

1 3:54 p.m.

2 THE COURT: All right, so we're here for the charge
3 conference, and why don't we just have counsel state
4 appearances. We are on the record starting with Plaintiff's
5 counsel.

6 MR. BUCHDAHL: Your Honor, from Sussman Godfrey Jacob
7 Buchdahl Seth Ard Geng Chen Russell Rennie and we're also
8 joined by Mark Kindall.

9 THE COURT: Okay, very well.

10 MS. HASSAN: Your Honor, for Defendants am in a Hassan
11 Dan yell Weiner and Marc Weinstein.

12 THE COURT: And Ms. Moffett is here as well.

13 MS. HASSAN: And Ms. Rowena Moffett.

14 THE COURT: And obviously there were a lot of issues
15 in this charge, you folks raised a lot of issues. We're going
16 to go through it page by page literally. But before we do
17 that, I just wanted to make a couple of comments. You folks
18 raised a slew of issues. I carefully considered your
19 proposals. I read the cases. My law clerk and I read the
20 cases that you cited. We also did some of our own research.
21 So I think you can assume that we resolved every issue that was
22 raised, although if you think we missed one, please point it
23 out. I will give you a few comments on how I resolved some of
24 the major issues. I won't go through every single one because
25 we wouldn't be able to have the charge conference if I did

1 that.

2 Okay. So just to start, and this is in no particular
3 order. So with regard to investment contract, I went with the
4 notion of both horizon tall and I forget whether they call it
5 strict vertical, the narrower verdict cal version, the one that
6 says you can show it -- that element if your fortunes are
7 tied -- the fortunes of other investors or to the fortunes of
8 the promoter, but not the one that goes -- that your fortunes
9 are tied to the effort of the promoter that was reject by the
10 Second Circuit. Although I recognize there isn't governing
11 authority on it within the Second Circuit, that appeared to me
12 to not suffer from the flaw identified in the decision by Judge
13 Jacobs, the name of which I can't remember, in that it didn't
14 lump the second and third elements together, that is to say,
15 the elements about pooling and sole efforts of others, because,
16 again, it's just tied to the fortunes of the promoter, not the
17 efforts of the promoter.

18 And I thought it was also -- doing that was also
19 consistent with the broad flexible definition of security that
20 the Supreme Court, I believe, has suggested Congress intended.
21 So that's how I resolved that one.

22 The -- let's see. So I ultimately agreed with the
23 Plaintiffs and not Defendants as to the reading of CUSA in
24 *Jacobi* the Connecticut Supreme Court decision. I don't
25 believe -- the *Jacobi* decision talks about a burden of

1 production with regard to -- that the Plaintiff has a burden of
2 production to show the knowledge or constructive knowledge of
3 the Defendant. I think it's fairly clear in general but also
4 specifically from *Jacobi* itself that a burden of production is
5 something that operates at a level before a trial, before the
6 case goes to the trier of fact. Typically a burden of
7 production operates on summary judgment. In other words, one
8 party has to come forward with some evidence and then they do
9 that. The other side has to come forward and bear the burden
10 of proof.

11 So I think that at trial what's relevant is who has
12 the burden of proof on that issue, and it's clear to me at
13 least from the language of the statute and from *Jacobi* that the
14 Defendant has the burden of proving either that he didn't know
15 or that in exercise -- and in the exercise of freedom of care
16 could not have known. So that's how I resolved that issue.

17 The issue of partner and similar function, I actually
18 think I ended up agreeing with the Defendant on this. I
19 think -- it's hard to make sense of the statute unless, when it
20 first refers to partner it's using the formal legal definition
21 of partner and then later in the functionality -- I can't
22 remember the other languages functionality or similar function
23 or position is using a sort of operative practical de facto
24 concept of partner one would be de jure; the other would be de
25 facto. There's no evidence that the companies here were

1 partnerships, that I'm aware of.

2 I know there's been some evidence that Mr. Fraser was
3 Mr. Garza's partner, but there's simply no evidence that that
4 was formally the case. I think that it was a partnership. And
5 so that's how I resolved -- that's why I resolved that issue
6 the way I did. Namely, I did not instruct the jury that they
7 could find control based on the title of partner or the legal
8 position of partner. But I did find that they could find
9 control based upon the functional concept of partner. That's
10 how I resolved that one. That's why I resolved that one in
11 that particular way.

12 So currency, this one I struggled with, I will be
13 candid. There didn't seem -- the parties didn't really cite
14 that much case law on this, and I presume because there isn't
15 much.

16 There were a couple Southern District cases that
17 though not strictly speaking inconsistent with the way I've set
18 up this charge are arguably inconsistent. But I -- to me, the
19 statute is hard to make sense of unless currency has some
20 independent meaning, meaning I think I would conclude that if
21 currency was not effectively an affirmative defense, then I
22 think the currency language would be superfluous. That's how I
23 read the statute. I think it has to suggest that if the
24 product fits something, in this case investment contract,
25 something in the part that comes before they get to the word

1 not or no, but it also fits something that comes afterward,
2 after the not or no, then my conclusion is, then, it's not a
3 security. Because, again, I'm not sure why they would include
4 the no if -- if it could be -- if you could have an investment
5 contract that was also a currency that was a security, you
6 would need to include no currency in that case. Hopefully that
7 was clear.

8 But in any event, that's how I resolved that issue,
9 although I did -- and we can talk -- we will talk about this.
10 I didn't think that it was any evidence to support the notion
11 that any other of the products, other than Paycoin, was a
12 currency. So that's why I made -- I set that up the way I did.

13 Let's see. I do want to talk about forward looking
14 statements. I have some questions about that. And then
15 finally, and this is where I'll end and we can start going
16 through -- then hear the motions. I have some real questions
17 about the affirmative defenses as to the named Plaintiffs. And
18 I'll just outline that for you.

19 So, first of all, for Mr. Audet, I don't think any of
20 those defenses apply. I didn't see any evidence that, at all,
21 that any of those defenses, no matter how they're construed
22 would apply to Mr. Audet.

23 With regard to the others, so I did a fair amount of
24 research on in pari delicto and unclean hands in Connecticut.
25 I'm aware, of course, that the Supreme Court decision

1 discussing in pari delicto in context of a securities claim.

2 But in Connecticut, in pari delicto, as far as I can
3 see has only been recognized in one context and that is in a
4 breach of contract claim. In particular, courts have held that
5 it's effectively a synonym or really another label for the
6 illegality doctrine that the courts won't enforce an illegal
7 contract. And some of the older cases say because the parties
8 are in pari delicto, for example, a contract to engage in
9 prostitution the Court wouldn't enforce that because the
10 parties are in pari delicto that's the only context in
11 Connecticut that I was able to find I don't know after 40
12 minutes or so of looking at cases where in pari delicto has
13 actually been recognized. There is a Connecticut Supreme Court
14 case from a few years back by justice McDonald that recognizes
15 in the tort context something called wrongful -- a wrongful
16 conduct type doctrine. That case the Plaintiff sued -- the
17 Plaintiff had looked at child pornography and sued somebody who
18 wanted to be his mental health therapist for not treating him.
19 He then was arrested. And he sued the therapist claiming that,
20 well, if this guy had treated him, he wouldn't have -- you
21 know, he won't have continued looking at child pornography he
22 wouldn't have been caught by the police. The Court said no as
23 a matter of public policy we're not going to allow that they
24 didn't use the words in pari delicto but they also made clear
25 under the circumstances of this case, whatever you want to call

1 that doctrine that they recognized would not be satisfied
2 because they said that it was critical -- they talked about --
3 sorry, case law from other jurisdictions, which also applied to
4 the factual situation in that case. I think the case is called
5 green wood. And they made clear that the -- this was a
6 situation where the Plaintiff was trying to profit from his own
7 wrong. So this would be akin to if Plaintiff in this case
8 suing Mr. Fraser because the Plaintiff -- I don't know -- had
9 fraudulently sold securities to Mr. Fraser. So in any event,
10 I'm having trouble seeing how in pari delicto would apply
11 outside that context. That said, I do recognize that
12 Connecticut securities law is very sparse and that the
13 Connecticut courts would often look to federal courts on that.
14 So the way I handled that for the moment -- now, this is
15 subject -- very much subject to discussion, would be to
16 instruct the jury on in pari delicto with respect to the
17 securities claims only. I'm quite confident that in a pari
18 delicto would not apply to the fraud in this case unclean hands
19 also real trouble seeing how that applies in Connecticut
20 unclean hands has two requirements that I don't see being
21 satisfied here. The first is it has to involve the same
22 transaction about which the Plaintiffs are suing. So this
23 comes up a lot in mortgage cases in Connecticut. Um, there's a
24 case called Thompson versus or cut that discusses it. And I
25 can get into that requirement. We can talk about it. But the

1 more significant requirement that I think really I think
2 forecloses its recognition here is that the unclean hands
3 defense has to be directed at conduct that is itself directed
4 at the defendant. In other words, it would have to be the case
5 that Mr. Shinnors or Mr. Audet or Mr. Pfeiffer did something
6 bad to Mr. Fraser or at least to GAW or Zen and that would be
7 what would prevent -- that would be the unclean hands. It has
8 to be directed to the defendant. It can't be directed to a
9 third party.

10 So that I think is fairly -- and the case is called
11 Thompson versus or cut it's a 2001 Connecticut Supreme Court
12 case. I think that would foreclose it here but I'm willing to
13 discuss it then I'll be honest on ratification I don't really
14 understand that one. I haven't heard of ratification outside
15 as a general matter. I've never seen it asserted as an
16 affirmative case I've been involved in.

17 But I know the Defense cited a case for it. I'm
18 familiar with the concept in principal agent relations, but I'm
19 not familiar with it outside that concept and I don't see how
20 that would apply here.

21 So anyway, those are -- those are some concerns about
22 affirmative defenses and I'm willing to talk about them. So
23 those are my comments here's what I propose we do why don't we
24 have brief discussions of the motions then we'll go page by
25 page through the charge. Okay? All right so did Defense want

1 to go first with their motion, with this motion?

2 MS. HASSAN: Sure, Your Honor.

3 THE COURT: Okay.

4 MS. HASSAN: So, Your Honor.

5 THE COURT: I can hear you.

6 MS. HASSAN: Okay good I was hearing myself. Okay,
7 so, Your Honor, Defendant is going to move for directed verdict
8 as to each of Plaintiff's claims against Mr. Fraser. We
9 believe that Plaintiffs have not prevented sufficient evidence
10 for a jury to find for them on one or more elements of each of
11 those claims.

12 In particular, Plaintiffs have not presented
13 sufficient evidence for a jury to find that Mr. Fraser was a
14 control person or materially assisted the fraud at issue.

15 But in light of the Court's instruction to generally
16 keep the argument brief instead of walking through each
17 element, there are three or four main points that we want to
18 focus on for argument purposes.

19 THE COURT: Thank you. Thank you.

20 MS. HASSAN: And we're happy to discuss anything else
21 that the Court wishes to address.

22 So Point No. 1, Your Honor, Hashpoints and HashStakers
23 two of the products at issue, all of Plaintiffs' evidence is
24 in, and we have not -- I don't think we have seen any evidence
25 that identifies what the material misstatements or omissions

1 were with regard to these two products.

2 So just as an example, with Hashpoints, the only
3 representation that we have heard about is that it was
4 represented Hashpoints would be converted to Paycoin but the
5 evidence also shows that that's exactly what happened. So
6 we're not aware of any misrepresentation or omission that was
7 made as to Hashpoints.

8 THE COURT: Okay.

9 MS. HASSAN: And as to HashStakers, Your Honor, we
10 don't know what the misrepresentation is. We don't believe any
11 has been identified.

12 .

13 THE COURT: Okay.

14 MS. HASSAN: So, you know, all of Plaintiffs' claims
15 which relate to material misrepresentations or omissions.

16 THE COURT: For Hashpoints and HashStakers.

17 MS. HASSAN: Correct.

18 THE COURT: Got it. Because from your standpoint,
19 there's no evidence of a material misstatement or material
20 omission with respect to those two products.

21 MS. HASSAN: Correct.

22 THE COURT: Got it next.

23 MS. HASSAN: So second point, we don't believe that
24 any of the core products or investment contracts adequately
25 address Hashpoints and HashStakers but I think where I want to

1 spend most of my time is Hashlets as far as Hashpoints and
2 HashStakers is concerned all we have heard about them is they
3 were a kind of in-house credit and you could accumulate them to
4 exchange for Paycoin. Um, and we haven't really heard anything
5 about HashStakers other than the fact they were some kind of
6 wallet. So we just don't believe that there's sufficient
7 evidence for the jury to actually assess the three Howey
8 factors.

9 THE COURT: I thought Mr. Pfeiffer testified today
10 that HashStakers were like a CD, you put in your whatever it is
11 your Hashpoints or your Paycoin or your Hashlets -- I can't
12 remember which -- into the HashStakers' wallet and you get it
13 back in 90 days or something like that. I don't know if he
14 said with interest or not, but that was my impression. Am I
15 wrong about that?

16 MS. HASSAN: No, Your Honor, you're actually correct.
17 I believe there is testimony they are like CDs, but that
18 doesn't make something investment contract. That would be like
19 saying something is like a bond and, therefore, it's an
20 investment contract. And that just isn't the case. You have
21 to still check off those three requirements of how we and the
22 only allegation in this case are these products are investment
23 contracts and therefore securities.

24 So I do -- I do correct myself but I think the point
25 is that there isn't sufficient evidence or any evidence for the

1 jury to assess the three factors of Howey for both Hashpoints
2 and HashStakers.

3 THE COURT: So if the company's doing well in mining
4 and the, you know, striking it rich, all right, and they're
5 mining lots of Bitcoin, don't -- I mean I'm asking this: Is
6 there evidence to suggest that the value of Hashpoints and
7 HashStakers goes up if that happens?

8 MS. HASSAN: Your Honor, as I understood from the
9 evidence that was presented was Hashpoints was something that
10 would be mined; right? I believe Mr. Pfeiffer or Mr. Audet
11 said that Hashlets at some point would start mining Hashpoints.

12 THE COURT: I think there were -- so there was a
13 suggestion that I thought you could invest or buy Hashpoints
14 but you could definitely mine them as well. That's certainly
15 what Mr. Pfeiffer said today and that you could convert
16 Hashpoints into ultimately Paycoin at the relevant time.

17 But I thought what you -- how you got Hashpoints --
18 oh, another way to get Hashpoints, I thought there was evidence
19 of this, was you could convert your Hashlets into Hashpoints.
20 Wasn't there some evidence along those lines?

21 MS. HASSAN: Well, Your Honor, even let's say you
22 could convert your Hashlets into Hashpoints or you could buy
23 Hashpoints.

24 THE COURT: Yeah.

25 MS. HASSAN: Again, I'm not sure whether pooling of

1 assets comes in, whether time of the Hashpoint owner's
2 fortunes -- like we have no evidence of the actual fact factor
3 that feed into the investment contract like where is the
4 pooling of assets for a Hashpoint?

5 THE COURT: Well, isn't the -- as I say, if you buy a
6 Hashpoint or -- sorry -- you convert your Hashlet to a
7 Hashpoint, I mean I will confess I don't remember a lot of
8 specific evidence on this. So you can say, Judge, there just
9 was no evidence on that and you might be right but I had the
10 impression that if you convert your Hashlet to a Hashpoint --
11 and as I say, you know, the company's supposedly mining all
12 along and they're making money end over fist now it's not like
13 they're striking it rich in the pools, I would have thought
14 your Hashpoints increase in value because of the underlying
15 Hashlet increased in value, although I admit I may be
16 speculating here. I'm not quite sure how that.

17 MS. HASSAN: Your Honor, I don't believe we have that
18 evidence.

19 THE COURT: Okay.

20 MS. HASSAN: And that's what I'm going by. And
21 eventually if the idea is that Hashpoints are converting into
22 Paycoin, then I get that the class members have claims as to
23 Paycoin but I still don't get that interim step, how does a
24 coupon or an in-store credit really become a security?

25 THE COURT: Got it. Okay.

1 MS. HASSAN: So Hashlets -- that's what I want to
2 focus on, Your Honor. So Howey has three elements. We want to
3 focus on the second two, which is common enterprise and whether
4 there was an expectation of profits derived solely from the
5 efforts of others.

6 So on the common enterprise issue, it is our position
7 that Hashlets do not satisfy either of the two tests the
8 horizontal commonality or the strict vertical commonality
9 tests.

10 I'll start with well, I'll just take the horizontal
11 commonality test. So for horizontal commonality, each of the
12 Hashlet owners' fortunes had to be tied to the fortunes of the
13 other Hashlet owners. We've had very consistent and clear
14 testimony from the class representatives that was not the case.
15 We've had testimony that two Hashlet owners could own the same
16 type of Hashlet and one could do really well and the other
17 could do really poorly depending on which pools they had chosen
18 to mine in.

19 THE COURT: True.

20 MS. HASSAN: So that tying of fortunes it just doesn't
21 exist based on the evidence that has come in.

22 THE COURT: Got it. Go ahead.

23 MS. HASSAN: As to vertical commonality, Your Honor,
24 again, we have very clear and consistent evidence that GAW
25 Miners and ZenMiner, which take a fixed fee for Hashlets --

1 THE COURT: That being the maintenance fee.

2 MS. HASSAN: Correct, the fixed service or maintenance
3 fee, and that means the fortunes of GAW Miners and the Hashlet
4 owners were not tied together.

5 THE COURT: Does it? I mean if my broker charges me a
6 fee, transaction fee, whatever it is, does that mean what the
7 broker's selling is not a security?

8 MS. HASSAN: Um --

9 THE COURT: The mere fact that charging maintenance
10 fee don't make it not an investment contract; right? Does that
11 foreclose it from being an investment contract?

12 MS. HASSAN: Well, it doesn't satisfy the vertical
13 commonality test. And I think when we're transacting through a
14 broker we're buying and selling securities, it's not that the
15 broker service becomes a security. Over here we're saying that
16 the product that the company was selling is a security. But I
17 think the broker example is slightly different. If it's
18 helpful we did find some cases which basically say that if the
19 promoter or the defendant all that they're doing is they're
20 charging you a fixed maintenance fee, which does not change
21 with how much profit the actual Plaintiff is making then that
22 does not satisfy.

23 THE COURT: Yeah but I had the impression -- I thought
24 there was some testimony about -- again, this is what was
25 represented. I know the whole thing didn't turn out this way.

1 But that company's mining, they're mining Bitcoin. They've got
2 these machines. They're selling a piece, in effect a piece of
3 a machine I know it's not it's a timeshare whatever slice the
4 machine to others those are called Hashlets.

5 So if the company is, as I say, doing really well in
6 the mining, they're, you know, knocking it out of the park,
7 then the Hashlet payout -- so that's the company's fortune.
8 Company's doing well; right? And then the Hashlet payout goes
9 up too; right?

10 MS. HASSAN: Well, Your Honor, okay, so the reason
11 that the company would do well in that situation is that maybe
12 more people would come and buy more Hashlets; right?

13 THE COURT: Well, no. Because I thought that -- I
14 thought early on -- and I don't remember which witness
15 testified -- that, well, the company's doing mining their
16 machines. And they're selling pieces of these machines. But
17 they're the ones doing the mining. I don't know if somebody
18 said this. I had the impression that what they're doing is the
19 company's sharing profits with you. They're not paying out
20 every -- in other words, let's say the company makes a hundred
21 dollars on particular day on a particular machine and there
22 were ten Hashlets and that machine was represented by ten
23 Hashlets. I didn't have the impression they were paying ten
24 apiece I had the impression they were paying nine apiece and
25 keeping something on the top.

1 MS. HASSAN: You might be thinking of Professor
2 Narayanan's testimony.

3 THE COURT: Maybe.

4 MS. HASSAN: In which he said there are different ways
5 in which this kind of operation could be set up. There could
6 be the example that you gave is one way of setting it up. But
7 what the testimony is about Hashlets is that you were buying
8 either a physical miner or basically it's power or a piece of
9 the physical minor so a portion of its power and then you were
10 deciding which pool, including external pools, that it was
11 mining in. And all that the company is doing, vis-a-vis the
12 Hashlet, is operating the miners and maintaining them.

13 The fact that the company might have been -- and I
14 don't know if that's the case or if I don't believe there's
15 evidence of that, the fact that the company might be mining for
16 its own purposes, then I don't think that's relevant.

17 THE COURT: Even if they're not just sharing the
18 profits of even if the Hashlet is ultimately not just there
19 sharing the profits with you?

20 MS. HASSAN: Well, our position would be that based on
21 the evidence what the representation of what a Hashlet was was
22 not that. It wasn't that we are going to mine and then share a
23 slice of our profits. It was we will -- we will give you a
24 physical minor or a piece of the physical minor and that's what
25 two of the three class representatives also represented, that

1 it was the machine or part of the machine. I understand it's
2 actually the power of the machine but it's not that we're
3 getting a slice of the overall profit.

4 THE COURT: Okay. I had the impression there was some
5 testimony like that, but I'm not at all certain of that. So
6 you could be right. But keep going. Okay.

7 MS. HASSAN: So, Your Honor, then it takes to us the
8 third element, which is profits to be derived solely from the
9 efforts of others. And, again, as to Hashlets, we don't
10 believe that that requirement is satisfied. The reason being.

11 THE COURT: Because you were pointing your thing to
12 the pool and that was the testimony you brought out; right?

13 MS. HASSAN: Correct. And, you know, you could be
14 boosting your Hashlets. If somebody's boosting their Hashlets,
15 being interacted with their Hashlet they get more profits.

16 THE COURT: But, of course, you're not doing the
17 mining; right? The company is. Isn't the company the one
18 doing all the ago go rhythms and the fancy math and all that
19 stuff.

20 MS. HASSAN: Your Honor, I'm not sure whether the
21 company is doing the algorithms. It has the machines and the
22 machines are being pointed to different pools which could be
23 external pools. So the machine is doing the algorithms.

24 THE COURT: I know, but the company owns the machines.
25 So, I mean, it amounts to the same thing, doesn't it? I mean

1 if the company owns the machine, it's not like they -- that
2 shouldn't matter for purposes of this. They own the machine so
3 they say look this is what we're doing we happen to use the
4 machine other than somebody from M I T.

5 MS. HASSAN: They sold you the machine or part of the
6 machine they sold you the power of the machine so you own the
7 piece of the power of that machine.

8 THE COURT: Yeah but you're not doing a thing; right?
9 You're not doing any math. You're just saying, oh, I'll aim it
10 at the clever pool or the this pool or the that pool. So
11 you're having that say.

12 MS. HASSAN: Correct.

13 THE COURT: But you're not then, you know, okay let's
14 solve that blockchain. You're not doing that. The machine is.

15 MS. HASSAN: Well, Your Honor, I think it's a unique
16 kind of situation because here nobody really is doing much
17 other than switching -- the machine is doing.

18 THE COURT: I mean in reality, yeah, but -- well,
19 okay.

20 MS. HASSAN: So I guess, for instance, let's say there
21 was no GAW Miners or ZenMiner; right? You could buy a minor or
22 a smaller minor you could plug it at home and it would do all
23 the calculations; right? Again all you'll be doing is I want
24 to --

25 THE COURT: Yeah but you own the machine at that

1 point. You're housing the machine at that point. You're
2 maintaining the machine at that point. And so in that sense
3 those are your efforts. Here the company's housing the
4 machine. It's maintaining the machine. It's paying for the
5 electricity for the machine. So those are its efforts.

6 MS. HASSAN: Well, that's fair. So it's almost like
7 the company's contributing something and you're contributing
8 your strategy.

9 THE COURT: So it's not solely from the efforts of
10 others is your point.

11 MS. HASSAN: Correct. And I think Your Honor your
12 proposed instruction on this is instructive because in the
13 instruction it says the question is whether the product was
14 being promoted primarily as an investment, in which case it
15 would be an investment contract or whether the product was
16 being promoted as a means whereby participants would pool their
17 activities, money, and the promoter's contributions in a
18 meaningful way.

19 So here it seems like both of them are putting
20 together their efforts and their strategy. Both are
21 contributing something.

22 THE COURT: I got it. What's next?

23 MS. HASSAN: Okay. So, Your Honor, I'll touch lightly
24 on pay point again from our perspective it's not investment
25 contract. It's a currency. (Paycoin) we don't need to go into

1 much detail about that.

2 THE COURT: Can I ask you this: Do you agree with me
3 that -- I mean I'm sure the plaintiffs disagree that it's a
4 currency at all. But you department say about any of the
5 others that you thought they were currency. So would you agree
6 that if -- that if any product of currency it's just Paycoin?

7 MS. HASSAN: Yes, Your Honor.

8 THE COURT: Fair enough.

9 MS. HASSAN: And, again, Your Honor, with Paycoin, we
10 don't believe the evidence is in which would satisfy all three
11 elements of Howey in terms of the pooling of assets. We've
12 heard evidence that, you know, people were buying and selling
13 Paycoin on the open market, GAW Miners ZenMiner had no control
14 over that. So it was -- it was sold as a medium of exchange.
15 It was being created on the open market. It doesn't -- there
16 isn't necessarily the same type of the Paycoin holder's
17 fortunes as you would need.

18 THE COURT: So is Paycoin, contrary to fact had shot
19 up in value (So if) wouldn't GAW have been more valuable?

20 MS. HASSAN: To the extent that GAW was also holding
21 Paycoin?

22 THE COURT: Yeah. That would be one reason. Also,
23 there wouldn't have had to -- well, again, I know we're
24 supposed to deal with this. It's a little strange because we
25 have to live in a fictional world. They also won't have had to

1 put in the hundred million dollar pay fund. In theory they
2 said they were doing to back it. That was fiction, burr they
3 said they were bog to back it. And so they certainly had a
4 financial interest in Paycoin's success and so that they didn't
5 have to throw in the hundred million dollars to back it; right?

6 MS. HASSAN: That's fair, Your Honor. I think with
7 Paycoin would argue there was some type of fortunes that we,
8 the companies and the Paycoin holders, if things had actually
9 worked out that way. But it seems that, you know.

10 THE COURT: But as I understand it, we're to consider
11 the question of whether something's a security based on what it
12 was represented to be.

13 MS. HASSAN: Correct.

14 THE COURT: Okay.

15 MS. HASSAN: And what it was represented to be was
16 essentially a medium of exchange. And, again, the fact that
17 all -- that at least a couple of the class representatives, I
18 believe they were open -- they were buying and selling it on
19 the open market, that seems completely divorced from what was
20 happening to the company; right? The company hadn't even
21 launched the coin at that point.

22 So, again, you know, it's our position that --

23 THE COURT: Okay. But it's true that it hadn't
24 launched, but arguably those are -- those are based on -- based
25 on people's expectations about what's going to happen during a

1 launch. And, again, if Paycoin -- it's true that those -- I
2 will ask them about that. Because you're saying basically
3 those initial transactions didn't involve the company at all.

4 MS. HASSAN: Correct. And it seems to me that by the
5 time the company does launch Paybase, there's already enough
6 transactions of Paycoin -- for instance, Mr. Audet had already
7 bought Paycoin in December long before Paybase was launched.

8 THE COURT: Yup. Fair point. All right. Let's move
9 on. So just to be clear, your position is Paycoin's not an
10 investment contract in the first instance.

11 MS. HASSAN: Correct.

12 THE COURT: Okay, got it.

13 MS. HASSAN: And then, Your Honor, just touching on
14 the last point, we don't believe that there is sufficient
15 evidence for a finding that Mr. Fraser was a control person.
16 I'll just address a couple of big points here.

17 THE COURT: Okay.

18 MS. HASSAN: Under the CUSA one of the ways that you
19 can prove control is if the Defendant was a partner, officer or
20 director. We've already taken the partner issue out.

21 THE COURT: Correct.

22 MS. HASSAN: There is no evidence and plaintiffs --
23 they have presented no evidence that Mr. Fraser was an officer
24 or director of the company.

25 THE COURT: Yeah but there's lots of testimony about

1 that some people thought he was a partner or silent partner or
2 this partner or that partner. Now, he wasn't, in fact, a
3 partner or in law partner. But the fact that people thought he
4 was a partner suggests that maybe he had a similar function to
5 a partner. No?

6 MS. HASSAN: Well, Your Honor, if I may -- I guess I
7 was actually addressing whether the jury should be asked to
8 determine whether he was actually an officer or director.

9 THE COURT: Oh, I see just that part of it.

10 MS. HASSAN: Correct. So that's step one.

11 THE COURT: Didn't Mr. Garza say he was the CEO above
12 the CEO?

13 MS. HASSAN: Well, I think he said that -- well, he
14 said that he wasn't a board member. He was like an informal
15 CEO above the CEO.

16 THE COURT: It may not be fantastic testimony for the
17 Plaintiffs, but it's probably enough to charge a jury on. But
18 anyway so is that your final point? I think I got the control
19 person thing under control. In other words, I think I
20 understand the evidence -- that's one I really listened to the
21 evidence carefully on.

22 MS. HASSAN: And that's why, Your Honor, I didn't have
23 too many points there.

24 THE COURT: Very good. All right. I want to hear
25 from the other side. And then I'll let each side wrap up very

1 quickly. I want to get done with this by quarter of Mr.
2 Buchdahl.

3 MR. BUCHDAHL: Where would you like me to start.

4 THE COURT: You also had a motion to present; is that
5 right?

6 MR. BUCHDAHL: So we did want to make a motion on the
7 affirmative defenses but I'm not sure it's the right time to do
8 it.

9 THE COURT: So let's not do that yet. So why don't we
10 start with the investment contract issue.

11 MR. BUCHDAHL: Sure. So just taking it in order.

12 THE COURT: Yup.

13 MR. BUCHDAHL: First of all, what Hashpoints and
14 HashStakers we believe that there was testimony from Professor
15 Narayanan as well as I think all three of the Plaintiffs
16 describing the relationships with between Hashpoints and
17 Hashlets, between Hashpoints and Paycoin, and between
18 HashStakers and Paycoin. And in our view, Hashpoints and
19 HashStakers were both ways that the company essentially sold
20 Paycoin. Because that was the sole purpose of acquiring a
21 Hashpoint or a HashStaker was to get Paycoin eventually.

22 And so it was a way of selling the Paycoin security
23 through --

24 THE COURT: Okay, so it's a way of selling Paycoin.
25 Why does that make Hashpoints and HashStakers themselves a

1 security?

2 MR. BUCHDAHL: Because they would have the same
3 characteristics, in other words, their value depended on the
4 same -- in the same way that Paycoin depended on the
5 expectation of profits from Paycoin was based on the efforts of
6 others, the expectation of profit in a Hashpoint or a
7 HashStaker was based on the same expectation of those same
8 efforts of others.

9 THE COURT: But wasn't -- weren't the Hashpoints and
10 HashStakers basically just contracts around Paycoin?

11 MR. BUCHDAHL: So HashStaker I think that's accurate.

12 THE COURT: Okay.

13 MR. BUCHDAHL: I think with Hashpoint it's a little
14 more complicated.

15 THE COURT: Okay.

16 MR. BUCHDAHL: Because Hashpoint was also the kind of
17 output or return on a Hashlet.

18 THE COURT: Right.

19 MR. BUCHDAHL: And, therefore, had that kind of
20 intermediary role.

21 THE COURT: Okay. So let's take HashStakers then. So
22 if I have a contract to buy a stock or a bond or I have a
23 contract with the bank to hold a stock or a bond for a certain
24 amount of time, a stock or a bond is a security for sure. But
25 is the contract a security?

1 MR. BUCHDAHL: I think depending on how it was set up,
2 it would be. And I think that there is, as the Court pointed
3 out, a paucity of evidence on the precise nature of these two
4 products. And I think there's enough in there to describe them
5 as investment contracts based on their relationship to the
6 other products. But if the Court has any question about that,
7 we'd like to go scrub the record a little more carefully.

8 THE COURT: All right. Let's keep going.

9 MR. BUCHDAHL: So with regard to Paycoin, a couple
10 different things to consider. First of all, the very nature of
11 an ICO is -- makes something a security because the kind of
12 putting together of an ICO, the kind of promotion of it, all of
13 that are ways in which the investors are relying on the efforts
14 of the company to kind of generate profits through the ICO
15 itself. And here the way that everyone was expecting this is
16 that they would have this kind of cheap entry point into
17 Paycoin, but it would result in these profits being generated
18 between the \$4, that was kind of the Hashpoint exchange rate,
19 and the \$20, that was represented to be the floor, all those
20 efforts were going to be generated by the efforts of GAW Miners
21 on their behalf.

22 THE COURT: But what do you do with the trading and
23 Paycoin on other exchanges before it launches? That has
24 nothing to do with the company, does it.

25 MR. BUCHDAHL: To that end we would point the Court to

1 the testimony of approver Narayanan my colleague, Ms. Chen,
2 spent some time going over the centralization features of
3 Paycoin. And each one of those questions was designed to
4 elicit testimony about the ways in which it was a security.

5 THE COURT: I know. I assumed that was the purpose of
6 the testimony, but to this day I don't understand why. Tell me
7 why centralization has to do with this.

8 MR. BUCHDAHL: So the reason for that has to do with
9 the efforts of others, because what you see there is that GAW
10 Miners was responsible for issuing the coins. GAW Miners was
11 much more responsible than some kind of cryptocurrency for
12 controlling the blockchain, and that is a way in which you
13 depended on the efforts of GAW Miners for the value of the
14 Paycoin. The fact that they were going to buttress the value
15 of it with the investment fund and the Coin Adoption Fund was
16 another way they were going to rely on GAW Miners. And so each
17 of those centralization factors is what takes Paycoin away from
18 something like a decentralized Bitcoin that I think no one's
19 arguing is a security right now into something that is a
20 security.

21 THE COURT: So in other words, your position is
22 because of the centralized control of GAW, that suggests --
23 that helps satisfy the efforts solely by others requirement.

24 MR. BUCHDAHL: Yes, Your Honor.

25 THE COURT: Okay, got it.

1 MR. BUCHDAHL: We skipped past Hashlets. I think
2 Hashlets in some ways is the easiest one I think that's the
3 reason why the SEC charged a security. There is evidence from
4 our expert as well as the Plaintiffs that what they understood
5 to be sold them what they understood to be buying was a slice
6 of the total mining power that was maintained, operated,
7 controlled, and optimized by GAW Miners itself. So, in other
8 words, I think the Court's questions hit the nail on the head.
9 GAW Miners is mining Bitcoin. That is the efforts of others.
10 And the Hashlets would be profitable or not, or less so or more
11 so based on how successful GAW Miners was at mining Bitcoin in
12 its so-called data center.

13 THE COURT: Okay.

14 MR. BUCHDAHL: I'm not going to give any argument
15 about control person. I think there's --

16 THE COURT: Yeah.

17 MR. BUCHDAHL: Would you like to hear from us on an
18 affirmative argument --

19 THE COURT: In a moment. I am going to rule on the
20 Defense's Rule 50 motion. I'm sure we could argue for a long,
21 long time on these but I'm going to reserve I'm going to submit
22 it to the jury. You know what the rules are. You can renew
23 after there's a verdict.

24 So why don't you go ahead, if you'd like to make the
25 argue on the affirmative defenses, that's fine. So this is

1 your Rule 50 motion with respect to the affirmative defenses.

2 MR. BUCHDAHL: Ms. Chen's going to present it as to
3 Mr. Pfeiffer and I think she may hand the baton to Mr. Rennie
4 as to Mr. Shinn's'.

5 THE COURT: Sounds good.

6 So let me jump in and get -- cut to the chase. Wasn't
7 Mr. Pfeiffer selling unregistered securities?

8 MS. CHEN: So, Your Honor, are you speaking of which
9 defense you speaking of?

10 THE COURT: So I would say that would probably go
11 to -- I mean entertaining the notion that in pari delicto
12 applies here at all, for a moment, wouldn't that go to an in
13 pari delicto defense?

14 MS. CHEN: So I would point, Your Honor, to *Pinter v.*
15 *Dahl*. That's 486 U.S. 622. And in that case, the actual --
16 the claim was that the Plaintiff had also sold unregistered
17 securities. And the Court held that even where a plaintiff
18 actively participants in the distribution of unregistered
19 securities, his suit should not be barred or his promotional
20 efforts are incidental to his role as an investor. And in that
21 case the Plaintiff had actually been part of the distribution.
22 So in that case it would be as if Mr. Pfeiffer had been part of
23 kind of the marketing and the promotion of Hashlets.

24 And that is not absolutely not the case.

25 THE COURT: Do you have a page number on that for me?

1 MS. CHEN: Sorry?

2 THE COURT: Do you have a pin site on that? I have
3 the case up. Do you have a page number I could look at or a
4 couple page numbers?

5 MS. CHEN: It's 638 to 639.

6 THE COURT: All right. If you give me a second,
7 please.

8 (Pause.)

9 THE COURT: What did it mean in that case that his
10 promotional efforts were incidental to his role as an investor?
11 What were the facts underlying that statement? Do you know?

12 MS. CHEN: You have to -- I'd have to look it up, Your
13 Honor, just to be more precise. I don't want to say anything
14 that's incorrect. But my understanding, if my recollection
15 serves, is that in that particular case there was something in
16 addition just to the selling of unregistered securities against
17 the plaintiff in this case Mr. Pfeiffer is absolutely not.

18 THE COURT: But there's a last sentence in that
19 paragraph that says, Thus the in pari delicto defense may
20 defeat recovery in a Section 12 one action only where the
21 plaintiff's role in the offering or sale of non-exempted
22 unregistered security -- securities is more as a promoter than
23 as an investor.

24 So let me ask you this: When Mr. Pfeiffer sells
25 unregistered securities to other people, how is that not more

1 as a promoter than as an investor?

2 MS. CHEN: I would argue, Your Honor, that it was GAW
3 and the companies that promoted, right, these investments. Mr.
4 Pfeiffer, just like any investor may buy or sell his
5 investments but does not make him a promoter.

6 THE COURT: Shouldn't I let the jury determine that?
7 I could add this language, though, to the charge. That would
8 seem to make some sense actually because I wasn't aware of this
9 case. I wish this case had been brought to my attention
10 before. Maybe it was, so I apologize.

11 But shouldn't I let the jury determine what his
12 specific role was?

13 MS. CHEN: I don't know there's been any evidence,
14 Your Honor, regarding his role, other than the fair allegation
15 that he sold securities.

16 THE COURT: There was some e-mails put up, I think.
17 There was also Mr. Weinstein put up a long list of his sales.
18 I agree with you, not a lot to go on on whether he's more
19 promoter than investor. But usually when it's not crystal
20 clear, I let the jury decide in the first instance.

21 So your position is no, Judge, don't submit to it the
22 jury. Knock out the defense; right?

23 MS. CHEN: Right and I have maybe two more points on
24 that, Your Honor, one is the e-mails I believe Your Honor's
25 thinking about were from, I think, well after the end of the

1 class period.

2 THE COURT: Okay.

3 MS. CHEN: I think those were from April 2015.

4 And the second thing is just -- I just want to kind of
5 in *Pinter v. Dahl*, the actual claim that was being brought
6 against the defendant, the person who invoked the in pari
7 delicto defense was a sale of unregistered securities claim
8 under the I think federal law.

9 And so I mean even in that case where the kind of the
10 alleged wrong that was being charged against a defendant was
11 just the sale of unregistered securities, here the wrong that
12 is being charged is securities fraud.

13 THE COURT: Well, the -- so that's a good question.
14 I'll certainly ask the defendants about this. I'm not aware of
15 any evidence that Mr. Pfeiffer engaged in anything close to
16 securities fraud here. So the -- I think -- and so this is a
17 good point. The only -- I think the only basis -- although
18 they may tell me I'm wrong and I'll listen to them, but I think
19 the only basis, possible basis for an in pari delicto defense
20 would be his sale of unregistered securities. So maybe you and
21 I are on the same page as that one. In other words, I -- I,
22 from his testimony, don't think there's any evidence to suggest
23 he engaged in securities fraud.

24 But there is evidence to suggest that he sold
25 unregistered securities. So if the Court were to give a in

1 pari delicto defense, it would probably need, with respect to
2 Mr. Pfeiffer, it would probably need to be limited to that --
3 that issue.

4 What else do you want to tell me now on that?

5 MS. CHEN: So as -- Your Honor, do you want to hear
6 more about that defense?

7 THE COURT: Let's move on.

8 MS. CHEN: Okay. So I think with unclean hands I
9 think we agree with Your Honor that there's just no allegation
10 that Mr. Pfeiffer, you know, any of his conduct had any sort of
11 impact or negative impact or was directed to the interests of
12 Mr. Fraser.

13 THE COURT: Okay.

14 MS. CHEN: And then as for ratification similarly,
15 Your Honor, I couldn't find any cases where this defense was
16 used in a security fraud context other than what had to do with
17 the ratification of a broker's action on behalf of an investor
18 and whether that initially unauthorized action by the broker
19 had been ratified by a investor.

20 THE COURT: Was that a breach of contract case? What
21 was the context?

22 MS. CHEN: I remember it was related to securities
23 fraud.

24 MR. BUCHDAHL: Sounds like a suitability claim.

25 THE COURT: Okay, maybe.

1 MS. CHEN: Regardless and, of course, Your Honor, I
2 certainly agree this is the defense that comes in breach of
3 contract claims.

4 THE COURT: Very well. Mr. Rennie, did you want to go
5 next?

6 MR. RENNIE: Certainly.

7 THE COURT: Succinct, please.

8 So we're talking about Mr. Shinnars, so why don't I
9 cut to the chase.

10 So on the -- I suppose the argument with Mr. Shinnars
11 would be, well, it's in pari delicto. You know, the e-mails
12 suggest, you know, this would be what the defendants would
13 argue, the e-mails would suggest, you know, he's an insider,
14 he's involved with Garza very closely. He's actually drafting
15 stuff like including the white paper that gets put out to the
16 public. So they might go so far as to say he's actually
17 participating in the fraud. Now, you can talk about whether
18 there's enough evidence of that. But I think that's probably a
19 lot of things they would say.

20 So what's your response to that?

21 MR. RENNIE: I think you're right, Your Honor, that's
22 sort of the direction that any argument would go. I think it
23 sort of stretches circumstantial evidence to the breaking point
24 though. You saw a lot of e-mails about, you know, ignorance is
25 bliss and, you know, isn't that a mean thing to say? And a lot

1 of e-mails about the white paper, including that he, you know,
2 fixed some commas but may also have rewritten a chunk of the
3 abstract.

4 So, you know, I think there is evidence in the record
5 that Mr. Shinnars provided assistance to GAW Miners in some
6 respect.

7 THE COURT: There was the taking advantage of
8 ignorance comment. What about that?

9 MR. RENNIE: Certainly. So I think Mr. Shinnars
10 testified on yesterday, the days are mixing together that, you
11 know, he was talking about wanting to avoid a sort of blowback
12 from the HashTalk community. The jury can draw whatever
13 inferences it wants to, you know, from his direct testimony
14 and -- or interpretations of the e-mail. But I think the only
15 sort of testimony that was elicited on cross was that Mr.
16 Shinnars thought he was sometimes, in some circumstances it
17 could be okay to take advantage of someone in some context.
18 There was absolutely no connection between that e-mail and any
19 of the fraud at issue in this case.

20 So, you know, we would argue that the sort of
21 constellation of, you know, dubious e-mails taken out of
22 context and Mr. Shinnars's, you know, assistance with the white
23 paper simply don't add up -- sorry, Your Honor, participation
24 in the underlying fraud.

25 THE COURT: Okay. Great. Thank you.

1 MR. ARD: Your Honor, can I make a couple global
2 points?

3 THE COURT: All right. All right.

4 MR. ARD: First, there's 21 affirmative defenses pled
5 in the answer. None of these are pled. We think that's a
6 threshold issue.

7 THE COURT: Right. That was sort of litigated in the
8 papers though, and I will ask them about that, yeah.

9 MR. ARD: That's one point.

10 THE COURT: Just to be clear, my understanding is --
11 so I know part of their argument is, yeah, but at least in pari
12 delicto and unclean hands were raised in the class
13 certification. My understanding, my recollection is
14 ratification wasn't. Their position is, yeah, but
15 ratification's close to estoppel. So it's close enough, and
16 they did plead estoppel in the answer apparently. I haven't
17 read the answer recently.

18 MR. ARD: Yeah. They pled estoppel.

19 Our position is it would have to move to amend to
20 plead the answer to one plead they didn't do it.

21 THE COURT: Got it.

22 MR. ARD: The second point is --

23 THE COURT: So in pari delicto and unclean hands are
24 not pled in the answers.

25 MR. ARD: Correct, Your Honor.

1 THE COURT: Got it.

2 MR. ARD: The second point is that, you know, they've
3 never identified any CUSA authority, Connecticut authority for
4 in pari delicto applying. If you look I can give you a couple
5 sites does your monitor work or not? I can put something on
6 there to make it faster.

7 THE COURT: Sure.

8 MR. ARD: Can you put up slide 13.

9 THE COURT: You have a CUSA case.

10 MR. ARD: No what I have is cases from other
11 jurisdictions with blue.

12 THE COURT: That say no parry delicto.

13 MR. ARD: A financial body of mostly state case law
14 exists that hold that the equitable defenses have no place when
15 construing statutory claims on the security acts. And that's
16 quoting Joseph C law and Blue Sky law treatise, 9100. The cite
17 for that case is a Utah case is 22 P dot three D 683.

18 THE COURT: So let me ask you this.

19 MR. ARD: I gave you the wrong number.

20 THE COURT: Let me cut to the chase on that. So
21 Connecticut has a lot of statutes but not much case law on
22 virtually anything. So that's no offense.

23 MR. ARD: Is that off the record, Judge?

24 THE COURT: It makes it a fun jurisdiction to practice
25 in.

1 So I don't know whether there's case law in
2 Connecticut that talk specifically about well, we look to the
3 federal securities laws in construing the CUSA. There
4 definitely is in the antitrust context.

5 But I wouldn't be surprised at all if there were for
6 the very reason I just cited which is they look for guidance.
7 The definition of security in the statutes is not the same, but
8 it's very close.

9 And I think *Jacobi*, for example, cites the Second
10 Circuit on some issues. Securities interpretations of Second
11 Circuit by the Second Circuit.

12 So there is that Supreme Court case that the Defense
13 cites that seems to at least recognize the possibility that in
14 pari delicto could apply. It doesn't actually apply in pari
15 delicto in the insider trading context.

16 MR. ARD: Right that's why I was trying to point to
17 other blue sky state statutes that are similar to Connecticut
18 so it's two cases that we had. Another one is 680 S period W
19 period two D 304. And that's a Missouri case saying the
20 equitable offense of estoppel and parry delicto are not
21 offenses to liability and nonregistration claims a Missouri
22 Blue Sky law and the first cite which I think I gave you the
23 wrong number for was 322 P period 383.

24 THE COURT: 322 P period third 683.

25 MR. ARD: Correct, Your Honor. The point is just that

1 it's not being applied in similar statutes in other states so
2 that's what we should look to.

3 THE COURT: I got it.

4 MR. ARD: And then the third point quickly, Your
5 Honor, which may sort of should have been the first point I
6 suppose is these are equitable offenses. There's no reason for
7 them to be going to the jury.

8 THE COURT: Well, what about the rescission claim?
9 Doesn't the -- hasn't the CUSA claim been described as an
10 equitable remedy of rescission? In general not in this case.
11 But hasn't -- I think there's some case law that the Defense
12 cited that describe one of the remedies under CUSA as the
13 equitable remedy of rescission.

14 MR. ARD: Okay. We're not seeking an equitable remedy
15 of rescission, I don't think.

16 THE COURT: Aren't part of the damages -- you can
17 either seek damages or you can seek the price of the security
18 they paid for plus interest, as I understand it.

19 MR. ARD: Well, I stand corrected on that. So I'm not
20 sure because that's in the damages part of the case. I just
21 haven't saw it initially.

22 THE COURT: Thank you. I want to hear from Defense
23 now.

24 Let's march through these. Let's start with unclean
25 hands. You heard my comments at the outset. Tell me why

1 unclean hands should apply at all here.

2 MS. HASSAN: So, Your Honor, just the one
3 clarification unclean hands was actually pleaded in the onset.

4 THE COURT: Okay.

5 MS. HASSAN: But I think the idea behind just
6 generally unclean hands is an equitable defense that you come
7 in, you know, if you have dirty hands you can't be asking for
8 relief if your actions were somehow connected to the matters
9 that are at issue and taking for instance Mr. Shinnars he was
10 very closely involved with what was happening with Paycoin
11 there are e-mails that show he had indications that something
12 might be going wrong that he might have been helping Mr. Garza
13 hide things and saying, you know, you should be thankful to me
14 I didn't go and post this on HashTalk. So I think there's
15 enough there to show that he was involved in the development
16 and in the promotion of Paycoin and everything that ended up
17 happening.

18 THE COURT: This is from Thompson versus or cut which
19 is a Connecticut Supreme Court case it's talking on this is 257
20 con 301 it starts at page 310 where they start describing the
21 unclean hands doctrine, as some of the language that you
22 wanted, has some of the language that I included (Has). Then
23 it goes on and it says, first it says the wrong must be in
24 regard to the matter in litigation. Though an obligation be
25 indirectly connected with an illegal transaction, it will not

1 thereby be barred from enforcement if the plaintiff does not
2 require the aid of the illegal transaction to make out his
3 case. In addition -- and then it's got some citations then it
4 says, in addition, the conduct alleged to be unclean must have
5 been done directly against the interests of the party seeking
6 to invoke the doctrine rather than the interests of a third
7 party.

8 Let's take that last sentence. What was done here by
9 any plaintiff directly against the interests of Stuart Fraser?

10 MS. HASSAN: So, Your Honor, I would have to review
11 the case, but I think generally this case is slightly different
12 from the usual primary violation cases because here we have a
13 secondary liable defendant. Plaintiffs are seeking relief from
14 him. So the fact that.

15 THE COURT: Okay. So take -- I hear you. So take it
16 this way: What is the conduct that the plaintiffs engaged in
17 that is contrary against the interest of GAW Miners or
18 ZenMiners, the primary violators?

19 MS. HASSAN: Your Honor, to the extent that Mr.
20 Shinners had some indication of what Mr. Garza was doing and
21 was part of the fraud, that he was hurting GAW Miners just as
22 much as Mr. Garza was.

23 THE COURT: He was hurting GAW Miners?

24 MS. HASSAN: The companies; right? Like he was
25 facilitating the companies commission of fraud.

1 THE COURT: Right. But how is that hurting the
2 companies? The companies presumably was committing fraud to
3 enrich themselves.

4 MS. HASSAN: Mr. Garza was definitely doing that. I
5 think the idea is, Your Honor, again if Mr. Shinnars had an
6 indication that there was something going on, then all of this
7 could have been stopped earlier than what happened. And then
8 maybe the companies wouldn't have been in the state that they
9 are. I would have to review the case. I'm not sure exactly.

10 THE COURT: Okay. So tell me what the evidence is
11 that Mr. -- from which a reasonable jury could infer that Mr.
12 Shinnars was in on the fraud.

13 MS. HASSAN: Your Honor, I think it would be a bunch
14 of the e-mails that we saw today, including the e-mails about
15 ignorance is bliss and I believe there was another e-mail which
16 I'm forgetting the exact wording but he was suggesting he knew
17 something was going wrong but he was enforcing it on HashTalk
18 and Mr. Garza should be very thankful to him for that.

19 THE COURT: Now, that was January of 2015 I think
20 after he finished investing. Am I right about that?

21 MS. HASSAN: I will turn to Mr. Weiner.

22 MR. WEINER: January 12th.

23 THE COURT: Yeah, that's what I meant.

24 MS. HASSAN: So still I guess within the class period.

25 THE COURT: It was within the class period, you're

1 right. Okay. Okay. All right. So why -- so let's move on to
2 in pari delicto. Let me hear you on -- well, actually before
3 we do that, you don't -- do you contend that Mr. Audet is
4 subject to any of these defenses?

5 MS. HASSAN: No, Your Honor.

6 THE COURT: Okay. How about Mr. Pfeiffer? Which
7 defenses is he subject to.

8 MS. HASSAN: Your Honor, I think your -- I think you
9 were correct in saying that the in pari delicto defense for Mr.
10 Pfeiffer would be on the basis of sale of unregistered
11 securities.

12 THE COURT: That's the only one am I correct?

13 MS. HASSAN: Correct.

14 THE COURT: Okay. And then -- okay. And then so then
15 switching for in pari delicto, in what sense is Mr. Shinnars in
16 pari delicto?

17 MS. HASSAN: Your Honor, I believe it's the same kind
18 of evidence; right? That he was --

19 THE COURT: That's what I thought, that's fine.

20 Q I don't think it's different evidence.

21 THE COURT: And then ratification, how does
22 ratification apply?

23 MS. HASSAN: So, Your Honor, one, it is true that
24 ratification usually comes up in the agency context. We did
25 look -- and I apologize. I do not have that cite with me. We

1 did find at least a case where it was outside of the agency
2 relationship and the -- we can provide the cite later today.

3 THE COURT: I think it's in your comments, if I'm not
4 mistaken.

5 MS. HASSAN: That one actually isn't.

6 THE COURT: Oh, okay.

7 MS. HASSAN: And I believe it was a Second Circuit.
8 It might have been a district court case in which a former
9 employee brought a wrongful termination case.

10 THE COURT: Okay.

11 MS. HASSAN: But the company was able to use the
12 ratification defense because he had already taken or benefited
13 from the severance agreement that had been signed. And that
14 was considered a ratification defense. So that was in the
15 agency principle.

16 THE COURT: That's sort of like a waiver; right?

17 MS. HASSAN: Correct.

18 THE COURT: So how's that apply here?

19 MS. HASSAN: Your Honor, for instance, the fact that
20 by July -- by January 19th everyone knew or everybody
21 reasonably should have known that the SEC was investigating GAW
22 Miners and ZenMiner, the fact that some of the plaintiffs, some
23 of the class representatives might have continued buying GAW
24 Miners' products it ratifies their earlier purchases. And
25 that's the sense in which we're using that defense.

1 THE COURT: So I think with Mr. Shinnars, didn't he
2 stop in mid-December purchasing? 12/14 was his last purchase I
3 think based on the.

4 MS. HASSAN: We could check, Your Honor.

5 THE COURT: I'm pretty sure that's right.

6 MS. HASSAN: I will go with that.

7 THE COURT: I think Mr. Pfeiffer there was some
8 later.

9 MS. HASSAN: Correct.

10 THE COURT: So your view is Mr. Pfeiffer ratified the
11 fraud by continuing to purchase.

12 Now, of course, his testimony was that he's just
13 trying to get something out of this. He lost a lot of money.
14 They put up the e-mail, you know --

15 MS. HASSAN: And, Your Honor.

16 THE COURT: It was kind of sad they put up the e-mail
17 he lost money and he was trying to do what he could to get it
18 back. That's ratification you say?

19 MS. HASSAN: I believe so, Your Honor. And then his
20 actions in terms of continuing to try to collaborate with Mr.
21 Garza, so on and so forth, I believe that all goes into the
22 ratification.

23 THE COURT: I got it I'll reserve.

24 MR. ARD: Sorry I just want to correct the record. So
25 they did plead the unclean hands offense not in pari delicto, I

1 apologize.

2 THE COURT: Got it. Let's walk through the charge.

3 So turning to page 4, which would be the first page of
4 the introduction, comments on page 4? Plaintiffs have any
5 comments on page 4? No, okay, page 5, any comments on page 5?
6 Speak up any time. Mr. Weinstein, no?

7 MR. WEINSTEIN: It's going to be Ms. Hassan.

8 THE COURT: Ms. Hassan comments.

9 MR. ARD: Our first comment is on page, is it 13?

10 THE COURT: Where's your first comment.

11 MS. HASSAN: Page 7.

12 THE COURT: Let's go to page 7. What's your comment,
13 Ms. Hassan.

14 MS. HASSAN: So, Your Honor, at the very end of page 7
15 you remind the jury about some of your limiting instructions.

16 THE COURT: Yes.

17 MS. HASSAN: So we would request that another limiting
18 instruction be added.

19 THE COURT: Okay.

20 MS. HASSAN: We want to clarify that the jury may not
21 consider the statements concerning the partnership between the
22 companies and GAW Miners' acquisition of ZenMiner as a basis
23 for finding any liability against Mr. Fraser. We understand
24 the Plaintiffs have not alleged that these statements from May
25 2014 and August 2014 caused them any injury.

1 THE COURT: All right. Hold on one second. Right.
2 So I think -- Reese your position on that.

3 MR. ARD: Haven't you already given an instruction?

4 THE COURT: I think they want something a little more
5 explicit about the statements and I think that's fair. So what
6 I could do is in that first bullet point, what if I did this:

7 MR. ARD: I think it's already there, but ...

8 THE COURT: Hold on a second.

9 What if I added a sentence at the end of that bullet
10 point that says as follows, I also instruct you that the
11 statements made in relation to the acquisition of ZenMiners by
12 GAW Miners are not the statements the Plaintiffs allege were
13 materially false in connection with the sale of the four
14 products?

15 MS. HASSAN: Your Honor, that works for us.

16 MR. BUCHDAHL: I think it's a little different than
17 that, Your Honor. I think it's those statements are not the
18 false statements the Plaintiffs relied on. Because we
19 certainly believe those were false statements made.

20 THE COURT: Not the statements alleged -- but they're
21 not the statements the Plaintiffs allege were falsely in
22 connection with the sale of the products because this is before
23 the products existed.

24 MR. BUCHDAHL: Your Honor, the Hashlets were at least
25 within days of that false August press release.

1 THE COURT: Okay. But those statements didn't have
2 anything to do with the Hashlets.

3 MR. BUCHDAHL: Well, the reason I think that's not
4 entirely true is that those statements about that company were
5 all about how it was expanding GAW's ability to conduct its
6 mining operations.

7 THE COURT: Okay. What if I did this then: Okay, so
8 you want are not the false statements the Plaintiffs allege
9 they relied on?

10 MR. ARD: Yes.

11 THE COURT: What about that, Ms. Hassan?

12 MR. WEINSTEIN: I think our concern, Your Honor, is
13 question 2A on the verdict form.

14 THE COURT: Yeah.

15 MR. WEINSTEIN: Asks the following: Did Mr. Fraser
16 prove that he did not know in the exercise of reasonable care
17 could not have known that the companies offered or sold
18 securities by means of an untrue statement of material fact?

19 And the issue there is that's --

20 THE COURT: I got it so I'm going to do a compromise.

21 Are not the false statements the Plaintiffs allege I
22 also instruct you that the statements made in relation to the
23 acquisition of Zen by gauze are not the false statements the
24 Plaintiffs allege they relied on when purchasing (GAWs) the
25 products.

1 MR. WEINSTEIN: I think the problem with that is it
2 sounds like it only goes to the issue of reliance because of
3 this relied upon. And that's just one element ultimately.

4 THE COURT: I know, but -- yeah, I'm going to go with
5 that because I think it divorces it from the others, unless you
6 don't want me to give anything.

7 MR. WEINSTEIN: No, no, that is enough for sure.

8 THE COURT: Anything on page 8? When's the
9 Defendant's next comment? What page.

10 MS. HASSAN: Your Honor, page 10.

11 THE COURT: 10, let's go to page 10.

12 MS. HASSAN: So it's the paragraph starting it might
13 be helpful.

14 THE COURT: Yeah, I know you don't like the scales.

15 MS. HASSAN: No, no, Your Honor, no. We don't want
16 them but we're not going to raise that issue again. The third
17 line this is just an edit he should be they.

18 THE COURT: Sorry. Third line from the top on page
19 10?

20 MR. ARD: Yup, we have the same edit I missed it.

21 THE COURT: Sorry. I missed that.

22 MS. HASSAN: And then I guess it would be they bear
23 the burden of proof.

24 Your Honor, it's the paragraph close to the bottom
25 which starts it might be helpful to visualize.

1 THE COURT: Yes on which they bear the burden of
2 proof, gad catch and sorry what's the other one you said?

3 MS. HASSAN: I think your got it.

4 THE COURT: Okay. So the change on page 10 is -- and
5 I'll ask my law clerk to make this change on which -- so in
6 let's see one, two, third full paragraph on the page, third
7 line, supportive of the Plaintiffs on a particular issue on
8 which they bear the burden of proof. That's the change. Okay?
9 All right moving on, any comments on page -- or when's the
10 Defendant's next comment?

11 MS. HASSAN: On page 14.

12 THE COURT: All right. So let's do the Plaintiff's
13 first one is on 13 I think?

14 MR. ARD: Yeah it's a quick one you give this example
15 of someone walking with an umbrella.

16 THE COURT: Yeah.

17 MR. ARD: Then you say a few minutes later another
18 person comes in with an umbrella we don't think you need two
19 the fact you need two is circumstantial evidence.

20 THE COURT: Yeah I'm going to leave that but. 14
21 what's the Defendant's comment?

22 MS. HASSAN: Your Honor, just one second. Oh, it's
23 actually on page 15.

24 THE COURT: Page 15.

25 MS. HASSAN: Yes.

1 THE COURT: Go ahead.

2 MS. HASSAN: So first line and second line I think the
3 Plaintiff should be changed to plural.

4 THE COURT: Good catch, which remains with the
5 Plaintiffs throughout the case, the Plaintiffs filed this
6 lawsuit, yes, or the Defendants, right, so those two first
7 lines the word at the end should be Plaintiffs not Plaintiff.
8 Okay? When is the -- okay. Any comments on page 15?

9 MS. HASSAN: No, Your Honor.

10 THE COURT: Page 16?

11 MS. HASSAN: No, Your Honor.

12 MR. ARD: My next one's 21.

13 THE COURT: Do you have anything before 21.

14 MS. HASSAN: So on page 17.

15 THE COURT: 17.

16 MS. HASSAN: The first line I believe it should be
17 under oath at an earlier time.

18 THE COURT: I'm sorry. The first testimony under oath
19 at an early time, okay I think you're right. Earlier time, I
20 agree. That change will be made. That's, Madeline, that's the
21 first line, top of page 17 change early to earlier. Earlier
22 time.

23 Anything else on 17.

24 MS. HASSAN: No, Your Honor.

25 THE COURT: 18?

1 MS. HASSAN: Our next one is page 20.

2 THE COURT: All right. So let's go to page 20 because
3 I think Plaintiff's next one is 21.

4 MR. ARD: You said 24?

5 MS. HASSAN: 24.

6 THE COURT: 21 then.

7 MR. ARD: Well, it's actually 22.

8 THE COURT: Wow.

9 MR. ARD: You can place it where you want, but we have
10 a suggestion for a new sentence.

11 THE COURT: Okay.

12 MR. ARD: And the sentence is, in some -- this
13 sentence comes straight from the Supreme Court if I could
14 put -- is -- do you know how I turn on the screen?

15 THE COURT: Just raise it.

16 MR. ARD: The sentence from the Supreme Court.

17 MR. WEINSTEIN: Where is he proposing.

18 MR. ARD: I was proposing right above the paragraph
19 that starts if you find that the Plaintiffs have proved that a
20 particular product. I have red lions on my copies so may page
21 numbers may not line up.

22 THE COURT: Before you do that I want to see where we
23 are here so we're under investment contracts; right?

24 MR. ARD: Yeah I'm proposing a new penultimate
25 paragraph so right before the last paragraph.

1 THE COURT: In sum.

2 MR. ARD: In determining whether the product was an
3 investment contract, the touchstone is the presence of an
4 investment in a common venture premised on a reasonable
5 expectation of profits to be derived from the entrepreneurial
6 or managerial efforts of others.

7 THE COURT: Maybe we should try to put this up on the
8 screen. Let's see if we're able to do that.

9 MR. WEINSTEIN: Your Honor, just before we try to get
10 that on the screen, it sounds very repetitive of.

11 THE COURT: Let me read it first.

12 MR. ARD: The in sum part is not from the Supreme
13 Court but starting in determining is directly from the Supreme
14 Court. I guess it starts with touchstone is the Supreme Court
15 quote.

16 THE COURT: And you think it's redundant?

17 MR. WEINSTEIN: It's essentially what they're trying
18 to do is recast the three elements that you have at the top of
19 21. And as Your Honor said not only is the jury charge
20 conference not that exciting the charge is not that exciting
21 for the jury.

22 THE COURT: That's fair I agree.

23 MR. ARD: Unless I'm missing it and I may be I don't
24 want to misrepresent anything but unless I'm missing it from
25 the entrepreneurial or managerial efforts of others is not here

1 anywhere it's not repetitive at all.

2 MS. HASSAN: Your Honor, I believe if it was already
3 included in our proposed instructions and the third element
4 actually covers like the entrepreneurial or managerial efforts
5 is just a fleshing out in some cases of the third element of
6 Howey.

7 MR. ARD: Right but it's the Supreme Court authority.

8 THE COURT: Okay, folks, folks, I'll tell you what.
9 Here's what I would be inclined to do: I think this would
10 make -- it goes to the third element. Do we agree on that?

11 MR. ARD: Right. It's the sum of all three of them
12 but the part I care about is the third.

13 THE COURT: What if we did this: In the paragraph
14 that begins on the previous page, for the third element,
15 second, third, insert a new sentence after the third sentence.
16 The third sentence says if there was a reasonable expectation
17 of investor control then profits wouldn't be considered to rise
18 solely from the efforts of others what if we say instead of in
19 sum simply the touchstone the presence of an investment in a
20 common venture premised on a reasonable expectation of profits
21 to be derived from the entrepreneurial or managerial efforts of
22 others. And then we continue, but if the expectation was that
23 the participants would be passive investors, then -- oh, wait a
24 minute.

25 No, I think -- I think that's not the place to put it.

1 I think the place to put it would be.

2 MR. ARD: The last sentence.

3 THE COURT: And say the touchstone.

4 MR. ARD: Yup.

5 THE COURT: All right. I'm going to make that
6 decision. I'll add it but I'm not going to use in sum in
7 determining. I'll just say the touchstone is the presence,
8 etc., at the end of that paragraph, so before the paragraph
9 beginning if you find that the Plaintiffs have proved.

10 MR. ARD: Okay.

11 THE COURT: We'll add that. Anything else on that
12 page, 22? Are you able to get that?

13 Anything on page 23?

14 MS. HASSAN: Your Honor --

15 THE COURT: Sorry. Did you have something on 22,
16 Ms. Hassan?

17 MS. HASSAN: No. On 23 going on 24.

18 THE COURT: Okay.

19 MS. HASSAN: So, Your Honor, on page 23 the
20 instructions give a lot of examples of what control, how it
21 could be.

22 THE COURT: I know you don't like that.

23 MS. HASSAN: We don't like that, but I think we had
24 one more sentence we were proposing. So where it says these
25 are just examples and no one factors.

1 THE COURT: Yeah.

2 Q We think we need to clarify even if you find one of these
3 examples that might not be sufficient in light of all the
4 evidence; right? None of these are sufficient or exhaustive.

5 THE COURT: How's that different are from saying no
6 one factor is determined.

7 MS. HASSAN: Your Honor, we thought we could clarify
8 by saying one or more of these factors exist is also not
9 determinative. So it's also not just if you find one of these
10 or two of these it's possible you decide there isn't control
11 given all of the facts together.

12 THE COURT: Again, I'm not seeing how that's different
13 from saying one no factor is determinable. If I really thought
14 it was I would do it but I don't really think it is. All right
15 so I'm not going to do that move on.

16 MR. ARD: Sorry, Your Honor I do have one there.

17 THE COURT: On 23?

18 MR. ARD: When you list -- and I apologize because my
19 page numbers aren't corresponding with yours because I'm in red
20 line.

21 THE COURT: That's okay give me the first paragraph.

22 MR. ARD: I think it's the first paragraph but it says
23 the way the Plaintiffs.

24 THE COURT: Yup.

25 MR. ARD: So when you list the factors one of them is

1 whether he owned a controlling interest in GAW Miners. We
2 think that should be whether he owned half of the interest in
3 GAW Miners. And the reason for that is that if you look at
4 your Motion to Dismiss order you said -- it says the Amended
5 Complaint plausibly pleads that Fraser controlled the companies
6 in Garza.

7 THE COURT: I tell you what I'm not going to do that
8 I'm going to make it different. I'm going to say instead of
9 whether he owned a controlling interest in GAW Miners and
10 ZenMiners I'm going to say, the extent to which -- the extent
11 to which he owned an interest in GAW Miners and ZenMiner.

12 MR. ARD: Can I just.

13 THE COURT: You can push back but that's probably what
14 I'm going to do.

15 MR. ARD: Sure, Your Honor, what you said in your
16 Motion to Dismiss was it does so first by alleging that Fraser
17 owned half of the equity in each of the companies, a
18 well-recognized indicator of control.

19 THE COURT: Right but that's an allegation Mr. Ard
20 that was based on the Complaint.

21 MR. ARD: Okay.

22 THE COURT: It's up to the jury to decide what the
23 evidence shows about how much.

24 MR. ARD: Yes, Your Honor.

25 THE COURT: The extent to which he owned an interest

1 in GAW Miners and ZenMiner. I'm going to make that change from
2 whether he owned a controlling interest in.

3 MR. ARD: Yes, Your Honor.

4 MR. WEINER: Your Honor, I think you need the word
5 "controlling" in there; right? Because if he owned one half of
6 one percent that would be an interest in it. So the key is
7 controlling. You need the word controlling.

8 THE COURT: Right, but these are different factors,
9 Mr. Weiner. So the point is I don't agree. The point is that
10 a minority investor could control if, together with other
11 factors, for example, he had lent the company a ton of money,
12 he had security interests in all its assets, he had a close
13 personal relationship. So, no, I disagree. On to page 24.

14 MS. HASSAN: Your Honor, page 24 so for the sale of
15 unregistered securities claim we already discussed that
16 defendants won't get the affirmative defense that we had
17 initially asked for. But we would still.

18 THE COURT: Let's be clear I'm glad you raised that.
19 Just to be clear, what you asked for was an affirmative defense
20 that Mr. Fraser did not know and could not reasonably have
21 known that these were securities required to be registered.
22 That was the affirmative request defense you requested based on
23 my rulings before trial, I determined not to give that. That
24 was the only affirmative request you requested just to be
25 clear.

1 MS. HASSAN: Correct, Your Honor.

2 THE COURT: Okay.

3 MS. HASSAN: That's completely accurate. But in light
4 of that, we wanted to request an affirmative defense to the
5 unregistered securities claim. I can read it out and I believe
6 that this is just following basically the case law that
7 Plaintiff shared with you.

8 THE COURT: Basically whether he knew that they were
9 registered or not.

10 MS. HASSAN: Correct whether or not he knew that the
11 companies were offering or selling the product and doing so
12 without registering it as a security.

13 THE COURT: Right. I mean on the first one, is there
14 really any dispute about that?

15 MS. HASSAN: Your Honor, I guess I could see if you
16 give the jury Hashpoints, HashStakers, I don't know. It's not
17 clear to me that Mr. Fraser knew that there was even something
18 called Hashpoints.

19 THE COURT: Okay. What's the Plaintiffs' position on
20 that?

21 MR. ARD: Sorry what's the proposal?

22 THE COURT: The proposal is to add an affirmative
23 defense to the unregistered securities claim that would say, if
24 Mr. Fraser proves that he did not know or in the exercise of
25 reasonable care could not have known that the products -- I'm

1 making this up but this is what I assume it says -- were not
2 registered -- oh, sorry -- that the products were being sold or
3 did not know or exercise reasonable care could not have known
4 that the products were not registered, then you have to find
5 for Mr. Fraser. Right? Is that basically it?

6 MS. HASSAN: Correct, Your Honor.

7 MR. BUCHDAHL: They want an instruction that it
8 wouldn't have been possible for him to find out that GAW Miners
9 was selling these? That's the factual predicate that they're
10 asking the jury to find?

11 THE COURT: Well, I think the factual predicate would
12 be at least she mentioned Hashpoints and HashStakers that, you
13 know, their position is there may not be evidence that Mr.
14 Fraser was aware the company was selling those two products.

15 MR. BUCHDAHL: No, I get it. But doesn't it require
16 that if the exercise of reasonable care they're asking for an
17 instruction --

18 THE COURT: I get you. I get you. But, you know, I
19 mean I wouldn't not give the instruction on that basis.
20 Reasonable care is really a question for the jury.

21 MR. ARD:

22 MR. BUCHDAHL: Here's the state of the evidence.
23 There's no evidence, as far as I'm aware, I didn't ask him a
24 single question about HashStakers or Hashpoints. That's a
25 fair -- that's a fair point on their point. So if they want to

1 say he never could have found out about them.

2 As to the other one, I did ask him, did you have any
3 idea whether anything at all had ever been registered? He said
4 nope. I mean that's the state of the evidence on that.

5 THE COURT: Right. So that suggests I should give the
6 defense.

7 MR. BUCHDAHL: Well, no, because, again, like the
8 notion that he -- that he -- that there's no way for him to
9 find out.

10 THE COURT: No, I get that. That's an issue for the
11 jury.

12 MR. BUCHDAHL: Okay all right.

13 THE COURT: I will include that defense. So that
14 means, just so we're clear, just in terms of where that's going
15 to go, so that will go.

16 MS. HASSAN: Could that go right before Section B
17 starts?

18 THE COURT: Yes, it will. On page 24 we will say,
19 affirmative defense or unregistered securities, affirmative
20 defense. And we will draft that based on what I just said.

21 And then on the verdict form, Madeline, that needs to
22 be inserted as well. And that will go -- that will be question
23 1A under Section 2 of the verdict form. Okay? All right
24 moving on. Page 25.

25 MR. ARD: Sorry, Your Honor, there was one thing I

1 wanted.

2 THE COURT: Okay.

3 MR. ARD: If you go back -- the paragraph on my page
4 24 above where it says alternatively the second way the
5 Plaintiffs.

6 THE COURT: Yes.

7 MR. ARD: The sentence before that, we think that
8 sentence is misleading because it says, it restates the
9 standard of what Plaintiffs need to prove.

10 THE COURT: Yeah.

11 MR. ARD: But it's actually not the right standard.
12 The right standard is the first.

13 THE COURT: The management and policies.

14 MR. ARD: Yeah.

15 THE COURT: Fine. I'll change the actions to the
16 management and policies so.

17 MR. ARD: So what it should say they need to prove
18 they possessed the power to direct or caused the direction or
19 management of the companies whether through --

20 THE COURT: Yeah I'm not going to repeat that whole
21 thing. It just gets -- this charge is too unwieldy already.
22 I'm just going to say.

23 MR. ARD: That's why we would strike the entire
24 sentence but if it's going to be please be seated it shouldn't
25 say --

1 THE COURT: But why don't we just say but they need to
2 prove that he actually possessed the ability to direct the
3 management and policies of the company.

4 I'm not going to distinguish between those two things.

5 MR. BUCHDAHL: Your Honor, at some point --

6 THE COURT: Just to be clear for the record, I will
7 change actions to management and policies.

8 MR. ARD: Power to direct or cause the direction of --

9 THE COURT: Yeah, I'm going to use direct as a
10 shorthand for that. Again, I told them that earlier. I'm not
11 worried about them being confused. Go ahead.

12 MR. BUCHDAHL: Your Honor, before just for guidance,
13 are we allowed -- does the Court object to us displaying during
14 a closing portions of the charge.

15 THE COURT: No, not at all. You're welcome to do
16 that. Put up any part you want. In fact, well, I won't say I
17 encourage it but lawyers do it all the time. I much rather
18 have you do that than get it wrong.

19 MR. BUCHDAHL: Your Honor, one sentence that I think
20 belongs somewhere in the instruction on control portion,
21 there's been -- is the notion that there could be more than one
22 control person for a company.

23 THE COURT: You got to give me a place to put that
24 though. We've got to go through it.

25 THE CLERK: I missed the last.

1 THE COURT: So the last one was page 24, based on my
2 discussion with Mr. Ard, this isn't everything he wanted, but
3 this is what I was willing to do. I'm on the top of page 24.
4 The sentence that begins, To prove that Mr. Fraser directly or
5 indirectly controlled Plaintiffs need to prove he actually
6 directed the management and policies of the companies sorry
7 need not prove that he actually directed the management and
8 policies of the company but they do need to prove that he
9 possessed the ability to direct the management and abilities of
10 the company.

11 We're done with that, Mr. Ard.

12 MR. BUCHDAHL: Page 23, second element control.

13 THE COURT: Okay.

14 MR. BUCHDAHL: I think it would be appropriate to tell
15 the jury after that first sentence, a company can have more
16 than one control person.

17 THE COURT: So in other words, right after the three
18 element, listed elements and before the words, the first way,
19 that's where you want it?

20 MR. BUCHDAHL: That would be fine. We're not picky
21 about the location.

22 THE COURT: What's the Defendant's position on that?
23 I think that's accurate.

24 MR. WEINSTEIN: Yeah, although I think it probably
25 says a number of times that the allegation is he was a control

1 person, not the control person. I think it's obvious.

2 THE COURT: Well, okay. I'll include it. I'll
3 include it. So in terms of where it goes, page 23, after the
4 listing of the three elements under control -- sorry it's not
5 really the three elements, prove any one of the following three
6 things then it lists those three, we'll have a separate
7 stand-alone paragraph that says, a company they have more than
8 one control person (Company may have) then new paragraph, the
9 first way, etc.

10 Okay. 125.

11 MS. HASSAN: Your Honor, sixth line from the top I
12 think we need to add an or between under statement and
13 omission.

14 THE COURT: Untrue statement or omission, yes, I
15 agree. So that's one, two, three, four, five, six or between
16 statement and omission.

17 THE CLERK: What's the paragraph?

18 THE COURT: So it's the paragraph that begins the
19 Plaintiffs claim that Mr. Fraser is liable for the company
20 security fraud in either or both of the following ways. You
21 see it?

22 THE CLERK: Yeah.

23 THE COURT: Okay?

24 MR. ARD: Your Honor, this also reminds me of
25 something. It's kind of a global issue. Sometimes you talk

1 about, you know, whether he had financial leverage over GAW
2 Miners or ZenMiner whether he had control of GAW Miners or
3 ZenMiner. Sometimes you use and.

4 THE COURT: And it should be or?

5 MR. ARD: It should be or globally again.

6 THE COURT: So let me just think about that for a
7 minute.

8 How about -- when you globally, so, for example, on
9 page 25 under control, must prove each of the following two
10 elements. And by the way, I think those have to be renumbered
11 so they don't say 4 and 5. Say 1 and 2 so it says first that
12 GAW Miners and ZenMiner are liable for the sale of securities
13 that should be or.

14 MR. ARD: Yes if they find it.

15 THE COURT: I think that's right what's Mr.
16 Weinstein's position.

17 MR. WEINSTEIN: Your Honor, I think on that point and
18 also the one he has to be a control person of the entity that's
19 relevant to the security that you're dealing with; right? It's
20 not that if they just find at some point he's a control person
21 in one or the other he's now liable for all claims.

22 THE COURT: So is there any evidence that ZenMiner
23 sold these securities?

24 MR. ARD: Well, I think there's evidence that they
25 obeyed no corporate form and they kind of did all the stuff

1 together.

2 THE COURT: Query.

3 MR. ARD: But I agree.

4 THE COURT: Let me ask you a question. Query what
5 difference would it make if we just dropped ZenMiner
6 altogether? I'm not saying I'm going to do that. But I'm
7 curious. What difference does that make? I'm a big fan of
8 simplicity.

9 MR. BUCHDAHL: I certainly can't identify a
10 difference.

11 THE COURT: I think we just take ZenMiner out.

12 MR. WEINSTEIN: I think the fact they can't identify
13 the security is enough.

14 THE COURT: I don't see how you guys get hurt on that
15 how anybody gets hurt on it.

16 MR. ARD: It's all about GAW Miners.

17 THE COURT: We're going to take out ZenMiner
18 altogether.

19 MR. BUCHDAHL: Great. Probably save two and a half
20 minutes.

21 THE COURT: Great. ZenMiner's gone, okay, great. All
22 right? Let's just think about that. Is there any reason we
23 need ZenMiner at all?

24 MR. WEINSTEIN: Only in the limiting instruction about
25 the ZenMiner.

1 THE COURT: Yes because the acquisition fair enough.

2 MR. WEINSTEIN: But when it comes to control
3 elements --

4 THE COURT: I think Mr. Weinstein's correct.

5 MR. ARD: I can't think of anything.

6 THE COURT: That's good.

7 MR. ARD: That's the heart of my issue.

8 THE COURT: All right. Moving to page 26, all right,
9 moving to page 27.

10 MS. HASSAN: Your Honor, our next are on page 28.

11 THE COURT: Okay, 28.

12 MS. HASSAN: So first, Your Honor, I just wasn't -- I
13 think we just need to clarify the fourth, the last sentence of
14 the paragraph that starts but the first element the Plaintiffs
15 must prove, because right now it says, according to your
16 finding of the previous claim about whether GAW Miners and
17 ZenMiner.

18 THE COURT: This is under aiding and abetting

19 MR. HASSAN: Correct, Your Honor.

20 THE COURT: Accordingly, your finding on the previous
21 claim.

22 MS. HASSAN: Whether GAW Miners and ZenMiner violated
23 the.

24 THE COURT: Security fraud. And that will just say
25 GAW Miners violated the CUSA, securities fraud anything else on

1 28.

2 MS. HASSAN: Yes, Your Honor. So this is a comment
3 for both the aiding and abetting claims, where there's a
4 requirement of material assistance.

5 THE COURT: Okay.

6 MS. HASSAN: Your Honor, there has been evidence or
7 questions asked during the trial about, you know, what Mr.
8 Fraser did or did not do, why he didn't take certain actions.

9 THE COURT: Yes.

10 MS. HASSAN: And we believe that in light of that,
11 it's necessary to instruct the jury that failure to act is not
12 material assistance.

13 THE COURT: Well, I think this was debated in the
14 comments. And I think you referred me to a Second Circuit case
15 that involved New York law assessing fiduciary duty,
16 assisting -- I'm sorry aiding and violating a duty of fiduciary
17 duty. In other words, the question was did he have to take
18 affirmative steps. Think the case you cited was under New York
19 law but second I thought dealt with aiding and abetting a
20 condition of fiduciary duty that's why I didn't give it but
21 that's happy to hear you on it.

22 MS. HASSAN: As I read the case the mere inaction does
23 not constitute aiding and abetting unless there's an
24 independent fiduciary duty to act our position is there is no
25 evidence that Mr. Fraser had a fiduciary duty to the Plaintiffs

1 here, so --

2 THE COURT: Again, that's maybe New York law, although
3 I don't -- but that wasn't even a fraud claim. That was -- I
4 think the case -- I looked this up yesterday because I was --
5 maybe I got it wrong. Can you just give me the case again.

6 MS. HASSAN: In re sharp and the cite is 403 F 3rd 43.

7 THE COURT: Sorry. Give me a second.

8 403 F.3d 43?

9 MS. HASSAN: Yes. Yes, Your Honor.

10 THE COURT: Thank you.

11 MR. ARD: Your Honor, we have nothing to add other
12 than that. This is briefed pretty heavily in our comments. We
13 think you got it right.

14 THE COURT: Hold on. Hold on.

15 So the discussion concerns aiding and abetting the
16 breaches of fiduciary duty under New York law, there are three
17 elements to a claim for aiding and abetting a breach of
18 fiduciary duty. So I'm not sure both because it's a different
19 claim and because it's under New York law why this case is
20 informative here.

21 MS. HASSAN: Your Honor, I agree this is under New
22 York law. I think the idea being just the idea of material
23 assistance suggests something affirmative rather than a failure
24 to do something.

25 THE COURT: I hear you but I'm going to leave it as

1 is. Let's move on. Anything else on -- I think we were up to
2 28.

3 MR. RENNIE: Your Honor, may I?

4 THE COURT: Yes.

5 MR. RENNIE: For the remainder of the charge
6 conference may I bring a chair over?

7 THE COURT: Sure, if you can fit it, yeah.

8 29.

9 MR. ARD: When you get to currency that's when I want
10 to pipe in.

11 THE COURT: We're up to 30. Ms. Hassan anything on
12 29?

13 MS. HASSAN: No, Your Honor.

14 THE COURT: 30. Currency go ahead, Mr. Ard.

15 MR. ARD: All right.

16 THE COURT: Okay.

17 MR. ARD: So.

18 THE COURT: So you know, the only place I -- where I
19 came up with this definition of currency is Black's law
20 dictionary.

21 MR. ARD: I hear you let me give you proposal No. 1.
22 Slide 2, please. This is directly from the.

23 THE COURT: CFR?

24 MR. ARD: CFR.

25 THE COURT: But under what.

1 MR. ARD: This is not under the security laws. This
2 is treasury.

3 THE COURT: Treasury.

4 MR. ARD: Just looking for other definitions and the
5 CFR is the best I could find. And, you know, if you look at
6 the statute, we think this is clearly what it's talking about.

7 I'll note that there have been many, many cases
8 recently holding that cryptocurrencies are securities and not a
9 single one has ever, you know --

10 THE COURT: Has the Second Circuit so held?

11 MR. ARD: No.

12 THE COURT: Please tell me if it has.

13 MR. ARD: No. No, yeah, no. But SEY, there have been
14 several courts in SEY that have held cryptocurrencies are
15 securities.

16 THE COURT: Have they used the definition you're
17 showing me.

18 MR. ARD: It actually hasn't been litigated there's
19 only one case I'm aware of.

20 THE COURT: It's cited in your papers.

21 MR. ARD: It's sort of on point we're not saying it's
22 directly on point.

23 THE COURT: Right. But why is this definition the
24 right definition to use.

25 MR. ARD: Well it's a regulation. It's how in other

1 statutes other context the Government is defining currency.

2 And, you know, if you look at the statute -- what's that?

3 MS. CHEN: I think it just adds that the currency has
4 to be legal tender which I think is not currently in the
5 definition.

6 THE COURT: It is not currently in the definition.
7 Very interesting. So I shouldn't do this because I do want to
8 get through this. So I was at home this weekend. I didn't
9 have my modern Black's so I pulled out my father's Black's law
10 dictionary from like 1948. I'm not kidding you. It actually
11 has name in there Yale station all that good stuff.

12 And that definition of currency is closer to the one
13 Mr. Ard's showing me. But under the tutelage of the great --
14 oh, God I'm going to fretting his name the legal writing goo
15 rue you guys know.

16 MR. BUCHDAHL: Brian garner.

17 THE COURT: Garner right Black's has apparently
18 changed his definition of legal currency to take out the
19 references to legal tender it wasn't a reference to legal
20 tender but it was very close and said circulated by hand, which
21 I'm sure you folks would love.

22 MR. ARD: We'll go with that.

23 THE COURT: But then I said you know what I better
24 check the more modern definition and I went with that.

25 MR. ARD: So let me.

1 THE COURT: Go ahead. Go ahead.

2 MR. ARD: So here's the logic of it. If you look at
3 the statute, your definition here, you could have something
4 that's a security that could arguably count as this and fall
5 under this definition and that's the problem with it. If you
6 look at the context of --

7 THE COURT: Well, why do you say that? So a coin sort
8 of begs the question here; right?

9 MR. ARD: Right.

10 THE COURT: A bank note doesn't. A bank note, as I
11 understand is cash; right?

12 MR. ARD: Yeah.

13 THE COURT: A Government note, now, for me I'm not --
14 I'll be honest. I'm not exactly sure what a Government note
15 is. I would think it was a T bill, they would say a government
16 bond, not a government note.

17 But I am not really sure what a Government note S. I
18 just used the definition. So but why do you say that a
19 security could qualify?

20 MR. ARD: Well, you could use -- I mean I think
21 cryptocurrency are the right example. It's what comes to mind.

22 THE COURT: Yup.

23 MR. ARD: You could argue that some of these
24 cryptocurrencies may be our medium of exchange.

25 THE COURT: Mr. Narayanan said so.

1 MR. ARD: Exactly, Your Honor. But that doesn't
2 mean -- that don't mean it can't be a security. It would be a
3 security if it fit under the Howey Test if you look at the
4 statute the examples given in statute everything else is like
5 bank note under the statute these are all clearly things that
6 are not securities and we think currencies should be read in
7 the context of the rest of the example.

8 THE COURT: You just remind me statutory 78 U is it
9 or.

10 MR. ARD: I wish I could.

11 THE COURT: 15 USC 78? It's in the papers.

12 MR. WEINSTEIN: While that's being looked up, Your
13 Honor, Professor Narayanan also in his demonstrative compared
14 cryptocurrency, Bitcoin to a dollar bill. And that's the
15 point.

16 MR. ARD: Right but.

17 MR. WEINSTEIN: Bitcoin is not a security.

18 THE COURT: I did want to follow-up on Mr. Ard's
19 point. Judem whatever that thing lists birds of a feather
20 flock together.

21 MS. HASSAN: Your Honor, it's 15 USC 78c, 810.

22 THE COURT: Great.

23 So No. 10 says but shall not include currency or any
24 note, draft, bill of exchange or banker's acceptance which has
25 a maturity, blah, blah, blah. So those don't all sound like

1 Government-issued documents. I mean a note is a -- just an
2 evidence of indebtedness. A draft, I think, refers to a check.
3 I didn't take secure transactions at least this part of secure
4 transactions in law school.

5 A bill of exchange I think is used in the commodities
6 world, but I'm not really sure. And a banker's acceptance I
7 don't know what that is. But it certainly doesn't sound like
8 it's Government issued.

9 MR. ARD: My point was not that these are Government
10 issued.

11 THE COURT: Oh.

12 MR. ARD: My point was that these things are all
13 designed to be things that are clearly not securities. And
14 your definition, the proposed definition in these instructions
15 doesn't fit that pattern. You could have something that fits,
16 you know, arguably fits the definition you've given in the
17 instruction that's, you know, I mean it's a Howey test. None
18 of these things --

19 THE COURT: Again that's where I might part ways with
20 you because as I said at the outset, I don't see the point of
21 this language, but shall not. If all they're doing is sort of
22 clarifying what's not a security. Because those things, um,
23 depending on how you interpret them, I would have thought it
24 would be fairly clear in the draft those things wouldn't meet
25 the definition anyways.

1 MR. ARD: Well, let me move to the -- I respectfully
2 disagree but.

3 THE COURT: You've made your point.

4 MR. ARD: Let me move to my second proposal, even
5 better.

6 Can you put up the next, yeah, proposal 2. So your
7 definition here says a currency is an item that circulates as a
8 medium of exchange.

9 THE COURT: Yeah.

10 MR. ARD: I think that's less clear than what currency
11 is. I think a juror would know what currency is more than
12 medium of exchange Black's dictionary defines medium of
13 exchange my second proposal is to put in the definition may I
14 approach.

15 THE COURT: You may I got it right here.

16 MR. ARD: This is actual definition of medium of
17 exchange from Black's.

18 THE COURT: Let me ask the Defendants, what about
19 that? What he's done is to take the word "medium of exchange"
20 and plug in the Black's definition for "medium of exchange."

21 MR. WEINSTEIN: And in the generally accepted as
22 payment?

23 THE COURT: Yeah. According to this piece of paper
24 that Mr. Ard just handed me, "medium of exchange" in Mr.
25 Garner's world is defined as anything generally accepted as

1 payment in a transaction and recognized as a standard of value.

2 MR. WEINSTEIN: The problem with that is at what point
3 in a currency's life does it become generally accepted to
4 become a currency? It doesn't change its form once it
5 Government's Exhibit something that's more generally accepted.
6 Bitcoin wasn't accepted at all for a while. But it's a
7 currency. It ultimately came somewhat accepted in some places.
8 It's a currency. It shouldn't be in its early stages it's not
9 just because it's not generally accepted around the world.

10 THE COURT: I think I agree with Mr. Ard on this one.
11 I'll go with proposal No. 2.

12 So we'll change it to a currency -- where was I?
13 Currency is an item (such as a coin, government note, or bank
14 note) instead of the rest we would say that is generally
15 accepted as payment in a transaction and recognized as a
16 standard of value. Because I do think if I were on the jury
17 I'm not sure I would know what a medium of exchange was. Okay?
18 Let's move on. Page 31 in my version.

19 MR. ARD: Our next comment is not until the forward
20 looking statement.

21 THE COURT: Anything before that Ms. Hassan.

22 MS. HASSAN: I'm sorry. Which page are we on?

23 THE COURT: He said his next comment is on 33.

24 MR. ARD: No. I take it back. Right below the
25 currency definition where you say the Defendant has asserted an

1 affirmative defense --

2 THE COURT: Yeah.

3 MR. ARD: The next sentence we would like to take out
4 the word necessarily it says it is important to note merely
5 describing is not necessarily.

6 THE COURT: Yeah I agree because I used the word
7 merely, I agree, take out the word necessarily. I agree, make
8 that change (Currency) now are we up to anything before forward
9 looking statements?

10 Okay, so I have a question for the Defense on this.
11 What are the forward looking statements in this case?

12 MS. HASSAN: Your Honor, the statements would all be
13 the ones related to Paycoin, the fact that there would be a
14 hundred million dollar fund and that there would be a \$20
15 floor. So that's all future related projects really for --

16 THE COURT: Is that a project?

17 MS. HASSAN: Well, it's forward looking, I'll correct
18 myself. It's what will happen in the future. This is the
19 expectation of what will happen.

20 THE COURT: The statement of the plans and objectives
21 of management for the future operation of the company would be,
22 we're going to have a \$100 million re reserve fund and a
23 trading floor of \$20.

24 MR. WEINSTEIN: And merchants that will --

25 THE COURT: And merchant adoption, okay. All right.

1 Mr. Ard, go ahead.

2 MR. ARD: I think Ms. Cheng is going to handle this
3 one.

4 THE COURT: Ms. Cheng.

5 MS. CHEN: Your Honor, we just don't think this safe
6 harbor for forward looking statements even applies in this
7 case.

8 THE COURT: Why is that.

9 MS. CHEN: 15 USC 78 U dash 5 the section application
10 of safe harbor for forward looking statements. And there are a
11 couple of reasons, Your Honor. I think maybe the simplest one
12 is just to look at subsection B exclusions.

13 THE COURT: Give me a second. Exclusions, B, yeah,
14 I'm with you.

15 MS. CHEN: Except to the extent otherwise specifically
16 provided by rule, regulation or order or commission this
17 section shall not apply to forward looking statement we go to
18 subsection section 2.

19 THE COURT: That is.

20 MS. CHEN: That is, and then there is subsection E is
21 made in connection with an offering by or relating to the
22 operations of a partnership, limited liability company or I'll
23 skip the rest. But I think the allegation here is that, you
24 know, GAW Miners is a limited liability company, and so there
25 is an exclusion for forward looking statements.

1 THE COURT: Hold on a second.

2 MR. WEINSTEIN: Ms. Cheng can we get the statute
3 citation.

4 MS. CHEN: It's 15 USC 78 U-5.

5 THE COURT: All right. So actually, I have to take a
6 step back because I read this a little too quickly last night
7 or whenever I did this.

8 The safe harbor itself is subsection A this section
9 shall only apply to a forward looking section, oh, here the
10 safe harbor, subsection C. I see, I see so that's the safe
11 harbor so it says except provided in subsection B and that
12 provides exclusions and the one Ms. Chen is referring me to is
13 this section shall not apply to a forward looking statement
14 that is made in connection with an offering by or relating to
15 the operations of a partnership, limited liability company, or
16 a direct participation investment program.

17 And so is -- I should know this GAW Miners and
18 ZenMiners are both LLC?

19 MS. CHEN: I'm not sure ZenMiner is anything.

20 THE COURT: But GAW Miner is an LLC? Yes?

21 MS. CHEN: Yes.

22 THE COURT: Okay. So let me hear from Defense as to
23 why that -- this wasn't put in the very detailed set of
24 objections I got, but I'll listen to it. What have we got on
25 that, Ms. Hassan?

1 MS. HASSAN: Your Honor, we can't dispute with the
2 fact it says LLC and we agree GAW was an LLC.

3 THE COURT: Okay.

4 MR. WEINSTEIN: And we haven't looked at it. So.

5 THE COURT: I ... hold on one second.

6 So I just did a quick search on forward statements 10
7 within 10 LLC in the Second Circuit. I didn't come up with
8 anything. That doesn't mean it's not there. The language I
9 read to you does seem to support the Plaintiffs' reading. Let
10 me know just pull it up again.

11 As I read the statute, safe harbor's in subsection C
12 it says except as provided in subsection B, in any private
13 action arising under this chapter that is based on an untrue
14 statement of a material fact or omission of material fact,
15 etc., a person referred to in subsection A shall not be liable
16 with respect to any forward looking statement. And then it
17 goes on to qualify that with types of forward looking
18 statements.

19 Subsection B, which is clearly carved out by that
20 language says except to the extent otherwise provided by rule
21 regulation or order of the commission this section shall not
22 apply to a forward looking statement and one of them is that is
23 subsection 2e, made in connection with an offering by a limited
24 liability company.

25 So based on that, I'm not going to give this

1 instruction.

2 That makes life a little bit easier actually.

3 Okay. I think we're up to page 34. Page 35. Page
4 36. Page 37.

5 MS. HASSAN: Your Honor, if you could give one second,
6 I just need to --

7 THE COURT: Yup.

8 MS. HASSAN: So, Your Honor, this is -- I'm not sure
9 exactly. I think it falls somewhere in the page 35 and 36
10 range where we're talking about reliance.

11 THE COURT: Yeah.

12 MS. HASSAN: We had asked for an instruction which
13 clarifies that reliance has to be found on a class-wide basis.

14 THE COURT: I know. And I said early on when I refer
15 to Plaintiffs, I mean the entire class. So that's how I dealt
16 with that. You're preserved.

17 We're on to page 37. Anything on 37? 38? 39? 40?
18 All right, so folks, I'm moving on. Page 41? 42? 43? All
19 right, then we have the comments on the affirmative defenses.
20 I think I've heard you on that. I'm going to come up with
21 something. I'll take that back I have to come up with
22 something.

23 MS. HASSAN: Your Honor, page 42 though you might have
24 already passed it.

25 THE COURT: 42 yeah I did already pass it but that's

1 okay.

2 MS. HASSAN: So, Your Honor, five lines so the last
3 sentence of the first -- of the last full paragraph on that
4 page where it says the Plaintiffs need to prove that only by
5 preponderance of the evidence.

6 THE COURT: Okay, maybe my 42's different from yours.
7 My last paragraph on 42 begins, for the second element.

8 MS. HASSAN: Oh, Your Honor, so the paragraph above
9 that.

10 THE COURT: Okay, the Plaintiffs -- go ahead tell me
11 where.

12 MS. HASSAN: So where it says the Plaintiffs need to
13 prove that only by preponderance of the evidence this is the
14 last.

15 THE COURT: For the fourth sub-element.

16 MS. HASSAN: Exactly so, Your Honor, we don't think
17 the only is necessary.

18 THE COURT: Fine, I'll take it out. I'll take out
19 only, fine.

20 Okay, 43? Okay, so then I'm going to deal with --
21 I've heard you on the defenses. We're not going to do that
22 anymore, so we're into the final instructions now.

23 MS. HASSAN: Your Honor, may I ask for one
24 clarification on the affirmative defenses? We had four. There
25 was also a separate affirmative defense for sale of

1 unregistered securities under the CUSA.

2 THE COURT: Separate affirmative defense for sale of
3 unregistered securities. Sorry what you referring to exactly?

4 MS. HASSAN: Let me find what it was in the proposed
5 instructions.

6 MR. ARD: There were a lot of comments back and forth
7 and I mean our position was it doesn't apply.

8 THE COURT: This is based on the sale by the
9 Defendants?

10 MR. ARD: Exactly.

11 THE COURT: The named Plaintiffs? This was related to
12 the names Plaintiffs?

13 MS. HASSAN: Correct, Your Honor.

14 THE COURT: Okay, but isn't this covered by -- that's
15 what we've been discussing with the in pari delicto. There is
16 an argument. There is a nonfrivolous argument here along the
17 lines Mr. Ard was making that the statute's exclusive. The
18 statute recognizes a defense, you know, Defendant has to prove
19 burden, etc. Not a frivolous argument to say they wanted to
20 put other defense in the statute, they could have. But there's
21 certainly no defense in the statute, other than that one, for
22 hey, if you sell unregistered securities, you can't sue. So
23 I've covered that with in pari delicto, unclean hands -- well,
24 I don't know.

25 MS. HASSAN: Your Honor, that's fine. I just wand a

1 clarification. If that concept is already covered in pari
2 delicto that's fine with us.

3 THE COURT: I assume that's what we talked about
4 before.

5 MS. HASSAN: Yeah.

6 THE COURT: We're into the final instructions. Well,
7 are there any comments on the final instructions? Part 3.

8 All right, let's go to the verdict form.

9 Okay, so there is the one change that I said I would
10 make earlier in Section 2 we'll add a question 1A regarding
11 whether Mr. Fraser knew or in the exercise of reasonable care
12 could have known that the products were being sold or that they
13 were not registered. So we will add that language to Section 2
14 in question 1 A and we will instruct the instructions
15 accordingly you'll see I didn't adopt with either proposal. I
16 came up with something that's sort of a hybrid. And Mr. Ard.

17 MR. ARD: I was just going to say that if we're moving
18 to ZenMiner obviously.

19 THE COURT: Yeah we're moving ZenMiners, absolutely.

20 So you're, obviously, preserved. I know neither side
21 really likes this verdict form. I can't say I'm that fond of
22 it. I never had a verdict form that's this complicated. But I
23 do think it's consistent with the instructions. Again, I
24 haven't figured out exactly what I'm going to do with the
25 affirmative defense but I will figure that out after this.

1 Anything other than what you've already told me about
2 this or already put in and preserved on the verdict form?

3 Mr. Weinstein.

4 MR. WEINSTEIN: Yeah, before I misstate it, Your
5 Honor, I know that the first question requires them to find
6 investment contract, essentially a security for each of the
7 four different products. I'm just trying to remember --

8 THE COURT: Correct, it does.

9 MR. WEINSTEIN: Right. So if -- let's assume the jury
10 finds all of those to be securities. If, for example, they
11 find that there is no material misstatement as to Hashpoints
12 because it was only represented to be something that converts
13 into Paycoin and it was, there's no way for them to distinguish
14 between the products.

15 THE COURT: Okay. Well, if they find they're all
16 securities, and then they think that, as you say, well, there
17 were no false statements with respect to Hashpoints but only
18 with respect to, say, Hashlets or Paycoin, and you're saying --
19 effectively you're saying to me, Judge how is the jury -- not
20 this jury but how is some other factor finder going to
21 calculate damages that's effective what you're saying because
22 they can fill out the form still; right? As long as they find
23 one is a security, they can answer the other questions with
24 respect to that one, which is what I'm telling them to do. But
25 you're saying Judge when we get to some other proceeding, who

1 knows what they think is and how do we measure damages is that
2 what you're saying?

3 MR. WEINSTEIN: Right because we don't know for which
4 product he was actually held liable by the first jury.

5 THE COURT: Right. Fair enough. Right. What's your
6 response to that, Mr. Ard?

7 MR. ARD:

8 MR. BUCHDAHL: Say something.

9 MR. ARD: I don't understand.

10 THE COURT: So I mean to me the only solution to that
11 would be so let's, for example, take question 2. What we would
12 have to do is say, with respect -- I'm on page 4 -- with
13 respect to -- this is Section 2, question 2. With respect to
14 the Plaintiff's claim for fraud, etc., did Plaintiffs prove
15 that Stuart Fraser's liable as a control person at GAW Miners
16 with respect to each of the following products? And then list
17 them and put yes, no next to each one. That's the only, I
18 think, way to accommodate Mr. Weinstein's comment, that I can
19 think of.

20 MR. WEINSTEIN: Yes. And trust me, I hesitate to make
21 this a longer form but I don't see how we avoid that.

22 MR. BUCHDAHL: This is Seth's idea sorry, Mr. Ard's
23 idea. But what if the question said, you know, if you found --
24 if you found any of these products to be securities, for those
25 that you found to be securities, etc.

1 THE COURT: That's what it said I mean that's what the
2 verdict form says in effect for those you found to be
3 securities, go and answer these questions. That's what it
4 already says.

5 MR. BUCHDAHL: Ah.

6 THE COURT: But he's saying okay, suppose we get an
7 answer on that. We don't know -- it's fine for liabilities so
8 far as it goes, but how the heck are we ever going to determine
9 damages for the class which is a concern.

10 MR. ARD: I guess I don't understand the question
11 because they've already checked for the first four which ones
12 they're answering the question about.

13 THE COURT: Right. But he's saying, for example,
14 let's say they say all four are investment contracts.

15 MR. ARD: Yeah.

16 THE COURT: But in their mind there were no false
17 statements with respect to Hashpoints because, as he said,
18 Hashpoints were stated they were going to convert to Paycoin
19 and they did. And so the jury might want to express that --
20 the jury had that view, we would know, again you folks know the
21 numbers better than I do, much better than I do. I don't know,
22 for example, if that would mean that somebody who -- part of
23 whose damages or if the class's if we did damages on a
24 class-wide basis.

25 That's a way of telling us we have to leave. I never

1 had that happen before. I hope you guys can get out of the
2 building.

3 All right. Mr. Ard, I'll let you wrap it up.

4 MR. ARD: I think we're having a conversation right
5 here.

6 MR. BUCHDAHL: Yeah, I do think we probably need to
7 delineate the four.

8 THE COURT: I think you're right. I think that's how
9 we have to do it. So we'll have to do it product by product.

10 MR. ARD: Can I make one last pitch for parry delicto
11 for the securities.

12 MR. WEINSTEIN: I have one more issue right before we
13 rehash old issues. The jury's also not being asked to
14 determine with respect to material misstatements at what point
15 in time were those made. And I know that ultimately it becomes
16 a damages issue if they find it at you will, again, not sure
17 how the damages jury would figure it out if, quick example, I
18 think we've heard evidence from employees testifying by
19 deposition at some point it may have been the case that they
20 didn't have enough mining power to back what people were buying
21 but not necessarily from the beginning. And so people could
22 have been buying and it wasn't a misrepresentation for some
23 period of time that they didn't have the power to back.

24 THE COURT: Yeah, but I mean it seems to me that the
25 jury could draw a different inference too.

1 MR. WEINSTEIN: No, they could. There's no doubt that
2 they could draw a different inference, but we won't know what
3 they determine and then ultimately we get to a damages -- if we
4 get to a damages phase, do we -- is he liable for damages for
5 things purchased in August when perhaps it wasn't a material
6 misstatement as of then?

7 MR. ARD: We would accept an instruction that just
8 said, did you find that these false statements -- that the
9 purchases made during the class period were a reliance on the
10 false statements?

11 MR. WEINSTEIN: The question is how that gets
12 translated at --

13 THE COURT: Well, but it might be a fix to do it in
14 the instructions. So in other words, you must -- wait a
15 minute. Wait a minute. Isn't the class definition simply
16 based on when they purchased?

17 MR. ARD: Yeah.

18 THE COURT: It's not when the statements were made.

19 MR. BUCHDAHL: Correct.

20 THE COURT: So why am I worrying about this?

21 MR. WEINSTEIN: Because if they purchased something in
22 August and the statement upon which they're saying they were
23 induced to do it was they didn't have enough hashing power to
24 back the Hashlets and that was actually -- that's not a false
25 statement as of that period of time, they didn't purchase based

1 on a misstatement. It -- later, whenever it is -- and I don't
2 think there's any evidence as to when that actually occurred,
3 perhaps that was no longer true and people who bought after
4 that date might have a basis for damages on that kind of
5 misstatement. But there's nothing in the record that says, at
6 what point in time did this company not have sufficient mining
7 power to support the Hashlets?

8 You heard from, I believe, Mr. Mordica today --

9 THE COURT: Why couldn't they infer that Garza was a
10 crook from the outset?

11 MR. WEINSTEIN: They could. The issue isn't whether
12 they couldn't for one or the other. I think they can be --
13 they can find liability for a misstatement during the period.

14 THE COURT: Yeah.

15 MR. ARD: The problem with it is once you get to a
16 damages phase, how is the damages jury going to decide, at what
17 point in time does it start? The jury could infer he was a
18 crook from the beginning, although a crook doesn't mean a
19 material misstatement. But that doesn't mean they did conclude
20 that.

21 THE COURT: Okay. We're going to have to reconvene on
22 this in the morning. It's a fair point. I want to think about
23 it overnight. I'm not going to hear further on in pari
24 delicto.

25 MR. ARD: Okay, Your Honor.

1 THE COURT: So I'm going to think about this, and
2 we'll confer further in the morning. Why don't we expect to be
3 here at 9:00 for that purpose. Okay? We'll be in recess.

4 (Proceedings concluded at 6:04 p.m.)
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