

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 11305 / September 16, 2024

ADMINISTRATIVE PROCEEDING
File No. 3-22114

In the Matter of

Flyfish Club, LLC,

Respondent.

**ORDER INSTITUTING CEASE-
AND-DESIST PROCEEDINGS
PURSUANT TO SECTION 8A
OF THE SECURITIES ACT OF
1933, MAKING FINDINGS, AND
IMPOSING A CEASE-AND-
DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”) against Flyfish Club, LLC (“Flyfish” or “Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over Respondent and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

SUMMARY

1. Between August 2021 and May 2022, Flyfish conducted an unregistered offering of crypto asset securities by offering and selling to the public, including U.S. investors, approximately 1,600 non-fungible tokens ("NFTs") at two price points. The first price point was for the Flyfish NFT priced at 2.5 ETH (~\$8,400), and the second price point was for the Omakase NFT priced at 4.25 ETH (~\$14,300). The offering generated gross proceeds of approximately \$14.8 million.

2. The purpose of the Flyfish NFT offering was to fund the construction and operation of a members-only club, restaurant, and bar called "Flyfish Club," in New York City. It is currently scheduled to open in fall 2024. Possession of a Flyfish NFT was to be the exclusive means of obtaining membership in the club. If a Flyfish NFT sold in the secondary market or otherwise transferred, membership would transfer to the new holder.

3. Flyfish led investors to expect profits from the entrepreneurial and managerial expertise of Flyfish and its principals in building and running the restaurant. Flyfish told investors they could potentially profit from reselling their NFTs at appreciated prices in the secondary market. As one Flyfish principal stated in an interview on CNBC: "You are going to go [to the restaurant] 3, 4, or 5 times, and then want to sell [the NFT] and make a profit." Flyfish told investors they could also make money by leasing the NFTs on a monthly basis to others seeking to dine at the restaurant. Flyfish described this to investors as a "passive income strategy." Approximately 42% of investors bought more than one NFT in the offering, even though they needed only one to become a member of the club.

4. The Flyfish NFTs began trading in the secondary market almost immediately after the first sale in December. There have been thousands of trades involving the NFTs on secondary market trading platforms, many at profitable prices for sellers.

5. Flyfish benefited from investors selling Flyfish NFTs in the secondary market. Until on or around February 17, 2023, Flyfish received a 10% royalty payment each time a Flyfish NFT sold on certain NFT-trading platforms, with proceeds totaling more than \$2.7 million by early 2023.

6. Flyfish offered and sold the Flyfish NFTs as investment contracts, and therefore securities, pursuant to the test laid out by the U.S. Supreme Court in *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298–99 (1946) and its progeny, including, among others, cases referenced by the Commission in its *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO* (Exchange Act Rel. No. 81207) (July 25, 2017). Investors in Flyfish NFTs had a reasonable expectation of obtaining future profits based on the managerial and entrepreneurial efforts of Flyfish and its principals. Flyfish was required to, but did not, register

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

the offer and sale of Flyfish NFTs with the Commission, and no exemption from registration was available. Flyfish thus violated Sections 5(a) and 5(c) of the Securities Act.

RESPONDENT

7. **Flyfish Club, LLC** (“Flyfish”) is a Delaware limited liability company with its principal place of business in New York City, New York. Flyfish minted, offered, and sold the Flyfish NFTs to the public. Neither Flyfish nor its securities are registered with the Commission in any capacity. Flyfish is owned by VCR Group LLC, also a Delaware limited liability company, which in turn is owned by several individuals. The term “principals” used in this Order refers to these individual owners.

FACTS

The Flyfish Club and Its NFT Financing

8. The principals of Flyfish planned Flyfish Club to be a members-only restaurant in New York City with 11,000 square feet for dining, socializing, and a bar, as well as a dedicated room for service of Omakase sushi. Flyfish financed the extensive costs of the restaurant by selling investors memberships in the form of NFTs, which were to be the exclusive means of accessing the club. There were two kinds of NFTs. The regular NFTs provide holders general access to the restaurant and bar and enable them to make dining reservations. The “Omakase” NFTs added the option to make reservations for the restaurant’s Omakase room, which will be able to serve up to 14 guests.

9. The Flyfish NFTs are linked to artwork. The regular Flyfish NFTs each link to the same image of a yellowfin tuna. The Omakase NFTs link to one of seven different images of sushi.

The Unregistered Offering Began with a Media Campaign

10. Starting in August 2021, the principals of Flyfish engaged in significant marketing efforts to offer Flyfish NFTs to the public. They promoted the NFTs by advertising them on the website FlyfishClub.com, marketing them in social media posts, including on X (then known as Twitter) and Discord, and promoting them in interviews on television, podcasts, and YouTube. The Flyfish principals also produced a promotional video featuring themselves, which was available to the public on FlyfishClub.com, and exchanged emails directly with investors urging them to buy NFTs.

11. Flyfish’s communications to the public emphasized that the value of the Flyfish NFTs was related to the success of the restaurant, which could create demand for the NFTs, and that the NFTs could be resold in the secondary market for potential profit. Flyfish also promoted to potential investors the opportunity to generate “passive income” by leasing Flyfish NFTs to others seeking to access the restaurant. For example:

- a. During the offering, the Frequently Asked Questions page on Flyfishclub.com and on the Flyfish Discord server included the following: “Q. If one does not intend to use the token, should they buy a token?”

- A. Since we have created a leasing mechanism where a token holder can ‘lease’ their token to a non-token holder on a monthly basis, there is a potential ‘passive income strategy’ that could exist here, in addition to the potential appreciation of the token price due to scarcity and demand of the token. That being said, we encourage all token holders to enjoy the restaurant, as this is how the tokens were conceptualized, as our project is focused on utility.”
- b. In a promotional video posted to the Flyfish Club website in August 2021, one of the principals stated: “I’m thrilled to announce this project because it’s never been done before. It’s extremely innovative, and it turns a membership into an asset for the people that join our community.”
- c. In the same promotional video, another of the principals stated: “We’re not a Country Club. We’re not a club. Like this is ... you own it. Let’s call it what it is. Everywhere else: you rent, you pay an upfront fee, and then you pay every year. The fact that I actually own that asset, I can list it and sell it, is a remarkable innovation.” Later in the video, he also stated: “Every ounce of my energy on this restaurant has been for the people that take the plunge to buy this token because they respect or expect or believe in our collective, what we can achieve, and already planning on what could we add to this token in 2027, 2033, 2047. That’s what I do for a living. That’s what I think.”
- d. On or about August 20, 2021, in an interview on CNBC, a principal of Flyfish stated: “The token is the access to the membership and the table. ... The token and the access is ownable by you and transferrable on the blockchain. ... It’s going to change the world. NFTs are going to [be] a platform for access and membership, but [also] asset creation. You are going to go [to the restaurant] 3, 4, or 5 times, and then want to sell it and make a profit.”
- e. On or about December 14, 2021, a Flyfish principal told an investor in an email: “the better the restaurant does/is, the more likely the value of the token will appreciate.”
- f. On or about December 21, 2021, in an email to an investor interested in buying a token in the upcoming January 2022 sale, a Flyfish principal touted that: “Tokens have already been selling on the secondary market at \$10k - \$30k!!!” He further stated: “So your token should be very valuable for you to either enjoy or sell (or both).”
- g. On or about January 13, 2022, in a video he posted on YouTube, a Flyfish principal stated: “The [Flyfish Club] token is the membership club. You used to pay \$12,000 ... for [the] onetime fee and then monthly fees for a country club. But now it’s a token so now you can go enjoy it. Maybe you move and you sell it for a profit. [It’s] an asset.”

- h. On or about January 13, 2022, in an interview posted on the website Nation's Restaurant News, a Flyfish principal stated: "It's not a reoccurring [sic] fee each year, so it's not like any other members club. ... And because it's so scarce and limited and we're creating community around it, there's a lot more demand for the supply. If we do a good job and execute and produce really cool events and engage our community and put our heads down and really work hard to create value, it's really endless what this could do."
- i. On or about January 13, 2022, in an interview posted on the website Nation's Restaurant News, an interviewer asked a Flyfish principal: "So what happens if you make an investment in this membership and the restaurant never opens?" In response, the principal stated: "You're betting on the people. People should do their homework. People especially in this NFT land are jumping in without their eyes wide open. They're not researching the project, they're not in the Discord community ... 98% of these projects are going to fail. ... It's about the operators and team. Believing in the people through their track record, through their reputation. ... This is about innovation and creativity and trying to change the landscape. For people [who] say [we] could run with the money, of course we can. And we would get crushed by the community and never do anything again. It's not close to the amount of money to ruin your life over."
- j. On or about January 25, 2022, in an interview on the Fox Business News Channel, a Flyfish principal stated: "[The Flyfish NFT] changes a membership into an asset, which you could sell, you could use, you could transfer, you could gift, or you could lease if you're not in town and you won't be available to use it. ... It can be a passive income strategy, it can be an investment."
- k. On or about January 27, 2022, in an interview published on the website XP LAND, a Flyfish principal stated: "We wanted to launch a private club and, by selling memberships through the blockchain, give its members ownership. With traditional clubs, members 'lease' their memberships annually; once they stop paying dues, they're no longer members. **We wanted to build ownership.** Flyfish Club members can monetize when the time comes. They can sell their memberships with no annual dues or renewal fees." (Emphasis in the original.)
- l. On or about February 5, 2022, an article on Bloomberg.com summarized and quoted one of the Flyfish principals as saying: "'Every single thing about what we are doing is the exact opposite of a typical membership,' he says. 'Ours is a one-time purchase of the NFT which becomes an asset to the token holder, there is no reoccurring [sic] fee each year and that person is in control of their asset and can actually use it, or sell it or lease it.' He emphasized that people who buy into Flyfish have the ability to monetize

their membership, ‘which no other club in the world could do because you don’t own anything. You are essentially just renting an experience from them.’”

- m. On or about March 31, 2022, in an interview on the YouTube channel, “This Week in Startups,” a Flyfish principal stated: “Our intent is to build a large business around this with multiple clubs, ancillary offerings, other social experiences, pop-up events, and build a whole world around Flyfish Club. So you know anything could happen and there’s risk in anything obviously and I’m you know, I can’t just say like yes, we’re definitely going to have the same restaurant you know for 100 years there that’s going to exist. That being said, we’re, we’re very good at what we do. We have big plans to do this. We’re well capitalized to do it. And we’re going to look to create endless value for our people.”

12. The principals of Flyfish were seasoned professionals in the restaurant industry. Some were entrepreneurs and managers, and others were professional chefs. All of them brought specialized skills to the project to design, build, promote, finance, and operate the restaurant. During the offering, they promised to apply these managerial and entrepreneurial skills to ensure that investors profited from purchasing Flyfish NFTs.

13. Based on these and other statements, investors and potential investors in Flyfish NFTs reasonably expected that, by purchasing an NFT, they could profit based on Flyfish and its principals’ efforts. For instance:

- a. In a YouTube video posted on January 8, 2022 and titled, “Spent \$20,000 on a NFT! [FlyFish Club] Review,” an investor explained how he could profit from the Omakase token he had purchased: “So if I sell today, I would make 2 ETH today, \$6,000 in one day. Not bad for one day. ... Do we want to sell in one day for \$6,000 profit? It wouldn’t be bad. However, we can make, in perpetuity, if people really like the restaurant, if people like the ambiance, if people like this whole NFT restaurant thing, \$6,000 a year ... and that’s just a guesstimate of \$500 a month lease.”
- b. In a YouTube video posted on January 14, 2022 and titled, “Overpriced JPEGs Recap #8,” an investor stated: “I bought three [Flyfish Club NFTs], much for the same reasons—betting on people, betting on [one of the Flyfish principals]. He is obviously incredibly smart, incredibly hardworking, he knows business ... also his reputation matters. He’s basically not going to let these fail. He’s going to do everything in his power to make anyone that took a leap of faith, who bet on him and invested in his ideas, he wants to make everyone money.”
- c. In a YouTube video posted on January 30, 2022 and titled, “How the 1st NFT Restaurant May Ruin NFT Holders,” a commentator stated: “[Going into the club] has a monetary value. And then as the club evolves, maybe you can make some money later on by selling the token to somebody else

who wants membership at a later [higher] price because the actual value, the ability to enter the club has gone up. Or you can lease it out potentially. ... There are two ways to make money.”

Sales of the Flyfish NFTs

14. In December 2021, Flyfish minted 3,035 NFTs (2,650 regular Flyfish NFTs and 385 Omakase NFTs) as tokens compatible with the ERC-721 standard on the Ethereum blockchain. Flyfish then offered and sold approximately 1,500 of these NFTs to the public on December 15, 2021 and January 7, 2022. Flyfish sold approximately 120 additional NFTs between January and May 2022. The sales generated proceeds of approximately \$14.8 million, which Flyfish pooled to finance the construction of the restaurant. Flyfish retained approximately 1,400 NFTs potentially to offer to the public in the future.

15. The offering was publicly available in the United States and the rest of the world to any investor willing to pay the purchase price of 2.5 ETH (approximately \$8,400) for the regular NFT or 4.25 ETH (approximately \$14,300) for the Omakase version. Both also required the payment of “gas fees” (*i.e.*, transaction fees paid to record the transactions on the Ethereum blockchain). Flyfish did not limit the offering to accredited investors, nor did it prevent investors from buying more than one NFT. Six months after the public sale, 75% of the NFTs sold to the public had been resold one or more times in the secondary market, suggesting that the original owners bought them with investment intent and not for consumption.

16. After selling some of the Flyfish NFTs in December 2021, Flyfish conducted a survey of purchasers to determine their motivations for purchasing the Flyfish NFTs. The survey asked buyers whether they bought the NFTs because they wished to enjoy the restaurant, because they viewed the NFTs as investments, or both. More than half of purchasers stated that they were motivated at least in part by the chance to profit from the investment in the NFTs.

17. To date, Flyfish has spent a substantial portion of the proceeds from the offering to pay for the costs of leasing space and designing and building the physical club. Flyfish has a 10-year lease for the club space in New York City. Flyfish has hired and supervised designers, architects, permit expeditors, and construction personnel to build the club’s facilities, dining room, bar, and VIP room for Omakase dining. The Club is currently scheduled to open in fall 2024.

Trading of the Flyfish NFTs in the Secondary Market

18. The Flyfish NFTs began trading in the secondary market within hours of the first NFTs selling in the offering on December 15, 2021. Flyfish facilitated the trading by “verifying” the NFTs on certain trading platforms. Doing so ensured that Flyfish would receive royalties from resale transactions and also reassured purchasers in the secondary market that they were buying authentic Flyfish NFTs.

19. Prices for the NFTs in the secondary market initially increased substantially. Between December 2021 and May 2022, there were 1,441 secondary market sales of regular Flyfish NFTs on one trading platform at ETH prices that on average were equivalent to \$12,814—roughly a 50% increase compared to the offering price of \$8,400. There were also 284

secondary market sales of Omakase Flyfish NFTs on this platform at ETH prices that on average were equivalent to \$27,163, almost double their offering price of \$14,300. Investors spent approximately \$26.2 million buying Flyfish NFTs on this trading platform during the period. Flyfish also received approximately \$2.7 million from its 10% royalty on sales on this trading platform. As of July 11, 2024, the “floor price” (*i.e.*, the lowest price offered by any seller) for a regular Flyfish NFT had dropped to 0.687 ETH—approximately \$2,163 or 74% less than the offering price. The floor price for the Omakase NFTs had dropped to 3.088 ETH—approximately \$9,724, or 32% less than the offering price.

VIOLATIONS

20. As described above, Respondent Flyfish offered and sold securities worth at least \$14.8 million by means of interstate commerce to investors. No registration statement was filed or in effect for the Flyfish NFT offering, and no exemption from registration was available.

21. As a result of the conduct described above, Respondent Flyfish violated Section 5(a) of the Securities Act, which states that: “[u]nless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly, (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.”

22. As a result of the conduct described above, Respondent Flyfish violated Section 5(c) of the Securities Act, which states in relevant part that “[i]t shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security.”

UNDERTAKINGS

23. Respondent has undertaken to:

- a) destroy all Flyfish NFTs in its possession, custody or control within 10 days of this Order;
- b) publish notice of this Order on the Flyfish website and social media channels, in a form not unacceptable to Commission staff, within 10 days of the date of this Order;
- c) remove all links to crypto asset trading platforms from the Flyfish website and social media channels, within 10 days of the date of this Order;
- d) not accept, and notify secondary market trading platforms that it will not accept, further royalties from the sale of Flyfish NFTs;
- e) assist the Commission staff in the administration of a distribution plan, including any and all efforts to distribute to affected investors the

monetary relief described in Section IV, paragraphs C and D below, including, without limitation, providing Commission staff with a list of blockchain addresses for Flyfish holders within 10 days of the date of this Order and promptly publishing on the Flyfish website and social media channels, upon request by Commission staff, notice of a distribution and/or claims process, in a form not unacceptable to Commission staff. In connection with such assistance, Respondent will produce, without service or notice of subpoena, any and all documents and other information reasonably requested by Commission staff; and

- f) certify in writing compliance with the undertakings set forth in this paragraph. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to Brian O. Quinn, Assistant Director, Division of Enforcement, with a copy to the Office of the Chief Counsel of the Enforcement Division, no later than 30 days from the date of the completion of the undertakings.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent's Offer.

Accordingly, it is hereby ORDERED that pursuant to Section 8A of the Securities Act:

- A. Respondent cease and desist from committing or causing any violations and any future violations of Sections 5(a) and 5(c) of the Securities Act.
- B. Respondent shall comply with the undertakings enumerated in paragraph 23 above.
- C. Respondent shall pay civil penalties of \$750,000 to the Securities and Exchange Commission. The Commission may distribute civil money penalties collected in this proceeding if, in its discretion, the Commission orders the establishment of a Fair Fund pursuant to 15 U.S.C. § 7246, Section 308(a) of the Sarbanes-Oxley Act of 2002. The Commission will hold funds paid pursuant to this paragraph in an account at the United States Treasury pending a decision whether the Commission, in its discretion, will seek to distribute funds or, subject to Exchange Act Section 21F(g)(3), transfer them to the general fund of the United States Treasury. Payment shall be made in the following installments: \$350,000 within 14 days of the entry of this order; \$200,000 by December 31, 2024; and \$200,000 within 12 months of this order. Payments shall be applied first to post order interest, which accrues pursuant to 31 U.S.C. § 3717. Prior to making the final payment set forth herein, Respondent shall contact the staff of the Commission for the amount due. If Respondent fails to make any payment by the date agreed and/or in the amount agreed according to the schedule set forth above, all outstanding payments under this Order, including post-order interest, minus any payments made, shall become due and payable immediately at the discretion of the staff of the Commission without further application to the Commission.
- D. Payments must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Flyfish Club, LLC as the Respondent in these proceedings, and noting the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Carolyn Welshans, Division of Enforcement, Securities and Exchange Commission, 100 F St. NE, Washington, DC 20549.

E. Regardless of whether the Commission in its discretion orders the creation of a Fair Fund for the penalties ordered in this proceeding, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Vanessa A. Countryman
Secretary