

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE : Case No.: 23-cv-4738  
COMMISSION, :  
Plaintiff, :  
v. :  
COINBASE, INC. and COINBASE : New York, New York  
GLOBAL INC., : September 5, 2024  
Defendants.:  
-----:

TRANSCRIPT OF STATUS CONFERENCE HEARING  
BEFORE THE HONORABLE KATHERINE POLK FAILLA  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiff: U.S. SECURITIES AND EXCHANGE  
COMMISSION  
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1 THE DEPUTY CLERK: Your Honor, this is in  
2 the matter of SEC versus Coinbase, Inc, et al.

3 Counsel, please state your name for the  
4 record, beginning with the SEC.

5 MR. TENREIRO: Good afternoon, Your Honor.  
6 This is Jorge Tenreiro on behalf of the Securities  
7 and Exchange Commission.

8 THE COURT: Good afternoon, sir. And I am  
9 aware that you have colleagues with you  
10 participating on the line. I thank them all for  
11 appearing.

12 Representing the Coinbase entities, please.

13 MR. SCHWARTZ: Good afternoon, Your Honor.  
14 Kevin Schwartz here from Wachtell, Lipton on behalf  
15 of Coinbase.

16 THE COURT: All right. Thank you very  
17 much. And I understand that you have colleagues as  
18 well from the Wachtell and SEC firms, and I thank  
19 them for appearing.

20 After we met yesterday, I thought and  
21 thought some more about our discussions, and I  
22 drafted an oral decision last night and finalized  
23 it. Well, finalized it in advance of this  
24 conference. So I am going to read it into the  
25 record and I will ask the parties, someone can

1 decide who, to obtain a transcript of this decision  
2 at whatever speed you think is appropriate.

3 I will issue an order later today. It may  
4 not get docketed until tomorrow, but it's only a  
5 bottom line order that reflects what happened and  
6 not the reasons why.

7 Let me begin, as I always should, by  
8 thanking you for your helpful and comprehensive  
9 submissions in connection with the motion to compel  
10 that the Coinbase entities filed. I also  
11 appreciated your availability for oral clarification  
12 of the points in dispute, which was easier for me  
13 than seeking supplemental briefing.

14 And let me just note, because I feel like  
15 it, that I appreciate it as well, and I continue to  
16 appreciate the level of advocacy, written and oral,  
17 that I get in this case. It is great for me and it  
18 is great for my clerks to see how real lawyering is  
19 done. So I thank you for that.

20 Separately, I'm confirming orally that in  
21 light of certain representations made by counsel for  
22 the SEC, Coinbase is no longer pursuing its request  
23 to compel searches of Mr. Gensler's personal e-mail  
24 accounts and devices.

25 Now, for the reasons I'm about to set

1       forth, I am granting in substantial part the  
2       remainder of Coinbase's motion to compel.  However,  
3       in a manner that will soon become clear, I took to  
4       heart the statements of Coinbase's counsel about  
5       their sincere desire to work with the SEC to address  
6       certain search terms that yielded large numbers of  
7       potentially irrelevant documents.  I am also mindful  
8       of the time that the SEC has spent already in  
9       producing and logging the discovery productions  
10      undertaken to date.  I have no reason to discredit  
11      their estimates of the amount of work it would take  
12      to comply with Coinbase's request for production in  
13      their current state.

14               Now, I also want to say at the outset that  
15      though I gave very serious consideration to the  
16      Commission's request, I am requiring that responsive  
17      documents be either produced or logged, and that the  
18      logs be categorical but include metadata  
19      information.

20               Understanding the arguments that were made  
21      to me, understanding that some judges have concluded  
22      otherwise, it is my view that inclusion of the  
23      metadata is appropriate and will give the defense  
24      the information it needs to challenge, as  
25      appropriate, the SEC's privilege assertions.

1           Turning now to the analysis, having left  
2 these preliminary points behind, I'm not going to  
3 read into the record the relevant legal standards.  
4 I think the parties do not dispute those standards.  
5 If you disagree, let me know afterwards and I'll  
6 give you the case law in a separate written or oral  
7 supplement.

8           Instead, as I previewed for the parties, my  
9 focus has been balancing the relevance of the  
10 materials sought by Coinbase with the difficulty for  
11 the SEC in isolating and reviewing that material.  
12 Or, if you want to do this a little bit more  
13 metaphorically, the likelihood that a whole lot of  
14 haystacks will have to be reviewed in order to find  
15 a few needles.

16           So, on this point, let me note that I do  
17 not agree with the SEC's foundational premises that  
18 the facts relevant to the determination of  
19 Coinbase's liability, or not, are unlikely to be in  
20 serious dispute. Nor do I agree with the premise  
21 that the evidence sought by Coinbase is for that  
22 reason, irrelevant or somehow disproportionate.

23           Beginning with the answer and continuing  
24 with the motion for judgment on the pleading  
25 submissions, Coinbase has explained in considerable

1 detail why it believes that the SEC's position on  
2 the application of the securities laws to digital  
3 assets isn't about faith, and conversely, why  
4 reasonable market participants could not fairly have  
5 been aware of the SEC's current position.

6 In other words, the relevant facts  
7 concerning Coinbase's liability are, and remain very  
8 much in dispute. What is more, I agree with  
9 Coinbase that it should be able to defend itself  
10 against these very significant charges by obtaining  
11 at least some of the evidence it seeks in discovery.  
12 And as I have hinted at in the past, there's a  
13 degree to which the SEC is the architect of  
14 Coinbase's current discovery demands. By pleading  
15 the complaint as it did, it is the SEC who set the  
16 parameters of the universe of permissible discovery.

17 And let me then turn to those permissible  
18 areas of discovery. I'll begin with what we've  
19 termed the Howie issue, the Howie discovery, and I  
20 agree with Coinbase that it is entitled to discovery  
21 on that issue. I think Coinbase is entitled to the  
22 majority of the search terms and the majority of the  
23 custodians that were put forward to the SEC and that  
24 were used by the SEC for the test runs discussed in  
25 the SEC's opposition papers.

1           As Judge Netburn noted, in allowing  
2 analogous discovery in the Ripple litigation, this  
3 quantum of discovery is reasonable for an incredibly  
4 high stakes, high value litigation. However, and  
5 all of that being said, in recognition of the  
6 burdens that have been cited by the SEC in complying  
7 with such a request in its current form, I offer  
8 three provisos.

9           First, I am not requiring the Commissioners  
10 themselves to be searched as custodians, because I  
11 agree with the SEC attorneys that of the putative  
12 custodians listed, the Commissioners are among the  
13 least likely to have responsive information that  
14 wouldn't also be held by one of the other  
15 custodians.

16           Now, if the parties wish, they can agree to  
17 drop other custodians and keep in the Commissioners.  
18 But this Court concluded that it was too much to  
19 permit searches of all 22 e-mail accounts or  
20 custodian accounts, and this seemed like -- still  
21 seems like a sensible line of demarcation.

22           Second, I am not requiring the SEC to  
23 produce purely intra-agency communications like  
24 e-mails sent from sec.gov to sec.gov addresses  
25 unless the communications also include attachments,

1 including but not limited to memoranda, PowerPoint  
2 decks and materials received from third parties.

3 In part, and I want to make this clear,  
4 this restriction is being imposed to limit the  
5 number of false positives. And I'm using that term  
6 to refer to ultimately non-responsive documents that  
7 end up being included among the hits. I recognize  
8 the possibility that a responsive document may elude  
9 production as a result of this restriction, but in  
10 my estimation, the number of false positives that  
11 would otherwise ensue would render such searches  
12 disproportionate under the Federal Rules of Civil  
13 Procedure.

14 Now, also in part, I am doing this because  
15 I recognize that most, if not all of these  
16 documents, would be subject to deliberative process  
17 or similar privileges. I'm declining to order their  
18 production streamlined, the generation of the SEC's  
19 privilege log.

20 Third, the third proviso is that I am  
21 ordering the parties to meet and confer to address  
22 some of the searches that yielded an outsized number  
23 of hits in order to see if there's a way to modify  
24 the search terms and thereby reduce the number of  
25 false positives. I've been looking in particular at

1 Exhibit B to Mr. Margida's declaration. And if you  
2 look at the 10th through 18th entries, they generate  
3 a striking number of hits. I'm certain that not all  
4 of these are responsive.

5 Thinking out loud for a moment, I would  
6 probably keep the Crypto and Howie and the digital  
7 asset and Howie searches as they are because of the  
8 potential criticality of the Howie case and analysis  
9 to the issues in dispute here. But I think the  
10 other searches in this section might benefit from  
11 additional limitations, if possible.

12 And ones I'm thinking of are things like  
13 within a certain number of words, like ten words, or  
14 within the same sentence. And then later on in Mr.  
15 Margida's chart, there's a search term "flow" that  
16 generates an outsized number of hits. I have to  
17 believe that there are further search terms that  
18 could be added to ensure that hits can turn the  
19 particular token or ecosystem, and not something  
20 more generic.

21 So I am asking you, I guess, indeed, I am  
22 instructing you to meet and confer on these issues.  
23 And if you can agree on further restrictions, great.  
24 And if you can't agree, fine. Send me a joint  
25 letter with your competing provisions. No argument,

1 please, and I'll decide it promptly.

2           And then, as I mentioned a little while  
3 ago, I am directing the SEC to produce or log the  
4 resulting documents, responsive documents.

5           On the fair notice issue, however, I am  
6 coming out differently, at least at this stage.  
7 Now, contrary to the SEC's initial position, I don't  
8 believe this issue was decided by my motion for  
9 judgment on the pleadings opinion, and I do believe  
10 Coinbase is entitled to raise this as a defense.  
11 However, my analysis of the motion to compel aligns  
12 more with that of Judge Barbadoro in the LBRY case.  
13 The fair notice inquiry is an objective standard.  
14 And while I can admit of the possibilities that  
15 there might be probative evidence within the SEC's  
16 files, it is here that I think the amount of effort  
17 that would have to be expended by the SEC and the  
18 likelihood of false positives would render the  
19 effort disproportionate to the possible results.

20           I did note, however, you heard me use the  
21 term "at least at this stage." I did so for a  
22 reason. If other productions from the SEC suggest  
23 that there is an easily identifiable cache of  
24 relevant documents, I might revisit the issue.

25           Let me also note in this regard that I took

1 seriously Mr. Schwartz's point that there could well  
2 be a degree of overlap between the responsive to  
3 Howie production and the responsive to fair notice  
4 production. The conclusion he draws is that the  
5 incremental -- and yes, I use that term "effort" in  
6 searching those terms is small enough to merit their  
7 inclusion. And I'm actually coming out of the  
8 converse position, which is that Coinbase will  
9 obtain enough information from the Howie production  
10 to make their fair notice arguments to me, and, if  
11 appropriate, to make a supplemental motion to  
12 compel.

13           Accordingly, I'm not compelling production  
14 of documents using the fair notice search terms that  
15 I saw listed in Exhibit B. And I think that leaves  
16 one issue that was only briefly touched on by the  
17 parties in their briefing. That's request for  
18 production 27, which requested documents concerning  
19 Coinbase's public listing. I am granting that  
20 motion to compel production or logging of this  
21 information subject to the provisos I've just  
22 described; limits on custodians, limits on the  
23 production of purely intra agency communications,  
24 and an expectation that the parties can agree on a  
25 limited number of search terms to run through the

1 accounts of a limited number or the limited number  
2 of custodians.

3 Now, I believe that resolves the open  
4 issues. Let me please confirm with the parties that  
5 that is the case.

6 Mr. Tenreiro, is there anything I --  
7 actually, let me please begin with Mr. Schwartz,  
8 because it is Coinbase's motion. Is there anything  
9 I've left open?

10 MR. SCHWARTZ: No, Your Honor. Your Honor,  
11 this is Kevin Schwartz here. Thank you very much  
12 for taking us through all that. I think that  
13 covered all of the many topics we discussed  
14 yesterday, and we really appreciate it.

15 THE COURT: You have my thanks.

16 Mr. Tenreiro, is there anything I've  
17 omitted from your perspective, sir?

18 MR. TENREIRO: Your Honor, I wonder if the  
19 Court had, and maybe it'll be something we'll have  
20 to clarify later, but when the Court referred to the  
21 Howie term and the fair notice terms, was there a  
22 delineation there? That might help us in our own  
23 meet and confer process, rather than coming back to  
24 you.

25 THE COURT: Okay. Sure. If you'll just

1 please give me a moment. I need to -- I just, of  
2 course, filed that away, which is why you need to  
3 hear it.

4 MR. TENREIRO: Sorry.

5 THE COURT: No, not at all.

6 MR. TENREIRO: Sorry.

7 THE COURT: No, no, please don't apologize.  
8 I'm looking at Docket Entry 151-2, it is the  
9 attachment B to Mr. Margida's declaration. It's  
10 called the Coinbase search report. That's what I  
11 had been working from. And I had understood, for  
12 example, that perhaps the first entry, crypto and  
13 fair notice, going down to at least digital asset  
14 and confusion, were things that were designed to  
15 address the fair notice inquiry. I understood the  
16 other things to be Howie test related. And those  
17 were the delineations we were using yesterday.

18 If I can be a little bit more precise, my  
19 understanding from yesterday's conference was that  
20 there were one or two proposed search strings that  
21 were given by Coinbase to the Commission, and that  
22 the Commission wasn't able to run them sort of as a  
23 bunch, but had to break them out in the way they are  
24 here. So that's what -- when I was thinking of  
25 taking things out for fair notice, what I was

1 thinking about were the first nine or so entries in  
2 attachment B. If the parties hold a different view,  
3 I will certainly let you have that debate. But  
4 that's what I was thinking about when I was issuing  
5 the decision.

6 Does that clarify the point, Mr. Tenreiro?

7 MR. TENREIRO: Yes, Your Honor. And I  
8 think you also preempted my next question, which is,  
9 if we have a different view of that, I guess maybe  
10 the first thing to do is discuss it with Coinbase  
11 and then come back if we can. There's one there  
12 that I think may be -- that we maybe disagree on,  
13 but I'm fine to discuss it with them, if that's the  
14 Court's preference.

15 THE COURT: It is the Court's preference.  
16 Rather than having it in this conversation, I think  
17 it is my preference. And I'm going to tell myself  
18 that I should be more optimistic than I was  
19 yesterday in thinking about the parties' ability to  
20 work through these things.

21 Now, let me say this, because it's sort of  
22 the elephant in the room. I know there are  
23 discovery deadlines. Someone's going to tell me  
24 that they can't be met. I get it. But I at least  
25 want you to have these really robust discussions

1 with each other before you come back to me to start  
2 talking about those issues. So I'm not unmindful of  
3 that. I'm not unmindful that there's extra work,  
4 and that may result in a moving of the deadlines.  
5 But for now, you needed an answer to this motion to  
6 compel and you have it.

7 All right. With that, I'll let you go and  
8 do other things, I'm sure more exciting things. I  
9 thank you very much for your time again, and I'll  
10 hear from you as appropriate.

11 We are adjourned.

12 MR. SCHWARTZ: Thank you, Your Honor.

13 MR. TENREIRO: Thank you.

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