Fear the Reaper – FinTech and Digital Assets Litigation

Richard B. Levin, Matthew G. Lindenbaum, Robert L. Lindholm, and Jeffrey M. Kelly

October 1, 2024

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Agenda

- **Regulatory Authority and Digital Assets**
  - A brief overview of the primary sources of regulatory authority governing the digital assets industry in the United States.
- **Precursor Lawsuits in the Digital Assets Industry**
  - Lawsuits brought by the SEC against the digital assets industry participants, such as Terraform Labs and Ripple, resulted in mixed rulings for the SEC and are shaping the regulatory environment for FinTech companies and the digital assets industry.
- ***SEC v. Binance*, *SEC v. Coinbase*, and Recent Regulatory Proceedings**
  - The SEC's claims against Binance and Coinbase have survived motions to dismiss. How do these preliminary rulings and endorsements of the broader reading of the *Howey* test applied in the *Terraform Labs* case impact the digital assets industry?
- **Recent Regulatory Probes and Wells Notices**
  - Ethereum developers and others continue to receive investigatory probes and Wells notices. What does this mean and how can the digital assets industry navigate these inquiries?
- **The Digital Asset Industry Strikes Back?**
  - In addition to proceedings brought by the SEC, the digital assets industry is challenging the SEC's regulatory authority. How have these actions clarified or impacted the rules governing the digital assets industry?

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Regulatory Authority and Digital Assets

Brief synopsis of regulatory authority (primarily SEC) and concepts related to recent litigation.

SEC - Regulatory Authority

- Independent federal agency, established pursuant to the Securities Exchange Act of 1934
- Five Commissioners – Three from the party of the President and two from the other party
- Large – approximately 4800 employees, as reported in 2022
- Responsibilities
  - Protecting investors
  - Maintaining fair, orderly, and efficient markets
  - Facilitating capital formation

U.S. Securities and Exchange Commission

What are Digital Assets?

- For purposes of this presentation we use the term “digital asset” in the same manner as the SEC to refer to "*an asset that is issued and transferred using distributed ledger or blockchain technology*.”
- Statement on Digital Asset Securities Issuance and Trading, Division of Corporation Finance, Division of Investment Management, and Division of Trading and Markets, SEC (Nov. 16, 2018).
- As the SEC has noted, digital assets include, but are not limited to virtual currencies, coins, and tokens.
- A digital asset may in certain instances be deemed a security under the federal securities laws.
- While not defined in the securities laws, the SEC often refers to digital assets that are securities as a “digital asset securities.”
- **The definition of what is a security in the digital asset space has resulted in a considerable amount litigation with the SEC and debate in Congress.**

What are Digital Asset Securities?

- The definitions of "security" under the Securities Act and the Exchange Act are nearly identical and each is broad enough to include the various types of instruments that are used in commercial marketplaces that one might suspect to fall within the ordinary concepts of a security.

- This would include common instruments like stocks, bonds, and notes, as well as the various collective investment pools and common enterprises devised by persons seeking to generate profits from the efforts and investments of others (i.e. investment contracts and instruments commonly known as securities).

- Section 2(a)(1) of the Securities Act defines a "security" as:

  [A]any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, . . . transferable share, ***investment contract***, . . . any put, call, straddle, option, or privilege on any security, certificate of deposit, . . . or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

What are Digital Asset Securities?

- In the SEC's "Framework for 'Investment Contract' Analysis of Digital Assets, the agency detailed its framework for analyzing digital assets as "investment contracts" pursuant to *SEC v. W.J. Howey Co.*, stating:
  - Under the *Howey* test, an "investment contract" exists when there is the investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others.
  - Whether a particular digital asset at the time of its offer or sale satisfies the *Howey* test depends on the specific facts and circumstances.
- This legal framework has been the basis of numerous enforcement actions brought by the SEC against digital asset issuers and exchange platforms.
- The SEC has also pursued interest-digital assets in the context of "notes" under the U.S. Supreme Court's holding in *Marine Bank v. Weaver*, in which the Court addressed whether the sale of a certificate of deposit was a security.
- In recent years, "staking" and other interest bearing digital asset products have grown in popularity.
- The SEC has brought enforcement actions citing *Marine Bank* against issuers of interest-bearing products including Celsius, BlockFi, and others.

Exchanges

- Section 3(a)(1) of the Exchange Act defines an "exchange" as "any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange."

- Exchange Act Rule 3b-16(a) interprets the definition to mean any organization, association, or group of persons that: (1) ***brings together the orders of multiple buyers and sellers*** and (2) uses established, nondiscretionary methods (***whether by providing a trading facility*** or by setting rules) ***under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade***.

- Absent an exemption, an exchange must register as a national securities exchange pursuant to section 6 and section 19(a) of the Exchange Act.

- If a blockchain technology platform brings together multiple buyers and sellers of digital assets that are deemed securities, the platform could be required to register as a securities exchange unless it falls within an exclusion from registration.

Alternative Trading Systems

- In 1998, the SEC adopted Regulation ATS, which allows an ATS to choose whether to register as a national securities exchange or to register as a broker-dealer and comply with additional requirements of Regulation ATS.
- An "alternative trading system" means any organization, association, person, group of persons, or system:
  - that constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange within the meaning of Rule 3b-16 under the Exchange Act, and
  - that does not set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system; or discipline subscribers other than by exclusion from trading.
- A blockchain technology platform may be required by the SEC to register as an ATS if it maintains a marketplace or facilities for bringing together purchasers and sellers of digital assets that are deemed securities, and it does not set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such platform.
- An ATS must be operated by a broker-dealer registered with the SEC.

Broker-Dealers

- Section 15 of the Exchange Act requires registration with the SEC of all broker-dealers using interstate commerce or the facilities of any national securities exchange to effect transactions in securities (other than exempted securities and certain short-term debt instruments).
- Section 3(a)(4)(A) of the Exchange Act defines a "broker" as "any person engaged in the business of effecting transactions in securities for the account of others."
  - The Exchange Act and the rules thereunder do not define these terms.
  - The courts and the SEC have taken an expansive view of the scope of these terms.
- The SEC and the courts apply a "facts and circumstances" analysis in evaluating whether a person has acted as a broker, with no single element being dispositive.
- Depending on the circumstances, the operator of a blockchain technology platform may be deemed a broker-dealer if the operator of the platform is deemed to be engaged in the business of effecting transactions in securities for the account of others.

Clearing Agencies

- Section 17A(b) of the Exchange Act generally makes it unlawful "for any clearing agency, unless registered, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a clearing agency with respect to any security."

- Section 3(a)(23)(A) of the Exchange Act defines the term "clearing agency" as:

  any person who acts as an intermediary in making payments or deliveries or both in connection with transactions in securities or who provides facilities for comparison of data respecting the terms of settlement of securities transactions, to reduce the number of settlements of securities transactions, or for the allocation of securities settlement responsibilities.

- As well as:

  any person … who (i) acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates, or (ii) otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates.

- Registered clearing agencies are subject to comprehensive regulation—including recordkeeping requirements and SEC examination—under the Exchange Act and the rules thereunder, providing important safeguards to investors and market participants, and to the maintenance of fair competition.

- Properly registered clearing agencies must enact a set of rules to govern their and their members' behavior, and these rules are subject to review by the SEC.

Digital Asset Trading Platforms

- Digital asset trading platforms are marketplaces that generally offer a variety of services relating to digital assets, often including brokerage, trading and settlement services.
- Digital asset trading platforms allow their customers to purchase and sell crypto assets for fiat currency (legal tender issued by a country) or for other crypto assets. “Off-chain” transactions are tracked in the internal recordkeeping mechanisms of the platform but do not involve transferring crypto assets from one wallet to another, while “on-chain” transactions involve the transfer of a crypto asset from one blockchain address to another.
- Digital asset trading platforms typically possess and control the digital assets deposited and/or traded by their customers and, thus, function as a central depository.
- The customers’ entitlements are then typically tracked and maintained on the digital asset trading platform’s internal ledgers.
- The graphic user interfaces employed by digital asset trading platforms—such as on websites, mobile apps, or other software—typically emulate and function like traditional securities trading screens: they show order books of the various assets available to trade, and historical trading information like high and low prices, trading volumes, and capitalizations.

Digital Asset Trading Platforms

- However, unlike in traditional securities markets, digital asset trading platforms typically solicit, accept, and handle customer orders for securities; allow for the interaction and intermediation of multiple bids and offers resulting in purchases and sales; act as an intermediary in making payments or deliveries, or both; and maintain a central securities depository for the settlement of securities transactions.

- By contrast, a registered national securities exchange submits information regarding executed trades to a registered clearing agency that takes responsibility for ensuring settlement finality and safekeeping of the assets being traded and, in doing so, protects investors' interests.

- Thus, registered national securities exchanges typically do not assume possession or control of the underlying assets being traded.

- Digital asset trading platforms usually settle transactions by updating internal records with each investor's positions, a function typically carried out by clearing agencies in compliant securities markets.

- Likewise, digital asset trading platforms typically perform roles traditionally assigned to broker-dealers in compliant securities markets, without following or even recognizing the legal obligations and restrictions on activities that accompany status as a broker-dealer.

SEC Regulation of Digital Assets

- The SEC Division of Enforcement was created in August 1972 to consolidate enforcement activities that previously had been handled by the various operating divisions at the SEC's headquarters in Washington.
- The SEC's enforcement staff conducts investigations into possible violations of the federal securities laws, and prosecutes the SEC's civil suits in the federal courts as well as its administrative proceedings.
- SEC investigation processes/timeline
- What you see is the tip of the iceberg
- Penalty structure
- Alternatives / options?

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Precursor Lawsuits in the Digital Assets Industry

The SEC engaged in a series of proceedings related to the digital assets industry. How have these cases shaped the regulatory and litigation environment we see today?

The SEC Announces its Focus on Crypto Assets (May 2022)

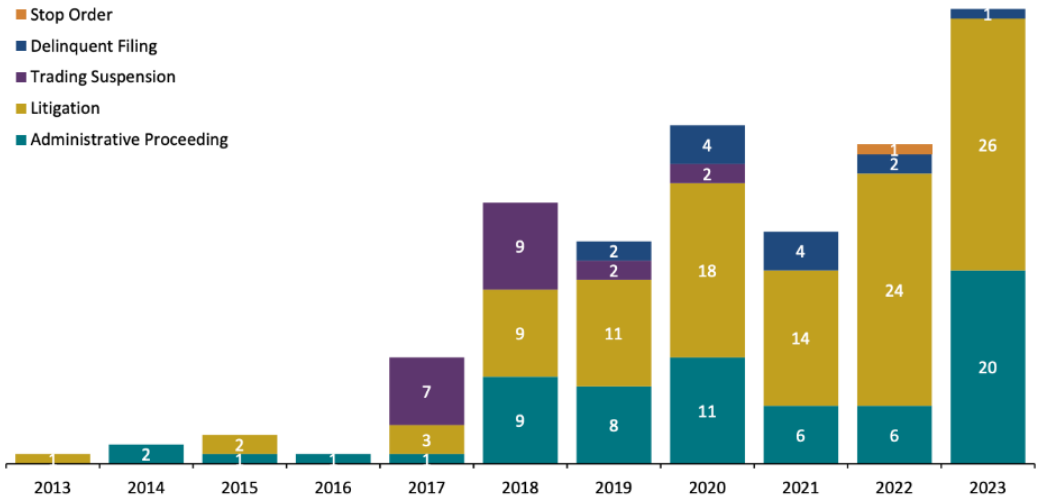
- On May 3, 2022, the SEC announced that it was nearly doubling the size of the Division of Enforcement's Cyber Unit – the unit charged with policing crypto markets for securities law violations and for protecting the securities markets against cyber-related threats.
- Along with doubling the size of the Cyber Unit, the SEC renamed it the "Crypto Assets and Cyber Unit" to emphasize its focus going forward.
- The SEC also shared that it would be focusing on investigating securities law violations related to:
  - Crypto asset offerings;
  - Crypto asset exchanges;
  - Crypto asset lending and staking products;
  - Decentralized finance ("DeFi") platforms;
  - Non-fungible tokens ("NFTs"); and
  - Stablecoins.

U.S. Securities and Exchange Commission

SEC Nearly Doubles Size of Enforcement's Crypto Assets and Cyber Unit

FOR IMMEDIATE RELEASE | 2022-78

Figure 1: Number of SEC Cryptocurrency Enforcement Actions, Trading Suspensions, Delinquent Filings, and Stop Orders 2013–2023



Source: SEC.gov

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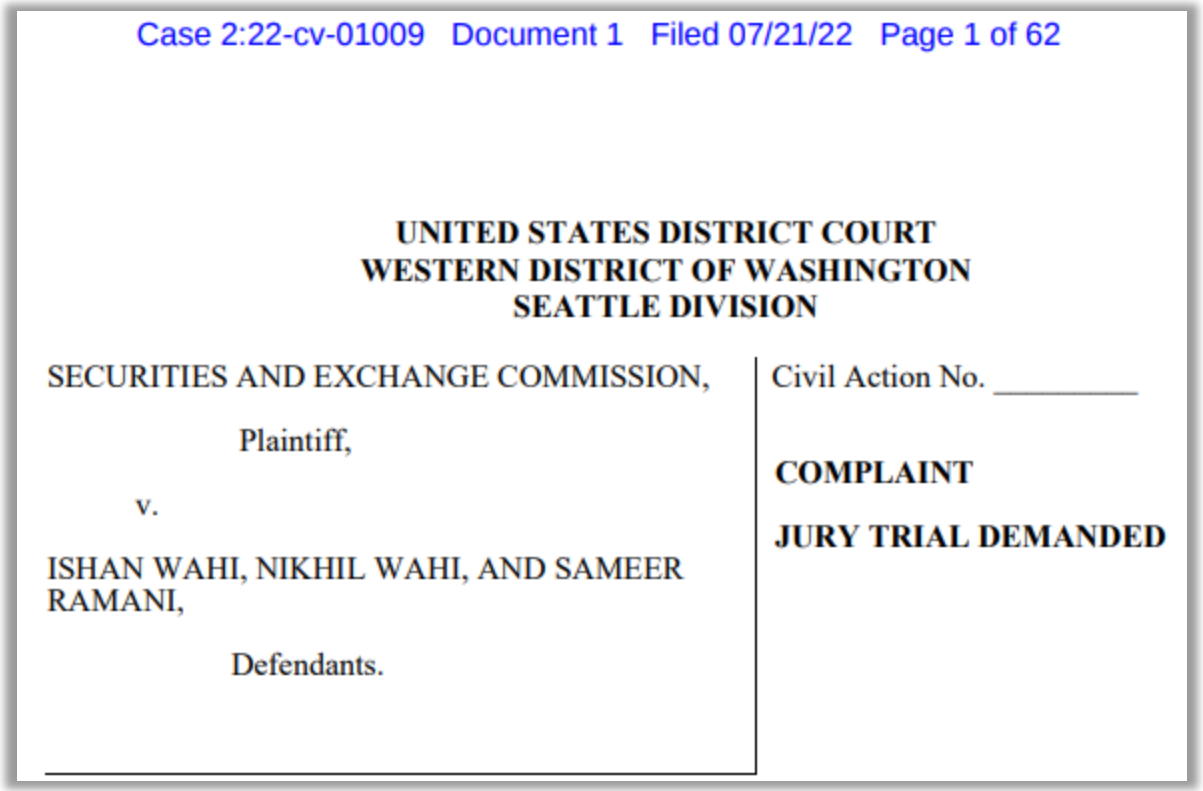
SEC v. Wahi, et al. (July 2022)

- On July 21, 2022, the SEC charged Ishan Wahi – a former Coinbase product manager – in connection with an insider trading scheme involving crypto assets. The SEC also charged Wahi's brother, Nikhil Wahi, and his friend, Sameer Ramani, who received tips from Wahi.
- As part of his role at Coinbase, Wahi had access to information on impending listings ahead of public announcements, which the SEC's complaint alleged that he shared with his brother and friend so that they could buy the assets at a lower price before the market reacted to the news.
- The SEC's complaint raised a significant question about whether certain digital assets involved in this insider trading case should be classified as "securities" under U.S. law.
- The SEC argued that at least nine of the crypto assets traded by the defendants were securities under the *Howey* test.
- The SEC's position was a harbinger for a series of crypto enforcement actions, including pending litigation against Binance and Coinbase.



Case 2:22-cv-01009 Document 1 Filed 07/21/22 Page 1 of 62

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ISHAN WAHI, NIKHIL WAHI, AND SAMEER RAMANI,

Defendants.

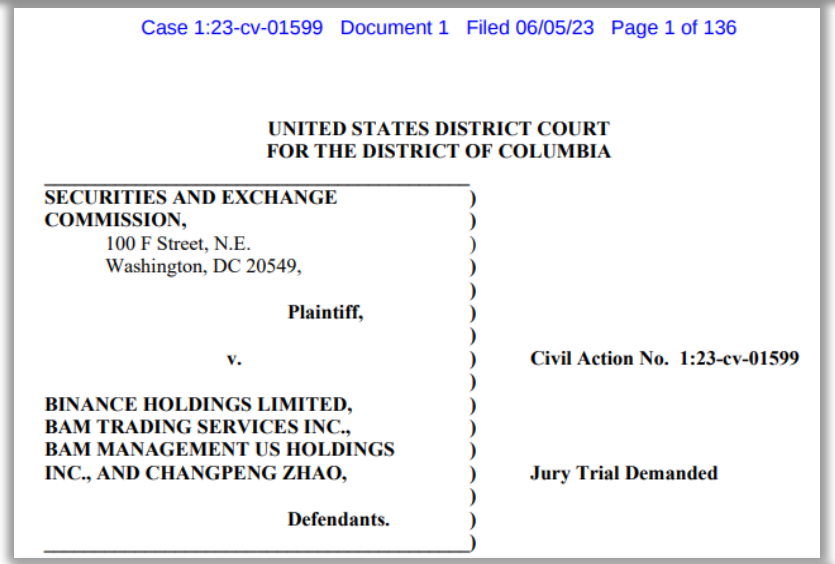
Civil Action No. _____

COMPLAINT

JURY TRIAL DEMANDED

SEC v. Binance & SEC v. Coinbase (June 2023)

- On June 5, 2023, the SEC charged Binance, which operates the largest digital asset trading platform in the world; its CEO, Changpeng Zhao; and others with 13 charges of securities law violations.
- Among the charges, the SEC accused Binance of operating an unregistered exchange, broker-dealer, and clearing agency, as well as offering unregistered securities.
- It also highlighted concerns about transparency and customer asset protection at Binance, particularly involving its U.S. platform, Binance.US.
- One day after filing its case against Binance, the SEC also brought a lawsuit against Coinbase, alleging several securities law violations.
- Similar to Binance, the SEC accused Coinbase of operating an unregistered exchange, broker, and clearing agency, as well as offering unregistered securities.
- The SEC also challenged Coinbase's staking-as-a-service program.



Case 1:23-cv-01599 Document 1 Filed 06/05/23 Page 1 of 136

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SECURITIES AND EXCHANGE COMMISSION,
100 F Street, N.E.
Washington, DC 20549,

Plaintiff,

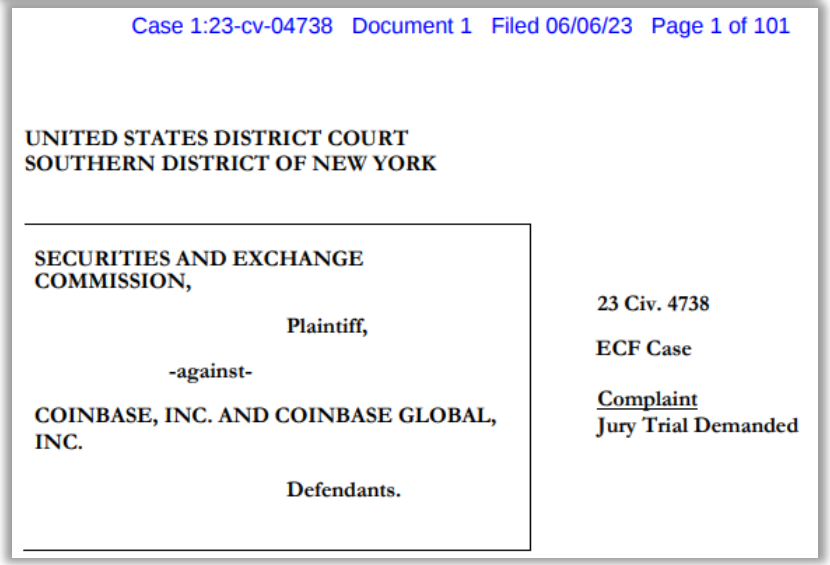
v.

BINANCE HOLDINGS LIMITED, BAM TRADING SERVICES INC., BAM MANAGEMENT US HOLDINGS INC., AND CHANGPENG ZHAO,

Defendants.

Civil Action No. 1:23-cv-01599

Jury Trial Demanded



Case 1:23-cv-04738 Document 1 Filed 06/06/23 Page 1 of 101

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

COINBASE, INC. AND COINBASE GLOBAL, INC.

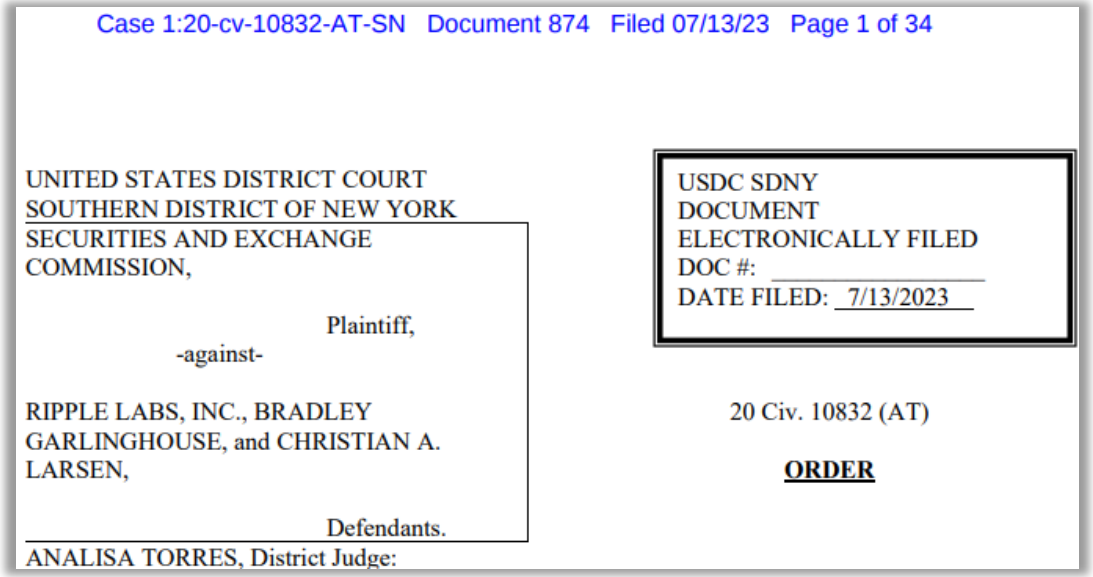
Defendants.

23 Civ. 4738

ECF Case

Complaint
Jury Trial Demanded

SEC v. Ripple Labs (July 2023 Order)



Case 1:20-cv-10832-AT-SN Document 874 Filed 07/13/23 Page 1 of 34

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

RIPPLE LABS, INC., BRADLEY GARLINGHOUSE, and CHRISTIAN A. LARSEN,

Defendants.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 7/13/2023

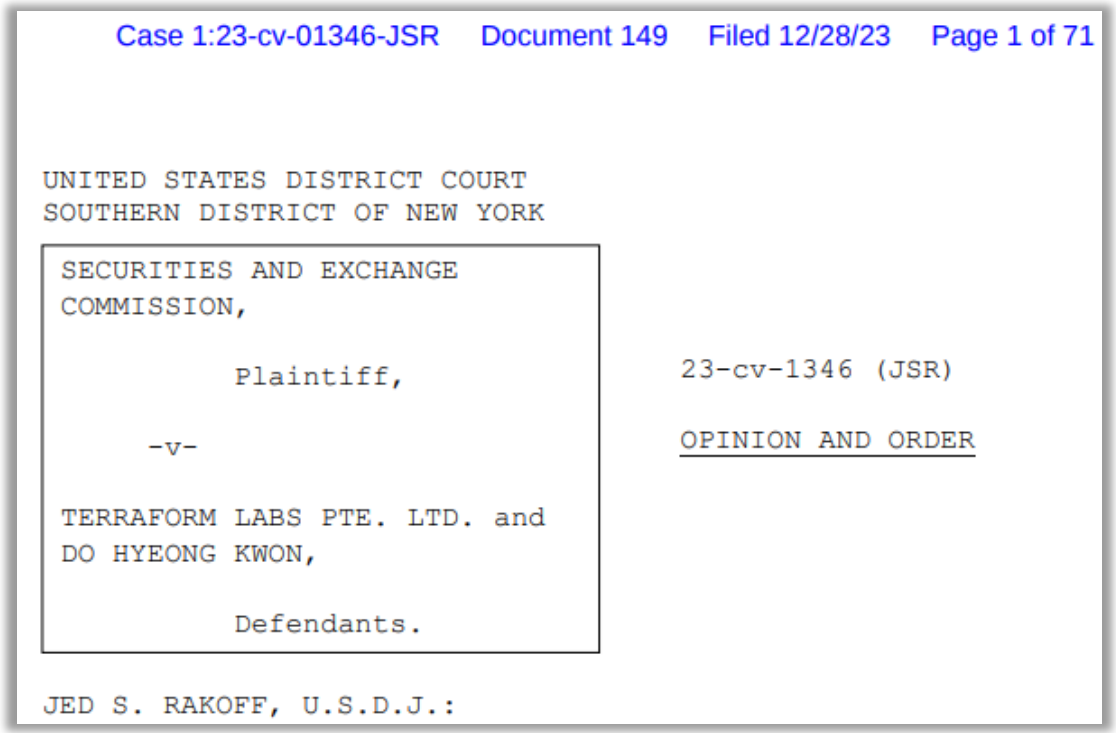
20 Civ. 10832 (AT)

ORDER

ANALISA TORRES, District Judge:

- In a long-running lawsuit between the SEC and Ripple Labs, Judge Analisa Torres of the U.S. District Court for the Southern District of New York issued an order on the parties' motions for summary judgment that were a partial win for the digital assets industry.
- Initially filed in December 2020, the SEC's case against Ripple Labs and two of its co-founders conducted a $1.3 Billion unregistered securities offering through the sale of its native digital token: XRP.
- Ripple sold approximately $730 million's worth of XRP tokens directly to third parties in private sales, including institutions and hedge funds (termed "Institutional Sales"); Ripple sold roughly $750 million's worth of XRP tokens on digital asset exchanges using trading algorithms (termed "Programmatic Sales"); and Ripple distributed roughly $610 million's worth of XRP as a form of payment for services (termed "Other Distributions").
- The Court held that XRP was not inherently a security when sold to retail investors; however, it upheld the SEC's view that Institutional Sales of XRP did qualify as securities.

SEC v. Terraform Labs (December 2023 Order)



Case 1:23-cv-01346-JSR Document 149 Filed 12/28/23 Page 1 of 71

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-v-

TERRAFORM LABS PTE. LTD. and DO HYEONG KWON,

Defendants.

23-cv-1346 (JSR)

OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.:

- After a partial win for the digital assets in the *SEC v. Ripple* case, Judge Jed Rakoff of the U.S. District Court for the Southern District of New York issued a significant ruling in the *SEC v. Terraform Labs* case, concluding that Terraform Labs' tokens, including LUNA and MIR, were unregistered securities under U.S. securities law.

- Judge Rakoff noted that the SEC had alleged that the LUNA coins were marketed as "yield-bearing investments whose value would grow in line with the Terraform blockchain ecosystem" and that the UST coins "could be converted to LUNA coins". He also emphasized that defendants had broadly marketed the coins as profit-generating based on the defendants "pooling" purchasers' investments, including by investing proceeds from the sale of coins "to develop the Terraform blockchain", which the defendants allegedly held out publicly would "increase the value of the LUNA tokens themselves".

- Judge Rakoff also declined "to draw a distinction between" sales of tokens to institutional investors and sales in secondary market transactions, and expressly stated "in doing so, the court rejects the approach recently adopted by another judge in this District in a similar case, *SEC v. Ripple Labs, Inc.*"

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SEC v. Binance, *SEC v. Coinbase,* and Recent Proceedings

Ongoing securities litigation with Binance and Coinbase are proceeding through discovery.

What can the industry learn from the preliminary rulings in major cases?

SEC v. Binance

- On June 28, 2024, Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia who is the presiding judge in this matter, dealt a blow to Binance, which had asked the court to toss the SEC's lawsuit that alleges Binance and its founder and former CEO Changpeng Zhao broke securities laws.
- The ruling adds to the digital asset trading platform's woes after Binance agreed in November to pay $4.3 billion to settle with the Department of Justice and the Commodity Futures Trading Commission over illicit finance breaches.
- The ruling marks a partial victory for the broader cryptocurrency sector as she sided with a previous judge in saying that the SEC had not made its case that secondary sales of Binance's tokens – sold by sellers other than Binance on trading platforms – were not securities.
- On September 12, 2024, the SEC filed a motion for leave to amend its complaint, arguing that its proposed amended complaint addressed some of the issues that the judge had initially dismissed. This included allegations related to ongoing BNB sales and the Simple Earn product.
- In other areas, the SEC supplemented its charges, particularly related to ten digital assets that the SEC used as examples of unregistered securities available on Binance's platform.

SEC v. Coinbase

- The SEC's complaint alleges that Coinbase acted as an unregistered securities exchange, broker, and clearing agency by: (1) providing a marketplace that matches multiple buyers and sellers using non-discretionary methods (through the use of technology); (2) facilitated securities transactions for its customers; (3) provided securities depository services; and (iv) engaged in unregistered securities offerings through its staking-as-a-service program.

- Of particular interest in the Coinbase complaint is an identification of numerous digital assets that the SEC has identified as securities. Among those identified were Cardano, Solana, and Polygon, which, as of July 17, 2023, were among the largest digital assets by market cap in the world.

- On August 4, 2023, Coinbase sought an early dismissal of the case – moving for judgment on the pleadings – raising several arguments that the digital assets available through Coinbase do not meet the criteria of an investment contract under the *Howey* test, particularly because the digital assets at issue were not sold with an expectation of profits solely from the efforts of others, as required by *Howey*.

- On March 27, 2024, Judge Katherine Failla of the U.S. District Court for the Southern District of New York ruled in favor of the SEC on all but one of the arguments raised by Coinbase's motion.

- The *Coinbase* decision aligns with Judge Rakoff's ruling in the *Terraform* case, rejecting the distinction between direct and secondary-market sales.

- However, the Court granted Coinbase's motion as to the SEC's allegations that the Coinbase Wallet constituted brokerage services under relevant securities laws.

- Coinbase and the SEC are in active discovery, which is currently set to conclude in early 2025.

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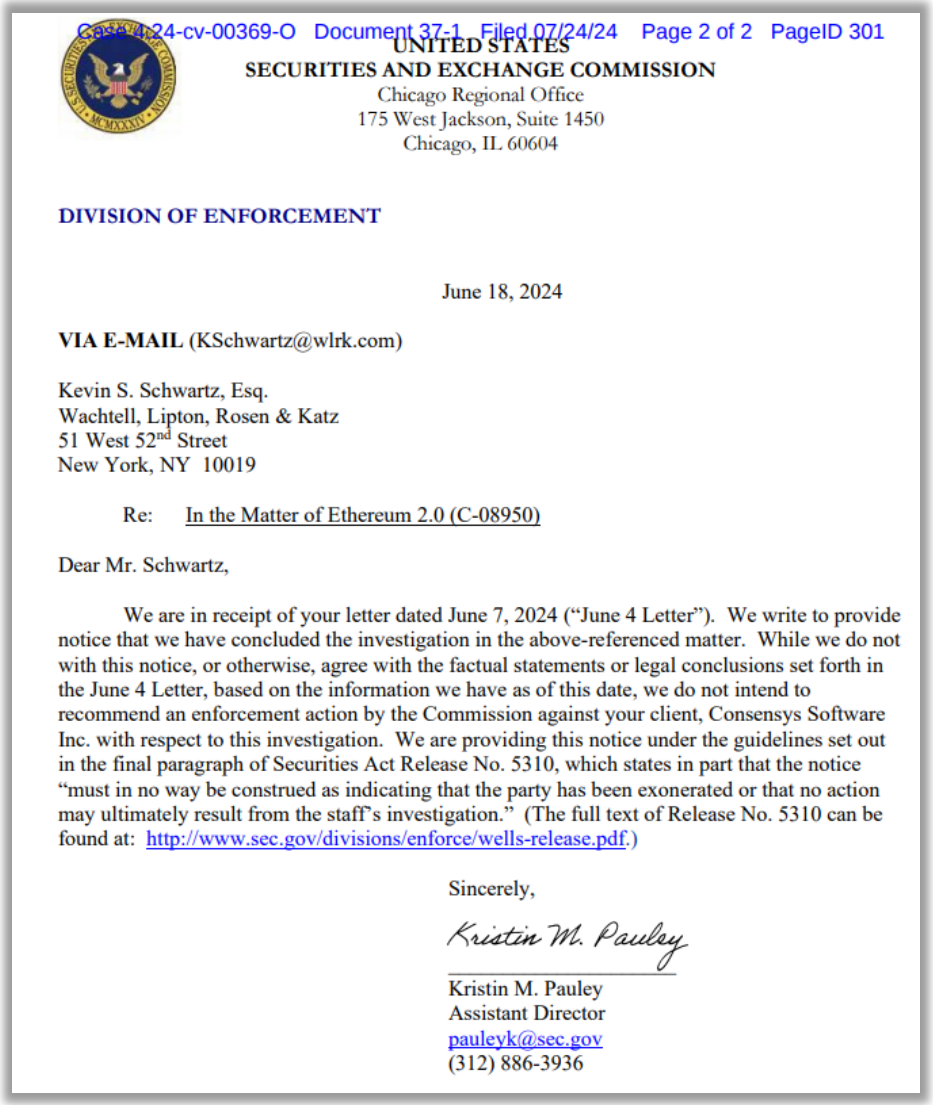
Recent Regulatory Probes

Public reporting reveals that several large platforms continue to receive investigatory probes.

What can the industry learn from these Wells Notices and potential lawsuits?

Ethereum 2.0 Investigation

- In March 2024, several news outlets reported that the SEC was probing crypto companies in an Ethereum investigation.
- The Ethereum Foundation removed its warrant canary in March 2024, also suggesting that it may have received a government subpoena.
- At that time, the SEC was considering applications for the approval of an Ethereum spot ETP, which it did on May 23, 2024.
- However, court filings by the SEC indicated that it has "concluded the investigation in the above-referenced matter" related to Ethereum 2.0.



Case 4:24-cv-00369-O Document 37-1 Filed 07/24/24 Page 2 of 2 PageID 301

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Chicago Regional Office
175 West Jackson, Suite 1450
Chicago, IL 60604

DIVISION OF ENFORCEMENT

June 18, 2024

VIA E-MAIL (KSchwartz@wlrk.com)

Kevin S. Schwartz, Esq.
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019

Re: In the Matter of Ethereum 2.0 (C-08950)

Dear Mr. Schwartz,

We are in receipt of your letter dated June 7, 2024 ("June 4 Letter"). We write to provide notice that we have concluded the investigation in the above-referenced matter. While we do not with this notice, or otherwise, agree with the factual statements or legal conclusions set forth in the June 4 Letter, based on the information we have as of this date, we do not intend to recommend an enforcement action by the Commission against your client, Consensys Software Inc. with respect to this investigation. We are providing this notice under the guidelines set out in the final paragraph of Securities Act Release No. 5310, which states in part that the notice "must in no way be construed as indicating that the party has been exonerated or that no action may ultimately result from the staff's investigation." (The full text of Release No. 5310 can be found at: http://www.sec.gov/divisions/enforce/wells-release.pdf.)

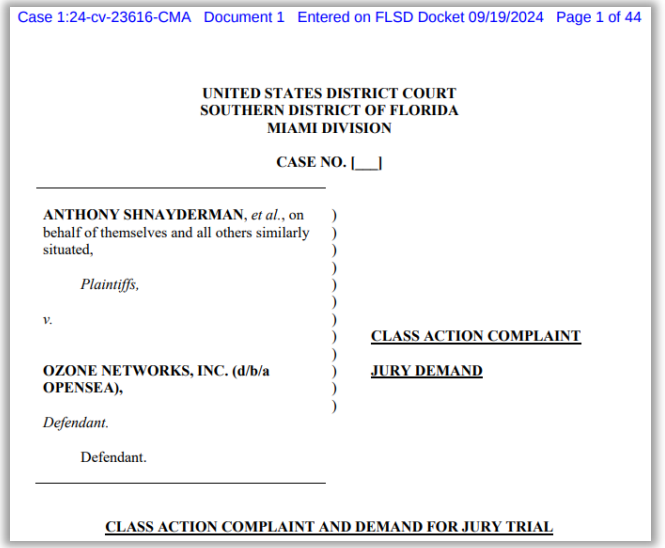
Sincerely,

Kristin M. Pauley

Kristin M. Pauley
Assistant Director
pauleyk@sec.gov
(312) 886-3936

OpenSea & NFTs

- On August 28, 2024, OpenSea – the world's largest NFT marketplace – announced that it recently received a Wells notice from the SEC, alleging that NFTs on OpenSea's platform are unregistered securities.
- Although the SEC's position that NFTs may be digital asset securities has not been tested in court, it has settled charges on that basis. Last year, two high-profile NFT projects settled enforcement actions with the SEC – Impact Theory, LLC and Stoner Cats – without admitting or denying that the NFTs at issue constituted digital asset securities that were offered and sold in violation of securities laws.
- OpenSea has pledged $5 million to cover legal fees for NFT artists and developers who receive a Wells notice.
- Although the SEC has not filed charges against OpenSea, the announcement of the SEC's Wells notice has prompted at least one putative class action against OpenSea.


Case 1:24-cv-23616-CMA Document 1 Entered on FLSD Docket 09/19/2024 Page 1 of 44

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. [___]

ANTHONY SHNAYDERMAN, *et al.*, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

OZONE NETWORKS, INC. (d/b/a OPENSEA),

Defendant.

Defendant.

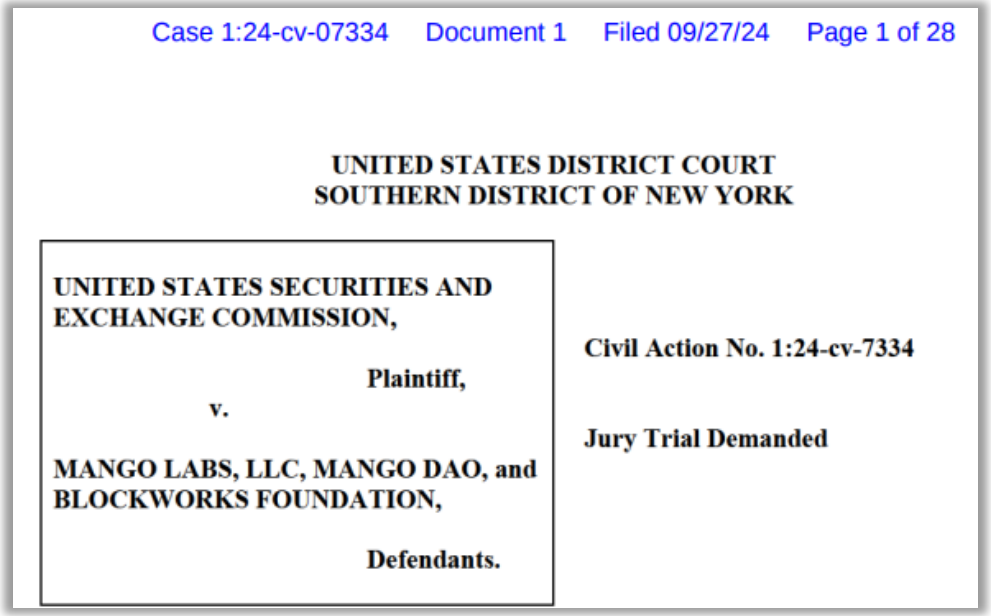
CLASS ACTION COMPLAINT

JURY DEMAND

CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL

Mango Markets and Mango DAO

- Even though interest in DAOs and NFTs has waned, the SEC's investigation into a broad array of the digital assets industry has not.
- If you are unfamiliar with DAOs, they are decentralized organizations operating without traditional management, relying on blockchain-based voting and governance.
- Mango Markets, a trading platform using DAO governance, raised $70 million by selling MNGO tokens, which the SEC deemed unregistered securities.
- The SEC's enforcement resulted in Mango Markets agreeing to destroy its tokens and stop their trading, alongside paying nearly $700,000 in penalties. The case now awaits judicial approval to finalize the terms of the settlement.
- In addition to the settlement with the SEC, Mango Markets is also negotiating a settlement with the CFTC.



Case 1:24-cv-07334 Document 1 Filed 09/27/24 Page 1 of 28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MANGO LABS, LLC, MANGO DAO, and BLOCKWORKS FOUNDATION,

Defendants.

Civil Action No. 1:24-cv-7334

Jury Trial Demanded

SEC Charges Entities Operating Crypto Asset Trading Platform Mango Markets for Unregistered Offers and Sales of the Platform's "MNGO" Governance Tokens

Pair of affiliated entities separately charged for acting as unregistered brokers

FOR IMMEDIATE RELEASE | 2024-154

NELSON MULLINS

The Digital Assets Industry Strikes Back?

The SEC has brought most of the court challenges, but some companies are fighting back.

What are the impacts of challenges brought against the SEC by industry participants?

Grayscale Investments Spot Bitcoin ETP

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 7, 2023 Decided August 29, 2023

No. 22-1142

GRAYSCALE INVESTMENTS, LLC,
PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION,
RESPONDENT

On Petition for Review of an Order
of the Securities and Exchange Commission

Out, Damned Spot! Out, I Say!: Statement on Omnibus Approval Order for List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units

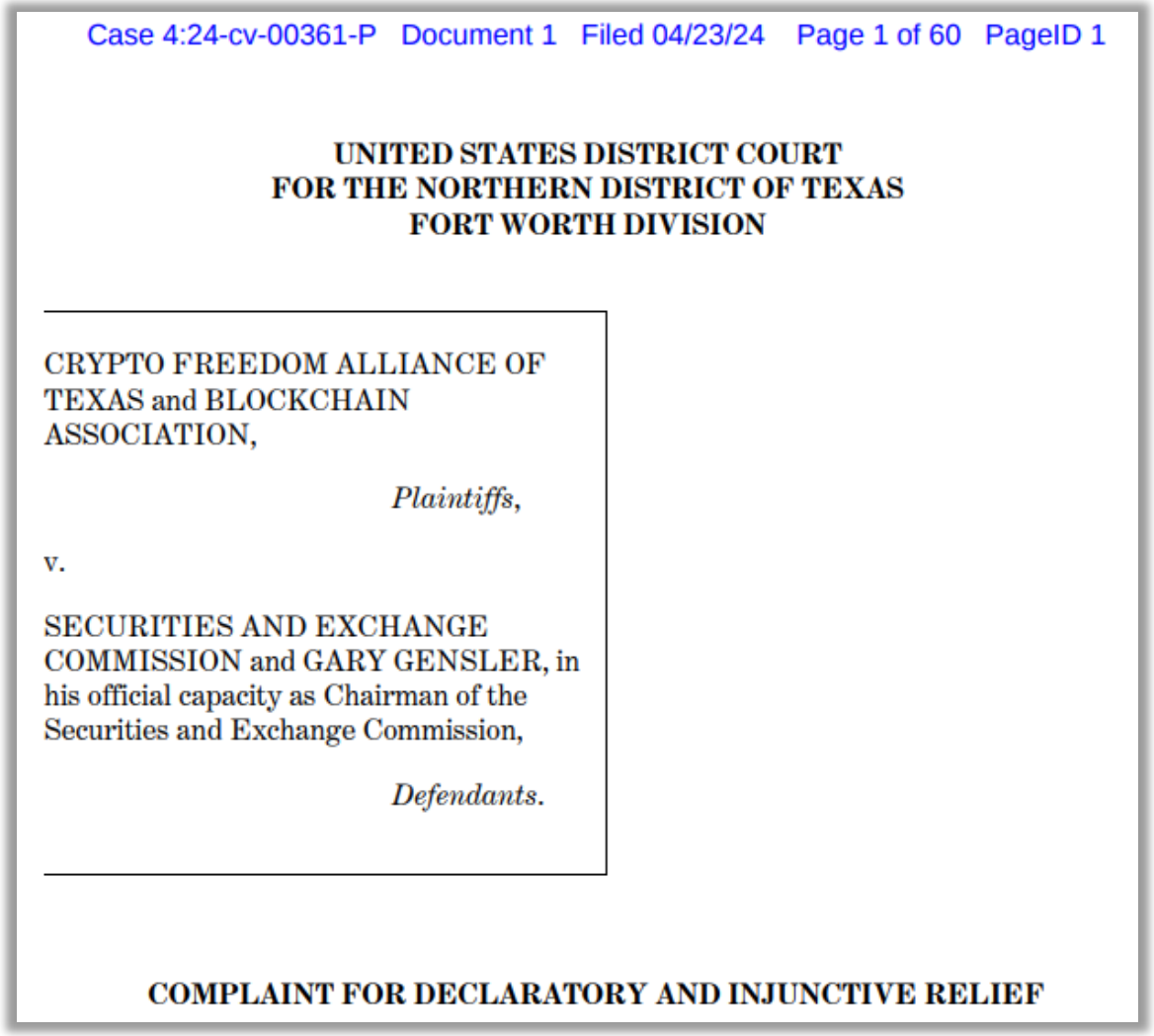
Commissioner Hester M. Peirce

Jan. 10, 2024

- On June 29, 2022, the SEC rejected Grayscale Investments' application to convert its Grayscale Bitcoin Trust to a spot Bitcoin Exchange Traded Product.
- That same day, Grayscale petitioned the D.C. Circuit Court of Appeals for review of the SEC's rejection.
- The Petition's primary legal argument was that the SEC's rejection was arbitrary and capricious and inconsistent with the SEC's approval of futures-based Bitcoin ETPs.
- Pointing to the prior approval of Bitcoin Futures ETPs, such as ProShares' Bitcoin Futures ETF, Grayscale argued that both products derive their pricing from the same underlying asset: Bitcoin.
- On August 29, 2023, the D.C. Circuit Court of Appeals agreed with Grayscale's argument that the SEC's rejection was arbitrary and capricious, paving the way for spot Bitcoin ETPs.
- On January 10, 2024, the SEC approved 11 spot Bitcoin ETPs, including Grayscale's spot Bitcoin ETP.

Blockchain Association, et al., v. SEC

- On April 23, 2024, the Blockchain Association and Crypto Freedom Alliance of Texas filed a lawsuit against the SEC and Gary Gensler, in his official capacity as Chairman of the SEC.
- The Complaint accuses the SEC of exceeding its statutory authority by expanding the definition of "dealer" with an interpretation that could encompass participants in the digital asset markets who do not engage in traditional "dealing" activities.
- The Complaint also accuses the SEC of ignoring significant feedback raised by the digital assets industry during the rulemaking process and failing to conduct "its statutorily required economic analysis."
- This case is ongoing.
- Both parties have submitted cross-motions for summary judgment.



Case 4:24-cv-00361-P Document 1 Filed 04/23/24 Page 1 of 60 PageID 1

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CRYPTO FREEDOM ALLIANCE OF TEXAS and BLOCKCHAIN ASSOCIATION,

Plaintiffs,

v.

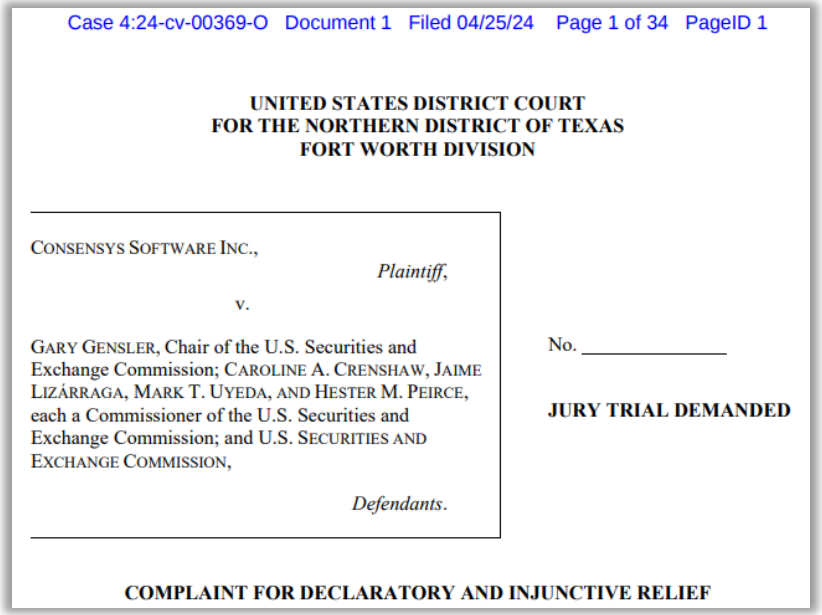
SECURITIES AND EXCHANGE COMMISSION and GARY GENSLER, in his official capacity as Chairman of the Securities and Exchange Commission,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Consensys v. SEC (Dismissed*)

- On April 25, 2024, Consensys also filed a lawsuit against the SEC in the Northern District of Texas, seeking declaratory and injunctive relief.
- On June 28, 2024, the SEC charged Consensys with engaging in the unregistered offer and sale of securities through its MetaMask Staking and MetaMask Swaps services.
- On September 19, 2024, the Northern District of Texas granted the SEC's Motion to Dismiss this case.
- The SEC's case against Consensys is ongoing in the Eastern District of New York.



Case 4:24-cv-00369-O Document 1 Filed 04/25/24 Page 1 of 34 PageID 1

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CONSENSYS SOFTWARE INC.,

Plaintiff,

v.

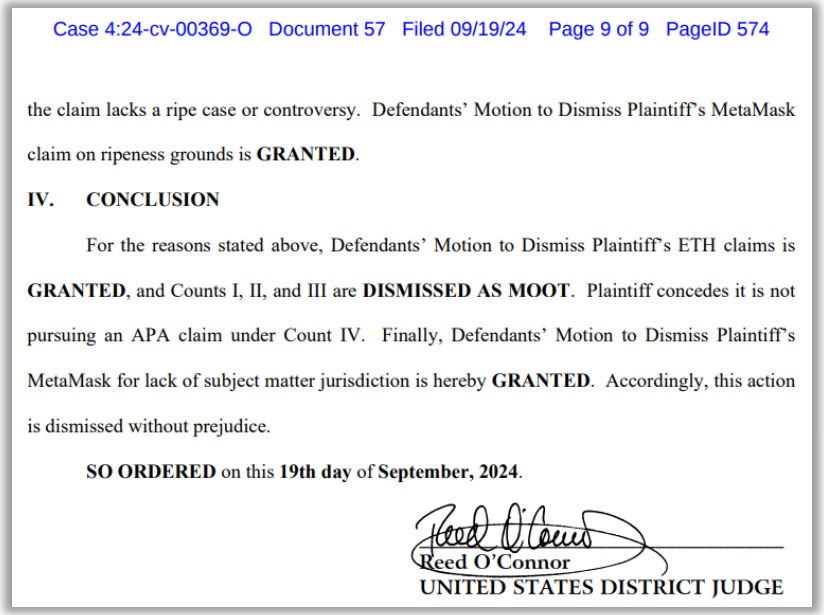
GARY GENSLER, Chair of the U.S. Securities and Exchange Commission; CAROLINE A. CRENSHAW, JAIME LIZÁRRAGA, MARK T. UYEDA, AND HESTER M. PEIRCE, each a Commissioner of the U.S. Securities and Exchange Commission; and U.S. SECURITIES AND EXCHANGE COMMISSION,

Defendants.

No. _____

JURY TRIAL DEMANDED

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF



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the claim lacks a ripe case or controversy. Defendants' Motion to Dismiss Plaintiff's MetaMask claim on ripeness grounds is **GRANTED**.

IV. CONCLUSION

For the reasons stated above, Defendants' Motion to Dismiss Plaintiff's ETH claims is **GRANTED**, and Counts I, II, and III are **DISMISSED AS MOOT**. Plaintiff concedes it is not pursuing an APA claim under Count IV. Finally, Defendants' Motion to Dismiss Plaintiff's MetaMask for lack of subject matter jurisdiction is hereby **GRANTED**. Accordingly, this action is dismissed without prejudice.

SO ORDERED on this **19th day** of **September, 2024**.

Reed O'Connor
UNITED STATES DISTRICT JUDGE

Case 1:24-cv-04578 Document 1 Filed 06/28/24 Page 1 of 59 PageID #: 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

CONSENSYS SOFTWARE INC.

Defendant.

COMPLAINT

24 Civ. 4578 ( )

JURY TRIAL DEMANDED

Presenter Biographies

MATTHEW G. LINDENBAUM

Matthew is the leader of Nelson Mullins' Boston Litigation Team, co-chair of the firm's Securities Practice, and co-chair of the firm's Sanctions Practice. He represents companies in high-stakes litigation with an emphasis on class action defense in the financial services and automotive industries, and the FinTech (blockchain, cryptocurrency, bitcoin mining, on-line gaming) industry. He also defends companies and individuals in government investigations and enforcement actions involving the United States Department of Justice (DOJ), the Securities and Exchange Commission (SEC), the Consumer Financial Protection Bureau (CFPB), the Office of Foreign Assets Control (OFAC), the Commodity Futures Trading Commission (CFTC), the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the Financial Industry Regulatory Authority (FINRA), the Federal Trade Commission (FTC), and various state attorneys general, departments of financial services, and licensing agencies. Matthew also conducts internal investigations for companies and special board committees.

ROBERT L. LINDHOLM

Rob focuses his practice on government investigations and white collar defense, high stakes business litigation and class action defense, and e-discovery and litigation readiness. He represents financial institutions, Fortune 500 companies, private equity firms, hedge funds, and companies/individuals involved in the cryptocurrency industry in a wide array of internal/government investigations and commercial litigation.

JEFFREY M. KELLY

Jeff focuses his practice in areas of emerging technology, particularly in areas involving data analytics, artificial intelligence, digital assets, and FinTech. He works closely with entrepreneurs and companies to effectively navigate changing regulations, government investigations, and complex corporate and securities law challenges.

Moderator Biography

RICHARD B. LEVIN

Richard is chair of the FinTech and Regulation Practice and was one of the first lawyers to focus on the regulation of blockchain and digital assets. He is considered a thought leader in the FinTech space. Richard brings his experience as a senior legal and compliance officer on Wall Street and in London to bear in advising clients on corporate, FinTech, securities, and regulatory issues. A problem-solver by nature, he has been advising FinTech clients on legal and regulatory issues since the start of electronic trading in the late 1990s. His practice focuses on helping financial services and technology clients identify and address regulatory issues as they build their businesses.

Richard's practice focuses on the representation of early stage and publicly traded companies in the FinTech space, including investment banks, broker-dealers, investment advisers, peer-to-peer lending platforms, digital currency trading platforms, alternative trading systems (ATSs), exchanges, and custodians. He represents these firms before the U.S. Securities and Exchange Commission (SEC), the U.S. Commodity Futures Trading Commission (CFTC), the Financial Industry Regulatory Authority (FINRA), the U.S. Department of the Treasury, Office of the Comptroller of the Currency (OCC), state regulators, and Congress. Richard has represented clients before regulators in Australia, Canada, France, Germany, Hong Kong, Ireland, Japan, Singapore, South Korea, and the United Kingdom. His current and past clients include leading national financial institutions, multinational financial services holding companies, leading firms in the FinTech space, and institutions engaging in global investment banking, investment management, securities, and other financial services with institutional clients.

Richard has been identified by Chambers and Partners as one of the leading lawyers in the Blockchain and Cryptocurrencies category since the inception of the category. He has been recognized by Chambers for his knowledge on regulatory matters, great relationships with regulators, for helping clients push the boundaries of the FinTech sector, and for his advice on matters such as broker-dealer licensing and alternative trading systems. Richard is routinely quoted by leading publications including Bloomberg, the New York Times, Reuters, and the Wall Street Journal and is a frequent speaker at conferences around the world on the regulation of FinTech, blockchain, and digital assets.

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