UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. 23 CV 4738 (KPF)

COINBASE, INC. and COINBASE GLOBAL, INC.,

Defendants. Conference
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New York, N.Y.
July 13, 2023
10:15 a.m.

Before:

HON. KATHERINE POLK FAILLA,

District Judge

APPEARANCES

NICHOLAS MARGIDA
PETER MANCUSO
LADAN STEWART
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Attorneys for Plaintiff

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Attorneys for Defendants
BY: WILLIAM SAVITT
-and-
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BY: STEVEN R. PEIKIN

(Case called)

MR. MARGIDA: Good morning, your Honor, Nick Margida on behalf of the Securities and Exchange Commission.

MR. MANCUSO: Peter Mancuso with the Securities and Exchange Commission. Good morning, your Honor.

THE COURT: Good morning.

MS. STEWART: Good morning. Ladan Stewart with the SEC.

MR. KURUVILLA: Good morning, your Honor. Ben Kuruvilla for the SEC.

THE COURT: Good morning to each of you.

At the back table. Thank you. Mr. Savitt.

MR. SAVITT: William Savitt for Coinbase and Coinbase Global. Good morning.

THE COURT: Good morning.

Mr. Peikin.

MR. PEIKIN: Good morning. Steven Peikin for Coinbase and Coinbase Global.

THE COURT: Thank you so much. Please be seated.

Welcome to those of you in the gallery, some of whom I suspect are working on this case in one capacity or another. This is our initial pretrial conference in this case and it is as well a premotion conference.

Just a couple of housekeeping things at the beginning. Typically, my practice for having premotion conferences is to

do two things.

One is to try and persuade the moving party not to file a motion, but I'm confident that will fail here, so I am not going to try it.

The second is to see whether there is a desire on the part of the nonmoving party to amend the pleadings at issue, so I'll talk about the commission about whether there is an appetite for that.

I understand as well that there is some discussion about a motion to strike. Without prejudging the matter, I don't know enough about it to know how I feel about it. To me, it just seemed like it would be a bit of a waste of time at this stage. I am not sure what it would accomplish. If the commission is of the view that it would dramatically affect the progress of discovery or something else, I will hear from you.

What I'd like to do in the first instance is to hear from the commission about their complaint and about any desire to amend or supplement the complaint, but not to hear from the commission in response to the motion.

I would then like to hear from someone at the back table and the contemplated motions, and I have some questions for them in that regard.

Then I'll hear from the commission regarding their opposition to the motion.

There is one other thing I would just like to put out

there. I have thought very hard about how to say this, and I am not sure I will not say it as precisely as I'd like to. There is a sense of time sensitivity and urgency to the parties' submissions, and I have no doubt that people have been working extremely hard on this case for weeks, if not months, if not years. And I have no doubt that both sides could put together quite professional, quite wonderful submissions on short time frames, but I need to communicate to you, just so that no one is unaware of this, that I have a very busy July and August, and then I go into a four to five-week RICO trial that will consume my September into October.

So as you are thinking about what is an appropriate briefing schedule, and I invite the parties to speak offline about what is an appropriate briefing schedule, please understand that I can't, unless there is a reason that has not yet been provided to me, allow this case to leapfrog the criminal and other urgent matters. I have also, for those of you who understand the concept, a Hague Convention, a parental kidnapping hearing that's coming up as well. All of those have to take place first.

I don't want you to think that I don't care about your case. Of course I do. But I do want us all to be realistic. I don't want you, for example, to wreck all of your summer vacations to get me something in the month of August that I'm not going to get to in the next couple of months. Please,

please, keep that in mind. And, of course, if there is a reason for immediacy that hasn't been expressed to me, you will certainly let me know, but that is the concern that I have.

Let me then please begin with the SEC. I don't know who wants to talk about the complaint.

Mr. Margida, you're getting up. Thank you so much.

MR. MARGIDA: Thank you, your Honor.

First of all, with respect to your Honor's --

THE COURT: Let me say that this courtroom is known for its acoustic challenges. I appreciate the respect, but if it ends up that we all can't hear you just because of the sheer number of people in here, I will take no offense if it's easier for folks to sit down.

MR. MARGIDA: Please let me know if you can't hear me.

First, your Honor, with respect to your question about whether the SEC would intend to amend its complaint, we don't think that's necessary at this time.

I don't know how much your Honor would like to hear about the complaint, but I'm happy to start. If you have any questions, let me know.

THE COURT: I am not sure we have had the pleasure of working with each other previously, sir. So please know, I have read the complaint, I have read all the materials that have been given to me, and I have in fact prepared for this conference. I do not need you to summarize. If there are

things you want to call my attention to, that's great. But if the issue is one of making sure I have read the document, I promise you that I have.

MR. MARGIDA: Thank you, your Honor. That's helpful.

As we lay out in the complaint, I just want to kind of frame the case about what the complaint says and put aside kind of the lamentations and grievances of Coinbase that they identify in the preliminary statement of their answer. We think, respectfully, that this is a pretty straightforward case. I know --

THE COURT: You see me smiling. If I had a nickel for every time someone told me it was a straightforward case, I could retire. OK. Fine.

MR. MARGIDA: We teed this up in the premotion submission response, that it really has to do with the application of a strict liability statute to one overarching question, putting aside the staking Section 5 arguments.

With respect to the Exchange Act registration violations that we allege, there are three elements. One is, Coinbase admits it's not registered with the SEC in any capacity. Two are the cryptoassets, do they engage in activity that could be -- that's consistent with what the Exchange Act rules say about National Securities Exchange activity, brokerage activity, clearing agency activity.

THE COURT: Just to that point, sir, at what level are

you asking me to focus? You're asking me to focus on the assets themself or on what's being done with them on the Coinbase platform?

MR. MARGIDA: That's a good question, your Honor.

We are asking you to focus on the securities that Coinbase allows to be transacted on their platform and that they offer by and through the Coinbase Wallet application and through the Prime service, which gives access to the platform to their institutional and other customers.

The only thing that's in dispute, your Honor, and I think both sides agree on this, is whether the cryptoassets that Coinbase makes available on its platform are fairly characterized as investment contracts or not. And obviously the parties have laid out their legal arguments. Respectfully, Coinbase accuses the SEC of seeking to create new regulations and new law.

THE COURT: Sir, I am advised by my deputy that your microphone is cutting out. Perhaps you can be seated, sir, because I do want to make sure we all can hear you. In fact, my deputy, who knows all things, suggests that it's better if you remain seated. I really do appreciate it. Apologies for our not great technology. Thank you.

MR. MARGIDA: Coinbase accuses the SEC of creating new law in this area, a regulatory power grab, but Coinbase's legal arguments, and I know we will get into this later, are

effectively asking the Court to create new law with respect to a common law contract requirement that the *Howey* test and the *Howey* case does not include, and no case in 75 plus years of *Howey* jurisprudence has held this.

Additionally, I think the bigger argument is just that *Howey* can never apply to secondary market transactions. I think as we laid out in our complaint, that's just illogical and it's contrary to economic reality, which is what *Howey* requires the Court to look at. Coinbase has marketed these cryptoassets as speculative investment opportunities. They have asset pages that include historical price and volume information.

THE COURT: Thank you, sir. I think we are starting to trend into their motion, and I promise you I will give you that opportunity to speak. I am, again, focusing on your complaint. If there is something that you think I'm not focused on or something that you just think is very, very important and might get overlooked in the many pages of your complaint, please, sir, tell me what that is.

MR. MARGIDA: That's helpful.

What I'd like to frame for the Court is why this matters, and I think we go into that in some of the background of the securities laws and background of cryptoassets themselves.

The Exchange Act requirements cannot be viewed as just

some statutory requirement. They matter for purposes of investor protection. With an entity such as Coinbase, if it were registered as an exchange, clearing agent, or broker, there are requirements -- opening up books and records to the SEC, providing onsite inspection -- to allow the SEC to provide oversight.

And so what we have alleged in the complaint is, essentially, Coinbase wants a just-trust-us system and the Exchange Act requires a trust-but-verify system, so that's something that I think is important to frame for the Court.

THE COURT: Let me just say this, sir. Again, we will probably have a greater discussion about this in a little bit. I understand the reliance on *Howey*, and I understand there is this sort of contract aspect to *Howey*.

But there is a question about the efforts involved in the underlying cryptoassets. I think that's where perhaps there is some traction to the defendants' arguments. I know you don't agree with it, and the question I'll have for both of you, spoiler alert, is that I'd like to know what I really can decide on the record before me and on the stuff I may properly consider in this context.

But you can keep talking about *Howey*, and that's great, but there are several parts to *Howey* that I want to understand better than I do.

Please continue, sir.

MR. MARGIDA: Sure, your Honor.

With respect to the efforts of others, and I can elaborate later on this in response to Mr. Savitt's or Mr. Peikin's arguments, the efforts as alleged in the complaint are the efforts of the issuers, promoters, and developers of the tokens and their associated technologies. We are not alleging that Coinbase engages in efforts with respect to *Howey* for the Exchange Act registration violations.

We are, with respect to the staking allegations in Section 5, under the '33 Act, alleging that Coinbase engages in significant entrepreneurial and managerial efforts. But for purposes of the Exchange Act violations, it's an investor -- I think our argument would be, an investor does not distinguish between buying directly in an initial offering versus buying on Coinbase's platform. In both instances, it's relying upon and reasonably expecting to profit based on the efforts of the issuers themselves and the developers of the associated networks, platforms, technologies, gains, etc., that we have alleged with respect to the 13 cryptoassets securities in our complaint.

THE COURT: Thank you very much.

Is there someone at the back table who wants to take the lead on this? That might be Mr. Savitt.

Mr. Savitt, you're also welcome to sit down in deference to our court reporter, if you're comfortable doing

that.

MR. SAVITT: Thank you, your Honor. I am not sure I'm comfortable doing it. It just seems sort of wrong.

THE COURT: It does to me too, I understand that, but we all want to hear you, sir.

Let me please ask this, sir. I have not seen an answer like the answer that was submitted in this case.

One of the things that I've had to learn as a judge and moving from the sort of criminal side of the house to the civil side is the stuff that I can properly consider in the context of a dispositive motion. I know what answers usually look like, and they don't usually have preliminary statements that are so heavily footnoted and argumentative. That's fine.

I guess my questions in the first instance are, why is it that in this context I can consider your preliminary statement? To me, it seems as though it's a lot of very helpful information to you, but I am not sure that it's the totality or the sum of information on the issue that's out there.

How can I consider it? How is it that I can decide, based on basically your preliminary statement, as a matter of law, that the cryptoassets are not securities and that the stuff in which your clients are engaged does not bring them within the securities laws? And I appreciate you allowing me the indulgence of that long question.

MR. SAVITT: Thank you, your Honor, and it's a fair one.

Without wanting to concede that answers like this are entirely unconventional in all contexts, the question the Court has put I think is a really is sound one, which is, for purposes of this pleading motion, which it is, what is the factual weight that the Court can give to the untested pleadings in our answer, confident, though we are, of their accuracy.

And I think the right answer, your Honor, is that for purposes of the motion for judgment on the pleadings that we have sought leave to file and hope to file, the Court need look no further than the complaint that the commission has filed and the documents incorporated by reference into it and relied upon by the SEC and other documents that are properly cognizable upon judicial notice. That's a long-winded way of saying, we don't expect to ask the Court to rely on the allegations in the answer, confident, though we are, of their accuracy for purposes of the Rule 12(c) motion.

And there are other reasons why we thought it appropriate and salutary to include the allegations that are there; among other reasons, to ensure that there wouldn't be a claim, that the affirmative defenses, for example, that we have raised are inadequately supported factually.

But in terms of what's before the Court on 12(c), we

will not be relying on the unverified assertions in the answer, notwithstanding that we are confident they are going to pull through as a matter of proof.

THE COURT: I didn't think you'd cite anything to me that was incorrect. I just wondered if there might be competing information or competing evidence that your adversaries would ask me to consider in the context of a motion for judgment on the pleadings, such that I wouldn't be able to decide the issue as a matter of law.

It seemed to me, at first blush, that there are points that you make that are interesting and that I really would like to explore, but they seemed to sound more in summary judgment than in judgment on the pleadings. So I am interested as to how I can be as confident as you currently are, based on solely on the materials that I may properly consider in a 12(c) context, that I will be able to make the findings that you wish me to make.

MR. SAVITT: Our position, your Honor, and we will have, we hope, the opportunity to elaborate this to the Court in full briefing --

THE COURT: Of course.

MR. SAVITT: -- is that boiled all the way down on the essential issue that I think is going to be before the Court on the Rule 12(c) motion is the following.

The commission has claimed that certain of the tokens

trading on the Coinbase platform are trading there in violation of the securities laws. The entire rationale for that contention is that these assets constitute investment contracts and, therefore, fall within the purview of the SEC's regulatory jurisdiction, which is broad within the universe of securities, but stops at the water's edge. If it's not a security, the SEC shouldn't regulate it.

THE COURT: Just to that point, sir, I don't think you're suggesting in your answer that the activities that are going on on the Coinbase platform and in Wallet and in Prime are, in the colloquial sense, trading. Your argument is that the things that are being traded are not assets subject to the securities laws.

Do I understand that correctly?

MR. SAVITT: I think that's fair. They do not constitute investment contracts, as that idea is properly understood, and, therefore, the claims of our good adversaries must fail. That is, in a sense, the boiled-down version of the essential point.

The reason we think that it is susceptible of a motion in this posture is that we think we will be able to show, through an appropriate exposition of the case law, that to qualify as an investment contract, a contract or scheme of related contracts must represent participation in a business enterprise. That is what we intend to show your Honor upon the

motion for judgment on the pleadings. An investment contract will show that an investor pays money in exchange for an entitlement to a future payout of some sort. That's what turns an investment contract into a security. It's why an investment contract is a security. We will show that that is the essential defining characteristic.

THE COURT: If I could pause you for a moment, sir. I did appreciate and it was obvious that each side had put a lot of effort into the premotion letters, so I applaud you for getting them within page limits, and I thank you for that.

I guess I'm wondering, is what has been given to me in the premotion letters the bulk or the totality of the cases on the issue? I am not sure there is a lot of case law in this area. I do feel like I'm breaking new ground. I'm wondering, sir, if you want to comment at this stage, on the three cases. I believe there was a New Hampshire, a Connecticut, and a Southern District of Florida case cited by the commission in its opposition to your premotion letter.

MR. SAVITT: I think those cases, your Honor, if I'm recalling correctly, related to the question of secondary trading on the platform, and the SEC in its brief colloquy with the Court this morning has drawn attention to that.

A few things that we want to make sure in this early posture, your Honor.

First, our position is not that something that trades

on a secondary market can never be an investment contract. That is not our position. It's not what we said. It's a caricature of our position.

The following is true, that we think that for something to qualify as an investment contract, it must create some promise of contractual relationship of obligation between the buyer of the asset and the issuer or promoter, and that to qualify as an investment contract, one must have an investment of money that constitutes a claim upon the proceeds of the business, as opposed to the things it creates.

I'm warming to your question, your Honor.

THE COURT: I know you're getting there eventually.

MR. SAVITT: I will get to it.

That is our essential claim. We think that's clear with respect to the totality of trading in the cryptoassets generally. We aren't here to litigate every cryptoasset trading anyplace anywhere. We have been confronted with the claim. The 12 assets trading on our platform are unlawful and that's what we are going to focus on.

It is true, however, and we said this in our letter, and perhaps this is what the commission was picking up on, that to the extent any of these tokens can be said to be investment contracts in the context of an initial offering, they certainly cannot be said to be that in the context of the secondary trades that are occurring on the Coinbase platform, because in

those trades nothing is traveling with the sale, except the token itself, in exchange for a payment of fiat or digital currency. That is not an exchange of value that carries any ongoing obligation to anyone and it is not an exchange of value that constitutes an investment or a claim on the return of the issuer or the promoter now.

The cases that have been cited in the SEC's letter on this we think do not stand for the proposition that secondary trades are incapable of -- that there is no distinction, I should say, between secondary trades on the one hand and primary trades on the other.

In fact, I'm grateful for the Court's question because this *LBRY* case that is the first case cited, and I think it's pronounced library, even though there is some vowels missing in it, in its case name, the SEC -- and I think this is emblematic of what's happened here -- the SEC cites that case to claim -- and I'm quoting now from the letter -- that there is no distinction between investors who purchased cryptoassets directly from the issuer and those who purchased them on a secondary platform.

Respectfully, your Honor, that's just not what that case says. It's just not what it says. In that case, in the *LBRY* case, the SEC repeatedly refused, notwithstanding the district court's preference, to put at issue to evaluate the question at all whether secondary cryptotrades could be trades

and securities.

Here is what Judge Barbadoro said in the District of New Hampshire. I am quoting now. "I would like the issue of secondary trading to be resolved. The SEC has rejected every suggestion I have made that they should resolve that issue with me. That's from a transcript.

And reflecting that position, the *LIBRY* court just this week, I think it was two days ago, issues an order that specifically declined to say whether secondary trades are security trades and specifically made clear in issuing its remedial order in that case that the case could have no effect on the secondary token market.

So the commission's assurance to the Court that *LBRY* drew no distinction between secondary trading and primary trading or initial trading is just wrong. It's just not what that case says. We don't think that's correct.

I will return, however, to my long introduction, your Honor, to your good question to say that our first argument is that the proper inquiry as to whether these investment contracts looks to issues that go over the question of whether they are secondary or initial trades. The argument is even more powerful here on the secondary market, but we do not say that there are not circumstances one could imagine in which assets or securities are traded on a secondary market and they are within the scope of the securities laws, just not on the

pleadings in the commission's case and documents incorporated therein.

THE COURT: The commission seems to think that your clients were provided with adequate notice, at the very least, in the form of the Dao report. Do you want to comment on the degree to which one can intuit anything from that report that could lead you to have expected that you'd be where you are today?

MR. SAVITT: Thank you, your Honor.

We, first of all, would observe that that report said absolutely nothing about trades about on a secondary market, such as Coinbase. We don't agree that it provided fair notice.

Moreover, the whole matter of how we got to where we are we think is importantly colored by the SEC's careful review of Coinbase's S-1, its declaration of effectiveness of that S-1, the commencement of trading, the remarks that we put in our letter, and I'm sure the Court doesn't need me to rehearse about what Chair Gensler has said about the lack of regulatory authority.

There is, moreover, the overhang here of Coinbase having, over the course not just of weeks, months, but of years, seeking engagement with the SEC and a reasonable regulatory regime to understand what the SEC viewed as its regulatory lane and what could appropriately be within it. That has been entirely withheld, and we appreciate it very

much.

I did not want to fail to come back to your introductory remarks that you have a very busy docket and lots and lots of stuff to get to. We, of course, understand that. But one of the reasons that Coinbase is keen to move with dispatch here, of course with your Honor's schedule, is that the SEC has filed a serious set of allegations. It attacks Coinbase's business in some ways. It puts a cloud over the business.

We think that cloud is going to be, with certainty, dispelled as a matter of law, whether it's in a preliminary motion, which we think is the case, certainly thereafter if not, and it's important from our perspective to try to get clarity on these matters so that there can be a more coherent and cognizable regulatory regime. That's, in a sense, why we are asking for dispatch in not just the briefing on the 12(c) motion, but the case in its entirety. I say that fully appreciating that there will be things well ahead of us in the cue, and of course we will work with your Honor and your schedule and all of that.

THE COURT: Again, sir, I've asked you questions that interest me. I am going to be returning to the front table in a moment to ask them some questions sort of suggested by the answers that you have given.

Is there anything else that you want me to know about

your contemplated motion? I am quite confident I can't dissuade you from filing it.

MR. SAVITT: Your Honor, we think it's a meritorious motion, and we'd like to file it if the Court will permit us. I think that's a no on that question.

On the merits of the motion itself, we have tried to pack a lot into our letter, and the exercise of writing it all in three pages is a useful one from our perspective, so I will say thanks to the Court for imposing that restriction on us. It's a great exercise in distillation.

There is a rich body of case law about what investment contracts are and how they have been perceived by the courts and the commission. There will be a lot more for the Court to consider when that motion is fully briefed. But we do think that we provided the bones of the argument for the Court's evaluation.

So if the Court has no questions on that or the major questions piece of it that follows in train, we are happy to recede and turn the floor back over to our adversary.

THE COURT: Then there are two follow-up questions.

The first is, perhaps I don't think I understand well enough to opine on the portion of the SEC's complaint that deals with your client's staking program. If you want to talk about the staking program and why I shouldn't be worried about it, even as the SEC is worried about it, I would appreciate

that. Thank you.

MR. SAVITT: Staking is a means of verifying the transactions that occur on the blockchain of the respective tokens and platforms and trade at Coinbase.

As we previewed in our letter, the staking program fails as a matter of law to establish the requisites for regulation under the securities laws because there is ultimately no risk to the staking party because of important guarantees that the principal will be returned.

Moreover, the staking program involves, essentially, the provision of administrative and IT support, rather than the risk of loss, and, therefore, it is in the nature of a supply contract, a services contract, not in the nature of an investment contract or a security. And we think we will be able to show that here again based on the inadequacy of the pleadings rather than anything that we have stated affirmatively in the preliminary statement of the answer.

THE COURT: Your view, sir, is that it's just the equivalent of a broker holding a trade?

MR. SAVITT: It's the equivalent of a payment for a service with a shared return between the -- Coinbase provides a service and, in response, it generates some profits that are divided between Coinbase and the staking party, and there is no risk of loss to the staking party, and it's ultimately an administrative and IT function rather than an investment

function.

THE COURT: I appreciate the clarity with which you have described that. I am not sure your colleagues at the front table hold the same view of the staking program and perhaps that's causing me a bit of confusion.

You also were kind enough to remind me about the major questions doctrine, and I actually thought I understood the major questions doctrine, and then the Supreme Court issued a decision a few weeks ago, and I'm now beginning to wonder what I understood.

I understood it as an issue of separation of powers, I understood it as an issue of what has and what should be arrogated to particular branches of government.

But it seemed to me that the *Biden v. Nebraska*, I believe, decision of a couple of weeks ago also seemed to focus a lot on the size, monetarily, of the issue. Perhaps you are going to argue that that portion of the decision is analogous or somehow useful in your case because we are talking about billions, trillions of dollars, but perhaps I could hear from you on the major questions doctrine. Thank you.

MR. SAVITT: Thank you, your Honor.

It's an interesting area of the law. I think ultimately it does still reduce, in its doctrinal essence, to a matter of separation of powers and the question of the appropriate scope of the exercise of agency authority.

From its beginnings, and particularly as it has been developed in the *West Virginia* case and in the *Nebraska* case of a week or two ago, it's correct that it inheres most powerfully in circumstances where there is clearly an important impact on economic activity. We are confident, your Honor, that that branch of the major questions inquiry will be satisfied here. Crypto is a one trillion dollar plus industry. It's an important emergent industry. One in five U.S. adults have held cryptocurrency. It has, and I think this is common ground, the capacity to significantly create innovation in financial services internationally and nationally. We don't think there is any question it will satisfy that branch of the major questions inquiry.

The other pieces of it that are important to ask the following sorts of questions: Is the agency exercising authority in the same way that it has previously exercised authority? Here we think the answer is plainly no.

Chair Gensler's remarks that there was not adequate regulatory authority over cryptoexchanges just two years ago we think is very powerful evidence that what we have now is an expansion of authority, precisely the kind of expansion of authority that was called out in many of the cases involving the major questions doctrine, including the *Nebraska* case, page 6 of the slip op.

And there is important analogies here to what's come

up in these cases. The *Brown v. Williamson* case is a good example. There, after for a long time saying that nicotine wasn't a drug, the FDA said it is a drug, and the Supreme Court said you can't do that. You can't take within your regulatory authority something that you had hither to failed to, just like cryptoassets here.

There is also the fact relevant here that there is ongoing and intense congressional debate right now about who, if anyone, regulates crypto and how that regulatory authority should be allocated. Senator Gillibrand just yesterday, or the day before, introduced bipartisan legislation on exactly this subject, which, if I'm understanding correctly, does not assign to the SEC the regulatory authority that, through cases like this, seeks for itself. That's a bipartisan bill.

Putting aside what the law ultimately becomes in Congress, the fact that there have been over a dozen legislative initiatives to try and establish a regulatory regime really suggests that they have not been debating a question that's already been settled. There is even a dispute within the commission amongst the commissioners and between the CFTC and the SEC on this question.

For these reasons, we think this is a case that cries out for the application of the major questions doctrine.

The last point on this before shutting up, your Honor, is, you don't need to get to this issue, in our view, even on

our motion because we think when you look at the history of the investment contract law and the other law applicable to the trades on the platform and the other aspects of the commission's case staking and the rest of it, you will see that they do not qualify as securities under the prevailing precedent. But if it's a colorable claim, then the major question doctrine comes into play, and we think it powerfully influences the analysis.

THE COURT: Thank you, sir.

Mr. Margida, am I hearing from you or from someone else at your table?

MR. MARGIDA: It depends on the issue. There is a lot to unpack there, your Honor, so my colleague, Mr. Mancuso, is going to address some of the issues, including the major questions doctrine.

THE COURT: I would like to begin where I began my questioning with Mr. Savitt, which is, there was for me some confusion about the degree to which defendants were asking me to focus on the statements made in their preliminary statement.

I believe Mr. Savitt has attempted to clarify how he thinks I can look at that and the fact that the defendants believe that other information in the answer and in the pleadings and in the materials that I may properly consider in a 12(c) context is going to be enough for me.

So my first question is really one of just scope of

materials I may consider, if there is someone who wants to speak to that issue.

MR. MARGIDA: There is. Mr. Mancuso can handle that, your Honor.

THE COURT: Mr. Mancuso, I am sure you appreciate being volunteered, sir. Thank you.

MR. MANCUSO: Thank you, your Honor.

With regard to 12(c), your Honor hit the nail on the head. I think you were indicating that the materials that were included in the 105 footnotes to the preliminary answer should not be considered on a 12(c) motion. I am sure your Honor is very, very familiar with the standard.

12(c) is basically a 12(b)(6) motion, but that the Court can consider pleadings on both sides, those that are alleged in the answer, as well as information that judicial notice could take account of, as well as any documents or evidence that's integral to the pleadings.

If you run these cases, both in this district court, as well as the Second Circuit, to ground, that seems to be what the Second Circuit is saying, that the external documents that are not attached to the pleadings, if the Court is going to consider them on a 12(c) motion, they have to be integral to the framing of the complaint, and, therefore, the 105 footnotes in the preliminary statement are not integral to the framing of our complaint. There are certainly some documents that we do

reference in our complaint that are integral to the framing of the complaint, but not those that are in the preliminary statement. However, it seems like we have agreement between the parties as to what is and is not proper for the Court to consider on a 12(c) motion.

THE COURT: I will speak about this a little bit later on, sir, but I'm sort of hinting to the folks at the front table that I really don't want a motion to strike. I am really not convinced that we need to do a motion to strike, and I am not sure it's going to save anybody any time, but you will be able to persuade me of the contrary or not later on in this proceeding.

Sir, what I am told by the defense is, fine, I am not going to consider the stuff I can't consider. But if I can consider the stuff within the universe of appropriate 12(c) materials, I am going to find that your complaint should be dismissed because you have not properly alleged that these cryptoassets are in fact securities or that they are investment contracts or that somehow the conduct taking place on the Coinbase exchange is within the federal securities laws.

I would like to understand, because I think it is presented to me as a matter of optics, yet it is of interest to me. How do you -- and by you, I mean your clients -- contextualize Mr. Gensler's testimony? How do you contextualize what he was saying about the absence of market

regulation of cryptoassets?

Is it your view that actually -- I understand, I think, that you are suggesting that this wasn't estoppel and that perhaps minds could be changed or maybe better arguments could be made. But he did seem to suggest, and I thought he was speaking for the commission when he did so, that the SEC could not or did not regulate transactions of this type. What has changed?

MR. MANCUSO: Your Honor, I think what we have to go back to is to the actual context of that quote, and I am sure your Honor has read it beyond just the snippet that is taken out and put in the answer.

THE COURT: I have.

MR. MANCUSO: However, I think if we go back to the actual transcript and you see that the question was asked, I believe it involved Bitcoin, which is not at issue here, and the SEC has made clear that that's not the focus of any of these enforcement actions.

Also, I believe it was a congressman from the House of Representatives who said, what can we do to make this safer? I don't have it in front of me, the whole quote. But from what I remember, it was what can we do to make this market more robust so that people -- the way I interpreted it is so people trust it.

Mr. Gensler said a couple of things about the

unregulated nature. There is no regulator in this space, meaning no one is currently regulating it. I think taking, there is no regulator in this space out of context and just throwing it in the answer is a nice soundbite, but it doesn't necessarily mean that the chair committed to the SEC at some point based on some conduct that violates the securities law bringing an enforcement action.

That's another thing that I think dovetails with the major questions doctrine, is that the SEC is not attempting to regulate all of the crypto industry in this country or around the world. We regulate conduct, and we are regulating Coinbase's conduct, which we believe violates the law.

And if you look and you kind of synthesize all of Coinbase's arguments, they are basically saying, in terms of the equitable arguments, what Mr. Gensler had said, the major questions doctrine, they are saying that if the SEC or some other criminal authority is looking at conduct of a crypto actor and it violates the securities law or some other law, that they don't have authority to do that because Congress hasn't given it yet. That's just incorrect and that, we believe, to be a nonsensical argument. So I think that these all have to be looked at together, and that would be my response to how the Court should view it.

THE COURT: Are defendants correct, and I think the answer is yes to this, that the commission is not considering

Bitcoin or Ether to be securities, cryptoassets from Bitcoin or Ether. Do you consider those to be securities?

MR. MANCUSO: I believe the commission has spoken on Bitcoin. I do not believe that the commission has spoken definitively on Ether. Certainly with Bitcoin, which I think the Court can take judicial notice of, it amounts to, and don't quote me on this exact number, but it's something like over 50 percent of the crypto industry is Bitcoin.

THE COURT: Let me ask the question a little bit differently, sir.

There are certain cryptoassets as to which I believe the commission has taken the position they are not securities. There are 12 or 13 assets traded by -- or something appearing on Coinbase platforms or Prime or Wallet that the commission has taken the position, they are securities.

What is the difference between those that are not and those that are? And how has that been communicated by the commission to the investing public and to those involved in the space so that they know that this type of asset may implicate the securities laws and some other cryptoasset may not?

MR. MANCUSO: The simple answer to your Honor's question is the *Howey* analysis. And those that are not, which there is one that the commission has spoken to definitively is not, which is Bitcoin, do not meet the *Howey* element. I can't speak to all 250 assets that are currently traded.

THE COURT: Sir, you're not committing that the number is 12 or 13. It could be hundreds. But based on the commission's implementation of the *Howey* analysis, you have found 12 or 13 assets that meet what you understand to be the definition of securities.

MR. MANCUSO: We gave them as examples to the Court, that those are what we believe to be securities based on the *Howey* analysis that are being currently traded and have been traded for a number of years on the Coinbase platform.

However, we are not committing that it is limited to 12, but I also can't take a position on all 250 because, as your Honor is aware, this is a very fact-intensive analysis, and each token has to be looked at. As you can see from our complaint, we just gave a preview of 12 tokens and each token takes two pages, three pages. That the just the tip of the iceberg. There is certainly more evidence that we will get into when we are beyond the pleadings stage. I can't sit here and just determine whether we assess a specific asset to be a security unless we do a full *Howey* analysis. We have communicated that -- I'm sorry, your Honor.

THE COURT: I think you're about to say what I was about to say, which is, in terms of whether that's been communicated to the investing public and those involved in this space, you're suggesting *Howey* has been around forever, they should just know, and *Howey*, by its terms, even covers novel

assets that may or may not be securities, such as cryptoassets.

MR. MANCUSO: Yes, your Honor.

I would also add to that that the SEC has been explicit in that it said, you have to look at *Howey*.

Starting with the Dao report in 2017, that analysis used factors from *Howey* and explicitly applied them to cryptoassets, so it's beyond just that the investing or the public should know about *Howey*. SEC has said that cryptoassets can be viewed under this standard. And Coinbase has acknowledged that in their filings with the commission and documents that they have distributed to their shareholders that the cryptoassets that are being traded -- we note it in the complaint for these purposes that these cryptoassets that are being traded on our platform can be subject to regulation.

THE COURT: I think personally, and perhaps at this stage of the game my opinion matters, it seems to me you're ascribing a little too much importance to that. I have seen registration statements. I have seen filings in cases of this type. And there are a lot of eventualities and contingencies that are covered that do not themselves amount to admissions. Saying that some day someone may determine that something is a security is a different thing than acknowledging that something is a security. So, again, I don't want you to rely too much on that.

I am just trying to figure out how folks involved in

the industry can know that a particular cryptoasset with which they are involved is or is not going to be found at some later date by the commission to be a security.

MR. MANCUSO: They need to do an analysis of the cryptoassets that they allowed to trade on their platform or that they have issued. We see that the industry has done this. They have created, I believe they call it a CRC -- I forget what it stands for; crypto rating council -- where there is a number of market participants that have gotten together, and they have created I think what they call a scorecard, and they use the *Howey* analysis as part of that to determine how risky their cryptoassets are in terms of, I think it's like a zero to a five scale, and how risky they think it is for being considered a security.

The industry has been aware of this standard and these factors could be applied. There has been several district court cases that have applied them over the past couple of years and have found that some cryptoassets are securities. I understand your Honor --

THE COURT: One moment, please, sir. How many district court -- you gave me three. Are there more out there? I didn't understand there to be a wealth of case law on this issue.

MR. MANCUSO: It's under ten, I would say. Please don't hold me to that. It's not hundreds. I know that.

THE COURT: Fair enough. I appreciate the wiggle room you are giving yourself. Is Mr. Savitt correct that the three that you have identified really involve secondary market trading?

MR. MANCUSO: I believe Mr. Savitt's point was they don't involve --

THE COURT: I beg your pardon. You're exactly right. I have misspoken.

MR. MANCUSO: Those cases were brought against issuers, so Mr. Savitt is not wrong that in a direct context of those cases that the SEC brought enforcement actions against companies that were issuing cryptoassets and not -- they weren't traded.

However, the district courts in those cases, in response to arguments that, well, these assets are now being traded on a secondary platform, and therefore I believe the argument went that they are no longer securities, there is language that there is no distinction or it doesn't matter that they are now being traded on secondary platforms. My decision still stands.

I don't agree a hundred percent with Mr. Savitt's characterization of the *LBRY* decision because the Court does discuss secondary trading. I know he quoted from, I believe, a transcript from oral argument. But we all have access to the decision, and the Court does discuss secondary trading.

However, back to your Honor's question, Mr. Savitt is correct that that LBRY was not running an exchange or brokerage or clearing agency. They were issuing a cryptoasset that was found to be a security.

THE COURT: Thank you, sir.

Sir, you have mentioned that there are some small modest number of cases on the issue. At least one of them predates the issuance of CGI's registration statement, is that correct?

MR. MANCUSO: I don't have them all off the top of my head, your Honor. I can look up what is cited in our letter.

THE COURT: The Southern District of Florida *Bitconnect Securities Litigation* was 2019, per your letter. Will you agree with me on that?

MR. MANCUSO: Yes.

THE COURT: Am I correct that the CGI registration statement was sometime in 2021?

MR. MANCUSO: That's correct, your Honor.

THE COURT: The defendants tell me that at the time that the commission was evaluating the registration statement there were six cryptoassets being traded on the Coinbase platform that you now say qualify as securities. Is that correct?

MR. MANCUSO: Factually, yes, there was cryptoassets that were trading that are now part of enforcement action, yes.

THE COURT: Is there some significance that I should give, or maybe there is none, to the fact that the commission issued the S-1 and didn't say, hey, watch out, guys, you're engaging in securities laws violations?

What I believe the defense wants me to do is to intuit from the fact that you issued the registration statement, or at least another side of the commission issued the registration state, to intuit that they felt that whatever was going on there was OK, no one was in violation of the securities laws, and that we should all be surprised that two years later we are here. Please comment on that.

MR. MANCUSO: Sure. The short answer is no. Your Honor should take nothing from that.

THE COURT: Let me have a slightly longer answer.

MR. MANCUSO: Your Honor, I'll say that simply because the SEC allows a company to go public does not mean that the SEC is blessing the underlying business or the underlying business structure or saying that the underlying business structure is not in violation of the law.

The S-1 is about disclosures, and I don't have everything in front of me. We can fully brief all of the legal and factual implications that goes on with regard to an S-1 filing. But there is no way that an approval of a S-1 is a blessing of a company's entire business. In fact, there is no evidence being put forth that the SEC looked at specific assets

and made specific determinations and then gave Coinbase comfort that this would not later be found to be a security.

THE COURT: Let's just pause so I can just sort of get rid of the skepticism I currently have as I hear that answer.

I am not saying that the commission should be omniscient at the time it's evaluating a registration statement and that it should know all things. But I would have thought the commission was doing diligence into what Coinbase was doing, and somehow I thought that it would say, you know, you really shouldn't do this. This is violative of the securities laws, or we are kind of in some interesting unchartered territory here with respect to whether the assets on your platform are securities, so be forewarned that maybe some day there could be a problem.

I hear what you are saying, which is, I shouldn't give it any consideration and it doesn't absolve the defendants of any of the securities laws. Yet I'm just wondering why it is that the commission saw fit to press what they were doing, because that is kind of what they did by issuing the S-1, and that there not be any discussion about the possibility of violative conduct. Again, you may be right, but I am just viewing your answer with a measure of skepticism.

MR. MANCUSO: Understood, your Honor.

Respectfully, I would take issue again with the word blessing their conduct or their business. This is about

disclosures. In fact, and I think we lay it out in our complaint, that Coinbase disclosed in their S-1 that the risk that the assets that are being traded on their platform could be found to be securities, and that came from the process back and forth between --

THE COURT: You never could have said to them, hey, you guys need to register as a securities exchange. That was within the power of the SEC to do, was it not?

MR. MANCUSO: I can't really speak to that.

THE COURT: I think it was. I don't think anything stopped the commission from doing it. I am not suggesting, sir, that this is dispositive or that there is an estoppel issue. But it's not crazy in the Failla parlance for Coinbase to think that what they were doing was OK because it was exactly what you let them do when they issued the S-1. That's the point I'm making. You may say that they and I are reading too much into the issuance of the S-1.

MR. MANCUSO: I'd agree with that.

THE COURT: I might disagree with that, but I do understand.

Eventually, sir, we are going to get to the major questions doctrine, but let me ask you. You have heard me engage with Mr. Savitt in discussions about the arguments that they contemplate making. I have certainly seen your responses, at least as they are in writing. Is there something else that

you want me to know or do you wish to engage at a more granular level with any of the responses that Mr. Savitt gave me this morning?

MR. MANCUSO: Your Honor, if we are not going to talk about the major questions doctrine, you would like to talk about secondary trading or the reasons for moving to dismiss. If that was it, I will defer to my colleague to handle those.

THE COURT: Are you coming back for major questions doctrine?

MR. MANCUSO: I will be coming back, unless you want to hear about that now.

THE COURT: I will wait. Thank you so much.

MR. MANCUSO: Thank you, your Honor.

MR. MARGIDA: Thank you, your Honor.

I don't want to belabor this because I think the positions of the parties are fairly set out in the letters.

I do want to point out that what Coinbase is doing with respect to reading into *Howey* a contract requirement is very interesting. They acknowledge that *Howey* says an investment contract can be a contract transaction or a scheme, and in their letter they say the transaction or scheme, yeah, but associated contractual undertakings. Today I think Mr. Savitt's phrase was schemes of related contracts.

The SEC's position is that's just wrong as a matter of law. No court in 75 plus years has held that *Howey* requires a

common law contract. *Howey* itself said the paper or the financial instrument is incidental. Courts in this circuit, including *Gary Plastic* and *Glen-Arden*, have looked at what *Howey* compels, which is the economic reality of the transaction. They have looked at the series and collection of inducements, representations, what they are selling, the enterprise.

And Judge Castel in *Telegram* says, scheme is used in a descriptive, not a pejorative sense. And Coinbase seem to ignore the fact that courts are actually finding cryptoassets to be securities where there is no contract. *Balestra v. ATBCOIN* in this court is an example of that where there is no contract.

In *Telegram*, Judge Castel is very clear -- and I know it was in the context of, the Court found there was one continuous offering, but the Court also found that there is no ongoing -- there is no ongoing privity between what happens in like public market sales. So there is an initial offer to 175 initial purchasers and *Telegram* finds -- and this relates to the secondary market transaction argument -- *Telegram* envisioned that there would eventually be secondary sales, and there is no distinction -- I'll get to that point in a minute.

On *LBRY*, we think it speaks for itself. Putting aside any examination of the transcript, I think the Court itself draws no distinction between primary and secondary

transactions. The '33 and the '34 Acts draw no such distinction. There are no such distinctions drawn in other securities market contexts, and Coinbase offers no compelling reason why we should one here.

Commonality. I think Mr. Savitt was hitting on like investing in an enterprise. Commonality, as your Honor knows, is about tying -- if you're talking about horizontal commonality, it's tying the fortunes of investors together, and then strict vertical commonality is about tying the enterprise itself, the people who are running the platform or network or the issuers together with investors. We have alleged in our complaint, and they have to be taken as true at this stage, that those elements are satisfied.

The fortunes of an investor who buys a cryptoasset security, including one of the 13 that we have alleged here -- and, by the way, your Honor, the commission has spoken on other cryptoassets that are available that the commission thinks are securities. The *Wahi* litigation, insider trading litigation, named specific assets. Coinbase didn't delist any of those, except for one later when the relevant platform became defunct. We also identify in paragraph 124 of the complaint other assets that the commission has brought enforcement actions on.

The argument that the commission hasn't spoken until now with this complaint about assets being securities on Coinbase's platform is just not true.

I don't want to belabor this, but coming back to your Honor's question from earlier this morning about the reasonable expectation of profits based on the efforts of others, someone who purchases in an initial offering on a Monday, versus on a secondary platform the following week, has the same expectation of profit based on the representations of the issuers, the promoters and the developers, so I think that's pretty clearly alleged in our complaint as well.

If your Honor has other questions about the *Howey* related aspects, but I think our position is well set out, and we look forward to briefing the issues.

THE COURT: On the issue of staking, in listening to Mr. Savitt, I began thinking that the parties had completely different views of the staking program. Because the way it was being described to me by him suggested more. I believe he used the word administrative. I guess the defendants are suggesting that it's sort of a means of verifying trades and transactions and, again, something almost back officee, although there is perhaps a profit-generating element to it as well.

Is it that you just hold two different views as to what the staking program is? Has your position been clarified by Mr. Savitt's comments to me this morning? And if not, what's violative about the staking program?

MR. MARGIDA: I am really confused about Coinbase's decision to move for judgment on the pleadings with respect to

staking because I think -- and we include a specific *Howey* analysis, and our facts as alleged are supposed to be deemed true and reasonable inferences drawn in our favor.

With respect to your Honor's question about the reasonable efforts here for purposes of the third element of *Howey*, Coinbase argues that they are just IT services. There is no case that says IT services can't be entrepreneurial and managerial.

But putting that issue aside, what Coinbase does here is far more significant than what Coinbase is saying in its answer.

By the way, I don't think the SEC and Coinbase dispute much with respect to staking. I think it's how you characterize the efforts and whether investor assets are actually invested and there is a risk of loss. Our position is, at least for 12(c), we have alleged that they are put at risk. I think that's pretty clear. Whether the relevant staking protocol goes under, whether private keys associated with cryptoassets that are staked get lost, whether there is a cybersecurity incident, for a number of reasons as we have alleged.

But the efforts, what Coinbase does, first of all, it markets this as an investment opportunity. It says: Earn up to 6 percent for the respective assets. This is applying *Howey* to the economic reality based on the perspective of an

objectively reasonable investor looking at the facts and circumstances. If it walks like a duck and quacks like a duck, it's a duck. This is an investment scheme, a product that they are selling, and their efforts go to establishing the necessary links with the staking protocols which involves -- I think one witness testified during the investigation -- involves creating and implementing software to establish that, providing cybersecurity protections, actually operating the validator nodes, so pooling investor assets and then staking those at the validator nodes.

And Coinbase -- the way staking works is, the greater number of assets that are staked at a particular node, the higher the likelihood it is that that protocol will select, in this instance Coinbase, to actually validate transactions on the respective blockchain. That increases the success of the enterprise, and Coinbase does that.

They also do the actual staking. They receive the cryptoassets that they distribute, that they take their commission, so their fortunes are tied with investors. If the staking program succeeds, Coinbase succeeds.

And then the returns are the cryptoasset rewards that the protocols provide to be the investment returns, and those are done on a pro rata basis based on the amount of assets that the customer stakes.

I'm confused why they are moving on staking. I think

we have laid out why it satisfies the *Howey* test. There are issues of fact.

THE COURT: Excuse me for a moment, please. I just want to check my notes.

Mr. Margida, just so I'm clear, I think what I'm hearing you say is, as the commission understands the staking program, it is subject to the securities laws. If it turns out your understanding of the program is wrong, you have still alleged enough in the complaint, and I must accept your well-pleaded allegations and the inferences that can be drawn from them, and I still have to find, at least at this stage, that your conception of the staking program is the one I can consider, and your conception implicates the securities laws. Yes, sir?

MR. MARGIDA: That's our position with respect to Coinbase's proposed motion. Like I said, with respect to the merits, I don't think Coinbase disputes a whole lot, so I think we will be successful on the merits, but I know that's not your question.

THE COURT: That's not my question. Thank you.

Perhaps I can return to Mr. Mancuso and the question of the major questions doctrine. Thank you.

MR. MANCUSO: Sure, your Honor. Can I clarify something from our earlier discussion --

THE COURT: Of course.

MR. MANCUSO: -- that I should have picked up on before.

Your Honor was asking about Mr. Gensler and his statements to Congress, and I believe they were three weeks after he became commissioner. I just wanted to note for the Court that any individual commission or statement, as I am sure your Honor has heard before, does not represent a decision. It does not speak for the five-member commission. So only the five-member commission, after taking a vote and having a majority, can issue a statement on their behalf and bind the commission.

THE COURT: I think it's being presented to me, sir, for background information and optics.

But my larger question to you and your colleagues was the manner in which the commission has made determinations about whether and when cryptoassets are securities and the manner in which that has been communicated. I think we have discussed that today.

MR. MANCUSO: Understood. I just wanted to clarify that, your Honor.

THE COURT: It is so clarified, sir. Thank you.

MR. MANCUSO: Thank you.

THE COURT: Perhaps major questions doctrine.

MR. MANCUSO: Sure, your Honor.

Your Honor was correct earlier with regard to

identifying separation of powers. That's what this line of cases -- although the moniker major questions doctrine has only recently been announced, when you look at Chief Justice Roberts' opinion, I believe in *West Virginia*, he cites about six cases dating back to the 1990s that form this doctrine.

This doctrine, if you look at all these cases, which I am sure your Honor has at least perused them, they all involve regulation beyond what the agency was allowed by Congress. Not one of them involves enforcement.

What's going on here is, we are not seeking to regulate the entirety of the crypto industry. We are enforcing a violation of the securities law based on Coinbase's conduct. I think that that's a very important distinction, and we have to look at it in that context.

I think I said this before, but it's important and I am going to say it again. Coinbase's argument seems to be that if there is a violation of securities law by a crypto company or a crypto player in the sphere, there is no power to civilly or criminally enforce that violation based on the major questions doctrine. We think that's an incorrect reading of the case law.

THE COURT: The decision from the court two weeks ago in no way changes your analysis. Is there anything you wish to comment on or distinguish?

MR. MANCUSO: No. But I think it further supports our

argument in that in the *Biden v. Nebraska* case, you have the Department of Education, through its secretary, completely changing -- Chief Justice Roberts says that this was not the understanding of what that statute allowed previously. It was a modification of the student loan policy. It wasn't a wholesale forgiveness. That's just not applicable to the facts we have here.

THE COURT: Sir, if I could just push back slightly on something you said earlier, which has been sort of percolating while you've been talking, so excuse me.

I thought I heard you say a few sentences ago that the question was not whether the commission wanted to regulate the entire crypto industry but whether it wanted to regulate those assets that are found to be securities. Perhaps you can just restate that position, because I want to make sure I have it with greater clarity.

MR. MANCUSO: Sure. The commission regulates conduct that falls under the securities law, and we believe that Coinbase's conduct has violated the securities law. That's it. We are not looking to regulate through this action the entire crypto industry.

THE COURT: I guess I hear you. I am just wondering where we go with that because it seems to me, in trying to determine what conduct within the industry falls within the purview of the commission, it does sort of sound to me that you

have to consider all of the conduct in the industry.

I hear you saying, I do, that it's not a question of the commission purporting to regulate the entire cryptoasset industry. But I am just saying, there is a tension between making that argument and then having to determine in this rather unique space what are the things you actually get to regulate. That's my only point.

MR. MANCUSO: Understood.

THE COURT: Anything else you would like me to know, sir?

MR. MANCUSO: Not with regard to the major questions doctrine, no.

THE COURT: Fair enough. Perhaps I should take the hint from your last statement. Is there something else you wish to speak on? And then which of you gets to speak on the motion to strike that I am trying to persuade you not to file?

MR. MANCUSO: That would be myself, your Honor. We will move right to that.

THE COURT: If there is something else --

MR. MANCUSO: No.

MR. MARGIDA: Can I just say one thing on the fair-notice issue, unless your Honor is prepared to move forward?

THE COURT: I do not want to foreclose you from saying something, sir.

MR. MARGIDA: Thank you, your Honor. I'll be brief.

I just wanted to point out that with respect to the Dao report, paragraph 61 of the complaint --

THE COURT: Excuse me for calling it the Dao report. I appreciate that.

MR. MARGIDA: That's fine. It took me a couple of years to figure that out.

Paragraph 61 of the complaint identifies the Dao report and where it emphasizes the importance of complying with the registration provisions of the securities laws, including with respect to platforms.

The other thing I want to note about their fair-notice defense is that, under *Brigadoon Scotch* in the Second Circuit, it's untenable to find that an investment contract is unconstitutionally vague. Challenges in the cryptoassets space and elsewhere, on the basis that that term, investment contract, is vague, have failed, whether as applied or a facial challenge. We expect that to be true here. The only reason we are not moving to strike that defense now is because sometimes courts prefer to rule on that at the summary judgment stage.

Looking at whether the respective defendant had actual notice, we think it's pretty clear, and we have alleged in our complaint, that Coinbase has actual notice. They integrated *Howey* into their listing process. They disclosed the very risk that they would be found to be violating the securities laws.

Thank you, your Honor.

THE COURT: Thank you very much. Just give me a moment to take a note of that. Then I'll hear from Mr. Mancuso.

Let's take a 10-minute break. I will be back as soon as I can

(Recess)

THE COURT: I'm confident everyone has used the break to streamline what they want to say to me.

Mr. Mancuso, I believe it's you on the motion to strike that, I don't know if you know, I don't want you to file.

MR. MANCUSO: Understood, your Honor. If you will indulge me just briefly.

THE COURT: Briefly.

MR. MANCUSO: The reason we put it in our letter is because we believe that there is no daylight between your Honor's decision to deny defendants' motion with regard to the major questions doctrine and striking that affirmative defense. The standard is no question of fact, no question of law, and prejudice to the plaintiff, and we believe there are no facts at issue here. Obviously, Coinbase wouldn't have moved to dismiss it if they thought there was a factual issue that could change your Honor's decision on major questions.

THE COURT: I thought I just heard Mr. Savitt say a

moment ago that really the reason they weren't pushing the issue was because they think you are going to fall at the first hurdle and I don't even have to get to the issue of major questions doctrine, and that's sort of in the back pocket or in reserve in case something were to come up.

But go ahead. Keep going.

MR. MANCUSO: Understood. But they indicated, at least in their letter, that that is going to be part of their motion to dismiss, so we think it is ripe that the Court decides whether this is properly in the case or not. If the Court denies their 12(c) motion, it should be stricken as an affirmative defense. As I said before, the standard for the two doesn't seem to be that there is any daylight between them. It can be decided as a matter of law.

THE COURT: Perhaps I misunderstood Mr. Savitt. I thought what he was saying was, look, Failla, you can, just looking at the pleadings and materials you can consider, you can find, as a matter of law, that these things are not subject to regulation and therefore that the complaint falls apart.

But if, heaven for fend, you find that these things are possibly within the purview of the securities laws, then go to the major questions doctrine and basically decide that the commission can't do that because of either a change in position or an arrogation of power they don't have or some other reason. That's what I'm understanding.

I guess I am saying, why do I need to do the motion to strike if there are several places in which the major questions doctrine may come up. If it turns out that in none of those places does it succeed, then, again, I am still not sure there is going to be, for example, additional discovery or -- I don't know how it hurts you to have it in the case, but that's where you can help me.

MR. MANCUSO: Understood, your Honor.

We believe that every affirmative defense, if any other cases in this space are an indication, will be used to purportedly justify intrusive discovery into the SEC's internal communications and emails, and we think that an affirmative defense should be dismissed as a matter of law or it has insufficient legal basis, that it should be decided up front and should be out of this case as early as possible. We think if your Honor is treating this legal issue at this early stage based on -- I know their position -- I wasn't totally clear from their motion -- their motion letter how low on the food chain they may have felt the major questions doctrine is.

But as your Honor characterized what Mr. Savitt said, it may be their last argument, but it's still going to be their argument that our case should be dismissed on that basis.

We believe that the other direct arguments on *Howey* and secondary transactions will fail and that your Honor will have to rule on the major questions doctrine, and, therefore,

we are proposing moving to strike because we believe it's the same legal issue, and your Honor can decide at this early stage whether this theory of law in their affirmative defense is properly part of this case. That's the thinking and that's the reasoning.

Just very quickly, we are also planning to move to strike the equitable affirmative defenses that we believe have no basis in law, especially equitable estoppel, laches, and unclean hands, which I believe Judge Liman just ruled recently out of this court cannot be found against the Federal Government unless there is extreme extenuating circumstances of affirmative misconduct, which is not present in this case. I believe that is specifically with equitable estoppel.

And the cases that Mr. Savitt cites in his letter that we received last night are no different. Those are cases of extreme circumstances, if they were even held against the Federal Government.

That's the basis of our motion.

THE COURT: I thought for a moment there, sir, you were burying the lead because I heard the words intrusive discovery.

It's your belief, sir, if that these defenses go forward, the quantum of discovery sought by defendants from the commission will somehow change?

MR. MANCUSO: With regard to major questions and abuse

of discretion, certainly. We believe they will be used to justify what they seek. We will oppose them, even if they are still in the case. But we believe that discovery could be justified as being broader based on these affirmative defenses, yes. That would be our prejudice.

However, we understand the Court's position and your skepticism of this, and we would ask if we could take this back to the office and discuss it and possibly get back to your Honor about our decision whether to move forward or not.

THE COURT: Let me say this, lest I forget. I'm assuming, given the sheer number of people in the room, that someone is getting the transcript of this conference, so I am not going to impose someone the obligation of doing it.

I am also going to ask the parties when we break if the parties could meet and confer, in light of all the discussions we have had today, and propose a briefing schedule that accommodates one or both motions with a realistic time frame, and, with that, I'll sign it. I was going to give the parties a week to get back to me on that because I didn't know what folks' schedules were. That, I would hope, would give you the chance to talk to whomever you need to speak with.

Again, I can be skeptical, but it doesn't mean I am going to be closed-minded about it. If you want to persuade me, you're certainly welcome to try, and I do appreciate it, but I did just -- I think what I'm reacting from, and it's

something I have seen recently, is, I believe, and you will excuse me if I'm misquoting this, but I believe there is a decision from Judge McMahon in which I think she says that motions to strike affirmative defenses are the stupidest thing ever. I'm kind of quoting that, but I'm kind of just giving the gist. Maybe I am just translating my Judge McMahon knowledge. I think that's probably just in my head. So thank you, sir. Much appreciated.

Anything else?

MR. MANCUSO: One thing. We did meet and confer with counsel a few days ago about a briefing schedule.

THE COURT: I knew you had, but you hadn't heard me by then. I did not know if folks wanted to rethink, in light of what I've said.

MR. MANCUSO: If Coinbase's letter is any indication, I know they hadn't heard you in person, we would like to discuss with them if they are rethinking it.

MR. PEIKIN: Your Honor, of course we will meet and confer, in light of what you said today.

THE COURT: Mr. Peikin, I thank you very much.

MR. MANCUSO: Thank you, your Honor.

THE COURT: If I can just ask the folks at the front table from whom I have not heard.

Anything you want to add? You are here. You are allowed to talk.

MS. STEWART: No, your Honor. Thank you very much.

MR. KURUVILLA: No, your Honor. Thank you for the opportunity.

THE COURT: Much appreciated.

From my friends at the back table, does someone want to be heard in reply?

Mr. Peikin, you are taking over?

MR. PEIKIN: I don't think I am taking over.

THE COURT: Let me not step into that thicket.

Would you like to add to what Mr. Savitt said?

MR. PEIKIN: I just want to make two what I think will be brief points.

You asked the people at the front table whether the commission has spoken about whether Bitcoin or Ethereum are securities, and what you were told was the commission has only spoken about whether Bitcoin is a security.

On June 14, 2018, a person named Bill Hinman, who was then the director of corporation finance, gave a speech called *When Gary met Howey Plastics*, and it's a speech that's gotten a lot of attention, and everybody sitting at the front table is very familiar.

THE COURT: I think I actually have it on my screen right now.

MR. PEIKINL: In that speech Mr. Hinman said -- I'm reading from it -- putting aside the fundraising that

accompanied the creation of Ether, based on my understanding of the present state of Ether, the Ethereum network and its decentralized structure, current offers and sales of Ether are not securities transactions.

Now, this case is not about Ether, but I think the position of the people at the front table reflects on their position about Mr. Gensler's testimony, under oath, before Congress, in which -- and I think a fair reading of what he said is not that he was talking about Bitcoin or he was new on the job. He was saying that platforms like Coinbase's need congressional authorization for them to be regulated. That's the gravamen of what he said.

I know the commission wishes that he hadn't said things like that, because it impacts their position in this litigation, but you can't just will away things like what Mr. Hinman said and what Chair Gensler testified, and I think those things are going to be important.

THE COURT: Fair enough. Perhaps I misspoke earlier in saying that I understood it was being presented to me for optics and background information. You are not making an estoppel argument, or are you?

MR. PEIKIN: I think we will have to see how that plays out, your Honor, but I think it certainly is relevant.

I want to just raise one other point, which is, you reflected some discomfort with the idea that the commission

could authorize Coinbase's S-1 and allow it to become public, and your gut suggested to you that there seems to be something wrong with the idea that that's of no legal import, as the commission now says. The fact that they declare a registration statement effective says nothing about whether they are blessing, or maybe some less strong word, proving of the underlying business.

The fact is, other judges have had the exact same instinct that you have had and have said, in numerous instances, the fact that the commission reviews and authorizes a registration statement is of some legal weight.

It's clear that the commission has repeatedly refused to review authorized registration statements for companies because of concerns about the legality about their underlying business. It has done that repeatedly with cannabis companies. It did it repeatedly with betting companies. And here securities registration is the core competency of this agency.

So the idea that the commission could authorize the offer and sale of Coinbase's securities to millions of retail investors and then turn around and flip-flop and say, oh, sorry, you are running a completely illegal business --

THE COURT: But not merely that. An S-1 registration statement for Coinbase to provide the very platform that apparently I'm being told today violates the securities laws. That's what you're really saying.

MR. PEIKIN: Yes. All I'm just saying, to the extent that you have some core discomfort with the idea that this counts for nothing, we think your instinct is correct.

THE COURT: Thank you.

MR. SAVITT: Your Honor, if I might just add one or two points.

THE COURT: Of course.

And I'm not at all hurrying you up, sir. I am just letting the parties know that in about ten minutes I have an arraignment. I am sure we will be done by then.

Thank you, sir.

MR. SAVITT: Thank you, your Honor. We will be very quick.

I did want to pick up on Mr. Peikin's point regarding Bitcoin and Ether. Because while it's true that in some important respect the remark of Chair Gensler go to equities and optics and potentially the major question doctrine, the following point does not. It's an important analytical one.

Bitcoin and Ether are commodities. We think that's conceded. When a Coinbase customer buys tokens on Coinbase, the ones at issue in this lawsuit, she is buying no more and no fewer rights or interests than when she buys any other token, including Ether and Bitcoin.

There is no principal basis, no legal basis, no economic basis for the SEC's distinction between the tokens

that we now know are commodities beyond the SEC's regulatory power, beyond its remand on the one hand and those that it claims in this lawsuit are securities, and that is a fundamental analytical point that we hope to elaborate for the Court in our briefing.

Your Honor, you asked in your colloquy with plaintiff here how do people in the space know what is a security and what's not in the SEC's contemplation. The candid answer is, they don't. No one has any idea. You find out when you get a backwards-looking, after-the-fact enforcement action, the commission having declined, over the repeated requests, among others, of our client to promulgate rules that would permit at least the industry to understand the SEC's position.

I briefly just wanted to make sure that the Court had the latest information on the *LBRY* case because it was a decision two days ago. I just didn't want it to be left with any suggestion that that case bears on the secondary trading issue, and I'm, admittedly, with a couple of ellipses to make this sensible to the Court, but what the judge said there was, given --

THE COURT: Slow down, please. I know you're trying to be attentive to my schedule, but I want to be sure that we get what we are all saying.

MR. SAVITT: Thank you, your Honor. My apologies.

What the Court said is, given the SEC's litigating

posture, the issue of secondary trading has not been litigated in this case. I take no position whether the registration requirement applies to secondary market offerings and goes on to hold, therefore, that the remedial order in that case can't apply here.

I have some copies of this decision, if it would be useful for me to hand them up to the Court.

THE COURT: Yes, they would be welcome. Thank you.

Ms. Noriega, if you would accept them from Mr. Savitt.

MR. SAVITT: I think the final point we just wanted to make, and it's in the nature, your Honor, of a clarification, respectful as we are of the Court's time, is that our friends on the other side mentioned the *Balestra* case. That is one that we think is not applicable to the proposition for which it was stated.

THE COURT: You weren't going to say that it was wrongly decided.

MR. SAVITT: It may or may not be wrongly decided, but I was going to make the point that it was an issuer case. It was an ICO case, not a secondary trading case. And contrary to what we heard in the letter submitted a few days ago and this morning, the proposition that there was no contract in that case, no undertaking, isn't so. The Court found that in exchange for ICO funds, the issuer promised to launch and improve the ATB blockchain. Real attention to the various

decisions that have come down is going to be important.

I am certain, with a final point, picking up on a theme that our good friend on the other side made about the word scheme, we are going to be litigating that point, but we really are confident, your Honor, when the law and precedent is put before the Court, you will see that the bedrock principle remains. This isn't going to be surprising linguistically. To have an investment contract, you got to have a contract of some sort, and that is what the law will show when we are able to present it to your Honor.

Happy, of course, to take any further questions that your Honor might have.

THE COURT: At the very end of my discussions with Mr. Mancuso we spoke about the motion to strike, and I have done my diplomatic best to express some concerns about it. Perhaps you want to remain silent, thinking that it can only hurt the matter, but if you want to speak on the motion to strike issue, I will hear from you.

MR. SAVITT: Thank you, your Honor.

Our inclination on that is to try and work with plaintiff here to see if we can come to an agreement regarding whether the motion ought to go forward and, if it ought to go forward, how it should be presented.

We don't take any position whether the motion should happen. We agree with the Court that it is highly unlikely to

be granted and is probably not incremental to all the stuff that we have to get done over the next bit of time.

THE COURT: Thank you.

I should end, and I perhaps should have began this way, by thanking those of you who have spoken to me this morning for the preparation that you have undertaken. It's not always the case that I have oral argument, and it's certainly not always the case that I have it at the beginning of motion practice. But you were all very well prepared, and I'm grateful for that because it allows me to situate myself better for any proceedings in this case going forward.

Also, I have a sense that somewhere in the audience are associates or more junior folks who have given their lives for the papers that I have received, and know that your work was very much appreciated. Thank you very much, even those who of you who did not speak.

I am asking the parties to get together and meet and confer about a schedule, about what motions we are having, what time schedule we are having them on, and what reasonable, reasonable page limits are necessary to adequately express these motions. I appreciate it. Mr. Savitt's comment about my three-page letters, it's just because if I don't have those limits, I get ridiculous submissions. Please try so hard not to ask me for 50-page briefs. Also please don't put everything in footnotes.

Unless there is anything else that anyone wants me to know, I'll let you go to have that meet and confer and to go forward with this case with my thanks.

Sir.

MR. MARGIDA: I have to say, I disagree with most of what Mr. Savitt and Mr. Peikin said, but I know --

THE COURT: I am not shocked.

MR. MARGIDA: I just want to put that out there. We have --

THE COURT: Government disagrees. SEC disagrees. Understood. I'm writing it down.

MR. MARGIDA: Thank you, your Honor.

MR. MANCUSO: Your Honor, when would you like to hear from us about the briefing schedule?

THE COURT: One week, please.

MR. MANCUSO: Can do.

THE COURT: Thank you, all. Take care, everyone.

We are adjourned.

(Adjourned)