UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

RICHARD J. SCHUELER, a/k/a RICHARD HEART, HEX, PULSECHAIN, and PULSEX,

Defendant.

23-CV-05749-CBA

United States Courthouse
Brooklyn, New York

Thursday, October 31, 2024
2:00 p.m.

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TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE CAROL B. AMON
UNITED STATES SENIOR DISTRICT COURT JUDGE

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THE COURTROOM DEPUTY: Good afternoon. This is an oral argument on defendant's motion to dismiss, the Securities and Exchange Commission versus Schueler, Case No. 23-cv-05749. Will the parties please introduce themselves, for the record, starting with the plaintiff.

MR. GULDE: Good afternoon, Your Honor. I'm Matt Gulde for the SEC.

MR. KURUVILLA: Good afternoon, Ben Kuruvilla for the SEC.

THE COURT: Good afternoon.

MR. KLEINMAN: Good afternoon, Your Honor. Derek Kleinman for the SEC.

MR. TENREIRO: Good afternoon, Your Honor. Jorge Tenreiro for the SEC.

THE COURT: Good afternoon.

MR. LIFTIK: Good afternoon, Your Honor. Michael Liftik from Emanuel Urquhart & Sullivan for defendant, Richard Heart. I'll start and introduce the folks we have over here. I have my partner, Kristen Tahler and Sam Nitze. We also have from Clark Smith & Villazor, we have Patrick Smith and Brian Burns.

From Kirk & Ingram we have David Kirk and Michael Ingram, and from the Gray Reed firm we have Chris Davis.

THE COURT: All right. Good afternoon, everyone.

Who is going to be arguing for the defendant?

MR. LIFTIK: Your Honor, I will be arguing as to most of the arguments and Mr. Kirk will be handling the personal jurisdiction argument.

THE COURT: Okay. And for the SEC?

MR. GULDE: Your Honor, it will be Ben Kuruvilla and myself, Matt Gulde.

THE COURT: Are you splitting up arguments?

MR. KIRK: Yes, we are, Your Honor. I'm going to be handling personal jurisdiction and questions relating to the *Morrison* issues, and also the investment contract piece as well.

THE COURT: Okay. You can stand up when you're ready to talk. Everyone can be seated. Counsel, I guess we'll take your arguments from the table. I'll have you remain seated because of the way the microphones are set up. I think, first of all, why don't we begin with Mr. Kirk and the issue of personal jurisdiction.

MR. KIRK: Thank you, Your Honor. Can you hear on the microphone okay?

THE COURT: I sure can, yes.

MR. KIRK: Your Honor, as for the SEC's complaint alleging that Mr. Heart, a resident of Finland, published blockchain software programs, put information about them up on web sites and online videos, the complaint alleges that some persons in the U.S. executed that software, or viewed that

online content. That's not nearly enough to establish personal jurisdiction over Mr. Heart, or causally show that he engaged in any domestic transactions that should be subjected to U.S. securities laws. If I could, Your Honor --

THE COURT: Is that simply because you're saying it was a global, the terms of the information on his web site, it was globally to everyone and wasn't directed to the United States?

MR. KIRK: That's correct, Your Honor. I think in contrast to some of the other cases that the parties have cited, including Your Honor's opinion in *PlexCorps*, Mr. Heart's, both the blockchain software programs he developed and the web sites and information he put up about the software in online videos, is available to the world at large.

And under the Second Circuit's opinion in *Best Van Lines*, as well as a number of more recent authorities in the district courts, as well as more recent internet authorities in other circuits, you know, Courts have started to realize that the worldwide web is inherently worldwide. And just because persons in one jurisdiction are able to go and access information doesn't mean that the person who put that information online, or in this case the blockchain software programs were online has expressly aimed any activities at the forum.

That's the test under *Calder* is that the defendant

has to have expressly aimed his activities at the United States. We don't think the SEC makes that showing.

THE COURT: What about the conferences that the SEC makes reference to? It's your position there that they're after the offer period and, therefore, not relevant?

MR. KIRK: That's right, Your Honor. And we've actually prepared a demonstrative just to help set out the timeline, because I think two things that I'd like to bring to your attention, the first is that there are three different software programs at issue here and the SEC calls those software programs. They call them securities offerings. Obviously, we disagree with that.

And if we discuss offerings here, we're not agreeing with that contention. But what I think we can all agree on, is the software programs, they started and ended on different dates. They involve different alleged facts, different software codes, different statements, different assets, different people. If the SEC doesn't meet its burden to show jurisdiction and domestic transactions as to any one of them, then that one is out of the case.

So that's why, with Your Honor's permission, I hope you can see the demonstrative okay. We also have copies.

THE COURT: Have you given them to your adversary?

MR. KIRK: We have before the hearing, Your Honor.

MR. KURUVILLA: Your Honor, if we can get a few more

copies. We just have the one.

THE COURT: Let me clarify one thing, which will shorten the arguments. Addressing the SEC, you have abandoned, I take it, any alter-ego theory that you had set forth in the original complaint? That's gone?

MR. KURUVILLA: Your Honor, it's not part of this motion. It's not relevant to this motion.

THE COURT: Have you abandoned those claims or not? Counsel raised the issue that they weren't viable claims, that the PulseChain, the blockchains themselves, weren't entities. Are you pursuing that or not pursuing that?

MR. KURUVILLA: I think with respect to alter-ego, Your Honor, we allege that because we had facts, we had some facts to suggest that Mr. Heart has control over these entities, that he's controlling the web sites, et cetera.

THE COURT: But you've named the blockchains themselves as defendants. What's the basis for doing that, and are you continuing to do that or maintain that they're defendants?

MR. KURUVILLA: Right. Your Honor, again, it's not relevant for this motion but we are -- the reason we did that in the first place was because, again, to the extent there's an argument that Mr. Heart is not responsible for any of the conduct that's alleged in the complaint, that these are all with the responsibility of Hex and PulseChain and PulseX,

because they exist on the blockchain, he has no control over them, they're their own thing, we wanted to ensure when we pled this that we are covering the entire scheme, that we're covering all possible defendants. So that's why --

THE COURT: I'm sorry. Why isn't it relevant to the motions? It was part of their motion to dismiss, I think.

MR. KURUVILLA: Right. And we haven't responded to that argument, Your Honor.

THE COURT: So you're agreeing that they should be dismissed then?

MR. KURUVILLA: It's not part of our -- right. It's not part of our theory for why the Court would have personal jurisdiction.

THE COURT: All right.

MR. KIRK: Your Honor, if you have questions on that, I'm happy to speak about it. But I did just want to make clear that it is our position, we moved to have them dismissed, as I think counsel has acknowledged, even if they didn't respond to those arguments.

I do just want to point out that we cited case law in which opposing counsel cited, you know, they named non-existent entities as defendants. Again, our point was you can't do that. I had cited the case, sued as a defendant is a division of the New York Police Department that didn't exist, it wasn't an entity, and the Court on a motion by the City of

New York said, okay, we're going to dismiss that because you can't bring a suit against a non-existent entity.

Same with a lawsuit that named a television series as a defendant. We think this is the same kind of problem. I'm happy to elaborate on that, Your Honor.

THE COURT: No, I don't think that's necessary. You have this chart here. I take it it's your position that for both Hex and PulseChain and PulseX that the contacts that the SEC relies on heavily all occurred after the offering period for those three entities or securities. Correct?

MR. KIRK: That's correct, Your Honor.

THE COURT: And your chart presumably shows that.

MR. KIRK: That's right. That's our position. I think it's important here to unpack each of the three software programs because each one is different, and they occurred -- the events that the SEC has brought this lawsuit about occurred at different times.

If we take Hex as an example, Hex is a software program that Mr. Heart launched on December 3, 2019, and there was a period of about 11 months called the adoption amplifier period. And this is what they're suing over. This is the period of time when users could execute the Hex software and use it to generate Hex tokens.

The first of these conferences that they allege shows a tie to the United States wasn't until March of 2022.

That's well over a year later. And so we don't think it can have any conceivable connection to what they're calling the Hex offering. Again, we don't think it's an offering but we don't think it has any conceivable connection to this adoption amplifier period that ended more than a year before this first conference.

I think that's an easy sort of open and shut case when it comes to Hex. I'd like to also briefly touch upon each of the PulseChain Sacrifice and the PulseX Sacrifice. Again, two different transactions occurring at two different time periods. PulseChain, as you can see from the slide, July 15, 2021 through August 3, 2021, again, many months before the first of these conferences, and PulseX was December 29, 2021 through February 26, 2022, again, it ended before the first conference in March of 2022.

Now, the only thing, as far as we can tell, that sort of -- that they're using as a basis to, I guess, claim that this conference has some relevance is they have one allegation that says both the PulseChain offering period and the PulseX offering period were unofficially extended, are the words used, until April 6th of 2022.

We're not sure what unofficially extended means and it looks like they got that from the declaration of Kyle Bahr. He's an individual who that's what he said, and I think that's all that we have to go on for that. And just a couple of

things that --

THE COURT: Well, isn't there evidence, though, that there were transactions after April 6, 2022? In other words, people were able to go in and put money in and get whatever they got.

MR. KIRK: Your Honor, one of the strange idiosyncrasies about blockchain transactions is both the PulseX sacrifice wallet, to use the SEC's words, and the PulseChain sacrifice wallet, both of those wallets are essentially blockchain addresses that anyone can send assets to who uses the Ethereum network. I could do it today and that can never be stopped or turned off.

It's sort of like a PO box or even more it's kind of like the night drop box at the court. Anyone can walk up and put a digital asset into it. They can do it today. So I think it's correct that as a technical matter people can still send assets to this address. I don't know what that would accomplish. I think nothing. But that's just sort of the technological nature of how blockchain works.

However, in terms of what was actually happening after the close of these sacrifice periods, this unofficially extended period that lasts until April 6th of 2022, well, there if you look at the PulseChain web site, and we have this using the internet way back machine in a footnote in our reply brief, the PulseChain web site actually said as of early

August 2021, the PulseChain sacrifice phase is over. Don't send any more money. And so we're not really sure where they get this offering, to use their words, this sacrifice.

THE COURT: But you're making this argument to say, I take it, that I shouldn't consider anything said at the Hex conference about PulseChain?

MR. KIRK: That's --

THE COURT: Is that the reason that you're making this argument?

MR. KIRK: That's correct, Your Honor. I think that's why to us the unofficial extension makes it, you know, we don't think that's an allegation that is specific enough to be credited. With that said, Your Honor, suppose we say for argument's sake if we do credit the -- say let's see what happens if the time period for the sacrifices lasted up until April 6, 2022, let's think about what the consequence of that would be.

And so the only thing that gets into that extended timeline is this March 2022 Hex conference. And just to drill down a little bit on what that is, that's a community run Hex conference in Las Vegas. Mr. Heart was invited by video to attend and receive a lifetime achievement award from the community and give some remarks by video.

So he speaks for about two-and-a-half hours. That's all in the declaration. He talks about a lot of different

topics. During that talk, he mentions that the PulseChain and PulseX software seemed to have product markets because thousands of people joined chat rooms about them. And that's it.

THE COURT: So you're saying that it's not related to the claim in essence?

MR. KIRK: That's correct. For Hex, again, we could put that one to the side because the Hex offering ended more than a year before, again, using offering just to use the SEC's terminology. But that adoption amplifier period that allowed users to generate Hex tokens on the software, that was long over.

What I'm saying is that for PulseChain and PulseX, they're saying the offering period was extended and this video appearance gets Mr. Heart with a United States connection. And it's based on two-and-a-half hours of remarks, during which he mentions offhand that there are lots of people in the chat rooms about the PulseChain and PulseX software. We don't think that remotely supports the assertion that these were promoting the sacrifices. He never even mentions the sacrifices.

To put a finer point on it, Your Honor, if he was promoting the sacrifices to this audience, wouldn't he have encouraged people to participate or mention the sacrifice, or that people should or even could still participate, despite

the fact that the web site said it was over for several months?

And so we think that basically one line about these other software programs at a conference about Hex, about the different software program, one line about the software we don't think remotely gets to, you know, enough to support the allegation that he was promoting the sacrifices, if they were even still going on.

I think if that was his intention, he would have said something like, there's one month left, I encourage you to participate. He never even mentioned the word. He just briefly mentioned the software.

THE COURT: What about the fraud claim? The fraud claim, that was presumably to September 22nd, around that period of time, 2022, with the misappropriation. So the fraud claim goes out. What is your response to the personal jurisdiction issue as it pertains to the fraud claim?

MR. KIRK: Your Honor, Mr. Liftik will speak in more detail about the fraud chronology. I think the timeline there is also a little bit mixed up. But there, the issue we have for personal jurisdiction as it pertains to the fraud claim specifically is, you know, sort of like with these -- sort of like with these events we mentioned, there's no tie to any conduct in the United States.

The statements that they're relying on that they say

were misleading investors, they said they mislead United States investors because he was giving them updates about software development. Those statements weren't targeted towards anyone in the United States. Again, he was just --

THE COURT: Are you talking now about You Tube statements? What about statements made in the Miami interview, the Pulse Con, those two?

MR. KIRK: Your Honor, I don't think the SEC has contended that there are specific statements that they think were misleading.

THE COURT: In those conferences?

MR. KIRK: That's my understanding of their allegations.

THE COURT: So you're just saying that the statements that were made were made not directed to the United States, but part of this sort of global statements going to everyone?

MR. KIRK: That's correct, Your Honor. Our understanding of the fraud theory, and, again, Mr. Liftik will dive into some of the issues with the allegations themselves. But to the extent they've stated a claim for fraud, and we don't think they have, putting that to the side, they haven't stated a claim for domestic securities fraud because none of this conduct was targeted to the United States.

I believe we cited the *Aegean Marine* case, showing

that you actually have to have some nexus to United States conduct to state a fraud claim under securities laws, to state a domestic claim, that is.

THE COURT: Did you have anything else you wanted to add with regard to the personal jurisdiction argument? Because I'll try to take them argument by argument and hear from the SEC on that issue.

MR. KIRK: If I could just very briefly touch on an issue that I think is important. It's important as the jurisprudence develops. But it comes back to the first thing that you mentioned of there's a difference between information that's made generally available and things that are targeting the United States.

I actually think Your Honor's decision in *PlexCorps* really honed in on the different factors and the difference between what type of conduct falls on the side of expressly targeting United States persons, or the United States as a forum, and what type of conduct is just generally available to the world at large. And I just want to flag that, because you were probably interested to see that both we and the SEC relied on *PlexCorps*.

But that case involved Facebook accounts that marketed and advertised directly to United States persons, web site user registrations, including credit cards and billing addresses, including some United States customers, U.S.

payment accounts, and payment processors and even a business trip. Your Honor at least found there was an issue of fact as to whether it was a business trip to do business relating to the offering at the beginning of the offering period in that case.

Again, there's nothing here that resembles that, in our opinion, Your Honor. And we think the facts here are much closer to what the Southern District considered in *Holsworth versus BProtocol,* as well as a number of other cases that we cite that just show the way the internet works is you can put content online for the world to see and for the world to access, and that's not enough to show purposeful availment and expressly aiming activities.

THE COURT: Thank you. Who is going to take up this issue?

MR. KURUVILLA: I am, Your Honor.

THE COURT: How have you shown personal jurisdiction?

MR. KURUVILLA: Your Honor, we believe that we've shown it through a mix of different contacts, over the internet activity, as already discussed, which I'll elaborate on more, as well as the specific contacts with the United States. I just want --

THE COURT: Let me just ask for a concession, first of all. Do you agree that you have to establish personal

jurisdiction with respect to each of the claims?

MR. KURUVILLA: So we do have to establish it with respect to each claim, Your Honor. That's a general point I wanted to make. I know the defense wants you to sort of slice it up between each of these offerings, and certainly we did plead them in the complaint separately, because we do take the position that each one of them was offered and sold as a security and each one of them has to meet the *Howey* element. So each one of them is a security.

THE COURT: Each one of them you have to establish personal jurisdiction for.

MR. KURUVILLA: As far as personal jurisdiction is concerned, Your Honor, the point here is that each one of these offerings, although they were separate, they are interrelated. And the way we pled them is that they're intrarelated, as well. For example, we pled in the complaint that he's telling his audience via his internet marketing and his promotional campaign that Hex is -- the development of Pulse and PulseX is going to drive value to Hex.

The purpose, one of the purposes of developing PulseChain is so that Hex users can now trade on PulseChain and it would be cheaper than what it was before on Ethereum.

And that once PulseChain is developed and Hex users begin using PulseChain, that the value of Hex would go up. So I think it's important.

THE COURT: I think you need to differentiate, though, if you would, between statements that were made just broadly, across the globe, which counsel has pointed out are not that relevant or relevant for the question of personal jurisdiction because they're not directed and statements that you have then pointed out to the Court, well, there were instances where, you know, they came to the United States, he was Zoomed in to 3,000 people in Las Vegas, the Hex conference, the Miami interview, the Pulse con, virtual appearance in Las Vegas. The question I have with all of those is they all occurred after the offering period.

So how are those relevant to the inquiry?

MR. KURUVILLA: So Your Honor, with respect to that point, just because the offering period ends doesn't mean that the conduct has ended.

THE COURT: That may be true but the conduct has to be -- the conduct we're talking about, it has to be directed, it has to be during the period of the offering.

MR. KURUVILLA: Well, Your Honor, during before and during the offering period, the way these offerings were marketed to the public was that Mr. Heart was going to engage in efforts that included efforts Pulse launched. With respect to Hex, for example, he was going to stay involved, he was going to get Hex listed on platforms, that he was going to engage in efforts Pulse launched to make sure that Hex remains

a successful --

THE COURT: That may be relevant to your fraud claim. How is it relevant to the other claims? Because the offering sale of securities, that's what your claims are with regard to Hex, PulseChain, PulseX. Once that offering period has ended, the terms of personal jurisdiction, why are you considering things that happened after that period?

The offering is closed. And what authority do you have that supports the fact that I can consider on the issue of personal jurisdiction post offering contacts?

MR. KURUVILLA: Your Honor, it's relevant to *Howey* post sale efforts.

THE COURT: I'm not talking about *Howey*. I'm talking about personal jurisdiction.

MR. KURUVILLA: Personal jurisdiction is considered what our claims are. Personal jurisdiction goes to what our specific claims are. We have a claim for under Section 5, Section 5 of the Securities Act, under Section 17 of the Securities Act for fraud, and under Section 10(b) for fraud, as well. So the *Howey* analysis is relevant to our claim. So post sale efforts go to whether or not --

THE COURT: Whether or not there's a security.

MR. KURUVILLA: Whether or not there's a security. Exactly.

THE COURT: But that's not what we're talking about

now. We're not talking about the *Howey* issue or whether or not there's a security. We're talking about personal jurisdiction.

For instance, in the *Sarkisian* case, Southern District, the Court determined that contacts that occurred after the events giving rise to the liability, which is here the offer and sale, were not relevant to the question of personal jurisdiction.

MR. KURUVILLA: Right. Your Honor, so let me address one point. The April 6, 2022, the point that counsel was making about the unofficial extension of PulseChain and PulseX, our position is that we have pled that as the date the offerings ended for both of those, for PulseChain and PulseX, April 6, 2022, the relevant date. We pled it in the complaint. It's in the affidavit that we submitted by Mr. Bahr and we've indicated that the reason it was extended was that Mr. Heart can continue to receive investments through April 6th.

So that's -- that is a well pled allegation. And at this stage, Your Honor, the Court has to draw inferences in favor of the plaintiff and accept the April 6, 2022 date as the date the offering period ended for both of those offerings.

THE COURT: For Hex?

MR. KURUVILLA: No. For PulseChain -- both

PulseChain and PulseX, we pled in the complaint that the offering periods for both of those were open through April 6, 2022.

THE COURT: Okay.

MR. KURUVILLA: To the extent the defense is proffering facts to contradict that, those are not facts that the Court should accept on a motion to dismiss. So for that reason, the March 2022 conference occurred during the offering period for PulseChain and PulseX.

THE COURT: What happened at the March 22nd conference that is relevant to PulseChain or PulseX?

MR. KURUVILLA: The entire conference, Your Honor, is a promotion. It's called a Hex conference. It's a promotion for investment. It's an investment promotion.

THE COURT: It doesn't say anything about PulseChain or PulseX, other than there are a lot of people in a chat room. Right?

MR. KURUVILLA: He talks about that in reference to investment, Your Honor. He says that the fact that this is a product, that it has product market fit. The product -- the public is demanding this product. This is how you drive investments. He's talking about holding on, he's talking about advice with respect to Hex holders and PulseChain and PulseX holders, that they should hold onto their investment and watch it grow.

He's providing investment strategy during this Hex conference, with respect to Hex, with respect to PulseChain.

THE COURT: With respect, at least, to Hex you have to see that the offering period is over for Hex. On the issue of personal jurisdiction it has no relevance.

MR. KURUVILLA: I think -- well, I understand your point, Your Honor. I think our position, again, with respect to -- and I think this conference elaborates this point. He's talking about Hex, PulseChain, together here. In the later context that we have in our motion, the August 2022 appearance in the United States, the Pulse Con appearance in September, he's talking about Hex, PulseChain, PulseX, he's talking about all these things together. I think when the Court considers personal jurisdiction, it should consider that point.

THE COURT: Consider it for what purpose? Consider it as it relates to Pulse, as it relates to Hex?

MR. KURUVILLA: As it relates to Hex. Hex, for example, the offering period --

THE COURT: The offering period is over by the time he's having those conferences. I don't understand how you say that I can consider that.

MR. KURUVILLA: I think this goes back to the argument, Your Honor, that we have to establish -- for our claims, we make our claims, we make our Section 5 claim and our fraud claims based on whether or not the offerings are

securities and are evidence for why there are securities include post launch efforts, as well. That is relevant to establishing our claims under the Securities Act, under the Exchange Act.

And for that reason, when the Court is considering jurisdiction, it should consider these facts that are relevant to our making our claims. So let me make another point, Your Honor.

On Section 5, specifically, we plead a count for Section 5. The factual allegations that support the Section 5 claim are with respect to all three offerings. So at this stage, for our Section 5 claim to survive, it's our view that if the Court finds personal jurisdiction with respect to any one of those offerings that support our Section 5 claim, that the Section 5 claim should survive.

But it's our view that, again, because the claims -- our claims are dependent on whether or not we can establish that each of these offerings are, in fact, securities. And in order to do that, the Court can consider post launch efforts and that's established in the *Telegram* case, for example, in the Southern District. That is a principle that comes out of that case, that post launch efforts of the seller should be considered in the securities analysis and for that --

THE COURT: But it's not a personal jurisdiction case.

MR. KURUVILLA: That's not a personal jurisdiction case, Your Honor.

THE COURT: What are you relying on for the fraud case in terms of establishing personal jurisdiction?

MR. KURUVILLA: For the fraud case, the fraud case is the offering that is PulseChain. So it would be all the facts that we've alleged with respect to PulseChain. So that would include his appearance in -- one, his appearance at the conference virtually before the conference in Las Vegas, his appearance in August of 2022 before -- in a live studio for the podcast, and then his September 2022 appearance at Pulse Con. In addition to that, of course, we are using the internet --

THE COURT: Do you use what happened at those conferences as part of your fraud claim, or are you relying on the statements that were made during the You Tube videos as part of your fraud claim?

MR. KURUVILLA: No. I don't think that we're using any of the conferences for support.

THE COURT: They're not part of your fraud claim, the conferences?

MR. KURUVILLA: That's right.

THE COURT: So then, what are your contacts, then, or what are the activities that are directed towards the forum?

MR. KURUVILLA: Let me also say this --

THE COURT: For the fraud claim.

MR. KURUVILLA: With respect to the internet contacts, we haven't discussed those yet. As we pled in the complaint, Mr. Heart made comments when he was promoting these offerings, specifically talking about the *Howey* test, or at least tracking the language of the *Howey* test.

And so he, for example -- and I think the defense highlighted some of this in their opposition where they quote a line from him where he specifically says you are not to expect profit from the efforts of others. This is specifically tracking the *Howey* language.

The reason he does this is because he understands that there is a market in the United States, and he's directing these statements at those investors, specifically. He understands that there's a market for these securities in the United States. And with respect to PulseChain and PulseX, Hex has already been on the market at this point. Hex has already been on the market.

THE COURT: Does this relate to your fraud? What does this relate to?

MR. KURUVILLA: This relates to why statements that Mr. Heart has made in his promotional campaign through the internet, why these support personal jurisdiction. That includes statements that he's --

THE COURT: But you make this argument in your brief that because he talked about the *Howey* test he must be directing these to people in the United States. Is that an argument you made in your brief?

MR. KURUVILLA: That was not made in the brief, Your Honor, but those are facts that are pled in our -- those are facts that are pled in our complaint, and they do, again, underscore the fact that Mr. Heart understood that there was a securities market in the United States for his offerings. He certainly didn't restrict access.

THE COURT: He doesn't have to restrict access. Where do you get that principle from, that somehow personal jurisdiction is established unless he restricts access?

MR. KURUVILLA: Well, Your Honor can consider the totality of the circumstances here, the totality of the context. I would say that if Mr. Heart understands that there is a market in the United States for his offerings, and then he is directing statements into the United States now globally through You Tube and other social media, he would understand that indirectly this is reaching the U.S. market.

THE COURT: Well, it reaches any market in the world.

MR. KURUVILLA: Right. So, for example, in the *PlexCorps* case, Your Honor, there were efforts that were made, purported efforts that were made, to exclude the United States

investors, to exclude the United States investment.

I'm sorry. To prevent United States users from accessing Facebook or whatever other social media account was being distributed globally. I understand that those efforts were ultimately unsuccessful. The Court found that they were unsuccessful, but it underscores the point that -- and I think the Court makes this in *PlexCorps,* that simply because something is available globally, simply because a marketing campaign is targeting globally, does not mean that it does not indirectly reach and have relevance if it indirectly reaches the United States, especially where we have a seller who understands that there is a market for these securities in the United States.

THE COURT: This case is vastly different from *PlexCorps* in terms of the amount of contacts though. There was a trip to the United States during the offer period. U.S. based payment service providers received funds, I mean, as counsel pointed out all of the differences in *PlexCorps*.

So are you making the argument here that this case is similar to *PlexCorps*?

MR. KURUVILLA: No, Your Honor. We don't have all those contacts that existed in *PlexCorps*. With regard to the internet contacts, I would say that the Court articulated this principle in *PlexCorps*.

THE COURT: Are you relying on the affidavit you put

in from Mr. Bahr?

MR. KURUVILLA: We are. We understand that that's not one of our principle contacts we're relying on, but he certainly was a developer in the United States who worked on Hex and who worked on PulseChain and PulseX. We understand that we don't have anything in that affidavit that suggests that Mr. Heart knew that he was dealing with somebody in the United States when he was engaging him for work on Hex and PulseChain.

THE COURT: In essence, you're not relying on that affidavit?

MR. KURUVILLA: Right. The other point I want to make, Your Honor, is the conferences he had, the Hex conference, the conference in Las Vegas in September of 2022, the fact that he's having these conferences also reflect the fact that he understands that there is a U.S. market for his securities.

Why else would he be appearing before these markets? Why would he be appearing before these audiences and talking about Hex, PulseChain, and PulseX if he did not understand that there was a market for his securities there. I think that just the fact that he's having these conferences, and in the case of PulseChain and PulseX right around the time of the end of the offering period.

Why else would he be having it if he didn't

understand fully that there was a market to which these securities are going to be --

THE COURT: Well, the test isn't whether he understood there was a market. Obviously if he's going to everyone in the globe he understands that there's likely a market.

I think the question is whether he was directing his activities to that specific market, as opposed to any market in the entire world. I think that's the inquiry. Isn't it?

MR. KURUVILLA: He's reaching out to these when he's appearing virtually.

THE COURT: But these are, again, we're going over old ground here. The Hex Miami and Pulse Con conferences with respect to Hex were clearly after the offerings closed and after the offerings -- actually after the offerings for Pulse and PulseX closed. In any event, why don't we take up a different issue. Thank you.

I'll leave it to counsel for Mr. Heart to address the next issue that they think is the most important to raise, in terms of their motion to dismiss.

MR. LIFTIK: Thank you, Your Honor. I think we'll turn briefly to the fraud argument next. But before I do, I would like to raise two broader contextual points that I think have become live issues as part of the discussion, and they're being highlighted and run as a theme throughout the remainder

of the discussion.

And that is that there's a paradox in how the SEC treats Mr. Heart's statement. The SEC is asking the Court to focus on Mr. Heart's statements as evidence of jurisdiction, domestic securities transactions, or fraud. Then the SEC also wants this Court to ignore as, quote, tongue and cheek statements by Mr. Heart that undermine their allegations. The SEC can't have it both ways.

Either the relevant statements matter and the Court can take judicial notice of a significant amount of them, or none of them do. And if they matter, then even taking all the SEC's allegations as true, the complaint fails to allege, as we argue, and if you're limiting -- if none of them matter and we limit ourselves to Mr. Heart's conduct, what did he do, what is he alleged to have done in the complaint, then the complaint still fails.

The second sort of broad contextual point that will run as a theme throughout the remainder of the argument is that there's a significant issue throughout the complaint, and that is that the chronology is out of sequence leaving the impression that events happened before or long after or simultaneously when they didn't, and that Mr. Heart knew of the events before they happened or withheld information he could not have known at the time.

We would like to -- we believe that the Court --

that the SEC has jumbled this timeline for good reason. Once you actually deconstruct the timeline, the actual chronology would make apparent that the technology at issue is very different from the crypto projects that they mentioned in a lot of their briefing. This project is much more like Bitcoin fully built when launched, and that impacts legally how the complaint continues to fail.

I'd like to turn with that context to the fraud claim. As counsel for the SEC has admitted, the fraud claim is quite narrow. The fraud claim only relates to the PulseChain project. It also takes up an incredibly small amount of the SEC's complaint. It is only six paragraphs, two-and-a-half pages, of their entire complaint. It is very thinly alleged and it is very narrow.

To be very clear, and I think Mr. Kuruvilla conceded this point, the content in the affidavits that were submitted as part of jurisdiction discovery are not in the complaint. They have not alleged the Miami conference or any of the later events as giving rise to the fraud claim. It's quite narrow.

The second important point is that the SEC concedes that this is a claim that is based only on scheme liability. They have not alleged a false statement or omissions case. Under 10b-5(b) they have conceded that this is a 10b-5(a) or (c) case, or under the Securities Act it's a 17(a)(1) or (3) case not 17(a)(2) case.

So to establish scheme liability in broad strokes, the SEC needs to establish the omission, that they allege, and deceptive conduct. Obviously, they have done neither. It's a Second Circuit law that misstatements and omissions alone cannot establish scheme liability. That's the recent *Rio Tinto* case that the SEC brought.

And here, this is where the point about the statements comes into play. Mr. Heart's stark disclosures make any fraud claim impossible. Mr. Heart clearly disclosed in plain and unambiguous language that people who sent assets to the sacrifice address lost those assets.

THE COURT: Why would they send them? What is the earthly purpose of sending money to lose money?

MR. LIFTIK: Your Honor, the complaint doesn't give us anything on that. Frankly, I would be speculating if I were to guess why people were doing it. But what Mr. Heart said, again, we can return to his words, is that he was asked what is the sacrifice. This is in my declaration, Exhibit C, at page 11.

When you say sacrifice, what does it mean? What is a sacrifice? Mr. Heart says, you lose your coins. You don't have them anymore. For the political statement that you believe free speech is a protected human right and blockchains are speech.

THE COURT: What does that mean?

MR. LIFTIK: Well, we can't really go beyond his words in the context of a motion to dismiss, but I think what he's getting at is to express one's political belief, here is something you can do, and as a community people are going to be aware of that statement and acknowledge that statement.

One imperfect analogy is flag burning. You can destroy something to make a political statement. Here, people are choosing to sacrifice assets.

THE COURT: To build a blockchain, right?

MR. LIFTIK: No, Your Honor. That's expressly not what was said. This is sort of a key. We really have to look at what Mr. Heart said. He said the sacrifice is the coins are gone. In another place he says, you should have no expectation of profit from the work of others. You have lost your money. You have sacrificed it. It is gone.

The SEC themselves, I don't think, can draft a more explicit stark disclosure.

THE COURT: Why is he later in October 8th, for instance, of 2022 talking about things like you're not getting any updates on PulseChain, PulseX, they're done when they're done. The developers are working on it. Why is he saying that if someone has just given their money over for nothing? Why is he making those comments? Why is he talking about that at that point in time?

MR. LIFTIK: Again, the complaint offers us no clue

about that and it's not part of their fraud claim. I think we have to remember that there are essentially two events that happened. There's the sacrifice event, and Mr. Heart undertook to build PulseChain blockchain. And so he's speaking about the updates on the PulseChain blockchain, and the progress that they're making there.

THE COURT: What happens to all the money? I mean in terms of how you view what the complaint is saying, people are investing all of this money and what is this money supposed to be used for?

MR. LIFTIK: Well --

THE COURT: According to what Mr. Heart is saying.

MR. LIFTIK: Right. Again --

THE COURT: It doesn't make any sense.

MR. LIFTIK: Certainly it may not be a choice that Your Honor and I may make, but it is a choice that people are free to make and he was very clear with them. What Mr. Heart did not do is he did not give them a use of proceeds.

Mr. Heart did not say if you sacrifice to this address the money will be spent to build the PulseChain blockchain and we're going to spend X amount on coders and X amount on --

THE COURT: Well, even if he had said that, aren't the facts, as at least established in the complaint, even if he had said give me the money I'll build a straight

blockchain, you'll get all these tokens, everybody will be happy, that all happened. Correct?

MR. LIFTIK: Correct.

THE COURT: And there was never any statement that he wasn't going to take a fee or a cut from this or anything? Even if you viewed the statements as yes, I'm going to develop this, you give me this money, you fight, it's wonderful for free speech, blockchains are free speech, and you might get airdrop tokens, which is at the end of that speech, I might add, even if you viewed that as what he said, he did all of that. Correct?

MR. LIFTIK: We agree completely, Your Honor. There was no statements made that he would not spend money, or a very small portion, and the SEC is grasping to turn statements that they don't like into an omissions case.

THE COURT: Your position is a little bit puzzling because you seem to put all your eggs in one basket, which is there's no fraud because he told them they were giving up their money. That seems to me a little counterintuitive that people would just send money on that understanding.

MR. LIFTIK: If I may, Your Honor, I think there's two elements to our argument. The first is, where is the omission. I think Your Honor aptly walked through where is the omission, and our point is the SEC's argument seems to be that can't possibly be what happened.

In fact, they must have known, it must have been said that the money was being used. So we're just simply drawing out what was actually said, what were the words, what were the disclosures that were made.

The second point relates to their attempt to create allegations of deception, and their allegations of deception have to do with back and forth transactions.

THE COURT: Tell me about those. The mixer transactions, that seemed a little odd. Tell me why that's not suspect.

MR. LIFTIK: For a very simple reason, Your Honor. In order for an act to be deceptive, you have to be tricking somebody.

THE COURT: You have to be what?

MR. LIFTIK: Tricking somebody. You have to be hiding something from somebody. The SEC alleges that mixers are used to anonymize transactions. Well, these are all blockchain transactions.

So anyone can see assets being transferred into that mixer. If everyone knows that mixers are used to anonymize transactions, then what you see on the blockchain is assets going into a mixer and it is apparent that it's being used to anonymize for whatever reason. But there's nothing inherently deceptive about using a mixer.

Same with the back and forth transactions. These

are all visible on the blockchain. It's almost impossible to deceive people about blockchain transactions when you can see them in the blockchain when you look at the code. That's very different than the cases that the SEC relies on like *Sugarman,* where they're setting up shell entities to hide who owns an entity.

Sugarman is very interesting because what they do there is there's an Irish company with a very Irish name based in Ireland that they're going to be selling assets into. And it's alleged that what they do is set up a Nevada corporation with the exact same name, and they trick the investors to send the money to the Nevada corporation instead of to the Irish corporation.

There is nothing akin to that here. It's very plain on its face what's happening with the assets. Mr. Heart was very clear that nobody should expect anything. They're sacrificing as a free speech statement, and then things happen to the assets, that a small portion of the assets were sent to the --

THE COURT: The assets that they allege, the SEC alleges, though, that as a result of all these mixer transactions they ended up in a wallet that was Mr. Heart's private wallet. Have I got that right?

MR. LIFTIK: They don't actually allege who owns the private wallet, I believe, but they do eventually allege

transactions in various goods, watches, and cars. Again, here is where the chronology becomes important because the statements --

THE COURT: They do allege that it went into a wallet controlled by Mr. Heart. Correct?

MR. LIFTIK: They allege in their fraud claim.

THE COURT: That's what I'm talking about.

MR. LIFTIK: Correct, Your Honor. They allege that the assets -- it was not disclosed that the assets would go to a private wallet address, as if there was a disclosure obligation to disclose that after the period was over some amount of the assets would be sent to a private wallet.

Again, there is no affirmative duty to disclose on which SEC can pin their allegations. There's an understanding, a plain statement, there is no omission, they don't touch the topic of how assets would be spent. And so one of their claims is it was not disclosed that assets would be immediately transferred from the PulseChain Sacrifice address to the private wallet. There is no disclosure obligation for that.

The other important point is the chronology, which is that the alleged mixer transaction and alleged back and forth, does not happen until January of 2022, well after the alleged purchase of the goods that they are --

THE COURT: I have to say I was confused. Maybe

this question goes to the SEC, as opposed to you, but there was some footnote that suggested that there were funds taken out, or this mixing happened throughout the course of the -- I didn't understand the footnote, quite frankly, but I'm not sure it was your footnote.

MR. LIFTIK: Your Honor, I think you're right. The chronology, which you have before you, is the PulseChain Sacrifice period, even unofficially extended goes to the end of April 6, 2022. The complaint alleges that these various goods were purchased starting in August.

THE COURT: August of when?

MR. LIFTIK: August '21.

THE COURT: When did the period begin?

MR. LIFTIK: The period began in July of 2021.

THE COURT: So I mean it could be that he took out the initial assets that were being deposited.

MR. LIFTIK: It's not in the complaint. I would also point out the other -- that the SEC has in their opposition raised a new theory. And obviously you can't demand in your opposition and so --

THE COURT: What new theory do you see them raising?

MR. LIFTIK: The new theory I see is the theory about adding another statement about money going to charity, and we can walk through that but it's not in their complaint.

THE COURT: That was the statement about where the

money wasn't going. There wasn't a statement about where money was going. It was a statement about where money wasn't going. Correct?

MR. LIFTIK: Well, again, what they've done is they've quoted it out of context. And the question, the specific question, was so the money that is raised by PulseChain, essentially, for the most part goes to charity. And Mr. Heart says no, they're different.

If you go to SENS.org and send them an email, some of it went to charity, 26.5 million is done as money in the bank. And then it goes on to say but it's not the .5 billion that you see on those other sacrifice addresses.

Those addresses, to the best of my knowledge, do not go to charity. Right there on the web site it says, you have no expectation of profit from the work of others. So to the extent that 26.5 million did go to charity, that's a true statement.

THE COURT: That was 26.5 million of funds of PulseChain that went to charity? I haven't heard that before. So I'm just --

MR. LIFTIK: This is the problem with amending through the opposition, Your Honor, it's not laid out. But they do raise this statement and there is money that was sent to a different address that was designated for charity. But --

THE COURT: Well, I guess this is outside the complaint, I take it.

MR. LIFTIK: Yes.

THE COURT: Did you have anything you wanted to add or I can hear from the SEC on the question of fraud.

MR. LIFTIK: Reserving to reply, yes, Your Honor.

THE COURT: Counsel, you're going to take this issue?

MR. GULDE: Yes, Your Honor. Thank you.

Your Honor, it's not that the SEC's conceded that we're only seeking a fraud scheme. We're seeking a fraud scheme as set forth in the complaint. We only sued Mr. Heart under Section 17(a)(1) and (2) and Rule 10b(a) and (c).

So there's no concession. It's what we set out to do. To support the fraud scheme, we do have an omission. We have kind of deceptive movements.

THE COURT: What is the omission? The omission is what, that I didn't say I was going to spend some of the money on myself?

MR. GULDE: The matrix initiatives, which they cite, says disclosure is required under these provisions of the U.S. securities laws when necessary to make statements made in light of the circumstances under which they were made, not misleading.

THE COURT: What statement did he make that made the

failure to disclose that he was going to use assets misleading? What affirmative statement did he make that using the assets made misleading?

MR. GULDE: Number one, when he was talking about while he was raising money for the PulseChain offering, lamenting publicly in response to PulseChain investors who were frustrated, apparently, about the timeline of the roll out, stuff is hard. He's saying the software development in connection with PulseChain was hard, that he had a team of developers working on PulseChain, and that investors would have to wait. That's one example.

THE COURT: You glean from that that he's telling them that I'm using your assets to develop PulseChain?

MR. GULDE: I'm saying that that is an example of a statement made, which under the circumstances to omit the fact that in January 2022 he had already used millions of their dollars directly.

And by the way, Heart sets himself out as a mega millionaire. He's not using his prior Bitcoin money. He's using money that's directly traceable to what's just coming in from PulseChain investors to buy luxury goods for himself like cars, watches, and ultimately the biggest black diamond in the world, not to hire more developers, not to pay developers for overtime, not to hasten or at least split among these. And it is misleading, in this context, to talk about the development

and not also mention that he's doing that.

He's spending PulseChain investor funds as soon as it hits his hand. That would have altered the total mix of information available to investors, and we point to a specific Brooklyn investor that told us he expected Heart to use the PulseChain funds to actually develop PulseChain.

THE COURT: PulseChain was developed. Correct? And people got, some investors got tokens. So why didn't he do what he said he was going to do? How is it fraud if you do what you say you're going to do?

MR. GULDE: PulseChain was eventually released. As evidenced by these conversations that he's having with PulseChain investors, clearly not released as fast as they wanted it. The comment I just made, I mean he's giving an exasperated response to the PulseChain investors saying we're going as fast as we can. I hired developers. We're working on this. And so while PulseChain --

THE COURT: Have you alleged those statements are false?

MR. GULDE: We have alleged in our complaint those statements, and I believe that that statement is rendered misleading by the omission of the statement that -- the omission of disclosure that at the exact same time he is, in fact, using millions of those dollars, their dollars, directly for personal luxury purchases, Rolexes, McLaren, Ferrari, and

a black diamond.

There's one thing that Mr. Liftik said that I really have to address, and Your Honor was hinting towards it. Heart spent a lot of time arguing that these are not investor funds and there can't be any expectation about the use of these funds, you know, harking again to *Howey,* and an example of how Heart is speaking into the United States, by the way, because otherwise it would not have been relevant. And we're talking about this interview.

THE COURT: Which interview are you talking about?

MR. GULDE: The one they included as Exhibit C, and they cite at page 11 -- I'd like to focus on pages 11 and 13, also. But it's got that language in there.

THE COURT: Is this the Miami interview?

MR. GULDE: This was a You Tube interview.

THE COURT: Okay.

MR. GULDE: I don't believe he's in the United States when he gave this. He says those words. He says, there's sacrifice, lost and gone, with no expectation from this sacrifice. This is worth unpacking, number one, because it's obviously not true. He directly contradicts himself afterwards and because, also, Heart relies on this idea of loss and gone repeatedly throughout the briefing.

THE COURT: Do you allege anywhere in your complaint that these were false statements that he made?

MR. GULDE: Throughout the complaint the idea that he's alleging that PulseChain Sacrificers sacrifices were not going to his personal use, that concept.

THE COURT: He doesn't say that anywhere, that I'm not going to take, I don't know what you want to call it, a fee or anything else. He doesn't tell any of the investors that he's getting nothing out of this. This is not like a fraud where you say to the investors, all this money is going to this charity, I'm not taking a bit of it and then it turns out that money is taken, and the next thing you know you're spending four months in jail. It's not that case.

MR. GULDE: It is not that case, Your Honor. You're right. This is a case where the things he's saying are rendered misleading by him not also saying, by the way, you probably want to know that I'm spending your money as soon as it hits my hands on these cars. So the briefing --

THE COURT: Does it make any difference what he spent the money on? The question is, could he take money out? Was he permitted to take money out?

MR. GULDE: It makes a difference if he spent it on the enterprise or not.

THE COURT: I understand that. But if he took out personal money, you keep emphasizing that. If he is entitled to money, and I know you dispute that, and he takes money out, it doesn't really make any difference the nature of the

purchases that he made, as long as he was permitted to take some money out if he took it out as a fee.

MR. GULDE: In one sense, no, and I don't disagree with that. In another sense, Your Honor could consider it in terms of we're not talking about subsistence goods. He's not Jean Valjean over there stealing a piece of bread.

I want to speak simply about Exhibit C where they quote Mr. Heart as -- and he's explicitly very thoroughly implicitly referring to *Howey* and saying, you should have no expectation of profit from the work of others, you've lost your money, you sacrificed it. But then in the very next breath he says, lucky you, if you get an airdrop of 10,000 Pulse per each dollar value of sacrifice that you performed weighted against that rate I was telling you about.

And then he goes on to talk more about multipliers and how lucrative PulseChain might be for these folks. Heart cannot claim that these sacrificed funds are lost and gone in one breath, and then turn right around in the next breath and tell investors what they're getting for their exchange. It gives up the whole joke here.

THE COURT: Did you mention this added paragraph in your brief? I don't remember.

MR. GULDE: We pointed to the exhibit in the exchange, I believe, but I don't think we talked about the "lucky you" paragraph.

That idea, when we talk about tongue and cheek, and we're a little bit mock to the idea that you can't rely on him and then also call his statements tongue and cheek, I'm certainly responding to that argument by saying we can hold Mr. Heart to his words and we can point out obvious contradictions when they exist.

PulseChain was still being developed at this time and so Heart is speaking about an investment in the enterprise. PulseChain hadn't been released yet. By his own words, he was still developing PulseChain.

So Heart is simply not being serious when he says PulseChain funds are lost or gone. It's another example of him not being honest with investors. So not only did Heart use millions of this PulseChain investor money for himself, not only did he misleadingly omit this information from investors, but he also took this money through a series of back and forth transactions.

THE COURT: Those were all public transactions, though. If someone wanted to take the time, I take it, it would have been publicly available. They could have seen what was happening.

MR. GULDE: I don't think that's true as to where they end up. So I don't think it's as transparent as Heart would have you believe, the result of these 2022 back and forth transactions, and also the use of a crypto asset

mixture.

One reason is because we don't have full information about who owns the addresses. So even if there's public -- even if they're open to the public, you don't know who is transacting. Again, we return to when Mr. Heart is talking about, in the briefing, why these can't be deceptive acts, these back and forth transactions. He goes back to the idea of lost and gone. You can't have deceptive transactions about money that you had no expectations about to begin with.

We've already discussed that. Lost and gone are effectively a sham, part of Mr. Heart misleading us here. Heart immediately retracts it with a little bit of a wink and a nod saying lucky you, if you get all these Pulse out of the deal.

We have alleged a reasonable investor would expect Heart to use the funds to develop the enterprise, and we've alleged a Brooklyn investor believed that. Now they poke holes on the Brooklyn investor and they point to the *National Elevator* case that talks about needing to establish a confidential witness' reliability, saying we haven't done that. That case is definitely not this case.

The four confidential witnesses in that case, they needed more specialized knowledge to testify about the things that are being quoted on. It was pointed out that they had no routine interaction with the particular corporate project at

issue. They had no firsthand knowledge of facts contradicting the executive of the company's public statements.

Here, the only bona fide that matters is that the Brooklyn investor was an investor in PulseChain, and we have alleged that. So, Your Honor, we have deceptive conduct.

THE COURT: The greatest number that you have alleged is not in the complaint, but I recognize you could amend the complaint to add it. But you have not alleged anything more than ten U.S. investors.

Am I correct about that?

MR. GULDE: As written in the complaint, yes, Your Honor.

THE COURT: I don't think that's even in the complaint. That's all you have. Right?

MR. GULDE: Maybe we should get a show of hands from the folks in the gallery.

THE COURT: I would just as soon not.

MR. GULDE: Yes, Your Honor, you're right. We have only alleged that. As I sit here today, of course, I believe many more than ten.

THE COURT: How does that relate when we talk about going -- there's an argument that's been made, and perhaps counsel needs to articulate the argument quite apart from the fraud argument and quite apart from the *Howey* argument, about whether these are investment contracts that meet the *Howey*

test.

There's more of a preliminary argument about whether these are domestic securities transactions. And let me ask if counsel wants to address that issue, because that seems to be a fairly significant issue.

MR. LIFTIK: Your Honor, we can talk about the *Morrison* issue, but before we go there, I do feel like I need to address a couple of points that Mr. Gulde made. It's a little hard because it almost sounds like the complaint is being amended in real-time.

We know that they didn't like that the assets are gone, the language, because it doesn't anywhere appear and, in our opinion, it's false. Here's the key, the chronology. Mr. Gulde spent a bit of time talking about the October 8th statement. If Your Honor draws your attention to the chart that we made, it's literally off the chart. That is in October of 2022. And even under the most expansive version of the SEC's view of the sacrifice period, that ends in April 6, 2022. So again, similar to the argument --

THE COURT: As it pertains to the fraud.

MR. LIFTIK: As it pertains to the fraud.

THE COURT: It's not past the fraud, the theory of the fraud case. Correct?

MR. LIFTIK: I believe it is, Your Honor. If the sacrifice period ended April 6, 2022, how is a statement made

six months later relevant to decisions that purchasers or sacrificers were making six months before?

Again, this is why we started with the theme of the chronology. The way they conflate events with when things happen is really important here. We want to turn to *Morrison*. We can also do that. The other point that is very clear, as Your Honor notes, that ultimately the PulseChain was built and there's certainly no allegation about there were insufficient funds to purchase it. There was a significant amount of money that went to the sacrifice address, and only a fraction of that is alleged to have been spent on the items that are in the complaint. So we can turn to *Morrison*. And Mr. Kirk, do you want to address that?

MR. KIRK: Yes. Thank you, Your Honor. I'll speak for just a couple of minutes on *Morrison* and their obligation, the SEC's obligation, to plead domestic security transactions.

THE COURT: Because that's the end of the game. If there's no domestic security transactions, that's it. Correct?

MR. KIRK: That's correct, Your Honor. And we think there's neither personal jurisdiction, nor domestic securities transactions. Those are two equally valid ways out. We think that, again, it's not disputed that *Morrison* applies here and that it's the SEC's burden to plead adequate --

THE COURT: Well, *Morrison*, it's disputed whether

Morrison applies to the fraud claim. Correct?

MR. KIRK: That's correct.

THE COURT: That is disputed.

MR. KIRK: That is disputed. You're absolutely right, Your Honor. So focusing -- and I apologize. I'll focus on Section 5 for a moment. On the Section 5 sales claims, we don't think the allegations in the complaint even do the bare minimum.

The only thing they say, the only allegation at all, is that some unspecified number of U.S. persons participated in these alleged transactions. That's not enough as a matter of law because in *Absolute Activist* the Second Circuit said, and I'm quoting, the parties' residency or citizenship is irrelevant to the location of the given transaction.

It also says: The mere assertion the transactions took place in the United States is insufficient to adequately plead the existence of domestic transactions. That's at page 70 of *Absolute Activist*. The *City of Pontiac*, which involved U.S. purchasers, made clear that even alleging the U.S. persons placed transactions from the U.S. is not enough. The SEC here didn't even do that. It just says there are some unspecified number of U.S. persons.

I think if those allegations were enough, then we would be back to a citizenship or residency test, which isn't what *Morrison* calls for. I think there's just not enough meat

on the bone, Your Honor. I'm not even sure there is a bone.

The only thing they do to try to save that problem is they invoke the recent decision in *Williams versus Binance*. The problem is none of the facts that animated the Court in *Williams* are present here. In that case you have transactions with U.S. users that were allegedly matched on the defendant's servers located in the U.S., and in addition, the transactions became irrevocable when they were sent in the U.S. pursuant to express terms of service. Again, nothing like that is present here. The Court also relied on what it called an interrelated reason.

THE COURT: Do you think that's an independent basis? That's not clear from the decision to me. When it calls it interrelated, can it stand by itself?

MR. KIRK: Your Honor, my reading of *Williams,* and obviously everyone will have a slightly different gloss, my reading is that both of these things are what got the Court there. The reason is, the Court clearly said there might be some cases where allegations about servers that were based in the U.S. might not be enough. The Court went on and it went on to describe, I think, the allegations in that case that the Second Circuit found troubling, for lack of a better word, and that is that the defendant entities, according to the Second Circuit, had expressly disclaimed having any location and notoriously disclaimed being subject to any country's

regulation.

A couple of quotes. They said: *Binance* expressly disclaims having any physical location, foreign or otherwise. The Court also noted that the government of the defendants' headquarters in Malta had actually disclaimed having any regulatory authority over the defendant.

THE COURT: What would be the equivalent in this case of Malta and *Binance*.

MR. KIRK: Your Honor, it's a little bit difficult because we have so few allegations in this complaint. The one thing we have is that Mr. Heart is alleged to be a resident of Finland. Finland has financial services authority. I dare not say the Finnish version of it. I would butcher the pronunciation. But it's alive and well and it's a regulatory authority. They have other regulatory agencies, as well.

Of course it doesn't mean they're going to chose to regulate blockchain technology the same way that the United States must, or that the SEC is at the moment.

But, you know, that said, they've alleged that Mr. Heart lives in a foreign country. They've alleged that that's where he developed and launched this software, that's where he spoke about it on the internet, that's where he made what the SEC is characterizing as promises to users. We disagree with that, of course. But all of that is happening from Finland. So, Your Honor, there aren't enough allegations here and I

think we can stop the work there. But as best as I could piece it all together, the only reasonable nexus would be that these are activities happening in Finland, or at least certainly not in the United States.

Again, the SEC tries to compare this to *Williams.* But Mr. Heart is a human being. He certainly doesn't lack a physical location. He certainly hasn't disclaimed having one and, again, no allegation that the Finnish government has disclaimed any responsibility for him. The only comparison that the SEC really can draw between this case and *Williams* is that they both involve blockchain technology.

In the SEC's brief, as I read it, they seem to be suggesting that if transactions occur on a decentralized blockchain ledger, then they have no location under *Williams* and they should default to the U.S. I don't actually think that's what *Williams* said at all. I think the Court in *Williams* wasn't concerned so much with the decentralized blockchain ledger as with a decentralized defendant.

Again, it was saying the defendant itself disclaims having any location. I think the fact the transactions are recorded on a decentralized ledger isn't really part of the analysis, and if it were, it would mean anytime you used blockchain ledger technology, as opposed to servers, or pen and paper, or whatever, to record transactions, then you would automatically get to default to the United States. I don't

think that's the outcome that *Williams* intended.

THE COURT: What about the 5(c) offer, the analysis there?

MR. KIRK: So thinking about that, the clear result under the case law is that it's the location of the offerer that's relevant. Here, according to the SEC, that's Mr. Heart. I'm not agreeing that he made offers, but it would be the location of Mr. Heart that matters.

And that was established and made clear by the Court in *Ripple*, and it was also established many years before by the Court in the Goldman Sachs case. We quote both of those. And I'll note those are both cases brought by the SEC. And in both of those cases the SEC was very happy with the result that it's the location of the offer that we look at.

That was the test and they were pleased with that result because the offerer in both cases was based in the United States.

What troubles me a little bit is now the shoe is on the other foot. There's a person outside the United States making statements and so they say, oh, well, maybe it should be a different test. Maybe now we should base it on where offers are heard.

Again, that's not supported by any case law in this circuit and, in fact, *Absolute Activist* actually noted that even allegations about heavy marketing in the U.S. or U.S.

persons being effected, again, we don't have marketing in the U.S., *Absolute Activist* says that sort of thing might satisfy conduct in effect, but not what *Morrison* calls for, a transactional test.

We also think there is no factual basis for this theory because, again, they don't actually provide any particulars of who heard what and where they heard it. The only law that they cite is a recent case from the Western District of Texas called *SEC versus Balina*. It's an out of circuit case recently accepted for interlocutory appeal.

And in addition to not being anything binding on this circuit, it's also a very unusual set of facts that are not present here. The defendant in *Balina* was a U.S. resident. He knowingly built up an investment information group with other U.S. participants, along with people from elsewhere in the world. So there's no personal jurisdiction issue. He's a U.S. resident and he leaves the U.S. on a two month road trip to learn about and promote cryptocurrencies, and in the meantime, he is, according to the opinion, expressly beaming back his information and promotions to his U.S. audience.

So he goes away for two months and then he comes back to the country when he's done. And the Court said it didn't want to encourage people to do what the defendant did by quote, temporarily leaving the United States to evade

United States securities regulations while targeting United States investors and United States financial markets. There's nothing similar here at all.

THE COURT: All right. Thank you. Let me just take up one separate issue, and then I'll hear from the SEC with response to both of those arguments. And this deals with the *Howey* argument. And I admit to being a bit confused by what position Mr. Heart is advocating on the Court with respect to the *Howey* analysis.

You said you're not making an argument that the PulseChain, Hex, PulseX don't satisfy the *Howey* test. You're saying that there's some sort of preliminary finding that has to be established prior to. You get to the *Howey* test about some continuing obligation, and I don't know where that is in the law.

MR. LIFTIK: Your Honor has accurately described our argument. The argument is before we march our way through the *Howey* elements, you have to have a preliminary inquiry. Frankly, at some point in time on a full record after full discovery we would be happy to argue the *Howey* elements. But on a motion to dismiss standard, we'd be arguing facts and that's obviously not appropriate.

But the federal securities laws define certain things as securities. Stock, bonds, ventures, notes, et cetera. One of those terms is an investment contract. That

language has to have meaning. The investment contract. Now, *Howey* defines how do you know once you have an investment contract, that's the box we're in, how do I know if I have a security.

Our argument is, essentially, it's not clear to us and we think under these facts as alleged, we're not even in the investment contract box. Now, why is that? You could even use a little bit of *Howey* to get there. *Howey* says --

THE COURT: Well, most of the cases that you cite use a lot of *Howey* to get there, don't they? They're mainly *Howey* cases examining the third element.

MR. LIFTIK: Well, they are, Your Honor. Here's the challenge. Before these crypto cases came about, the stream of crypto cases, nearly every single *Howey* test, *Howey* case, actually involved a contract. It's maybe not formally written, maybe it's an oral representation, but nobody is disputing that there is actually a contract, a binding agreement, or some type of agreement between two parties.

What is challenging and unique about crypto and about these transactions at issue here, the argument is there is no contract, there is no agreement, there is no connective tissue between someone sitting in their house choosing to execute the Hex code, execute against the Hex smart contracts, get back Hex tokens and anyone else.

Howey refers to transactions scheme or contract, and

our essential argument is there are none of those. If there is no transaction scheme or contract, we don't do the *Howey* analysis. We're not in the investment contract box.

THE COURT: There had been a series of cases that analyze cryptocurrency under the *Howey* test and, in fact, find that it's met the term investment contract.

MR. LIFTIK: I don't disagree. Obviously there is limited appellate authority here, and we believe that the argument still has merit, even if other courts disagree. But I think one of the other key aspects, if you look at some of the examples, for example, the *Telegram* case which counsel mentioned, you look at what happened in *Telegram* and there actually was a contract initially.

The investors made an investment. Telegram said they were going to develop the TON blockchain and that at some future period of time, they would release the TON blockchain and the TON tokens. So it was pretty apparent, putting aside, again, the elements of the *Howey* test, that there was some kind of agreement and some kind of continuing obligation that Telegram had took on.

Our argument here is if you look at the facts as alleged, Mr. Heart made no promises, no undertakings to do anything in the future. Once Hex was launched, fully built, anyone was free to either engage with that smart contract on their computers or not engage with that smart contract.

If Mr. Heart the day after Hex launched had decided to never go on You Tube again, never do anything related to Hex, and go into a completely different line of business, that would not have violated -- there would be no standing for a fraud claim. It was launched fully built.

He never said he was going to maintain the code. He never said I was going to make apps available on the smart contract. On Hex that doesn't work, but on PulseChain, never said I'm going to go build apps on PulseChain. Without any kind of continuing, individuals who are simply choosing to interact --

THE COURT: Hex was being transacted on a secondary market and, obviously, if it went up on the secondary market, that would be important to investors.

Wasn't he at the Hex conference and touting? This is after the period ends, but he's touting how great Hex is. Isn't that continuing on to promote Hex, if you will?

MR. LIFTIK: Well, I think simply speaking and saying I think this is a cool program, and let me explain to you how it works, is very different from saying, I have a continuing obligation here to make sure the code works, to continue to refine it, to make it better. It's very different than the vast majority of the crypto cases that the Commission has brought.

THE COURT: Okay. Thank you. Does counsel for the

SEC wish to respond to the two arguments that were raised? And if there's any short rebuttal, I'll hear it.

MR. KURUVILLA: First, Your Honor, just to address the points regarding *Morrison*, it's our position that we have alleged, the SEC has alleged domestic transaction that meets the *Morrison* test and the test articulated in *Absolute Activist*.

The key inquiry is where was irrevocable liability incurred. And that brings both from *Absolute Activist* and also *Williams versus Binance*, which counsel referenced is instructive on this point.

In this case we're dealing with a digital -- transactions that occurred on a digital blockchain. So there's even more reason than there was in *Williams versus Binance*. In *Williams versus Binance* the Court articulated the fact that it focused on where orders or where investors sent money from in that case. The reason that that was the focus of the inquiry was because it was dealing with a digital exchange that disclaimed having a location anywhere, or disclaimed having any presence in any foreign jurisdiction.

Here we're dealing with a fact pattern that actually makes that even more significant here, because these were transactions that did not occur over an intermediated exchange of any type, foreign or domestic.

THE COURT: Where did they occur? Have you

sufficiently alleged where it took place to suggest that they were irrevocably bound within the United States?

MR. KURUVILLA: Well, what we've alleged is that investors sent funds to a digital wallet address on the blockchain, and we have alleged that.

THE COURT: Where is the blockchain?

MR. KURUVILLA: It's --

THE COURT: Where does it live?

MR. KURUVILLA: The blockchain itself is not located in the United States. But our position --

THE COURT: Didn't it become -- not become irrevocable until it hit the blockchain?

MR. KURUVILLA: Well, no, it becomes irrevocable -- it can become irrevocable in -- a transaction can become irrevocable in multiple places.

THE COURT: What if you allege to tell me where that happened here?

MR. KURUVILLA: Here, where the investor in the United States became irrevocably bound is when they sent their funds to the wallet address. One thing that underscores that --

THE COURT: How did they do that?

MR. KURUVILLA: They transferred crypto assets.

THE COURT: They transferred ETH from where to where?

MR. KURUVILLA: ETH from their wallet address to a wallet address.

THE COURT: Where was their wallet address?

MR. KURUVILLA: Again, the wallet address exists on a digital blockchain.

THE COURT: Which takes me back to, where is the digital blockchain? How do I know this is all happening in the United States?

MR. KURUVILLA: Well, we have alleged that investor that's in -- that's, again, located in the United States sending their funds from --

THE COURT: It's not enough that the investor is in the United States, though, correct? That fact alone is not sufficient.

MR. KURUVILLA: The investor is physically present in the United States with -- again, this was *Williams versus Binance.* The investors were located in the United States sending funds over a digital --

THE COURT: But they found that there was some matching transaction that occurred within the United States.

MR. KURUVILLA: Right. We don't have that fact here because, again, we're not dealing with an exchange. Again, *Williams versus Binance* looked at two different ways where someone could incur irrevocable liability.

THE COURT: Is it your burden to show, at least on

the allegations of your complaint, to establish that? Isn't it your burden to show me that and how do you do that?

MR. KURUVILLA: Well, I think we do that using the same analogous facts that are here that are analogous to *Williams versus Binance,* which is an investor located in the United States that's sending funds, their funds, from the United States over, again, a digital platform but they're originating from the United States. At that point the investor becomes bound to the transaction at the point.

And, again, Mr. Heart, as I think we've referenced earlier today, referred to at least with regard to PulseChain, the sending of these funds as sacrifices. In other words, underscoring the point that once they had been sent, the funds have been committed.

THE COURT: So you say take him at his word that they're sacrifices?

MR. KURUVILLA: No, Your Honor. I think it underscores the point, just as it would be if someone was making an investment that wasn't called a sacrifice, that once they're paying for something, once they've sent their order, once they've sent the funds, they are committed to the transaction. And that's the inquiry under *Williams versus Binance*.

We think we've met it here, and that we've pled a domestic transaction, we've pled a Brooklyn investor, of

course, in the complaint. We think that satisfies the standard that was set out in *Williams versus Binance* and *Absolute Activist*.

THE COURT: Thank you. I don't know if anyone wanted to speak to the *Howey* issue or not.

MR. KURUVILLA: Yes, Your Honor. As far as the notion that there is a continuing obligation, or that *Howey* requires some kind of contractually grounded obligation, that argument has been rejected by multiple Courts that have considered it.

There has been -- the test for *Howey* is clear. It's set forth in the *Howey* case, investment money and the common enterprise with an expectation of profit from the efforts of others.

And I don't know where they're finding this contractually grounded argument, but if it's in the third *Howey* prong, which is an expectation of profit from the efforts of others, the test there and the focus there is what expectations were created by the seller.

THE COURT: Not whether they actually came to fruition?

MR. KURUVILLA: Right. Yes, and not that they were obligated. There is no part of the test that obligates the seller to do those things or requires a contract. It's just what expectations did they create objectively through the way

they marketed the asset, in what expectations they create in the investor that they were going to engage in certain efforts that would result in profit. That's the focus.

There is no requirement. Every Court that's heard this argument, *Terraform*, *Coinbase,* they've all rejected this notion that there is any continuing contractually bound obligation for the promoter to do anything in connection with the *Howey* test.

THE COURT: Thank you. Anything that you feel the need to respond to that you don't think you've been given the opportunity to address, since the burden is with you?

MR. KIRK: Your Honor, just very briefly on the *Morrison* point. They said that the test they need to show is where was irrevocable liability incurred. Again, there are a lot of factors that the cases look at, like where were servers located, where were orders matched, where was there a meeting of the minds from a contract perspective.

And we'd love to dust off our contract case books and get into the details, but there's just none in the complaint at all. It just says United States persons participated. It doesn't actually even say that they did so from the United States. Even if we assumed that were the case, the *City of Pontiac*, footnote 33, says that even placing purchase orders from the United States isn't enough that they've never actually said that that alone is enough for

irrevocable liability.

In *Williams,* again, while *Williams* did look to where purchasers in the United States were, it was for very specific reasons of both U.S. servers matching U.S. orders, and, again, like we said, the express disclaimer of the defendant having a location.

Again, there just aren't enough facts here for us to actually do that analysis, and that is the SEC's burden. That's the reason we haven't said more on the topic. There aren't enough facts to have that debate.

MR. KURUVILLA: Your Honor, if I could address the *City of Pontiac* point. The *Williams* court did distinguish that case because it held that in the *City of Pontiac* they were dealing with transactions that occurred over a foreign Swiss exchange that was regulated by Switzerland.

So there, there was an exchange that implicated a foreign regulatory regime, which did not exist in *Williams versus Binance* and does not exist here.

THE COURT: Thank you. Was there anything further?

MR. KIRK: On that point, Your Honor, again, they're talking about transactions on a Swiss exchange. We don't have enough details, enough allegations, to get into the facts. But from what little they've alleged, it, again, looks like there might be conduct in Finland.

The question is not is this a sufficiently regulated

market in another country. It's is there another country that would have jurisdiction here, and without enough allegations to get into it, it, again, looks to us like that may be Finland but it's certainly not the United States. I also just wanted to say this sort of comes back to a point we did make in the brief about transactions being predominantly foreign.

Again, here the only nexus to the United States is that some unspecified, or maybe it's 10 people in the United States, participated and were involved in the different software programs.

If everything else is alleged to have been outside the country from the person who spoke about the software and allegedly took responsibility for launching it, everything else is outside the country. I think that's all we have on *Morrison*, Your Honor.

THE COURT: All right. Thank you, gentlemen, for your argument. I'll reserve decision.

MR. GULDE: Thank you, Your Honor.

MR. LIFTIK: Thank you, Your Honor.

(Proceedings concluded at 3:39 p.m.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/S/ Nicole Sesta, RMR, CRR
Court Reporter/Transcriber

November 3, 2024