

## Southern District of New York: Plaintiff Failed to Plead That Crypto Exchange Platform Was a Statutory Seller or Actively Solicited Sales Under *Pinter* (Securities Law Alert)

02.28.23



(Article from *Securities Law Alert*, February 2023)

For more information, please visit the [Securities Law Alert Resource Center](#)

On February 1, 2023, the Southern District of New York dismissed a putative class action brought by customers alleging that a company sold cryptocurrencies as unregistered securities through its two online digital trading platforms. [Underwood v. Coinbase Global, 2023 WL 1431965 \(S.D.N.Y. 2023\) \(Engelmayer, J.\)](#). Discounting the amended complaint’s allegations, which contradicted the original complaint, the court held that plaintiffs failed to plead that the company was a “statutory seller” under *Pinter*’s first prong<sup>[1]</sup> as plaintiffs did not plead that the company passed title to the buyer. The court also held that plaintiffs failed to allege that the company actively solicited the sales under the second prong.<sup>[2]</sup>

“Section 12(a)(1) of the Securities Act creates a private right of action for the purchaser against the seller in any transaction that violates Sections 5(a) or (c),” which “prohibit any person from selling unregistered securities using any means of interstate commerce unless the securities are exempt from registration.” 15 U.S.C. § 77e(a), (c). To state a claim under Section 12(a)(1), plaintiff must allege defendant meets the “statutory seller” requirements articulated in *Pinter*. Under *Pinter* an individual is a “statutory seller” if defendant either: (i) “passed title, or other interest in the security, to the buyer for value” (in other words, was the “direct seller”); or (ii) “successfully solicited the purchase of a security, motivated at least in part by a desire to serve its own financial interests or those of the securities’ owner.”

In their amended complaint, plaintiffs alleged that the company was the statutory seller under the first prong of *Pinter* because the company held title to the cryptocurrencies at the time of the transactions among the users because the digital assets were placed in a centralized wallet. Therefore, plaintiffs alleged that for every transaction involving these digital assets, the only blockchain address that a user ever interacted with was provided and owned by the company such that users interacted with the company, not with each other. Noting that while such “allegations would ordinarily assist plaintiffs in pleading this theory” the court determined that because these allegations were contrary to those in the original complaint, it should disregard the amended pleading.

The court observed that the original complaint’s factual allegations related to counterparties undermined plaintiffs’ thesis in the amended

complaint that the company was a statutory seller under the first prong. Specifically, the original complaint had alleged that once digital assets were credited to a user’s wallet, the user could enter into trade agreements with other users for purchases and sales of digital assets; however, the amended complaint alleged that buyers and other users as sellers were not in privity with one another. The court further observed that the original complaint’s factual allegations about who held title to the digital assets undermined plaintiffs’ thesis in the amended complaint. Specifically, the original complaint incorporated a user agreement that was in effect during the class period and indicated that the users were the title holders, thereby contradicting the amended complaint’s allegations that the company held title to the digital assets. In language directed to the user, the user agreement stated, “You control the Digital Currencies held in your Digital Currency Wallet” and that “Title to Digital Currency shall at all times remain with you and shall not transfer to [the company].” Therefore, the court held that amended complaint’s allegations fell short of meeting the first prong of *Pinter*.

Regarding the second prong of *Pinter*—examining whether the company solicited the transactions—the court explained that to hold a defendant liable under Section 12 as a seller, plaintiffs must demonstrate defendant’s “direct and active participation in the solicitation of the immediate sale.” The court determined that the amended complaint’s allegations failed because they did not “describe conduct beyond the ‘collateral’ participation that *Pinter* and its progeny exclude from Section 12 liability.” The amended complaint alleged, among other things, that the company promoted the tokens with descriptions of the tokens, participated in direct promotions, and wrote news updates on token price movements. The court described these efforts as akin to marketing efforts, materials, and services that courts have held to be insufficient to establish active solicitation under *Pinter*’s second prong. Generally, it appears that active solicitation involves defendant directly contacting investors. For example, in *Holsworth v. BProtocol Foundation*, 2021 WL 706549 (S.D.N.Y. Feb. 22, 2021), the court dismissed a Section 12 claim, stating that plaintiff failed to show that he was directly contacted by defendants or that he purchased securities as a result of any active solicitations by defendants.

[1] *Pinter v. Dahl*, 486 U.S. 622 (1988).

[2] Plaintiffs also asserted certain state-law claims that are not discussed in this summary, which were based on the company’s alleged sale of unregistered securities and failure to register as a broker-dealer. These state-law claims were dismissed without prejudice based on the court’s decision not to exercise supplemental jurisdiction. Additionally, plaintiffs brought a claim under Section 29(b) of the Exchange Act, alleging that the company utilized illegal contracts with users in violation of the Exchange Act’s registration requirements. As with plaintiffs’ Securities Act claim under Section 12(a)(1), the Exchange Act claim was also dismissed with prejudice.

Authors and  
Contacts

Meaghan Kelly  
Partner  
mkelly@stblaw.com  
+1-202-636-5542

Janet Gochman  
Senior Counsel  
jgochman@stblaw.com  
+1-212-455-2815

Rachel Sparks Bradley  
Partner  
rachel.sparksbradley@stblaw.com  
+1-212-455-2421

