**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

JOSEPH KENT,

Plaintiff,

v.

POOLTOGETHER, INC.; DHARMA LABS, INC.; OZONE NETWORKS, INC.; LEIGHTON CUSACK; KAIN WARWICK; STANISLAV KULECHOV; DRAGONFLY DIGITAL MANAGEMENT, LLC; NASCENT US, LLC; NASCENT LIMITED PARTNERSHIP; STICHTING MAVEN 11 FUNDS; GALAXY DIGITAL TRADING HK LIMITED, LP; PARAFI CAPITAL, LP; and COMPOUND LABS, INC.,

Defendants.

Case No. 21-cv-6025-FB-CLP

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT POOLTOGETHER INC.'S MOTION (1) TO COMPEL ARBITRATION, OR ALTERNATIVELY, (2) TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT, OR ALTERNATIVELY, (3) TO STRIKE PLAINTIFF'S CLASS ALLEGATIONS**

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Page(s)

**Cases**

**Statutes**



**Other Authorities**

# I. INTRODUCTION

PoolTogether Inc. operates a website that provides an interface for users to connect their cryptocurrency wallet to an autonomous, decentralized savings protocol that resides principally on the Ethereum cryptocurrency network. The idea of the savings protocol is to incentivize people to save their money – it does so by providing cryptocurrency distributions to randomly selected depositors who save their funds in the protocol. The savings protocol was designed to provide a cryptocurrency-based alternative to traditional savings methods, which generally consist of recurring interest. This savings protocol – sometimes dubbed a "no-loss lottery" due to its randomness mechanic – is not a lottery at all because fundamental elements of a lottery are absent, much in the way "non-alcoholic beer" does not contain alcohol (though it may taste like beer).

Critically, users of the savings protocol do not "pay" anything – let alone make a "purchase" – which are necessary elements to constitute a lottery and permit recovery under the statute Plaintiff invokes. Users deposit funds into the savings protocol. The funds are pooled together and sent to a separate cryptocurrency protocol where they accrue interest. Users who keep their funds in the savings protocol – the key incentive to save – are eligible to receive a periodic randomized distribution of the collectively accrued interest. Users do not pay or purchase anything during this process – let alone pay anything to or purchase anything from **Defendant**, which only maintains an interface to the savings protocol – but users also do not place their deposit at risk of loss based on chance, in contrast to fundamental characteristics of New York's lottery prohibition. While Plaintiff's theory of liability is unprecedented and fails as a matter of law, there are several threshold grounds warranting dismissal apart from the merits issues.

***First***, Plaintiff consented to the Terms of Service on Defendant's website, which requires mandatory arbitration of Plaintiff's claim. ***Second***, Plaintiff lacks Article III standing to pursue his claim because he suffered no "economic injury" by his deposit of cryptocurrency into the savings protocol. Plaintiff has admittedly attempted to manufacture standing by voluntarily inflicting alleged "injury" upon himself by depositing cryptocurrency into the savings protocol, which he does not dispute he can withdraw (preventing the alleged injury). This is precisely the type of self-inflicted injury – to the extent it can even be called an injury at all – for which courts routinely deny standing. ***Third***, Plaintiff cannot plausibly allege that the savings protocol is a "lottery" under New York law or that Defendant is a "seller" against whom relief may be sought.

***Finally***, the Court should strike Plaintiff's class allegations. Plaintiff has unresolvable conflicts of interest with the proposed class he seeks to represent, as he has accused a large swath of putative class members of engaging in criminal conduct, and his theory of liability, if successful, means that a large portion of the putative class members cannot recover. Also, Plaintiff cannot plead a nationwide class based on New York gambling laws because such laws have no extraterritorial effect on individuals who made deposits into the savings protocol in other states.

In sum, this is a case in which Plaintiff attempts to avoid an arbitration provision to which he agreed, in order to manufacture a claim based on a venerable statute that has never been applied in the manner here attempted. In the words of a former member of this Court, Plaintiff's distortion of New York's unlawful lottery law is nothing but an attempt "to harvest[] a ripe plum at relatively little cost" – an attempt that should summarily be rejected. *MLB Props., Inc. v. Price*, 105 F. Supp. 2d 46, 53 (E.D.N.Y. 2000) (Nickerson, J.) (rejecting RICO claim premised on N.Y. lottery statute).

## II. FACTUAL BACKGROUND

Plaintiff is a political activist who claims to be "gravely concerned that the cryptocurrency ecosystem . . . is accelerating climate change and allowing people to evade financial regulations and scam consumers." Second Amended Complaint ("SAC") ¶ 4. The PoolTogether savings protocol is a decentralized, autonomous savings protocol that was created and principally resides on the Ethereum network, Decl. of Leighton Cusack ("Cusack Decl.") ¶¶ 11–17, which itself is a decentralized "blockchain" computing platform for verifying and recording digital assets and transactions. *See In re Bibox Sec. Litig.,* 534 F. Supp. 3d 326, 329–30 (S.D.N.Y. 2021). Defendant is an open-source software developer and operates a website (pooltogether.com) that provides information relating to the savings protocol and an interface through which users can connect a cryptocurrency "wallet" to the protocol to make deposits into the protocol. Cusack Decl. ¶¶ 4–10.

The savings protocol is not owned or controlled by Defendant. It is governed by its original coding, most of which is immutable and a subset of which can be changed by a majority vote of POOL governance token holders. Cusack Decl. ¶¶ 11–17. Thus, the savings protocol is decentralized – it is not governed by any person or company, but rather is subject to the democratic consensus of the POOL token holders, of whom there are thousands. *Id*. All funds deposited into the savings protocol are located on the cryptocurrency network on which the protocol resides – *e.g.*, Ethereum – and such funds are not sent to or otherwise controlled by Defendant. *Id*.

Users deposit cryptocurrency into the savings protocol, SAC ¶ 29, which programmatically pools the funds together and routes them to yield protocols on the same cryptocurrency network – for example, the Aave or Compound protocols. *Id*. ¶ 31. There, the pooled deposits accrue interest at a rate set by the particular yield protocol, and at periodic intervals the savings protocol recalls and distributes either all or a portion of the accrued interest to randomly selected depositors in that pool. *Id*. ¶ 30. As Plaintiff alleges, there are several different pools offered by the savings protocol, which differ primarily in the type of cryptocurrency that can be deposited (*e.g.*, USDC, GUSD, DAI), the cryptocurrency network on which the pool resides (*e.g.*, Ethereum), and the frequency with which distributions are made. *Id*. ¶ 33; Cusack Decl. ¶¶ 8, 9.[1]

[1] Plaintiff, however, is incorrect in his assertion that the pools "are otherwise identical." SAC ¶ 33. For example, for some pools, a percentage of the interest accrued in the yield protocols is kept as a "reserve" in the savings protocol for future prizes as the POOL governance token

In order to engage in any transaction on the Ethereum network, the user has to pay a "gas fee" to the Ethereum network "miners" who process and validate the transaction for recordation on the blockchain ledger. SAC ¶¶ 38, 39. Plaintiff does not allege that gas fees are specific to the PoolTogether savings protocol (which is one of thousands of protocols on the Ethereum network to which gas fees apply), and Plaintiff does not allege that gas fees are set or collected by Defendant or the savings protocol. Plaintiff also acknowledges a user's autonomy to withdraw funds deposited into the savings protocol – a voluntary decision only the user can make – but Plaintiff complains that the user would have to pay a gas fee to Ethereum miners for the withdrawal similar to the gas fee paid to process the deposit in the first place. *Id*. ¶¶ 40, 41.

When a user connects a cryptocurrency wallet on the PoolTogether website interface, the user is presented with and consents to the Terms of Service ("Terms"), which includes an agreement to submit all disputes to arbitration. Cusack Decl. ¶¶ 22–24, Ex. A at 5, 6. Plaintiff made his first deposit of 10 Gemini Dollars (GUSD) on October 21, 2021, after he connected his wallet through the interface on Defendant's website – during which he consented to the Terms. *Id*. ¶¶ 29–42; SAC ¶¶ 91–95.[2] During the pre-motion process, Defendant informed Plaintiff that he had consented to Defendant's Terms. Dkt. No. 31; Decl. of Andy LeGolvan ("LeGolvan Decl."), Ex. 5. Plaintiff, apparently disappointed with this result, sought to "injure" himself again by making a second deposit into a different pool of the savings protocol and through another website (Dharma.io) during which he maintains he avoided agreeing to the online terms governing that website. SAC ¶ 3. His second deposit consisted of depositing two U.S. Dollar Coins (USDC)

holders may decide. Cusack Decl. ¶¶ 44, 45. For other pools, there is no such reserve; rather, the entire amount of interest accrued with the yield protocol is distributed randomly to depositors. *Id*. ¶ 46. The pool into which Plaintiff deposited, and for which he seeks to hold Defendant liable – the GUSD pool – does not have a reserve. *Id*.

[2] GUSD is a "stablecoin" – a cryptocurrency pegged to a stable asset, *e.g.*, here, the U.S. dollar.

– another dollar-pegged stablecoin, *see* n.2 – into the savings protocol. *Id.* ¶¶ 96–105.

Plaintiff asserts two counts under GOL § 5-423, which permits a person who "purchase[s]" a "ticket . . . of any lottery" to "sue for and recover double . . . which he may have paid or delivered in consideration of such purchase." Count One relates to his first deposit of 10 GUSD, and is based on the assertion that Defendant PoolTogether Inc. sells lottery tickets when users deposit funds into the savings protocol. SAC ¶¶ 176–182. Count Two relates to his second deposit of two USDC, and seeks to hold several other defendants liable on a "general partnership" theory of liability alleging they hold POOL governance tokens and therefore they allegedly operate a business for profit. *Id.* ¶¶ 183–189. Count One is asserted against Defendant; Count Two is not.

## III. <u>ARGUMENT</u>

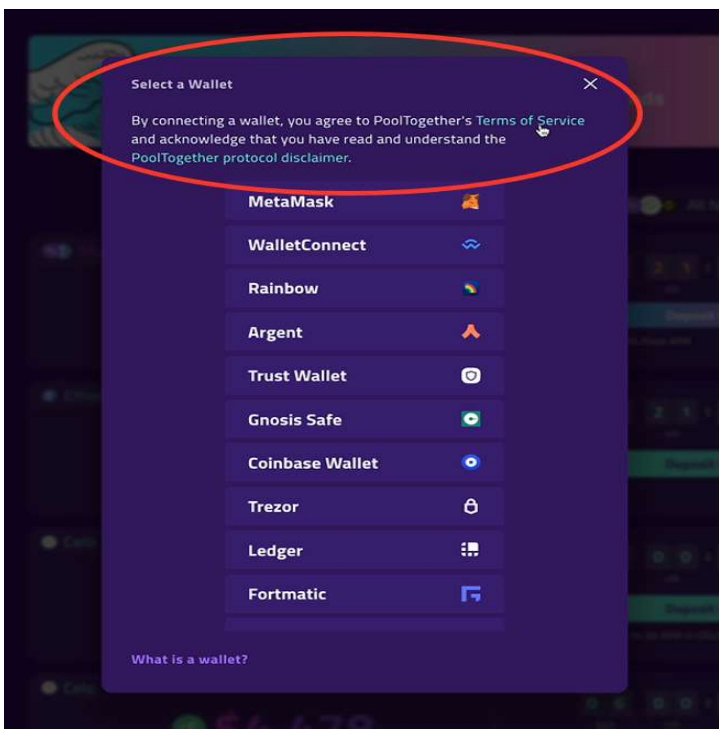
### A. Plaintiff's Claim Should Be Compelled to Arbitration

"The Federal Arbitration Act [] embodies 'a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.'" *Sultan v. Coinbase, Inc.*, 354 F. Supp. 3d 156, 159 (E.D.N.Y. 2019) (Block, J.) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The Court should compel arbitration where (1) "the parties agreed to arbitrate," and (2) "the scope of that agreement encompasses the claims at issue." *Filipkowski v. Bethpage Fed. Credit Union*, No. 20-cv-1754, 2021 U.S. Dist. LEXIS 41251, at *8–9 (E.D.N.Y. Mar. 4, 2021) (quotations omitted).

#### 1. Plaintiff and Defendant Agreed to Arbitration in the Terms of Service

"While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract." *Sultan*, 354 F. Supp. 3d at 159 (quoting *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004)). As courts have recognized in the online context, "[s]ome websites . . . prompt the user to manifest their assent to particular terms by engaging in some dual-purpose action, such as creating an account, executing a purchase order, or downloading an application." *Nicosia v. Amazon.com, Inc.*, 384 F. Supp. 3d 254, 266 (E.D.N.Y. 2019) (collecting cases; citations omitted). "Courts will give effect to [such agreements] where the button required to perform the action manifesting assent (*e.g.*, signing up for an account or executing a purchase) is located directly next to a hyperlink to the terms and a notice informing the user that, by clicking the button, the user is agreeing to those terms." *Id.* (collecting cases).

This is what occurred here. In order for a user to interact with the savings protocol through the interface on Defendant's website, the user must first connect a cryptocurrency wallet to the interface, during which the user must consent to Defendant's Terms. Cusack Decl. ¶ 22. As of 4:42 pm ET on October 20, 2021, when a user on pooltogether.com initiates the wallet connection step, the user is presented with a popup (shown below) displaying the hyperlinked Terms with this text: "**By connecting a wallet, you agree to PoolTogether's Terms of Service**." *Id.* ¶¶ 23, 29.[3]




[3] Before October 20, 2021, the above popup did not contain this language. The Terms were only accessible on a different location of the website. Cusack Decl. ¶ 29. Defendant implemented this popup language at the wallet connection step on October 20, 2021, at 4:42 pm ET. *Id.* The Terms and this language were presented when Plaintiff connected his wallet. *Id.* ¶¶ 30–32.

When presented with this popup, to proceed the user has to select the type of wallet to connect (*e.g.*, Coinbase Wallet). Cusack Decl. ¶ 23. When a user proceeds through these steps – clicking "Connect Wallet," then being presented with the language "[b]y connecting a wallet, you agree to PoolTogether's Terms of Service," and then proceeding to connect (for example) a "Coinbase Wallet" – the user has consented to the Terms of Service in precisely the type of "dual-purpose action" described in *Nicosia*, 384 F. Supp. 3d at 266, and in a manner that provides clear notice that by doing so the user is agreeing to the Terms.

Plaintiff went through these steps. He alleges that on October 21, 2021 – when the Terms were live at the wallet connection step, *see supra* n.3 – he connected his wallet to the website interface and made a deposit into the savings protocol: "On **October 21, 2021**, [Plaintiff] navigated to app.pooltogether.com and there delivered [10 GUSD]. . . . During no part of the process was [Plaintiff] asked to provide any information about himself **other than the address of the cryptocurrency wallet** from which he delivered GUSD[.]" SAC ¶¶ 91, 95 (emphasis added); *see also* Cusack Decl. ¶¶ 29–32. Thus, based on the manner in which the Terms are presented at the wallet connection step and Plaintiff's allegations confirming he connected his wallet on October 21, 2021, Plaintiff consented to the Terms as described above.

During the pre-motion conference, Plaintiff disavowed his allegation that he connected his wallet on October 21, 2021, and now asserts that he connected his wallet two days earlier on October 19, 2021 – before the Terms were live at the wallet connection step, *see supra* n.3 – and that when he returned to the website to make his deposit on October 21, 2021 (**after** the Terms were live) he claims was not required to connect his wallet again. Plaintiff's theory is fundamentally incompatible with how the website operates. Connecting a wallet once does not necessarily mean it remains connected when a user returns days later to make a deposit. Cusack

Decl. ¶¶ 24, 35. To the contrary, Plaintiff was required again to connect his wallet on October 21, 2021 – which is confirmed by documentation associated with Plaintiff's IP address. For example, Defendant has a documented error log showing that when Plaintiff returned to the website on October 21, 2021, his Coinbase Wallet failed to connect automatically. *Id.* ¶¶ 36–39, Ex. C ("failed to fetch" error log at 12:35 pm ET on Oct. 21, 2021). In order to proceed with his deposit transaction later that day (at 11:43 pm ET), he was required to connect his wallet again through the wallet connection process, during which he consented to the Terms. *Id.* ¶ 39.[4]

### 2. The Arbitration Agreement Encompasses Plaintiff's Claim

The Terms describe an overview of the savings protocol interface feature offered on the website, and provide the user with a limited license to use the website features, including the savings protocol interface, subject to the Terms. *See* Cusack Decl., Ex. A at 1. The Terms also require an informal dispute resolution process for resolving any dispute and subsequent binding arbitration before JAMS for "any claim, dispute, or controversy . . . arising out of or in connection with or relating to [the Terms]." *Id.* at 5, 6. Plaintiff's claim relating to his use of and deposit into the savings protocol is a "claim" "arising out of or in connection with or relating to" the Terms because the Terms expressly govern Plaintiff's license to "access" the "decentralized money

---

[4] Plaintiff's counsel produced many videos and screenshots Plaintiff took of himself interacting with Defendant's website. In the video taken on October 21, 2021, a 47-second video in which Plaintiff makes his 10 GUSD deposit, Plaintiff only began recording his interactions **after** his wallet was already connected. LeGolvan Decl. ¶ 4, Ex. 2. Plaintiff's counsel also sent a series of videos obtained from various websites and videos prepared by an "investigator" similarly engaging with the website, ostensibly to show that Plaintiff somehow avoided consenting to the Terms. Counsel for Defendant sent a letter to Plaintiff's counsel explaining why Plaintiff's contention is misplaced. *See id.* ¶ 8, Ex. 5. One such video from Plaintiff's "investigator" exemplifies what Plaintiff would have experienced. In that video, like Plaintiff, the investigator had previously connected his wallet **before** October 20, 2021, and returned days later to make a deposit **after** October 20, 2021; and despite the fact that he had previously connected his wallet, the investigator was required to proceed through the wallet connection step again and thus was required to consent to the Terms that went live on October 20, 2021. *See id.* ¶ 5, Ex. 3.

saving and reward tool ('Protocol')." *Id*. at 1. In his pre-motion letter response, Plaintiff raised two arguments related to the scope of arbitrability. Both arguments are misplaced.

***First***, Plaintiff argues that the Terms only bind him as to the pooltogether.com website, but not the app.pooltogether.com webpage. *See* Dkt. No. 49 at 6 ("PoolTogether purports to bind only users who access the 'Site,' which it defines as PoolTogether.com. Plaintiff did not purchase his tickets through that site. He went to app.pooltogether.com[.]"). Plaintiff is mistaken. Pooltogether.com is the "main" domain, which provides information relating to the savings protocol and also provides a link to a "subdomain" app.pooltogether.com, which is where users can access the latest version of the interface to the savings protocol. Cusack Decl. ¶ 47. The subdomain, app.pooltogether.com, is part of the **same website** as pooltogether.com, the main domain – they are not different websites as Plaintiff erroneously asserts without support.[5]

***Second***, Plaintiff argues that the Terms cannot be enforced by Defendant PoolTogether Inc. because the Terms were written as to its predecessor company, PoolTogether LLC. *See* Dkt. No. 49 at 6. PoolTogether LLC was a New York LLC that operated the website until September 26, 2019, when PoolTogether LLC merged into PoolTogether Inc. – with PoolTogether Inc. as the surviving company. Cusack Decl. ¶ 5. PoolTogether Inc. assumed all assets, liabilities, and obligations of PoolTogether LLC, and since the merger, PoolTogether Inc. has operated the website. *Id*. ¶ 6. Plaintiff attempts to avoid arbitration by leveraging the fact that Defendant inadvertently overlooked changing three letters – "LLC" to "Inc." – in one location of the Terms after the merger. *See* Dkt. No. 49 at 6. But this technical argument fails because this oversight in changing LLC to Inc. implicates an **arbitrability** issue that is for the arbitrator to decide – not

[5] This is similar to how uscourts.gov is the main domain for federal courts; nyed.uscourts.gov is the subdomain for this district; and each judge in this district also has a subdomain – for example, nyed.uscourts.gov/content/judge-frederic-block. They all are part of the same domain.

this Court. *See Contec Corp. v. Remote Sol. Co.*, 398 F.3d 205 (2d Cir. 2005) (where contract delegates arbitrability to the arbitrator by incorporating AAA rules and there is relational sufficiency between the non-signatory post-merger surviving company and the signatory predecessor, the question of non-signatory enforcement is for the arbitrator to decide).

Here, as in *Contec*, the party named in the Terms was the pre-merger predecessor company (PoolTogether LLC). *See* 398 F.3d at 208. And, as in *Contec*, the Terms designate specific arbitration rules (JAMS), Cusack Decl., Ex. A at 6, and the JAMS Rules in turn delegate to the arbitrator all "[j]urisdictional and arbitrability disputes" including "disputes over the formation, existence, validity, interpretation or scope of the agreement" and "who are proper Parties to the Arbitration." Rule 11(b) (www.jamsadr.com/rules-comprehensive-arbitration/); *see* 398 F.3d at 208. Therefore, as in *Contec*, because Plaintiff is suing Defendant as the operator of the website that was previously operated by PoolTogether LLC until its merger with Defendant, there is relational sufficiency between the parties and claims, and thus any dispute regarding non-signatory enforcement must be submitted to arbitration. 398 F.3d at 209, 211.[6]

**B. Plaintiff Lacks Article III Standing to Pursue His Claim in Federal Court**

To have Article III standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). The plaintiff "must demonstrate standing for each claim that [he] press[s] and for each form of relief that [he] seek[s]," *id*. at 2208, and therefore, while the underlying merits of the plaintiff's claim is not directly at issue in this

[6] Alternatively, the Court should reform the Terms to reflect the clear intent of the parties – *i.e.*, that Defendant is the operator of the website and the signatory to the Terms. *E.g.*, *Deutsch v. Pressler, Felt & Warshaw, LLP*, 535 F. Supp. 3d 322, 327 (S.D.N.Y. 2021).

inquiry, the plaintiff's standing "often turns on the nature and source of the claim asserted." *Baur v. Veneman*, 352 F.3d 625, 632 (2d Cir. 2003) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)).[7]

**1. Plaintiff's Deposit Was Admittedly Solely Designed to Manufacture Standing**

It is well recognized that "[a] plaintiff cannot establish Article III standing to pursue a cause of action where that plaintiff is the primary cause of [his] own alleged injury." *Union Cosmetic Castle, Inc. v. Amorepacific Cosmetics USA, Inc.*, 454 F. Supp. 2d 62, 71 (E.D.N.Y. 2006); *Taylor v. Bernanke*, No. 13-cv-1013, 2013 U.S. Dist. LEXIS 128533, at *32–33 n.5 (E.D.N.Y. Sept. 9, 2013) ("Self-inflicted injury that results from a plaintiff's personal choices rather than a defendant's conduct will not confer standing."). Simply put, a person cannot "manufacture standing" under Article III "merely by inflicting harm on [himself]." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013); *see, e.g.*, *Ctr. for Biological Diversity v. U.S. EPA*, 937 F.3d 533, 541 (5th Cir. 2019) ("successful efforts to locate aesthetically displeasing pollution cannot serve as the basis for an aesthetic injury in fact"). To hold otherwise would permit any number of "publicity seekers," "'cause' mongers," *Illinois DOT v. Hinson*, 122 F.3d 370, 373 (7th Cir. 1997), or would-be "enterprising plaintiff[s]," *Clapper*, 568 U.S. at 416, to highjack the powers of the federal judiciary to pursue claims in "the rarified atmosphere of a debating society" rather than a "context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 472 (1982).

Plaintiff admits that he made his deposit into the savings protocol for the purpose of

[7] Defendant's Article III challenge is principally a "facial" one, *Harty v. W. Point Realty, Inc.*, No. 20-cv-2672, 2022 U.S. App. LEXIS 7107, at *6–7 (2d Cir. Mar. 18, 2022), based on Plaintiff's failure to meet his pleading burden for Article III. *Spokeo*, 578 U.S. at 338 (2016) ("[A]t the pleading stage, the plaintiff must clearly . . . allege facts demonstrating each element." (internal quotations omitted)). Defendant also raises alternatively a "factual" challenge based on evidence outside of the pleadings to the extent "jurisdictional facts are placed in dispute." *Harty*, 2022 U.S. App. LEXIS 7107, at *7.

manufacturing standing, ostensibly because of his alleged environmental and political concerns about cryptocurrency. *E.g.*, Dkt. No. 49 at 7 (claiming there "is nothing unusual, let alone improper, about plaintiffs attempting to create standing"); SAC ¶ 4 (alleging "grave[] concern[s]" regarding the "cryptocurrency ecosystem"). Indeed, Plaintiff filed suit only eight days after making his first deposit into the savings protocol and video-recorded his interactions with the savings protocol for the purpose of collecting evidence for his anticipated lawsuit. *See* LeGolvan Decl. ¶¶ 4, 7, Ex. 2. And when Defendant brought the arbitration agreement to the attention of Plaintiff's counsel during the pre-motion process, Plaintiff attempted to manufacture standing **again** by making a **second deposit** through a different website presumably to avoid arbitration and keep his claim public. These self-induced efforts to create artificial standing, in the name of generic political or environmental concerns, are insufficient as a matter of law. *Ackers v. U.N.*, No. 5-cv-1200-FB, 2005 U.S. Dist. LEXIS 5940, at *3 (E.D.N.Y. Apr. 8, 2005) (Block, J.) (rejecting standing over general "concerns" regarding "the Oil for Food program" and Iraq war); *Taylor*, 2013 U.S. Dist. LEXIS 128533, at *32–41 (rejecting "activist" standing).

### 2. Plaintiff Suffered No Injury By Depositing Into the Savings Protocol, Let Alone Injury Fairly Traceable to the Challenged Conduct of Defendant

Plaintiff's claim separately fails under Article III because he did not suffer "economic injury" when he made his deposit, and any alleged "injury" derived from his voluntary decision to deposit or keep funds in the savings protocol is due to his own actions and not from any conduct of Defendant. Courts in this Circuit hold that if a person sends money to another but declines recoupment through available means, the "financial loss" is "self-inflicted" and is not "caused by or fairly traceable to the defendants' conduct." *Bandler v. Town of Woodstock*, 832 F. App'x 733, 734–35 (2d Cir. 2020) (affirming dismissal of putative class action); *Epstein v. JPMorgan Chase & Co.*, No. 13-cv-4744, 2014 U.S. Dist. LEXIS 38628, at *23 (S.D.N.Y. Mar. 21, 2014) ("The

Court cannot accept Plaintiff's contention that by neither requesting nor cashing the Refund Check, he has somehow created standing."); *cf. Rothman v. Equinox Holdings, Inc.*, No. 20-cv-9760, 2021 U.S. Dist. LEXIS 80683, at *21 (C.D. Cal. Apr. 27, 2021) (distinguishing *Bandler* where defendant misrepresented plaintiff would "automatically" get a refund which did not occur).

Plaintiff voluntarily deposited 10 GUSD into the savings protocol and alleges he can withdraw his funds while asserting he suffered – and continues to suffer – alleged economic injury. SAC ¶¶ 40, 41; Dkt. No. 49 at 2. In response, Plaintiff advances two misplaced theories arguing he somehow still "lost money" when he made his admittedly withdrawable deposit: First, he claims his voluntary deposit required him to "forfeit" interest to Defendant that otherwise would have been "due" to him; second, he paid cryptocurrency "gas fees" to third-party "miners" when he made his deposit. Both theories fail under Article III for several reasons.

**Allegedly "Forfeit[ed]" Interest.** Plaintiff argues he was required to "forgo the 'yield' – or interest – that would otherwise be due" to him on his deposit, and that Defendant "keep[s] up to 50% of the yield that would otherwise be due" to him as a "reserve." SAC ¶ 32; *see also* Dkt. No. 49 at 2, 7. This is incorrect. Plaintiff did not "forgo," "forfeit," or "lose" any interest that was "due" to him when he made his deposit because cryptocurrency does not accrue interest automatically such that Plaintiff would be "due" interest just by possessing his cryptocurrency in his wallet rather than depositing it into the savings protocol. Plaintiff laments that keeping cryptocurrency in a wallet is "the digital equivalent of keep savings under a mattress," Dkt. No. 49 at 2, but this is not due to anything Defendant or the savings protocol has done.[8]

[8] It is well-established that cryptocurrencies do not ordinarily accrue interest, and U.S. regulatory agencies have recognized that fact – a clear difference from how ordinary (fiat) currency deposits are regarded. *Compare* Treasury Department Office of Foreign Assets Control ("OFAC") FAQ 646 (when holding virtual currencies belonging to a sanctioned or "blocked" person, "U.S. persons are not obligated to hold [the cryptocurrency] in an interest-bearing account"), *with*

Of course, what Plaintiff **could have done** was not convert his $10 into 10 GUSD to deposit it into the savings protocol. Instead, he could have deposited his $10 with a financial institution that **does** pay recurring interest (*e.g.*, a bank or credit union), or he could have purchased stocks (potentially earning a gain or a yield) or any other investment for that matter. Or, as Plaintiff alleges, he could have kept his funds in GUSD and deposited the GUSD with any number of cryptocurrency custodians or protocols that **do** pay recurring interest on deposits. *See* Dkt. No. 49 at 2; SAC ¶ 14. But this does not mean he suffered a cognizable Article III economic injury when he deposited the GUSD into the savings protocol instead of choosing one of these alternatives. Indeed, every time a person uses funds for one purpose to the exclusion of others, he inherently "forgoes" the ability to do with those funds what he otherwise could have done. In this respect, Plaintiff's claimed injury based on alleged lost interest is really just a standard "loss of use" theory.

However, where loss-of-use is the claim of economic injury, such injury is only cognizable under Article III where the plaintiff alleges the funds are "wrongfully withheld" by the defendant, such that the plaintiff could plausibly claim an inability to use those funds for other activities, such as earning interest. *See, e.g.*, *Van v. LLR, Inc.*, 962 F.3d 1160, 1162–65 (9th Cir. 2020) (collecting cases for the proposition that "lost time value of money" theory is viable under Article III where the money is "wrongfully withheld," noting, "Every day that a sum of money is **wrongfully withheld**, its rightful owner loses the time value of the money." (emphasis added)); *MSPA Claims 1, LLC v. Tenet Fla., Inc.*, 918 F.3d 1312, 1318 (11th Cir. 2019) (plaintiff's "inability to have and use money to which [it] is entitled is a concrete injury" and "cannot be remedied by simply

---

OFAC FAQ 32 (with respect to fiat currency, "[o]nce it has been determined that funds need to be blocked, they must be placed into an interest-bearing account . . . ."). OFAC FAQs are available at home.treasury.gov/policy-issues/financial-sanctions/frequently-asked-questions/ofac-consolidated-frequently-asked-questions.

receiving the amount owed—it requires something more to compensate for the lost time, like interest"); *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 457 (7th Cir. 2010) (similar).

District courts in the Second Circuit follow this rationale, finding that a defendant's conduct causing a temporary, wrongful "deprivation" of money from the plaintiff constitutes Article III injury based on a loss-of-use theory. *See, e.g.*, *McRobie v. Palisades Acquistion XVI, LLC*, No. 15-cv-18, 2022 U.S. Dist. LEXIS 38778, at *39 (W.D.N.Y. Mar. 3, 2022) (defendant's unlawful execution on plaintiff's income resulting in temporary "deprivation" of money "constitutes a concrete injury"); *Porsch v. LLR, Inc.*, 380 F. Supp. 3d 418, 424 (S.D.N.Y. 2019) (same for unlawful sales tax resulting in wrongful "temporary deprivation of money"). However, Plaintiff makes no allegations of "wrongful withholding" or "deprivation." Instead, Plaintiff alleges he can withdraw his funds and do what he wishes with them. SAC ¶ 40; Dkt. No. 49 at 2.

Plaintiff also fails to allege he **would have** pursued an interest-accruing opportunity with his 10 GUSD but for his decision to deposit into the savings protocol – which, in addition to "wrongful withholding," must be alleged to assert a cognizable loss-of-use theory. *See Kawa Orthodontics, LLP v. Sec'y, U.S. Dep't of the Treasury*, 773 F.3d 243, 246 (11th Cir. 2014) ("[The] complaint does not . . . allege that [plaintiff] had specific plans to invest its money into an interest-bearing asset."); *Rosario v. Icon Burger Acquisition LLC*, No. 21-cv-4313, 2022 U.S. Dist. LEXIS 11454, *9 (E.D.N.Y. Jan. 21, 2022) (rejecting Article III standing absent "allegations that the plaintiff forewent the opportunity to invest or otherwise use the money"). Plaintiff currently has 9.30 GUSD in his wallet accruing no interest, Cusack Decl., Ex. B, suggesting he did not, in fact, forgo some interest-accruing opportunity when he deposited 10 GUSD into the savings protocol.

Plaintiff's Article III standing theory fails for another reason: None of the interest accrued on Plaintiff's 10 GUSD deposit was retained by Defendant, nor was it retained in a "reserve" by the savings protocol as Plaintiff alleges. Defendant does not receive any money, interest or yield by reason of any interactions with the savings protocol. Cusack Decl. ¶ 44. Even when a person makes a deposit using the interface on Defendant's website, the funds flow directly from the person's cryptocurrency wallet into the savings protocol. *Id*. Defendant does not take possession or custody of the funds during this process; Defendant does not have access to or control of funds in the savings protocol; and Defendant makes no revenue from the transactions or deposits. *Id*. Thus, to the extent Plaintiff's claims are based on a theory that Defendant keeps a portion of the interest accrued on his GUSD deposit as a "reserve," that is simply incorrect.

Moreover, to the extent Plaintiff's claims are based on a theory that the **savings protocol itself** retains a portion of accrued interest on Plaintiff's deposit as a "reserve," SAC ¶ 32; Dkt. No. 49 at 2, that is also incorrect. While this is true for **some** pools in the savings protocol – for those pools, a portion of interest is kept in the savings protocol as a reserve for future prize distributions – it is **not true** for the GUSD pool into which Plaintiff made a deposit. For the GUSD pool at issue, there is no reserve at all. Cusack Decl. ¶ 46. To the contrary, the full amount of the accrued interest is paid out to depositors, and no funds are kept by the savings protocol – let alone Defendant. Regardless, even if Plaintiff can establish that Defendant (or the savings protocol) benefited or gained by reason of Plaintiff's 10 GUSD deposit into the savings protocol, without a cognizable "loss" **to Plaintiff**, Article III standing is still lacking. *See Silha v. ACT, Inc.*, 807 F.3d 169, 174–75 (7th Cir. 2015) ("[A] plaintiff's claim of injury in fact cannot be based solely on a defendant's gain; it must be based on a plaintiff's loss.").

**Payment of Ethereum Gas Fees to Miners.** Plaintiff also argues that payment of a "gas fee" to third-party Ethereum miners for processing his transaction constitutes Article III injury. *See* Dkt. No. 49 at 7. The parties agree on what an Ethereum "gas fee" is: It is a fee paid in

Ethereum's native cryptocurrency – "ETH" – to Ethereum "miners" for processing and validating **any** transactions on the Ethereum network. *See* SAC ¶ 38 ("[B]ecause **every transaction** in a cryptocurrency using Ethereum [] requires significant computing power, transactors must pay something called a 'gas' fee **to compensate the network** for that power." (emphasis added)).

As Plaintiff acknowledges, this fee is not specific to the PoolTogether savings protocol, which is one of thousands of protocols on the Ethereum network. It is not a fee Defendant collects, nor is it a fee Defendant can adjust or eliminate. It is a **general fee** that fluctuates in amount based on market forces beyond the control of Defendant or the savings protocol. *See* Cusack Decl. ¶ 27. It is the same fee that **any person** pays for **any transaction** on the Ethereum network regardless of the nature of the transaction, much in the same way that people pay for gas to commute in their vehicles, which is paid regardless of the driver, the destination, or the purpose of the trip.

Because the gas fee is not a fee Defendant created or collected, payment of such a fee cannot, for purposes of Article III, be deemed an "injury . . . that the challenged conduct of the defendant caused." *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 62 (2d Cir. 2012). Courts rightly reject attempts by plaintiffs to point to ancillary fees paid in a transaction as the basis for alleged "economic injury" where the fee is not "fairly traceable" to the challenged conduct underlying the plaintiffs' claims. *See, e.g.*, *Evans v. Linden Research, Inc.*, No. 11-cv-01078, 2012 U.S. Dist. LEXIS 166006, at *27 (N.D. Cal. Nov. 20, 2012) (no standing where plaintiffs failed to establish economic harm from misrepresentation concerning virtual land, and rejecting standing based on a "transaction fee"); *Bench Billboard Co. v. City of Cincinnati*, 717 F. Supp. 2d 771, 783 (S.D. Ohio 2010), *aff'd*, 675 F.3d 974, 982–84 (6th Cir. 2012) (no standing for payment of fee).

In addition, Plaintiff had full knowledge of the gas fee required to process and validate his transaction, and he nevertheless voluntarily proceeded. SAC ¶ 92. Indeed, Plaintiff first attempted to make a 10 GUSD deposit into the savings protocol two days earlier on October 19, 2021; however, per his counsel, Plaintiff "lacked sufficient gas money" to process the transaction. *See* LeGolvan Decl. ¶ 7, Ex. 3. Plaintiff then visited his cryptocurrency exchange (Gemini) to purchase more ETH and returned to the PoolTogether website two days later to make the deposit into the savings protocol on October 21, 2021 – this time with sufficient funds to pay the $265.60 gas fee to Ethereum miners, during which he would have been warned of the relatively "high" gas fees that day. Cusack Decl. ¶ 27. Plaintiff may believe it is "very bad deal" to pay such a large gas fee to Ethereum miners to process and validate a relatively small cryptocurrency transaction, SAC ¶ 41, but it is not the province of federal courts to second-guess Plaintiff's business judgment. *Union Cosmetic Castle*, 454 F. Supp. 2d at 71 ("Article III of the federal Constitution does not grant the plaintiffs access to the federal courts in order to second-guess their poor business judgment.").

### 3. Plaintiff's Claims of Illegality Cannot Establish Article III Standing in the Absence of Economic Injury

Alleging only a violation of law without an actual concrete injury is insufficient to confer standing. *Spokeo*, 578 U.S. at 341; *TransUnion*, 141 S. Ct. at 2213. Even when Congress has created a statutory prohibition and cause of action, federal courts have a "responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III." *Id*. at 2205; *see Maddox v. Bank of N.Y Mellon Tr. Co., N.A.*, 19 F.4th 58, 64 (2d Cir. 2021) (inferring, in view of *TransUnion*, that New York cannot by statute "create legally protectible interests whose invasion gives rise to Article III standing"). Thus, Plaintiff cannot simply rely on the fact that he allegedly engaged in a transaction made illegal under New York law and pursue a statutory remedy where he has not suffered actual economic injury by reason of the allegedly illegal conduct.

Courts have applied this principle in a number of contexts. For example, in *McGee v. S-L Snacks Nat'l*, the Ninth Circuit rejected class claims alleging food products the plaintiff purchased from defendant were sold unlawfully in violation of federal law. 982 F.3d 700, 703–706 (9th Cir. 2020). Despite a state statutory cause of action permitting recovery for injuries caused by unlawful conduct, the Court found lack of Article III standing because the plaintiff failed to show that "she was denied the benefit of her bargain." *Id*. at 706. The food product was not misrepresented, the plaintiff received what she paid for, and thus the purchase price could not be "economic injury" based solely on the fact that it was "unlawful" to sell the product. *Id*. at 705–706; *see also Thorne v. Pep Boys Manny Moe & Jack Inc.*, 980 F.3d 879, 883, 886–89 (3d Cir. 2020) (no standing where plaintiff purchased tires from defendant and defendant allegedly violated federal law in the transaction, reasoning, plaintiff cannot establish economic injury by reason of the illegality as "the tires she bought . . . function[ed] as intended" despite the illegality).

Here, even if the savings protocol is a "lottery" – a charge Defendant disputes – Plaintiff cannot establish economic injury because he received exactly what he bargained for: Plaintiff sought to make a deposit of cryptocurrency into a savings protocol that provides a randomized opportunity to receive a distribution of accrued interest on deposits made in that pool, and that is exactly what he received. As in *McGee* and *Thorne*, the alleged presence of illegality and a state cause of action permitting recovery does not mean Plaintiff suffered economic injury under Article III where he does not dispute he received exactly what he bargained for. *Cf. Price*, 105 F. Supp. 2d at 52–53 (players in alleged unlawful "lottery" did not suffer "financial loss" or "injury" as they "received exactly what they bargained and paid for," "never alleged they were denied the benefit of their bargain," and the "illegality . . . of the gambling transaction [] does not change this fact").

**C. Plaintiff Fails to Allege a Plausible Claim for Relief Under GOL § 5-423**

New York law prohibits "lotteries." *See* N.Y. Penal Law § 225.00(10) (defining "lottery"). New York law also provides a statutory cause of action for a person who "purchase[s]" a "ticket . . . of any lottery," and allows the purchaser to "sue for and recover double . . . which he may have paid or delivered in consideration of such purchase." GOL § 5-423. Plaintiff attempts to squeeze the PoolTogether savings protocol – software designed to incentivize people to **save** their money – into the statutory definition of a "lottery." He then compounds this error by attempting to construe his 10 GUSD deposit as a "purchase" of a lottery ticket from Defendant – all of this under a statute that must be strictly construed. *Aiello v. Queens Cnty Jockey Club*, 144 N.Y.S.2d 322, 323 (Sup. Ct. N.Y. Cnty. 1955) (noting the statute "should be restricted to the extent and area clearly defined by law"); *People v. Mail & Express Co.*, 179 N.Y.S. 640, 645 (Ct. Spec. Sess. 1919), *aff'd,* 192 A.D. 903 (1st Dep't 1920), *aff'd,* 231 N.Y. 586 (1921) (where acts "are without the definition expressly set out in the [statutory definition of a lottery] the court in its proper province cannot put them within it"). Plaintiff cannot allege a claim for three reasons.

***First***, the definition of a lottery requires a person "to pay something of value," N.Y. Penal Law § 225.00(10), and GOL § 5-423 further requires the person to show that he "purchas[ed]" a lottery ticket to invoke the statute. GOL § 5-423; *see Grover v. Morris*, 73 N.Y. 473, 477 (1878) (statute provides "right to restitution" and "authorizes an action by the purchaser to recover double the sum paid" to the "seller"). "Valuable consideration must be parted with[.]" *People v. Shafer*, 289 N.Y.S. 649, 654, *aff'd* 273 N.Y. 475 (1936) (quoting *Mail & Express*, 179 N.Y.S. at 646).

New York courts have consistently held that where participation in a chance-based prize drawing does not require a "purchase" or payment of monetary consideration, then it is not a lottery, even if a person has to engage in some non-purchase act to be eligible.[9] The "payment"

[9] *Compare Shafer*, 289 N.Y.S. at 651 (no lottery where theatre gave out prizes pursuant to a chance-based drawing available to purchasers of theatre tickets and non-purchasers who registered and were required to be in the lobby when the drawing occurred), *Mail & Express*, 179 N.Y.S. at 645 (no lottery where newspaper distributed cash prizes requiring participants to acquire cards and view the winning numbers in the newspaper, but no purchase required), *Goodwill Advert. Co. v. State Liquor Auth.*, 244 N.Y.S.2d 322, 324 (Sup. Ct. 1962), *aff'd*, 19 A.D.2d 928 (3d Dep't 1963) (no lottery where prizes distributed for participants who obtained a

and "purchase" requirements in the statutes make sense because gambling prohibitions "were adopted with a view toward protecting the family man of meager resources from his own imprudence at the gambling tables," *Price*, 105 F. Supp. 2d at 53, not to outlaw chance-based prizes where the player does not risk losing the money he has. *See Kohn v. Koehler*, 96 N.Y. 362, 367–68 (1884) ("The evils attending a system of lotteries, and against which the laws of this State are aimed, consist in the risk which people are willing to take in hazarding their money with a chance of losing the same[.]"). Here, Plaintiff did not "pay," Penal Law § 225.00(10), or "part[] with," *Shafer*, 289 N.Y.S. at 654, his cryptocurrency – nor did he make a "purchase," GOL § 5-423 – when he deposited 10 GUSD into the savings protocol, which he alleges he can withdraw.

Plaintiff next argues he made a "purchase" effectively by paying "interest" to the protocol "to which [he] would otherwise be entitled." Dkt. No. 49 at 9–10; SAC ¶ 32. This is not a purchase because when Plaintiff made his deposit he had no interest to "pay" and had no entitlement to interest from Defendant or the savings protocol. He only had 10 GUSD with which he **could**, in theory, accrue interest based on some hypothetical transaction with a third party or protocol.

This is in stark contrast to the regulated financial institutions subject to the "savings-promotion prize giveaway" statute, N.Y. Banking Law § 9-v; Dkt. No. 49 at 10, where a customer can choose to deposit money into a traditional interest-bearing account, on the one hand, or a chance-based prize giveaway savings account, on the other hand, from the same bank. For such banks that offer both account types there is a statutory prohibition of requiring the customer to "forgo" any portion of interest that the customer would be entitled to by depositing into the traditional savings account offered by the same bank. In that situation it makes sense to prohibit

---

registration card weekly without purchase from the store), *with People ex Rel. Ellison v. Lavin*, 179 N.Y. 164, 168 (1904) (lottery found where purchase of cigar required in order to have a chance to win cash prize).

the bank from requiring the customer to "forgo" interest to ensure the product does not run afoul of lottery laws, *see* N.Y. Banking Law § 96(15)(b) ("regulations shall ensure that . . . no participant in a savings promotion **foregoes** . . . any interest" (emphasis added)), because the customer would, in fact, otherwise be entitled to the interest from the same bank by depositing into a traditional savings account. Here, however, Plaintiff makes no allegation that he has any comparable entitlement to interest from Defendant or the savings protocol, such that he can plausibly claim he has somehow "forfeited" his right to interest as part of an alleged "purchase." And, indeed, available guidance from federal regulatory agencies points to the contrary. *See* OFAC FAQs 646 and 32, note 8, *supra* (requiring blocked fiat currency to be placed in interest-bearing accounts but not requiring interest to be paid on blocked cryptocurrency).

***Second***, even if Plaintiff's deposit can be deemed a "purchase," Plaintiff's claim fails because he did not "hazard[] what he has paid upon . . . chance[]." *See Kohn*, 96 N.Y. at 367–68 (purchase of a bond where a premium was distributed by chance held not to be a lottery because the bond holder did not risk loss of guaranteed amount). Plaintiff does not allege an inability to withdraw his 10 GUSD deposit and thus it is not at risk of loss upon chance.

***Third***, even if Plaintiff's deposit constitutes a "purchase" under GOL § 5-423 and the deposit could be claimed to have been at risk of loss due to chance, his claim still fails because he cannot plausibly allege Defendant is the "seller," which is the "the person against whom [an] action [under GOL § 5-423] is to be brought." *See Grover*, 73 N.Y. at 477 (noting that the statute "prohibits the **sale** of lottery tickets" and "authorizes an action by the **purchaser** to recover double the **sum paid**" and therefore "by necessary implication [it] designates **the seller** as the person against whom the action is to be brought" (emphasis added)).

The necessary element for there to be a "purchaser" and "seller" engaging in a "sale" is "an agreement by which one of two contracting parties, called the seller, gives a thing and passes title to it, in exchange for a certain price in current money, to the other party, who is called the buyer or purchaser who, on his part, agrees to pay such price." *In re Estate of Franks*, 277 N.Y.S. 573, 575 (Sur. Ct. 1935); *see also* N.Y. U.C.C. Law § 2-106(1) ("A 'sale' consists in the passing of title from the seller to the buyer for a price."). Thus, even if Plaintiff can plausibly allege he "purchased" something that can be called a "lottery ticket," Plaintiff cannot plausibly allege Defendant sold it. Rather, the interaction is between Plaintiff and the savings protocol.

Plaintiff confusingly uses the term "PoolTogether" to refer to PoolTogether Inc. (the company) and the PoolTogether savings protocol (a protocol on the Ethereum network), resulting in some of his allegations incorrectly suggesting that users send funds to PoolTogether Inc. *See, e.g.*, SAC ¶ 177 ("[Plaintiff] and all members of the putative class delivered things of value to PoolTogether in exchange for lottery tickets."). However, elsewhere in the SAC he correctly alleges that users send money "to the protocol" and anything sent back to the user's wallet is likewise sent from the protocol. *Id.* ¶ 185 ("[Plaintiff] and all members of the putative class delivered things of value **to the PoolTogether protocol** in exchange for lottery tickets." (emphasis added)), ¶ 45 (users "send cryptocurrency **to the protocol** and receive lottery tickets in exchange" (emphasis added)). Plaintiff did not pay anything to – or purchase anything from – Defendant, and therefore he cannot pursue a claim against Defendant under GOL § 5-423.

### D. The Class Allegations Should Be Struck Because There Are Clear Conflicts of Interest and Plaintiff Cannot Proceed with an Extraterritorial Class

A court may strike class allegations where the plaintiff is not "adequate" to represent the putative class, and such facts are either apparent from the pleadings or are not disputed. *Wexler v. AT&T Corp.*, 323 F.R.D. 128, 129 (E.D.N.Y. 2018) (Block, J.). Likewise, a court may strike **nationwide** class allegations where the statute invoked does not apply extraterritorially to out-of-state putative class members. *Kassman v. KPMG LLP*, 925 F. Supp. 2d 453, 470 (S.D.N.Y. 2013).

"The adequacy inquiry . . . serves to uncover conflicts of interest between named parties and the class they seek to represent." *Wexler*, 323 F.R.D. at 129 (quotations omitted). "[T]he proposed class representative . . . must have no interests antagonistic to the interests of other class members." *Id.* (quotations omitted). Plaintiff's Count Two against certain POOL token holders is based on a "general partnership" theory under the premise that POOL token holders can participate in the operations of the savings protocol purportedly as business for profit (for which there are no pleaded facts). SAC ¶¶ 58, 59, 184. Plaintiff alleges there was an "initial distribution" of "15% of POOL tokens" of the total 10,000,000 POOL tokens to all previous users of the savings protocol. *Id.* ¶ 49. Plaintiff also alleges the savings protocol retained 57.54% of tokens in the protocol for future distribution "as determined by a vote of the holders of the other 42.46%." *Id.* Indeed, the POOL token holders have voted to make distributions to specific pools, though Plaintiff only deposited into pools that do not receive these distributions. Cusack Decl. ¶ 15.

Plaintiff's proposed class, as currently stated to include "[a]ll people" who deposited into the protocol, *see* SAC ¶ 151, necessarily includes the many thousands of users who, like the Count Two defendants, hold POOL tokens and can participate in governance of the savings protocol. This group of the putative class members are, according to Plaintiff's pleaded general partnership theory, allegedly participating in a criminal conspiracy. A class representative plaintiff cannot fairly and adequately represent a proposed class when it includes "the very individuals" whom the plaintiff is accusing of the alleged wrongdoing underlying the claim. *See Eng-Hatcher v. Sprint Nextel Corp.*, No. 7-cv-7350, 2009 U.S. Dist. LEXIS 127262, at *21–23 (S.D.N.Y. Nov. 13, 2009) (rejecting class where plaintiff accused supervisors of improperly failing to credit her hours at work and such supervisors were also members of the proposed class she sought to represent).

Also, Plaintiff's general partnership theory, assuming *arguendo* that it is viable (it is not), means the thousands of proposed class members holding POOL tokens cannot recover because under Plaintiff's theory they are allegedly "profiting" from – and thus are not "players" in – the alleged "lottery."[10] These proposed class members' claims are therefore subject to a unique defense, for which Plaintiff lacks the requisite interest fairly and adequately to rebut. *See In re Dig. Music Antitrust Litig.*, 321 F.R.D. 64, 88–89, 94–98 (S.D.N.Y. 2017) (where a large number of the proposed class members were subject to a unique defense in that they, unlike the plaintiff, illegally downloaded music, the plaintiff could not "fairly or adequately" advance their interests).

Finally, Plaintiff's proposed class – which is at least a nationwide class and, construed literally, an international class, SAC ¶ 151 ("All people . . .") – is untenable and must be struck. New York's gambling laws have no extraterritorial reach to residents of other states or countries engaging in transactions abroad; rather, the law of the jurisdiction in which those transactions occurred governs the lawfulness of the transaction. *See* N.Y. Const., art. 1 § 9 ("no lottery or the sale of lottery tickets . . . shall hereafter be authorized or allowed **within this state**" (emphasis added)); *Richter v. Empire Tr. Co.*, 20 F. Supp. 289, 292 (S.D.N.Y. 1937) ("[S]tatutes of this nature have no extraterritorial effect and do not allow a recovery back of the consideration paid . . . unless the debt was void or illegal under the law of the jurisdiction where the debt was incurred.").

## IV. CONCLUSION

Based on the foregoing, the Motion should be granted. Plaintiff's claims should be compelled to arbitration or dismissed, or alternatively, his class allegations should be struck.

---

[10] *See* N.Y. Penal Law § 225.00(10) ("'Lottery' means an unlawful gambling scheme in which (a) the **players** pay or agree to pay something of value for chances . . . ." (emphasis added)); N.Y. Penal Law § 225.00(3) ("'**Player**' means a person who engages in any form of gambling **solely as a contestant or bettor**, without receiving or becoming entitled to receive **any profit** therefrom other than personal gambling winnings . . . ." (emphasis added)).

DATED: April 19, 2022

PAUL HASTINGS LLP

By: /s/ Kevin P. Broughel
KEVIN P. BROUGHEL

KEVIN P. BROUGHEL
kevinbroughel@paulhastings.com
200 Park Avenue
New York, NY 10166
Telephone: 1(212) 318-6000
Facsimile: 1(212) 319-4090

BEHNAM DAYANIM (*pro hac vice*)
bdayanim@paulhastings.com
2050 M Street NW
Washington, DC 20036
Telephone: 1(202) 551-1737
Facsimile: 1(202) 551-0237

ANDY LEGOLVAN (*pro hac vice*)
andylegolvan@paulhastings.com
4747 Executive Drive, 12th Floor
San Diego, CA 92121
Telephone: 1(858) 458-3006
Facsimile: 1(858) 458-3005

Attorneys for Defendant
POOLTOGETHER INC.