

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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1 UNITED STATES OF AMERICA, : 17-CR-00647

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4 v. : U. S. Courthouse

5 MAKSIM ZASLAVSKIY, : Brooklyn, New York

6 : May 8 2018

7 Defendant. : 2: 45 o' clock p. m.

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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RAYMOND J. DEARIE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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23 Proceedings recorded by mechanical stenography, transcript
24 produced by CAT.
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1 (Case called; both sides ready.)

2 MS. NESTOR: Good afternoon, your Honor. Julia
3 Nestor for the United States and I'm here with and Andrey
4 Spektor from our office and Valerie Szczepanik from the
5 Securities & Exchange Commission.

6 THE COURT: Good afternoon.

7 MR. KAMDANG: Good afternoon, your Honor. Federal
8 defenders by Len Kamdang and Mildred Whalen.

9 MR. NAGI: Jason Nagi.

10 THE COURT: I take it you are prepared to be bound
11 by these discussions, Mr. Nagi.

12 MR. NAGI: Your Honor, every time I'm in court I'm
13 prepared to be bound.

14 THE COURT: You'll be afforded a full and fair
15 opportunity to participate in the discussion.

16 Before we get started, my calendar for the balance
17 of the year is such that it behooves me if this case is going
18 to be tried that we get down to the business of setting a firm
19 trial date if indeed the case is going to be tried and we
20 should turn to that before we complete today's discussions.
21 Apropos of that, what is the projected length of this case,
22 Ms. Nestor, do you know?

23 MS. NESTOR: I believe two weeks at the outset,
24 depending on defense case of course.

25 THE COURT: We'll return to that.

1 First of all, let me apologize for last week's
2 abrupt and last minute change of schedule. I know it's not
3 easy for busy lawyers to make those adjustments. I would not
4 have done it to you if I didn't have to. But I do apologize
5 for the change in schedule.

6 A couple of preliminary thoughts that might give you
7 some idea as to what's on my mind to take these allegations
8 and apply them to make some sort of a judgment. The first
9 thing, being an old-fashioned trial judge and not dealing with
10 motions to dismiss prior to trial and taking counsel from the
11 cases that these can be very fact specific issues, requiring I
12 think in the language of the Howey case the totality of the
13 circumstances, regardless of how I might be inclined, how do I
14 deal with this as a matter of pretrial?

15 It's fair to say I think we all agree that the
16 picture the government paints in its papers as opposed to the
17 picture the defendant paints in its papers are very different,
18 very different indeed. They are ships not only crossing in
19 the night, they are on different seas entirely. There's going
20 to be some sort of factual resolution down the road, not by
21 me, presumably by a jury.

22 Indeed, it occurred to me, with the help of my
23 clerks, that I had at one time in the past charged a jury on
24 the question of what is an investment contract. . A case
25 handled by your office, the Philip Barry case. It didn't

1 become a big issue in the case itself. The jury was asked to
2 consider whether or not we were dealing with investment
3 contracts that didn't involve digital currency and supposed
4 digital currency. It's a case not unlike what we have here,
5 at least from the government's perspective.

6 That gets me to one final preliminary, from whose
7 perspective do I look at this? We have the government's
8 perspective, this whole thing is a sham from start to finish.
9 There were no coins, there were no diamonds, there was no real
10 estate, etcetera, etcetera, etcetera. The defense presents a
11 very different picture that notwithstanding admissions of
12 Mr. Zaslavskiy there was a full intention to develop this into
13 what he regarded as a viable digital currency.

14 Then we have the perspective of the victims
15 themselves. Some might say, for example, I was investing my
16 money in a common pool in the hopes of getting a return, as
17 the white paper promised, through the efforts of others. Some
18 might say, you know, I was intently interested on establishing
19 a viable, working digital currency and this promised me that
20 with the added security of hard assets, real estate or
21 diamonds, to back it up.

22 So, where do we begin, from what perspective, from
23 what angle into do I consider this and particularly am I
24 supposed to do this prior to trial on a motion to dismiss the
25 indictment? That's my intro, what's dominating my thoughts.

1 MR. KAMDANG: Sure, your Honor. I don't think that
2 there's any dispute about what the operating standard is for
3 the court at this stage. And certainly our perspective on
4 this case, if this case were to go to trial, would be drawn
5 out and we would litigate that at a trial. But at this stage
6 I think that we're bound by the representations that were made
7 by the government and that the court should accept the
8 representations that were made by the government in their
9 pleadings as true.

10 With that being said --

11 THE COURT: If that's the case, we might as well
12 have a discussion, if that's the case, we take this whole idea
13 of coins and digital currency out the window.

14 MR. KAMDANG: I don't think so. The facts the
15 government allege are sufficient to make out a fraud. But the
16 question still remains whether or not this is the type of
17 fraud that should be regulated by the securities acts. The
18 example that I would have is let's say for example, let's take
19 a commodity that there's no question is not a security. We're
20 talking about gold bars. There was a scheme where a defendant
21 solicited investments in gold bars and he was selling gold
22 bars and what they were actually selling was pyrite, fool's
23 gold.

24 THE COURT: I'm sorry.

25 MR. KAMDANG: Pyrite, fool's gold.

1 That allegation would make out a fraud. It wouldn't
2 be the type of fraud that was covered by the securities act.
3 As the government's cases also note, we should take into
4 account the advertisements, the economic reality, and what was
5 being proposed here and in that case people would be proposing
6 gold bars. There is no question that that's a commodity.

7 So I think the court still needs to go into the
8 inquiry about what digital currency is, what ReCoin was, what
9 DRC was in this case and that I think the government's
10 pleadings are robust enough that there are real questions
11 here.

12 The government's indictment, before we even get to
13 the Howey test, describes and defines virtual currency as a
14 medium of exchange. There is no question both the parties
15 agree that there's a statutory exception in the securities
16 acts for currency. Given that the government has defined
17 virtual currency as a medium of exchange, the definition that
18 they have put forward in their papers, and it's also a
19 definition that we have pretty much concurred with in our
20 papers from Black's Law that we should understand currency as
21 a medium of exchange. The government has already pled it's a
22 medium of exchange.

23 THE COURT: So we are cabined, if you will, by the
24 defendant's choice of the description of currency. Throw the
25 word currency on it, or better yet digital currency, even

1 though there is no digital anything, okay, then we are painted
2 into the corner by the defendant's own fraud. I say that
3 fraud knowing I have to accept the government's view of it.
4 Does that make any sense?

5 MR. KAMDANG: It's not that the court is cabined
6 into just Mr. Zaslavskiy's characterization of a currency. I
7 think the court has to engage in the inquiry of what is
8 actually being advertised here, what is the actual investment
9 or what the opportunity that's being offered to people and I
10 think the complicated answer is the cryptocurrency are a novel
11 asset class because they have real aspects that operate like
12 currency. People trade them. In the advertising materials
13 the logo for Recoin in the white paper is included in the
14 constellation of other more established cryptocurrency that we
15 talk about that you can go to Subway to buy a sandwich with or
16 go to overstock.com.

17 THE COURT: Buy a sandwich with what?

18 MR. KAMDANG: More established cryptocurrency,
19 bitcoin, ether, nobody is suggesting that somebody could have
20 spent Recoin on that. That was the vision that was presented
21 to investors. That's what investors were buying into. They
22 were buying into this vision of currency that could be used as
23 a medium of exchange.

24 THE COURT: That's an evidentiary question. Do you
25 have any evidence? If you have that, that's perhaps a viable

1 defense at trial.

2 MR. KAMDANG: The evidence that it's in the white
3 paper that the government submitted.

4 THE COURT: There's a lot in the white paper that
5 you probably don't want to hear from me about, investment
6 opportunities and returns on investments and so forth.

7 MR. KAMDANG: I'm happy to address those. But I
8 think that's the problem with this type of currency. It's
9 something that never has existed before. It operates in a
10 number of different ways and because of that it's very
11 difficult to apply what we know about securities laws to this
12 asset.

13 By any definition, it operates as a currency. There
14 are certainly ways it was marketed that it operates as an
15 investment. Whether or not it's an investment under Howey is
16 a question the court needs to consider. But I don't think
17 that there should be any question that what was marketed here
18 was a medium of exchange. That's a real part of what was
19 being marketed here, that this would be a new medium of
20 exchange.

21 THE COURT: Do you want to pick up on that?

22 MS. NESTOR: To answer your initial question as to
23 what the court is supposed to consider at this point, you've
24 hit the nail on the head. It's what the government alleges in
25 the indictment. If the defendant has a different view of what

1 was marketed, that is to be disregarded. That is a factual
2 distinction that is going to be argued to the jury.

3 On the currency point I think the defendant is now
4 shifting away from even looking at Howey but looking at this
5 currency point specifically. This is nothing like a regular
6 currency, your Honor. Looking at just the white paper alone,
7 however as the government has alleged in its indictment it's
8 not just the white paper, it's the many different other
9 advertisements that went out to investors to entice them to
10 invest.

11 Looking just at the white paper this was not
12 something that was just going to be a coin that was going to
13 be used. This was not highly liquid. There was no liquidity
14 to this instrument. This was not something where the
15 relationship between the buyer and the seller ended upon the
16 exchange of the coin. Once you received the coin, as dollars
17 or as any other currency, there was no ending to the
18 relationship. In fact, all of these investors depended highly
19 upon Mr. Zaslavski'y's efforts and the efforts of his purported
20 professionals. The antithesis of a coin or something that was
21 going to be consumed.

22 This is what the Howey test talks about, the
23 practicality of the Howey test. I think it's very relevant
24 here in that it talks about the idea that something is going
25 to be -- the investor depends on the promoter in order to do

1 the work, in order to make this something. And that is what
2 the investors here depended on. I agree with your Honor to
3 the extent the defense is arguing that investors relied on
4 something different, they can cross-examine investors once at
5 trial. They can ask them all those questions.

6 What you look at in the white paper and in the ads
7 about this particular investment, both for ReCoin and for
8 Diamond, these were investors that thought their money was
9 going to grow in value. One of the advertisements says sit
10 back and relax and your money will grow in value. This is all
11 going to be backed by various investments, whether real estate
12 or diamonds.

13 This is not the only thing. He was supposed to
14 build out all of this stuff. He was supposed to create this
15 coin. None of that was done and that all requires the effort
16 of Mr. Zaslavskiy and his professionals and whoever else he
17 was hiring or was purportedly hiring.

18 THE COURT: In one of the press releases, ReCoin
19 press releases, it says that ReCoin would be "An easily
20 accessible financial platform through which people from all
21 over the world can convert their savings into real estate
22 backed currency for the potential of high returns or can
23 protect their earnings from inflation."

24 That sure does sound like an investment contract.

25 MR. KAMDANG: It sounds like --

1 THE COURT: I guess it is possible that it's both?
2 Don't panic, folks.

3 MR. KAMDANG: I think it's something we've all
4 wondered.

5 THE COURT: We are in a new world here, right? Back
6 in Howey days we were not talking digital currencies. You
7 will concede, Ms. Nestor, will you not, that there are
8 characteristics -- again, I fully understand your position
9 that this was a nothing burger, it was a fraud from top to
10 bottom. I understand that. But assume for a moment the
11 hypothetical along the lines that it's presented in the
12 defendant's papers. There are characteristics of both
13 currency and investment.

14 MS. NESTOR: Yes.

15 THE COURT: Are there not?

16 MS. NESTOR: Sorry, your Honor.

17 THE COURT: They are not necessarily mutually
18 exclusive.

19 MS. NESTOR: I think in this case this is
20 exclusively meaning in the sense that this wasn't a currency
21 at this point in time. Maybe at some point ten years down the
22 road, after he developed things, maybe then we could argue
23 that there's a currency aspect to this. At this point, and
24 this is where the court has to look at it, at the point that
25 it's being advertised at the point we actually have evidence

1 of what it is doing it's not a currency. It has to be viewed
2 from the time of advertisement, from the time the defendants
3 tried to entice investors. At this point there's no currency
4 here.

5 MR. KAMDANG: Your Honor, I think that allegation
6 makes out a fraud. But I think that what the court needs to
7 do is look at what the advertising is. Certainly your Honor
8 just read to us part of the advertising. And the government's
9 right. We are bound to what the government has alleged in
10 this case and what they have alleged in the indictment in
11 paragraph five is that virtual currency is a digital
12 representation of value this can be digitally --

13 THE COURT: They are not describing your client's
14 products. They are describing a virtually currency.

15 MR. KAMDANG: That's correct.

16 In paragraph eleven, with respect to ReCoin
17 specifically, Mr. Zaslavskiy and his co-conspirators began
18 advertising the ReCoin ICO as a new blockchain, virtual
19 currency founded by Zaslavskiy that was backed by real estate
20 investments in developed economies such as United States,
21 U.K., Switzerland, Australia, Canada and Japan.

22 THE COURT: If that's true.

23 MR. KAMDANG: The allegation being sufficient to
24 make out a fraud and the allegation being sufficient to make
25 out a security. Otherwise the SEC can regulate any type of

1 fraud because if any type of fraud is untrue and that ends the
2 inquiry, it does not matter what's being advertised.

3 THE COURT: Nobody is saying that. It's a security.
4 You can regulate it.

5 MR. KAMDANG: Agreed, your Honor. I think the court
6 has to engage in the inquiry of whether or not it's an
7 investment contract and in order to do that there has to be
8 some engagement with what's being alleged and what is being
9 advertised. There's certainly language in the white paper and
10 the government has been very good at pointing that out that
11 makes this seem like an investment.

12 What they have ignored and frankly the portion that
13 your Honor has described, if we get into the Howey test, is
14 they are talking about a financial platform, a token economy
15 where, if we're getting into Howey, the test is investor
16 control and whether or not it passes investor control or
17 active investor control. They are talking about a creating an
18 ecosystem where people come and transact in this coin and can
19 make money based on their transactions in the coin or lose
20 money. And that's what is also described in the white paper.

21 So I think the whole white paper is in. I think the
22 government has to take the good with the bad and the question
23 that your Honor asked is a good one, whether or not something
24 can be currency and an investment contract. If we're in that
25 situation I don't believe that we have guidance that would

1 lead us to our vagueness issue.

2 THE COURT: You want to spend time on the vagueness
3 issue, I'm happy to hear you. Anything else?

4 MR. KAMDANG: No, your Honor.

5 THE COURT: Don't you think we ought to get into the
6 Howey test?

7 MR. KAMDANG: Sure.

8 THE COURT: You want to add on that?

9 MR. KAMDANG: The language throughout the line of
10 Howey tests kind of changes between whether or not it's
11 managerial control and what solely means. I think the most
12 recent guidance and I think what the court should be concerned
13 about is the level of investor involvement that's contemplated
14 in something like cryptocurrency. It's true that
15 Mr. Zaslavskiy and his team would have to set up this
16 cryptocurrency.

17 But I think that once people are investing in it
18 what's contemplated is that people would use their
19 cryptocurrency. What people are ultimately betting on with
20 these cryptocurrencies -- and I will say I think the market
21 has changed in the past year. Digital currency has been
22 around for almost ten years and five years ago people were
23 transacting in bitcoin and other currency. What happened in
24 the past year that the market exploded and there are a lot of
25 speculators who have come in and are buying coins hoping that

1 they can find the next big one that gains mass adoption.

2 That being said, the purpose of these coins was to
3 be transacted, was to create these ecosystems. They are more
4 efficient than centralized banks. For example, my father
5 lives in Thailand. If I wanted to send him a bitcoin for his
6 birthday I can send it to him within 45 minutes. And that is
7 the promise of this digital currency and when they are
8 marketing blockchains and centralized currency those are terms
9 that mean something to investors and those are terms --

10 THE COURT: Very attractive to a lot of investors.

11 MR. KAMDANG: Certainly.

12 THE COURT: Investors who want to take their money
13 and see the possibility, if not a windfall, a profitable
14 return, take their money, they invest in this, they sit back,
15 as your literature said, sit back and watch it grow.

16 MR. KAMDANG: That's not --

17 THE COURT: That's not an unfair characterization.

18 MR. KAMDANG: I don't think so. It doesn't make it
19 a security. People do that with currency. What happened in
20 the money market after Brexit, the dollar gained significantly
21 against the UK. In times of world turmoil people go to the
22 dollar and the yen. It's not uncommon to invest in currency
23 as a way to hedge their portfolios. It's not unlike this.
24 They are betting on a currency that's going to take off.

25 THE COURT: Anything else you want to add to that?

1 MS. NESTOR: Your Honor, I think on the third
2 prong, which is what Mr. Kamdang started addressing, the idea
3 that a thousand different investors can have any impact as a
4 collective on this enterprise is frankly just absurd.

5 You know, this is not only the way it was
6 advertised. Think about the reality of what is going to
7 happen here. There is no way these investors could have
8 actually done anything to have legitimate oversight over this
9 venture. This was something that they relied on
10 Mr. Zaslavskiy and again his -- whoever they were --
11 professionals.

12 THE COURT: His team of professionals.

13 MS. NESTOR: Right.

14 MR. KAMDANG: The point is there is no oversight.
15 That's the point of decentralized currency. These thousands
16 of investors, some of them have to be willing to host the
17 ledger.

18 THE COURT: Big and selling real estate, wheeling
19 and dealing in diamonds.

20 MR. KAMDANG: Yes. And we would concede that that
21 is one way that profit could be derived from the ReCoin and
22 the DRC projects. But the other side of that is the coin
23 increasing in value. The coin increasing in value, mass
24 adoption, miners agreeing mine the coin. Investors agreeing
25 to host the blockchain on their computers. If the blockchain

1 is hosted by Mr. Zaslavskiy alone, then it is not a
2 cryptocurrency. It is not decentralized in any way. That is
3 not what people are investing in.

4 The idea here is that everyone has to take part in
5 the maintenance of this so that if a hacker were to attack
6 Mr. Zaslavskiy's office and take over his blockchain that
7 blockchain would be hosted in one hundred different places all
8 over the world and that's what makes this technology so
9 secure.

10 I think if we're going to get into the role that
11 investors play I think we have to have a conversation about
12 technology, what blockchain technology is.

13 MS. NESTOR: I disagree. I don't think we do in
14 this case because there was no technology in this case. There
15 was actually nothing here. I think the more important point
16 that is Mr. Kamdang throughout his briefing and now is
17 agreeing to group all cryptocurrencies in one big ball of wax.

18 That's not what the law requires us to do. What
19 Howey says and its entire progeny says you have to look well
20 beyond the name of the instrument. You have to actually begin
21 examine what this thing is doing. Unfortunately. You can't
22 group all cryptocurrencies together. They have different
23 approaches. Mr. Zaslavskiy's approach may be different from
24 the guy down the street who is selling cryptocurrency.

25 MR. KAMDANG: The court has to look at what the

1 product is advertised to be doing. Again, the fraud
2 allegation has been laid out and I understand the government's
3 position on that and we are bound by that. But the government
4 has defined these terms and what they mean. The
5 advertisements talk about these terms and I think that we know
6 what those terms mean. There's not much dispute about what a
7 decentralized letter is, what blockchain is and that is the
8 exciting opportunity attached to this new virtual currency.

9 THE COURT: It's a fascinating discussion. But my
10 immediate reaction is it has nothing to do with this case.
11 It's because there were no blockchains. There was no team of
12 professionals. There was no real estate. There was no
13 diamonds. It's a grand misrepresentation of an idea,
14 borrowing from an idea that is obviously a very dynamic
15 cutting edge concept about which I know -- I'm getting to
16 know a little bit more about it -- I don't know a lot about
17 it. It just wasn't there. It's a gossamer. There's nothing
18 to it.

19 Now, that doesn't answer the ultimate question.
20 That I agree with you. Fraud, yes. There are no mail fraud
21 or wire fraud charges in this indictment, if I recall.

22 MS. NESTOR: Not yet, your Honor.

23 THE COURT: I'm sorry.

24 MS. NESTOR: Not yet, your Honor.

25 MR. KAMDANG: There's no question if the court were

1 to dismiss these charges that those fraud counts would come.
2 I think we are all bothered by the idea of fraud and fraud
3 needs to be regulated. The question is whether or not the SEC
4 can regulate this fraud. If they want to regulate this fraud
5 our position is that Congress needs to give more guidance.
6 There's no question the government has any number of laws that
7 they could apply to this situation. But --

8 THE COURT: But that's beside the point. The
9 question is is it a security and what we have is the Howey
10 test and the directive that we look past the form and consider
11 the substance and step back and take a look at what's really
12 happening here. I must say I have difficulty with your
13 position.

14 Anything else?

15 MS. NESTOR: Nothing from the government, unless the
16 court has any questions for us.

17 (Pause.)

18 MR. KAMDANG: Your Honor, two additional points. I
19 agree that the court has to undertake a Howey analysis. We
20 encouraged the court not to discount the currency analysis. I
21 think that that is equally operative on the court's analysis
22 on the question of vagueness. I guess we would propose to the
23 court, I don't know that it gives a definitive answer, if the
24 CFTC were to bring this same action as a commodity, it would
25 be alleged and that has happened here. Across the hallway in

1 Judge Weinstein's courtroom he's ruled that virtual currencies
2 are commodities. In this courtroom we're 20 feet across and
3 the government is now saying that these are securities.

4 THE COURT: Did Judge Weinstein rule that they were
5 not securities?

6 MR. KAMDANG: He said that it's possible they could
7 be regulated by both. It was a helpful opinion. I think our
8 concern though is that this type of outcome is a determinative
9 analysis. The SEC wants to regulate something so they declare
10 something as a security. For the court to rubber stamp that
11 without the authority and rulemaking, there's flow definition
12 that makes clear this is not currency.

13 Your Honor asked an interesting question. What if
14 it's a currency and it's an investment contract? We don't
15 have guidance on that and the fact that what we're seeing on
16 the same floor in the same courthouse in Brooklyn, New York
17 the government alleges that these are different things
18 depending on the agency that wants to bring it, I think that
19 raises vagueness concerns and I think that the court should
20 think about that and think about the role that the court
21 should play.

22 THE COURT: It's a factual determination. I assume
23 some factfinder could say under the Howey test it's a
24 security. It's conceivable, listening to your position in
25 your papers.

1 MR. KAMDANG: The court would also have to instruct
2 the jury on what currency is and if a jury were to have to
3 answer the question -- what if the jury answered the question
4 we think it's a currency and we think it's an investment
5 contract and the jury came to an affirmative answer on both.
6 There's no guidance.

7 THE COURT: You have problem.

8 MS. NESTOR: I disagree the court would have to
9 instruct the jury it's also a currency. The court would have
10 to make a decision that it's either an investment contractor
11 or a currency. They could find it's not an investment
12 contract. They should not be given a choice as to what it
13 should be.

14 THE COURT: I would instruct them on what an
15 investment contract is and I did in the Barry case. If they
16 find it's an investment contract, as in Barry, they found that
17 it's a security. These are things we could talk about, if we
18 get that far. I'm not sure I follow you is what I am trying
19 to say. I have hidden my rubber stamp quite sometime ago. I
20 will try to find it, if necessary, in this case. Go ahead.
21 I'm being facetious. I hope you were, too.

22 MR. KAMDANG: Your Honor, one of the things your
23 Honor talked about is what if we got the investors on the
24 stand and many of them said they thought they were investing
25 in a currency. The court is going to instruct the jury as a

1 matter of law that cryptocurrency is not an currency, even
2 though there's no statutory definition of what a currency is.

3 THE COURT: We have to cross that bridge when we
4 get to it. If the jury credited the testimony of defense
5 witnesses or for that matter prosecution witnesses that they
6 were investing in the product that provided a facile way of
7 conducting business through that digital currency system and,
8 yes, they were concerned about their money of course, wouldn't
9 anybody, but ultimately their principal goal was to get their
10 hands on something that would work in the workplace without
11 the complication of hard cash, etcetera. That's what juries
12 are for, to work that out.

13 MR. KAMDANG: I think right now we can forecast that
14 problem without knowing -- I don't think the court needs to
15 go all the way to get to a jury verdict to know it's possible
16 that a jury could find that something is a currency and an
17 investment contract and we have no guidance on what to do
18 there.

19 MS. NESTOR: Your Honor, I disagree. That can only
20 happen if you give the jury 17 different options. You can
21 find one of these options. That's not what the jury
22 instructions are all about.

23 THE COURT: If we got to that point, we would have
24 to have that sort of discussion. I have to accommodate the
25 defense, if it is indeed a legal defense, by way of an

1 instruction to the jury. I'm not sure what the answer to that
2 is. I would have to think about that one.

3 Mr. Nagi, do you want to be heard here?

4 MR. NAGI: Yes, your Honor.

5 I would like to talk to you about something you
6 mentioned, the new world. Let's talk about the new world and
7 the lack of clarity. Can it be both a security and can it be
8 an currency and I would like to talk to you about the
9 Administrative Procedure Act which is essentially the
10 amalgamation or the inclusion of the due process clause into
11 government agencies that regulate the people.

12 I don't think you have to get to the issue of
13 whether this is a security and you have to do the Howey
14 analysis. Under the Administrative Procedure Act because
15 there was no clear rulemaking and if you look at what the APS
16 says, it's a couple of short answers. You don't have to have
17 special certifications. You don't even have to have a comment
18 period with the public. You can issue interpretive rules and
19 general statements under 553(b)(3) A and B and if there's good
20 cause you don't have to have public procedure to have an open
21 discussion about how you regulate something. We're dealing
22 with a new asset class and it's caused an a lack of clarity
23 with the law.

24 THE COURT: I'm not so sure I agree with you. Go
25 ahead.

1 MR. NAGI: I'll give you a couple of examples. Your
2 Honor is free to disagree with me.

3 THE COURT: Good. I'm pleased.

4 MR. NAGI: Bitcoin, Litecoin, Ether and Dash, not
5 securities. Or another rhetorical question, maybe they are.
6 We don't really know because there's not a clear description
7 of what it is that we're dealing with and what a
8 cryptocurrency is and how it should be regulated. And there
9 was a request that was sent as to the SEC -- when I say SEC
10 I'm talking about the people that run the show, the very top
11 -- for rulemaking so that we could get rid of this lack of
12 clarity in the law and it was not there.

13 Here is another example. Even after the DAO Report,
14 which was issued or released I should say on July 25, 2017,
15 there was a big split in the legal community about whether you
16 could have what people like to call a utility token or
17 security. A utility token people say is a token that is not a
18 security and is freely tradeable on a platform that people
19 created. That's essentially how of the 3.2 million dollar
20 ICO that came out in 2017 -- that's what everybody was doing.
21 Even after big law firms and professionals in the Fintech
22 industry had a dispute about, whether or not you could have
23 something that was a security or a utility token and if you
24 want to really understand it go to staffproject.org. The
25 staff was invented and been used since September of 2017. So

1 after this ICO.

2 I'll give you a third example. Congress, the
3 executive branch, neither have issued laws and if you listen
4 to public statements by Mr. Giancarlo, who is the chairman of
5 the CFTC, it was on CNBC on Fast Money, May 1 of this year,
6 he mentions that as an issue. This is something that the
7 executive branch or Congress needs to get behind and describe
8 so that you don't have a trap for unwary. When I say trap for
9 the unwary, I am not saying it was set on purpose. That's
10 what it has become. That's what it is in this particular
11 example right here.

12 Another example, right now cryptocurrency is being
13 regulated by criminal prosecutors in the state and federal
14 realm, the SEC, the CFTC, FinCen, the IRS and state
15 regulators. That's six different areas, that's my examples.
16 Lack of clarity and that's what dovetails into the APA and
17 that's what the APA is there to stop. It's to stop people
18 from falling into traps because they didn't know they were
19 there. Maybe I shouldn't say trap because that implies
20 intention. Falling into holes that were dug and were left
21 uncovered.

22 Now, I also want to point out another example of a
23 lack of clarity that you can see in the kinds of let's say the
24 statements that the SEC has made or enforcement actions,
25 relating to Ponzi schemes and it's in their papers on page

1 four to five. AriseBank they mention. AriseBank was January
2 30, 2018. Then there is PlexCorps, Ponzi scheme fraud,
3 December 1, 2017. Munchee, order by the SEC, December 11,
4 2017, the investor alert, August 28, 2017, when this ICO is
5 already in full swing. The suspension of trading that was
6 mentioned by the SEC in their preliminary statement, February
7 2018 and the statement regarding cryptocurrency December 11,
8 2017. All of that, all of it, postdates the events here.
9 That's the hole that my client fell in.

10 When Mr. Zaslavskiy believed that the SEC would
11 consider what he was doing to be a security he stopped doing
12 it. He's not a fat cat. He didn't take it and use it for
13 home improvements and go fix his house like they did in
14 PlexCorps. It's not a Ponzi scheme. He's not holding on to
15 anything and he's willing to work that out with the SEC,
16 whatever remains that was not provided. This is not your
17 example of a guy with a handle bar mustache sitting behind a
18 railroad tying somebody to the tracks.

19 THE COURT: You're giving a bad name to people with
20 handle bar mustaches.

21 MR. NAGI: The public has a right to be informed.
22 This is a statement by J. Christopher Giancarlo, the chairman
23 of the CFTC. He was talking about regulation of
24 cryptocurrency and this is what he said on May 1. It's often
25 hard to look at those statutes. He's talking about the 1933

1 and 1934 Act and the 1935 statute for the CFTC. It's often
2 hard to look at those statutes and find out where something as
3 new and innovative as bitcoin or cryptocurrency where do they
4 fall into a regulatory regime that was written decades ago.
5 That's why we need rulemaking and that's why we think you
6 should dismiss the case. You don't have to worry about
7 letting the Ponzi schemers off. They did something else.
8 That's all I have to say.

9 THE COURT: I don't have to worry about it for this
10 case either. The government intimated a moment ago that there
11 are going to be additional charges.

12 MS. NESTOR: I said there may be additional charges.
13 As your Honor is aware I am starting a trial in front of your
14 Honor in a month, so I'm not sure those charges will come in
15 the next month.

16 THE COURT: When can we try this case? How about
17 January 7?

18 MS. NESTOR: Sure.

19 MS. WHALEN: January 17 of 2019.

20 THE COURT: 2019.

21 MS. NESTOR: I do have one minor conflict, because
22 I'm going to be gone the week before. I will make it work.
23 If it's possible to do it later in January or early February,
24 that's my preference.

25 THE COURT: It's definitely not possible.

1 MS. NESTOR: Okay. I will make it work.

2 THE COURT: You can pick the jury the week before.

3 MS. NESTOR: It's not ideal given the holiday.

4 January 7 will work for the government.

5 THE COURT: Does May work now folks?

6 MR. KAMDANG: Your Honor, I have never scheduled
7 anything my life more than two months out.

8 THE COURT: Welcome to the world of a trial judge.

9 MR. KAMDANG: I am not as important as you. January
10 is fine with me.

11 THE COURT: We can't start without you. Me I'm
12 replaceable.

13 MR. KAMDANG: Millie is here.

14 THE COURT: All right. January 7 it is. I thank
15 you for your time. Yes, it would be wonderful if the
16 regulators, you know, got into the 20th century, much less the
17 21st and we would be able to avoid some issues. I have to
18 deal with the cards that have been dealt me and with that I'll
19 thank you for your time.

20 MS. WHALEN: Judge, can I put one more thing on the
21 record?

22 THE COURT: You may.

23 MS. WHALEN: In document 26, footnote number two,
24 I mistakenly attribute SEC vs. SG Ltd. to the Second Circuit
25 when it should have been attributed to the First Circuit. I

1 wanted to put that on the record and absolve Mr. Kamdang of
2 any role in that mistake.

3 THE COURT: Thank you.

4 MR. KAMDANG: One second, your Honor.

5 (Pause.)

6 THE COURT: Obviously, if I have a viable date that
7 opens up sooner, which I frankly don't expect at this point,
8 you are welcomed to it and I'll be in touch with you. I
9 honestly don't expect it.

10 MR. KAMDANG: Thank you, your Honor.

11 THE COURT: Anything else?

12 MR. KAMDANG: No, your Honor.

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