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Terms of Service Are Instrumental in Determining Rights to Digital Assets – The Holding in Celsius Network LLC

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The U.S. Bankruptcy Court for the Southern District of New York recently issued a Memorandum Opinion and Order Regarding Ownership of Earn Account Assets¹ in the Celsius Network LLC Chapter 11 bankruptcy case.

At issue were various versions of the Celsius website Terms of Service that addressed ownership of Earn account assets and were used by Celsius to contract with its customers. The court held that these Terms of Service were drafted, presented and accepted by Celsius customers, and subsequently amended by Celsius, in such a manner as to form a valid and binding contract which dictated that title to and ownership of the \$4.2 billion of assets in the 600,000 Earn Program accounts was transferred to Celsius upon deposit into

the Earn account, thereby making the assets part of the debtors' bankruptcy estate. Effectively, this relegated the customers' claims to the Earn account assets to those of general unsecured creditors under US bankruptcy law.

The Memorandum Opinion addressed three key issues:

1. Whether certain account assets were owned by the customers or by Celsius;
2. Whether the electronic contract execution process, and the terms of the agreement between Celsius and its customers, were effective to determine ownership of the account assets as of the date of the bankruptcy petition; and
3. Whether a series of unilateral amendments to the Terms of Service by Celsius, for which the customers were given notice, were effective.

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BACKGROUND

Celsius Network was a cryptocurrency platform that filed for bankruptcy on July 15, 2022. Celsius had approximately 600,000 customer accounts in its Earn Program, which held cryptocurrency assets with a market value of approximately \$4.2 billion as of July 10, 2022. Participation in the Earn Program enabled customers of Celsius to earn “rewards” in the form of interest on cryptocurrency deposits.

As discussed in the Memorandum Opinion, Celsius required customers to agree to its online Terms of Service at the time of opening an account. The Terms of Service provided that Celsius may modify the Terms of Service at any time by posting on its website and continued use of the site constituted the customer’s acceptance of the modified Terms of Service. The court specifically noted that Celsius required all existing customers to again affirmatively agree to Version 6 of the Terms of Service, and Celsius suspended each customer’s account until such consent was obtained. In addition, electronic notice of the amendments to Versions 7 and 8 of the Terms of Service were provided to all existing customers. Version 8 of the Terms of Service was effective as of the date of the bankruptcy petition.

Version 8 of the Terms of Service provided that, with respect to assets deposited into Earn accounts, the customer:

grant[s] Celsius . . . all right and title to such Eligible Digital Assets, including ownership rights, and the right, without further notice to you, to hold such Digital Assets in Celsius’ own Virtual Wallet or elsewhere, and to pledge, re-pledge, hypothecate, rehypothecate, sell, lend, or otherwise transfer or use any amount of such Digital Assets, separately or together with other property, with all attendant rights of ownership, and for any period of time, and without retaining in Celsius’ possession and/or control a like amount of Digital Assets or any other monies or assets, and to use or invest such Digital Assets in Celsius’ full discretion. You acknowledge that with respect to Digital Assets used by Celsius pursuant to this paragraph:

1. You will not be able to exercise rights of ownership; [and]
2. . . . In the event that Celsius becomes bankrupt, enters liquidation or is otherwise unable to repay its obligations, any Eligible Digital Assets used in the Earn Service . . . may not be recoverable, and you may not have any

legal remedies or rights in connection with Celsius’ obligations to you other than your rights as a creditor of Celsius under any applicable laws.²

THE COURT’S DECISION

The court applied New York law regarding the requirements for formation of a valid contract. New York law requires mutual assent of the parties (offer and acceptance), consideration and an intent to be bound.³

With respect to whether the Earn Program customers mutually assented to the Terms of Service, the court assessed whether a “reasonably prudent” customer would have been aware that they were being bound by the terms and the conspicuousness of the terms that were purportedly accepted.⁴ The court determined that the Terms of Service constituted a “click-wrap” agreement, which requires a customer to manifest assent by clicking a button confirming they accept the terms but does not necessarily require the customer to actually view the terms.⁵ Click-wrap agreements are “routinely enforced under New York law.”⁶ The debtors presented declarations of Celsius officers which provided screen captures of the account set-up process and which explained that an applicant could not advance to the next page and complete sign up unless they agreed to the Terms of Service.⁷ Furthermore, the declarations explained that 99% of Earn Program customers completed the sign-up process and affirmatively assented to the Terms of Service.⁸

The court then evaluated whether the Terms of Service were “reasonably conspicuous,” considering the presence or absence of clutter on the page that contained the terms or a link thereto, how the hyperlinks were indicated and the presence or absence of spatial and temporal coupling with acceptance.

Although courts generally do not opine on the adequacy of consideration,⁹ the court determined that consideration existed in that the Earn Program allowed customers to earn “rewards” in the form of digital assets.¹⁰ The court further noted that “a service provider’s notice of a change to the terms of service and a customer’s choice to continue using the service is valid consideration.”¹¹

Modification of an existing contract is permitted if the contract provides for modification and requires the same elements as the original contract formation.¹² As discussed above, the Terms of Service permitted Celsius to unilaterally modify the Terms of Service, and informed customers that continued use of the platform following such a modification posted to the platform constituted consent to the modified Terms of Service.¹³

Although the court did not describe the general click-wrap sign-up process used by Celsius, the court did discuss the process for existing customer acceptance of Version 6 of the Terms of Service. When the customer accessed their account:

An in-application pop-up window appeared, stating in large letters: “We have updated our Terms.” (See *Id.* ¶ 18, Exhibit C.) The pop-up then noted that “[i]t’s tempting to skip reading Terms, but it’s important to establish what you can expect from continuing using our product. These are not all of the changes, please read the updated Terms in full.” (See *id.*) This text was followed by a few bullets highlighting key changes and a hyperlink reading “Read the full Terms,” which linked to the full Terms of Use. (*Id.*) Below the hyperlink, the pop-up contained three check boxes adjacent to statements, one of which was “I have read and agree to the new Terms.” (*Id.*) In addition, the acceptance button itself included the word “Agree.” (*Id.*)¹⁴

The court found that this pop-up process, which required at least two clicks (one check box and the “Agree” button) was “clean and compact,” contained the pertinent information in close proximity, and met the standard for “clear and conspicuous.”¹⁵

Based on the express language of the Terms of Service, the court held that the Terms of Service expressly transferred title and ownership of the assets to Celsius. Although many objectors argued that the Terms of Service’s repeated use of the term “loan” to refer to the transfer of the assets to Celsius, the court noted that none of the customers had perfected a security interest in the assets with the filing of a financing statement.¹⁶ In both cases, if Celsius owned the assets or if the assets were “loaned” to Celsius with no financing statement filed, the customers were general creditors under bankruptcy law.¹⁷ The court also noted that the use of the term “loan” did not necessarily contradict the provisions providing for a transfer of title, citing the common practice of securities brokers to take a “loan” of securities that also incorporates a transfer of title.

CONCLUSION

Appropriate drafting of your online Terms of Service with respect to digital assets, and the appropriate presentation and acceptance of such Terms of Service, can establish how interests in digital assets are allocated between the parties and provide foundational support in the event of any dispute. In particular, the status and rights of parties to certain digital assets may be addressed by employing the “financial asset” structure authorized by Article 8 of the Uniform Commercial Code.

Notes

1. <https://cases.stretto.com/public/x191/11749/PLEADINGS/117490104238000000067.pdf>.
2. See Memorandum Opinion, pgs. 10-11 (citing Terms of Service Version 8).
3. See *id.* at pgs. 24-25.
4. See *id.* at pg. 26.
5. See *id.* at pgs. 26-27.
6. See *id.* at pg. 26 (citing *Whit v. Prosper Funding LLC*, No. 15-00136 (GHW), 2015 WL 4254062, at *4 (S.D.N.Y. July 14, 2015) (“In New York, clickwrap agreements are valid and enforceable contracts.”) (quoting *Centrifugal Force, Inc. v. Softnet Commc’n, Inc.*, No. 08-05463 (CM), 2011 WL 744732, at *7 (S.D.N.Y. Mar. 1, 2011)).
7. See Memorandum Opinion, pg. 32.
8. See *id.* at pg. 33.
9. See *id.* at pg. 27.
10. See *id.* at pg. 33.
11. *Id.* at pg. 28 (citing *Byrne v. Charter Commc’ns*, 581 F.Supp. 3d 409, 419 (D.Conn. 2022)).
12. See *id.* at pg. 28.
13. See *id.* at pg. 35.
14. See *id.* at pg. 26.
15. *Id.* at pg. 26.
16. See *id.* at pgs. 40-41.
17. See *id.* at pg. 41. The court noted that its ruling did not consider any contract defense claims of account holders or breach of contract claims, including claims of several states that Celsius violates state securities laws, which would render the Terms of Service void for all customers. These claims are reserved for the claims resolution process. See *id.* pg. 43.

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