UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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U.S. SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

KIK INTERACTIVE INC.,

Defendant.

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OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

19 Civ. 5244 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

The U.S. Securities and Exchange Commission ("SEC" or "Plaintiff") filed this action against Kik Interactive Inc. ("Kik" or "Defendant"), alleging that Kik's unregistered offering of digital tokens violated Section 5 of the Securities Act. The parties cross-moved for summary judgment. As detailed further herein, I hold that undisputed facts show Kik offered and sold securities without a registration statement or exemption from registration, in violation of Section 5. Therefore, the SEC's motion for summary judgment is granted, and Kik's motion for summary judgment is denied.

RELEVANT FACTS

I. The Advent of Kik and Kin

A. Background

Kik was founded in 2009 and launched its messaging application, Kik Messenger, in 2010. Pl. 56.1 Resp.[1] ¶¶ 1-2. Kik Messenger allowed users to communicate in real-time through their mobile devices, much like a text message or other chat application. Def. 56.1

[1] "Pl. 56.1 Resp." refers to Plaintiff U.S. Securities and Exchange Commission's Response and Counter-Statement to Defendant Kik Interactive Inc.'s Local Civil Rule 56.1 Statement, ECF No. 75. Paragraph references incorporate both Kik's numbered statements and the SEC's responses.

Resp.[2] ¶ 7. Though Kik Messenger was popular, it was not profitable, because Kik did not sell user data to third-party advertisers. Kik Ex.[3] A, ECF No. 64-1 ¶¶ 5-8; Def. 56.1 Resp. ¶¶ 8-9. In search of a profitable business model, Kik created and sold a digital currency, which it called "Kin." Kik Ex. A, ECF No. 64-1 ¶¶ 23-27; Def. 56.1 Resp. ¶¶ 18-32; *see also* SEC Ex.[4] 30, ECF No. 60-30 (Board presentation laying out plan for Kin).

As planned by Kik, Kin was to be a cryptocurrency stored, transferred, and recorded on a digital ledger called a blockchain. Kik Ex. A, ECF No. 64-1 ¶¶ 10-11. On a blockchain, each transaction is recorded in a block, which is linked to a prior block through cryptographic code. Kik Ex. A, ECF No. 64-1 ¶ 12. This results in the chain of blocks making up the ledger, or blockchain. *Id.* Blockchains are decentralized because they rely on the combined computing power of different networks of computers to process and verify transactions. Kik Ex. A, ECF No. 64-1 ¶ 13. Users have access to their own digital wallets to store Kin, and to buy and sell Kin. Kik Ex. A, ECF No. 64-1 ¶ 15. Kik planned to issue Kin using an already existing blockchain, the Ethereum blockchain. Pl. 56.1 Resp. ¶ 68; Kik Ex. K, ECF No. 64-11, at 8. The Ethereum blockchain is an open source, decentralized platform that has been used to issue other custom digital assets. Kik Ex. A, ECF No. 64-1 ¶ 81; Kik Ex. K, ECF No. 64-11, at 8

Kik envisioned Kin as a means of buying and selling digital products and services across different applications, including applications not run by Kik. For example, in this "digital ecosystem," a user might create a song and charge other users Kin to listen to that song. Kik Ex. K, ECF No. 64-11, at 12-15 (Kik white paper listing "prospective use cases" for Kin). That user

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[2] "Def. 56.1 Resp." refers to Defendant's Response to Plaintiff U.S. Securities and Exchange Commission's Local Rule 56.1 Statement of Undisputed Material Facts in Support of Summary Judgment, ECF No. 78. Paragraph references incorporate both the SEC's numbered statements and Kik's responses.

[3] "Kik Ex." refers to an exhibit annexed to the Declaration of Michael E. Welsh in Support of Defendant's Motion for Summary Judgment, ECF No. 64.

[4] "SEC Ex." refers to an exhibit annexed to the Declaration of Laura D'Allaird in Support of Plaintiff U.S. Securities and Exchange Commission's Motion for Summary Judgment, ECF No. 60.

might then take part of the Kin she earned and spend it on premium features in a gaming application. A user would be able to earn Kin in one application and spend the Kin in another.

Internally, Kik set a goal of raising $100 million total through private and public sales of Kin. Def. 56.1 Resp. ¶ 37. Kik publicly announced its plans for Kin on May 25, 2017 through various media, including a white paper (Kik Ex. K, ECF No. 64-11), press release (Kik Ex. M, ECF No. 64-13), blog post (Kik Ex. L, ECF No. 64-12), live announcement (SEC Ex. 36-B, ECF No. 60-37), and promotional video (SEC Ex. 58-B, ECF No. 60-69).

Kik also embarked on a multi-city tour (the "Roadshow") to promote Kin and discussed Kin at other public events. Def. 56.1 Resp. ¶¶ 57-71. In addition to describing how Kin would operate, Kik's CEO explained how people could make money from early purchases of Kin. For example, at an event five days before the beginning of the public sale of Kin, he said, "if you set some aside for yourself at the beginning, you could make a lot of money." SEC Ex. 49-B, ECF No. 60-58, at 36:7-10; *see also* SEC Ex. 48-B, ECF No. 60-55, at 10:20-11:3. This was possible because Kik "guaranteed scarcity" of Kin by offering a fixed supply. SEC Ex. 48-B, ECF No. 60-55, at 10:20-11:3. It hoped that as the supply stayed fixed, demand, and thus price, would go up. *Id.*

B. The Private Sale of Kin

The launch of Kin took place in two phases: a private offering between June 2017 and September 11, 2017 (labeled by Kik as the "Pre-Sale") and a public offering beginning on September 12, 2017, the next day (labeled by Kik as the "Token Distribution Event" or "TDE"). In the Pre-Sale, Kik entered into agreements called Simple Agreements for Future Tokens ("SAFTs") with 50 sophisticated participants, verified by Kik's independent consultant to be accredited investors. Pl. 56.1 Resp. ¶¶ 21, 30-33; *see also* Kik Ex. E, ECF No. 64-5 (SAFT). The SAFTs provided that Pre-Sale participants paid U.S. dollars for the right to receive Kin at a

30% discount: 50% of their acquisition when the public offering (described in the SAFT as the "Network Launch") became effective, and 50% a year after. Pl. 56.1 Resp. ¶¶ 22-23; *see also* SAFT § 1(a). Pursuant to the SAFT, purchasers acknowledged that their right to acquire Kin was a security and unregistered with the SEC, and that the right was being acquired for investment and not for resale:

> The Purchaser has been advised that the Right created by this instrument is a security and that the offers and sales of this Right have not been registered under any country's securities laws and, therefore, cannot be resold except in compliance with the applicable country's laws. The Purchaser is purchasing this instrument for its own account for investment, not as a nominee or agent, and not with a view to, or for resale in connection with, the distribution thereof, and the Purchaser has no present intention of selling, granting any participation in, or otherwise distributing the same.

SAFT § 4(b). A Private Placement Memorandum also said, "[Y]ou must also represent in writing that you are acquiring the SAFT for your own account and not for the account of others and not with a view to resell or distribute such securities." Kik Ex. F, ECF No. 64-6 (Private Placement Memorandum), at 20.

The Private Placement Memorandum further explained to Pre-Sale participants that money they paid would be used to create a "Minimum Viable Product," advance the development of a "Kin Ecosystem," and build an application to make the Kin Ecosystem available via Kik Messenger. Private Placement Memorandum at 18. The Minimum Viable Product, discussed in more detail below, was a "wallet" within the application that allowed holders of Kin to view their balances, send and receive premium stickers, and view their Kin status (*i.e.*, one of five tiers based on number of Kin held). Private Placement Memorandum at 3.

Kik received $50 million through the Pre-Sale. Pl. 56.1 Resp. ¶ 24. On September 11, 2017, the last day of the Pre-Sale period, Kik filed a Form D with the SEC, claiming the Pre-Sale was exempt under Rule 506(c). Pl. 56.1 Resp. ¶ 37; *see also* Kik Ex. G, ECF No. 64-7 (Form D).

II. The Public Sale (The Token Distribution Event)

Kik began its public sale of Kin, or as Kik called it, the Token Distribution Event, or TDE, on September 12, 2017, the day after the private sale ended. TDE participants purchased Kin using Ether, another type of cryptocurrency. Pl. 56.1 Resp. ¶ 39. A Terms of Use Agreement, constituting the entire agreement between the purchaser and Kik, provided that "KIN TOKENS ARE PROVIDED ON AN 'AS IS' AND 'AS AVAILABLE' BASIS WITHOUT WARRANTIES OR CONDITIONS OF ANY KIND, EITHER EXPRESS OR IMPLIED." Kik Ex. H, ECF No. 64-8, at KIK000088, 096. It also explained that "Kin Tokens are intended to be used for all transactions within a Kin ecosystem comprised of digital services that participate in the right and opportunity to innovate and compete for compensation in the form of Kin Tokens." *Id.* at KIK000081.

During the TDE, approximately 10,000 purchasers bought Kin in exchange for a total of 168,732 Ether, worth approximately $49.2 million. Def. 56.1 Resp. ¶ 260. For the first 24 hours, purchasers were permitted to buy only $4,393 worth of Kin. Pl. 56.1 Resp. ¶ 58. After that, they could buy unlimited amounts. Def. 56.1 Resp. ¶ 259. In the distribution that followed, on September 26, 2017, one trillion Kin were distributed to purchasers in the private and public sales, unrestricted, with the right to make further sales in the secondary markets. Def. 56.1 Resp. ¶¶ 287-88, 291-92. Kik retained an additional three trillion Kin, or 30% of issued and outstanding tokens. Def. 56.1 Resp. ¶¶ 106, 288. Six trillion additional tokens were distributed to the Kin Foundation, a not-for-profit entity created by Kik. Def. 56.1 Resp. ¶¶ 41, 289. Thus, Kik remained in control, directly and through the Kin Foundation, of 90% percent of all issued and outstanding tokens. As of that date, September 26, 2017, no goods or services were available for sale to holders of Kin. Def. 56.1 Resp. ¶¶ 210-11. They had only Kik's "Minimum

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