

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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U.S. SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

MEMORANDUM & ORDER
20-CV-327 (EK) (MMH)

-against-

SERGIY "SERGEY" GRYBNIYAK, and OPPORTY
INTERNATIONAL, INC.,

Defendants, and

CLEVER SOLUTION INC.,

Relief Defendant.

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ERIC KOMITEE, United States District Judge:

The SEC filed this civil enforcement action against Opperty International and its founder, Sergiy "Sergey" Grybniak. The complaint alleges that the defendants violated the Securities Act of 1933 and Securities Exchange Act of 1934 in connection with the unregistered offering of Opperty's digital coin, the "OPP Token."

Before the Court are the parties' cross-motions for summary judgment. For the reasons set forth below, the SEC's motion is granted in part and denied in part. The defendants' motion is denied.

I. Factual Background

The following facts, set forth in the parties' submissions, are undisputed unless otherwise specified.¹ In parsing this record, the Court notes the following. First, the majority of facts asserted by the SEC were not "specifically controverted" by the defendants; those facts thus are "deemed to be admitted for purposes of the [SEC's] motion." See Local Civil Rule 56.1(c).² Similarly, although Defendants cross-moved for summary judgment, they have largely failed to marshal any affirmative evidentiary content in their own Rule 56.1 Statement.

"Rule 56.1 statements are not argument. They should contain factual assertions with citation to the record" and "should not contain conclusions." *LaBarbera v. NYU Winthrop Hosp.*, 527 F. Supp. 3d 275, 287 (E.D.N.Y. 2021).³ Statements that "are not based on personal knowledge, contain inadmissible

¹ This includes the SEC's Local Rule 56.1 Statement ("SEC 56.1"), ECF No. 53; Defendants' opposition to this statement ("Def. Opp'n to SEC 56.1"), ECF No. 59; Defendants' Local Rule 56.1 Statement ("Def. 56.1"), ECF No. 57; the SEC's opposition and counterstatement to this statement ("SEC Opp'n to Def. 56.1 and CS"), ECF No. 63; and the SEC's reply to Defendants' opposition to their Local Rule 56.1 Statement ("SEC 56.1 Reply"), ECF No. 61.

² Local Rule 56.1(d) also provides that "[e]ach statement by the movant . . . must be followed by citation to evidence which would be admissible." See also *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 74 (2d Cir. 2001) ("Local Civil Rule 56.1 statement is not itself a vehicle for making factual assertions that are otherwise unsupported in the record.") *abrogated in part on other grounds* by *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009).

³ Unless otherwise noted, when quoting judicial decisions this order accepts all alterations and omits all citations, footnotes, and internal quotation marks.

hearsay, are conclusory or argumentative, or do not cite to supporting evidence" are therefore improper. *E.g.*, *Epstein v. Kemper Ins. Co.*, 210 F. Supp. 2d 308, 314 (S.D.N.Y. 2002).

Here, the defendants' 56.1 statement cites almost exclusively to a declaration submitted by Grybniak. It asserts inadmissible legal conclusions and lay opinion testimony and relies on exhibits whose admissibility at trial is questionable at best.⁴ An affidavit used to oppose or support a motion for summary judgment "must be made on personal knowledge [and] set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4). Courts may disregard portions of an affidavit that set out inadmissible hearsay, conclusory statements, or legal argument. *See, e.g.*, *Morris v. Northrop Grumman Corp.*, 37 F. Supp. 2d 556, 568 (E.D.N.Y. 1999); *Primmer v. CBS Studios, Inc.*, 667 F. Supp. 2d 248 (S.D.N.Y. 2009); *Ross Univ. Sch. of Med., Ltd. v. Brooklyn-Queens Health Care, Inc.*, No. 09-CV-1410 KAM, 2012 WL 6091570 at *6 (E.D.N.Y. Dec. 7, 2012).

Accordingly, this Court has disregarded the legal conclusions and arguments, unsubstantiated opinions, and unsupported factual assertions in Defendants' Rule 56.1 Statement and Grybniak's declaration. *See, e.g.*, *Congregation*

⁴ For example, the defendants' 56.1 statement cites to a section of Grybniak's declaration that relies on the SEC's privilege log, *id.* ¶ 12. Def. 56.1 ¶ 12 (citing Grybniak Decl. ¶ 22, Ex. 8), and to correspondence with Yelp containing potential hearsay evidence, *id.* ¶ 22 (citing Grybniak Decl. ¶ 22, Ex. 12).

Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona, 138 F. Supp. 3d 352, 394 (S.D.N.Y. 2015) (collecting cases), *aff'd sub nom. Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona, NY*, 945 F.3d 83 (2d Cir. 2019); *Schwapp v. Town of Avon*, 118 F.3d 106, 111 (2d Cir. 1997) (“To the extent that [supporting] affidavits contain bald assertions and legal conclusions . . . the district court [can] properly refuse[] to rely on them.”). In doing so, the Court will not “scrutiniz[e]” and make a ruling on each line of Defendants’ submissions, but will only consider the “evidence that is admissible.” *Morris*, 37 F. Supp. 2d at 569.

A. Oppority’s Business Model

Grybniak testified that he founded Oppority to create an “ecosystem for small businesses . . . to interact commercially” with their customers. SEC 56.1 ¶ 13. Oppority and Grybniak marketed Oppority’s website as a venue for small businesses to sell products and services via a blockchain, using so-called smart contracts. *Id.* ¶ 14.⁵ Customers would pay for those products using digital tokens issued by Oppority itself – the OPP tokens. *Id.*; see also *id.* ¶ 16. From September 2017 to

⁵ On a blockchain, each transaction involving digital assets is recorded, validated, and grouped together in blocks. *Id.* ¶¶ 17-18. Successive blocks are then linked chronologically to form the blockchain. *Id.* These transactions are generally recorded and maintained on a public, decentralized ledger. *Id.* ¶ 17. A “smart contract” allows for a range of tasks to be performed, such as automated financial transactions between parties. *Id.* ¶ 19.

October 2018 – the time period at issue in this case – Oppority had no employees besides Grybniak; it operated through contractors that he hired and supervised. *Id.* ¶¶ 5-8.

B. ICO Announcement and White Paper

In September 2017, Oppority announced its plan for an initial coin offering (“ICO”) for the OPP Token – the digital currency that would support purchases on its platform. *Id.*

¶ 16. Oppority planned to issue its OPP Tokens using an already-extant blockchain: the Ethereum blockchain. *Id.* ¶¶ 16, 19-20. The Ethereum blockchain is a decentralized, publicly accessible platform on which users can “define” new digital tokens. See Decl. of Kendra Kinnaird, Ex. 10, Aug. 12, 2021 Expert Report of Patrick Doody (“Doody Expert Rpt.”) ¶¶ 11-12, ECF No. 54-10.

Oppority posted a “White Paper” on its website in September 2017 describing its business model, “platform development team,” and initial plans for the ICO. *Id.* ¶¶ 23-25. As described, the ICO would be held in two phases: in the first phase, scheduled to begin the following month, Oppority envisioned selling a maximum of 400 million OPP Tokens. *Id.* ¶¶ 26-27. All unsold OPP Tokens would be offered in a second phase held in or before October 2018, with a “hard cap” of one billion total tokens available. *Id.* ¶ 28. Oppority also planned to issue up to 50 million OPP Tokens through a “bounty program” running through the end of the second phase, which would

compensate third parties for promoting the ICO, including by posting positive articles on social media. *Id.* ¶¶ 29-30.

Finally, the White Paper explained that OPP Token value would be “supported by the growth of the Oppority community,” and “tied to the overall value of Oppority[’s] services and to services provided at Oppority by third-party vendors and contractors.”

Id. ¶ 70.

C. Oppority’s Promotion of the OPP Tokens and ICO

1. The “Whitelist”

Between October 2017 and January 2018, Oppority maintained a “whitelist” on its website through which investors could register and pre-commit to purchase OPP Tokens through the ICO. *Id.* ¶ 40. In exchange for this commitment, those investors would receive a “whitelist bonus” – up to an additional 35% in OPP Tokens. *Id.*; *see also id.* ¶ 47.

2. Promotional Comments in Advance of the Pre-Sale

During the period leading up to the Pre-Sale, Defendants promoted the ICO and solicited investors through Oppority’s website, their social media platforms, and other online forums. *See id.* ¶¶ 31-37. These media were accessible in the United States – despite the fact that Oppority would later seek to rely on the Regulation S exemption, which provides that SEC registration is not required for offerings conducted “offshore” (meaning, among other things, that the issuer

conducts no “directed selling efforts” in the U.S.). See 17 C.F.R. § 230.903(a)(2).

The White Paper, for example, was posted on Opperty’s U.S. website. *Id.* ¶ 32. Defendants also promoted the ICO on their social media pages, which were accessible in the United States and globally. *Id.* ¶ 34. They paid third parties to publish press releases and articles about the ICO on U.S. websites, including a September 25, 2017 article published on themerkle.com describing the structure of the ICO and the intended use of funds (namely, to develop the platform). *Id.* ¶¶ 35–37. Defendants also paid purported influencers and “experts” on blockchain and digital assets and touted the relationship with these “advisors” in public statements. *Id.* ¶¶ 41–43.⁶

Grybniak personally promoted the ICO at U.S. digital asset conferences in January 2018, including in Miami and San Francisco. SEC 56.1 ¶ 38. According to Opperty, “[d]uring the events, many participants and attendees joined [Opperty’s] whitelist”: Opperty reported on its website that it obtained “pre-commitments” for its ICO “in the amount of 8 million US Dollars.” *Id.* ¶ 39.

⁶ The SEC does allow that Opperty did not engage in email solicitation in connection with the ICO. Defs. 56.1 ¶ 15.

The SEC contends that Defendants promoted and marketed Opporerty's ICO of the OPP Tokens by making material misrepresentations and engaging in other deceptive conduct during the offering. ECF No. 1 ("Complaint") ¶ 6. These alleged misstatements and deceptive acts are discussed in detail below, in connection with Defendants' motion for summary judgment.

D. Pre-Sale Postponement

Notwithstanding the announced launch date in October 2017, Opporerty postponed the "Pre-Sale" phase of the ICO multiple times. SEC 56.1 ¶¶ 44-47; see Doody Expert Rpt. ¶ 21. According to Grybniak, around the time of the ICO announcement, he read about the SEC's administrative proceeding against Munchee, Inc. Grybniak Decl. ¶ 7. In that proceeding, the SEC determined that an ICO run by Munchee – which had created an iPhone application that allowed users to post reviews of restaurant meals – was a securities offering. *In the Matter of Munchee Inc.* ("Munchee"), Securities Act Release No. 10445, 2017 WL 10605969 (Dec. 11, 2017).

Grybniak halted the Opporerty ICO and retained a New York-based law firm as securities counsel. Grybniak Decl. ¶¶ 7-8. Opporerty also voluntarily refunded any Ether tokens received in a 2017 presale (218 Ether, or about \$65,000 at then-prevailing values, from approximately sixty investors) to

purchasers who did not want to participate in the company's subsequent private placement offering. *Id.* ¶ 7. Opperty then proceeded to a "restructured ICO pre-sale." *Id.* ¶ 8.

B. Opperty's Pre-Sale

The Pre-Sale ultimately began on February 5, 2018 and ran until March 10, 2018. SEC 56.1 ¶¶ 52, 130. In this Pre-Sale, Opperty sold investors the right to receive OPP Tokens in the future through agreements called Simple Agreements for Future Tokens ("SAFTs"). *Id.* ¶ 53. Pursuant to Opperty's SAFT, investors were to receive those tokens automatically when Defendants publicly released what was called a "minimum viable product" – that is, when Opperty's platform met certain functionality requirements, including that users would be able to use the platform to receive, use, and purchase OPP Tokens, and to enter into smart contracts. *Id.* ¶ 54.

1. Pre-Sale Procedures

To participate in the Pre-Sale, investors were required to visit Opperty's website, where its offering materials – a private placement memorandum ("PPM") and the SAFT – were publicly available. *Id.* ¶¶ 32, 61. The PPM included a variety of disclaimers about the OPP tokens, including the fact that no market yet existed for the tokens, and that the SEC may deem the tokens to be securities. Defs. 56.1 ¶ 17; PPM at 1-4, 24-26, 28-29, Defs. Ex. 1. Investors had to acknowledge receipt

of the PPM, undergo certain verification procedures, and execute a SAFT. SEC 56.1 ¶¶ 61, 63.

Between February 5, 2018 and March 10, 2018, Oppority “pre”-sold over 9.6 million OPP Tokens to 194 purchasers in the U.S. and abroad, raising approximately \$600,000. *Id.* ¶¶ 52, 130. Only six out of these 194 purchasers were U.S.-based. Defs. 56.1 ¶ 16. Investors funded their purchases by sending Ether tokens to Oppority’s digital-wallet accounts on the Ethereum blockchain. See SEC 56.1 ¶ 131 (detailing blockchain analysis of publicly available information about digital asset transfers).

2. SAFT Terms

Each of these 194 purchasers executed a SAFT, and Grybniak countersigned each SAFT on Oppority’s behalf. *Id.* ¶ 56. The SAFTs were identical for all U.S. and foreign investors. *Id.* ¶ 57. After executing the SAFT, investors had no further investment decision to make to receive OPP Tokens. *Id.* ¶ 55. Pursuant to the SAFT’s terms, each investor purchased OPP Tokens at a price of 0.0002 ETH per OPP token. *Id.* ¶ 58. In addition to the 35% “whitelist” bonus, investors could receive additional bonus OPP Tokens of up to 90% of their purchase amounts, depending on the timing, amount of the investment, and the length of time the investor agreed to hold the original tokens. *Id.* ¶¶ 59-60.

3. Pre-Sale Reporting

Defendants never filed a registration statement for Oppority's ICO of the SAFT or OPP Tokens. *Id.* ¶ 68. Instead, on February 20, 2018, Oppority filed a "Form D" with the SEC, which stated that the "offering was made under a claim of federal exemption under Rule 506(c) [of Regulation D] and / or Regulation S under the Securities Act of 1933." *Id.* ¶¶ 126, 129. Thus, the defendants invoked two exemptions – Reg. D, which applies (generally speaking) to private placements: offerings to "accredited investors" and certain others, and Reg. S, which applies to offerings made and sold offshore. In the "Offering and Sales Amounts" section of that form, Oppority and Grybniak stated that the total offering amount was \$50 million, and the total amount sold thus far was \$550,000. *Id.* ¶ 129.

B. Statements Made Post-Launch

Once the ICO launched, Defendants explained – publicly – how and why the value of OPP Tokens might increase as the Oppority platform developed. *See id.* ¶¶ 69–78. For example, on September 25, 2017, an Oppority sponsored press release stated that the OPP Token's "initial value . . . will increase as the platform develops." *Id.* ¶ 72. On October 5, 2017, a member of the Oppority team who purported to be Grybniak⁷ stated, in a

⁷ The article is titled "ICO Focus: Interview with Sergey Grybniak," and all answers are represented to be Grybniak's, though Grybniak has testified

written interview published in an article the following day, that “[t]he value of OPP tokens is supported by the value Oppority brings to its customers” and “Oppority’s platform strives to expand its functionality, increasing the value of OPP tokens by introducing new features,” while the “[v]alue of [OPP] tokens is not only stable but will rise with each step of Oppority’s development.” *Id.* ¶¶ 73-75. On at least one occasion, however, on January 22, 2018, Oppority told a potential investor, “We don’t prediction [sic] Oppority token value [growing] in [the] future nor [are] giving promises [about] increasing price.” Grybniak Decl. ¶ 20, ECF 58.

Defendants told potential investors that OPP Tokens would trade on online platforms after they issued, SEC 56.1 ¶¶ 80-82, and they pursued relationships with several such platforms. *Id.* ¶¶ 80, 85-86. In a February 7, 2018 post on “bitcointalk.org,” Oppority stated that its token had already been “accepted” by the trading platform Liqui, and that Oppority was “talking to” at least two other trading platforms. *Id.* ¶ 85.

Finally, Defendants emphasized the actions they took and would take to make Oppority’s platform successful. *See id.* ¶¶ 90-98. The PPM claimed that ICO proceeds would “be used by

that another member of his team may in fact have drafted them. *Id.* ¶¶ 73-75 (citing SEC2, SEC5).

[Opportunity] to develop the technology supporting” its platform and “to build-out the decentralized network powered by blockchain and OPP token.” *Id.* ¶¶ 92, 95. At the same time, Opportunity told investors they would have no role in platform development and “no voting, management or control rights or other management or control rights in Opportunity.” *Id.* ¶¶ 102-03.

C. Opportunity’s Cancellation of the ICO’s Main Sale and Distribution of OPP Tokens

After the Pre-Sale, Defendants continued soliciting investors for a second phase – the “main sale” of Opportunity’s ICO. *Id.* ¶¶ 104-05. After multiple postponements, however, Opportunity announced in late October 2018 that there would be no main sale. *Id.* ¶¶ 106-07. Instead, Defendants listed OPP Tokens on the BTCEXA, a digital-asset trading platform based in Australia. *Id.* ¶¶ 87, 107. Around the same time, Defendants announced Opportunity’s platform had achieved “minimum viable product” status, and they would begin distributing OPP Tokens to SAFT participants whose vesting periods had ended. *Id.* ¶¶ 108-09. On October 31, 2018, Opportunity began distributing OPP Tokens, and ultimately distributed over 9.6 million tokens, to Pre-Sale participants. *Id.* ¶¶ 109-11. Opportunity distributed another 1.7 million tokens to bounty program participants roughly a year later, in October 2019. *Id.* ¶¶ 114-15.

Ultimately, Oppority raised roughly \$600,000 through its Pre-Sale but never registered the sale with the SEC. *Id.* ¶¶ 52, 68, 130.

II. Procedural Background

The SEC commenced this action on January 21, 2020, bringing six claims. The first three allege that both defendants violated Section 10(b) of the Exchange Act and Rule 10b-5, as well as Sections 5(a) and 5(c) and Section 17(a) of the Securities Act. Compl. ¶¶ 161-71. The Commission also included three additional counts against Grybniak for aiding and abetting Oppority's violations of the above statutes. *Id.* ¶¶ 172-80.

Following discovery, the two sides cross-moved for summary judgment. The SEC moves for partial summary judgment — on its Section 5 claims. See SEC Mem. Supp. Mot. Partial Summary J. ("SEC Mem."), ECF No. 52. Defendants likewise move as to the Section 5 claims, and also seek summary judgment on the SEC's fraud claims — the alleged violations of Section 10(b) and Rule 10b-5. See Defs. Mem. Supp. Mot. Partial Summary J. & Opp'n to SEC Mot. Partial Summary J. ("Defs. Mem."), ECF No. 56.

III. Legal Standard

Summary judgment is appropriate when the record demonstrates that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter

of law.” Fed R. Civ. P. 56(a). “A fact is material for these purposes if it might affect the outcome of the suit under the governing law. An issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 212 (2d Cir. 2001).

The moving party has the burden of demonstrating the absence of a question of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). If the movant carries its burden, “the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment.” *Jaramillo v. Weyerhaeuser Co.*, 536 F.3d 140, 145 (2d Cir. 2008). In doing so, the non-moving party “may not rely on conclusory allegations or unsubstantiated speculation,” *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998), as “unsupported allegations do not create a material issue of fact,” *Weinstock v. Columbia Univ.*, 224 F.3d 33, 41 (2d Cir. 2000). The entry of summary judgment is appropriate “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Where there are cross-motions for summary judgment, the court considers each motion independently and views the facts in the light most favorable to the non-moving party for each. *Morales v. Quintel Ent., Inc.*, 249 F.3d 115, 121 (2d Cir. 2001).

IV. Cross-Motions on the Section 5 Violation

Both sides move for summary judgment on the issue of Oppority and Grybniak's liability under Section 5. They dispute, first and foremost, whether the OPP Tokens are, in fact, securities under the Securities Act. Assuming they are, the parties dispute whether any exemption to Section 5's registration requirement applies. Defendants also assert that the Securities Act's definition of "security," as applied to Oppority's ICO, is unconstitutionally vague, and that their reliance on counsel precludes strict liability under Section 5.

A. Legal Standards for Section 5 of the Securities Act

Sections 5(a) and (c) of the Securities Act make it "unlawful for any person, directly or indirectly" to "sell," "offer to sell," or "offer to buy," a "security" unless a registration statement is in effect or has been filed as to such security. 15 U.S.C. §§ 77e(a), (c). To state a Section 5 claim, the SEC must show: (1) the lack of a registration statement as to the subject securities; (2) the offer or sale of the securities; and (3) the use of interstate commerce in

connection with the offer or sale. *SEC v. Cavanagh*, 445 F.3d 105, 111 n.13 (2d Cir. 2006). Once the SEC has established a prima facie case of a Section 5 violation, the burden shifts to the defendants to establish that a valid exemption applies. *Id.* Defendants here assert that such an exception does apply (in their Fifteenth Affirmative Defense). Am. Answer at 17.

As to the prima facie case, the parties agree that Oppority offered the OPP Tokens (via the SAFTs) in interstate commerce without filing a registration statement. It is also undisputed that Grybniak is and was, at all relevant times, Oppority's founder, sole owner, and sole officer. SEC 56.1 ¶ 1. As laid out in greater detail below, the vast majority of actions taken by Oppority were taken by Grybniak himself. The only disputed element, then, is whether the OPP Tokens constitute "securities" – and specifically, "investment contracts" as defined by the Securities Act, 15 U.S.C. § 77b(a)(1).

B. The *Howey* Test

To identify an investment contract, courts rely on the familiar test originally set forth in *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946). Under *Howey*, an investment contract refers to a "contract, transaction or scheme" in which a person makes: (1) an investment of money, (2) in a common enterprise, (3) with a reasonable expectation of profits to be derived from the

entrepreneurial or managerial efforts of others. 328 U.S. at 298-99; see also *SEC v. Edwards*, 540 U.S. 389, 393 (2004). In analyzing whether a contract, transaction, or scheme is an investment contract, "form should be disregarded for substance and the emphasis should be on economic reality." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

Prior to the proliferation of cryptocurrencies, most cases applying the *Howey* test often involved instruments that granted the purchaser some legal claim to the assets or profits of the promoter's business. Digital assets sold in initial coin offerings often lack these features. Nevertheless, the overwhelming majority of courts assessing digital tokens sold in ICOs have concluded that they are investment contracts within the meaning of the Securities Act. See, e.g., *Friel v. Dapper Labs, Inc.*, 657 F.Supp.3d 422, 433 (S.D.N.Y. 2023) (compiling ICO cases). I reach the same conclusion here as to the OPP tokens.

In reaching this conclusion, I am guided by the principles first articulated in *Howey* and reiterated by courts in the seventy-five years since. The *Howey* Court explained that its formulation of an investment contract "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of

profits.” 328 U.S. at 299. In regulating the securities market, Congress recognized the “virtually limitless scope of human ingenuity” and “painted with a broad brush” as the “best way to achieve its goal of protecting investors.” *Reves v. Ernst & Young*, 494 U.S. 56, 60-61 (1990). Accordingly, courts have considered a variety of unconventional schemes and contracts involving a wide range of assets to be investment contracts “in light of the economic reality and the totality of circumstances surrounding the sales.” See, e.g., *Glen-Arden Commodities, Inc. v. Costantino*, 493 F.2d 1027, 1034-35 (2d Cir. 1974) (whiskey warehouse receipts); *Cont’l Mktg. Corp. v. SEC*, 387 F.2d 466, 470-71 (10th Cir. 1967) (investment contracts for sale and management of live beavers); *Miller v. Cent. Chinchilla Grp., Inc.*, 494 F.2d 414, 417 (8th Cir. 1974) (contracts for sale of chinchillas); *Howey*, 328 U.S. at 293 (land sales and service contracts for orange groves).

With this framework in mind, we turn to the *Howey* factors.

1. Investment of Money

Defendants do not dispute that the first prong of the *Howey* test is satisfied. Investors made an “investment of money” by paying Ether, a virtual currency, in exchange for the future delivery of OPP Tokens. SEC 56.1 ¶¶ 58, 131.

2. Common Enterprise

The second prong of *Howey*, the existence of a “common enterprise,” can be established through a showing of “horizontal commonality.” *Revak v. SEC Realty Corp.*, 18 F.3d 81, 87 (2d Cir. 1994). Horizontal commonality is marked, generally speaking, by “the tying of each individual investor’s fortunes to the fortunes of the other investors.” *Id.* This may be evidenced by the pooling of the investors’ assets to further “the profitability of the enterprise as a whole.” *Id.*; see also *SEC v. SG Ltd.*, 265 F.3d 42, 49 (1st Cir. 2001) (“[H]orizontal commonality [is] a type of commonality that involves the pooling of assets from multiple investors so that all share in the profits and risks of the enterprise.”). While this pooling is “usually combined with the pro-rata distribution of profits,” *Revak*, 18 F.3d at 87, a “formalized profit-sharing mechanism is not required for a finding of horizontal commonality.” *Balestra v. ATBCOIN LLC*, 380 F. Supp. 3d 340, 353 (S.D.N.Y. 2019); *SEC v. Kik Interactive Inc.*, 492 F. Supp. 3d 169, 178 (S.D.N.Y. 2020) (“[R]eceiving a pro-rata distribution of profits . . . is not required for a finding of horizontal commonality”).

Indeed, another district court recently rejected the argument that horizontal commonality (or an investment contract more generally) requires “the formal imposition of post-sale obligations on the promoter or the grant to an investor of a right to share in profits.” *SEC v. Ripple Labs, Inc.*, 682 F.

Supp. 3d 308, 322 (S.D.N.Y. 2023), *motion to certify appeal denied*, 697 F. Supp. 3d 126 (S.D.N.Y. 2023). Instead, that court reasoned, the “Supreme Court’s use of the word ‘profits’ in *Howey* was intended to refer to ‘income or return,’ and financial returns on investments are not equivalent to post-sale obligations or profit sharing.” *Id.* (quoting *Edwards*, 540 U.S. at 394).⁸

The record in this case establishes horizontal commonality. The material facts are not disputed: Opperty raised approximately \$600,000 from its sales of the OPP Tokens and pooled the sales proceeds in five of its Ethereum wallets. SEC 56.1 ¶¶ 130, 131, 134 & n.12 (citing the Amended Answer, Doody Expert Rpt., and the Defendants’ “Crypto wallet.xlsx,” SEC48). Opperty then used these funds to develop the Opperty Ecosystem and otherwise fund its business. *Id.* ¶¶ 88–89, 96; Grybniak Decl. ¶ 14 (“All of the proceeds of the ICO were spent on platform development as described and disclosed in the PPM.”).

Several courts have found this prong satisfied based on just this type of pooling. In *Kik Interactive*, the token

⁸ See also *Edwards*, 540 U.S. at 390 (“The profits this Court was speaking of in *Howey* are profits – in the sense of the income or return – that investors seek on their investment, not the profits of the scheme in which they invest, and may include, for example, dividends, other periodic payments, or *the increased value of the investment.*”); *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 852 (1975) (“By profits, the Court has meant either capital appreciation resulting from the development of the initial investment . . . or a participation in earnings resulting from the use of investors’ funds.”).

could be used in a "digital ecosystem" to buy and sell "digital products and services," much like the instant case. 492 F. Supp. 3d 169, 178 (S.D.N.Y. 2020). The court found a common enterprise because the defendants sold their token, deposited the proceeds into a single bank account, and used those funds to further their operations, "including the construction of the digital ecosystem it promoted." *Id.* at 178.

Similarly, another court recently found a common enterprise where the defendant "pooled the proceeds of its Institutional Sales into a network of bank accounts under the names of its various subsidiaries," and then used those funds "to promote and increase the value of XRP by developing uses for XRP and protecting the XRP trading market." *Ripple Labs, Inc.*, 682 F. Supp. 3d at 316. In yet another example, the SEC established horizontal commonality by showing that a defendant had "pooled the money received from the Initial Purchasers [of its new cryptocurrency, Grams] and used it to develop [its] TON Blockchain." *SEC v. Telegram Grp. Inc.*, 448 F. Supp. 3d 352, 369 (S.D.N.Y. 2020); *see also Balestra*, 380 F. Supp. 3d at 353 (finding a common enterprise because "the funds raised through the ICO were pooled together to facilitate the launch of the ATB Blockchain, the success of which, in turn, would increase the value of Plaintiff's ATB Coins").

In Oppority's operational model, the fortunes of each OPP Token purchaser were tied to Oppority's fortunes and the fortunes of other purchasers. The digital tokens would be worthless if the platform failed to achieve critical mass (or, according to the lexicon of Oppority's SAFT, if Oppority failed to develop the "Minimum Viable Product"). On the other hand, if Oppority successfully deployed the pooled proceeds of the ICO to develop its platform, the value of the OPP Token holders' investments would appreciate collectively. As Oppority itself "recognized" and "emphasized," the "success of the ecosystem [would drive] demand for [OPP Tokens] and thus dictate[] investors' profits." See *Kik*, 492 F. Supp. 3d at 178 (discussing the ways in which token investors' fortunes would rise or fall together); see also SEC 56.1 ¶¶ 72-75 (citing SEC5, December 2018 "Interview with Sergey Grybniak of Oppority" article) ("Oppority's platform strives to expand its functionality, increasing the value of OPP tokens by introducing new features.").

Like the defendants in *Kik*, Oppority "investors reaped [or expected to reap] their profits in the form of the increased value" of OPP tokens. *Id.* The value of Oppority's token would be "dictated by the success of the . . . enterprise as a whole, thereby establishing horizontal commonality." *Balestra*, 380 F. Supp. 3d at 354; see also *Telegram*, 448 F. Supp. 3d at 369 ("The

ability of each Initial Purchaser to profit was entirely dependent on the successful launch of the TON Blockchain. If the TON Blockchain's development failed prior to launch, all Initial Purchasers would be equally affected as all would lose their opportunity to profit.").

Thus, the record demonstrates the existence of a common enterprise.

3. Reasonable Expectation of Profits

The third prong of the *Howey* test asks whether the purchaser of the instrument in question reasonably expects "profits to be derived from the entrepreneurial or managerial efforts of others." *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 852 (1975). This prong contemplates two related, but ultimately conceptually distinct, showings: first, that the ICO purchasers bought the tokens with an eye towards "profiting" from that purchase, rather than a consumptive purpose; and second, that they were looking to the vision and labor of others as the fount of that profit. *Telegram*, 448 F. Supp. 3d at 371; *Balestra*, 380 F. Supp. 3d at 355.

The Second Circuit has construed this prong fairly broadly, directing courts to "consider whether, under all the circumstances, the scheme was being promoted primarily as an investment or as a means whereby participants could pool their own activities, their money and the promoter's contribution in a

meaningful way.” *United States v. Leonard*, 529 F.3d 83, 88 (2d Cir. 2008). Under *Howey*, the term “profits” refer to “income or return, to include, for example, dividends, other periodic payments, or the increased value of the investment.” *Edwards*, 540 U.S. at 390.

In this vein, courts distinguish investment intent from acquisitive purpose. A purchase contract “does not fall within the scope of the securities laws when a reasonable purchaser is motivated to purchase by a consumptive intent.” *Telegram*, 448 F. Supp. 3d at 371 (citing *Forman*, 421 U.S. at 852-53). This “inquiry is an objective one focusing on the promises and offers made to investors; it is not a search for the precise motivation of each individual participant.” *Id.*

Based on the totality of circumstances, a reasonable investor would have purchased the OPP Tokens with the expectation that they would derive profits from Opperty’s efforts. From Opperty’s communications, marketing campaign, and the nature of the ICO, it is clear that the company asked investors to conclude that the tokens would appreciate in value through Opperty’s development of its online platform. Three categories of evidence support this conclusion: (1) Defendants’ public statements describing how OPP Tokens’ value would increase through their efforts, including their development of the platform; (2) Defendants’ promises to list OPP Tokens on

secondary trading platforms, ensuring liquidity; and (3) the nature of ICO Pre-Sale, which incentivized early investment at a time when OPP Tokens had no consumptive utility.

a. Opporerty's Public Statements

First, Grybniak and Opporerty predicted in various media – including Opporerty's White Paper, SEC 56.1 ¶ 70; press releases, *id.* ¶¶ 71-72; and an interview, *id.* ¶¶ 75-76 – that the OPP Tokens would increase in value as the Opporerty platform developed. “Promotional materials emphasizing opportunities for potential profit can demonstrate that purchasers possessed the required expectation of profits.” *Telegram*, 448 F. Supp. 3d at 373.

Public statements and communications such as these, that promote the digital token's anticipated increase in value as the defendant company develops its network are indicative of a “reasonable expectation of profits.” *See Kik*, 492 F. Supp. 3d at 179-80; *see also United States v. Zaslavskiy*, No. 17-CR-647, 2018 WL 4346339, at *6 (E.D.N.Y. Sept. 11, 2018) (indictment satisfied *Howey*'s third prong by alleging ICO token at issue “was described to investors as ‘an attractive investment opportunity’ which ‘grows in value,’ and as having ‘some of the highest potential returns’”). The court in *Kik* had little trouble determining that the sale of Kin tokens satisfied the expectation-of-profit prong, finding that *Kik* had “extolled

“Kin’s profit-making potential” in public statements and at public promotional events, including by emphasizing “the role of supply and demand in driving the value of Kin.” *Id.*

Specifically, “Kik was offering only a limited supply of Kin, so as demand increased, the value of Kin would increase, and early purchasers would have the opportunity to earn a profit.” *Id.*

Another court examining this third prong in detail – also on cross-motions for summary judgment – concluded that a digital token at issue, which operated much like the OPP token, satisfied the expectation-of-profit requirement. *See SEC v. LBRY, Inc.*, 639 F. Supp. 3d 211, 220 (D.N.H. 2022).⁹ The court highlighted statements that encouraged potential investors to expect profits – specifically, that the token was being traded at a “healthy clip” on major cryptocurrency exchanges and “should appreciate.” *Id.* at 217; *see also id.* at 220 (noting that “LBRY’s profitability turned on its ability to grow the value of LBC by increasing usage of the LBRY Network”). Similarly, in *Balestra*, the defendants’ marketing campaign for ATB Coins – including in press releases and on their website – “highlighted the potential profits that would result simply from holding those coins” in satisfaction of this prong of the *Howey* test. 380 F. Supp. 3d at 355.

⁹ The LBRY Credits in that case could be spent on activities on LBRY’s blockchain, such as publishing content, creating and promoting channels, tipping content creators, and purchasing paywall content. *Id.*

The Oppority statements quoted above, and others, indicated that the tokens would appreciate because of Oppority's entrepreneurial and managerial efforts, not any effort on the part of OPP Token holders. SEC 56.1 ¶¶ 76-78, 90-98 (citing Grybniak's deposition testimony, a 2017 article about Oppority, and Oppority's White Paper, among other sources). Oppority's PPM told investors (and Grybniak confirmed at his deposition) that they would have no role in developing the platform. *Id.* ¶¶ 102-03. These statements are similar to those that the *Kin*, *LBRY*, and *Balestra* courts found sufficient to satisfy the third *Howey* prong. For example, in *Kin*, the court found that Kik's statements that it would "provide startup resources, technology" and would "foster an ecosystem" by "creating a series of new products, services, and systems" demonstrated that "demand for *Kin*, and thus the value of the investment . . . would rely heavily on Kik's entrepreneurial and managerial efforts." *Kin*, 492 F. Supp. 3d at 180; see also *LBRY*, 639 F.Supp 3d at 220 (LBRY signaled that "it would work diligently to develop the Network so that LBC would increase in value" for both its purchasers and LBRY); *Balestra*, 380 F. Supp. 3d at 355-56 (complaint pleaded that "the success of ATB Coins was entirely dependent on Defendants' following through on their promise to launch and improve the ATB Blockchain" and ATB Coin purchasers

“had no control over whether the new ATB Blockchain technology worked”).

Defendants, for their part, do not meaningfully contest that evidence. Instead, they note that neither the PPM nor SAFTs *promised* that the tokens would increase in value or be tradeable on a secondary market. Defs. Mem. at 8 (citing Grybniak Decl. ¶ 18). Defendants also point to a January 22, 2018 social media post in which an Opperty contractor disavowed any promise or prediction of “increasing price” for the OPP Tokens. *Id.* at 9. “Disclaimers, if contrary to the apparent economic reality of a transaction, may be considered by the [c]ourt but are not dispositive.” *Telegram*, 448 F. Supp. 3d at 365. Here, Opperty’s late-breaking “disclaimers,” “cannot undo” Opperty’s prior representations or “the objective economic realities of a transaction.” *LBRY*, 639 F.Supp.3d at 219 (granting summary judgment despite evidence that LBRY informed some potential purchasers of LBC that the company was not offering its token as an investment).

b. Plans to List on a Trading Platform

Second, Defendants told potential investors that they would generate liquidity for OPP Tokens by listing them on secondary trading platforms. SEC 56.1 ¶¶ 79-86 (citing the Opperty White Paper, Grybniak’s deposition testimony, and various social media posts). Statements such as these,

regarding the possibility of “resale in the secondary market” are “crucial to the investor” with respect to the expectation of “realizing profits from capital appreciation.” *Gary Plastic Packaging Corp. v. Merrill Lynch, Peire, Fenner & Smith, Inc.*, 756 F.2d 230, 240 (2d Cir. 1985); *see also, e.g., Kik*, 492 F. Supp. 3d at 179–80 (noting Kik’s statements that Kin would be “tradable on the secondary market through cryptocurrency exchanges”); *Balestra*, 380 F. Supp. 3d at 356 n.14 (“Purchasers’ ability to resell ATB Coins on other exchanges also supports the conclusion that the coins are securities.”).

c. Nature of the OPP Tokens

Third, the nature of the OPP Tokens and ICO indicates an investment, rather than a *purely* consumptive, purpose. As courts in this and other circuits have held, “[t]he reasonable expectation of profits from the efforts of others need not be the sole reason a purchaser buys an investment; an asset may be sold for both consumptive and speculative uses.” *Ripple Labs*, 682 F. Supp. 3d at 326. Defendants’ primary response to the SEC’s claims is that the OPP Token is a “utility token” for consumptive use – namely, to facilitate commercial transactions on the Opportunity platform – not with any intention of return on investment. *See* Defs. Mot. at 8. According to Defendants, purchasers bought this “digital utility currency” simply “to be used rather than see[] an appreciation of value.” *Id.* That

consumptive use, they argue, is consistent with the financial realities of Opperty's commercial platform, where buyers and sellers would expect to transact for goods and services at stable, non-fluctuating prices. *Id.*

At the time of ICO, however, the OPP Tokens had "no inherent value," and any value would materialize only if Opperty's digital ecosystem "turned out to be successful." See *Kik*, 492 F. Supp. 3d at 180. Opperty, moreover, used bonuses and incentives to encourage investors to purchase *and hold* their OPP Tokens. For example, under the terms of the SAFT, once the SAFT converted to OPP tokens, the tokens were subject to a mandatory one-month vesting period, during which they had no consumptive utility. Grybniak Decl., Ex. 2 at 6. Thus, no pre-sale tokens were purchased for present consumption, nor could any reasonable investor conclude that they were. Opperty provided additional OPP Tokens to purchasers who agreed to a twelve-month "vesting" period, rather than one month. See SEC 56.1 ¶¶ 40, 59-60, 116-121. Such bonuses provided Pre-Sale investors with the ability to profit more by delaying consumption. Also, according to the PPM, "investors" who invested in a SAFT during the first three days of the pre-sale qualified for bonus tokens. PPM at 21. These bonuses were fixed and preceded the accrual of any utility in the OPP tokens.

Taken together, these features of the ICO “are inconsistent with the notion that [OPP Tokens were] used as a currency or for some other consumptive use.” *Ripple Labs*, 682 F. Supp. 3d at 328. “Simply put, a rational economic actor would not agree to freeze [thousands] of dollars . . . if the purchaser’s intent was to obtain a substitute for fiat currency.” *Telegram*, 448 F. Supp. 3d at 373.

Further, the defendants’ “utility token” characterization does little to counteract the evidence that Opperty sold the OPP Tokens to raise money to build out its platform – which was not functional at the time of the ICO – based on representations that purchasers would see their tokens increase in value once the platform was up and running.

Other courts have likewise rejected arguments that a digital asset’s “consumptive use” precludes it from being an investment contract. In *Kik*, for example, the defendant company characterized Kin as a “general purpose cryptocurrency for use in everyday digital services” on its platform. 492 F. Supp. 3d at 180. As the court reasoned, however, none of the tokens’ “consumptive use” was available when they were distributed, and such use “would materialize only if the enterprise advertised by Kik turned out to be successful.” *Id.* As a result, any value that Kin would realize would depend on the efforts of Kik to develop its online platform. *See id.*; *see also Telegram*, 448 F.

Supp. 3d at 367 (rejecting argument that digital token would have “functional consumptive uses” and should be considered a commodity instead of a security); see also *LBRY*, 2022 WL 16744741, at *7 (“Nothing in the case law suggests that a token with both consumptive and speculative uses cannot be sold as an investment contract.”).

Such is the case here: OPP Tokens had no value outside of Opparty’s promised digital ecosystem, and only through Opparty’s efforts to develop an in-demand ecosystem would the OPP Tokens grow in value and generate a profit *in the future*. Indeed, Opparty’s platform was not operational until 2019, Defs. 56.1 ¶ 120, and during the pre-sale and ICO, businesses and consumers were unable to transact business in OPP Tokens or on the platform. SEC 56.1 ¶ 120.

In short, the evidence demonstrates that the Defendants’ ICO of its OPP Tokens constituted an unregistered offer and sale of investment contracts, in violation of Section 5 of the Securities Act.

4. Defendants’ Vagueness Defense

Defendants assert a due process defense to the Section 5 claim, arguing that the SEC’s guidance about crypto offerings has been so vague and arbitrary that investors have not had sufficiently definite warning about how the *Howey* test might apply. Defs. Mot. at 10-11. They further assert that the SEC

acted arbitrarily in bringing this enforcement action against them when settling or declining to challenge “scores of other digital token ICOs,” *id.* at 12. Neither argument, however, is convincing.

The Fifth Amendment’s Due Process Clause requires that “laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). A law is “impermissibly vague” and thus invalid if it: (1) “fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits,” or (2) “authorizes or even encourages arbitrary and discriminatory enforcement.” *Copeland v. Vance*, 893 F.3d 101, 114 (2d Cir. 2018); *accord Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006). This inquiry is an objective one: “Courts ask whether the law presents an ordinary person with sufficient notice of or the opportunity to understand what conduct is prohibited or proscribed, not whether a particular [party] actually received a warning that alerted him or her to the danger of being held to account for the behavior in question.” *Dickerson v. Napolitano*, 604 F.3d 732, 745-46 (2d Cir. 2010).

First, the term “investment contract” – as defined by the Securities Act, 15 U.S.C. § 77b(a)(1), and subsequent case law – provides a person of ordinary intelligence with adequate

notice to understand what assets and transactions fall within its scope. Although the application of the *Howey* test to new facts can raise interpretive questions, that is inherent in the application of existing law to any new technology. The fact that a body of law involves an “inherently individualized and fact-specific inquiry” does not render it constitutionally vague. *Clavin v. Cnty. of Orange*, 38 F. Supp. 3d 391 (S.D.N.Y. 2014), *aff'd*, 620 F. App'x 45 (2d Cir. 2015).

More importantly, the Second Circuit has foreclosed the defendants' vagueness challenge: confronted with the argument that the term “investment contract” is void for vagueness, it held (albeit in a footnote) that “position to be untenable.” *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1052 n.6 (2d Cir. 1973).¹⁰

Consistent with the *Brigadoon* footnote, one court opined more recently that “the test expounded in *Howey* has – for over 70 years – provided clear guidance to courts and litigants as to the definition of ‘investment contract’ under the securities laws.” *Zaslavskiy*, 2018 WL 4346339, at *9. Clear

¹⁰ This should be dispositive, as void-for-vagueness challenges are directed at the statute itself, and thus not assessed on an “as applied,” or case-by-case, basis. See, e.g., *Johnson v. United States*, 576 U.S. 591, 603 (2015) (“If we hold a statute to be vague, it is vague in all its applications”); *but see United States v. Rybicki*, 354 F.3d 124, 129 (2d Cir. 2003) (“Panel opinions of this Court have repeatedly held that when, as in the case before us, the interpretation of a statute does not implicate First Amendment rights, it is assessed for vagueness only “as applied,” i.e., in light of the specific facts of the case at hand and not with regard to the statute's facial validity.”)

enough, at least. This “extensive body of case law,” which provides “guidance on how to apply that test to a variety of factual scenarios,” provides constitutionally sufficient notice, including in the age of digital assets. *Kik*, 492 F. Supp. 3d at 183; see, e.g., *Zaslavskiy*, 2018 WL 4346339, at *9; *Ripple Labs*, 682 F. Supp. 3d at 331-32; *LBRY*, 639 F. Supp. 3d at 221 (rejecting fair notice argument).¹¹

Second, and for similar reasons, Section 5 “provides sufficiently clear standards to eliminate the risk of arbitrary enforcement.” *Kik*, 492 F. Supp. 3d at 183. “Howey is an objective test that provides the flexibility necessary for the assessment of a wide range of contracts, transactions, and schemes.” *Ripple Labs*, 682 F. Supp. 3d at 332. Defendants point to SEC officials’ varied – and arguably shifting – public statements on the issue, as well as the absence of enforcement actions against other digital token issuers. But in making their vagueness argument, the defendants identify no SEC guidance suggesting that the OPP Token offering *itself* was Section 5 compliant. And “the law does not require the

¹¹ The Supreme Court has indicated that the clear guidance sufficient to overcome a vagueness challenge can come from case law as well as the statute itself. See *Screws v. United States*, 325 U.S. 91, 104 (1945) (“For the specific intent required by the Act is an intent to deprive a person of a right which has been made specific *either* by the express terms of the Constitution or laws of the United States *or* by decisions interpreting them.”) (emphasis added); *United States v. Lanier*, 520 U.S. 259, 266 (1997) (“[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute *nor any prior judicial decision* has fairly disclosed to be within its scope.”); *Ortiz v. N.Y.S. Parole in Bronx, N.Y.*, 586 F.3d 149, 158 (2d Cir. 2009) (same).

Government to reach out and warn all potential violators on an individual or industry level.” *Kik*, 492 F. Supp. 3d at 183 (citing *Dickerson* and rejecting same argument). In the end, the term “investment contract” and “judicial interpretations thereof, as well as regulatory guidance, provide sufficiently clear standards to eliminate any risk of arbitrary enforcement of the securities laws.” *Zaslavskiy*, 2018 WL 4346339, at *9.¹²

The Defendants’ vagueness challenge therefore fails.

C. Applicable Exemptions from the Registration Requirement

“Once the SEC has made a prima facie case [of a Section 5 violation], the burden shifts to the defendant to show that the securities were exempt from the registration requirement.” *Cavanagh*, 155 F.3d 129, 133 (2d Cir. 1998).

“Registration exemptions are construed strictly to promote full disclosure of information for the protection of the investing public.” *Cavanagh*, 445 F.3d at 115. The defendants have not carried this burden.

¹² As noted above, the defense also challenges the SEC’s ostensibly arbitrary (or selective) enforcement action – that is, the Commission’s decision to bring this action despite settling with, or declining to pursue, other cryptocurrency issuers. Defs. Mot. at 12. But the defendants have not invoked the equal protection clause (in respect of a selective-enforcement claim) or asserted an Administrative Procedure Act challenge (in respect of alleged arbitrariness). The assertion that others have engaged in similar conduct without being subject to enforcement action is not, of course, a defense, absent some indication that the defendant is in a protected class, is being retaliated against for the exercise of a constitutional right, or the like. See, e.g., *SEC v. LBRY, Inc.*, No. 21-CV-260-PB, 2022 WL 356772 (D.N.H. Feb. 7, 2022) (rejecting selective enforcement challenge by SEC in context of ICO offering).

The defendants contend that Oppority's ICO was exempt because it satisfied two exemptions: for the onshore (i.e., U.S.-based) purchasers, the transaction satisfied Rule 506(c) of Regulation D (for offerings to accredited investors). And they contend that transactions with non-U.S. purchasers satisfied Regulation S (for offshore offers and sales). Defs. Mem. at 13-17. The SEC disputes the second of these assertions – as to Reg. S – but not the first (at least not directly).

1. Regulation D and Regulation S

Offers and sales that comport with Rule 506 of Regulation D are “transactions not involving any public offering” and are thus exempt from registration. 17 C.F.R. § 230.506(a); 15 U.S.C. § 77d(a)(2). To satisfy Rule 506(c)'s requirements, an issuer must, among other requirements, “take reasonable steps to verify” that “[a]ll purchasers” are “accredited investors” as defined in Rule 501(a). 17 C.F.R. § 230.506(c)(2). Accredited investors are presumed to be able to demand access to information otherwise required by a securities registration statement, or otherwise able to bear financial loss. See generally *SEC v. Ralston Purina Co.*, 346 U.S. 119, 125 (1953) (“An offering to those who are shown to be able to fend for themselves is a transaction ‘not involving any public offering.’”).

Regulation S, in turn, provides an exemption for “offers and sales that occur outside the United States.” 17 C.F.R. § 230.901; *SEC v. Boock*, No. 09-CV-8261, 2011 WL 3792819, at *20 (S.D.N.Y. Aug. 25, 2011). For purposes of Section 5, an offer or sale of securities occurs outside the United States if, among other conditions, (1) the offer and sale constitute an “offshore transaction” and (2) the issuer makes no “directed selling efforts” in the United States.¹³ 17 C.F.R. § 230.903(a). An “offshore transaction” occurs when: (1) the offer or sale is “not made to a person in the United States” and (2) either (a) the buyer is outside of the United States (or the offeror reasonably believes him to be so), or (b) the transaction is executed on an established foreign securities exchange or designated offshore securities market. *Id.* § 230.902(h). The phrase “directed selling efforts,” in turn, refers to “any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States” for the securities being offered in reliance on Regulation S. *Id.* § 230.902(c).

An issuer may conduct simultaneous offerings under Regulation D and Regulation S without the onshore (Reg. D) sales tainting the offshore (Reg. S) component. “Regulation S may be

¹³ This prohibition also extends to “any person acting on behalf” of the issuer. *Id.*

relied on for such offers and sales even if coincident offers and sales are made in accordance with Regulation D inside the United States.” 17 C.F.R. § 230.500; see also 17 C.F.R. § 230.152(b)(2). Put differently, “[o]ffshore transactions made in compliance with Regulation S will not be integrated with registered domestic offerings or domestic offerings that satisfy the requirements for an exemption from registration under the Securities Act, even if undertaken contemporaneously.” SEC Release No. 6863, 46 SEC Docket 52 (April 24, 1990); see SEC Release No. 33-9415 § 4, 78 Fed. Reg. 44771 (July 10, 2013) (“Concurrent offshore offerings that are conducted in compliance with Regulation S will not be integrated with domestic unregistered offerings that are conducted in compliance with Rule 506.”). All this assumes, however, that the two components will – taken separately – satisfy Reg. D and Reg. S, respectively. See *id.* (“Concurrent offshore offerings that are conducted *in compliance* with Regulation S will not be integrated with domestic unregistered offerings that are conducted *in compliance* with Rule 506. . . .”) (emphasis added).

2. Opportunity’s ICO Failed to Comply with Regulation S

The SEC’s primary response to the defendants’ exemption claims relates to the second requirement of Regulation S: in connection with the ICO Pre-Sale, the SEC contends, the defendants “undisputedly engaged in ‘directed selling efforts’

in the U.S.” SEC Mem. at 21. They are correct: the uncontroverted evidence establishes such directed selling efforts. Accordingly, the defendants cannot claim the Reg. S exemption.

The defendants *do* point to evidence of their last-ditch efforts to qualify for exemptions (generally). They claim that, as “recommended by the lawyers,” they began, in or after January 2018, to vet U.S. purchasers for accredited-investor status (Reg. D), and they “routed” “foreign investors” to a “separate section” of the Oppority website “devoted solely to non-U.S. citizens” (Reg. S). Grybniak Decl. ¶ 12; *see also* SEC 56.1 ¶ 64 (citing SEC28, screenshot of Oppority’s website); Kinnaird Decl., Ex. 1, SEC1, Grybniak Dep. Tr. 173:3-5.¹⁴

But Reg. S cannot be satisfied by an issuer who engages in directed selling efforts in the United States. And there is no genuine dispute on this point: Oppority did so. As the SEC has explained, directed selling efforts can include activities such as placing advertisements in a publication with general circulation in the United States, 17 C.F.R. § 230.902(c)(1), or conducting promotional seminars in the United States, SEC Release No. 6863, 46 SEC Docket 52 (Apr. 24, 1990).

¹⁴ Oppority also included language required by Rule 506 in the PPM and SAFTs, and filed a Form D with the SEC. Grybniak Decl. ¶ 12.

As discussed above, the defendants made Opporerty's offering materials, including the White Paper, PPM, and SAFT, publicly available on the company's website. SEC 56.1 ¶ 32. Opporerty discussed the ICO on social media platforms (including Facebook, Twitter, and YouTube) and other online forums. SEC *Id.* ¶ 31.¹⁵ Grybniak touted the ICO at digital asset conferences in the United States, including in San Francisco and Miami in January 2018. *Id.* ¶ 38. The defendants paid digital asset "advisors" located in the U.S. to promote the OPP Tokens. *Id.* ¶¶ 41-43 (these advisors were purported experts and influencers in the blockchain and digital asset space, whom Opporerty and Grybniak retained and advertised on their website as affiliates). Through the efforts of these advisors and the company itself, the Opporerty ICO was discussed in "sponsored" press releases, articles, and other content published on third-party websites. *Id.* ¶¶ 34-36 (explaining that the defendants paid these publications to post this content about them). All this online content was accessible in the United States; at no time prior to the ICO pre-sale did Opporerty attempt to differentiate between U.S. and foreign investors, or otherwise

¹⁵ See, e.g., Kinnaird Decl., Ex. 12, SEC12 Excerpts of Opporerty Facebook Posts at 5 ("Opporerty.Com Announces ICO and Token Sale Starting October 18th 2017."); *id.* at 7 ("Recently we announced our ICO project. And Today we are taking leading positions among the strongest projects in the ICOWatchlist."); Kinnaird Decl., Ex. 13, SEC13, Excerpts of Opporerty Tweets at 2 (announcing new Opporerty ICO page).

limit the reach of any offshore component of its ICO to only non-U.S. persons. At the very least, these efforts “could reasonably [have been] expected to have the effect” of “conditioning” the U.S. market for the sale of the OPP Tokens. 17 C.F.R. § 230.902(c). Given that reasonable expectation, the Regulation S exemption is unavailable. *Id.* § 230.903.

The defendants minimize these promotional efforts, calling them “isolated, limited contact within the United States” – simply “publishing a website” and “merely discussing a future securities offering in public.” Defs. Mem. at 15. But these are exactly the types of conditioning efforts that contravene Regulation S. See SEC Release No. 6863, 46 SEC Docket 52 (Apr. 14, 2011); *SEC v. Martino*, 255 F. Supp. 2d 268, 286 (S.D.N.Y. 2003) (finding that “marketing efforts such as mailings, directed communications in the United States designed to induce the purchase of securities” constituted directed selling efforts under Regulation S); *SEC v. Boock*, No. 09-CV-8261 DLC, 2011 WL 3792819, at *20 n.26 (S.D.N.Y. Aug. 25, 2011) (finding distribution of press releases in the United States to be directed selling efforts). Given that compliance failure, the sale of OPP Tokens to foreign purchasers must be integrated with the sale to U.S. purchasers, and the offering as a whole cannot satisfy any exemption. See SEC Release No. 6863, 46 SEC Docket

52 (Apr. 24, 1990); SEC Release No. 33-9415, 78 Fed. Reg. 44771 § 4 (July 24, 2013); *cf.* 17 C.F.R. § 230.500.¹⁶

The circumstances of this case, moreover, support the conclusion that Oppority marketed and conducted the ICO, as a single transaction, to both U.S. and foreign investors alike. Among other facts, Defendants told the public that Oppority was conducting one Initial Coin Offering, and offered a “[t]otal number of tokens” at a uniform price of “0.0002 ETH per Token.” SEC27, SAFT at -1319. Defendants filed a Form D notice of one offering of securities via SAFTs that raised \$550,000, from both U.S. and non-U.S. investors. SEC 56.1 ¶¶ 126-29. Oppority’s ICO Pre-Sale was marketed in the same way within the U.S. and globally. And for both U.S. and non-U.S. investors alike, the ICO occurred at the same time, *id.* ¶¶ 49, 52; used the same offering materials; and bound investors to identical SAFT terms, *id.* ¶ 57.

Thus, Defendants cannot claim a valid exemption under Regulation D or Regulation S, and their ICO pre-sale, without registration, violated Section 5.

¹⁶ And the sales to non-U.S. purchasers are not protected by Reg. D. As the SEC points out (and defendants do not dispute), Oppority made no attempt to verify whether the 188 non-U.S. OPP Token purchasers qualified as accredited investors. The separate “know your customer” process Oppority conducted for these purchasers did not include verification of “accredited investor” status. *Id.* ¶¶ 66-67 (citing SEC28 and defendants’ Amended Answer). As a result, Regulation D’s exemption cannot apply with respect to these purchasers.

3. Defendants' Reliance on Counsel Defense

A violation of Section 5 is a strict liability offense. See, e.g., *SEC v. CKB168 Holdings, Ltd.*, 210 F. Supp. 3d 421, 452 n.34 (E.D.N.Y. 2016); *SEC v. Cavanagh*, No. 98-CV-1818, 2004 WL 1594818, at *16 (S.D.N.Y. July 16, 2004) ("To prove a violation of Section 5, a plaintiff need not establish scienter."), *aff'd on other grounds*, 445 F.3d 105 (2d Cir. 2006); see also *SEC v. Schooler*, 905 F.3d 1107, 1115 (9th Cir. 2018) ("Section 5 is a strict liability statute so good faith reliance on counsel cannot preclude liability under the statute."). Defendants nevertheless argue that the Court consider, as a defense, their good-faith reliance on outside counsel in structuring the ICO. Defs. Mem. at 17-19. This argument is unavailing.

"Compliance with federal securities laws cannot be avoided by simply retaining outside counsel to prepare required documents." *SEC v. Enterprises Sols., Inc.*, 142 F. Supp. 2d 561, 576 (S.D.N.Y. 2001). Instead, the Second Circuit has recognized a limited "advice of counsel" defense in civil securities actions *outside* the Section 5 context, when (and if) a defendant can show that: (1) "he made complete disclosure to counsel," (2) "sought advice as to the legality of his conduct," (3) "received advice that his conduct was legal," and (4) "relied on that advice in good faith." *Markowski v. SEC*, 34

F.3d 99, 105 (2d Cir. 1994). Even when the defense applies, and “where these prerequisites are satisfied, such reliance is not a complete defense, but only one factor for consideration.” *Id.*

At least one district court has held that this defense “provides no protection against a violation” of Section 5, precisely because it is a strict liability statute. *Cavanagh*, 2004 WL 1594818, at *17, (“A defense of reliance on advice of counsel is available only to the extent that it might show that a defendant lacked the requisite specific intent.”); see also *SEC v. Harwyn Indus. Corp.*, 326 F. Supp. 943 (S.D.N.Y. 1971) (finding Section 5 violation despite good faith reliance on counsel); see generally *SEC v. W.J. Howey Co.*, 328 U.S. 293, 300 (1946) (“[R]espondents’ failure to abide by the statutory and administrative rules in making such offerings, even though the failure result [sic] from a bona fide mistake as to the law, cannot be sanctioned under the Act.”). This conclusion is eminently logical, and this Court adopts it.

In any event, Defendants’ assertions – that they retained sophisticated securities counsel, prepared formal offering materials, and structured concurrent web-based offerings with different intake and verification methods, see Defs. Mot. at 18 – fall well short of satisfying the *Markowski* factors, even if they could be applied to an alleged violation of Section 5. Defendants offer no evidence as to the

completeness of their disclosures to counsel. Nor, for example, do they make any showing about seeking or receiving advice on whether Opperty's ICO marketing activities *prior to counsel's retention* constituted "offshore transactions" or "direct selling efforts" such that Regulation S could not apply. *Cf. Martino*, 255 F. Supp. 2d at 285 ("[T]he advice received must be timely in that the defendant must receive it prior to the illegal conduct."). As the SEC has explained, "[o]nce directed selling efforts are begun, offers of the securities necessarily will have commenced, if not before," SEC Release No. 6863, n.48 46 SEC Docket 52 (Apr. 24, 1990), making the defendants' promotional efforts a part of the offer itself.

In fact, according to Gryniak's deposition testimony, Opperty did not retain Dilendorf Khurdayan, the law firm that advised Opperty about the ICO, until January 2018. Kinnaird Decl., Ex. 1, SEC1, Grybniak Dep. Tr. 173:3-5. This was after the decision was made in the fall of 2017 to pursue an ICO pre-sale, Grybniak Decl. ¶¶ 7-8, and after Opperty posted about the ICO on various social media accounts and communicated about the endeavor via articles and press releases, see SEC 56.1 ¶¶ 34-37. Thus, the fact that Defendants hired and used securities counsel, without more, does not preclude finding a violation of Section 5 here.

* * * * *

For the foregoing reasons, the SEC's motion for summary judgment as to the Section 5 claim is granted as to both Oppority and Grybniak, and Defendants' summary judgment motion as to the SEC's Section 5 claims is denied.

V. The SEC's Motion for the Section 15 Violation

The SEC also brings a claim against Grybniak under Securities Act Section 15(b), for aiding and abetting Oppority's violation of Section 5. That statute provides: "[A]ny person that knowingly or recklessly provides substantial assistance to another person in violation of [Section 5] shall be deemed to be in violation of [Section 5] to the same extent as the person to whom such assistance is provided." 15 U.S. C. § 77o(b). To hold a defendant liable as an aider and abettor under this section, the SEC must prove: "(1) the existence of a securities law violation by the primary (as opposed to the aiding and abetting) party; (2) 'knowledge' of this violation on the part of the aider and abettor; and (3) 'substantial assistance' by the aider and abettor in the achievement of the primary violation." *SEC v. Apuzzo*, 689 F.3d 204, 206 (2d Cir. 2012).

As explained above, Grybniak is directly liable himself for violating Section 5. Therefore, a claim against him for aiding and abetting this violation is duplicative of the Section 5 cause of action. *Cf. In re BioScrip, Inc. Sec. Litig.*, 95 F. Supp. 3d 711, 747 n.12 (S.D.N.Y. 2015) (holding

that a claim under Section 15(a) was duplicative of a claim for the underlying securities law violation). Therefore, summary judgment is not appropriate as to this claim.

VI. Defendants' Summary Judgment Motion on the Section 10b-5 Claims

Both defendants move for summary judgment on the SEC's fraud claims under Exchange Act Section 10(b) and Rule 10b-5. See Defs. Mem. at 21-24. They assert that summary judgment is appropriate on these claims because the SEC has failed to raise even a genuine question of material fact as to misrepresentation, materiality, or scienter. *Id.* For the reasons set forth below, that motion is denied in its entirety.

A. Alleged Misstatements and Deceptive Acts

The complaint alleges that Opperty made four categories of materially false or misleading statements, or deceptive acts, to potential investors. The following recitation sets forth the material facts undisputed by the parties, but is primarily drawn from the SEC's Counterstatement (for the reasons discussed above regarding the parties' 56.1 submissions).

1. Statements That Opperty's ICO Was "100% SEC Compliant" And That OPP Tokens Were "SEC Registered"

Leading up to and during its ICO, Defendants made several statements on Opperty's social media pages that the OPP Tokens had been registered with the SEC and that Opperty's ICO

was "100% SEC compliant" and "SEC regulated." See generally SEC 56.1 Opp'n ¶¶ A-J, ECF No. 63. For example, on January 18, 2018, Grybniak posted on Opperty's Telegram channel, "[f]or now we are 100% SEC compliant regulated ICO according to US laws." *Id.* ¶ B (citing SEC50 at 8). Similarly, on February 8, 2018, Opperty stated on its Telegram channel, "Don't miss the amazing opportunity to participate in Opperty's SEC regulated presale!" *Id.* ¶ C (citing SEC52 at 17). On the same day, an Opperty contractor posted on Opperty's Telegram channel, "Opperty is US company, which provide[s] SAFT-regulated presale and SEC registered tokens for everyone who have passed the KYC/AI verifications." *Id.* ¶ D (citing SEC52 at 17).

Grybniak acknowledged that investors asked about the ICO's compliance with SEC regulations and whether the ICO was approved by the SEC, and "cared about whether Opperty's ICO was compliant with the securit[ies] laws"; and Defendants "wanted to provide [] transparency" in "talking to investors" and wanted to show they were "talking to government agencies." *Id.* ¶ I (quoting SEC1, Grybniak Dep. Tr. 231:13-232:3; 235:4-12). Defendants made no attempt to remove or amend these statements until after the Pre-Sale ended on March 5, 2018, when Grybniak publicly stated that Opperty had *not* received "direct approval from [the] SEC." *Id.* ¶ J.

2. Statements About Oppority's "Verified Providers" and Business Database

Similarly, Defendants made numerous statements about the increasing number of "verified providers" – companies providing content and services, who had been "onboarded" onto Oppority's platform – as well as the number and nature of entries in its "business database." See generally *id.* ¶¶ K-V.

For example, on October 8, 2017, Grybniak told potential investors: "[w]e have already about 1,000 verified company profiles. . . . The main thing is that we know how to attract them so we need to just scale this process." *Id.* ¶ L. Likewise, on December 28, 2017, a Telegram user asked, "[d]o you think you can convince enough customers to join Oppority?" and "[h]ow do you plan to acquire customers and companies to use Oppority?", and Grybniak responded, "[w]e already have 1,000+ verified providers in the US." *Id.* ¶¶ O-P.

The Commission has adduced evidence, however, that only 155 companies had agreed (or even indicated a willingness) to be listed on, use, or contribute content on Oppority's platform when these statements were made. *Id.* ¶ W & n.6. Moreover, Oppority's "verified providers" were merely companies whose contact information Oppority had purchased, *id.* ¶ II, "manually verified," and then posted on Oppority's online platform. The vast majority of "verified providers" had no role

or involvement in being listed on Oppority's platform. *Id.* ¶¶ X-Y. Defendants did not provide any explanation or description about Oppority's verification process when making the above statements. *Id.* ¶ AA.

Oppority's "verified providers" were a subset of entities from Oppority's database of U.S. "companies." *Id.* ¶ CC. In promoting its platform and ICO, Oppority represented its U.S. business database as containing over 17 million companies and published profile pages for each. *Id.* ¶¶ DD; EE; FF. The pages indicated that Oppority users could make "Offers" and submit "Requests" to these companies, regardless of whether the individuals and commercial and non-commercial entities were able or willing to transact business on Oppority's online platform. *Id.* ¶ FF, HH.

And the SEC marshals evidence to show that Grybniak purchased a database containing the 17 million entities' information in 2015, from a company called "USBizData," which had compiled the information. *Id.* ¶ II-JJ. Defendants never told investors during the ICO that its 17-million company database consisted of contact information purchased from a third party, rather than compiled by Oppority. *Id.* ¶ KK.

3. Yelp User Ratings and Reviews

The SEC also contends, and adduces evidence to demonstrate, that Oppority was deceptive in its use of Yelp

reviews on its own website. SEC's Reply Mem. ("SEC Reply") at 34-35, ECF No. 60. Opperty's contractors, at Grybniak's direction and with his knowledge, scraped reviews and ratings of various companies posted on the Yelp website and posted them on Opperty's online platform. SEC 56.1 Opp'n CS ¶ MM. Before posting Yelp reviews and star ratings on its platform, Opperty altered the color of the Yelp-branded rating stars and omitted the Yelp logo and all other attribution, in violation of Yelp's terms and conditions. *Id.* ¶¶ QQ-SS. Defendants did not seek Yelp's permission to use its reviews or ratings until January 2019, at which point Yelp directed Opperty to take them down. *Id.* ¶¶ OO, TT-UU. The SEC asserts that this practice was misleading, as it created the false impression that Opperty had users who were submitting reviews and ratings on Opperty's online platform. SEC Reply at 34-35.

4. Opperty's "Partnerships & Participations"

In promoting Opperty's platform and soliciting ICO investors, Defendants repeatedly made representations about Opperty's "partnerships" and/or "participations" relationships with various companies, including Microsoft Corporation. See generally *id.* ¶¶ VV-LLL. For example, on October 18, 2017, Opperty tweeted a link to an article discussing Opperty's ICO and identifying Microsoft and other companies as "Partners." *Id.* ¶ WW. Defendants also identified these companies and used

their logos in the "Partnerships and Participations" section of Opporpty's ICO promotional materials. *Id.* ¶ CCC; DDD.

With the exception of Relief Defendant Clever Solution (Grybniak's company) and Microsoft, Opporpty stated in response to the SEC's interrogatories that it had "no written agreements or specific oral terms" with any of the companies with which it entered into so-called "partnerships." *Id.* ¶ EEE. Instead, their relationship was "exploratory" in nature. *Id.* ¶ FFF (quoting SEC1, Grybniak Dep. Tr. at 306:23-307:18). But Defendants did not communicate this understanding to potential investors when representing those companies as "partners." *Id.*

Even identifying Microsoft as a partner could reasonably be considered misleading, as that relationship was initially only an agreement for Opporpty to use the Microsoft Azure cloud computing system. *Id.* ¶ LLL. Once Opporpty was accepted into Microsoft's BizSpark program, the standard terms of this program explicitly did "not create an agency, partnership, or joint venture." *Id.* ¶¶ HHH; KKK.

B. Legal Standards for Section 10b-5 Liability

Section 10(b) of the Exchange Act makes it unlawful to "use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe." 15

U.S.C. § 78j(b). The SEC's implementing rule, Rule 10b-5, provides that it is unlawful to: (a) "employ any device, scheme, or artifice to defraud"; (b) "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading"; or (c) "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 17 C.F.R.

§ 240.10b-5. To establish liability under Section 10(b) and Rule 10b-5, the SEC must demonstrate that a defendant acted with scienter in making the material misrepresentation at issue (or omission, if the defendant had a duty to speak). See *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1467 (2d Cir. 1996).

Materiality. Whether a misstatement or omission is material "depends on whether there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to act." *ECA, Local 134 IBEW Joint Pension Tr. of Chi. v. JP Morgan Chase Co.*, 553 F.3d 187, 197 (2d Cir. 2009) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). To be material, "a statement must, in the view of a reasonable investor, have significantly altered the total mix of information made available." *Plumber & Steamfitters Loc. 773 Pension Fund v. Danske Bank A/S*, 11 F.4th 90, 100-01 (2d Cir. 2021). "Materiality is a mixed question of law and fact." *In*

re All. Pharm. Corp. Sec. Litig., 279 F. Supp. 2d 171, 188 (S.D.N.Y. 2003). Thus, “[o]nly when the omissions are ‘so obviously important or unimportant’ to a reasonable investor ‘that reasonable minds cannot differ on the question of materiality’ is the issue ‘appropriately resolved as a matter of law by summary judgment.’” *Id.* (quoting *TSC Indus.*, 426 U.S. at 450 (1976)).

Scienter. *Scienter* refers to “a mental state embracing intent to deceive, manipulate, or defraud.” *SEC v. Obus*, 693 F.3d 276, 286 (2d Cir. 2012). “[S]cienter may be established through a showing of reckless disregard for the truth, that is, conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care.” *SEC v. Surlis*, 851 F.3d 139, 144 (2d Cir. 2016). Proof of scienter “need not be direct, but may be a matter of inference from circumstantial evidence.” *Valicenti Advisory Servs., Inc. v. SEC*, 198 F.3d 62, 65 (2d Cir. 1999). “The Second Circuit has been lenient in allowing scienter issues to withstand summary judgment based on fairly tenuous inferences.” *Press v. Chem. Inv. Servs. Corp.*, 166 F.3d 529, 538 (2d Cir. 1999) (“Whether a given intent existed is generally a question of fact, appropriate for resolution by the trier of fact.”); see *Grandon v. Merrill Lynch & Co.*, 147 F.3d 184, 194 (2d Cir. 1998). In other words, “scienter issues are seldom appropriate

for resolution at the summary judgment stage.” *SEC v. Cole*, No. 12-CV-8167, 2015 WL 5737275, at *5 (S.D.N.Y. Sept. 19, 2015) (collecting cases).

C. Genuine Disputes of Material Facts Exist as to Each Category of Misrepresentations

The Defendants argue that summary judgment is warranted with respect to the Section 10b-5 fraud claims, as the SEC has not established (i) that the Defendants made any misrepresentations; (ii) that the statements alleged were material; (iii) or that the Defendants acted with scienter. Defs. Mem. at 21-25. As set forth below, Defendants fail to demonstrate that they are entitled to summary judgment on the SEC’s Rule 10b-5 claims with regard to any category of alleged misstatements.

1. Statements That Oppority’s ICO Was “100% SEC Compliant” And That OPP Tokens Were “SEC Regulated”

Defendants assert that Oppority’s statement that its ICO was “SEC regulated” and its similar permutations were not unlawful because the statements were true, immaterial, and made without scienter. According to Defendants, the phrase “SEC regulated” was accurate and not misleading because Oppority’s ICO was made under and complied with the SEC’s “regulations.” In any case, such a statement would not “have been remotely important to the vast bulk of ICO investors,” who were foreign citizens located outside of the United States. Defs. Mem. at

22. Grybniak also could not have had scienter in making the relevant statements because English is not his native language; he attested that he “never had any intention of defrauding any investor.” *Id.* at 23. Defendants also assert “Opportunity received advice of counsel on this matter specifically,” which is relevant to both the accuracy of the statements and Grybniak’s scienter. *Id.* at 22. On the record before the Court, however, there are genuine disputes of material fact with respect to each of these three elements.

First, a reasonable jury could comfortably find that Opportunity’s statements regarding compliance with SEC regulations were false and misleading. This is true in particular of the defendants’ multiple statements, leading up to and during the Pre-Sale, that Opportunity’s ICO was a “100% SEC compliant regulated ICO according to US laws.” See SEC 56.1 Opp’n CS ¶ B. In one post on Telegram, Opportunity’s social media manager and contractor wrote: “Opportunity is US company, which provide SAFT-regulated presale and *SEC registered* tokens.” *Id.* ¶ D (citing SEC52 at 20 (Feb. 8, 2018 Post at 3:27:50 PM) (emphasis added)). Grybniak concedes that these statements – at least when made before February 20, 2018 – were inaccurate and should not have been made (though he blames others for them, in certain cases). *Id.* ¶ F (citing Grybniak Dep. Tr. 218:7-13) (“[W]e should not have done that.”). And for good reason: it is undisputed that the

OPP tokens were not, in fact, SEC-registered.¹⁷ *Id.* ¶ E (citing Grybiak Dep. Tr. 136:20-137:4). A potential investor might also reasonably conclude that the statement that Oppority's ICO was "SEC compliant" was false. *See id.* ¶ G.

Second, there is (at least) a genuine factual dispute as to materiality. Defendants cite no evidence for their assertion that these representations were "obviously unimportant" to non-U.S. investors, who made up the vast majority of OPP Token purchasers.¹⁸ To the contrary, the record contains evidence suggesting that investors considered SEC compliance to be material, because they were asking Grybniak and Oppority about it. As Grybniak testified during his deposition, "people from the public were asking Oppority about whether the ICO was approved by the SEC," and he "knew that potential ICO investors cared about whether Oppority's ICO was compliant with the security[ies] laws." SEC 56.1 Opp'n CS ¶ I (citing Grybniak Dep. Tr. 236:23-237:12). In making these statements, Defendants "wanted to provide the transparency" in "talking to investors" and wanted to show they were "talking to government agencies." *Id.* (citing Grybniak Dep. Tr. 237:4-12).

¹⁷ Indeed, even in arguing that Oppority's statements were not misleading, the defendants' memorandum does not address the representation that the OPP tokens were "SEC registered." *See* Defs. Mem. at 21-25.

¹⁸ Separately, this argument fails to account for the undisputed facts that Defendants promoted and marketed the ICO in the United States, SEC 56.1 ¶¶ 31-43, and that six U.S.-based investors actually did participate in the ICO, *id.* ¶ 52.

Third, there is a genuine factual dispute as to Defendants' scienter. Given that Grybniak was Opperty's sole employee, the jury will have a firm basis on which to conclude that he knew about the conduct and misrepresentations at issue – not least because much of that conduct was his own. Moreover, the SEC has adduced sufficient evidence from which a reasonable jury could conclude that Grybniak knew, or was reckless in not knowing, that Opperty's ICO was not "100% compliant" with U.S. securities laws at the time the statements were made. See SEC 56.1 Opp'n CS ¶¶ F, G, I. This includes the evidence that: (i) Opperty had not registered its ICO; (ii) the SEC had not granted "direct" or any other kind of "approval" – a fact Opperty did not disclose until after the Pre-Sale, *id.* ¶¶ J-K; and (iii) Opperty did not file its Form D until February 20, 2018, well after he told investors the ICO was "100% compliant." *Id.* ¶¶ B, F.

The defendants' primary argument regarding scienter is that Grybniak is "not a native speaker" of English and relied on his attorney's use of the word "compliant" in making the relevant statements about Opperty's ICO. Defs. Mem. at 23. This factual defense, however, depends on assessments of Grybniak's veracity and credibility – determinations best left to the finder of fact. See *Stichting Ter Behartiging v.*

Schreiber, 407 F.3d 34, 55 (2d Cir. 2005) (assessments of credibility not properly resolved on summary judgment).

2. Statements About Oppority's "Verified Providers" and Business Database

As to Oppority's statements regarding its "verified providers" and business database, Defendants argue only that these representations were not false or misleading. According to Defendants, "Oppority differentiated explicitly between 'companies in the data-base' and 'verified company profiles,' explaining that these were all simply metrics to gauge Initial Stage Market Opportunity.'" Defs. Mem. at 23 (quoting Grybniak Decl. ¶ 28). These representations, Defendants argue, were "permissible, 'forward looking' statements." *Id.* at 23-24 (citing Grybniak Decl. ¶ 28).

Defendants fall well short of carrying their burden on summary judgment as to these statements. As the SEC points out, the bald assertion that Oppority differentiated between database companies and verified providers is irrelevant because the SEC alleges that Defendants made misleading statements with regard to both. See SEC Reply at 33-34 (citing SEC 56.1 CS ¶¶ L-R). More critically, Defendants altogether fail to engage with the undisputed record regarding the statements Oppority made to potential investors, and they include no case law or explanation

for their single-sentence argument that such statements were “forward-looking” so as not to be misleading.¹⁹

Indeed, based on the record before the Court, a reasonable jury could find that Opporpy’s statements regarding its verified profiles and company databases were misleading. “Some statements, although literally accurate, can become, through their context and manner of presentation, devices which mislead investors.” *McMahan & Co. v. Warehouse Ent., Inc.*, 900 F.2d 576, 579 (2d Cir. 1990).

Here, potential investors were asking Defendants specific questions about Opporpy’s platform and the size and growth of its customer and company user base, including how many companies were on the platform at the time. See SEC 56.1 CS ¶¶ L-M. In response to these questions and in other instances, Defendants indicated that Opporpy had more than a thousand “verified providers” – without also disclosing that the overwhelming majority of “verified providers” had no role or involvement whatsoever in being listed on the platform. See *id.* A reasonable jury could therefore find that Defendants’ statements, when considered in context, gave potential investors the false and misleading impression that Opporpy had

¹⁹ The Court disregards this legal conclusion as it appears, in near-verbatim form, in Defendants’ Local Rule 56.1 Statement and Grybniak’s Declaration.

successfully attracted customers and companies who planned to use its platform.

3. Use of Yelp User Ratings and Reviews

Summary judgment is likewise denied as to Defendants' use of Yelp user ratings and reviews on Oppority's platform. Defendants assert that this alleged misappropriation cannot be "false or misleading." See Defs. Mem. at 24. In doing so, however, they fail to address the SEC's allegations that these actions were not misrepresentations or omissions in violation of Rule 10b-5(b) – but rather deceptive conduct or a fraudulent device in violation of Rules 10b-5(a) and (c). And Defendants cite to no evidence for their contention that "Oppority used the permissible API 'embedding' function offered by Yelp for [the] content." Defs. Mem. at 24. Instead, this bald assertion appears in Grybniak's declaration, see Grybniak Decl. ¶ 31, which likewise cites to no underlying source or material. To the contrary, evidence in the record suggests that Defendants' use of Yelp's content on the Oppority platform, with alterations and without attribution to Yelp, were not permissible, but violated Yelp's terms and conditions. See SEC 56.1 Opp'n ¶¶ MM-UU.

More broadly, the SEC identifies ample evidence demonstrating genuine disputes of material facts as to the deceptive and fraudulent nature of Defendants' conduct and their

scienter. Defendants admit they used Yelp ratings and reviews and posted them on Oppority's website without first obtaining Yelp's permission, and that "substantially all" or "all but a few" of the company reviews posted on Oppority's website came from Yelp – and were not created or posted by actual Oppority users. SEC 56.1 Opp'n CS ¶¶ OO-PP. A reasonable jury could find that such conduct created the false and misleading impression that Oppority had actual users provide ratings and reviews of businesses on Oppority's platform – again, suggesting more broadly that its product was growing when that was not the case. Defendants' alteration of Yelp's content and failure to attribute it to Yelp – both in violation of Yelp's terms and conditions – is likewise probative of deception and scienter. See *SEC v. Kelly*, 817 F. Supp. 2d 340, 344 (S.D.N.Y. 2011) (Rule 10b-5(a) and (c) reaches "inherently deceptive" conduct). While Grybniak claims that Defendants' actions were simply "mistakes," SEC2, Grybniak Inv. Tr. at 203:11-23; SEC1, Grybniak Dep. Tr. at 285:4-15, that assessment is best left to the finder of fact.

4. Statements about Oppority's "Partnerships & Participations"

Finally, Defendants assert that Oppority's representations regarding its "partnership" and "participation" with Microsoft were "factually correct," given its participation in Microsoft's BizSpark accelerator program and later acceptance

in July 2018 into the "Microsoft Partner Network." Defs. Mem. 25. Defendants once again fail to demonstrate that they are entitled to summary judgment as to these statements.

First, Defendants misapprehend the record in asserting that Opperty only identified Microsoft as a partner after its acceptance into the Microsoft Partner Network in July 2018. To the contrary, the SEC points to an article, shared on October 18, 2017 through Opperty's Twitter page, discussing Opperty's ICO and identifying Microsoft and other companies as "Partners." SEC 56.1 Opp'n ¶ WW. Opperty also identified Microsoft and used its logos in the "Partnerships and Participations" section of its ICO promotional materials, including in its March 2018 One-Pager and on the ICO landing page. *Id.* ¶¶ U, CCC.

Second, genuine issues of material fact remain as to the misleading nature of Opperty's representations. See *McMahon*, 900 F.2d at 579 (alleged misstatements judged by "the ability of the material to accurately inform rather than mislead prospective [investors]"). As the SEC points out, Defendants concede that Opperty never entered into formalized agreements with any of the companies that it identified as "partners." SEC 56.1 Opp'n CS ¶¶ EEE, JJJ, LLL. Grybniak instead testified that what Defendants meant when they used the term "partnerships" and "participations" during the ICO was not a formal commercial relationship, but an "exploratory" relationship where Opperty

and the companies had a “mutual desire” to “explore some business opportunities.” *Id.* ¶¶ FFF. Despite the lack of formal relationships, Defendants identified those companies as “partners” and “participants” and used their logos in Opperty’s promotional and marketing materials, without first seeking or obtaining permission. *Id.* ¶¶ III. This included use of Microsoft’s logo, in direct contravention of Microsoft’s “Internet-posted terms and conditions.” *Id.* ¶ JJJ. Taken together, a reasonable jury could find that Defendants’ representations as to its “partnerships” and “participations” gave the false and misleading impression that Opperty was successfully partnering with high-profile companies, lending additional credence to Opperty’s project and ICO.

D. Defendants’ Article III Standing Defense Fails

The Defendants make the additional – and borderline frivolous – argument that the SEC lacks standing to pursue fraud claims without proof of “reliance, causation and harm to investors.” *Defs. Mot.* at 21. The defendants frame this as an Article III problem, citing *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021). *Defs. Mem.* at 20-21.

The defendants have not raised a colorable jurisdictional question, and their argument has no other merit. Standing works differently for government agencies. The Constitution charges the Executive with the responsibility to

"take Care that the Laws be faithfully executed." U.S. Const. Art. II., Section 3. The Securities Exchange Act created the SEC, prohibited the employment of manipulative or deceptive devices in connection with the purchase and sale of securities, and gave district courts jurisdiction over actions "instituted by the Commission" in response to violations.

TransUnion – which involved a class of private litigants bringing claims for damages against private defendants – altered none of this, in respect of reliance or otherwise. The Second Circuit has repeatedly held that the SEC "does not need to prove investor reliance, loss causation, or damages in an action under Section 10(b) of the Exchange Act, Rule 10b-5, or Section 17(a) of the Securities Act." *SEC v. Credit Bancorp, Ltd.*, 195 F. Supp. 2d 475, 490-91 (S.D.N.Y. 2002); *see, e.g., SEC v. North Am. Research & Dev. Corp.*, 424 F.2d 63, 84 (2d Cir. 1970) (reliance not an element of a Rule 10b-5 claim in the context of an SEC proceeding); *Berko v. SEC*, 316 F.2d 137, 143 (2d Cir. 1963) (reliance, loss causation and damages not relevant); *see also Lorenzo v. SEC*, 587 U.S. 71, 84 (2019) ("[T]he Commission, unlike private parties, need not show reliance in its enforcement actions."); *SEC v. Jarkesy*, 144 S.

Ct. 2117, 2126 (2024) (“And the SEC may levy these penalties even when no investor has actually suffered financial loss.”).

Because an SEC enforcement action “is a creature of statute, legislatively authorized under” the Exchange Act, see *SEC v. Rana Rsch., Inc.*, 8 F.3d 1358, 1363 (9th Cir. 1993) (citing *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir.1975)), the standing elements applicable to private parties are “legally irrelevant”, See *Berko*, 316 F.2d. at 143, to the Commission. “The Commission’s duty is to enforce the remedial and preventive terms of the statute in the public interest, and not merely to police those whose plain violations have already caused demonstrable loss or injury.” *Berko*, 316 F.2d at 143.

The Defendants’ motion for summary judgment on the Section 10b-5 claims is therefore denied.

VII. Conclusion

For the reasons set forth above, the SEC’s motions for summary judgment against Grybniak and Opperty are granted as to its Section 5 claim, but denied as to the Section 15(b) claim. Defendants’ motion for summary judgment is denied.

SO ORDERED.

 /s/ Eric Komitee
ERIC KOMITEE
United States District Judge

Dated: September 24, 2024
Brooklyn, New York