Mar. 17, 2023) [Docket No. 137] (motion to seal individual customer names; motion remains *sub judice*);

f. *In re FTX Trading*, No. 22-11068 (JTD) (Bankr. D. Del. Apr. 20, 2023) [Docket No. 1324] (motion to seal individual customer names; motion remains *sub judice*).

V. Implications of Public Disclosure of Customer Information

a. After the disclosure of individual customer names in *Celsius*, there were numerous phishing attempts, including one sophisticated attempt where a malefactor emailed Celsius customers a modified court order that required customers to submit their cryptocurrency wallet address and contact information and pay a filing fee. *Notices of Phishing Attempts, In re Celsius Network LLC*, et al., No. 22-10964 (MG) (Bankr. S.D.N.Y.) [Docket Nos. 1527, 1681, 1904, 1992, 2082].

i. Judge Glenn ordered a prompt investigation into the phishing attempt, referring the matter to the Federal Marshal's Office, which coordinated with the FBI, given that the incident involved the modification of a court order.

Regulatory Issues

I. Introduction

a. Federal, state, and foreign regulations have different implications for the cryptocurrency industry.

II. Commodities Regulations

a. The CFTC has determined that virtual currencies are commodities under the Commodity Exchange Act (CEA), and the CFTC has jurisdiction when cryptocurrency is used in a derivatives contract and where there has been fraud or manipulation of a virtual currency traded in interstate commerce.

i. The CFTC charged three Binance entities and their founder, Changpeng Zhao, with numerous violations of the CEA. *See Complaint for Injunctive and Other Equitable Relief and Civil Monetary Penalties under the Commodity Exchange Act and Commission Regulations, CFTC v. Changpeng Zhao, et al.*, No. 23-cv-01887 (N.D. Ill. Mar. 27, 2023) [Docket No. 1].

III. Securities Regulations

a. Under the *Howey* test, investment contracts are subject to securities laws and regulations. *See SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

i. An investment contract is (1) an investment of money; (2) in a common enterprise; (3) with the expectation of profit; and (4) to be derived from the efforts of others. *See* Michael Mendleson, *From Initial Coin Offerings to Security Tokens: A U.S. Federal Securities Law Analysis*, 22 STAN. TECH. L. REV. 52 (2019).

b. Applying the *Howey* test, the SEC recently found that BlockFi's interest accounts were securities subject to federal securities regulations and reporting requirements. *See In the Matter of Blockfi Lending, Inc.*, Admin. Proc. 3-20758 (Feb. 14, 2022).

i. SEC Chairman Gary Gensler also recently testified in front of Congress that the "vast majority" of cryptocurrency tokens are securities, and that the current cryptocurrency market is "rife with noncompliance," prompting the SEC to communicate with cryptocurrency companies on specific rule proposals. *Testimony of Chair Gary Gensler before the United States House of Representatives Committee on Financial Services*, U.S. SECURITIES AND EXCHANGE COMMISSION (Apr. 18, 2023).

c. In *Voyager*, the SEC filed an objection to confirmation of Voyager's plan, arguing that the proposed asset sale to Binance could violate federal securities laws. *See Supplemental Objection of the U.S. Securities and Exchange Commission to Final Approval of the Adequacy of the Debtors' Disclosure Statement and Confirmation of the Chapter 11 Plan, In re Voyager Digital Holdings, Inc.*, No. 22-10943 (MEW) (Bankr. S.D.N.Y. Mar. 6, 2023) [Docket No. 1141].

i. The Committee on Foreign Investment in the United States ("CFIUS") also filed a notice maintaining that the Binance transaction may be subject to its review and could affect the parties' ability to complete the transaction. *See Notice of the United States of America Concerning the Review of Certain Transactions by the Committee on Foreign Investment in the United States, In re Voyager Digital Holdings, Inc.*, No. 22-10943 (MEW) (Bankr. S.D.N.Y. Dec. 30, 2022) [Docket No. 797].

ii. Although the *Voyager* court ultimately approved the chapter 11 plan and sale, Binance subsequently backed out of the purchase agreement, citing "a hostile and uncertain regulatory climate."

IV. State Money Transmitter Licenses

a. The Anti-Money Laundering Act of 2020 makes all transactions in "value that substitutes for currency" subject to registration with FinCEN as a money transmitter.

i. These laws are not specific to cryptocurrency but were enacted as part of broader banking regulatory efforts. Since cryptocurrency exchanges transmit "money" across state lines, they are likely subject to these regulations.

ii. FinCEN defines a money transmitter as someone that acts as an intermediary between two parties that send or exchange money for another currency.

1. FinCEN guidance from March 2013 notes that administrators and exchangers that "accept and transmit a convertible virtual currency" are money transmitters that are subject to FinCEN regulations.

2. *See United States v. Harmon*, 474 F. Supp. 3d 76, 80 (D.D.C. 2020) (finding that bitcoin is money under Washington D.C.'s money transmitter law).

b. Various states have different requirements and laws with respect to licensure. In most states, licensure requires the maintenance of surety bonds.

i. Surety providers typically enter into an indemnification agreement with the bonded company under which the surety provider can generally seek indemnification from the bonded company in connection with paying out claims and associated costs (e.g., litigation costs).

ii. Customers could potentially assert claims against the surety bonds in the states where they are residents.

V. Foreign Regulations

a. Certain foreign jurisdictions may be more favorable to the licensure of cryptocurrency companies and exchanges (e.g., The Bahamas, Cyprus, and El Salvador).

b. Other jurisdictions may have more developed regulations and requirements specific to cryptocurrency to protect customers and creditors (e.g., Japan).

i. The Japanese regulatory scheme required FTX Japan to segregate customer deposits and ensured that cryptocurrency deposits were held securely in cold storage. As a result of these protections, FTX Japan was able to reopen for withdrawals of customer funds following the bankruptcy filing.

Customer Property

I. Introduction

a. Determining whether assets that were deposited into cryptocurrency accounts are property of the customer or property of the debtor's estate is a key consideration for creditors' recoveries.

II. Are cryptocurrency deposits property of the customer or property of the bankruptcy estate?

a. Under section 541(d) of the Bankruptcy Code, property to which the debtor holds legal but not equitable title becomes property of the bankruptcy estate only to the extent of the debtor's legal title, as the debtor does not hold any equitable interest.

b. Thus, it is well settled that "debtors do not own an equitable interest in property they hold in trust for another," and therefore funds held in trust are not property of the estate. *City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 95 (3d Cir. 1994) (cleaned up).

III. Significance of classification as customer property

a. Assets that are property of the estate are subject to the automatic stay and other provisions of the Bankruptcy Code. Creditors only receive these assets subject to classification, treatment, absolute priority, and other provisions of the Bankruptcy Code, which may significantly reduce a creditor's recovery and delay payment.

b. Certain assets are not property of the estate, meaning these assets may potentially be recovered by their owners immediately and not made available for distributions to creditors.

IV. Recent Case Law Applying Contract Principles

a. Customer accounts are generally governed by terms of service, which often include language that provides that digital assets remain property of the customer, not the cryptocurrency company or exchange.

i. *Celsius*: The court held that Celsius's terms of use agreement was a binding and enforceable contract that mandated assets in Celsius accounts were property of the estate.

1. When customers deposited assets in Earn Accounts, they became Celsius's property under the terms of use agreement, and assets remaining in customers' "Earn" accounts on the petition date thus became property of the Debtors' estates. *See Memorandum Opinion and Order Regarding Ownership of Earn Account Assets, In re Celsius Network LLC*, No. 22-10964 (MG) (Bankr. S.D.N.Y. Jan. 4, 2023) [Docket No. 1822].

ii. *Voyager*: The court held that funds in the Debtors' two FBO bank accounts were not property of the estate based on the language in Voyager's Customer Agreement.

1. The Customer Agreement included language that stated "Customer authorizes and instructs Voyager to hold Customers' Cryptocurrency . . . on its behalf*." Decision as to Motion to Permit Withdrawals by Customers of Funds Held in FBO Accounts at Metropolitan Commercial Bank, In re Voyager Digital Holdings, Inc.*, No. 22-10943 (MEW) (Bankr. S.D.N.Y. Aug. 5, 2022) [Docket No. 250].

2. The court noted that other courts facing similar customer property issues should understand that the decision was based on the language in the Voyager agreements and the lack of opposition from the Debtors and creditors. *Id.*

iii. *FTX:* An ad hoc group of non-US customers filed a complaint and subsequent motion for partial summary judgment seeking a declaratory judgment that the customers' funds deposited on FTX.com are not property of the Debtors' estates. *See Opening Brief in Support of the Ad Hoc Committee of Non-US Customers of FTX.com's Motion for Partial Summary Judgement*, No. 22-50514 (JTD) (Bankr. D. Del. Mar. 24, 2023) [Docket No. 11].

b. However, the facts and circumstances of each case and the ability to trace the flow of digital assets on the blockchain play an important role in identifying customer assets.

i. Tracing Issues

1. When a trust is established, a tracing exercise is required to identify and recover trust assets.

2. Digital Asset Tracing: Common Law Tracing vs. Equitable Tracing

a. Common law tracing is used where the claimant has legal title to the original property, and the original property is segregated and readily identifiable.

b. Equitable tracing is used when the claimant holds equitable title to the original property. Unlike common law tracing, original property mixed with other assets is still considered traceable.

3. Applicable international law

a. To the extent that an exchange's terms of service may be governed by international law, different analyses regarding tracing may apply.

b. For example, under English law (which governs the FTX terms of service), all identifiable customer assets are held in a constructive or resulting trust for the benefit of such customers. These constructive or resulting trusts created by operation of law are distinct from express or implied trusts.

i. Under English law, there is a concept of a constructive trust arising in the case of theft or fraud and any trust property is therefore recoverable and traceable in equity. In such instances, tracing (either common law tracing or equitable tracing) is a procedure available under English law used to identify and recover property. Tracing may be an available remedy where a claimant is able to establish a proprietary interest in an asset at the time of its receipt by a defendant and where an asset has been misappropriated in breach of trust, by fraud or theft.

4. Impact on Distributions

a. If assets are traceable and payable to holders, unsecured creditors and beneficiaries of traced assets will likely receive unequal distributions from a debtor's estate.

5. Tracing may also be relevant in the context of criminal and civil asset forfeiture (see Criminal and Civil Asset Forfeiture in Bankruptcy).

Criminal and Civil Asset Forfeiture in Bankruptcy

I. Introduction

a. Upon the filing of a bankruptcy petition and creation of the bankruptcy estate, section 362 imposes an injunction known as the "automatic stay," which generally serves to protect property of the estate from creditor collection efforts. However, when parallel bankruptcy and forfeiture proceedings arise, there is an inherent conflict between the automatic stay and the Government's ability to seize and forfeit assets that may have a nexus to pre-petition criminal activity

II. Criminal vs. Civil Forfeiture

a. Criminal forfeiture is a post-conviction sanction imposed on defendants convicted of an applicable offense, and is ordered as part of the defendant's sentence.

I. Generally requires tracing of assets to the criminal activity.

b. Civil (or "judicial") forfeitures are in rem actions brought against the property itself and do not require that the owner be convicted (or even charged) to succeed.

I. The requisite nexus between the alleged crime and the seized property that triggers forfeiture varies from statute to statute. For example:

1. Money laundering charges under 18 U.S.C. § 1956(h), the requisite nexus is "[a]ny property, real or personal, involved in a transaction or attempted transaction . . . or any property traceable to such property." 18 U.S.C. § 981(a)(1)(A).

2. Wire fraud charges under 18 U.S.C. § 1343, the requisite nexus is "any property . . . which constitutes or is derived from proceeds traceable to a violation." 18 U.S.C. § 981(a)(1)(C)

III. Relation Back Doctrine

a. Once subject to forfeiture, title to the assets in question vests in the United States at the moment when the criminal conduct occurred, regardless of whether the criminal act occurred pre-petition.

b. Thus, even if a bankruptcy case is already pending when the forfeiture order is entered, the assets subject to such order will not be protected by the automatic stay if the crime in question occurred prior to the bankruptcy filing. *See In re Dreier LLP*, 452 B.R. 391, 411 (Bankr. S.D.N.Y. 2011).

IV. Automatic Stay (Police Power Exception)

a. Several courts have concluded that forfeiture actions are excepted from the automatic stay entirely due to the criminal and police/regulatory power exceptions found in section 362(b)(1) and 362(b)(4).

V. FTX / BlockFi Asset Seizures

a. FTX

I. The United States Department of Justice seized certain assets, including shares of Robinhood Markets, Inc. and approximately $150 million held in FTX accounts at Moonstone Bank and Silvergate Bank.

II. The DOJ also seized a number of cash deposits and other assets as a result of the criminal indictment of Samuel Bankman-Fried.

b. BlockFi

I. The DOJ also filed a notice of asset seizure in the BlockFi case, specifying that the Robinhood shares "and $20,746,713.67 were seized pursuant to criminal and civil asset seizure statutes, and argued that the BlockFi automatic stay does not apply to such assets due to (a) the relation back doctrine, or (b) the police/regulatory exception to the automatic stay.

Preference Claims in the Context of Customer Withdrawals

I. Introduction

a. Determining whether digital assets held by a cryptocurrency company in chapter 11 are property of the debtor's estate or property of the customer also impacts potential preference claims.

II. Elements of a Preference Claim

a. A preferential transfer is defined pursuant to section 547(b) of the Bankruptcy Code as any transfer of an interest of ***property of the debtor*** (1) to or for the benefit of a creditor, (2) for an antecedent debt owed by the debtor, (3) made while the debtor was insolvent, (4) within the 90 day or 1 year lookback period, which (5) entitles the creditor to receive more than they would otherwise be entitled to in a chapter 7 liquidation.

b. If the digital assets held by the debtor are not "property of the debtor," a withdrawal of those assets or transfer of those assets in the 90 days prior to the filing cannot be a preferential transfer.

III. Defenses to Preferences – to the extent digital assets are determined to be property of the debtor

a. Contemporaneous new value

i. In the context of customer deposits, the critical inquiry is whether the parties intended such an exchange to be contemporaneous.

b. Subsequent new value

i. To successfully invoke a subsequent new value defense, "the creditor must establish two elements: (1) after receiving the preferential transfer, the creditor must have advanced new value to the debtor on an unsecured basis; and (2) the debtor must not have fully compensated the creditor for the new value as of the date that it filed its bankruptcy petition." *In re Green Field Energy Servs., Inc.*, 585 B.R. 89, 103 (Bankr. D. Del. 2018).

c. Ordinary course of business

i. Customer deposits and loans between cryptocurrency exchanges may be incurred in the ordinary course of business.

ii. However, customer withdrawals amidst the collapse of an exchange or a run on the bank may fall outside of the ordinary course of business.

1. At least one court has found withdrawals from an investment account were not in the ordinary course of business during and after an announcement that the debtor bank was closing. *In re Southern Indus. Banking Corp*., 92 B.R. 297 (Bankr. E.D. Tenn. 1988).

iii. Ponzi scheme exception – when a debtor has facilitated a Ponzi scheme, transfers during the preference period cannot be protected by the ordinary course defense.

1. In *Celsius*, the Independent Examiner's Report noted that Celsius had used customer-deposited assets to fund its token buybacks, and Celsius insiders referred to its operations as "very ponzi-like."

2. The report maintains that "[i]n every key respect – from how Celsius described its contract with its customers to the risks it took with their crypto assets – how Celsius ran its business differed significantly from what Celsius told its customers." *In re Celsius Network LLC*, No. 22-10964 (MG) (Bankr. S.D.N.Y. Jan. 31, 2023) [Docket No. 1956].

IV. Valuing Preference Claims

a. The scope of a debtor's recovery for a preference claim is either the return of the debtor's property that was transferred or the value thereof. *In re DSI Renal Holdings, LLC*, 617 B.R. 496, 503 (Bankr. D. Del. 2020) (emphasis added).

i. For depreciating or non-stable assets, courts define value as the fair market value of the subject property at the time of the preferential transfer.

1. However, when the property increases in value after the time of transfer, courts may award the value of the property at the time of its recovery by the Debtor. *In re Heller Ehrman LLP*, No. AP 10-3221DM, 2014 WL 323068, at *8 (Bankr. N.D. Cal. Jan. 28, 2014) ("Certainly, courts can award the value of property measured at the time of recovery where the property naturally increases in value.").

2. Given the volatile nature of cryptocurrency, this could result in a discrepancy between the value of the preference claim and the value of the resulting claim against the estate, as valued on the petition date.

Valuing Cryptocurrency Claims

I. Introduction

a. In valuing cryptocurrency claims, relevant considerations include (1) the appropriate date on which to value such claims, and (2) whether such claims need to be "dollarized" so that they are all in a common currency.

II. Valuation Date

a. There is significant legal authority indicating that claims should be valued as of the petition date.

i. The "English Rule," arising from pre-Bankruptcy Code case law, provides that claims are valued as of the petition date. Numerous post-Bankruptcy Code cases have followed this case law and reasoning.

ii. Section 502(b) of the Bankruptcy Code also requires claims to be valued as of the petition date (though, by its terms, this section only applies to claims that are subject to an objection).

iii. Valuing claims as of the petition date generally mitigates the risk that certain creditors will gain an advantage over others based on value fluctuation following the bankruptcy filing.

1. Petition date valuation frequently arises in the context of foreign currency claims and has also been utilized in valuing claims asserted in non-currency denominations, such as gold.

b. Using the petition date as a claim's valuation date may be inequitable given the volatility of certain coins or tokens or the lack of the efficient markets in respect of those coins or tokens. Courts could alternatively use more equitable valuation markers, such as a VWAP or another reference date.

i. For example, pursuant to Celsius's proposed plan, claims on account of Celsius's native token, CEL, are to be valued at the pre-ICO price of $0.20 (notwithstanding that, at the time of the bankruptcy filing, CEL was trading at approximately $0.80).

c. Dollarization of Claims Asserted in Cryptocurrency

i. Numerous courts have required that claims denominated in a foreign currency be converted to the United States dollar (USD) as of the petition date.

1. Section 502(b) of the Bankruptcy Code requires claims to be valued as of the petition date in USD (though, by its terms, this section only applies to claims that are subject to an objection).

ii. Some debtors have proposed modified proof of claim forms that incorporate currency grids that allow claimants to specify the quantities of each coin or token in their accounts, obviating the need for subsequent claims objections based on the conversion price and issues surrounding the valuation of illiquid tokens as of the petition date.

1. There are also general concerns surrounding the identification of customer and creditor identities, which may necessitate cross-referencing the proofs of claim with the customer accounts, as well as obtaining additional KYC information.

III. Recent Cases

a. ***Cred*:** the confirmed chapter 11 plan provides for the dollarization of cryptocurrency claims and permits general unsecured creditors to make a "cryptocurrency election" that would enable them to receive distributions in cryptocurrency.

i. Following an objection by the Ad Hoc Committee of Bitcoin Lenders, all parties' rights were reserved as to whether general unsecured claims should be valued as of a date other than the petition date.

ii. Claim Procedures: Holders of cryptocurrency claims required to file standard proof of claim by general bar date (no separate cryptocurrency bar date) and requires denomination of claim asserted to be in USD as of the exchange rate on the Petition Date.

b. ***Voyager*:** the confirmed chapter 11 plan provides for dollarization of claim amounts and distributions in kind.

i. "Account Holder Claims shall be valued in U.S. dollars as of the Petition Date consistent with section 502(b) of the Bankruptcy Code."

ii. Account holders are to receive several forms of recovery under the plan, including in certain instances, "Net Owed Coins" and/or "Cryptocurrency."

iii. Claim Procedures: Holders of cryptocurrency claims required to file standard proof of claim by general bar date (no separate cryptocurrency bar date) and requires proof of claim to indicate (a) each type of cryptocurrency held and (b) the number of units of each cryptocurrency held.

c. ***Celsius*:** current proposed plan contemplates that claims will be dollarized as of the Petition Date.

i. "Pro Rata" is defined as "[t]he proportion that the U.S. Dollar value of an Allowed Claim or an Allowed Interest in a particular Class bears to the aggregate U.S. Dollar value of the Allowed Claims or Allowed Interests in that Class (or as otherwise specified), in each case calculated as of the Petition Date."

ii. In a March 9, 2023 opinion, the *Celsius* court held that account holders and customers can file claims for fraud, misrepresentation and other common law claims.

iii. The UCC was authorized to file a class claim, asserting non-contract claims (including for fraud and negligent misrepresentation) on behalf of account holders.

iv. Claim Procedures: Holders of cryptocurrency claims required to file a modified proof of claim form by general bar date (no separate cryptocurrency bar date). The modified form includes a chart with different types of cryptocurrency and their respective exchange rates to USD as of the Petition Date. Claimants are instructed to fill out the chart, indicating their coin balance of each cryptocurrency.

1. For any claim based on cryptocurrency, the proof of claim form must indicate (a) each type of cryptocurrency held and (b) the number of units of each cryptocurrency held (which may be done through the table of cryptocurrency on the proof of claim form), and (c) the type of account (Earn, Custody, Borrow, or Withhold).

d. ***BlockFi*:** current proposed plan is silent as to cryptocurrency valuation (both dollarizing and applicable date).

i. Notably, the section on "Foreign Currency Exchange Rate" expressly excludes Account Holder Claims: "Except as otherwise provided in a Bankruptcy Court order, as of the Effective Date, any Claim, other than any Account Holder Claim, asserted in currency other than U.S. dollars shall be automatically deemed converted to the equivalent U.S. dollar value using the exchange rate for the applicable currency as published in The Wall Street Journal, National Edition, on the Effective Date."

ii. Claim Procedures: Holders of cryptocurrency claims required to file a modified proof of claim form by general bar date (no separate cryptocurrency bar date). The modified form includes a chart with different types of cryptocurrency and their respective exchange rates to USD as of the Petition Date. Claimants are instructed to fill out the chart, indicating their coin balance of each cryptocurrency.

Plan Considerations

I. Introduction

a. Pursuant to section 1129 of the Bankruptcy Code, plan confirmation enables debtors to make certain distributions to creditors, including issuing securities in the reorganized company.

II. Distributions in Kind

a. In *Cred*, the plan provides for the dollarization of cryptocurrency claims but also permits general unsecured creditors to make a "cryptocurrency election" that would enable them to receive distributions in cryptocurrency.

b. In *Voyager*, the plan provides for dollarization of claim amounts and distributions in kind.

III. Court Approved Recovery Tokens

a. Celsius "NewCo" Equity Share Tokens

i. In its proposed chapter 11 reorganization plan, Celsius is seeking to distribute its liquid assets back to customers and issue new tokens representing equity in its illiquid assets.

b. Application of Section 1145 of the Bankruptcy Code

i. Securities issued pursuant to a chapter 11 plan of reorganization are exempted from the general securities law registration requirements pursuant to section 1145.

ii. Celsius's proposed plan notes that the equity share tokens are tokenized securities and are thus exempt for registration under section 1145.

IV. Third Party Recovery Tokens and Socializing Losses

a. Certain recovery tokens have been issued outside of the chapter 11 process and were not subject to court approval or the protections granted by the Bankruptcy Code.

b. Voyager

i. Ethos has launched a recovery token for Voyager creditors or VGX token holders that cannot access their assets on the Voyager interface through the pending bankruptcy.

ii. Creditors or users must provide Ethos their Voyager claim request, and Ethos will confirm the amount of USD on a creditors' Voyager account and the total number of VGX tokens and the creditors' Ethos allocation based on the USD or VGX amount.

c. Cryptocurrency lender DebtDAO launched the FTX Users' Debt (FUD) token, which is listed on the cryptocurrency exchange Huobi.

d. Bitfinex

i. In 2016, Bitfinex suffered a hack where 119,000 bitcoins were stolen from its interface. To recover the stolen funds, Bitfinex launched a Recovery Right Token (RRT), which incentivized its Bitfinex (BFX) token holders to convert to equity.

1. In the event of a recovery, BFX holders are repaid first and then any remaining bitcoins are distributed among RRT holders.

Issues in Recent Mining Cases

I. Introduction

a. The fluctuations in the price of bitcoin, changes in hash rate and power costs, as well as the looming halving event next year, have caused many uncertainties in cryptocurrency mining.

II. Funded Debt and What Constitutes Collateral

a. Mining companies typically require significant capital to run their operations, which in turn requires tapping the capital markets and incurring funded debt obligations. Given the relative speed in which these debt obligations are entered into and the gray area in which digital assets exist, the collateral securing this debt and the methods of perfecting a secured creditor's interest in digital assets may not be clearly defined.

b. In addition, there is often overlap in collateral packages among lenders and noteholders, equipment lenders, and statutory lien claimants, making the determination of lien priority difficult.

III. Pricing Volatility and Impact on Valuation

a. The fluctuations in the price of cryptocurrencies has also impacted the ability of mining companies to accurately develop projections and value their businesses. Companies such as Core Scientific have also claimed that a business plan is difficult to arrive at due to such fluctuations.

IV. Owned and Financed Miners vs. Hosted Miners

a. Bitcoin mining companies have had to deal with increased expenses related to debt and/or leases in respect of their miners vis-à-vis the value of those miners, which has decreased significantly in recent years. This has caused certain equipment debt to exceed the value of the equipment.

b. Some bitcoin mining companies have diversified into hosting mining equipment for other mining companies in order to secure a steady stream of revenue. This has resulted in friction, given the fluctuations in the price of power and has raised the question of whether power prices can be passed through to the customers.

Jurisdictional Issues

I. Introduction

a. Given the cross-border nature of the cryptocurrency industry, United States bankruptcy cases are often accompanied by foreign proceedings, which may raise the question of which court can hear and decide certain case issues.

II. FTX Bahamas Proceedings

a. There have been numerous disputes between the FTX Trading debtors (in chapter 11 in the US) and the FTX Digital Markets (in provisional liquidation in the Bahamas) joint provisional liquidators (the "JPLs"), including multiple motions for relief from the automatic stay.

b. Early in the chapter 11 cases, the JPLs sought to compel the FTX debtors to turn over certain electronic records, which the debtors and the committee opposed.

c. The debtors and the JPLs later entered into a settlement and cooperation agreement, detailing procedures for determining from which assets the chapter 11 debtors and the JPLs would be primarily responsible for recovering value.

d. Most recently, the JPLs have requested relief from the automatic stay to allow the JPLs to file an application in the Bahamas Court to resolve issues relating to the identification of FTX Digital accounts.

III. Voyager

a. In parallel with its chapter 11 cases in the US, Voyager commenced a foreign proceeding in Canada, seeking recognition of the chapter 11 cases under Canadian law, which the Canadian court ultimately recognized as a "foreign main proceeding."

b. The Voyager debtors and certain of Voyager's current and former directors and officers were named as defendants in a Canadian class-action suit filed in the Ontario Superior Court of Justice.

i. The class action was automatically stayed as to Voyager.

ii. The debtors filed an adversary complaint in the US bankruptcy court against the Canadian class action plaintiffs, seeking to also extend the automatic stay to the directors and officers that were named as defendants in the class action.

Corresponding case materials can be found at https://abi-materials.s3.amazonaws.com/2023/NYCBC2023/Cryptocurrency+Panel+Documents.zip.

Faculty

Philip Abelson is a partner in the Financial Restructuring and Insolvency Practice at White & Case LLP in New York, where his practice focuses on debtors' and creditors' rights and corporate restructurings. He represents debtors, creditors, official and unofficial committees, bondholders and third parties in both in-court and out-of-court restructurings. Mr. Abelson has been recognized as a "Rising Star" by *Law360*, and as a "Leading Lawyer" by *Chambers USA*. He has spoken on bankruptcy and governance issues, including on Debtwire's panel on Puerto Rico in 2015; ABI's New York City Bankruptcy Conference on municipal bankruptcies, insolvencies and restructurings in 2014; and the American Bar Association's Business Law Section Spring Meeting on chapter 11 current developments in 2013, among others. He also attended the working group session (model insolvency law) of the United Nations Commission on International Trade Law at the United Nations on behalf of the New York State Bar Association. Mr. Abelson received his B.A. from Indiana University and his J.D. from the University of Michigan Law School.

Dr. Youfei Chang is a senior consultant in NERA's Securities and Finance Practice in New York. Her work focuses on the estimation of liabilities for mass torts, securities class action claims and regulatory actions involving cryptocurrencies. Previously, Dr. Chang was an assistant professor at Duke University, where she taught financial accounting and conducted research on the economic consequences of shareholder takeover defenses, as well as the strategic behavior of equity research analysts. She also has a wealth of industry experience that includes validation of statistical models in the banking industry, financial statement audits, and tax advisory with various public accounting firms. Dr. Chang received her B.S. in economics and M.S. in accounting from the University of Waterloo, and her Ph.D. in accounting from Stanford Graduate School.

Andrew G. Dietderich is the co-head of Sullivan & Cromwell LLP's Global Finance & Restructuring Group and dean of Associate Life in New York. He began his career as a general practice associate 1996 and became partner in 2004. Mr. Dietderich founded the firm's restructuring practice in 2008 and has overseen its growth into a leading, diverse practice focused on major chapter 11 cases and litigations. He has helped debtors, plan sponsors and proactive creditors navigate some of the largest and most challenging chapter 11 cases in U.S. history, including Garrett Motion, Eastman Kodak, Chrysler, Caesars and General Growth Properties. Mr. Dietderich regularly counsels solvent companies considering liability management, balance-sheet optimization, spin-offs, carve-outs and other strategic initiatives. Many of his projects feature special issues relating to the structure of corporate groups, corporate ring-fences, bankruptcy remoteness, intercompany transactions, cross-border financial arrangements and related fiduciary duty matters. Mr. Dietderich has been recognized in *Chambers USA* and *Chambers Global*, *Law360*, *Turnarounds & Workouts*, *The Legal 500 US*, *IFLR 1000* and *New York Super Lawyers*, among others. He received his A.B. *magna cum laude* and Phi Beta Kappa in 1991 from Harvard College and his J.D. *magna cum laude* in 1995 from Harvard Law School.

Kristopher M. Hansen is co-chair of the Financial Restructuring practice at Paul Hastings LLP in New York. Throughout his career, he has guided clients through proceedings in bankruptcy and ap-

pellate courts across the country, as well as through many out-of-court situations. Mr. Hansen helps sophisticated investors in distressed credit formulate and execute complex strategies involving mergers and acquisitions, financing and litigation in and outside of actual bankruptcy. He represents official creditors' committees in complex corporate chapter 11 cases, and corporate debtors in connection with formal bankruptcy proceedings and informal negotiations to restructure their debt obligations. Mr. Hansen is admitted to practice before the courts of the State of New York, the Southern and Eastern Districts of New York, the U.S. Courts of Appeals for the Second and Third Circuits, and the U.S. Supreme Court. He frequently lectures and has published articles on the distressed marketplace. Mr. Hansen received both his B.S. in finance in 1992 and his J.D. in 1995 from Fordham University.

Hon. Michael B. Kaplan is Chief U.S. Bankruptcy Judge for the District of New Jersey in Trenton, initially appointed on Oct. 3, 2006, and named Chief Judge on May 1, 2020. Prior to taking the bench, Judge Kaplan served as a standing chapter 13 bankruptcy trustee, as well as a member of the chapter 7 panel of bankruptcy trustees, where he received case appointments as both a chapter 11 and chapter 12 trustee. His private practice included the representation of institutional lenders consumer debtors (under both chapters 7 and 13), business debtors and individuals undergoing reorganization pursuant to chapter 11. Judge Kaplan is a Fellow of the American College of Bankruptcy and is a member of the National Conference of Bankruptcy Judges, for which he is currently serving as Treasurer and Executive Board Member. Over the past 30 years, he has spoken to numerous bar associations and business organizations, and since 2009 he has taught as an adjunct professor at Rutgers University School of Law. Judge Kaplan has authored several articles relating to bankruptcy issues and is a co-author of West's *Consumer Bankruptcy Manual* and *Consumer Bankruptcy Handbook*. Additionally, he serves on the Editorial Board and as business manager for the *American Bankruptcy Law Journal*. Prior to taking the bench, Judge Kaplan served as mayor and councilman for the Borough of Norwood, N.J., and as a member of the Norwood Planning Board. He received his A.B. from Georgetown University in 1984 and his J.D. from Fordham University School of Law in 1987.

Mohsin Y. Meghji, CTP is the founder of M3 Partners LP in New York. His more-than-30-year career as a turnaround professional has focused primarily on reviving companies experiencing financial, operational or strategic transitions to maximize value for stakeholders through management and/or advisory roles in partnership with some of the world's leading financial institutions, private-equity and distressed hedge fund investors. Mr. Meghji has led some of the most significant financial restructurings in recent years, including serving as CRO of Sears Holdings Corp., Barney's Inc., Real Alloy Intermediate Holdings, Sanchez Energy Corp. and Capmark Financial Group. In 2021, he was appointed to the board of directors of the Nassau County Interim Finance Authority (NIFA) by New York State Governor Andrew Cuomo at the recommendation of Senate Majority Leader Andrea Stewart-Cousins. Prior to founding M3 Partners, Mr. Meghji served as executive vice president and head of Strategy at Springleaf Holdings, LLC, as well as CEO of its captive insurance companies. At Springleaf, he was a key member of the management team that transformed the struggling consumer lender into a highly successful IPO in late 2013. Prior to Springleaf, Mr. Meghji co-founded Loughlin Meghji + Co., a financial and restructuring advisory firm that became one of the leading restructuring boutiques in the U.S. Earlier in his career, he spent 12 years with Arthur Andersen & Co. in the firm's London, Toronto and New York offices, eventually becoming partner in its Global Corporate Finance group. Mr. Meghji recently served as a director on the corporate boards of, among others, Frontier Communications, Toys "R" Us, Philadelphia Energy Solutions Refining and Marketing LLC and SHOPKO Corp. He also previously has served as a director of, among others, Mariner Health

Care Inc., Cascade Timberlands, LLC, Dan River, Inc. and MS Resorts. Mr. Meghji is a director of Equity Group International Foundation, which provides funding for underprivileged high-potential students in Kenya, and he previously served on the boards of The Children's Museum of Manhattan from 2012-18 and HealthRight International from 2004-12. Mr. Meghji is a graduate of the Schulich School of Business, York University, Canada and has taken executive courses at the INSEAD School of Business in France. He has qualified as a U.K. and Canadian Chartered Accountant as well as a U.S. Certified Turnaround Professional.

Brett H. Miller is a partner in the Business Reorganization & Restructuring Department of Willkie Farr & Gallagher LLP in New York and chairs the firm's Official Creditors' Committees Practice Group. He advises on chapter 11 cases, out-of-court restructurings, bankruptcy-related acquisitions, cross-border insolvency matters, bankruptcy-related litigation and insolvency-sensitive transactions. Mr. Miller has represented parties in restructurings in such industries as real estate, transportation, retail, manufacturing, food service, oil and gas, and media. He is a Fellow of the American College of Bankruptcy and is listed as a leading lawyer for Bankruptcy & Restructuring in *Chambers Global*, *Chambers USA* and *Legal 500 US*. He has been recognized by *Law360* as an "MVP" of the bankruptcy bar, and *Turnarounds & Workouts* named him an "Outstanding Restructuring Lawyer." Mr. Miller received his B.A. from Columbia University in 1988 and his J.D. from Georgetown University Law Center in 1991.

Shoba Pillay is a partner and co-chair Jenner & Block LLP's Data Privacy & Cybersecurity Practice in Chicago. She advises clients on mitigating and responding to cybersecurity threats and national security risks, as well as developing robust regulatory compliance programs. Mr. Pillay is a former federal prosecutor and corporate crisis manager with extensive trial and investigations experience who leads complex and high-stakes internal and government-facing investigations. Due her technical expertise and significant investigation experience, she was the court-appointed examiner in the bankruptcy of digital asset lender Celsius Network LLC. As a federal prosecutor, Ms. Pillay gained experience with complex investigations and prosecutions involving cybercrime, complex fraud, human trafficking, theft of trade secrets, terrorism, espionage, and export control and international sanctions violations. Among her significant trials during her 11 years in the U.S. Attorney's Office in the Northern District of Illinois, she prosecuted a theft of trade secrets case involving a Chinese competitor, the computer intrusion of a Fortune 500 company, and the illegal export of technical data to China. She was honored with the Department of Justice John Marshall Award from the Attorney General in 2022. Ms. Pillay received her B.A. in political science in 1998 from Washington University and her J.D. in 2003 from Boston College Law School.