FOOL ME ONCE, SHAME ON ME; FOOL ME TWICE, SHAME ON CHAPTER 11: THE CELSIUS BANKRUPTCY AND A RADICAL APPROACH TO EQUITY DISBURSEMENTS

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Table of Contents

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I. Introduction

In recent years, Cryptocurrency firms released thousands of products to the public with the promise of profits, and formed dozens of platforms that pledge to be safe places for regular people to store and trade cryptocurrency.[1] However, it is clear that many products and platforms are marketed with misrepresentations, mismanaged, and survive only with a strong cryptocurrency market.[2] One such firm, Celsius Network LLC ("Celsius"), filed for Chapter 11 bankruptcy in July 2022 and later proposed a plan of reorganization that appeared to repeat some of the same problematic behavior that led to its bankruptcy in the first place.[3]

Celsius was primarily a cryptocurrency lending platform that held cryptocurrency assets worth more than $12 billion and had $8 billion in outstanding loans to customers as of May, 2022.[4] Following the 2022 crash of the cryptocurrency market, Celsius entered Chapter

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[1] *See What Is Cryptocurrency and How Does It Work?*, KASPERSKY, https://www.kaspersky.com/resource-center/definitions/what-is-cryptocurrency (last visited February 14, 2024) (explaining the various institutions and functions of cryptocurrency).

[2] *See id.*; U.S. vs. Goettsche, No. 19-877 (D.N.J. filed Dec. 5, 2019) (available at https://www.justice.gov/usao-nj/bitclub) (charging the leaders of a purported cryptocurrency mining Ponzi scheme with conspiracy to engage in wire fraud); Oliver Knight, *How Crypto Lender Celsius Overheated*, COINDESK (Jun. 16, 2022, 2:09 PM), https://www.coindesk.com/business/2022/06/16/how-crypto-lender-celsius-overheated/ (explaining the fall into insolvency suffered by one of the cryptocurrency industry's most established firms); Wayne Duggan, *What Is Crypto Winter?*, FORBES (April 20, 2023, 9:30 AM), https://www.forbes.com/advisor/investing/cryptocurrency /what-is-crypto-winter/ (dis-cussing the implications of the massive drop in the value of cryptocurrency assets and the drop in trading volume).

[3] Joint Chapter 11 Plan of Reorganization of Celsius Network LLC and its Debtor Affiliates, *In re* Celsius Network LLC, No. 22-10964 (Bankr. S.D.N.Y. 2022), ECF No. 2358 [hereinafter Joint Plan] (explaining plan proposed for reorganization).

[4] Knight, *supra* note 2 ("Celsius had more than $8 billion lent out to clients and $12 billion in assets under management by May of this year.").

11.[5] In January 2023, Celsius proposed the idea of a "Bankruptcy Recovery Token" for the reorganized Celsius to create and distribute to certain creditors under their Chapter 11 plan.[6] At first glance, allowing an insolvent cryptocurrency firm to settle their debts by creating a new cryptocurrency offends common sense.[7] The idea of issuing cryptocurrency to repay debts, while not entirely novel, has never been done in bankruptcy.[8] Why should a firm that collapsed on the failure of its cryptocurrency be allowed to wave a hypothetical magic wand, creating a new cryptocurrency, and settle over $1 billion in stated liabilities?[9] The reality of the situation is not so black and white.[10]

Celsius filed a proposed plan of reorganization that included a tokenized equity cryptocurrency distribution; Celsius made this plan with the support of its creditors and secured a plan sponsor.[11] Celsius designed the "Equity Share Token" and "Management Share Token" (the "Share Token[s]") to be integral parts of the disbursement to certain

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[5] *Id.*; Chapter 11 Voluntary Petition for Non-Individual, *In re* Celsius Network LLC, No. 22-10964 (Bankr. S.D.N.Y. 2022), ECF No. 1 at 1 [hereinafter Voluntary Petition] (showing Chapter 11 filing).

[6] Steven Church, *Celsius May Issue a Bankruptcy Crypto Token to Pay Creditors*, BLOOMBERG LAW (Jan. 24, 2023), https://www.bloomberglaw.com/bloomberglawnews/bankruptcy-law/BNA%2000000185e4f3d8f6a9f5feff46e80000?bna_news_filter=bankruptcy-law ("Celsius Network LLC is considering issuing a new digital-asset token to repay creditors as part of a proposal to reorganize and exit bankruptcy as a regulated crypto platform, the company said in court Tuesday."); Transcript from Omnibus Hearing Held on January 24, 2023, *In re* Celsius Network LLC, No. 22-10964 (Bankr. S.D.N.Y. 2022), ECF No. 1949 at 44-55 [hereinafter Omnibus Hearing Transcript] (proposing a bankruptcy crypto coin).

[7] Joint Plan, *supra* note 3 (showing the proposed plan was not viable).

[8] *See* Omnibus Hearing Transcript, *supra* note 6, at 44-55; Emma Newbery, *Will Bitfinex Hack Victims Get Their Bitcoin Back?*, MOTLEY FOOL (Feb. 10, 2022), https://www.fool.com/the-ascent/cryptocurrency/articles/will-bitfinex-hack-victims-get-their-bitcoin-back/ (describing the use of a newly issued token to pay back victims of a cryptocurrency hack).

[9] *See* Voluntary Petition, *supra* note 5, at 4 (highlighting hypocrisy of proposed plan).

[10] *See* Joint Plan*, supra* note 3 (describing the complexity of this specific bankruptcy issue).

[11] *Id.*; Debtor's Statement Regarding Plan Process, *In re* Celsius Network LLC, No. 22-10964 (Bankr. S.D.N.Y. 2022), ECF No. 2359 [hereinafter Statement Regarding Plan Process] (explaining how the Celsius plan came about).

classes of Celsius creditors.[12] Celsius later proposed a revised version of the plan with a superior sponsor relationship; but, the release of a profit-sharing token was still contemplated in the amended version.[13]

To better understand the implications of Celsius's proposed plans, this article will examine the Chapter 11 restructuring process and cryptocurrency in general.[14] This article will then assess the hypothetical effects of each plan on the return for Celsius's creditors, arguing that while Celsius's original plan likely complied with the Bankruptcy Code, it posed greater risks to creditors than the amended plan.[15] This article will further argue, however, that once the federal government fully regulates cryptocurrency, tokenized equity disbursements in some Chapter 11 bankruptcies may improve returns for creditors.[16]

II. Chapter 11 Reorganization

Creditors first experience a debtor corporation's Chapter 11 filing as a roadblock, to preventing them from recovering assets for the debts they are owed.[17] Section §362 of the bankruptcy code authorizes the "Automatic Stay" that creates such roadblocks.[18] The Automatic Stay acts as a shield, taking effect upon the filing of the bankruptcy petition.[19] It protects nearly all the debtor's assets from any means of collection outside of the bankruptcy court.[20]

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[12] Joint Plan, *supra* note 3 (distinguishing the different tokens Celsius had planned).
[13] *Id.*; Revised Joint Chapter 11 Plan of Reorganization of Celsius Network LLC and its Debtor Affiliates, *In re* Celsius Network LLC, No. 22-10964 (Bankr. S.D.N.Y. 2022), ECF No. 2807 [hereinafter Revised Plan] (showing attempts at amending Celsius's original idea).
[14] *See infra* Parts II and III.
[15] *See* 11 U.S.C. § 1129; *infra* Part IV (detailing the bankruptcy code and the author views on Celsius's new plan).
[16] *See* Revised Plan, *supra* note 13; *infra* Part III.
[17] *See* 11 U.S.C. § 362 (creating aforementioned roadblock, the Automatic Stay).
[18] *Id.* (authorizing the Automatic Stay and its circumstances of use).
[19] *Id.* (describing statutory structure for Automatic Stay).
[20] *Id.* (describing eight different ways that an Automatic Stay acts as a stay).

The Chapter 11 process functions as a complex negotiation and a battleground among many parties.[21] The goal of a Chapter 11 bankruptcy is to reach confirmation.[22] Confirmation means that a plan of reorganization is approved by the bankruptcy court and may go into effect.[23] The time period from the filing of a bankruptcy petition until plan confirmation is usually over a year.[24] The Bankruptcy Code gives debtors the first opportunity to propose a plan; in public company bankruptcies, nearly all plans that reach confirmation are those proposed by the debtor.[25] While debtors often use that opportunity to push for a more debtor-friendly plan, they are limited by formal constraints in the Bankruptcy Code.[26] The bankruptcy court enjoys wide discretion to make changes to existing contracts and to reallocate assets, resulting in significant litigation, including the adjudication of state law claims throughout the course of a Chapter 11 restructuring.[27]

A. What is a Chapter 11 Plan of Reorganization?

A confirmed Chapter 11 plan "bind[s]" all creditors accounted for in the plan to its terms and, except as otherwise specified in the plan,

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[21] *See* 11 U.S.C. § 1126 (providing bankruptcy claim and interest holders with the power to accept or reject plan of reorganization).

[22] *See id.* (outlining the rules relating to acceptances).

[23] *Id.* (outlining the rules relating to acceptances and what constitutes an acceptance).

[24] MARK ROE & FREDERICK TUNG, BANKRUPTCY & CORPORATE REORGANIZATION (Robert C. Clark et al. eds., 4th ed. 2016) at 10 (outlining the timeline of bankruptcy proceedings).

[25] *Id.* at 9-10 ("The debtor firm and its managers enjoy the opportunity to propose the first plan of reorganization. During the first 120 days after the filing of the bankruptcy petition, a court will not listen to others proposing reorganization plans").

[26] *See id.* at 8-10 (discussing the limits and constraints created by the Bankruptcy Code).

[27] *Id.* at 7-10 ("Chapter 11's central organizing feature is that it gathers all of the firm's assets and debts, and then allows a comprehensive reorganization plan to be formulated and implemented"); *see* Consolidated Rock Prods. Co. v. Dubois, 312 U.S. 510, 522-23 (1941) ("The bankruptcy court having exclusive jurisdiction over the holding company and the subsidiaries has plenary power to adjudicate all the issues pertaining to the claim. The intimations of Consolidated that there must be foreclosure proceedings and protracted litigation in state courts involve a misconception of the duties and powers of the bankruptcy court").

gives all property to the debtor retained for purposes of the reorganization, terminates all rights that security holders held, and discharges debts incurred before the date of confirmation.[28] A Chapter 11 plan must specify classes of claims against the bankruptcy estate and provide means for paying them back.[29] However, plans may impair these claims, modify contractual rights, and make other big changes to the financial relationships the debtor has.[30] From these foundational rules it should be clear that a Chapter 11 plan "anticipates the court rewriting a debtor's contracts, re-drafting its corporate charter, selling its assets, and modifying the rights of the parties contracting with the debtor corporation."[31]

The events that lead to a bankruptcy petition and the Chapter 11 bankruptcy process include many different steps: financing; default; the filing of the bankruptcy petition and the § 362 Automatic Stay that follows; Debtor-in-possession Financing; potential management turnover; committee formation; scrutiny of pre-bankruptcy transactions for preference or fraudulent transfer liability; executory contract decisions; and finally, plan proposal and potential confirmation.[32]

The concept of absolute priority determines the order in which creditors may be paid out in bankruptcy.[33] Senior claimants must be paid out in full before junior claimants can be paid out at all.[34] Classes of creditors who receive less than what they would potentially be entitled to under absolute priority principles can consent to that treatment

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[28] 11 U.S.C. § 1141 (indicating the effects of confirmed plan on the debtor, creditor, and others).
[29] 11 U.S.C. § 1123(a) (describing what must be included in Chapter 11 plan).
[30] 11 U.S.C. § 1123(b) (describing what Chapter 11 plans are permitted to do subject to subsection (a)).
[31] ROE & TUNG, *supra* note 24, at 8-10 (outlining Chapter 11 reorganization process).
[32] *Id.* at 8-10, 405-08 (providing an overview of Chapter 11 reorganization). The concept of a debtor-in-possession ("DIP") is central to the Chapter 11 process because it allows a firm to continue to manage its business and its bankruptcy throughout the process. *See* 11 U.S.C. § 1107 (providing for rights, powers, and duties of DIP); 11 U.S.C. § 364 (authorizing DIP financing, or loans given priority above existing creditors to allow the DIP to keep their business afloat throughout the bankruptcy).
[33] *See* 11 U.S.C. § 1129(b) (discussing how different classes of claims must be treated based on the Chapter 11 plan).
[34] *See id.*

under the plan.[35] Alternatively, if certain conditions are met, importantly that the plan is "fair and equitable," plans may still be confirmed or "crammed down" over the objections of certain creditors.[36]

B. Reaching Confirmation

Celsius' plan of reorganization must comply with the requirements for plan confirmation under the bankruptcy code to be confirmed and put into effect.[37] Debtors must meet a multitude of formal requirements in order to show a bankruptcy judge that their plan of reorganization is worthy of confirmation.[38] These requirements guide the decisions that different parties make in negotiating a Chapter 11 plan and in determining whether to consent to the plan.[39]

First, the Debtor must convince the judge that the plan is feasible.[40] Judges cannot confirm a plan if evidence, like expected earnings,

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[35] 11 U.S.C. § 1129(a)(8) (plan is confirmed if "[w]ith respect to each impaired class of claims or interests—(A) such class has accepted the plan; or (B) such class is not impaired under the plan.").

[36] 11 U.S.C. § 1129(b)(1) ("[I]f all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, ..."); ROE & TUNG, *supra* note 24, at 8-10 ("They usually settle their disputes and agree to a plan of reorganization; if they don't agree, the judge can 'cram down' a plan of reorganization.").

[37] 11 U.S.C. § 1129(a) ("The court shall confirm a plan only if all of the following requirements are met").

[38] *Id* (providing a list of requirements for a Chapter 11 plan).

[39] *See, e.g.* 11 U.S.C. § 1129(a)(8) (explaining the absolute priority requirements that provide predictable expectations for treatment under chapter 11 plans); ROE & TUNG, *supra* note 24, at 29-66 (discussing how priorities are organized during bankruptcy in Chapter 11 framework).

[40] *See* 11 U.S.C. § 1129(a)(11) ("Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."); 7 COLLIER ON BANKRUPTCY P 1129.02 (16th 2023) ("Section 1129(a)(11) requires courts to scrutinize carefully the plan to determine whether it offers a reasonable prospect of success and is workable."); *In re* Pikes Peak Water Co., 779 F.2d 1456, 1460 (10th Cir. 1985) ("'The purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promises creditors and

shows that it is practically impossible for the debtor to meet their requirements under the plan.[41] However, the valuation process is very difficult for bankruptcy judges to administer.[42] Courts are keen to accept the optimistic estimates provided by the debtor themselves because debtors have more information about their own firm than anyone else.[43]

The second formal requirement of confirmation asks the debtor to show that claims have been properly classified together under the plan.[44] The Bankruptcy Code gives the vague instruction that only claims that are "substantially similar" may be grouped together.[45] However, the intent of this provision, as exemplified by case law, is to prevent creditors of different levels of priority, conflicting creditors (creditors secured by different collateral), or creditors with the same collateral and different priorities from being grouped together.[46] Another, more manageable requirement for the debtor to meet is to provide creditors with a disclosure statement containing sufficient information about the company to make an informed vote.[47]

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equity security holders more under a proposed plan than the debtor can possibly attain after confirmation.'" (quoting Pizza of Hawaii, Inc. v. Shakey's, Inc., 761 F.2d 1374, 1382 (9th Cir. 1985))).

[41] *See* 11 U.S.C. § 1129(a)(4) ("The court shall confirm a plan only if . . . [a]ny payment made or to be made . . . in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.").

[42] ROE & TUNG, *supra* note 24, at 91-108 (describing the various factors that make judicial administration of the valuation process difficult).

[43] *Id.* (explaining that judges are typically deferential to the debtor's estimates due to their familiarity with their own firm).

[44] 11 U.S.C. § 1122(a) ("Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.").

[45] *Id.*

[46] *See* 7 COLLIER ON BANKRUPTCY P 1122.01 (16th ed. 2023) ("Section 1122 does not indicate whether all claims of the same type must be placed in the same class, when and under what circumstances substantially similar clams may be placed in separate classes, whether the unsecured portion of an undersecured claim can be placed in its own class separate from any other unsecured claim, and whether the determination of 'substantial similarity' of claims is a factual or legal finding.").

[47] 11 U.S.C. § 1125(b) ("An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of

The fourth and most contentious requirement for confirmation is that of consent under § 1129(a)(8).[48] Consent to a proposed plan must be given by each class separately or by other provisions of § 1129(a)(8). [49] A class accepts the proposed plan according to § 1129(a)(8)(A) if creditors totaling at least 2/3 in dollar amount and at least 1/2 in number vote to approve the plan.[50] Section 1129(a)(8) may still be satisfied under section B if a dissenting class's claim is not impaired, as defined in §1124 under the plan.[51] For a creditor class to be unimpaired under § 1124 there must be no contractual alteration to their claim, or there is a reinstatement of their debt despite an interim default.[52]

If a creditor's claim is impaired under the proposed plan and they vote against it, the plan can still be confirmed through the § 1129(b) "cramdown" procedure.[53] To complete a cramdown, the debtor must show that a plan is "fair and equitable."[54] A judge may find that a plan

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or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information.").

[48] 11 U.S.C. § 1129(a)(8) ("The court shall confirm a plan only if . . . [w]ith respect to each class of claims or interests—(A) such class has accepted the plan; or (B) such class is not impaired under the plan.").

[49] *Id.*

[50] 11 U.S.C. § 1126(c) ("A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.").

[51] *Id.*; 11 U.S.C. § 1124 (defining impairment for purposes of the bankruptcy code).

[52] 11 U.S.C. § 1124 ("Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan—(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; or (2)notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default— […] (B) reinstates the maturity of such claim or interest as such maturity existed before such default.").

[53] *See* 11 U.S.C. § 1129(b).

[54] *See* 11 U.S.C. § 1129(b)(2) (laying out requirements for plan to be considered "fair and equitable).

is fair and equitable if it follows the key elements of absolute priority.[55] Absolute priority requires that a dissenting class's claim is only modified in a manner that provides them assets with a present value equal to the present value of their claim, and if that is not the case, then the claims junior to them are completely wiped out.[56] Fair and equitable plans must also provide for no "unfair discrimination," meaning that pro rata distribution of assets is ensured within creditor classes.[57] Finally, according to § 1129(a)(10), at least one impaired class must vote for the plan in order to do a cramdown.[58]

The "best interests test" serves as a final protection for creditors in Chapter 11.[59] Any dissenting creditor within an accepting class must be guaranteed at least what they would have gotten in a hypothetical liquidation scenario.[60] However, this baseline protection is generally rendered ineffectual because of the absolute priority rule, a more protective standard.[61] Almost every possible case mathematically entails that a plan that satisfies absolute priority will also satisfy the best interests test.[62]

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[55] *See* 11 U.S.C. § 1129(b)(2)(B) (defining "absolute priority.").
[56] *See id.*; Czyzewski v. Jevic Holding Corp., 580 U.S. 451, 455 (2017) ("A distribution scheme ordered in connection with the dismissal of a Chapter 11 case cannot, without the consent of the affected parties, deviate from the basic priority rules that apply under the primary mechanisms the Code establishes for final distributions of estate value in business bankruptcies.").
[57] *See* 11 U.S.C. § 1129(b)(1) (requiring that a bankruptcy plan "does not discriminate unfairly" to take advantage of the "cramdown" procedure); *see generally In re* New York, New Haven and Hartford RR Co., 4 Bankr. 758 (D. Conn. 1980) (approving plan through "cramdown" procedure after finding that it did not discriminate unfairly).
[58] 11 U.S.C. § 1129(a)(10) ("The court shall confirm a plan only if . . . at least one class of claims that is impaired under the plan has accepted the plan.").
[59] ROE, *supra* note 24 at 1-20; § 1129.
[60] *Id.*
[61] 11 U.S.C. § 1129(a)(7).
[62] *Id.*

C. The 11 U.S.C. § 1145 Exemption from Securities Laws

If there are no assets left over to pay the remaining creditors, then creditors may be paid with an equity disbursement.[63] For this to happen, the value of the reorganized company must be assessed, and creditors will then be given their pro rata share of the new equity.[64] Usually, however, when a company wants to make a public distribution of equity they are required to comply with securities regulations.[65] Companies issuing new equity in bankruptcy can be exempted from these regulations under § 1145 of the Bankruptcy code.[66]

Through a Chapter 11 plan, debtors may "offer . . . a security . . . in exchange for a claim" against them without complying with "section 5 of the Securities Act of 1933 and any State or local law requiring registration for offer or sale of a security or registration or licensing of an issuer of, underwriter of, or broker or dealer."[67] Section 1145 makes the issuance of equity, an important part of many Chapter 11 plans, much easier.[68] A debtor must still demonstrate that all of the requirements § 1129 of the Bankruptcy code are satisfied to convince a judge that their plan is worthy of confirmation. Section 1145 makes this process easier, but Debtors must still show that the myriad of other confirmation requirements are met to reach confirmation.[69]

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[63] *See* ROE & TUNG, *supra* note 24, at 11-28 (discussing the equity disbursement process); *see generally* Bank of Am. Nat. Tr. and Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434 (1999) (reversing confirmation of chapter 11 plan because equity was not disbursed according to absolute priority rules).

[64] *See* ROE & TUNG, *supra* note 24, at 11-28.

[65] *See* Securities Act of 1933, 15 U.S.C. §§ 77a-77mm (1934).

[66] *See* 11 U.S.C. § 1145 (exempting certain securities issuances made in connection with Chapter 11 bankruptcy from securities laws).

[67] 11 U.S.C. § 1145(a)(1)(A).

[68] *See id.*

[69] *See generally* 11 U.S.C § 1129 ("The court shall confirm a plan only if all of the following requirements are met.").

III. Cryptocurrency, Smart Contracts, Crypto Equity

A. What is the Blockchain and Cryptocurrency and Why is it Generally Useful?

Cryptocurrency at its core is a "digital payment system."[70] Cryptocurrency can replace banks and other financial institutions in a growing number of complex transactions.[71] The only parties necessary to facilitate a cryptocurrency transaction are the exchanging parties themselves.[72] Cryptocurrencies function through a software invention called the blockchain, a self-governing system of code that provides an often public ledger that automatically records every movement of the cryptocurrency.[73] A typical cryptocurrency exchange will be done through a broker or an exchange website, but those parties are technically not necessary.[74] Cryptocurrency trades offer significantly lower transaction fees than traditional methods of exchange.[75] For example, merchants that accept cryptocurrency may pay 0-1.5% per transaction, compared to credit cards that charge from 0.5-5% and $0.20-0.30 flat fees per transaction.[76] Cryptocurrency transactions are

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[70] *What Is Cryptocurrency*, *supra* note 1 ("Cryptocurrency is a digital payment system that doesn't rely on banks to verify transactions.").

[71] *Id.* ("Transactions including bonds, stocks, and other financial assets could eventually be traded using the technology.").

[72] *Id.* ("If you own cryptocurrency, you don't own anything tangible. What you own is a key that allows you to move a record or a unit of measure from one person to another without a trusted third party.").

[73] *Id*. ("Cryptocurrencies run on a distributed public ledger called blockchain, a record of all transactions updated and held by currency holders.").

[74] *Id.* ("There are also other ways to invest in crypto. These include payment services like PayPal, Cash App, and Venmo, which allow users to buy, sell, or hold cryptocurrencies.").

[75] Kelli Francis, *Crypto Fees: A Full Breakdown and How to Minimize Costs*, GO BANKING, https://www.gobankingrates.com/investing/crypto/how-to-minimize-crypto-fees/ (last visited July 9, 2023) ("Crypto isn't yet a well-regulated industry in the way that we've come to expect from more traditional forms of investing.").

[76] Dan Blystone, *Bitcoin vs. Credit Card Transactions: What's the Difference?*, INVESTOPEDIA, https://www.investopedia.com/articles/forex/042215/bitcoin-transactions-vs-credit-card-transactions.asp (last visited July 9, 2023) ("For example, the average per transaction fee on Nov. 3, 2023, was $3.92—on Nov. 7, 2023, it was $7.17. In contrast, credit card fees can range from 0.5% to 5%, plus a $.20 to $.30 flat fee for each transaction.").

also nearly instantaneous.[77] However, they are only reversible by the parties themselves, unlike credit cards, making careless use of cryptocurrency very risky. Despite that risk, digital assets may one day become the dominant method of transacting because of their security, instantaneous processing, and minimal transaction costs.[78]

B. General Problems with Cryptocurrency in Current Legal Frameworks

Cryptocurrency is a groundbreaking invention that redefines how people transact.[79] Predictably, regulators and legislators have not had enough time to resolve many of the problems that digital assets raise under current legal frameworks.[80] Under the Bankruptcy Code, for example, it is not clear whether cryptocurrency should be treated as

[77] *See What Is Cryptocurrency*, *supra* note 1 ("When it was first launched, Bitcoin was intended to be a medium for daily transactions, making it possible to buy everything from a cup of coffee to a computer or even big-ticket items like real estate.").

[78] *See id.* (describing the basic structure of cryptocurrency transactions and basic use cases).

[79] *See id*. ("Although Bitcoin has been around since 2009, cryptocurrencies and applications of blockchain technology are still emerging in financial terms, and more uses are expected in the future.").

[80] *See* Ryan W. Beall, *Cryptocurrency in the Law: An Analysis of the Treatment of Cryptocurrency in Bankruptcy*, 35 CAL. BANKR. J. 43, 47-48 (2019) (arguing that treatment as a commodity will lead to losses for creditors, but treatment as a currency will create bigger problems in valuation, highlighting the massive intricate debate on this issue.).

commodity or as a currency.[81] This question affects the valuation of the cryptocurrency as an asset in bankruptcy estates.[82]

In *Hashfast Technologies LLC v. Marc Lowe*, the Bankruptcy Court for the Northern District of California heard arguments that cited diverging agency interpretations.[83] The court did not decide whether cryptocurrency is a commodity or currency in bankruptcy; instead, it made the narrow determination that the Bitcoin at issue was not "United States dollar[s]" under the Bankruptcy Code.[84] This decision arguably places some types of cryptocurrencies in the role of a commodity, but how to categorize other cryptocurrencies remains unclear.[85]

In the years since *Hashfast,* various regulators opined on what classification and legal treatment should apply to cryptocurrency, classifying it as a security, a commodity, and a currency, but these

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[81] *See id.* at 51-52 ("While there is sparse case law, and little to no legislative guidance, the legal status of cryptocurrency has consequences in bankruptcy, and will increase in relevance as more debtors have cryptocurrency assets and more creditors have claims in cryptocurrency against bankruptcy estates . . . The central question is whether cryptocurrency should be treated as a commodity or a currency in bankruptcy."); Matthew D. Rayburn, *Bitcoin When the Bank Breaks: Uncertainty in the Treatment of Bitcoin & Other Cryptocurrencies in the Face of Bankruptcy*, 16 N.Y.U. J. OF L. & BUS. 257 (2019); Josephine Shawyer, *Commodity or Currency: Cryptocurrency Valuation in Bankruptcy and the Trustee's Recovery Powers*, 62 B.C. L. REV. 2013, 2024 (2021) ("A large part of the difficulty in designing effective regulation for cryptocurrencies arises from their lack of uniform classification.").

[82] Beall, *supra* note 80, at 51-52 ("The debate between whether cryptocurrency should be treated as a commodity or as currency is important because of the bankruptcy consequences of such a distinction.").

[83] *See generally* Hashfast Technologies LLC v. Marc Lowe, No. 14-30725DM, (Bankr. N.D.C.A. Feb. 22, 2016).

[84] Order on Motion for Partial Summary Judgment, Hashfast Technologies LLC and Hashfast LLC v. Marc A. Lowe*,* Adv. No. 15-3011DM (Bankr. N.D. Ca. 2016) (Dckt. 49) at 1-2.

[85] Beall, *supra* note 80, at 57-58 ("Currently, despite no definitive answer, cryptocurrency appears to be treated more often as property than as currency in bankruptcy, at least in the context of avoided transfers. This perspective is supported only by a determination that cryptocurrency is not U.S. dollars made in an unpublished opinion by a bankruptcy trial court. Thus, while not controlling, Hashfast signals how courts may look to characterize cryptocurrency.").

interpretations often contradict one another, leaving the problem largely unresolved.[86]

C. Asset Tokenization and Smart Contracts

Cryptocurrency consists of much more than just digital coins; it can represent and transfer the ownership of almost any asset.[87] "Tokens" representing assets like equity in a company or real property are traded like any other cryptocurrency.[88] Smart contracts make this possible.[89] Smart contracts are digital contracts contained in the code of cryptocurrencies.[90] They may be preferable to normal, paper-bound, contracts because they are self-executing and subject to public monitoring.[91]

Imagine two parties who agree that if more than 15 inches of rain fall in any given month in 2023 in Phoenix, Arizona, Party A pays $500 to Party B. Party B gives $100 to Party A as consideration for this opportunity. So, in any event, Party A receives $100, and if it rains enough, Party B will make $400 profit. Party A could create a token containing those terms and program the token to monitor the monthly weather reports in Phoenix. The smart contract would then execute

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[86] Samuel P. Hershey & Kathryn Sutherland-Smith, *Two Sides of the Same Coin? Cryptoassets and Estate Property in Bankruptcy*, 41 AM. BANKR. INST. J. 18 (Aug. 2022) ("U.S. regulators and civil courts have varied in their efforts to classify crypto-currency, adopting alternative designations such as a security, commodity or currency.").

[87] *See Asset Tokenization: A Beginner's Guide to Converting Real Assets into Digital Assets*, COINTELEGRAPH, https://cointelegraph.com/nonfungible-tokens-for-beginners/asset-tokenization (last visited June 26, 2023) ("Asset tokenization is an extended use case of blockchain technology beyond Bitcoin that enables the purchase, sale and exchange of digital assets on the distributed ledger.").

[88] *Id.* ("Virtual or real assets can nearly all be converted into digital tokens through tokenization. For instance, security tokens issued via the STO process may represent an investment fund, company shares or real estate ownership").

[89] *Id.*

[90] *Id.*

[91] *Id.* ("Digital tokens backed by underlying assets are controlled and executed using a smart contract.").

automatically by instantly transferring $500 of assets to Party B when it rains more than 15 inches in a month.[92]

By leaving the paper contract behind and opting for a smart contract, especially in very simple agreements like this, the fictional parties may save transaction costs.[93] They need not send emails back and forth about the weather or worry about repayment; everything can be settled automatically and publicly.[94] The tokenization of the contract also allows Party B to transfer their rights under the contract instantly.[95] Party A can conveniently start a business selling rain contracts because tokens cost much less to produce than unique contracts.[96]

Asset tokenization is becoming a valuable tool for real estate developers.[97] Developers offer tokens for sale to the general public in security token offerings ("STO").[98] An STO functions much like an

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[92] *See id.* ("[S]traightforward send-and-receive transaction settlement and clearance can be automated, enabling quick transactions of only a few seconds instead of the hours or days previously needed. As a result, managing tokenized assets improves market efficiency and optimizes the exchange of goods and services.").

[93] *Id.* ("[T]he automated smart contracts help to decrease transaction fees as well as faster processing of transactions by reducing the administrative burden of reviewing and validating transactions.").

[94] *Id.* ("Additionally, an immutable record of ownership along with the rights of the concerned parties are embedded directly onto the token, allowing sellers and investors to find out details like the original owner of the token, [and] current dealer(s) . . . .").

[95] *Id.* ("[A]s security tokens are liquid, investors can exchange them 24/7 on the global secondary markets.").

[96] *Id.* ("A larger spectrum of people can buy/invest in tokenized assets due to the reduced minimum investment amount. Blockchain technology also allows asset tokenization startups to access tokenized funds without the involvement of third parties.").

[97] Michael DeCosimo & Colton Riley, *The Tokenization of Real Estate: An Introduction to Fractional Real Estate Investment*, DENTONS (Sept. 26, 2022), https://www.dentons.com/en/insights/articles/2022/september/6/the-tokenization-of-realestate ("The real estate sector now makes up about 40% of the digital securities market, amounting to approximately $200 million . . . .").

[98] *Id.* ("The digital tokens are created and issued on a blockchain during a security token offering (STO), also referred to as a tokenized security offering or a tokenized asset offering. Each fraction of ownership is converted into a token and then encrypted to grant ownership. Ownership can then be transferred directly from investor to investor on digital securities

Initial Public Offering.[99] The value of tokens disbursed in an STO are "tied" to the value of particular real estate assets.[100] The real estate tokens may represent assets like: "ownership of part of a real property; ownership of the entire real property; an equity interest in an entity that controls real property; an interest in a debt secured by real property; or a right to share in the profits generated by real property."[101]

The tokenization of these assets offers "advantages for both issuer and investors."[102] Issuers use STO's to raise capital more efficiently than through debt or Real Estate Investment Trusts.[103] Investors enjoy the ability to make small investments in a broad range of assets and the ability to instantly transfer their interests by selling the tokens on the open market.[104] Asset tokenization therefore makes the real estate investment market more efficient.[105]

D. What Makes a Security?

Smart contracts allow for cryptocurrency to convey equity in companies or to represent other investment vehicles.[106] Despite the cutting-edge nature of this technology, the question of whether each cryptocurrency is a security may still need to be analyzed under the

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marketplaces using alternative trading systems (ATSs) almost instantly for a relatively low fee.").

[99] *See id.*

[100] *Id.* ("Real estate tokens are similar to non-fungible tokens (NFTs), which are non-interchangeable units of data stored on a blockchain that can be sold and traded, with the exception that real estate tokens are generally tied to the value of a physical asset.").

[101] *Id.*

[102] *Id.*

[103] *See id.* ("Real estate tokens are easily and securely transferable by way of blockchain technology, allowing investors to diversify their portfolios, minimize risk and create liquidity in the real estate market. Conversely, issuers are provided access to a wider pool of investors").

[104] *See id.* ("As a result, investment transactions are generally completed faster and at a lower cost to the parties involved, facilitating higher returns for the investor").

[105] *See id.*

[106] *Asset Tokenization*, *supra* note 87.

traditional framework that the S.E.C. and other regulatory agencies have used for decades, the *Howey* test.[107]

In *Howey*, the Supreme Court held that contracts are securities when they include an "investment of money in a common enterprise with profits to come solely from the efforts of others."[108] Contracts that satisfy the *Howey* test must be registered with the S.E.C. and comply with other regulatory schemes.[109] The Supreme Court emphasized that it does not matter if the "enterprise is speculative or non-speculative or whether there is a sale of property with or without intrinsic value," it only matters whether the contract satisfies the test or not.[110]

The investment contract at issue in *Howey* was an agreement to invest in plots of land on a citrus farm.[111] Both land sale contracts and service contracts were offered by the promoters.[112] The service contracts allowed the promoters to farm the purchased land for ten years without an option for cancelation.[113] Investors were not encouraged to become farmers; instead, the evidence showed that they were investing in the promotor-manager's equipment and citrus-growing expertise.[114] This lack of control in the outcome of the investment was what pushed the

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[107] *See* Speech by William Hinman, Director, Division of Corporation Finance, SEC, Remarks at the Yahoo Finance All Markets Summit (June 14, 2018) ("Just as in the Howey case, tokens and coins are often touted as assets that have a use in their own right, coupled with a promise that the assets will be cultivated in a way that will cause them to grow in value, to be sold later at a profit."); S.E.C. v. W.J. Howey Co., 328 U.S. 293 at 293-96 (1946) (setting out test for determining whether a contract is a security).

[108] *Howey,* 328 U.S. at 301.

[109] *Id.* ("The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.").

[110] *Id.*

[111] *Id.* at 299-300 ("They are offering an opportunity to contribute money and to share in the profits of a large citrus fruit enterprise managed and partly owned by respondents. They are offering this opportunity to persons who reside in distant localities and who lack the equipment and experience requisite to the cultivation, harvesting and marketing of the citrus products.").

[112] *Id.* at 295.

[113] *Id.* ("Each prospective customer is offered both a land sales contract and a service contract, after having been told that it is not feasible to invest in a grove unless service arrangements are made.").

[114] *Id.*

Supreme Court to hold that what was on the surface just land sale and service contracts to be a security.[115]

Regulatory agencies were faced with similar problems when smart contracts burst on the scene.[116] In a speech by William Hinman, the Director of the Division of Corporation Finance at the S.E.C., Hinman proposed that the agency could use the *Howey* test as an "easy" method to determine whether cryptocurrency offerings were securities offerings.[117] However, Hinman noted that this inquiry could be tricky and "requires a careful and fact-sensitive legal analysis," because not all cryptocurrencies may be securities.[118]

Even though cryptocurrencies are "simply code," Hinman proposed that each cryptocurrency be evaluated individually, just like the Supreme Court in *Howey* evaluated what was a sale of land and services to decide whether they were investment contracts.[119] Hinman stated that cryptocurrencies, even if they satisfy the *Howey* test at first, may later "no longer represent" a security.[120] The key change occurs when a cryptocurrency has become "sufficiently decentralized" so that

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[115] *Id.* (observing that investors stood to make a profit merely from contributing capital to an enterprise that they took no active role in managing).

[116] Hinman, *supra* note 107 ("I will begin by describing what I often see. Promoters, in order to raise money to develop networks on which digital assets will operate, often sell the tokens or coins rather than sell shares, issue notes or obtain bank financing. But, in many cases, the economic substance is the same as a conventional securities offering.").

[117] *Id.* ("When we see that kind of economic transaction, it is easy to apply the Supreme Court's "investment contract" test first announced in *SEC v. Howey."). *

[118] *Id.* ("As I will discuss, whether a transaction in a coin or token on the secondary market amounts to an offer or sale of a security requires a careful and fact-sensitive legal analysis.").

[119] *Id.* ("The digital asset itself is simply code. But the way it is sold—as part of an investment; to non-users; by promoters to develop the enterprise—can be, and, in that context, most often is, a security—because it evidences an investment contract."); *see Howey*, 328 U.S. at 299-301. ("The transactions in this case clearly involve investment contracts as so defined. The respondent companies are offering something more than fee simple interests, in land, something different from a farm or orchard coupled with management services.").

[120] Hinman, *supra* note 107 ("But this also points the way to when a digital asset transaction may no longer represent a security offering.").

"purchasers would no longer reasonably expect" someone to "carry out . . . managerial . . . efforts."[121]

The tokenized equity disbursement contemplated in Celsius's first proposed plan would likely be deemed a security offering.[122] The equity tokens represent shares in the profits of reorganized Celsius.[123] There is no expectation that the owners of the tokens contribute in any way to the profitability of the reorganized Celsius, so they would likely satisfy the *Howey* test and represent securities under the Securities Act of 1933.[124]

E. How is Cryptocurrency Used as an Equity Security Today?

Cryptocurrencies are successfully offered as equity in a variety of different enterprises.[125] They were created to replace IPOs, venture capital financing, and other forms of fundraising.[126] For example, The Elephant Token represents a revenue share in a $300 million private equity platform.[127] Solana raised over $300 million through a non-

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[121] *Id.*

[122] *See id.*; *Howey*, 328 U.S. at 299-301 (articulating the test for determining whether a transaction qualifies as an investment contract).

[123] Joint Plan, *supra* note 3 (demonstrating the plan of reorganization of Celsius Network and its Debtor Affiliates).

[124] *See Howey*, 328 U.S. at 299-301 (articulating the test for determining whether a transaction qualifies as an investment contract); *see also* Securities Act of 1933, 15 U.S.C. §§ 77a-77mm (1934); Joint Plan, *supra* note 3. (demonstrating the plan of reorganization of Celsius Network and its Debtor Affiliates).

[125] *A Beginner's Guide to Equity Token Offerings (ETOs)*, COINTELEGRAPH, https://cointelegraph.com/learn/a-beginners-guide-to-equity-token-offerings-etos ("Equity token examples include The Elephant Private Equity Coin, Neufund and BFToken").

[126] *Id.*; *Private Token Sales: How Crypto Is Changing Venture Capital*, PONTEM BLOG (Nov. 9, 2021), https://pontem.network/posts/private-token-sales-how-crypto-is-changing-venture-capital. ("Tokens are the tradable element of blockchains which you can use to invest or make purchases. They also underlie the function of the blockchain ledger.").

[127] *The Elephant Token*, SECURITY TOKEN MARKET, https://stomarket.com/sto/Private-equity-coin-PEC (describing the Elephant Token and information about the token's price and fundraising information).

equity token offering purchased in large part by venture capital firms.[128] Solana firms purchased the coins simply because they will be used to trade on the Solana Network, a new blockchain-powered product.[129] These tokens, while not formally equity as contemplated herein, represent a means for investors to share in the risks and rewards of a new enterprise. Neufund is a platform that creates tokens for startups attempting to raise money outside of normal venture capital methods.[130] These tokens represent equity in the startups and allow consumers to invest in them as opposed to only offering financial institutions that opportunity.[131]

The Provenance blockchain serves as a platform for firms to create financial services cryptocurrencies.[132] While it is possible to create a cryptocurrency from scratch and use that as tokenized equity, it is exponentially cheaper to create one that functions through an existing platform.[133] Provenance's entire business model is centered around providing cryptocurrency solutions to firms.[134]

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[128] *Private Token Sales*, *supra* note 126. ("[I]n June 2021, the decentralized blockchain Solana announced that more than $300 million dollars of Solana tokens had been purchased. The buyers were a long list of venture capital (VC) firms, led by powerhouses Andreessen Horowitz . . . and Polychain Capital.").

[129] *Id.* ("[R]ather than acquire equity with their money, the VC firms acquired Solana tokens").

[130] NEUFUND, https://neufund.ltd/invest (last visited February 7, 2024) ("[N]eufund makes investing in equities inclusive and accessible, innovative and simple. It's for innovators and investors, in any industry, on any continent. It's inclusive and accessible, ingenious and simple.").

[131] *See id.* ("[I]t's for anyone, anywhere. You can be an individual in Istanbul, an institution in India or a VC in Venice. And you can invest €10 or €10 million.").

[132] *Markers: Smart Contract Code Built into the Protocol*, PROVENANCE BLOCKCHAIN, https://provenance.io/solutions/capabilities/markers/ ("[A]n aspect of being purpose-built for financial services and a core pillar of the Provenance Blockchain is issuing, transacting, and managing tokenized securities natively within the protocol. Included in this pillar are the smart contract capabilities that live at the protocol-layer, which are referred to as Markers.").

[133] *Id.*

[134] *Q2 Friends of Provenance Blockchain Update*, PROVENANCE BLOCKCHAIN, https://provenance.io/learn/posts/Q2-2023-Foundation-Updates/ ("[P]rovenance Blockchain protocol is purpose-built for financial services, with capabilities natively built into the blockchain to enable digital assets and privacy, including

The main advantage that tokenized equity offers to companies is increased liquidity.[135] Increased liquidity means that equity can be more easily traded.[136] Because equity tokens are more easily traded, they are available to more types of investors.[137] Firms may therefore curtail their business plans and advertising to appeal to consumers, as opposed to just institutional investors, potentially offering them more value for their equity.[138] As the founders negotiating with the sharks on "Shark Tank" clearly understand, equity is a very valuable and limited resource.[139] Therefore, startups may benefit from offering their equity as a tokenized asset instead of dealing directly with venture capital firms.[140]

Similarly, equity tokens offer benefits to investors.[141] Tesla produced a tokenized version of their stock; each coin is redeemable for one share of Tesla stock.[142] This token has previously traded over a million dollars in volume in one day.[143] Clearly, it offers an opportunity to investors that normal stock does not.[144] Investors can trade this

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Smart Tokenization, Identity, Data Privacy, Exchange, Interoperability, and private and permissioned Zones.").

[135] *Equity Token Offerings*, *supra* note 125. ("[A]nother advantage of the equity token is that it can be sold in a public or private offering. This considerable flexibility is matched by the possibility of obtaining investor rights, which include the ability to participate in the development of the blockchain network and receive monetary compensation based on how the token performs in the cryptocurrency market.").

[136] DeCosimo & Riley, *supra* note 97 ("[B]y facilitating investment in fractional portions of real property, real estate tokenization enables small-scale investor participation and lowers barriers to entry for retail investors.").

[137] *Id.*

[138] *Id.*

[139] *Id.*; *Shark Tank*, NBC, https://www.nbc.com/shark-tank.

[140] *Asset Tokenization*, *supra* note 87 (explaining a benefit of offering equity tokens).

[141] *Id.* (stating that equity tokens are beneficial not only for emerging companies, but investors as well).

[142] *Tesla Tokenized Stock Defichain DTSLA Price*, COINGECKO, https://www.coingecko.com/en/coins/tesla-tokenized-stock-defichain (last visited Mar. 12, 2024) (showing the value of Tesla Tokenized Stock Defichain).

[143] *Id.* (showing that the trading volume of the token surpassed $1 million in late March of 2022).

[144] *See id.*; *Equity Token Offerings*, *supra* note 125 (explaining, for instance, that selling equity tokens allow buyers to participate in decisions made by

tokenized asset more easily while enjoying the same profit-raising benefits that the issuers do.[145]

The benefits that both issuers and investors receive from a tokenized equity offering may extend to the parties in the Celsius bankruptcy.[146] The increased liquidity that tokens offer could improve the return that creditors get from the plan.[147] Holders of the tokens would also be able to transfer their tokens and get out of their investment in the reorganized Celsius more easily than they would have with a normal equity disbursement.[148] If Celsius's creditors were financially sophisticated parties, instead of mostly consumers, an equity disbursement may be closer in value to a token offering. But, in this case, the creditors that would receive the equity tokens held thousands of dollars of claims against Celsius and are therefore likely to be sophisticated in cryptocurrency trading.[149] Therefore, the use of tokenized assets in Celsius's plan could increase the value of the estate, more so than a traditional equity offering.[150]

IV. Celsius' Bankruptcy in Detail and Their Proposed Plan

A. The Initial Earn Account Controversy

Controversy surrounded the first days of the Celsius bankruptcy.[151] Celsius filed a voluntary petition for Chapter 11 bankruptcy on July 13, 2022.[152] From then on, the stage was set for a

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firms, and allow investors to invest in companies that rely on blockchain technologies).

[145] *Id.* (describing the mutual benefits received by investors and issuers alike).

[146] *Id.*; Joint Plan, *supra* note 3 (showing that the parties in the Celsius bankruptcy may receive equity tokens that represent shares in the profits of a reorganized Celsius).

[147] *Asset Tokenization*, *supra* note 87 (noting the benefits that come with the highly liquid nature of tokenized assets).

[148] *Id.* (remarking on the ease with which equity tokens can be transferred).

[149] Joint Plan, *supra* note 3 (describing the parties in the case).

[150] *See Equity Token Offerings*, *supra* note 125 (explaining why equity tokens can be more valuable than a traditional equity offering).

[151] Dietrich Knauth, *U.S. Judge Says Celsius Network Owns Most Customer Crypto Deposits*, THOMPSON REUTERS (Jan. 5, 2023), https://www.reuters.com/business/finance/us-judge-says-celsius-network-owns-most-customer-crypto-deposits-2023-01-05/ (highlighting the issue of whether Earn customers would get repaid).

[152] Voluntary Petition, *supra* note 5, at 1.

legal debate that would have ramifications for billions of dollars of claims in the Celsius case and for the rights of cryptocurrency investors everywhere.[153]

Celsius, as the debtor in possession, filed a "motion for entry of order establishing ownership" of over $4.2 billion worth of cryptocurrency assets in its possession.[154] These specific cryptocurrency assets were deposited with Celsius in "Earn" accounts.[155] Earn customers deposited their cryptocurrency and received a very competitive interest rate on the deposit.[156] However, the "Terms of Use" for the Earn account state that customers must grant Celsius "all right and title . . . including ownership" of the cryptocurrency.[157] The Earn customers challenged Celsius's motion.[158] They argued, among other things, that the Earn program was like a loan and that Celsius should not be able to own their cryptocurrency as property of the estate.[159]

The court held that through a plain reading of the contract language it was clear that Earn customers were not entitled to the return

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[153] *See In re* Celsius Network LLC*,* 647 B.R. 631, 659 (Bankr. S.D.N.Y. 2023), *leave to appeal denied*, 23-CV-523 (JPO), 2023 WL 2648169 (S.D.N.Y. Mar. 27, 2023) (holding that Celsius Earn customers surrendered ownership of their cryptocurrency when they deposited in the Earn program and are only entitled to an unsecured claim against the Celsius bankruptcy estate).

[154] *Id.* at 639 ("[C]hapter 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 . . . .").

[155] *See id.* ("[F]irst, 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 . . . .").

[156] *See id.* at 653 ("[T]he Debtors put forth evidence that the Debtors' consideration was the payment of proceeds from Earn Assets to Account Holders as 'rewards.'"); Knauth *supra* note 151.

[157] *Id.* at 640.

[158] *See id.* at 636-38 ("[M]any 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 . . . .").

[159] *Id.* at 644-46 ("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.").

of their specific cryptocurrency or priority status in the bankruptcy.[160] The court held that Earn customers were only entitled to an unsecured claim for the value of their assets.[161] The court did not decide at that time what method would be used to determine the amount of each claim, stating that it will be decided "through the claims allowance process."[162]

The court first stated that the Terms of Use were a "valid, enforceable contract."[163] Valid, enforceable contracts require: (1) mutual assent, (2) consideration, and (3) an intent to be bound.[164] Customers accepted the Terms of Use by "clicking a button," called a "clickwrap" agreement.[165] The court followed New York precedent and found this clickwrap contract was sufficient to show mutual assent.[166] Updates to the contract were found to be valid as well.[167] Finally, the court discussed whether the Terms of Use transferred ownership of the Earn

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[160] *Id.* at 651 ("[T]he 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.").

[161] *Id.* ("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 . . . .").

[162] *Id.* at 651 ("[T]he 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 . . . .").

[163] *See id.* at 652 ("[T]he 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.").

[164] *Id*. ("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)").

[165] *Id.*

[166] *Id.* at 652-54 ("New York Courts overwhelmingly accept 'clickwrap' agreements as sufficient to constitute mutual assent . . . . 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.").

[167] *Id.* at 654 ("Each version of the Terms of Use allowed the Debtors' modification of the contract terms and provided that the Account Holders'

assets "in accordance with" its "plain meaning" and "clear and unambiguous terms."[168] The court found that the Earn accounts clearly transferred ownership of the Earn assets.[169]

The court held that Earn account holders were at best entitled to unsecured claims in bankruptcy; they were subordinated beneath both secured creditors and customers who simply deposited their crypto-currency with Celsius.[170] Both secured creditors and depositing customers were to be paid in full.[171] Celsius's assets were significantly below their liabilities, most of which were owed to Earn customers, meaning they were insolvent and unable to pay back all the claims.[172] Therefore, Earn account holders had to push for every scrap of value they could get out of the bankruptcy, with no expectation of being paid out in full.[173]

B. Celsius First Pitches the Idea

The idea to give unsecured creditors ownership of reorganized Celsius in the form of cryptocurrency tokens was first made public in an Omnibus hearing on January 24, 2023.[174] Counsel for Celsius stated that to "give ownership" and get an "actual recovery for creditors" the debtors were considering a plan to "tokenize and distribute to account holders" an "asset share token" that would "reflect the value of the assets managed by the recovery corporation."[175] These tokens would only be

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continued use of the platform following an update constituted consent to the updated Terms of Use.").

[168] *Id.* at 656.

[169] *Id.* ("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.'").

[170] *Id.* ("The Court does not take lightly the consequences of this decision on ordinary individuals, many of whom deposited significant savings into the Celsius platform."); *see* 11 U.S.C. § 1129(b)(2); Knauth, *supra* note 151.

[171] *See* Joint Plan, *supra* note 3, at 26-32. (setting forth the treatment of each class of claimants under the plan).

[172] *See* Voluntary Petition, *supra* note 5, at 1.

[173] *See id.*; 11 U.S.C. § 1129(b)(2); ROE & TUNG, *supra* note 24, at 29-44.

[174] *See* Omnibus Hearing Transcript, *supra* note 6, at 44-45; Church, *supra* note 6.

[175] Omnibus Hearing Transcript, *supra* note 6, at 45.

distributed to claimants with claims above a certain threshold around $5,000.[176]

Creditors below the threshold, totaling around 60-70% of total Earn customers, would receive a "one time distribution in liquid crypto."[177] This distribution was proposed because many of these smaller claimants expressed a desire to get out of the bankruptcy quickly and not fight over such small amounts of money or invest such small amounts into the reorganized Celsius.[178] The rest of the creditors, "a relative handful" with "very large claims," were more invested in maximizing their returns.[179] These creditors were already working with Celsius through their status as representatives of the Committee of Unsecured Creditors to plan out the asset share token program.[180]

Celsius's counsel explained that they planned to work with regulators to make sure that the token distribution was legal.[181] They had some conversations with regulators but were still in the early planning stages.[182] However, counsel expressed that the plan for the recovery corporation and asset share token distribution would feature some important "guideposts."[183]

First, the recovery corporation would be a "fully-licensed and registered and compliant entity" with relevant securities regulations.[184] They planned to have their crypto assets "hosted by . . . a third-party

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[176] *Id.* at 46 ("[W]ith a threshold as low as a U.S. Dollar value claim of sort of $2,500 to $5,000, you're picking up a substantial majority of our customers.").
[177] *Id.* at 45.
[178] *Id.* at 47 ("Because we're really not looking to drag the smaller investors who just -- you know, we've seen the letters, we'd like some crypto back, even at a discount, and just kind of be done with the Celsius case.").
[179] *Id.* at 46 ("To Mr. Adler's point, there are a relative handful of customers who have very large claims and who make up -- a smaller percentage makes up in the aggregate a much larger percent of the assets on deposit and the claims.")
[180] *Id.* at 47 ("We are still working with the Committee on how best to structure it.").
[181] *Id.* at 47-48 ("We reached out and had some initial conversations with some of our key regulators.").
[182] *Id.* at 48. ("Those discussions are going to continue as our plans develop.").
[183] *Id.* ("And so I think there's a couple key features or guideposts, if you will, that we have in mind as we're developing the plans for this recovery corporation.").
[184] *Id.*

licensed custodian."[185] This would be very different from the custody system that Celsius originally used, which was "put together . . . somewhat on the fly."[186] They also planned on managing the recovery corporation with an "arm's length third party" in an effort to avoid the mismanagement that led to the fall of Celsius.[187] Finally, counsel expressed the most important part of the plan, that asset share tokens "would be freely tradable by holders."[188] They expressed to the court the flexibility that this option afforded to creditors.[189] Celsius was even "in discussions" with "licensed broker dealers" to make sure that creditors would have markets in which to trade the tokens.[190] It was clear from the first mention of the asset share token that Celsius and the creditors committee were serious about making the tokens an integral part of their Chapter 11 plan.[191]

C. 3. The Specific Language in the First Proposed Plan

The plan to incorporate tokens into Celsius's Chapter 11 reorganization carried enough momentum to make it into an official plan of reorganization submitted to the bankruptcy court on March 31, 2023.[192] NovaWulf, a prominent cryptocurrency firm, served as the stalking horse bidder, plan sponsor, and proposed new manager of the

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[185] *Id.* at 49. Hosting the crypto assets with a third party mitigates the risk that the failure of the recovery corporation means the failure to maintain the crypto assets. *See What Is Cryptocurrency*, *supra* note 1.

[186] Omnibus Hearing Transcript, *supra* note 6, at 49 ("We are going to take the time to build a custody program from the ground up that would use a third party who is licensed to provide custody services.").

[187] *Id.*

[188] *Id.*

[189] *See id.* ("So if an accountholder gets their token and they want to ride out the recovery and try to see where we can get to in the future, they definitely have the right to do it. But for somebody who says, you know what, I would rather just sell my token, convert it into cash, other crypto, move on with life, they would have the ability to do that").

[190] *Id.*

[191] *See id.* (stating that Celsius and the creditors committee created an organized plan for the asset share tokens).

[192] Joint Plan, *supra* note 3; Statement Regarding Plan Process, *supra* note 11, at 8-12 ("Following the entry into the Plan Sponsor Agreement, the United States Bankruptcy Court for the Southern District of New York ('the Court') granted the Debtors' request to extend their exclusive period to file a chapter 11 plan through March 31, 2023 (the 'Filing Exclusivity Period').").

reorganized Celsius under the plan.[193] Celsius crafted the terms of this plan largely through negotiations with NovaWulf.[194]

Under the plan, NovaWulf would create "Equity Share Tokens" to represent common stock in NewCo, the reorganized Celsius, and "Management Share Tokens" to represent preferred stock.[195] Celsius listed the tokens as sources of consideration for the plan's distributions.[196] Upon confirmation, the plan authorized NewCo to "take any action necessary" to create the coins and distribute them to claimants.[197] The plan also authorized the trading of the tokens on the Provenance Blockchain.[198] Management Share Tokens were much more complicated than the Asset Share Tokens.[199] One year after the release of the tokens, a smart contract in the Management Share Tokens

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[193] *See* Statement Regarding Plan Process, *supra* note 11, at 1-2 ("On February 28, 2023, the above-captioned debtors and debtors in possession (the 'Debtors'), the official committee of unsecured creditors (the 'Committee'), and NovaWulf Digital Management, L.P. (together with its affiliates, 'NovaWulf' or the 'Plan Sponsor' and together with the Committee and the Debtors, the 'Parties') executed the Plan Sponsor Agreement and announced the transactions documented therein as the 'stalking horse bid' for the sale/reorganization process with respect to the Debtors' assets.").

[194] *See id.* at 1-10 (discussing the relationship between Celsius and NovaWulf).

[195] *Id.* at 8. ("Equity Share Tokens and Management Share Tokens reflecting common and preferred equity interests in the NewCo . . . .").

[196] Joint Plan, *supra* note 3, at 37 ("The Debtors . . . shall fund distributions under the Plan with: (1) Cash on hand as of the Effective Date, including from the Management Contribution and net proceeds from the sale of GK8, (2) Available Cryptocurrency, (3) the Equity Share Tokens and Management Share Tokens, and (4) Litigation Proceeds.").

[197] *Id.* at 35 ("On or before the Effective Date, the Debtors, NewCo and/or its subsidiaries, or the Post-Effective Date Debtors, as applicable, shall take any action as may be necessary or appropriate to effect the NewCo Transaction or Orderly Wind Down, as applicable, including those steps set forth in the Transaction Steps Memorandum.").

[198] *Id.* at 37 ("Entry of the Confirmation Order shall authorize the clearance and trading through the Provenance Blockchain of the Equity Share Tokens and Management Share Tokens . . . .").

[199] *See id.* at 38 (imposing additional restrictions on trading Management Share Tokens).

would release them for trading; before that, the tokens were not tradeable.[200]

The plan discussed how these tokens are "equity securities" under Section 3(a)(11) of the Exchange Act.[201] However, NewCo would issue them without registration under the Securities Act or any other law "in reliance upon section 1145 of the Bankruptcy Code."[202] The plan argued that this initial token distribution would fulfill all of the requirements of section 1145.[203] However, due to state "Blue Sky" laws regulating resales of securities, NewCo would have to file a registration statement in accordance with the Exchange Act to make the tokens transferable soon after their initial disbursement.[204]

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[200] *Id.* at 38 ("As discussed in detail in the Disclosure Statement, until the one-year anniversary of the Effective Date (the 'MST Release Date'), each Management Share Token will be subject to an MST Smart Contract, pursuant to which one (1) Management Share Token will be mandatorily redeemed (for no consideration) for each Equity Share Token such holder trades prior to expiration of the MST Release Date.").

[201] *Id.* ("The Equity Share Tokens and Management Share Tokens being issued under the Plan will constitute 'equity securities' as defined in Section 3(a)(11) of the Exchange Act, and will be issued without registration under the Securities Act or any similar federal, state, or local law in reliance upon section 1145 of the Bankruptcy Code.").

[202] *Id.* ("Securities issued in reliance upon section 1145 of the Bankruptcy Code to an entity that is not an 'underwriter' as defined in subsection (b) of section 1145 of the Bankruptcy Code are exempt from, among other things, the registration requirements of section 5 of the Securities Act and any other applicable U.S. state or local law requiring registration prior to the offering, issuance, distribution, or sale of securities . . . ."); *see* 11 U.S.C. § 1145.

[203] Joint Plan, *supra* note 3, at 38 ("NewCo shall not be required to provide any further evidence other than the Plan or Confirmation Order with respect to the treatment of such Plan Tokens, and such Plan or Confirmation Order shall be deemed to be legal and binding obligations of NewCo in all respects."); *see* 11 U.S.C. § 1145.

[204] Joint Plan, *supra* note 3, at 38 ("Notwithstanding the foregoing, due to restrictions on resales under state 'Blue Sky' laws, none of the Equity Share Tokens or Management Share Tokens will be transferable until the tokens are registered under the Exchange Act pursuant to an effective Registration Statement on Form 10 (the 'Registration Statement')."); *See* Securities and Exchange Act, 15 U.S.C. § 781(g) (mandating issuers to register their securities with the SEC).

D. The Amended Plan

To find a better bid for their assets and the NewCo management contract, Celsius continued the auction process even after their first plan of reorganization was filed.[205] The bankruptcy court granted NovaWulf a "break-up fee" of $5 million and an expense reimbursement of $15 million as compensation in case the deal fell through, or they were replaced.[206] Sure enough, a new bidder, Fahrenheit, LLC ["Fahrenheit"], placed a bid with "vastly improved terms."[207] Fahrenheit officially won the auction; the Blockchain Recovery Investment Consortium won as a backup bidder.[208] Soon after the auction ended, Celsius filed a motion to extend the exclusivity deadline to submit and solicit votes for their Chapter 11 plan.[209] Celsius would need time to change the terms of their

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[205] Order Granting the Debtors' Motion for Bid Protections as Modified at 1, *In re* Celsius Network LLC, No. 22-10964 (Bankr. S.D.N.Y. 2022), ECF No. 2344 (discussing Celsius's entry of an order approving bid protections for their proposed plan, NovaWulf).

[206] *Id.* at 5 ("The Debtors' proposed Bid Protections as modified are as follows: a Break-Up Fee of $5 million and Expense Reimbursement up to $8 million, with an additional $5 million of Expense Reimbursement to be subject to further Court approval following the approval of the disclosure statement.").

[207] Debtors' Third Mot. for Entry of an Order (I) Extending the Debtors' Exclusive Period to Solicit Acceptances of a Chapter 11 Plan Pursuant to Section 1121 of the Bankruptcy Code and (II) Granting Related Relief at 2, *In re* Celsius Network LLC, No. 22-10964 (Bankr. S.D.N.Y. 2022), ECF No. 2805 [hereinafter Third Exclusivity Extension Motion] ("[T]he winning bid has vastly improved terms compared to the initial NovaWulf stalking horse bid, which will result in hundreds of millions of dollars of additional value for the Debtors' creditors.").

[208] *Id.* ("[F]ollowing a competitive auction process, the Debtors and the Committee jointly designated Fahrenheit, LLC as the winning bidder . . . [and] also designated the Blockchain Recovery Investment Consortium (the 'BRIC') as the 'backup bid,' so that the Debtors can promptly pivot to an orderly wind-down in case the Fahrenheit bid cannot be confirmed or consummated for any reason.").

[209] *Id.* at 3 ("Although much progress has been made in the past few months, additional time will be needed to obtain approval of the disclosure statement and solicit votes to accept or reject the revised Plan. Accordingly, the Debtors seek an additional extension of their exclusive right to solicit a chapter 11 plan . . . .").

plan to accommodate the terms of the new bid.[210] In this motion, Celsius explained why the Fahrenheit bid was superior to the NovaWulf bid.[211]

Fahrenheit's bid allowed for the return of more than $500 million extra in liquid cryptocurrency to creditors.[212] Fahrenheit's new management agreement featured reduced fees and a new incentive scheme that more accurately compensated Fahrenheit for strong performance as a manager.[213] Fahrenheit also agreed to contribute more money to NewCo than NovaWulf, and the Fahrenheit bid provided a clear plan to maximize the value of NewCo's mining products by leveraging their own cryptocurrency infrastructure.[214] One important change, however, was the scrapping of the original Share Token plan.[215] The new plan required Fahrenheit to list the stock of NewCo on a public exchange "such as Nasdaq."[216] After Fahrenheit listed the stock, they

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[210] *Id.* at 4 ("Cause exists under section 1121 of the Bankruptcy Code for this extension, which will ensure that all stakeholders can thoroughly review and understand the revised Plan and related disclosure statement—which have both materially changed since the filing of the NovaWulf Plan—to decide whether to vote to accept or reject the plan in an efficient, organized fashion. With this extension, the Debtors are positioned to expeditiously move towards plan confirmation.").

[211] *Id.* at 2 ("Through the improved terms of the Fahrenheit bid, the Debtors' creditors will receive much more liquid cryptocurrency in the initial distribution to be made shortly after the effective date of the Debtors' chapter 11 plan. Additionally, Fahrenheit's members are proven leaders in bitcoin mining, cryptocurrency staking, and alternative cryptocurrency investments, and their leadership and expertise will increase the value of the 'NewCo' that will operate and manage the Debtors' illiquid assets for the Debtors' creditors, who will receive the equity of the NewCo under the Plan.").

[212] *See* Order (I) Extending the Debtors' Exclusive Period to Solicit Acceptances of a Chapter 11 Plan Pursuant to Section 1121 of the Bankruptcy code and (II) Granting Related Relief at Ex. B, *In re* Celsius Network LLC, 22-10964, (Bankr. S.D.N.Y. 2022), ECF No. 2805 (indicating that NewCo's "Liquid Crypto Holdback" under Fahrenheit's successful bid is between $450 and $500 million).

[213] *Id.* (describing Fahrenheit's Fixed Management Fee of $35 million per year, in addition to Incentive Stock Units and Options).

[214] *Id.* (describing Fahrenheit's Management Contribution of $50 million, along with Staking and Lending Growth Strategies).

[215] *See id.* (describing a new reorganization plan without mention of Share Tokens).

[216] *Id.*

would create a "secondary security token" that is "one-to-one redeemable for [the] exchange-listed common stock."[217]

The Bankruptcy Court granted Celsius's motion. Soon after, Celsius provided a new plan of reorganization with the updated terms.[218] The new plan gave no mention of the Share Tokens previously contemplated.[219] Celsius now must solicit votes from each creditor class in favor of the plan, otherwise, attempt to cram it down upon dissenting creditor classes.[220]

V. A Comparison of the Equity Token Aspects of the Two Restructuring Plans

A. The NovaWulf Plan Was Overly Ambitious and Risky Considering Celsius's Alleged Misconduct and the Unpredictability of Future Cryptocurrency Regulations.

Celsius's first plan of reorganization contained a cutting-edge idea: disburse reorganized Celsius' equity to creditors in the form of equity tokens.[221] This approach offered unique benefits to creditors, like

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[217] *Id.*

[218] Order (I) Extending the Debtors' Exclusive Period to Solicit Acceptances of a Chapter 11 Plan Pursuant to Section 1121 of the Bankruptcy Code and (II) Granting Related Relief, *In re* Celsius Network LLC, No. 22-10964 (Bankr. S.D.N.Y. 2022), ECF No. 2935; Revised Plan, *supra* note 13 ("The Motion is granted as set forth herein.").

[219] *See* Revised Plan, *supra* note 13; Disclosure Statement for the Joint Chapter 11 Plan of Reorganization of Celsius Network LLC and Its Debtor Affiliates, *In re* Celsius Network LLC, No. 22-10964 (Bankr. S.D.N.Y. 2022), ECF No. 2902 [hereinafter Disclosure Statement] (describing "Plan Settlement Provisions Regarding Claims and Interests" without mention of Share Token plan).

[220] *See* 11 U.S.C. §§ 1129, 1122. ("The court shall confirm a plan only if… (8) with respect to each class of claims or interests— (a) such class has accepted the plan; or (b) such class is not impaired under the plan.")

[221] *See* Joint Plan, *supra* note 3, at 37 ("On the Effective Date or as soon as reasonably practicable thereafter, in accordance with the Transaction Steps Memorandum, NewCo shall issue Equity Share Tokens and Management Share Tokens."); Omnibus Hearing Transcript, *supra* note 6, at 45 ("[W]hat we're envisioning at this time is somewhat of a novel approach where we think we can tokenize and distribute to account holders what we're referring to as an asset share token . . . .").

low transaction costs and barriers to entry, but featured unique risks as well.[222] Regardless of the support it received from Celsius, NovaWulf, and the Committee, the plan was overly ambitious and put Creditors' returns at risk.[223]

In July 2023, multiple federal law enforcement agencies acted against Celsius and its executives.[224] Prosecutors levied seven charges against Celsius's former CEO, Alex Mashinsky, and another key executive. The SEC unveiled "concurrent charges" against Celsius and Mashinsky.[225] The FTC also announced a $4.7 billion settlement with Celsius, one of the largest in FTC history.[226] This settlement will only be paid out after Celsius's creditors are paid out in the bankruptcy proceeding, but this, along with the DOJ and SEC charges, it demonstrated just how serious the issues at Celsius were.[227] Much of Celsius's legal status is already in turmoil; therefore, Celsius is not a good candidate for a radical new bankruptcy plan.[228]

Celsius's counsel originally claimed that Celsius was talking with regulators about the idea of an asset share token back in January 2023; but, it was no certainty that NovaWulf would have been

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[222] *See* DeCosimo & Riley, *supra* note 97 (describing the various benefits and risks associated with the tokenization of real estate investment).

[223] *See* Joint Plan, *supra* note 3 (describing the various mechanisms to ensure that creditors are repaid).

[224] Rohan Goaswami, *Former Celsius CEO Arrested, Company Agrees to Pay $4.7 Billion Settlement*, CNBC (July 13, 2023) https://www.cnbc.com/2023/07/13/former-celsius-ceo-arrested-company-agrees-to-pay-4point7-billion-settlement.html ("Former Celsius CEO Alex Mashinsky was arrested Thursday on federal securities fraud charges, as the bankrupt crypto exchange agreed to $4.7 billion settlement with the Federal Trade Commission.").

[225] *Id.*; *See* Complaint*,* S.E.C. v. Celsius Network L. & Alexander Mashinsky, No. 23-cv-6005 (D. S.D.N.Y. 2023) [hereinafter Complaint] ("Defendants Celsius . . . and CEO Alexander 'Alex' Mashinsky ('Mashinsky') raised billions of dollars from investors through unregistered and fraudulent offers and sales of crypto asset securities.").

[226] *See* Goaswami, *supra* note 224 ("Celsius' settlement is one of the largest in the FTC's history, close to the record $5 billion fine levied against Meta in 2019 . . . .").

[227] *See id.* ("The settlement, announced by the FTC, will not be paid until the company is able to return what remains of customer assets in bankruptcy proceedings.").

[228] *See id.*; Omnibus Hearing Transcript, *supra* note 6, at 45 (summarizing a proposal for a novel plan to pay out creditors with asset share tokens).

successful in registering the Share Tokens as securities with the SEC.[229] The tokens would have been worth significantly less if holders had to violate the Securities and Exchange Act and state Blue Sky laws in order to trade them.[230] The SEC may have acknowledged that NewCo was to be managed by a new entity and would not harbor the same issues that Celsius had.[231] But, because the SEC accused Celsius and Mashinsky of misrepresenting the safety and profitability of Celsius, NovaWulf may have faced significant difficulties in registering the tokens.[232]

Another unreasonable risk included in the original plan was the risk of future regulation that would affect the value of the tokens.[233] The SEC complaint clearly shows that they view many cryptocurrencies as securities and the SEC aims to regulate them as such.[234] This lack of

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[229] *See* Omnibus Hearing Transcript, *supra* note 6, at 37 ("We've had discussions with him and will continue to going forward in hopes of reaching a consensual resolution. I think I would be the first to acknowledge that any significant litigation on a creditor-by-creditor basis here is going to be massively destructive of value. And we are very focused on -- I'm not prepared as we stand here today to roll out the specifics of it, but suffice it to say, Your Honor, that issue is something that we are in advanced discussions about and are very focused on as, you know, we've made a lot of progress in a lot of the key gating issues in the case.").

[230] *See* Securities and Exchange Act, 15 U.S.C. § 78a ("[I]n order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the Private Securities Litigation Reform Act of 1995, it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits.").

[231] *See* Complaint, *supra* note 225 ("Defendants falsely promised investors a safe investment with high returns through its 'Earn Interest Program,' they misled investors about the financial success of Celsius's business, and they fraudulently manipulated the price of Celsius's own crypto asset security—the so-called 'CEL' token.").

[232] *See* Joint Plan*, supra* note 3; Complaint, *supra* note 225 ("'*NewCo*' means the Entity to be managed by the Manager following the Effective Date, which shall hold and operate the NewCo Assets for the benefit of holders of ESTs.").

[233] *See* Hinman, *supra* note 107 ("Applying the disclosure regime of the federal securities laws to the offer and resale of Bitcoin would seem to add little value."); Hashfast Technologies LLC v. Marc Lowe, No. 14-30725DM, (Bankr. N.D.C.A. Feb. 22, 2016); Beall, *supra* note 80, at 57-58.

[234] *See* Complaint, *supra* note 225, at 11 ("Celsius and Mashinsky publicly promoted CEL as an investment on which investors could profit based on

regulation creates a large risk for investors.[235] New regulations may create unforeseen roadblocks or expenses that devalue the tokens, or limit NewCo's activities.[236]

One strong aspect of the plan that survived into the amended version was the idea to differentiate between creditors holding large claims and those holding small ones.[237] The Celsius bankruptcy has become a complex, drawn-out process.[238] Therefore, smaller creditors clearly will appreciate having their returns guaranteed and not having to bargain for improved terms under the equity disbursement.[239]

The other benefits of the plan have already been discussed above.[240] Asset tokenization gives holders added liquidity, fractional investing, and other monetary incentives that give tokenized assets more value than normal ones.[241] Pending a theoretical creditor vote solicitation process, the plan also likely satisfied the requirements for confirmation under the Bankruptcy Code.[242] It followed the absolute priority rule by paying out secured creditors in full before paying out the Earn customers.[243] The plan also properly grouped claimants together according to their interests: Earn customers were kept separate from others, and Earn customers did not have conflicting claims that would preclude their grouping together.[244] However, the risks posed by adversarial federal agencies, and the soured history of Celsius's

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Celsius's efforts . . . Celsius and Mashinsky also marketed CEL as a profitable asset growing in value.").

[235] *See* Beall, *supra* note 80, at 43-50 (explaining that security at exchanges and personal security are important weak links in cryptocurrency security).

[236] *See id.* (summarizing how cryptocurrency's value is dependent on self-regulation).

[237] *See* Joint Plan, *supra* note 3 ("'Convenience Claim' means any aggregate Account Holder Claim . . . valued greater than the De Minimis Claim Threshold ($10) but less than or equal to the Convenience Claim Threshold ($5,000).").

[238] *See id* at 14 (indicating a petition date of July 13, 2022).

[239] *See* Omnibus Hearing Transcript, *supra* note 6, at 105 ("We want to get off this plane right now and maximize our returns.").

[240] *See infra* § V.

[241] *See Asset Tokenization, supra* note 87 ("Tokens may be traded in fractions.").

[242] *See* 11 U.S.C. § 1129 (defining the absolute priority rule).

[243] *See id.*

[244] *See id*.

management, make the tokenized equity disbursement contemplated in this plan overambitious and mistimed.[245]

B. The Amended Plan Lacks Some of the Benefits of the NovaWulf Plan but is Much Safer.

The Share Token idea was so well accepted by Celsius, the creditors' committee, and NovaWulf, that it survived months of deliberations and was comprehensively drafted into Celsius's first official plan of reorganization.[246] The concept was only thrown out in the amended plan once Fahrenheit and their generous bid came into the picture; a bid promising a much stronger return for creditors is more valuable than preserving a radical equity disbursement idea.[247] Fahrenheit may have vetoed the idea because they wanted to avoid being the test subject for asset tokenization as a primary part of an equity distribution under a Chapter 11 plan.[248]

Fahrenheit, however, agreed to create equity tokens for NewCo after they listed NewCo stock on an established exchange.[249] Clearly, someone in the negotiation was still interested in owning tokenized equity in NewCo. This approach avoids some of the risks inherent in the original Share Token plan while still preserving some of the benefits. Because of the negative discourse around risky cryptocurrency ventures, NewCo is less likely to run into problems while applying to be listed on a major stock exchange than if they attempted to register the Share Tokens as cryptocurrency securities.[250] NewCo will be primarily a cryptocurrency mining company.[251] As a mining company, NewCo

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[245] *See* Joint Plan, *supra* note 3 ("'Earn Claim' means any (i) Claim arising out of or related to the Earn Program or (ii) Account Holder Claim not separately classified under the Plan.").

[246] *See* Omnibus Hearing Transcript, *supra* note 6 ("[W]e think that these share tokens would be provided to all account holders who have account balances over a certain threshold."); Joint Plan, *supra* note 3.

[247] *See* Revised Plan, *supra* note 13.

[248] *See* Third Exclusivity Extension Motion, *supra* note 207, at 25.

[249] *See id.* at 25 (detailing that Fahrenheit's successful bid includes a plan "to publicly list a NewCo security on an exchange such as Nasdaq").

[250] *See* Revised Plan, *supra* note 13.

[251] *Id.* at 21 ("'NewCo Assets' means the assets that shall be transferred or assigned to NewCo or its subsidiaries on the Effective Date, free and clear of any Liens, Claims, interests, charges, or encumbrances, which shall consist of . . . (d) Mining . . . .").

will not release new tokens to the public.[252] It was the tokens that Celsius released, coupled with outsized claims about their profitability, that helped bring the strong arm of the law down on Celsius.[253] Therefore, the risk that Fahrenheit will be unable to secure NewCo's stock listing on a major exchange is significantly smaller than the risk that NovaWulf faced under the original plan.[254]

The risk of new regulations affecting the profitability of Share Tokens is also absent from the amended plan.[255] Under the amended plan, creditors will receive normal stock in NewCo and may later invest in the tokenized version of that stock.[256] While the original stock will still come with the same transaction fees and other shortcomings inherent in owning any stock, it will not face an increased risk of major regulatory changes.[257] The value of the tokenized equity is tied to the value of NewCo stock because the tokens can always be exchanged for one share of stock.[258] Therefore, both the stock disbursement and the tokenized equity that will follow are both significantly safer investments than the Share Tokens would have been.[259]

The amended plan is likely confirmable for the same reasons the original plan was.[260] The amended plan does come with drawbacks, however.[261] Listing a stock on an exchange like Nasdaq costs hundreds

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[252] *See* Fergus O'Sullivan, *What Is Crypto Mining, and How Does It Work?*, HOW-TO GEEK (Mar. 15, 2022), https://www.howtogeek.com/771391/what-is-crypto-mining-and-how-does-it-work/ ([C]rypto mining is how new units of cryptocurrency---usually called coins---are created . . . and the reward is a coin.").

[253] Complaint, *supra* note 225, at 1-2. ("Defendants falsely promised investors a safe investment with high returns . . . [and] they fraudulently manipulated the price of Celsius' own crypto asset security.").

[254] *See* Third Exclusivity Extension Motion, *supra* note 209, at 25.

[255] *See id.*

[256] *See id.* at 25 ("$50 million to purchase NewCo common stock in the primary or secondary market").

[257] *See Asset Tokenization*, *supra* note 87, at 6. ("The volatility risk of the virtual assets is further increased by regulatory changes, cyber-attacks and crypto heists").

[258] *See* Third Exclusivity Extension Motion, *supra* note 207, at 25 ("Fahrenheit has secured MOUs to provide a digital asset based security token offering that is one-to-one redeemable for exchange-listed common stock once an exchange listing is completed.").

[259] *See* Revised plan, *supra* note 13.

[260] *See* 11 U.S.C. § 1129.

[261] *See* Revised plan, *supra* note 13.

of thousands of dollars upfront and more in perpetuity.[262] Brokers and exchanges also charge additional transaction fees to consumers.[263] However, NewCo will manage hundreds of millions of dollars in assets, so these exchange fees should not be too large to bear.[264] Furthermore, the risks inherent with an ambitious tokenized asset disbursement would likely have outweighed all transaction costs that consumers will bear.[265]

C. The Celsius Bankruptcy Provided the Perfect Forum for the Idea of a Tokenized Equity Disbursement to Come to be, but it Was Not the Perfect Candidate to Carry Out the Concept.

The Celsius bankruptcy provided a unique situation that was perfect for the birth of a novel bankruptcy idea, the tokenized equity distribution.[266] The main claim holders in the Celsius bankruptcy were regular people who held their cryptocurrency on the exchange.[267] Jackpot-seeking and trailblazing cryptocurrency investors were likely more risk tolerant than institutional investors or the average retail investor.[268] They clearly appreciated the benefits of asset tokenization and wanted to squeeze as much value as possible out of the Celsius bankruptcy.[269]

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[262] *See Company Listing Fees*, THE NASDAQ STOCK MARKET (2023), https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5900-series ("[A] Company shall pay to Nasdaq a $295,000 fee the first time the Company lists a class of its securities . . . .").

[263] Rebecca Lake, SMART ASSET (Mar. 18, 2023), https://smartasset.com/financial-advisor/trading-fees ("[T]rading fees apply when you want to buy or sell shares of a specific investment. Also called a commission, this fee is paid to the broker in exchange for helping to facilitate the trade through the platform . . . .").

[264] *See* Revised Plan, *supra* note 13.

[265] *See id.*

[266] *See* Omnibus Hearing Transcript, *supra* note 6, at 53-54 ("[C]elsius has been negotiating with various creditor groups over how to set up the new company and issue a new token to creditors as part of a payout plan, Kwasteniet told US Bankruptcy Judge Martin Glenn, who is in New York . . . .").

[267] *See* Chapter 11 or Chapter 9 Cases: Consolidated List of Creditors Who Have the 50
Largest Unsecured Claims and Are Not Insiders, *In re* Celsius Network LLC, No. 22-10964 (Bankr. S.D.N.Y. 2022), ECF No. 1 at 1-6.

[268] *See* Omnibus Hearing Transcript, *supra* note 6, at 45-48.

[269] *See id.*

Ideally, the Celsius creditors could be offered a plan that combines the safety of the amended plan and the cryptocurrency benefits of the original NovaWulf plan.[270] However, given the current, tumultuous, state of cryptocurrency regulation, that may not be possible.[271] One day, there may be exchanges that register and trade cryptocurrency with the security of the NYSE or Nasdaq. The secure cryptocurrency exchange of the future is not here yet; Celsius and FTX are the leading examples of exchanges today.[272]

While the amended plan does provide for the creation of an equity token, the value of the token is still limited by the shortcomings of standard stock.[273] A true tokenized equity disbursement would not have one foot in both worlds but instead exist entirely as cryptocurrency.[274] This would allow creditors to enjoy lower transaction costs, instant transactions, added security, and give the disbursement a lower barrier to entry.[275] However, we are yet to see such a disbursement.[276]

Celsius is a massive corporation, so many of the costs inherent in an equity disbursement will be inconsequential to the Earn customers returns in bankruptcy.[277] However, smaller companies may feel more inclined to save costs and disburse their equity in the form of a tokenized asset.[278] Celsius at first glance may have seemed like the perfect candidate for a tokenized equity disbursement because they are a cryptocurrency company, and their creditors are interested in investing in cryptocurrency.[279] However, the benefits that they would experience from a tokenized equity disbursement would be subsumed by their size, and the fact that Celsius is already at the center of so much controversy for their cryptocurrency dealings is also a serious barrier.[280]

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[270] *See* Joint Plan*, supra* note 3; Revised Plan, *supra* note 13; *Asset Tokenization, supra* note 87.
[271] *See* Shawyer, *supra* note 81, at 2039-43 (discussing the impact that regulatory treatment of cryptocurrency has on its treatment in bankruptcy).
[272] *See* Complaint, *supra* note 225.
[273] *See Asset Tokenization*, *supra* note 87.
[274] *See Equity Token Offerings, supra* note 125.
[275] *See id.*
[276] *See id.*
[277] *See* Revised Plan, *supra* note 13.
[278] *See Asset Tokenization*, *supra* note 87.
[279] *See* Omnibus Hearing Transcript, *supra* note 6.
[280] *See* Joint Plan, *supra* note 3; *see* Complaint, *supra* note 225.

VI. Conclusion

The main goal of a Chapter 11 bankruptcy is to maximize the value of a business for the benefit of its creditors.[281] There are a variety of requirements that debtors must meet when designing a plan of reorganization, requirements intended to ensure that creditors are given the best possible outcome from the bankruptcy.[282] Often this results in creditors being paid with equity in the reorganized company.[283] Cryptocurrencies and blockchain technology are changing the financial services landscape.[284] Tokenized assets provide increased liquidity and security when compared to normal equity.[285] The mismanagement of cryptocurrency assets led Celsius to file for Chapter 11 Bankruptcy.[286] Despite this, Celsius's original plan of reorganization featured tokenized equity as repayment to its largest group of unsecured creditors.[287] Celsius's amended plan features tokenized equity in a diminished role.[288]

Celsius was not the perfect test case for a tokenized equity disbursement in Chapter 11 bankruptcy.[289] However, now that the idea has been developed, it may come before a bankruptcy court again in the future.[290] Tokenized equity distributions in Chapter 11 bankruptcy may offer creditors increased returns for their claims, but such plans also pose unique risks under the current regulatory framework.[291] Therefore, creditors' committees should be careful when assessing whether to approve Chapter 11 plans that feature tokenized equity disbursements.[292]

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[281] ROE, *supra* note 24 at 7-20.
[282] *See id.*; *see* § 1129; § 1122
[283] *See* ROE, *supra* note 24 at 7-20; *see Jevic Holding Corp*., 137 S. Ct. 973.
[284] *See* Provenance Blockchain Update, *supra* note 137.
[285] DECOSIMO, *supra* note 97.
[286] *See* Chapter 11 Voluntary Petition for Non-Individual, *supra* note 5.
[287] *See* Joint Plan, *supra* note 3.
[288] *See id.*; *see* § 1129; § 1122.
[289] *See* Complaint, *supra* note 227.
[290] *See* Joint Plan, *supra* note 3; DECOSIMO, *supra* note 97.
[291] *See* Asset Tokenization, *supra* note 87.
[292] *See id.*; Revised Plan, *supra* note 13.