

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 SECURITIES AND EXCHANGE
5 COMMISSION,

6 Plaintiff,

7 v.

23 CV 4738 (KPF)

8 COINBASE, INC. and COINBASE
9 GLOBAL, INC.,

10 Defendants.

Conference

11 -----x
12 New York, N.Y.
13 July 13, 2023
14 10:15 a.m.

15 Before:

16 HON. KATHERINE POLK FAILLA,

17 District Judge

18 APPEARANCES

19 NICHOLAS MARGIDA

20 PETER MANCUSO

21 LADAN STEWART

22 BEN KURUVILLA

23 Attorneys for Plaintiff

24 WACHTELL LIPTON ROSEN & KATZ

25 Attorneys for Defendants

BY: WILLIAM SAVITT

-and-

SULLIVAN & CROMWELL, LLP

BY: STEVEN R. PEIKIN

1 (Case called)

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

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

6 THE COURT: Good morning.

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

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

11 THE COURT: Good morning to each of you.

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

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

15 THE COURT: Good morning.

16 Mr. Peikin.

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

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

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

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

1 do two things.

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

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

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

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

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

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

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

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

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

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

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

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

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

7 MR. MARGIDA: Thank you, your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 MR. MARGIDA: That's helpful.

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

25 The Exchange Act requirements cannot be viewed as just

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

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

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

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

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

25 Please continue, sir.

1 MR. MARGIDA: Sure, your Honor.

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

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

21 THE COURT: Thank you very much.

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

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

1 that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 THE COURT: Of course.

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

25 The commission has claimed that certain of the tokens

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

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

14 Do I understand that correctly?

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

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

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

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

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

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

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

25 First, our position is not that something that trades

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

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

11 I'm warming to your question, your Honor.

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

13 MR. SAVITT: I will get to it.

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

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

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

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

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

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

1 and securities.

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

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

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

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

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

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

9 MR. SAVITT: Thank you, your Honor.

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

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

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

1 much.

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

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

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

25 Is there anything else that you want me to know about

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

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

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

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

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

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

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

1 that. Thank you.

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

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

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

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

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

1 function.

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

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

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

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

21 MR. SAVITT: Thank you, your Honor.

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

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

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

18 Chair Gensler's remarks that there was not adequate
19 regulatory authority over cryptoexchanges just two years ago we
20 think is very powerful evidence that what we have now is an
21 expansion of authority, precisely the kind of expansion of
22 authority that was called out in many of the cases involving
23 the major questions doctrine, including the *Nebraska* case, page
24 6 of the slip op.

25 And there is important analogies here to what's come

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

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

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

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

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

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

9 THE COURT: Thank you, sir.

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

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

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

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

25 So my first question is really one of just scope of

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

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

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

7 MR. MANCUSO: Thank you, your Honor.

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

13 12(c) is basically a 12(b)(6) motion, but that the
14 Court can consider pleadings on both sides, those that are
15 alleged in the answer, as well as information that judicial
16 notice could take account of, as well as any documents or
17 evidence that's integral to the pleadings.

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

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

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

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

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

1 regulation of cryptoassets?

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

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

13 THE COURT: I have.

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

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

25 Mr. Gensler said a couple of things about the

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

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

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

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

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

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

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

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

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

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

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

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

10 However, we are not committing that it is limited to
11 12, but I also can't take a position on all 250 because, as
12 your Honor is aware, this is a very fact-intensive analysis,
13 and each token has to be looked at. As you can see from our
14 complaint, we just gave a preview of 12 tokens and each token
15 takes two pages, three pages. That the just the tip of the
16 iceberg. There is certainly more evidence that we will get
17 into when we are beyond the pleadings stage. I can't sit here
18 and just determine whether we assess a specific asset to be a
19 security unless we do a full *Howey* analysis. We have
20 communicated that -- I'm sorry, your Honor.

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

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

2 MR. MANCUSO: Yes, your Honor.

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

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

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

25 I am just trying to figure out how folks involved in

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

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

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

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

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

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

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

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

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

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

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

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

5 THE COURT: Thank you, sir.

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

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

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

15 MR. MANCUSO: Yes.

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

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

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

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

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

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

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

14 THE COURT: Let me have a slightly longer answer.

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

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

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

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

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

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

23 MR. MANCUSO: Understood, your Honor.

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

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

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

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

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

18 MR. MANCUSO: I'd agree with that.

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

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

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

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

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

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

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

13 MR. MANCUSO: Thank you, your Honor.

14 MR. MARGIDA: Thank you, your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 THE COURT: Of course.

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

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

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

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

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

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

22 MR. MANCUSO: Thank you.

23 THE COURT: Perhaps major questions doctrine.

24 MR. MANCUSO: Sure, your Honor.

25 Your Honor was correct earlier with regard to

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

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

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

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

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

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

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

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

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

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

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

1 have to consider all of the conduct in the industry.

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

8 MR. MANCUSO: Understood.

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

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

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

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

19 THE COURT: If there is something else --

20 MR. MANCUSO: No.

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

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

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

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

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

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

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

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

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

1 Thank you, your Honor.

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

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

7 (Recess)

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

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

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

15 THE COURT: Briefly.

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

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

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

6 But go ahead. Keep going.

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

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

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

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

8 MR. MANCUSO: Understood, your Honor.

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

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

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

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

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

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

18 That's the basis of our motion.

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

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

25 MR. MANCUSO: With regard to major questions and abuse

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

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

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

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

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

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

9 Anything else?

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

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

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

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

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

21 MR. MANCUSO: Thank you, your Honor.

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

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

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

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

4 THE COURT: Much appreciated.

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

7 Mr. Peikin, you are taking over?

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

9 THE COURT: Let me not step into that thicket.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 THE COURT: Thank you.

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

7 THE COURT: Of course.

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

11 Thank you, sir.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 decisions that have come down is going to be important.

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

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

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

19 MR. SAVITT: Thank you, your Honor.

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

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

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

3 THE COURT: Thank you.

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

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

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

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

4 Sir.

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

7 THE COURT: I am not shocked.

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

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

12 MR. MARGIDA: Thank you, your Honor.

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

15 THE COURT: One week, please.

16 MR. MANCUSO: Can do.

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

18 We are adjourned.

19 (Adjourned)

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