UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

U.S. SECURITIES AND EXCHANGE COMMISSION	21-cv-260-PB
v.	July 20, 2022
LBRY, INC.	1:00 p.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE PAUL J. BARBADORO

APPEARANCES:

For the Plaintiff: Marc Jonathan Jones, Esq.
Amy Burkart, Esq.
Securities and Exchange Commission

For the Defendant: Keith Miller, Esq.
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P R O C E E D I N G S

THE CLERK: This Court is in session and has for consideration a motion hearing in civil matter 21-cv-260-PB, U.S. Securities and Exchange Commission versus LBRY, Inc.

THE COURT: All right. First, I would like to just take a minute and thank the parties for their briefs and compliment you. I mean, I really feel the briefs are very well done and were quite helpful to me, the briefs on both sides.

Let me explain to you how I would like to proceed. The SEC has filed a motion to strike a limited supplemental disclosure by one of the defendant's experts. That motion is serious, and I recognize there's a real potential for unfair prejudice if I were to allow the motion to be -- excuse me -- allow the supplemental disclosure to be included in the materials that I would consider in ruling on the parties' cross-motions for summary judgment, but I think that LBRY has proposed the outlines of the solution, at least an interim solution to that problem.

As I understand LBRY's disclosure, response to the motion to strike, you're saying, hey, Judge, if there's a -- if you have a significant concern of unfair prejudice, just don't include the supplemental disclosure on these briefs and we'll live to fight another day about whether the disclosure can be used in some subsequent proceeding like a trial.

That would address my most -- my most immediate concern is I think it would be unfairly prejudicial to the SEC to allow you to just add to the record on summary judgment something like that so late in the process under these circumstances.

But I understand your argument that if we get beyond this, the prejudice is obviously lessened and there are other remedies that I might use, like reopen discovery, allow supplemental depositions, things like that, and that's at least a viable alternative.

So it would seem to me the best thing to do would be to simply proceed without consideration of the supplemental disclosure in ruling on the parties' cross-motions because as LBRY has pointed out, you don't rely extensively on the supplemental disclosure. You argue that you can prevail regardless of whether I can consider it, and you appear to be willing to allow me to rule on the motions without considering it.

And since there's a danger of unfair prejudice it's very prevalent to me if I were to consider it now, I would propose that we simply agree that it will not be considered on these motions. I will rule on these motions as if it had not been filed and deny the motion without -- deny the motion to strike without prejudice to the SEC's right to renew it. Subsequently, in light of that agreement, the immediate

concern for unfair prejudice could be in my mind satisfactorily addressed.

So let me first ask for the LBRY's -- whether I've read enough into your response that what I'm suggesting to you would be acceptable to you. Would you let me know whether that is?

MR. MILLER: Yes, your Honor. That's agreeable and acceptable.

THE COURT: All right.

So I understand your argument. It's fully preserved with respect to supplemental if the case survives summary judgment.

I don't see how it's unfair to you in any way given their agreement that I'll act as if it doesn't exist for purposes of these motions. So I would assume that's acceptable to the SEC.

MR. JONES: It is, of course, your Honor, more than fair. I would ask -- we would preserve that if in fact we proceed beyond this.

The other thing is that the amended report concedes substantial methodological and factual errors that are in the original report. So I would ask your Honor to at least take that into account if your Honor is still going to consider the original report.

THE COURT: It's sort of in for a penny, in for a

pound kind of thing. It would raise complications. So I'm not inclined to do that. Of course you can raise those issues at a later time.

You have an argument which you say is entirely sufficient based on the state of the record as it existed before the supplemental disclosure. LBRY is willing to have these motions decided on the record as it existed before the supplemental disclosure. I think that's the best way to proceed. So I understand your point. I'm not willing to grant all that you ask for.

So I will deny the motion to strike without prejudice given LBRY's concession that I can decide the current motions without regard to the supplemental disclosure. All right?

So that takes care of that, which is good because I want to focus on serious substantive arguments that the parties are presenting here today.

Now, there are cross-motions for summary judgment. So a question arises, who should go first, okay, and I know the SEC might want to go first, but from my mind the clearer way to proceed is to give LBRY a chance to go first and explain why the SEC is not entitled to summary judgment and while making that argument to simultaneously claim that you're entitled to summary judgment, and then to give the SEC an opportunity to respond to that. Because at least -- and I'll

ask the parties if they agree with me on this. I found quite helpful the fact that LBRY did not choose a scattershot approach to responding to the summary judgment motion.

In the SEC's opening brief they seek summary judgment on the entire claim and lay out why this meets the test for a security under all of its elements and notes that essentially the other requirements of a failure to register claim are not in dispute.

I think, again, LBRY has helpfully and in a focused way presented a developed serious argument that this doesn't meet the definition of security because of the third element in the definition as refined by the First Circuit's SG decision, and I would -- I assume that's the only -- I understand you to make a fair notice defense argument which we can engage with after we deal with the principal argument, but in terms of the other elements of the SEC's case, I understand you do not base either your opposition to their motion or your own motion on some contention that there's a problem with the other elements of a federal failure to register claim here.

You're attacking this on the grounds that, wait a minute, under the third element of the definition of security this simply doesn't meet it and therefore they can't get summary judgment and in fact we're entitled to summary judgment. Then I understand you to also press a fair notice argument that even if we're wrong about that, there's at least

a triable issue on our fair notice affirmative defense.

So I see your argument as being quite focused and developed and serious and I want to deal with those things, and I don't want to deal with the other aspects of the SEC's motion because I don't understand you to dispute them for purposes of the current motions.

Is that fair? Is that a fair way to view your arguments?

MR. MILLER: I think it is.

THE COURT: Okay. So we will accept that as true, and I will not waste anyone's time with other issues.

So let's get right to it then and let's address your arguments. You can speak first and explain to me why this doesn't satisfy the third element of the Howey test as refined in the First Circuit case.

And I will just -- to let the parties know about my thinking, I am a judge who has a strong theory of precedent. I believe I have to be a faithful lieutenant to the holdings of the Supreme Court and the First Circuit Court of Appeals. I find Judge Selya's decision in the SG case to be the controlling precedent that I have to respect and I will -- unless someone convinces me that there's something about it that's wrong, I'm going to follow his analytical method and view both parties' arguments through the lens of what I think the SG opinion teaches.

So just so you know, if you're going to take on SG, you better do it directly and early because I'm thinking I'm going to faithfully apply SG, okay?

All right. So that said, say whatever you want to say on the issue of whether this qualifies under the definition of security, and then I'll hear LBRY's response, and then I'll let you say what you want to say on fair notice -- the SEC's response. Then I'll hear what LBRY wants to say on fair notice and hear the SEC's response to that, okay?

With that said, I guess one other thing. Again, I found your briefs quite helpful and I think I understand what you're saying. You have several arguments to present, but one of them that's important, as I understand it, is we're very different from the other SEC enforcement actions. We're not an ICO. The fact that we're not an ICO puts us in a very different position from the other proceedings that the SEC has commenced against others, and I'm interested in hearing what you have to say about that.

Your principal argument, as I see it, focuses on your contention that there is a consumptive use -- what I think the parties call consumptive use. I might call it utility use or -- but there is a use for this token and a reason why people are acquiring it that has nothing to do with investment potential. It has the -- it is used or consumed in

engaging with the LBRY app on the LBRY protocol, and because of that you don't believe that it can meet the third element of the Howey test.

I also understand you to make an argument that to the extent that the value of LBC fluctuates independently of any actions that the company is taking with respect to the LBRY app, instead may have some correlation with the cryptocurrency market generally, that that suggests that if there is any expectation of profit it isn't because of the actions of the developer or a third party and, therefore, we don't think there's any evidence that this is principally an asset that is being offered based on an expectation of profit and we don't understand, even if it is, that it's an expectation of profit based principally on the work of the company, and for those reasons it doesn't meet the test.

That's what I understand your principal set of arguments to be. Address them in whatever order you want and add any others, but that's what I understand you to be saying.

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

Before we proceed, my name is Keith Miller. With me is my colleague Emily Drinkwater, my client Mr. Jeremy Kauffman, and local counsel Tim McLaughlin from the Shaheen & Gordon firm.

Thank you, your Honor, for holding this hearing. I

think it's an important case, a case that the crypto industry is looking at very closely because it is a unique issue here.

This isn't SEC versus Telegram. It's not SEC versus Kik where there were ICOs, where there were private placement memorandums, where there were agreements whereby people invested money, obtained tokens after.

There's something called a simple agreement for future tokens. People entered into that arrangement and said once the platform is built -- this is the Telegram case. Once the platform is built -- we'll pay you now. Once the platform is built, we'll get tokens. Now, why were they doing that? Not to use those tokens, arguably. What they were doing, and I think it's a fair and reasonable interpretation, was they were purchasing the tokens for investment, and that's what --

THE COURT: So I think it is entirely relevant whether something is an ICO or not, but isn't that more a matter of degree rather than kind? So, for example, there's a contention here, as I understand it, that at a time in which there were only four videos for operation that LBRY had a market cap of 1 point something billion dollars based principally on its holdings of LBC, and so how is that radically different from an ICO? You actually have the thing up and running, but there's no real belief that anybody who's acquiring LBC as of that date is doing it because of an immediate plan to access one of those four videos. It's

because they believe that they will be a successful platform in the future in the same way that an ICO purchaser would believe that that application would be successful in the future.

So it's relevant, but it's a difference in-kind rather than -- a difference in degree rather than in-kind. I'm seeing it that way. Is that right or wrong and why?

MR. MILLER: I think it's partially right, your Honor, and I say I think it's partially right because what the courts have said from United Housing versus Forman, a Supreme Court case, to SG is the Court needs to look at the promotional materials.

THE COURT: Right.

MR. MILLER: Right. And you need to look at the promotional materials here. In SG, the SG case, there were persistent representations --

THE COURT: I don't see your case as having as much efforts at promoting an investment as SG. At least as outlined by Judge Selya, there were very, very substantial investment promotion efforts made in connection with that case that seem to be more significant than the ones that occurred here according to the SEC.

MR. MILLER: And I analogize this closer to the Forman case, frankly, your Honor. In United Housing the Supreme Court said --

THE COURT: But there are analogies -- you've got to be careful with the analogy to Forman because in Forman the certificates were capped. You couldn't increase the value of it. And that's -- I mean, if you were Pocketful of Quarters, you would be no action. And Pocketful of Quarters is like Forman in that there are restrictions on the ability of the token to grow in value.

And so I think you have to be careful of Forman. I think Forman is a case where the Court was quite clear that there was no investment potential there. People were buying the -- I believe it was apartments, wasn't it?

MR. MILLER: Co-ops.

THE COURT: Because they wanted to buy apartments, and that's different and it's more like Pocketful of Quarters. I'm sure you know what that case is.

MR. MILLER: Yes, your Honor.

THE COURT: It isn't cited in the briefs, but it's a no-action letter from the SEC.

MR. MILLER: Right.

THE COURT: In that case -- if you were Pocketful of Quarters, we wouldn't be here.

MR. MILLER: Right. But I will say that under Forman there's a dual purpose -- there was an argument of dual purpose.

One purpose was people were buying these co-ops for

investment. They were going to flip them. They were going to rent them. They were going to do certain things as an investment. And the Court said let's look at the promotional, let's look at the information bulletin, and that will guide us.

And I think when you look at the promotional materials, what the SEC has identified as promotional materials, there aren't solicitations. They're not invitations to purchase LBRY credits and you'll get a 10 percent profit. This isn't like SG in that regard where there was a sale based on solicitation.

THE COURT: I think Forman -- I think the way to look at this, why I think this case is interesting, I'll see what the SEC says, but there is a -- there does appear to be, according to the record, and I might be misreading it, a consumptive use for LBC. There appears to be a consumptive use for LBC. The SEC says there's a non-consumptive use. Forman is a case where the Supreme Court says where there is no non-consumptive use or investment use, there is no security at stake.

Howey says where the use of it is for investment, it is -- it meets that element of expectation of profit.

This case might be different from both Forman and Howey, at least this would be I think something you're saying, is what happens in a what we would call in another context a

mixed motive case where there is both an objective -- and let me just ask this to make sure that I'm on the right track here. Do you agree that the perspective that I should be looking at is from the perspective of a reasonable acquirer of the LBC?

MR. MILLER: I think that's the main test, but I do also think you can look at the subjective intent.

THE COURT: All right. So it can play a role, but ultimately in helping me see what an objective investor would be -- we wouldn't call it an investor. An objective acquirer. Do we agree on that?

MR. MILLER: Yes.

THE COURT: Okay. So I'm thinking that to the extent this case can be helpful to people in this world that your client lives in is to provide -- at least my take on what you do in a case where there is a consumptive acquirer and arguably some people who are not acquiring for consumptive purposes, how does that fit under the third element of the Howey test?

And I think you argue that there's a legal question and a factual question.

I understand your brief to argue that the test should be unless it is principally for investment we should not treat it as satisfying the third element of the Howey test. Is that the position you take at least on the law that

I would use?

MR. MILLER: Yes.

THE COURT: Okay.

MR. MILLER: I think the law is that what the Court needs to look at is the principal motivation of the purchaser. If the motivation --

THE COURT: Based on the totality of circumstances, not on a characterization or label that anyone gives to it.

MR. MILLER: Right. The overall emphasis. What was the overall emphasis. The Court uses this language.

THE COURT: Judge Selya doesn't use the word principally in SG with respect to the first element of the -- first component of the third element of the SG test. He uses different language. So I'm inclined to just use his language. Do you think that language requires any different interpretation than the principal motivation? Because what you cite as far as I can see -- do you understand my point that there are -- with respect to the third element of Howey there are two components. One is expectation of profit and the other is from the action of the --

MR. MILLER: Of others.

THE COURT: Okay. Action of others.

The cases you cite for the proposition using the principal motivation case all deal with the second component of the third element. I went back and tried to read them all,

and they don't -- I didn't find any case that uses that language principally with respect to the first component of the third element. Have I missed something?

MR. MILLER: I would have to -- and I apologize. I believe that -- or I thought that the Forman case, and that's where I was getting it from, used the word principally or primarily. I know obviously the word overall emphasis has been used.

THE COURT: Yeah, I just looked at -- I mean, I'll get out Judge Selya's language. You can tell me if that's wrong or not from your perspective.

So this issue arose -- of course you know this. I'm just making it clear on the record. This issue arose because Howey when talking about the efforts of others used the word solely. And in every circuit that has considered that after Howey said, oh, yeah, he used that word but they don't really mean that word, they mean something else. And Judge Selya endorses that view as well when talking about the efforts of third parties or others, efforts of others, and then he cites a variety of cases.

But when talking about expectation of profits -- so he cites to Forman, you're right. "Based on its determination that investors were attracted solely by the prospect of acquiring a place to live and not by financial returns", Forman used that for the different proposition of in a case in

which it is solely, because they wanted to acquire a place to live, that in that case it doesn't meet the test of security. And Howey uses solely in a different way, I believe, and that's what courts are rejecting. But when talking about the first component of the third element of the Howey test, he seems to say that --

MR. MILLER: I believe there's one paragraph, your Honor, in that section where the Court is talking about --

THE COURT: Yeah, I love when -- he does a great job of comparing Forman and Joiner.

MR. MILLER: Right.

THE COURT: And Forman was a case in which it was solely for they want to live there, not for investment. And Joiner was a case where most of their value and all of their lure was investment, and the leasehold interests were no more than an incidental consideration to the transaction.

So he seems to be -- I'm inclined to take that as my model when analyzing this issue. Is that right or wrong?

MR. MILLER: I think the first sentence of that paragraph is instructive. The way in which these cases fit together is instructive.

In Forman the apartment was the principal attraction for prospective buyers. Principal. He's using the idea of principal. And then he goes into Joiner and says incidental. So I think those two words, principal versus

incidental, is what the Court needs to weigh. And that's why I think the overall emphasis of the materials, the promotional materials, was it principally to speculate, to have people buy, to speculate, or was it principally to consume or use the tokens.

THE COURT: Okay. I get your point. I'll be interested when the SEC speaks to know do you agree that that's the right way to read SG or not. You need to explain why not if you think that.

All right. So let's set aside the question of the legal test, which is not, you know, there isn't a super clear statement of what the legal test is, but why factually do you think in this case the SEC is wrong in contending it's entitled to judgment, that the evidence construed in the light most favorable to you could only cause a reasonable factfinder to conclude that the expectation of profit component has been satisfied here?

MR. MILLER: Factually there's no solicitation.

THE COURT: Well, there is some solicitation and there is in fact some private deals for the acquisition of LBC. We can't pretend those don't exist.

MR. MILLER: Well, there is one e-mail from one of the employees to a quote-unquote prospective investor, and they say you may want to buy because two or three years from now it could be worth a lot of money.

THE COURT: But he actually sold LBC, and maybe I got that wrong, I thought to a crypto club, a buying club, and to this other entity. I can't remember the name of it. Your client sold significant quantities of LBC to people and in connection with those things certain things were said, right?

MR. MILLER: Right. Let me take one at a time.

So in connection with the club, club members were buying crypto, different types of crypto, different tokens, okay, and the testimony elicited from them is they wanted to check out LBC and see how it could be used.

So there is a situation where a club -- there's no evidence to suggest that the club members were specifically buying it for speculation. Other ones, market makers, why were they buying it? Were they buying it for investment or were they buying it --

THE COURT: What do I glean from the fact that when there were four videos available on your site you had a market cap of 1.2 billion or 1 point whatever billion which was based principally on the value of the company's holdings of LBC?

MR. MILLER: But that's an asset. It's an asset of the company.

THE COURT: Right. But it says that the asset had been bid up to a price that was extraordinarily high when there was almost no current use. It wasn't an ICO, I agree with you, but there was almost no current consumptive use that

would justify that market cap valuation.

MR. MILLER: Just like any other commodity -- and we maintain that LBC is a commodity. Just like any other commodity -- and I think we identified an analogy, I don't know if it's a great analogy, but Beanie Babies, LEGOs, would people argue that those are securities because the value in a market -- and there's markets out there. Go on a website and you can say I want to buy --

THE COURT: Well, if you were selling investment contracts in a Beanie Baby consortium of -- we've cornered the market on Beanie Babies and we're going to release them like the diamond companies release diamonds and we're going to control the rate at which Beanie Babies get into the market, that would look like a security to me. I mean that would definitely be --

MR. MILLER: I don't think -- well, as I said, just like any other commodity. We think it's a commodity here. And just because the price increased at some point in time doesn't mean it's a security. It's a commodity and we will argue it's a commodity because the courts have said you need to look at how it's being promoted. How are you promoting it and why are people interested in buying it? What's the motivation?

THE COURT: Right. That's why I think a very high market valuation for -- and I want to get terminology that to

your company is acceptable. I've been calling it digital asset. Is that acceptable?

MR. MILLER: That's acceptable, yes.

THE COURT: All right. So when a digital asset has a very, very high valuation and there is no current use for it, doesn't that tell you that they are anticipating that you will make the business succeed to the point that there will be a substantial current use for it, and, therefore, people are investing in the hope that you make the company and the app much more profitable?

MR. MILLER: I still don't believe that that's solicitation. It's not an invitation to buy. That's why I think what's instructive here is these other cases the SEC has brought. They involve private place memorandums. They involve SAC agreements. They involve white papers.

THE COURT: Is there any evidence that the crypto club guys wanted to use your site as opposed to -- usually investment clubs make investments in a pool and in a basket of things that they are trying to invest in, not that, oh, we're all going to want to use LBRY.

Doesn't that suggest that at least with respect to that purchaser that they were motivated by investment potential?

MR. MILLER: I think there is that argument, yes.

THE COURT: Yeah. Okay.

All right. But you do make an argument, and I'm interested in understanding this argument, about on-chain and off-chain uses, and, you know, we're going to set aside the supplemental disclosure, but help me understand a couple of things about this.

So, first, can you give me a brief description of what LBRY's business model is? How does LBRY succeed businesswise?

MR. MILLER: Well, it's all based on users. Today they have 1.5 million users visiting the site and using the blockchain. 1.5 million users.

THE COURT: So YouTube succeeds by an advertising model. You're not doing an advertising model, right?

MR. MILLER: They are not.

THE COURT: And your people who post on LBRY have a great potential to reap very large rewards if they produce very valuable content for which people are willing to tip or pay with LBC, right? I see how those people profit.

How does your company profit and grow financially? I understand to the extent LBC appreciates in value and you're a store of LBC, the company prospers, but apart from that how does it make money other than the fact it holds LBC?

MR. MILLER: As in a lot of startups, the purpose of the startup is not necessarily to make money immediately. It is to look at opportunities.

THE COURT: What's the business model? Eventually FaceBook would make money on an advertising model. That's how they started and why people wanted to invest in them. I'm just trying to figure out -- and they weren't making money in the beginning, you know, and I assume all of these things like YouTube didn't make money in the beginning, but they had a plan to make money in the long run. I just -- I needed to -- like, does your -- and please excuse my ignorance.

When someone posts something to the blockchain on LBRY, on the LBRY app, right, or they basically want to have a video or something, right, so there has to be an entry on the blockchain for that, right? Right. Okay. And when they do that, is there a transaction fee in LBC that the poster has to pay?

MR. MILLER: So let me try to distinguish between two things. One is the LBRY blockchain.

THE COURT: Right.

MR. MILLER: That's open-source software --

THE COURT: Okay.

MR. MILLER: -- that has been adopted by known operators, computers, everybody that's in the system, and they get a chance -- and that's where the LBRY credits are derived from, from the blockchain, right?

THE COURT: Right.

MR. MILLER: You can get a credit, a LBRY credit,

mostly from mining, right? There is pre-mined, and then now going forward somebody who validates a transaction on a blockchain gets rewarded a token.

THE COURT: Right.

MR. MILLER: And that's how new tokens get minted.

THE COURT: Now, you said something that I need to understand. I've always recognized that there's a separation between the LBRY application and the LBRY -- what would you call it?

MR. MILLER: Blockchain.

THE COURT: It would include the blockchain.

MR. MILLER: Yes.

THE COURT: And so I understand that the LBRY blockchain is open-source like Ethereum is, for example. So people can use Ethereum for whole varieties of things, and you're saying they can use the LBRY blockchains for a whole variety of things as well.

MR. MILLER: Right.

THE COURT: And when a block is verified, there is a -- the miner earns some sort of LBC credit, right?

MR. MILLER: That's correct.

THE COURT: And the LBRY app is just one thing that sits on the blockchain.

MR. MILLER: That's right.

THE COURT: Okay. And what I'm asking is, is there

a transaction fee that somehow your company benefits from when somebody uses the blockchain?

MR. MILLER: Yeah. So right now I believe, and it was in Mr. Kauffman's declaration, there are some 35 different applications that run on the LBRY -- so each application could be unique, could be different.

THE COURT: Right. I get that.

MR. MILLER: With respect to Odysee, which is the LBRY-owned subsidiary that is now the application that people are using, right, I do not believe there's a transaction fee. That could be something in the future that is -- or it could be that they decide to go down an advertising route, but with most of these companies it's getting users to come to the site, it's getting people to use the business, and that's the first step.

THE COURT: I understand you want to build a user base, but there needs to be a business model. I'm just trying to understand what it is.

I understand part of the model is if we hold a gigantic amount of LBC, that's going to become way more valuable and we're going to be all wealthy because of it, and people who own shares of our company are going to be multimillionaires. That's great.

Apart from that, what's the business model?

MR. MILLER: I don't think they've figured out how

to definitively monetize that at this point in time.

THE COURT: Is it fair to say as it currently stands the business case for making money that we identify is growing the value of LBC?

MR. MILLER: I don't think that's a fair interpretation.

THE COURT: Then what is it?

MR. MILLER: I think it's growing the network of users.

THE COURT: Right. Growing the network of users might be a very good public benefit, but you've got to make money, and I'm just asking how do you make money. If you are pitching me -- think I'm the venture capitalist who wants to give you a couple million bucks. Tell me how I'm going to make money within the next ten years. Answer the question for me. Tell me. I'm your venture capitalist.

MR. MILLER: There are different ways to monetize it. One's advertising, which is like YouTube. YouTube is all advertising fees.

THE COURT: But you distinguish yourself from YouTube in that you're not an advertising model, and you don't have an algorithm that you need if you're going to have an advertising model, and you have nonintrusive limited content moderation, and those are things that distinguish you from YouTube. To the extent you want to just be YouTube on a

blockchain, that is not what I understand you to be aspiring to.

MR. MILLER: No, not necessarily, but that doesn't mean they can't change if they need to get monetized, right? Another way is transaction fees, like you said. I do not believe neither of those things are --

THE COURT: But there's nothing going to them now?

MR. MILLER: Right, but -- yes, it's an asset. LBRY credits are an asset. So you can't ignore that. A venture capital company coming in would certainly look at that and say how many credits do you have and what's the market value of it. Certainly.

THE COURT: Could your company choose to run its business like Pocketful of Quarters and use a digital asset that has limitations on its ability to grow in value which could still be used at a designated fixed rate to compensate miners and to perform other functions but that would not have any -- it would be like Forman, not having any investment potential?

MR. MILLER: It could. It could, but I would go back to why was this developed. This was developed as an alternative to other -- it's to allow publishers --

THE COURT: I fully get how -- you know, just saying LBRY is YouTube on a blockchain says a lot because a blockchain operates very differently from a company like

YouTube. So we don't want to diminish that. I agree it's a very different kind of enterprise. I'm just trying to figure out -- the concern I have is to the extent that LBRY is -- its business model is grow the value of LBC, and you grow the value of LBC by building uses on the blockchain that make LBC more valuable to users, other people who acquire LBC not for they want to use it on LBC but they are bolstered in their desire to buy LBC as an investment because, like the company, they think LBC is going to grow in value because LBC is going to do stuff to help it grow in value and LBC is incentivized to do stuff to help it grow in value.

That's my concern and that looks a lot like expectation of profit.

MR. MILLER: Well, but I think what Forman and SG say is you need to look at the promotional material, not ultimately how could --

THE COURT: Not just the promotional material, but you do look at the promotional material. I agree.

MR. MILLER: Right. That's where I think we have a difference of opinion with the SEC. There is no solicitation. I think -- you know, Section 5 is the offer or sale, and typically in all the cases, including, you know, SG, even SEC versus Smith which SEC cites in their brief, there are offers. Somebody offers, says this is a great deal, you're going to make 10 percent.

The language -- when you look at the language here that they've identified --

THE COURT: And you've pointed out there are disclaimers, you know, don't buy it for -- you know, we have a one billion plus valuation, but that doesn't matter.

MR. MILLER: Focus on the -- ultimately, focus on this network.

THE COURT: There are a number of those kinds of statements in the record. As well, I have to take issue with you because -- and LBRY -- excuse me, SEC when it has its turn -- its brief does identify a number of things that they think are solicitation materials that touts the investment value of it. So, I mean, we shouldn't pretend that the SEC doesn't cite anything. What they cite you say may be insufficient when you look at it considering the total mix of available information about LBC that the company is putting out, but they did make -- your company did make sales of LBC and they did make statements about the growth in value of the LBC asset. Maybe that's not enough, but it is there.

MR. MILLER: I don't think it's enough, and I think I would direct the Court to Rice versus Branigar. It is an Eleventh Circuit case, but in that case the Court said passing references or mere mentions of the possibility that an item could increase in value do not necessarily transform a transaction into an investment company.

THE COURT: I agree with that.

MR. MILLER: And that's our point here. If you look at what these statements are, LBRY is not out there saying, hey, everyone, buy LBRY credit. That's not -- you need to take the overall emphasis of the promotional material. And what's principally or significantly here, not incidental, what's principally and significantly being mentioned? And it's not focused on buy LBRY you're going to make money. It's use the network. Because just like Naomi -- the declarants, we had five declarants along with 300 others. Brockwell. That's it. Naomi Brockwell. Just like she said, I've made a business out of this. And the same thing with the other four declarants. I've made a business out of this. On YouTube I wasn't getting any advertising money. Why? Because I didn't have enough views. I've gone to LBRY and now I'm getting tipped. I'm getting people purchasing. And that's what LBRY wanted to accomplish.

THE COURT: I think this record does contain evidence that there are consumptive uses for LBC. I think that's undeniable, you know, and it's a question of looking at the total mix of available information, looking at the economic reality of the situation, and trying to consider no one piece of evidence as dispositive here and looking at it to see whether the standard for summary judgment is met.

Can I ask you about -- again, this is an

opportunity for me to kind of clarify gaps in my knowledge here. When we talk -- both of you talk about on-chain and off-chain uses and you seem to talk as if something is an on-chain transaction, that that is necessarily a consumptive transaction, and I don't understand that to be the case. I understand you can definitely have off-chain transactions which are not likely to be consumptive transactions, and I understand you have on-chain transactions, but I don't know why you can't have on-chain transactions which are both just as much investment transactions.

If I want to buy the LBC in your wallet and instead of having an off-chain side contract I believe in blockchain and I want to have that asset in my wallet, we would do an on-chain transaction for me to make my investment. So I don't know that the proxy that the two of you are using between on-chain and off-chain really is as perfect as you seem to suggest it is.

Now, maybe that's a misunderstanding on my part. Is it a misunderstanding on my part?

MR. MILLER: No, your Honor. On-chain transactions can include transactions for consumption and it can include transactions that an exchange, for example, has put on it.

THE COURT: Am I safe in assuming, because otherwise the SEC would have produced it, that your company has no way of identifying precisely which LBC transactions are

consumptive and which ones are not?

MR. MILLER: The only way you would be able to do that is to have the wallet addresses of all the exchanges and to be able -- so when someone does a transaction on exchange, for the most part they don't automatically hit the blockchain. Why? Because they have an internal ledger. It's internal. They have LBRY credits. One person wants to buy. One wants to --

THE COURT: You say internal to the two of them?

MR. MILLER: No. Internal to the exchange. The exchange says I've got a thousand LBRY credits. Someone wants to buy ten of them. Okay. I'll take --

THE COURT: When you say the word exchange, what are you referring to?

MR. MILLER: An asset exchange.

THE COURT: Oh. Coinbase or something?

MR. MILLER: Coinbase. Exactly.

THE COURT: So you're saying that Coinbase has a giant wallet of LBC and it's just assigning certain LBC in its giant wallet from this person to that person?

MR. MILLER: Right. In their ledger.

THE COURT: Yeah.

MR. MILLER: But there are obviously times where it may be a big purchase, right, where they have to come and --

THE COURT: If you buy LBC at Coinbase, right,

you're telling me, and I think that's what I've understood, there isn't an entry on the LBRY blockchain of Barbadoro has just bought four LBC.

MR. MILLER: That's right.

THE COURT: And there's no entry on the blockchain except ultimately the wallet that Coinbase has on the chain has a number of LBC in it, and then Coinbase either with an internal ledger or a contract between the parties or something engages in an off-chain transaction, right?

MR. MILLER: That's correct.

THE COURT: Okay. And if I want to use my LBC to tip somebody, don't I need it in my wallet?

MR. MILLER: Yes.

THE COURT: In my LBRY wallet?

MR. MILLER: Right.

THE COURT: Okay. So tipping would necessarily be an on-chain transaction.

MR. MILLER: That's correct.

THE COURT: Paying somebody, at least if I'm using the blockchain -- I could go to a side transaction, I suppose, and say, oh, you know, my law clerk is posting something on LBC and I really want to view the private part of it, I want to pay his ten LBC credits, I can call him up on the phone and say, look, can I just send you a check and will you let me in, and they probably could, couldn't they?

MR. MILLER: Sure.

THE COURT: It's possible to have an off-chain, but, generally speaking, I would assume that to the extent things are on-chain -- that if you want to do a consumptive use, the ordinary use would be an on-chain use, right?

MR. MILLER: That's correct.

THE COURT: Okay. And off-chain uses are not directly ordinarily tied to consumptive uses. Do you agree with that?

MR. MILLER: Well, except for in the situation which if you wanted to, you have to --

THE COURT: But that's not the way it's designed to work. I mean, if you're a blockchain person, you don't want to be running your life with individual private ledgers with people. You believe in blockchain.

MR. MILLER: Yes.

THE COURT: And blockchain is a public ledger, this one is, and this public ledger is what you would use for your on-chain transaction in the ordinary course.

MR. MILLER: That's correct.

THE COURT: Fair to say?

MR. MILLER: Yes.

THE COURT: So it's not a complete, perfect substitute but is a rough indicator perhaps of the ratio of on-chain to off-chain uses? Does that make sense?

MR. MILLER: I think it's fair, yes.

THE COURT: All right. Good.

Sorry to interrupt. Say anything else you want to say. This has been very helpful in educating me.

MR. MILLER: We also think -- besides the objective analysis of what a reasonable investor would believe, we also believe that some of the case law allows subjective, and for that reason we would argue that the 300 or so declarations -- and those declarations, what did they say? Look at them. They said I purchased on exchanges not as an investment. For use. I needed LBRY credits. Where do you get LBRY credits? Well, you can mine them or you can buy them. So that's important. That's important.

So the theory of, gee, people are buying them on exchanges and therefore they're speculators --

THE COURT: You can't -- I've never looked at the LBRY app because I believe I need to make my decision based on what you people tell me.

MR. MILLER: Right.

THE COURT: But I don't think you can tip somebody off-chain, can you?

MR. MILLER: No, you have to -- the point here is when you buy --

THE COURT: Am I right, though? To tip you've got to be on-chain?

MR. MILLER: Yes.

THE COURT: To buy on the app itself, to buy access, you've got to be on-chain.

So you buy your Coinbase LBC. Unless you instruct Coinbase I want an on-chain transaction from your wallet -- the off-chain transactions can't be used to tip or to buy unless you've tried to do kind of a workaround, an off-chain workaround, which isn't the way the app is designed to work, right?

MR. MILLER: Right. Your LBRY wallet is where you tip from, okay, where you purchase from.

THE COURT: Right. So if you buy your LBRY at Coinbase and there's an internal transfer in the Coinbase ledger, you can't use that LBC to tip.

MR. MILLER: Unless you transfer to your LBRY wallet.

THE COURT: Right. And then it's an on-chain transaction.

MR. MILLER: Right.

THE COURT: Okay.

MR. MILLER: So the point here is the SEC argues that there's all this exchange activity, right, and therefore that's speculative. People are buying -- and I think it's a faulty premise. People are buying on these exchanges, Coinbase, all the exchanges, for speculation, and our

declarations prove the opposite. That's not true. There's no evidence that the SEC has presented to show that people were buying on exchanges for speculation.

Now, is it logical? Yes. But there's no evidence in the record that says -- we don't have one affidavit from an investor to say --

THE COURT: I haven't scrutinized these affidavits yet. Do your LBC uses for business people, do they say that I acquire LBC in an off-chain transaction, or do they say I buy on Coinbase and tell them I need the actual LBRY in my wallet because otherwise I can't use my, you know, I can't use my LBRY?

MR. MILLER: They don't go into that type of detail, but they say I bought on an exchange and then subsequently have used it on LBRY to tip, to stake.

THE COURT: But we've just agreed mechanically, except in an extraordinarily unusual circumstance, it would have to involve an on-chain transaction to do that.

MR. MILLER: Right.

THE COURT: Okay.

MR. MILLER: I will correct one thing that my client has told me, and that is the Odysee entity, subsidiary, the new entity that is the app that is running makes money through advertising and credit card processing. So there is money being generated by Odysee through advertising --

THE COURT: Okay.

MR. MILLER: -- and through credit card processing.

THE COURT: But the LBRY app doesn't do advertising, right? I thought one of the things you differentiate yourself from YouTube is you don't do advertising.

MR. MILLER: We didn't, but now the -- and that was when LBRY.com or LBRY TV, okay, at that point in time during the generation as it expanded, it did not. I'm being told now that the new entity Odysee that is the app that everyone is using is charging a processing fee for credit cards, okay, and is doing advertising.

THE COURT: Okay. All right. That's helpful.

MR. MILLER: So I just wanted to clarify that.

THE COURT: Okay. Good. I appreciate that.

How about the -- unless you have something more to say about the first component, you also have an argument on the second component, based on the effort of others, and your argument -- it's one that I haven't seen in the case law anywhere else, but your argument is LBC fluctuates in value for reasons unrelated to LBRY's activities in building the site. If we did a -- oh, like if you had to do a loss causation argument in an SEC fraud case like I've had to do in several cases, you would have to separate out market fluctuations from movements in the individual stock for

reasons that aren't ordinary market fluctuations.

It's very common for all kinds of investments to tend to move as groups, and I think what the SEC is saying to you is that doesn't mean a thing. That doesn't in any way support your argument. It still is bought for investment because they want it to go up for reasons other than the labor of the person that has the LBC. And when they talk about efforts of others, in order for LBC to be viable as a currency the LBRY blockchain has to continue to function and LBRY has to make that LBRY blockchain continue to function. And, therefore, it's the efforts of LBRY that allow for cryptocurrency movements of LBC to be coordinated with Bitcoin and Ethereum and a bunch of others, and that doesn't in any way undermine their claim that this is being marketed and sold for the investment potential based on the work of others.

That's what I understand the SEC to be saying to you why your argument fails. What's your response?

MR. MILLER: So efforts of others. The efforts of others in a blockchain is all the note operators. Everyone has a say. Everyone can do things.

And we said -- in Mr. Kauffman's declaration he identifies how many times --

THE COURT: Is the LBRY blockchain like the Bitcoin blockchain? There's nobody running the Bitcoin blockchain.

MR. MILLER: Exactly. And just like Ethereum.

THE COURT: And you're saying there's no one running the LBRY blockchain?

MR. MILLER: That's right. Now, certainly --

THE COURT: Your client doesn't do anything except promote it?

MR. MILLER: No. No, I wouldn't say that. They certainly do do things on the blockchain. Tweak it, right? They talk to other members, the LBRY Foundation.

THE COURT: I mean, they could go out of business today and the LBRY blockchain would continue in perpetuity just like the Bitcoin blockchain.

MR. MILLER: Absolutely. And anyone could offer some software code adjustments. And if it's adopted by all the members, it takes off.

THE COURT: Okay. All right. So that's your -- that would be your point. LBC's viability only depends on the LBRY blockchain continuing to function. To the extent it fluctuates in price, it's based on speculation because of people who are speculating based on cryptocurrency values, cryptocurrency as a sector of a market, say for example, and that isn't efforts of others as meant by Howey.

MR. MILLER: That's correct. That's correct.

THE COURT: Okay. Anything else you want to say about that?

MR. MILLER: Just, again, there are approximately

35 applications that are running on top of -- if Odysee decides to go poof, it doesn't matter. Those other applications are still going to be running on the LBRY blockchain, and LBRY, Inc. has no control over that.

THE COURT: Okay. Good. Thank you.

MR. MILLER: Thank you.

THE COURT: Let me hear from the SEC and your response to what you've heard.

MR. JONES: Thank you, your Honor. Give me a moment to carry all my stuff over here.

Your Honor, just for the record, Marc Jones for the Securities and Exchange Commission.

If I can pick it up right there where we left off on efforts of others.

THE COURT: All right.

MR. JONES: LBRY did not run an ICO but instead allocated credits for various purposes. The only way those credits are worth something in the future is if LBRY delivers on their promises to create a revolutionary way to share and monetize content. That's Exhibit 49, Plaintiff's Exhibit 49.

It's not credible and it's not true that there is no expectation of profits based on the efforts of LBRY. LBRY told people again and again that LBRY credits would go up when they developed the network and that they were spending tens of thousands of hours to develop that network.

Now, that's the factual point there. The efforts of others are absolutely -- LBRY said again and again, we are developing this network. We are solely focused on it. We are in it for the long term. Don't look at the short-term price of LBC because in the long term it's going to go up. In the long term, as we develop this network, us.

In fact, they said you don't get a very good product -- you don't get a very good software product when you leave it to the masses. You have to have somebody focused on doing it.

THE COURT: Well, it is open-source. People can contribute to its development.

MR. JONES: Absolutely, your Honor, and legally that's fine. It doesn't actually have to be the efforts of LBRY solely. It has to be the efforts of someone other than the purchaser.

That's the point in the Howey test. If you buy something and you're gonna -- you know, if you buy a fixer-upper house and you're gonna fix it up and make it worth more, that's not the efforts of others.

If you buy something from LBRY because you think Odysee, their wholly owned subsidiary, is going to make it go up in value, that's okay.

THE COURT: I mean, I think the principal concern underlying the efforts of others requirement is to deal with

situations in which the person acquiring the asset is also involved in some significant way in the decision-making and functioning of the business.

MR. JONES: As a partner.

THE COURT: That would be the clearest example.

MR. JONES: Right.

THE COURT: But say, for example, you had a LLC where someone was a non-working member, just an investor member or something like that. Then you would have questions. If they don't have any voting rights in the company, if they don't have any decision-making responsibility, then they are purely an investor and whatever money they make on it comes from the return on their capital invested in the business. That's an example of where you have a business with a bunch of people undertaking effort in someone who's not -- who is a member of the organization, they've contributed capital, but they've signed away their vote and they have agreed not to be involved in the business in any way. Sales of those kinds of interests would be investment contracts I would suspect.

MR. JONES: They can be, your Honor, yes.

And on this point, on the point that your Honor was making about the price of LBC can fluctuate based on the overall market or competitors in the market just like any other security, and in fact it is defendant's expert who puts the falsity to the way that Mr. Miller was putting it because

defendant's expert actually says, well, when LBRY makes an announcement about its team or about an idea or puts out a general blog post, no price change. And we take some issues with that event study and the soundness of it. You got 20 pages from us on that earlier this week, unfortunately.

But what the expert from LBRY, Exhibit 2, says is, "When LBRY announces new functionality, you do see some statistically significant price changes," which you would expect because LBRY has told everyone, as I just quoted to the Court, that when we develop this network, as we develop it, as it becomes more useful, as it becomes more desirable for users, LBC is going to go up. Expect the profit from our efforts.

THE COURT: So let me ask you though -- let me pursue the opposite extreme case. So I understand you're saying, well, there's plenty of evidence here to suggest that there's an expectation of profit because of LBRY, but what if they're trying to just ride a tulip bulb frenzy case and they say the way you get into this crypto market is you create a new digital asset and people are buying it up without any prospect of its future performance just because they are -- and you get into it and try to sell it on the grounds that, look, we're not going to do anything to develop this product, but once we issue this coin, you can buy it, and like all crypto coins they're going to go up in value tremendously.

That would be okay with you? That would not be a security if you were trying to sell your coin under that theory? We won't do anything, but the market will take care of it. Because I think there are a lot of skeptical people about cryptocurrency that suggest that's really why it goes up in value, not because of any good work or bad work that any company does.

MR. JONES: Your Honor, absolutely there are certainly lots of cases of fraudulent coins out there but --

THE COURT: I'm not even saying fraudulent. Just direct upfront. We're not doing anything to increase the intrinsic value of this coin. The market will take care of it. You decide. But look at what's happened to all these other coins. And you get in and you buy a few thousand dollars of it, and you know a bunch of other people are going to jump on it and buy a few thousand, and it's going to go up as long as I can dump it quickly. The company hasn't engaged in any fraud. They said right upfront what they're doing. Would that not be a security?

MR. JONES: Your Honor, I may have to think about that. I've never seen an instance solely like that.

THE COURT: Yeah. Well, I mean they -- the crypto people themselves don't believe that the whole thing is a tulip bulb frenzy.

MR. JONES: No, your Honor. Certainly. And

certainly even things that have been created as, you know, joke coins have become valuable I think largely through the promotions of the people who create them in the first place and the people who hold a lot of them, and that's the situation we have here. It's not a joke coin. It does have some utility, but they created it. They created an intangible item called an LBC. They did it for the express purpose of funding the building of their business. They told everyone that's what they're doing. That's what they did.

They held onto 400 million of them. They've gotten rid of about half of that now, but they still have a substantial amount. They told everybody, and particularly people who wanted to invest in the business, we think when we become the platform of choice this will be worth a billion dollars or more. You should get in with us.

THE COURT: You cited your strongest piece of evidence about why this is based on -- expectation of profits based on the activities of LBRY. Is there any other evidence you want to point out on that particular component of the test other than what you've just referred to?

MR. JONES: On the efforts of, your Honor?

THE COURT: Efforts of others.

MR. JONES: I think on page 8 of our original brief, and then again in the original reply, we've cited a bunch of different statements by LBRY. You know, the token

has value in proportion to the usage --

THE COURT: And most of those are expectation of profit but not specifically due to the activities of LBRY, and I want to get to those because that's important.

MR. JONES: Yes, your Honor. Sure.

We've actually made two lists in the brief. The list here on page 8 is actually LBRY talking about its own efforts.

So, for instance, here in Exhibit 52 LBRY says, "LBC will go up when we've (LBRY) built a product that is compelling enough to change people's habits. We'll be focusing all our efforts entirely on creating a product that people will love."

There are several of those statements. They're all in the brief. I don't need to read them all.

THE COURT: Okay. I just want to be sure we review them carefully when we evaluate your argument.

MR. JONES: Yes, your Honor.

And the way that it is -- and there are two prongs of the third prong test, but they do overlap.

The way that LBRY has set up this whole system, there is expectation of profits from LBRY's efforts. Just -- and I'll sort of shade into the first part of the prong.

THE COURT: Do you concede that there is what I think LBRY is calling a consumptive use for LBC?

MR. JONES: We do, your Honor.

THE COURT: Okay.

MR. JONES: Not for the entire time of the offering. The offering starts in 2015. People are promised LBC for services. People are paid in LBC or executives make agreements that, you know, their companies that are providing efforts to LBRY are going to get LBCs later, but through most of it --

THE COURT: When would you say is the first offering to the public of LBC?

MR. JONES: Well, so in July -- I think it's the end of June of 2016 the LBRY blockchain goes live. On July 4, 2016, LBRY makes an announcement. It's a symbolic day. Freedom at last. LBC is available for you to get. It's being mined. You can get it. In 2017 and 2018 the LBRY starts selling on those digital asset platforms, the exchanges.

THE COURT: At one point it was selling on its own on the LBRY app, wasn't it? Couldn't you buy --

MR. JONES: Yes, your Honor. LBRY did in fact engage a third party service provider called MoonPay in 2020 and 2021 to allow people to come with their credit cards or Bitcoin or whatever and get on the app LBC. That was very late in the game, not so long before this case was filed, but there were eventually abilities to buy on the app. But from 2015 on LBRY was in one way or another continuously offering

LBRY through user reward programs, through employee compensation, through employee purchase programs, through digital platform sales, through its --

THE COURT: When does something that has a consumptive use and that LBRY would say is a commodity shade over into a security?

MR. JONES: Well, your Honor, I first would say you don't start with the presumption that something is a commodity. You apply the Howey test in the first instance.

THE COURT: Right.

MR. JONES: You should look at it. And in this case from the first instance with LBC there are promises made and a reasonable expectation on the part of a purchaser that they can buy this thing. In fact, there were what we see in these cases a fair amount, you know, get in early while the price is low when we're building this thing and it's going to go up. There were representations made that there were going to be profits and that LBRY was going to -- there was going to be a rise in value of LBC. I don't want to say the word profit was used, but there would be a rise in value in LBC based on LBRY building this network that it was building, and in fact those representations were made before even the blockchain and therefore the LBRY service went live.

THE COURT: What's your take -- so I think LBRY's counsel did a good job of drawing my attention to Judge

Selya's discussion of Forman and Joiner, and they cite in their brief cases that deal with their expectation of other cases, but they talk about you don't have to prove it solely for investment purposes.

So if you don't have to prove it solely, what is the test, and what does the SEC say is the test for expectation of profit? It's not solely. You would I'm sure agree it's not solely because Judge Selya says it's not solely.

Do you agree that it's principally? Do you agree that -- do you have a view that there's some other test? What is it that you say is the legal refinement of Howey and Joiner and Forman?

MR. JONES: Your Honor, I think I would start by saying that the test does not turn on the intent of the purchaser alone. All of the cases that deal with Howey talk about looking at the economic realities of the transaction.

THE COURT: I agree with that. So we don't use labels. We don't use any one factor. We focus on the economic realities. But we're asking, I thought given the economic realities, would a reasonable acquirer of this be acquiring it principally, not incidentally, whatever your test, as an investment. And that would be -- you would view it from the eyes of a reasonable acquirer given the total mix of information and the economic realities of what is going on.

But then you still have to ask in a mixed motive case if some acquirers are acquiring for purely consumptive and others are acquiring purely for investment, what is the test by which a judge evaluates that kind of a case, which I don't think any of the cases I've seen have really evaluated in detail those kinds of -- that kind of problem, and that's what we seem to have here.

I think it's undeniable that people are acquiring LBC for investment reasons. I think it's undeniable that people are acquiring LBC for consumptive reasons. How do I determine in a case like that whether something is acquired -- a reasonable investor considering the total mix and not looking at any one factor determine -- where some investors are acquiring for consumptive and some investors are acquiring for investment, how do I determine whether in that case it meets the first component of the third element of the Howey test?

MR. JONES: Your Honor, I agree it is a tricky problem not fully addressed by the law. And, in fact, there's a third possibility, which is what if someone buys a thousand LBC wanting to spend 10 and hold onto 990.

But I think part of the way to solve this conundrum, your Honor, is to take a step back and to realize that neither utility nor subjective intent --

THE COURT: They're not dispositive. Are you

saying they're irrelevant?

MR. JONES: I'm not saying they're irrelevant.

THE COURT: Okay.

MR. JONES: I'm saying they're not -- that they do not --

THE COURT: They're not dispositive. They're not irrelevant.

See, judges -- you know, maybe it's a fault. Judges like to have standards against which to analyze things. Otherwise, it looks like we're just making it up as we go along.

I'm trying to have you help me --

MR. JONES: Yes, your Honor.

THE COURT: -- formulate the correct standard in what you might call a mixed case where investors are acquiring -- or people are acquiring the digital asset some for consumptive reasons, some for investment reasons, some mixed investment and consumptive reasons. At what point does the expectation of profits test justify a conclusion that that component of the test is satisfied? What formulation? What language do you think I ought to use to describe that component of the test?

MR. JONES: Your Honor, let me put where I think it comes out, and then let me take a step back and try to justify that.

THE COURT: All right.

MR. JONES: I think it comes out can a reasonable purchaser expect to profit. It's not do they. It's can they.

THE COURT: I agree it's not do they. I agree it's can.

MR. JONES: Can.

THE COURT: But if a reasonable acquirer -- let's say it came out that 70 percent of the people that bought LBC -- we actually dragged every LBC purchaser into court, put them under oath, asked them, why did you buy it, what's your evidence, or we had definitive -- apparently there is no evidence that definitively shows which are consumptive uses, but if we had all of that and we could nail down absolutely and the conclusion I came to at the end is 75 percent of LBCs were used and bought for consumptive purposes, people realized that there are also promotion of this for investment, and 25 percent were buying because of investment, would that make it expectation of profits?

MR. JONES: Your Honor, I want to suggest to the Court that that would be a tough test to both implement and --

THE COURT: What if we flipped it and it was 25 percent wanted to use it for consumptive uses and 75 percent didn't? Would that be a -- they wanted to use it for investment first. Would that be a security, meet the component of that test?

MR. JONES: Your Honor, I think in neither case does the ratio actually help the Court or a securities issuer to determine whether it is a security or not. That is why the economic reality -- and it's not just labels have to be issued and all that. Part of the economic realities test is what's really going on with this thing. When you buy it, when it is a transaction in commerce, what's happening?

What's happening here is you can buy this thing. You can wait. LBRY can continue to develop its network and it will be more. According to them and according to some other evidence that I'm sure you want me to get to, it will go up. And, therefore, whether or not I want to take part of it and spend it on my cat videos, it's still an expectation of profits if I am a reasonable purchaser.

Now, let me take a step back and try to justify that in the case law a little bit.

THE COURT: I don't want anybody to think I'm confused about this. I don't think subjective intentions is the determining factor here.

MR. JONES: No, our Honor.

THE COURT: I just don't read the cases to say that, but I don't think the cases provide a good answer right now, a clear-cut line drawing kind of answer between -- that you use to address cases in which there is a viable consumptive use. I mean, SG -- there might be a consumptive

use in SG as well if you think about it. They don't really discuss that in -- this case doesn't discuss it in detail. It focuses primarily on things like how is it promoted, how was it -- in connection with where it was sold, what was going on, and the economic reality of that situation looked at in a kind of holistic, practical way, is it being sold in such a way that people are -- a reasonable investor given the total mix of available information and the economic realities of really what is going on buying that non-incidentally for investment purposes.

I think that seems to be the way I would take the test, and maybe it doesn't matter whether you use the word principally or not incidentally, but that's the kind of thing of which Supreme Court decisions are made, and I don't like to make decisions that are going to be resolved by the Supreme Court. I like to decide things so that at my level that's the end of it. People just agree that it's right. So it may not matter, but I am just giving you your chance now to tell me if you think there's a -- LBRY has suggested the language for the legal test. You haven't. So if you've got any language, now's your time.

MR. JONES: Your Honor, I would go to what I just said. Can a reasonable purchaser expect profits as opposed to what is the reasonable purchaser's intent. What is 65 percent versus 35 percent? Can they expect profit?

THE COURT: You don't have a case that says that.

MR. JONES: So this is interesting, your Honor. This is where I want to talk about SG and Forman.

In SG -- let's start with Forman.

The Court actually goes through, okay, you can't sell this thing for a profit, you're prohibited, but let's go through -- you know, clever plaintiffs with a financial interest came up with a few possible profits, and the Court actually exhausts each one of those and says, no, that is not expectation of profits, that is not expectation of profits, that is not expectation of profits, those are profits, and it exhausts the whole thing. And that suggests that the Court at least in Forman and in the subsequent cases where they're looking at mostly housing, some of these EB-5 visa cases, but mostly housing, is there anything there beyond you just want to consume it. And if there is, then maybe the Court was wrong to dismiss or wrong to give summary judgment, but is there anything there.

And here SG confronts this question squarely in my opinion, your Honor, because the principal defense in SG was this is a game. This thing you're buying from us, you're playing a game. And, yeah, you may make some money from it, but you're playing. You're getting the utility of the game.

And Judge Selya says that doesn't matter. In fact, that's how the lower court had decided and said it's a game.

It's not a transaction in commerce. It doesn't look like a securities transaction. And Judge Selya comes along and says, no, what's actually going on here, there actually is a profit motive here. Although he doesn't deny that there's a game aspect to it and that some people may be playing because there's a game. He simply looks at it and says it doesn't matter that it's a game. It doesn't matter that there's a utility. Because there was a utility in the oranges and the whisky casks and the chinchillas and all the other cases that come along in the Howey chain. The utility doesn't matter.

Judge Selya says the fact that it's a game doesn't matter both in disqualifying it as a securities transaction and in whether or not there's a reasonable expectation of profits. Because that's what the SG defendants said. They said this was a game. How could anybody have expected profits? And Judge Selya said, well, pretty much because you told them to expect profits, and that's what LBRY did here.

THE COURT: Okay. And you will look at your brief to see the specific instances.

Can you just refresh my memory? I'm remembering from the briefs that in fact there were several instances in which LBRY did make substantial sales of LBCs. I mentioned the investment club was one of them. There were others according to you, right?

MR. JONES: Yes, your Honor.

So the investment club sales -- there are several of those sales. I believe there are four. I could be wrong and there's five. I think there's four. They were two different investment clubs run by the same investment house, a place called Flipside Crypto. Overall 1.1 million LBC, for a value of around that time $260,000, were sold to what was advertised as a small group of influential people.

It is not credible in the -- and this is what the cases say, too. Look at the actual transaction to see what the economic realities are. Part of the economic realities are how many, how much, and what would it have taken you to actually consume those millions and millions of videos.

First of all, your Honor, most of the videos are free to watch. Most of them cost a tenth of an LBC to publish unless you're publishing it from YouTube, in which case LBRY pays it for you. Tipping is optional. And this process of what's called staking, which is supporting a channel by putting down your LBC, is a nonconsumptive use. You can take all your LBC back. It's not even really something we need to worry about.

So when Flipside Crypto comes along in 2017 and 2018 and buys 1.1 million of these, says they're going to put them in cold storage, which right there you know is not going to be a consumptive use because --

THE COURT: Sorry. The names are mixing up. Who

is that?

MR. JONES: That's Flipside Crypto. They are the investment clubs.

THE COURT: They were the investment clubs?

MR. JONES: Yes, your Honor.

Right there when they say we're going to put them in cold storage, cases like Telegram say, well, that's part of the economic reality you look at. The fact that you're buying it to put in cold storage means that -- no one would buy something that they wanted to use and then voluntarily agree to put it away for a year for no reason. They're putting it in cold storage.

The same thing with Pillar. Pillar is the venture capital investor that originally just gives money. They are purely a venture capital investor at the beginning, and then as time goes on, it's 2018, they say we've done a lot of other valuable things for you. We want to negotiate that you give us LBC for them. They make a contract. A million LBC is promised in that contract. It's got a lock-up period.

THE COURT: I wanted to ask you -- so there is a lock-up period?

MR. JONES: There is on that, your Honor.

THE COURT: Okay.

MR. JONES: Now, my friends at LBRY say, well, they never took possession of them.

THE COURT: What does that mean, they never took possession of them?

MR. JONES: Apparently, they never transferred them from LBRY's wallet to their own wallet.

THE COURT: Did they give -- so what did they -- what was their consideration for the transaction?

MR. JONES: In the agreement it's specifically cited as a change in loan terms essentially, a change in debt terms.

THE COURT: So there's some kind of debt security that evidences the Pillar contribution?

MR. JONES: I think -- the second part, absolutely, your Honor, the tokens were to recognize the Pillar contribution. The testimony states that. I don't even know if you have that testimony, your Honor, but the testimony does state that.

The first part was -- I don't want to say it was for debt. It was in consideration of changing the terms of prior debt --

THE COURT: Okay.

MR. JONES: -- is my understanding. But the testimony is also the LBRY folks and the Pillar folks both thought that it was also coming from the fact that Pillar had contributed services and advice and things like that. Now, that's not specified in the agreement as we've put into the

record, but that's what the testimony is.

THE COURT: But Pillar -- whatever this agreement was, there never was an actual transfer from the LBC -- or the LBRY wallet to the Pillar wallet?

MR. JONES: Let me answer that in two ways, your Honor.

As far as we know, there was never an electronic transfer from one wallet to the other.

On the other hand, Pillar gets audited. The auditor says to LBRY, confirm that there are 2 million LBC that are possessed by Pillar that you owe to them. LBRY says yes. Pillar says yes. It goes in their audit. It's listed as an asset on their books.

THE COURT: It could be an off-chain transaction.

MR. JONES: Well, your Honor --

THE COURT: There's a right to recover that remains, right? So Pillar could sue LBRY and say you've agreed to give me -- in exchange for agreements about debt or so forth, we had some kind of a contract, and they could execute on it you're saying.

MR. JONES: And I don't think either side disputes the fact that if Pillar said an hour from now I'm taking my LBC now, that LBRY wouldn't absolutely just give it to them. I think they're willing to give it to them, I think they know they have to give it to them, and they've stated on the audit

that they are Pillar's LBC that they're holding onto -- that LBRY is holding onto for them.

I think the details of that are less significant than the economic reality of that transaction, which is 2 million LBC sold, you know, for valuable consideration and put into a lock-up period, which means that absolutely it was not for consumptive intent.

There are others, your Honor. The sales on the platform go from 2017 through 2021 with a little break in the middle. There's also market making during that time, and we think the market making is significant. Why? Because in addition to what LBRY has said is going to happen with these, they are actually taking affirmative steps and paying for services to create and stabilize a market in LBC.

Now, if you're buying four LBC to watch some videos, you're not destabilizing a market. If you're buying or selling 10,000, 100,000, a million, there's market making that can stabilize a market in that point.

And in fact we know those are the levels because there were two accounts that the market maker controlled, one in the name of Mr. Kauffman and one in the name of another executive, and those accounts together traded 7.4 billion LBC over the time period June 2020 to March --

THE COURT: Let me just make sure I understand your argument.

MR. JONES: Yes, your Honor.

THE COURT: And then we're going to have to take a break in a minute for my reporter.

MR. JONES: Yes, your Honor.

THE COURT: You're saying I can infer from the fact that LBRY was engaged, actively engaged in market making activities for LBC that they understood that this would be a substantial investment use of LBC and they needed to have market making to prevent wild swings in the value of LBC whenever one of these holders of a substantial amount decides to dump it. If it was just people who are using LBC for consumptive purposes, it would sort of gurgle along at a steady and hopefully significantly increasing but not a need to have market making you would say?

MR. JONES: That is our argument, your Honor. Yes.

THE COURT: I suppose their argument would be if we want LBC to be valuable at all, we've got to have viable markets, and if there aren't viable markets, we can't -- nobody is going to hold an LBC for any purpose because they can't -- it's completely nonliquid.

MR. JONES: Well, that may be what they say, but you can certainly have LBC in a Pocketful of Quarters kind of way that you wouldn't have that concern. It's only when you have -- people want to have these and hold onto them and have the value go up in the future that you're concerned about

that.

THE COURT: Let's stop in a minute.

MR. JONES: Yes, your Honor.

THE COURT: I want to ask this one question. Just so people know, I have another thing at 3:30 that I've got to do. We'll take a break. We'll come back and finish your argument, give LBRY a brief chance to respond. Then LBRY will present on its fair notice argument, give you a brief chance to respond. I've got to wrap up by 3:30.

So if you accept the view, as I think many people do, that blockchains like the one LBRY operates have great potential utility for our society -- and we want to encourage people to use things like blockchains at least under certain circumstances. Obviously, people have different views about it consumes too much energy, it's not good for society, but there are a lot of people that think they have great economic utility and real potential.

It seems an essential part of an operation of blockchain that you have to incentivize people that validate blocks of the blockchain, and the way in which that's been traditionally done is through a digital asset.

Is there in the SEC's mind a way in which LBRY could operate the LBRY blockchain using LBC as a digital asset that would not qualify LBC as a digital asset -- as a security? Excuse me.

MR. JONES: Your Honor, I want to be very careful for this answer.

THE COURT: I understand.

MR. JONES: I am not a commissioner appointed by the senate. I am not a policy maker. I am a lowly trial attorney, enforcement attorney who's in charge of enforcing the law as it stands now.

THE COURT: Well, let me just suggest -- because I'm none of those things. I'm not even a lowly SEC attorney. I'm lower than that.

Couldn't they operate as Pocketful of Quarters and use LBC in the same way that a token in Pocketful of Quarters was used which generated an SEC no-action letter?

MR. JONES: Your Honor, to answer as honestly as I can without making any policy for the Commission, I believe there are probably several ways that all are focused on the Howey test. And if you can disqualify yourself from a certain part of the Howey test then, all things being equal, you're probably operating in a way that would be allowed. The Pocketful of Quarters no-action letter. The no-action letters the Commission has issued.

If you can make it so there's not an expectation of profits, if there's no common enterprise, that's a way that, you know, that's talked about.

If there's no reasonable efforts of others, if

you're not putting in any efforts, as your Honor was talking about before, perhaps, and without binding the Commission in any way, perhaps all of those would be ways that you could do a blockchain program without violating the Howey test.

But from my perspective, your Honor, I have the Howey test, and I can see what LBRY has done.

THE COURT: Are there ways if you conclude that it's -- again, you can't bind the SEC.

MR. JONES: Correct.

THE COURT: I understand. I'm just trying to gain this out.

If it did qualify as a security -- as we all know, there are vast, vast quantities of transactions that are securities transactions that are exempt from registration requirements. Indeed, the private placement market is bigger than the registered market so there are more trillions of dollars exchanged in the private market than the public market.

Would someone like LBRY be able to qualify under one of the exemptions, the many exemptions that exist?

MR. JONES: Your Honor, I would presume that if you're -- I don't want to say that LBRY could because LBRY has done certain things.

If you're a company who's putting out tokens and you qualify for the exemptions, there's nothing in my

understanding that says because you're a blockchain company you don't qualify for the exemptions.

If you're going to make a general solicitation, you're going to have a hard time qualifying for the exemptions.

THE COURT: Well, there are small dollar solicitations. There are interstate solicitations.

MR. JONES: Yes, your Honor.

THE COURT: You know, there are exemptions --

MR. JONES: Absolutely.

THE COURT: -- which are gigantic in number.

Okay. I just was curious about that. I'm not trying to bind the SEC. I just was interested in the counterfactual -- if we deem blockchain to be useful and we deem digital assets to be important to function as a blockchain and we don't want people to have to engage in the burden of registration, are there ways that this could be done that wouldn't subject the blockchain creator to the obligation to register.

It seems to me that there are, but I don't know -- one thing that would not be able to do, which is a company that wants to rely on the growth and the value of its holding of its coin as the means to finance the growth of the company.

MR. JONES: Right.

THE COURT: It's very hard to do that and have it

not be a Howey investment contract under your client's view, right?

MR. JONES: And so, your Honor, that's exactly what LBRY did here. In fact, they put out a whole post, it's Exhibit 43, about how there's a whole new way of doing business, and we can create these tokens. We don't have to exploit our customers because we can sell these tokens because they'll go up in value over time, and that's how we'll fund and build our business.

So that latter part, the part where you said it's very hard for it not to be an investment contract, that's what LBRY did.

But in my personal opinion, I think which may be what the Court is also expressing, there are ways to not run afoul of the Howey test and still run a blockchain.

THE COURT: Yeah. That's what I'm just wondering, you know, because it does seem that there are very important valuable uses of blockchain technology and there would be seemingly ways to run a blockchain successfully without the digital asset being a security, like Pocketful of Quarters, but it would be hard to do that if your business model is we don't need large amounts of venture capital. We don't need to charge people for stuff. We will just build a blockchain with a digital asset that will increase in value in the future as we build out and succeed with the blockchain because that's

quintessentially people who -- it goes up in value because people want to buy it. People want to buy it because it's going to become more valuable in the future because the company builds it up. That's sort of quintessentially Howey. That's your position?

MR. JONES: That is, your Honor.

THE COURT: All right.

Again, take a short break. As soon as my court reporter is ready, we'll come back, hear LBRY's response, LBRY's argument about fair notice, your response, and then we'll wrap up, okay?

MR. JONES: Thank you, your Honor.

(RECESS)

THE COURT: So just to anticipate something I assume LBRY is going to ask you, I want your answer first.

You place great weight on things LBRY said in connection with or loosely or more directly related to offerings of LBC. LBRY says, look, that's one tiny fraction of all the things we said about LBC and our app, and we actually said things like don't look at it as an investment, you know, and they swamp those few things that you point to. What's your response to that?

MR. JONES: A couple of responses there, your Honor.

First of all, they don't swamp it with everything

they said about LBC. They swamp it with everything they've said about everything. New functionality. Hey, we got a new video. This person is joining our platform. We're a bunch of cool guys. This is the guy that we created that we write a pen name under.

It's not all the things we said about LBC. This is a small fraction. The things that the Commission have cited that they said about LBC or the things that they've said about LBC, that's -- I mean, we put in a lot of stuff because that's what they've said.

And you won't find anywhere in the record submitted by LBRY except one time where they said don't expect a profit. Don't think this is going to go up over the long-term. We're not working on this. You will not make a -- this will not go up in value. They say nothing like that except one time.

The one time they say it is when they're selling hundreds of thousands of tokens to Flipside Crypto, the investment club that you and I were talking about before, your Honor. And they say as an afterthought, after the deal is consumed, oh, by the way, we are very conscious of the securities laws. This is not for investment. This is for use on the platform. Not credible. In fact, perhaps proving the opposite in the fact that they felt that --

THE COURT: That kind of disclaimer you would say is of really no value. It's just designed to show the

awareness that this is potentially an offering of security?

MR. JONES: Correct, your Honor.

So I think Mr. Miller is right when he says you look at the promotional materials. You know, when they talked about LBC, they talked about it in the way that the Commission has presented with its many exhibits, and LBRY has not presented any exhibits that show that they talked about it in a different way.

And so, yes, they may have said 8,000 things, but the test is not about how verbose the defendant is, as we say in our brief, or reticent. The question is when they talk about LBC -- and in many of the cases there's two or three documents.

THE COURT: Let me ask you about reticence. What's the oil well case, the Supreme Court's oil well case about leases of the land in --

MR. JONES: It's Joiner, your Honor.

THE COURT: Joiner.

MR. JONES: Yes.

THE COURT: What the Court in Joiner said was this might well be a different case had they not engaged in any kind of promotional statements.

Do you think a complete absence of promotional statements would be sufficient for a company like this?

MR. JONES: I don't, your Honor.

And, first, I don't think I necessarily agree with you exactly what the Court says in Joiner.

THE COURT: I'm trying to do it from memory.

MR. JONES: In Joiner -- and Judge Selya talks about this actually. In Joiner they say if you had never said that this exploratory drilling part of the deal could render you some profit, right, they say the exploratory drilling part of the deal is the part that drives the expectation of profits. Otherwise, I think they call it a leasehold interest in what is otherwise a, you know, possibly oil-filled, probably dry piece of land.

So I think the point that's being made in Joiner there is -- you know, normally, like in Forman, you might have just a leasehold interest, but once you put an exploratory drilling part on it that actually gives it the value, the economic reality of that transaction is that there's an expectation of profits which we can see by the fact that you talked about it and highlighted it. I don't think, your Honor, if they hadn't talked about it but still had it, that the Joiner Court might have said, well, there is no expectation of profits here.

And the reason I say that, your Honor, is because the courts in analyzing this, whether it's Joiner or SG or Forman or Telegram or Kik, they look at not just what is said, and I think it's inappropriate to look at just what it said.

They look at the structure of the transaction.

Here LBRY creates these things. It holds back 400 million. It starts to sell them out in the world. And then it makes statements.

But the whole structure of the transaction in the first place, which is we are going to fund our business -- our business model, as you said, is -- and it was admitted as testimony and submitted as part of this record. All of the money to build LBRY --

THE COURT: So your point is -- at least your perspective, again not binding the SEC, but you're saying even if they had been completely silent but had structured the transactions the way they did, engaged in the transactions, held back the 400,000, whatever, million, whatever --

MR. JONES: Yes, your Honor.

THE COURT: -- all of that, that would have been enough. You don't need these statements in this case to satisfy Howey.

MR. JONES: I believe that's right, your Honor, because I don't believe that the securities laws permit you to put out what is a security in an economic reality and stay quiet and evade the securities laws. That's what I have to look out for here, that there's some loophole created that, hey, you know, we never said this was going up, but everything we did showed that that's what we thought and the whole part

of the transaction that that's how it worked, and it did.

I want to say one more thing, your Honor, before I sit down.

THE COURT: One more thing, and then I've got to let LBRY have a turn.

MR. JONES: Of course, our Honor.

You seem to think that the Commission was buying into this off-chain/on-chain ratio. We think that's bunk. The way that it's presented --

THE COURT: I thought you were making arguments based on on-chain/off-chain ratio.

MR. JONES: We're making I think rebuttal arguments based on if you actually look at the data, here's what it is, your Honor, and in fact we've rebutted it in our --

THE COURT: So you agree with me that it doesn't necessarily tell you which uses are consumptive or not?

MR. JONES: No, your Honor.

The on-chain transaction is extraordinarily problematic. We've outline that in our Daubert motion we just submitted to you.

THE COURT: I have not seen it.

MR. JONES: Of course, your Honor. There's more than enough here.

But not only is it bunk in the way that it's done, not only is it not a reliable proxy for consumptive use, it's

not a -- even if it was, it's not a workable test. You can't have the securities laws basically say, well, you don't know whether it's a security until five years down the line when you see if enough of these people bought it and not enough of those people.

THE COURT: No. I agree that it couldn't work as a test in and of itself. The issue is, is it a relevant -- can it be a relevant factor at all in consideration, and I think this is where you and LBRY may disagree. I think they say evidence of what subjective intent of acquirers of a digital asset, evidence of that is potentially useful, and so if we were able to show here in a perfect world 100 percent of the acquirers of LBC acquired it for consumptive use and we were able to prove that conclusively, that they would say that's very, very strong evidence that -- just like people who bought the apartments wanted to live there and not the stock, people who bought LBC and in fact used it entirely for consumptive purposes wanted to use it for consumptive purposes, not for investment. So that's why I think at least in theory in extreme cases it might be relevant. It's not dispositive. I'm just saying it may be a factor that I can consider.

MR. JONES: I understand, your Honor, but I think the key part of what you said at the end there was that they bought it for consumptive purposes and not for investment purposes.

THE COURT: Right.

MR. JONES: Once you're in for investment purposes, even for part of it, even by some people, even, you know, a fraction of those people, you're in securities land.

THE COURT: Yeah, but if you're buying -- people buy houses. Do you live in a house you own?

MR. JONES: I do, your Honor.

THE COURT: If you have, you probably think, you know what, rather than rent a house, I'm going to buy a house.

MR. JONES: Yes.

THE COURT: Because over time I'm going to make some appreciation in the value of the house or maybe it's a hedge against inflation or something else. It's primarily I want to live in it, you know, but houses are, like under the family resemblance test or something, they wouldn't be investment contracts necessarily, but the point is that there are things that people acquire both because they have some investment value but principally because they have some consumptive value which are not going to satisfy the Howey test.

MR. JONES: Absolutely, your Honor. And I would say in most of those circumstances it's going to fail on a different part of the Howey test before you even get to expectation of profits. Your house is not a common enterprise.

THE COURT: Right.

MR. JONES: And to the extent it goes up in profit, it's because possibly you improve it.

So I would say there absolutely are, your Honor, there are Beanie Babies in the world, but they're not LBC.

Thank you, your Honor.

THE COURT: All right. So let me hear from LBRY briefly in response to what you've heard, and then your argument on fair notice, and then I can only give you about ten minutes at most and then I'll get a brief response from the SEC, and then we'll wrap up.

MR. MILLER: Thank you, your Honor.

We completely disagree with the SEC's analysis here that simply running an application on a blockchain where an entity owns those tokens turns those tokens into a security. That is not the test.

THE COURT: Well, I don't think it's the test, but I also don't think that's what they're saying.

MR. MILLER: Well, we believe -- let me change a little point here.

Your Honor has been focusing on what type of promotional material is enough. What is enough?

We think the SG case in using the word the principal attraction, we believe that the Price case which said, used the word primarily, and we believe that -- and

that's an Eleventh Circuit case, we believe the Second Circuit's case in SEC versus Aqua-Sonic where they said the overall emphasis, those words, particularly in the First Circuit SG case, mean something. We think they were put there for a reason.

Next point, your Honor.

THE COURT: I mean, I'm going to have to think more about that. I do think it's a point worth considering, but I don't think it involves a mechanical counting up of the number of investors and their subjective statements as to what they acquired the asset for. That would be an impossible to administer test and shouldn't really be the focus, but your point is not that because you agree that it's a reasonable investor test and you agree that it's economic reality and you agree that it's totality of circumstances. You're just saying subjective intent can be relevant and this is evidence of subjective intent, and when there's an undeniable, substantial in your view, consumptive use, the SEC isn't really able to prove that using the reasonable objective purchaser standard that this is an acquisition or an offer because of expectation of profit?

MR. MILLER: That's correct. And I think although we believe that the evidence presented, which when looked at by a reasonable investor here, would suggest that LBRY is not promoting it for investment.

We do recognize that there's a counterargument here and question whether either side would be -- whether it would be appropriate for the Court to rule on summary judgment for either side given the arguments.

THE COURT: I'm either going to rule on cross-motions or I'm going to hold a trial and rule. It's not like we're going to have a jury decide this case, right? I assume -- I haven't looked, but you haven't made some demand for a jury, which would be very unusual.

I'm just not sure what else I would uncover at trial that I don't already have in front of me. I mean, it seems like you've both done a good job of putting together the core arguments on your respective positions. But in any event, I hear your point on that.

MR. MILLER: And lastly, your Honor, if the SEC is right about how they interpret this, and that is go look at an application on a blockchain and look what they say about the token, and when you look at what they say about the token, it talks about -- what is it talking about? It's talking about the underlying blockchain and the fact that they're building a protocol, and because they own tokens in that blockchain that makes it a security.

I think that is turning the entire Howey test upside down. It's then converting it into I think a subjective test, not a reasonable investor test that is

looking at promotional materials.

Again, I would argue if LBRY -- if the LBRY credits are tokens, then thousands of companies that run on Ethereum platform, that use Bitcoin, they're all going to be deemed to be security.

THE COURT: Yeah, that's a bit of an overstatement. I mean something like Bitcoin that doesn't have an entity, a business that's trying to build out the Bitcoin blockchain and isn't offering anything to anybody, it's completely different.

MR. MILLER: It does have -- Bitcoin has been forked many times. Not many times but a few times. And who's done that? The members. The people who run those notes. Just like LBRY, just like Ethereum, those are members who make determinations of we should do this in the software. It's more advantageous for all the users. And so if people adopt it, then it's forked.

So there's nothing different between Bitcoin, which is the transfer of value, and LBRY. It's a transfer of value. That's all it is. It's -- can people believe that it's an investment? Certainly. But what is -- and it goes back to what did LBRY do to promote this. That's what you need to look at. I think the courts are saying look at the promotional material. And when you look at the promotional material, you don't have what the SEC has alleged in SEC versus Telegram, SEC versus Kik. You don't have any of these

issues of a private place memoranda, what someone normally would think of.

I think, your Honor, we're struggling with dual purposes. The reason you don't have those cases is because the government usually passes on those cases because they recognize, well, people can disagree on whether it's investment or whether it's use. We're not going to go prosecute this case.

For some reason they made this a case, and we think under Howey, its progeny, the First Circuit case law of SG, this does not constitute -- LBRY credits do not constitute securities.

THE COURT: Okay. Thank you. Did you want to say anything more on the fair notice argument? You raised it in your brief. I think I understand it, but if there's anything you want to add on that.

MR. MILLER: No. Nothing further, your Honor.

THE COURT: All right.

Any last comment from you before we wrap up?

MR. Jones: No, your Honor. We absolutely believe this is ripe for summary judgment, and we think the case law supports you deciding it as a question of law.

THE COURT: Okay. I'll take the matter under advisement. I think it's been well-argued. The oral argument has been helpful to me. It's a significant issue. I want to

make sure I devote substantial time to it. It may be 30 to 60 days before I get out a ruling on it.

I'm going to stay LBRY's need to respond to the Daubert motion because it isn't going to take -- I'm not going to take that into account when ruling on this matter, and I'm not considering the supplemental expert disclosure either. So you don't have to answer the Daubert motion. I'm not going to look at it. If you want to answer it, you can, but I just don't want to make you work unnecessarily. I tend to take those motions before trial anyway. And before I determine there's a need for trial here, I don't think there's a need in ruling on the Daubert motion.

So the time for you to respond to that is stayed until further order of the Court.

If I determine that there's a triable matter left at the end of this, I'll schedule a further status conference to discuss any remaining matters that have to be done. So I wouldn't expect the parties to be either engaging in substantial additional discovery now or doing anything, filing things with the Court. I have this briefed. I'm ready to go. Give me my time to rule on it. Then we'll revisit if necessary.

Is that acceptable to you?

MR. JONES: It's absolutely acceptable, your Honor.

Just as a matter of clarification, when we asked to

have the trial pushed to October 4th there were automatic pretrial submission dates.

THE COURT: Everything is stayed until further order of the Court.

MR. JONES: Thank you, your Honor.

THE COURT: I have to decide whether there's a triable case here. I don't want people to spend money on things that might not be necessary.

MR. JONES: We appreciate that.

THE COURT: I recognize how expensive litigation is. It's now in my hands for a while. If there's something that survives after this, we'll meet again and set up new deadlines and all of that, okay?

It is important. I want to get it done. I'm going to try to get it done expeditiously. I hope by the end of August, but certainly by the end of September I'll have something, and then we can chat, okay?

All right. Thank you. That concludes the hearing.

MR. MILLER: Thank you, your Honor.

MR. JONES: Thank you, your Honor.

(Conclusion of hearing at 3:15 p.m.)

C E R T I F I C A T E

I, Susan M. Bateman, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 7-31-22

/s/ Susan M. Bateman
SUSAN M. BATEMAN, RPR, CRR